IN THE MATTER OF JOHN C. ROSERO -APPELLANT 21507 AND 21511 YORK ROAD MARYLAND LINE, MD 21105	*	BEFORE THE BOARD OF APPEALS OF
RE: Civil Citation Nos.: 1608947 and 1802191	*	BALTIMORE COUNTY
	*	Case No: CBA-18-027 and CBA-18-029

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OPINION

This matter comes before the Board of Appeals for Baltimore County (the "Board") as a consolidated Record Appeal from two Code Enforcement hearings. The first occurred on March 23, 2018. It involves 21507 York Road and is reflected in Citation 1608947 (hereinafter Citation "47"). The related appeal was assigned case number CBA-18-027. The second hearing occurred on March 28, 2018. It involves 21511 York Road and is reflected in Citation 1802191 (hereinafter Citation "91"). The related appeal was assigned case number CBA-18-029. This Board's hearing occurred on May 22, 2018. Marissa Merrick, Assistant County Attorney appeared on behalf of Baltimore County, Maryland. John C. Rosero appeared *pro se*. The Board requested briefing by the parties, and the written submissions were filed on June 21, 2018. Baltimore County Code (BCC) §3-6-301(b)(3).

Each hearing concerned an alleged violation of the Baltimore County Zoning Regulations (BCZR) §428 which prohibits the outside storage of unlicensed or inoperable vehicles on residential property. In Citation 47, the Administrative Law Judge ("ALJ") imposed a fine of $23,700. In Citation 91, he imposed a fine $25,000. For the reasons stated below, we affirm the findings that Dr. Rosero violated each citation solely for violating §428. We reduce the fine in Citation 47 to $5,400 and the fine in Citation 91 to $3,000. Accordingly, the collective fine for

both cases is reduced from $48,700 to $8,400. We also strike the portion of the Order in Citation 47 which provides that Dr. Rosero must correct the situation by March 20, 2018, and if not done, the County may enter the property, correct the violation, and bill the costs to Dr. Rosero.

FACTUAL BACKGROUND

Specific facts will be discussed as needed in the legal analysis. In general, Citation 47 alleged that Dr. Rosero had inoperable and/or unregistered vehicles on property he owns at 21507 York Road, Maryland Line, Maryland[1], in violation of BCZR §428. At the hearing before the Administrative Law Judge, the County presented photographs taken on February 22, 2018, showing a number of cars in various states of disrepair on the property. The Inspector also testified that, as of the day of the hearing, the situation had not been abated. Dr. Rosero called a witness who was his neighbor. She testified that she had walked through the property and the vehicles had license tags. She could not say that the vehicles were operable, and she did not inspect the registration documents. Consequently, she could not say that the tags corresponded to the vehicle to which it was affixed. Some of the tags were in the windshield and not actually in the designated license tag area near the bumper. It is a more than reasonable inference from the photographs that the vehicles are inoperable. The ALJ resolved that factual dispute in favor of the County, and because there is evidence in the record to justify the finding, we are not authorized to disturb that finding. *See e.g. Monkton Preservation Society v. Gaylord Brooks Realty Corp.*, 107 Md. App. 573, 580-82 (1996). The citation had been issued on February 14, 2018. The hearing was on

[1] Dr. Rosero's effort to initially deny knowledge and/or responsibility because, according to him, his address is "21507 York Road, Maryland Line" and not "21507 York Road, Freeland" as recited in the Citation is frivolous. The record establishes that 21507 York Road can be designated as either Maryland Line or Freeland. There was no lack of notice to Dr. Rosero regarding to which property the citation related. In addition, there is no merit to the claim that service of process was defective for either citation. As to Citation 47, the ALJ determined that Dr. Rosero had received the citation by mail. As to Citation 91, service was done by counsel for the County handing the citation to Dr. Rosero. Both forms of service are permitted under BCC § 3-6-205(c)(2).

March 13, 2018. Accordingly, there were 27 days between the issuance of the citation and the hearing.

