STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

[FILED: April 4, 2014]

TOWN OF TIVERTON	:	
	:	
v.	:	**C.A. No. N3-2013-0238**
	:	
RICHARD TOSI and	:	
ANN TOSI	:	

DECISION

CLIFTON, J. Before the Court are Defendants Richard and Ann Tosi's (Defendants) motions to dismiss the criminal charges levied against them by the Town of Tiverton (the Town) for alleged violations of the Town of Tiverton Zoning Ordinance (Zoning Ordinance). The Defendants were originally charged with violating two Zoning Ordinance provisions: art. V, § 1, which establishes the district's required yard setbacks, and art. VI, § 3.b which governs coverage and setbacks relating to accessory structures. The Defendants were also charged with alleged violations of the State Building Code, G.L. 1956 § 23-27.3-113.1, and chap. 18, § 18-56 of the Town of Tiverton Code of Ordinances, which requires that any person first receive a building permit from the building inspector before performing any construction in the Town. In March of 2013, the Defendants were tried before the Town of Tiverton's Municipal Court, established in 1993, pursuant to G.L. 1956 § 45-2-34. Judge Donnelly found them guilty on two counts alleging violations of the Zoning Ordinance and dismissed the remaining charges. The Defendants are now before this Court appealing the convictions. Jurisdiction is pursuant to § 45-2-34.

Facts and Travel

The following facts are taken primarily from the Defendants' memorandum in support of their motions to dismiss. The Defendants own real property in the Town located at 348 Nanaquaket Road. In the spring of 2001, they applied for a building permit from the Town for the construction of a storage shed they wished to build in their backyard. A copy of the permit application indicates that the Defendants wished to place their shed six feet from the rear property line, 350 feet from the left side property line, and 387 feet from the right side property line. (Defs.' Ex. A.) A copy of the permit shows that it was issued on March 20, 2001 and required the Defendants to "begin work on said building within SIX MONTHS from the date hereof and prosecute the work thereon to a speedy Completion." (Defs.' Ex. B.)

Defendants assert that they began work on the shed within the requisite six months, but due to personal difficulties, ceased construction for a number of years. Construction resumed in the summer of 2009. In the fall of that same year, after much of the construction was completed, the Town's building inspector, Gareth Eames, visited the property and informed the Defendants that their building permit was too old and that they needed to apply for a new permit. Two days later, on October 15, 2009, the Defendants did just that. They applied to Mr. Eames' office, but were told the application required a new site plan and report of the soil strength. Defendants complied and submitted these reports to the building inspector. On November 17, 2009, their application was denied. In the denial letter, Mr. Eames stated that the shed was an "illegally constructed free standing accessory structure" which had "been placed closer to the side line setback than is currently allowed in a R80 zoning district." The letter also instructed the Defendants to take down the shed. In response, the Defendants petitioned the Tiverton Zoning Board of Review (Zoning Board) seeking a variance that would allow them to keep their shed.

The Zoning Board held two public hearings on the application: one on January 6, 2010 and the other on February 3, 2010. Portions of the transcripts from those hearings show that Mr. Tosi relied primarily on the fact that he had, in 2001, applied for and received a building permit for the shed to be built on the exact location which it still stands today. (Tr. 4-5, Jan. 6, 2010.) However, Mr. Tosi was unable to locate and present the building permit to the Zoning Board; the original permit's whereabouts were unknown and, at the time of the Zoning Board hearing, Mr. Tosi had not yet acquired the copy of the permit that he presented as evidence to this Court. He did attempt to bolster his claim by providing the Zoning Board with a copy of the canceled check that paid for the permit. Id. A review of the transcript reveals that the Zoning Board members did not think the canceled check was legally adequate to prove the existence of the permit. Id. at 8. When asked if he had any way of "tracking down" the permit, Mr. Eames represented to the Zoning Board that permits issued in 2001 were not put into a computer system, and that he was unable to find a print copy anywhere. (Tr. 4, Feb. 3, 2010.) Under oath, Mr. Eames informed the Zoning Board that the permit "doesn't exist." Id. at 5. He testified that he searched his files and records and that "there's no record of a building permit for this structure having been issued." Id. The Zoning Board members expressly acknowledged that if that original building permit had in fact been issued, then they "would almost have to grant [the Tosis] relief now." (Tr. 7, Jan. 6, 2010.) The Zoning Board continued, however, to note that "if that building permit didn't specify where the structure was to be, then we would have to take this as a whole new variance request." Id.

