

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

**DISTRICT COURT DEPARTMENT
PLYMOUTH DIVISION
DOCKET NUMBER 2259AC1837**

HALIFAX BUILDING DEPARTMENT

V.

JOSEPH KEHOE

MEMORANDUM OF DECISION RE: NON-CRIMINAL HEARING

Facts

After a hearing on the merits and making appropriate determinations of credibility the Court finds the following facts. Joseph Kehoe is a resident of the town of Halifax. He and his family reside at 125 Cranberry Drive. Kehoe's residence is zoned Agricultural - Residential (AR). Chapter 167-7 of the Halifax's Zoning Bylaws provides, in pertinent part, "[l]ight industrial uses, including manufacturing, storage, processing, fabrication, packaging and assembly" are prohibited in the AR district.

Kehoe operates a septic company that installs and repairs septic systems. He owns several pieces of heavy equipment used in his business. In May of 2022 Kehoe was storing his equipment at his home. On May 16, 2022, Halifax Building Inspector/ Zoning Enforcement Officer (ZEO), James Perry, ordered Kehoe to remove all commercial vehicles and equipment from the property at 125 Cranberry Drive, as their storage constituted a violation of Halifax Zoning Bylaw Chapter 167-7. Kehoe appealed the order to the Halifax Zoning Board of Appeals (HZBA). The HZBA held a hearing on Kehoe's appeal and on August 8, 2022, voted to deny Kehoe's appeal and ordered him to remove any commercial vehicles or equipment from his property. The order provided Kehoe 30 days to comply. The board filed its decision with the Town Clerk on August 15, 2022. Kehoe did not appeal this decision.

As of September 15, 2022, Kehoe had moved all his commercial equipment from his property to property owned by his uncle in Scituate. The equipment remains stored there or on jobsites he is working on.

From September 15, 2022, thru December 28, 2022, ZEO James Perry began issuing citations to Kehoe. Each one fining Kehoe \$300 for violating chapter 167-7 of the town's

bylaws. The citations were issued in numerically sequenced batches. Each batch and were written in a single sitting before being mailed to Kehoe. Many of the citations were mailed to Kehoe after the expiration of the 21-day appeal period. None of the citations included the time of the alleged violation and *all* of them indicated that Perry was unable to serve Kehoe personally and obtain his signature acknowledging the receipt of the citation. In October 2022 Kehoe called Perry to ask what the citations were for, but Perry did not respond. On October 20, 2022, wrote to Perry seeking an explanation of how he was violating the bylaw. Perry responded Kehoe was in violation "for storage of equipment and supplies" without further specification. On November 10, 2022, Kehoe again wrote to Perry seeking an explanation of how he was violating the bylaw. Perry did not respond.

On December 22, 2022, Kehoe lodged a complaint with Board of Selectman regarding Perry's conduct. On December 23, 2022, the town's counsel propounded a request for admissions to Kehoe "by its Building Inspector/ZEO, James Perry, Enforcing Person."

On January 3, 2023, the Building Official Certification Committee (BOCC) of the Commonwealth's Division of Occupational Licensure Office of Public Safety and Inspections, held a hearing to consider Perry's request for an extension of time to become certified as a building code enforcement official. *M.G.L. c. 143 s. 3* prohibits a municipality from employing or appointing an individual who is not certified in accordance with *780 CMR 110.7*, except on a conditional basis. The Committee denied Perry's request stating that he had had amply time to become certified and his continued non-compliance was a public safety issue. They recommended Perry resign his "appointment of local inspector for the Town of Halifax and not seek equivalent appointment until such time as you are properly qualified."

On January 10, 2023, the Board held a hearing. At the hearing Perry stated that he did not view Kehoe's property each day he issued a citation for, but when he did go to the property, he observed violations and "assumed" they were ongoing. The Selectman told Kehoe there was nothing they could do and ended the hearing.

In February of 2023 the BOCC's decision was ratified by the Board of Building Regulations and Standards, who in turn notified the Town of Halifax on February 27, 2023. The town terminated Perry's employment the following day.