Citation 91 was essentially the same as Citation 47 except that it related to the property at 21511 York Road. The hearing date was March 28, 2018. The properties at 21507 and 21511 are contiguous and both owned by Dr. Rosero. The second case was brought because the inspectors were unable to explicitly determine the boundary between the two Rosero properties. Because the cars in question were littered over the entire Rosero "estate", the County thought it prudent to bring the additional charge linked to the second property. Again, the County presented photographs dated both February 22 and March 12, showing, to any reasonable person, what appeared to be abandoned, junked and inoperable vehicles at 21511 York Road. Again, the Inspector testified that the circumstances were unabated as of the hearing. Dr. Rosero presented affidavits dated March 12, 2018 from two neighbors saying that ". . . questionable issues that would constitute the listed violations have been abated." The text was the same as the affidavits he presented at the first hearing. Once again, the ALJ resolved the disputed facts in favor of the County, and for the same reasons as stated above, we affirm his findings. Citation 91 was issued on March 13, 2018. The hearing was March 28, 2018. There were 15 days between the issuance of the citation and the hearing.

LEGAL ISSUES

Dr. Rosero has raised a number of legal issues. Because he is representing himself, however, some of those arguments are not made with the precision that would attend if presented by counsel. Accordingly, the Board has made a special effort to interpret his arguments and respond to what it believes are the legal issues which, at times, are embedded in his lay arguments.

I. THE VALIDITY OF THE CITATIONS

There are two citations. They appear to be generally in conformity with and in the format designated by the Baltimore County Code. *See* BCC §3-6-205(c)(1). Though the record does not reflect the history of this citation form, we believe that it is used, and has been used, for years in Baltimore County.

Dr. Rosero has challenged these citations in a rather scattergun approach. It emerged at oral argument that one of his concerns relates to the adequacy of the notice of the charges that these citations provide. We believe that there are defects in the citations, but ones that do not change the decisions below as to Dr. Rosero's responsibility for the conditions.

The citations each contain an ambiguity. The citation recites that the offender "DID UNLAWFULLY VIOLATE THE FOLLOWING BALTIMORE COUNTY CODES AND/OR REGULATIONS". Underneath that recitation are two large boxes. One box is labeled "County Codes/Regulations" which would appear to key into the capitalized notice to the recipient that he/she violated certain Codes and/or Regulations. The other box is labeled "Inspector's Comments". In the Codes/Regulations box, it indicates that there is a violation of BCZR §428, outdoor storage of unlicensed and/or inoperable vehicles. It also states "Other Violation(s)", but no additional allegations are presented in that box, nor is there a reference to the Inspector's Comments portion. In the Inspector's Comments box, there is a reference to BCZR §§1A04.1 and .2. Those provisions define permitted uses in an RC5 zone. The County indicated that Dr. Rosero was charged with violating not only §428 from the Codes/Regulations box, but also the §1A04.1 and .2 listed in the Inspector's Comments box. The ALJ found that Dr. Rosero had violated those latter provisions as well as §428 listed in the Codes/Regulations box.

This problem was addressed at the argument before this Board. In part it emerged because in Citation 9I, a reference was made in the Inspector's Comments to §§1A04.1 and 1A04.2 which

address permitted uses in an RC5 zone. However, when Citation 97 was prepared, it mistakenly referred to RC2. At some point after service on Dr. Rosero, the original citation was amended by hand to read RC5. The issue at argument was whether this was a permitted amendment of the citation. The question was whether Dr. Rosero was charged with violating §1A04 which relates only to RC5 or was he charged with violating §1A01 which relates to RC2? In other words, which reference – the BCZR section or the zoning classification -- controls?

From the Board's view, the ambiguity generated by the mistake and the question of permitted amendment of a charge is irrelevant because the code citations in the Inspector's Comments box are not actual charges. Consequently, any modification in the Inspector's Comments portion is simply clarification or correction of general information and has no substantive impact. We see no reason why these additional purported alleged violations are in the Comments box and not the Codes/Regulations box which is intended by its terms to specify which provisions are alleged to have been violated. Notably, the charging sentence refers to the alleged violation of "THE FOLLOWING BALTIMORE COUNTY CODES AND/OR REGULATIONS". That reference can only be understood as referring to the code sections in the Code/Regulations box. Moreover, there is plenty of space in the Code/Regulations box for multiple charges to be alleged. Further, there is no language in the Codes/Regulations box that purports to incorporate into that box the information in the Inspector's Comments box. Having one clearly demarcated charge in one properly labeled box while purporting to have additional charges buried in the Inspector's Comments box is misleading.