Ostensibly based on Mr. Eames' testimony and Mr. Tosi's inability to present the building permit, the Zoning Board denied the application for a dimensional variance. (Tr. 33,

Feb. 3, 2010.) Mr. Tosi appealed the Zoning Board's decision to this Court, and a civil action in that matter is still pending.[1]

In their memorandum, Defendants assert, but offered no evidence to prove, that in August of 2010, Mr. Eames attempted to initiate criminal proceedings against the Defendants because the shed was still standing. Defendants claim that Mr. Eames personally served them with an invalid Tiverton Municipal Court criminal summons.[2] Defendants state that around September of 2010, Judge Nebergall refused to hear the case. Defendants provided no factual reason for this refusal but suggest that it was based on the invalidity of the service and complaint.

In October of 2012, approximately two years later, Mr. Eames reinitiated the criminal proceedings. By 2012, Judge Nebergall had been replaced by Judge Donnelly. Defendants argue here that the unexplained period of time between these two attempts was an effort to "Judge Shop." However, once again, aside from Defendants' assertions in their memorandum, there is no factual support in the record for this allegation. On October 3, 2012, Mr. Eames served Mr. Tosi with what the Defendants argue was another deficient summons. Defendants stress that that case was also dismissed by the court, for what the Defendants claim was insufficient service of process.[3]

In March of 2013, Mr. Eames again filed criminal complaints against the Defendants.[4] The record contains four complaints from March 2013 and eight summonses. All the complaints

[1] NC-2010-0099.

[2] Defendants assert that the summons was served on August 15, 2010, though dated August 16, 2010; that it did not include a copy of the complaint; that Mr. Eames was not authorized to effectuate service; that Mr. Eames was not authorized to initiate the proceedings at all; and, that the summons was not signed by any authorized individual.

[3] This summons is in the file. It appears that the summons was mailed to an attorney who, at the time, represented Mr. Tosi and lacks a deputy or constable stamp.

[4] Mrs. Tosi had not been named as a Defendant in the two prior complaints. This third complaint is the first time her name appears on the complaints and summonses.

contain varying combinations of allegations for violations of the following provisions: Tiverton Zoning Ordinance art. V, § 1; Town Code of Ordinances ch. 18, § 18-56; § 23-27.3-113.1; and, Tiverton Zoning Ordinance art. VI, § 3.b. Each of the four complaints contains a different offense date. The offense dates are reported as: October 14, 2009; November 17, 2009; April 8, 2010; and, July 22, 2011.

As the parties prepared for trial in the Municipal Court, Defendants sent a discovery request to the Town. In response, the Town delivered to the Defendants a copy of the building permit file from 2001; Defendants claim that the file contained the 2001 completed application form. The Defendants were tried before Judge Donnelly on March 18, 2013. Mr. Eames testified at trial and, when confronted with the permit application, confirmed that the permit number on the application and fee amount on the canceled check evidenced that a permit had been issued. Judge Donnelly found the Defendants guilty on two counts: violations of Zoning Ordinance art. V, § 1 and Zoning Ordinance art. VI, § 3.b.[5] Judge Donnelly dismissed the remaining charges. Defendants were assessed a fine of $500 and ordered to remove the shed within ninety days. Defendants timely filed their appeal to this Court.

Issues on Appeal

Defendants now argue the two remaining charges against them should be dismissed because: they are barred by the statute of limitations; the Defendants were never arraigned in the Municipal Court; the Town failed to file a sworn criminal complaint under oath; the Town failed to comply with statutes requiring the Town's counsel to initiate legal proceedings; and, the Town is guilty of continuous and pervasive prosecutorial misconduct. The Town objected.

[5] Art. V, § 1 sets forth the required setbacks and art. VI, § 3.b states: "a permitted accessory structure may cover up to 25 percent of the rear yard area, but may not be placed closer to a boundary line than the minimum side or rear yard requirements of that district."

Though the Court will address each of the Defendants' arguments in seriatim, the overarching principle that motivates the Court's decision as a whole is that zoning violation proceedings are not "criminal in nature." See Aptt v. City of Warwick Bldg. Dep't., 463 A.2d 1377 (R.I. 1983). The Court is aware that an earlier Supreme Court decision held that because a town was trying in a combined action to recover a punitive penalty, the Court viewed the zoning violation suit to be a criminal proceeding. See Town of Glocester v. Tillinghast, 416 A.2d 1178 (R.I. 1980). However, as the Supreme Court explained in Tillinghast, that case involved an improper attempt, by the municipality, to join an action to recover a fine for a zoning violation with a request for injunctive relief. In Aptt, however, the court was faced with "the question of whether a right to a de novo jury trial arises under the state constitution for a person convicted of violating a zoning ordinance." 463 A.2d at 1378. Because of what the Aptt court called "the great disparity in scenarios," it did not find the Tillinghast case controlling on the issue of constitutional protections afforded persons charged with zoning violations. As the motions to dismiss presently before this Court are based primarily on the Defendants' apparent belief that they are owed many of the same safeguards offered to criminal defendants in the Superior and District Court Rules of Criminal Procedure, the Court finds the Aptt case and its rationale to be a more appropriate guide than the Tillinghast case.