Kehoe requested a non-criminal hearing on his citations pursuant to *M.G.L. c. 40 s. 21D* before the Plymouth District Court. On March 22, 2023, Kehoe was served with a second request for admissions from the town "by its Building Inspector/ZEO, James Perry, Enforcing Person."

At the hearing in the Plymouth District Court, Kehoe introduced Perry's mileage reimbursement records from the town. The records show that Perry went to Kehoe's home on July 25th, 28th, & August 2, 2022. The records also show that Perry did not go to the defendant's house on any of the days he cited Kehoe for violations. Kehoe also introduced photographs of his home on several the days he was cited. The photographs show there were no violations on those dates. The town did not call Perry as a witness nor was he present at the hearing.

Ruling

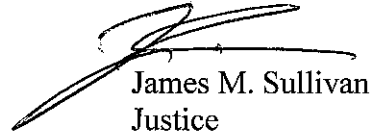
M.G.L. c. 40 s. 21D governs non-criminal dispositions of bylaw violations. It provides that an enforcing person cognizance of a bylaw violation shall provide notice of the violation to the offender. The notice shall contain the name and address of the offender as well as the specific offense charged. The citations at issue in this case were approved by the Chief Justice of the District Court pursuant to the statute for use on and after March 29, 1991. **C. 470 Acts of 1990** They are required to state the time and date of the violation. The statute also provides that "The enforcing person shall, if possible, deliver to the offender a copy of said notice at the time and place of the violation", and they were to be signed by the offender, whenever practical. The citations are to be made "at or before the completion of each tour of duty, or at the beginning of the first subsequent tour of duty. Hearings under the statute shall be held before a district court judge, clerk magistrate or assistant clerk. The focus of the hearing is to determine whether a violation occurred and if so, did the alleged offender commit the violation. The maximum penalty provided for is \$300 for each day a violation occurs.

In June of 1991 the Massachusetts Office of Communities & Development published a revised Guide for Using Non-Criminal Disposition for By-law Enforcement. Appendix F is a procedures guide. It states that if an enforcing person is issuing a citation for a non-criminal violation they should, among other things, explain to the offender that they believe a violation of a town by-law has occurred, explain the citation process, enter the time, date and place of the occurrence, request that the offender sign the citation acknowledging receipt of it and give the offender a copy of the citation in hand and again explain the procedures to be followed. It is clear to the Court that specific and detailed notice of the violation and instructive direction on curing a by-law violation and preventing a reoccurrence is a core tenant of the statute along with providing a more informal way of ensuring compliance with bylaws.

The Halifax Building Department is responsible for the issuance of citations for by-laws violations of the type presently before the court. Thus, they bear the burden of establishing a by-law violation occurred and that Joseph Kehoe is the person responsible for the occurrence. The Court finds they have failed to meet this burden. Former Building Inspector, James Perry, was the enforcing person who issued the 102 citations to Kehoe. The Court finds that Perry's conduct in this matter to be wholly inconsistent with the statutory intent. The Court further finds that any information provided by Perry, via citations, statements attributed to him at either the HZBA or the Selectman's meeting, about the conditions at Kehoe's residence after September 15, 2022, to be totally void of credibility. The Town has failed to produce any evidence, other than what was attributed to Perry, that the alleged violations occurred. Additionally, the Court credits the evidence produced by Kehoe that they did not.

The Court finds for Joseph Kehoe and against the Halifax Building Department on the issue of by-law violations.

So Ordered.



James M. Sullivan
Justice

Date: May 23, 2023

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Kehoe operates a septic company that installs and repairs septic systems. In May of 2022 Kehoe was storing his equipment at his home. On May 16, 2022, Halifax Building Inspector/ Zoning Enforcement Officer (ZEO), James Perry, ordered Kehoe to remove all commercial vehicles and equipment from the property at 125 Cranberry Drive, as their storage constituted a violation of Halifax Zoning Bylaw Chapter 167-7. Kehoe appealed the order to the Halifax Zoning Board of Appeals. (HZBA) The HZBA held a hearing on Kehoe's appeal and on August 8, 2022, voted to deny Kehoe's appeal and ordered him to remove and any commercial vehicles or equipment from his property. The ordered provided Kehoe 30 days to comply. The board filed its decision with the Town Clerk on August 15, 2022.