In this instance, the problem of charges in the Comments box makes no difference as to the ultimate result because the fine imposed in Citation 91 was for two offenses – the one in the Code/Regulations box and the one in the Inspector's Comment box. In effect, the fine was

"concurrent". Therefore, the elimination of one charge does not alter the outcome. This means that the charge and finding for "Use of Property as a Junkyard in an RC5 Zone" are nullities. It also means that any confusion sought by a mistaken reference to the RC2 zoning classification as opposed to RC5 is irrelevant. Though not raised in Citation 47, we find that the principle applies with equal force to that citation.

II. THERE IS NO CONSTITUTIONAL BASIS TO CHALLENGE THE EVIDENCE IN THIS CASE.

Dr. Rosero has complained at every juncture that the Inspector's entry onto his property to take photographs violated his constitutional rights. He refers to the County as having "trespassed". Rosero Memorandum at p. 12. Inherent in his argument is either the request that the citations be dismissed, or that the evidence obtained by the alleged trespass, *i.e.* the photographs and the Inspector's testimony as to what she saw on the property, be suppressed. Rosero Memorandum at p. 11-12. We see no merit in this argument.

First, a government entry onto a citizen's property can theoretically be a trespass. In this instance, it was pursuant to a statute that authorizes inspections of open areas for enforcement of zoning laws. BCC §32-3-602(b). This incursion is hardly a trespass[2], but even if it were, it clearly is not state action that is so gross as to "shock the conscience" of a court, which is the only standard by which the citations be dismissed under the Fourteenth Amendment due process clause. See *e.g. Rochin v. California*, 342 U.S. 165 (1952). *And see County of Sacramento v. Lewis*, 523 U.S. 833 (1998) as an example of egregious official action that does not meet the "shock the conscience" test.

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[2] Dr. Rosero has never alleged, nor is there any evidence to suggest, that the County employees ever entered a closed structure.

Secondly. Dr. Rosero's argument may be founded in the Fourth Amendment which protects people against unreasonable searches and seizures. In order to apply, the individual must have an objectively reasonable expectation of privacy in the place searched or items seized. The remedy for a violation of this objectively reasonable expectation of privacy has never been dismissal of the charges to which the violation relates. Rather, the Supreme Court has created a non-constitutional judicial remedy by which courts *in criminal cases* can suppress evidence that was obtained in violation of the Fourth Amendment. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

The notion that there is no Fourth Amendment protection for items "left out in the open" was first articulated in *Hester v. United States*, 265 U.S. 57 (1924). The *Hester* doctrine, commonly referred to as "open fields", was revisited and re-affirmed in *Oliver v. United States*, 466 U.S. 170 (1984). It is enough to say that where one exposes something outdoors, he has no expectation of privacy that society is willing to recognize as reasonable. *See Oliver v. United States*, 466 U.S. at 173-76, holding that there was no expectation of privacy and hence no search where officers bypassed a locked gate with a "No Trespassing" sign and searched the entire outside area of Oliver's farm, ultimately finding a secluded marijuana field about a mile from Oliver's home.