To further bolster this Court's conclusion that the charges against the Defendants are not criminal in nature, and as such do not warrant the full range of protections owed to criminal defendants, the Court relies upon G.L. 1956 § 11-1-2. That section distinguishes "violations" from other criminal offenses, such as felonies, misdemeanors, and petty misdemeanors. Further, § 11-1-2.1 states "[c]onviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense." Because violations are a distinct

species of criminal offenses that do not give rise to the same legal disadvantages, nor carry with them the same societal stigmas as traditional criminal offenses, the need for high levels of constitutional protection is not as great. Therefore, to the extent that they are based upon the assumption that strict adherence to the rules and formalities of criminal procedure is required in the current proceedings, the Defendants' arguments are fundamentally flawed.

The Defendants first argue that the charges are barred by the statute of limitations. They rely on G.L 1956 § 12-12-17 to assert that, because there is no statute of limitations which provides otherwise, zoning violations must have a statute of limitations of three years.[6] The Town counters that the Town Code of Ordinances Part III, chap. 1, § 1-7 is the controlling statute and unambiguously provides that "[e]ach day any violation of this Code or of any such ordinance or resolution shall continue shall constitute a separate offense." Additionally, art. XVIII, § 6 of the Zoning Ordinance provides that "[e]ach day of the existence of any violation shall be deemed a separate offense." Rhode Island law also provides "each day of the existence of any violation is deemed to be a separate offense." Sec. 45-24-60(b).

The statutory language of both the Zoning Ordinance and Rhode Island General Laws clearly indicates that every day the violation is in existence, the alleged violator may be charged. Because the charges were brought while the alleged violation was still in existence, the statute of limitations argument is without merit.

Next, Defendants argue that the Town failed to arraign them before trial. Defendants argue that Rule 10 of the District Court Rules of Criminal Procedure requires the State to arraign defendants in open court. Though Defendants concede that the cited rule is not a constitutional command, they argue it is a prophylactic measure designed to prevent other constitutional

[6] Subsection (c) provides: "The statute of limitations for any other criminal offense shall be three (3) years unless a longer statute of limitations is otherwise provided for in the general laws."

infirmities. Defendants rely primarily on State v. Nardolillo, 698 A.2d 195 (R.I. 1997) and State v. Wax, 83 R.I. 319, 116 A.2d 468 (1955). The Court finds that neither of the cited cases is pertinent to the case at hand. Nardolillo concerns R.I. Superior Court Rules of Criminal Procedure 5(a). That rule provides, in pertinent part, "an officer making an arrest under a warrant issued upon a complaint shall take the arrested person without unnecessary delay before a judge of the District Court as commanded in the warrant." The case involved an appeal on the grounds that an undue delay between the time of the defendant's arrest and the time he was brought before a judge should serve as grounds to suppress his confession. Defendants here were never arrested and Rule 5(a) simply does not apply to them. See Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045 n.3 (1966) ("In the case of adults, arraignment before a magistrate for determination of probable cause and advice to the arrested person as to his rights, etc., are provided by law and are regarded as fundamental.")

Further, the Town asserts that both Defendants were present at trial and were represented by counsel. They did not object to proceeding to trial without an arraignment; they also filed a motion to dismiss prior to trial and never raised the arraignment issue.

Lastly, where the Supreme Court has discussed failures in arraignment procedures, it concerns itself with whether the failures substantially prejudiced the defendants. See State v. Carrillo, 112 R.I. 6, 307 A.2d 773 (1973). Carrillo implies that the main consideration surrounding arraignment deficiencies is if and when they yield any prejudice to the defendant. Here, the Defendants have not asserted that they were prejudiced in any way. Additionally, the Court reiterates that zoning violation proceedings are not "criminal in nature" and thus, do not require the same procedural safeguards as criminal proceedings. See Aptt, 463 A.2d at 1379. A thorough search of Rhode Island law revealed little in the way of express, unequivocal mandates

that persons charged with violating zoning ordinances must be arraigned. Therefore, the Court rejects Defendants' argument on this point.