Beginning September 15, 2022, thru December 28, 2022, ZEO James Perry began issuing citations to Kehoe. Each one fining Kehoe \$300 for violating chapter 167-7 of the town's bylaws. Kehoe was cited 102 times. The citations were issued in numerically sequenced batches. Kehoe requested a non-criminal hearing on his citations pursuant to *M.G.L. c. 40 s. 21D* before the Plymouth District Court. On October 6, 2022, the Court sent notices to the parties that a hearing would be held on the matter. The notice specifically addressed the Halifax Building Department/Complainant stating ***"If you have any witnesses you want to testify at the hearing, you must bring them to the hearing"***

On October 11, 2022, John H. Hucksam Jr., Esq. filed his appearance for the Building Department.

On December 22, 2022, Kehoe lodged a complaint with Board of Selectman regarding Perry's conduct. On December 23, 2022, the town's counsel propounded a request for admissions to Kehoe "by its Building Inspector/ZEO, James Perry, Enforcing Person."

On January 10, 2023, the Board held a hearing. At the hearing Perry stated that he did not view Kehoe's property each day he issued a citation for, but when he did go to the property, he observed violations and "assumed" they were ongoing.

On February 27, 2022, the town fired Building Inspector James Perry

On March 22, 2023, Kehoe was served with a second request for admissions from the town's counsel "by its Building Inspector/ZEO, James Perry, Enforcing Person."

On March 24, 2022, a hearing was held in the Plymouth District Court. The Court bifurcated the hearing and informed the parties it would decide the issues of whether any bylaw violations occurred and if Kehoe was responsible for them. The Court differed the issue of Kehoe's counterclaim against the town and the town's motion to dismiss it. The Court scheduled a hearing on those issues for June 1, 2022.

At the hearing Kehoe introduced Perry's mileage reimbursement records from the town. The records show that Perry went to Kehoe's home on July 25th, 28th, & August 2, 2022. The records also show that Perry did not go to the defendant's house on any of the days he cited Kehoe for violations. Kehoe also introduced photographs of his home on several the days he was cited. The photographs show there were no violations on those dates. The town did not call Perry nor any other witnesses.

On May 23, 2022, the Court decided the bylaw portion of the case in favor of Kehoe. The memorandum of decision was filed with the Court on May 31st due to the holiday weekend and the Court's responsibilities at the Nantucket District Court.


On May 30, 2022, the Town filed an affidavit of Lewis Tempesta executed the same day and attached photographs to accompany the affidavit.

Ruling

M.G.L. c. 40 s. 21D governs non-criminal dispositions of bylaw violations. A hearing was held in accordance with the statute on May 24, 2023. The parties were given explicit notice as early as October 6, 2022, that the hearing would be their opportunity to present whatever evidence they felt useful to their respective cases. Counsel for the town knew or should have known that Mr. Perry's testimony could be problematic given his testimony before the Board of Selectman on January 10, 2023, where he admitted to citing Kehoe on Days when he did not observe Kehoe's property. Perry's February 27, 2023, termination should have raised questions

as to whether he would even be available to testify at the hearing. There was ample time and opportunity for the town to prepare for the hearing and augment the evidence as they saw fit. Instead, the town submits an affidavit and photographs after the evidence on the bylaw violation had been closed for over two months, and 2 days before the hearing on the counterclaim issues. The Court notes that the majority of Tempesta's purported information pertains to dates outside of the time frame of the contested citations. To permit these submissions to be considered at this late date would be tantamount to sanctioning trial by ambush. The court excludes this information from its consideration of the alleged bylaw violations. The Court's prior ruling remains unchanged.

So Ordered.

A handwritten signature in black ink, appearing to read 'James M. Sullivan', with a stylized flourish extending to the right.

James M. Sullivan
Justice

Date: May 31, 2023