In this matter, the record in no way establishes that Dr. Rosero has a reasonable expectation of privacy in the automobiles and other motor vehicles which are strewn over his property. These vehicles appear to be visible from York Road. Dr. Rosero states in his Memorandum to the Board at p. 11 that there is a fence along the front of his property on York Road. He does not give any description of that fence, and the burden is on him as the one seeking to establish a constitutional violation to adequately describe the nature of the fence. It could be a privacy fence, or it could be

a country split rail fence that provides no visual privacy. There was testimony from the inspector that some of the vehicles were visible from York Road, meaning that whatever the fence, it could not prevent outsiders from seeing onto his property. Even more, Dr. Rosero also indicates that his property is bounded by other residences, but this actually hurts his argument. Rosero Memorandum at p 11. That his neighbors can look onto his property and see the vehicles clearly establishes that he has no objectively reasonable expectation of privacy in the vehicles in his yard. His neighbors' property does not operate as a *de facto* privacy fence. The fact that his property is visible from his neighbors' property negates any significance of the front fence. Accordingly, the Fourth Amendment simply does not apply to the vehicles that litter Dr. Rosero's property.

Even if this were a Fourth Amendment event, it is highly questionable that the exclusionary rule would apply. First, the exclusionary rule does not automatically apply in non-criminal settings, and the notion of it applying in an administrative zoning hearing where it would be a highly rare and unfamiliar concept makes its application even more unlikely. *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357, 362-67 (1998). Second, the purpose of the exclusionary rule is to punish official misconduct. *Id.* at 367-69. Here, the inspectors acted pursuant to a Baltimore County statute. Consequently, their actions were legislatively sanctioned, and there is simply no basis for this Board (even if it had the authority to do so) to create an administrative exclusionary rule where the inspectors simply did what the Baltimore County Council indicated they could do.[3] Finally, even in criminal cases, the exclusionary rule does not apply where the officers acted in good faith reliance on a search warrant. *United States v. Leon*,

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[3] Dr. Rosero has filed a federal civil rights action in which he claims that the zoning authorities are treating him unfairly by reason of his Hispanic heritage. Even if this were true, a notion that the Board finds highly unlikely, it would not justify imposing an exclusionary principle. The misconduct sought to be discouraged is an objective one and has nothing to do with the subjective views of the official engaging in the alleged misconduct. *See e.g. Blair v. United States*, 665 F.2d 500, 506 (1981).

468 U.S. 897 (1984). Here, of course, there was no warrant. Nonetheless, as just noted, the inspectors acted pursuant to a publicly enacted statute. It is arguable that this is the functional equivalent of a warrant for the purposes of good faith. Of course, such an esoteric finding only matters if all of the previously discussed issues are all resolved in Dr. Rosero's favor, and this Board finds that **none** of them – from the question of a Fourth Amendment event through the extension of the exclusionary rule to an administrative hearing – could ever be so resolved.

Accordingly, the Board holds that the questions raised by Dr. Rosero regarding the alleged official trespass on his property has no application in this matter.

III. THE FINE IN EACH CASE IS MISCALCULATED

In Citation 47, the ALJ imposed a fine of $23,700. In Citation 91, he imposed a fine of $25,000. Neither of these fines is justified by the evidence.

The BCZR authorizes fines of up to $200 per day of violation. BCC §32-3-602(c)(1). In the first case, the County harkened back to an earlier case heard on September 7, 2016, in which the County and Dr. Rosero agreed to a particular disposition. The County attached that transcript to its submission before the Board. County Memorandum, Exhibit A. In effect, the parties agreed to $5,000 fine with $4,500 suspended upon the condition that the problem – the same one at issue here – is or would be abated and that Dr. Rosero would allow the County inspectors to enter his land in order to confirm the abatement. The ALJ permitted the matter to remain open for six months, after which the case would be closed. Implicit in this arrangement was that the County could not seek reinstatement of the full fine after the six-month period. The transcript is unclear as to whether upon Dr. Rosero's breach of the agreement, the County would be limited to seek the additional $4,500 fine or a larger fine in the amount of $19,200, which was the amount apparently recited on the citation. In any event, the County never sought **any** relief under that agreement.

The 2016 case was denoted as Citation 1608947, the same number as the February 14, 2018, citation at issue now as Citation 47 regarding 21507 York Road. The transcript is utterly muddled as to whether that 2016 case related only to 21507 York Road or also included 21511. The lack of clarity regarding key terms of the agreement is irrelevant at this stage because, as noted above, the six-month period has passed without either party taking any action. Accordingly, the 2016 case is closed and the County can only proceed on the existing violation.