Next, Defendants argue that the Town failed to file a sworn criminal complaint under oath, in violation of Rule 6(b) of the District Court Rules of Criminal Procedure. For this argument, the Defendants rely on Tiverton Code chap. 30, art. II, § 30-34. They argue that the language of the Code directs that criminal complaints in the municipal court must follow the same rules as the district court complaints. That is not what the actual language of the municipal code states. The Code provides:

> "It shall be lawful for the judge of the court to prescribe and vary the form of all complaints, warrants, writs, or other process as to make the same consistent with the organization, style, and jurisdiction of the court. Such complaints, warrants, writs, and other process shall have the same effect, validity, and extent, and be served, obeyed, enforced, and returned, in the same manner and by the same officers, as if issued from the district courts. They may be served by any constables of the town who are authorized to serve process in civil or criminal cases."

Thus, the Town Code allows a judge to "prescribe and vary the form of all complaints," and yet still allows these complaints to be enforced "in the same manner and by the same officers, as if issued from the district courts." Contrary to Defendants' assertions, the Code allows a municipal judge to vary the requirements of the criminal complaint without rendering it ineffective. The Code does not state that criminal complaints filed in municipal court are subject to the same rules as the district court. Therefore, this particular argument is without merit.

Defendants also argue that the Town failed to comply with statutes requiring that the Town's counsel be the one to initiate legal proceedings. The Defendants rely on § 23-27.3-122.1 to argue that Mr. Eames was without the authority to initiate these proceedings. That section, however, pertains to State Building Code violations. Though the Defendants were originally

charged with violating the State Building Code, those charges were dismissed at the municipal level. Therefore, the only charges being considered in this appeal are those alleging violation of the Zoning Ordinance.

It is true that the Rhode Island Supreme Court has held that "only the municipality, through its town solicitor, may initiate proceedings to enforce local zoning ordinances." Zeilstra v. Barrington Zoning Bd. of Review, 417 A.2d 303, 309 (R.I. 1980). However, this mandate serves as a jurisdictional requirement for the "supreme court and the superior court." The current version of the statute discussed in Zeilstra states, in part:

> "The supreme court and the superior court, within their respective jurisdictions, or any justice of either of those courts in vacation, shall, upon due proceedings in the name of the city or town, instituted by its city or town solicitor, have power to issue any extraordinary writ or to proceed according to the course of law or equity or both." Sec. 45-24-62.

Defendants' case was brought in the Tiverton Municipal Court. Because the Defendants have not brought to the Court's attention any authority that requires the Town Solicitor be the one to initiate proceedings brought before the Municipal Court, the argument must fail.

Defendants' last argument is that the case should be dismissed for continuous and pervasive prosecutorial misconduct. Defendants offer two reasons as support for this argument: that Mr. Eames "judge shopped" when he waited two years to bring the second criminal complaint; and, that Mr. Eames represented to the Zoning Board that there was no evidence of the building permit being issued, but later admitted at trial that the permit application and the fee amount of the canceled check did indicate that a permit had been issued. Defendants argue that these facts demonstrate that the prosecution attempted to prejudice the Defendants and deprive them of their rights to a fair trial. However, Defendants have not shown that they were in fact

prejudiced at all. Also, there is only mere speculation that Mr. Eames made an attempt to judge shop and/or that he made any knowingly false representations to the Zoning Board.

Our Supreme Court has stated that "dismissal is employed only as a last resort, and is limited to cases of extreme and substantial prejudice." State v. Veltri, 764 A.2d 163, 168 (R.I. 2001) (internal citations omitted.) Though the facts and travel of this case certainly raise suspicions about Mr. Eames and the Town's motivations and protocol, the Defendants have not identified any extreme or substantial prejudice that would warrant dismissal.

Conclusion

In sum, each of Defendants' arguments has its own individual flaws. Additionally, the proceedings in which the parties are engaged are not criminal in nature. The Defendants here are attempting to be afforded the same safeguards as criminal defendants. "Persons who violate zoning and subdivision regulations may be regarded as offenders subject to penalties, but they are seldom thought of as persons who have committed crimes." Aptt, 463 A.2d at 1379 (quoting 4 Anderson, American Law of Zoning § 29.01 at 381 (2d ed. 1977)). Therefore, the Defendants' motions to dismiss are denied.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Town of Tiverton v. Richard Tosi and Ann Tosi
CASE NO:	N3-2013-0238
COURT:	Newport County Superior Court
DATE DECISION FILED:	April 4, 2014
JUSTICE/MAGISTRATE:	Clifton, J.
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