The earlier case does, in the County's view, at least have relevance to the calculation of the fine amount in these two cases. The County's position is that the violation dates back to September 2016, for both properties. At $200 per day from September 7, 2016, there are more than enough days to justify a fine of $23,700 on 21507 and $25,000 on 21511 if that last property was even included in the 2016 case. *See* BCC §32-3-602(c)(2) which states that each day constitutes a new violation. The fact that Citation 47 is the same number as the 2016 citation seems to indicate that the County envisions that new case as a continuation of the old one, though what it means for Citation 91 is unclear.

The record does not reflect any action whatsoever by the County to enforce a violation of the 2016 agreement. The only possible conclusions are that the agreement was fully satisfied, or the agreement was not satisfied but the County chose not to pursue its remedy under the agreement. Of course, no matter which, the case closed by its own terms on March 7, 2017. Accordingly, the new Citation 47 is not an extension of the September case and cannot be the basis for extending the fine for the present violation back to September 2016. The same logic applies to Citation 91 if it was part of the 2016 case.

Even taking the new citations as brand new charges, the 2016 case does not provide an evidentiary basis justifying the present fines. No one can now say that Dr. Rosero did not comply

with the 2016 agreement. The County did not present any evidence before the ALJ to establish that the violation had continued unabated since 2016. Moreover, there is also some evidence in the record going back to before 2016 showing a pattern of citation-compliance-new citation. *See* Rosero Memorandum, Exhibit 2. Given that history, the ongoing and unbroken status of the violation from 2016 to the present is even less justifiable. In short there is no factual support in the record for the imposition of fines going back to 2016.

The BCZR permits a fine of $200 per day for the violations at issue here. As to Citation 47, there were 27 days between the issuance of the citation and the finding that a violation had occurred. For Citation 91, the same period was 15 days. Consequently, the fine for Citation 47 is limited to $5,400, and the fine for Citation 91 is $3,000.

IV. THE ORDER IN CITATION 47 ALLOWING THE COUNTY TO ENTER THE PROPERTY AND UTILIZE A CONTRACTOR TO CORRECT THE VIOLATION IS INVALID.

Though not raised by Dr. Rosero, there is an obvious defect in the order from the ALJ in Citation 47. The Order was issued on March 23, 2018. The Order states that ". . . if the subject property is not brought into compliance **pursuant to this Order** by March 20, 2018, Baltimore County shall be. . ." permitted to send a contractor to the property to correct the problem, at Dr. Rosero's expense. (Emphasis Supplied). By its terms, the Order requires Dr. Rosero to remediate three days **before** the Order was issued. This was an obvious error that neither party sought to correct at the time.

It is not readily apparent what the ALJ intended. The hearing was March 13. If he intended to give Dr. Rosero seven days to correct before the County could take steps on its own, then that would have given Dr. Rosero until March 20, the date in the Order. In that situation, however, the Order would say that if compliance had not been completed by March 20 as stated at the March

13 hearing, then the County could remediate. It would make the language "pursuant to this Order" meaningless. On the other hand, the Order could have stated that Dr. Rosero had seven days from March 23, the date of the Order, for correction. That would then align with the Order's language "pursuant to this Order" but would be inconsistent with the reference to March 20 which appears in two different places in the Order.[4]

One could argue that whether the date is March 20 or March 30, the date has long since passed. Accordingly, so the argument goes, the Order justifies the County in now entering and remediating the problem. It is the Board's view, however, that entry onto someone's property and engaging in expensive activity that will then be billed back to the property owner is too intrusive to be justified by an order with muddled content. Similarly, on the record before it, the Board is not comfortable exercising its authority in imposing its own date by which Dr. Rosero should correct or be subject to County correction. As a result, the final two paragraphs of the ALJ Order dated March 23 shall be stricken.[5]

CONCLUSION

For all of the reasons stated above, the Board finds that: (1) each citation is valid though limited to a violation of BCZR §428 and not to any purported charges listed in the Inspector's Comments section of the citations; (2) there is no relief to Dr. Rosero for any alleged trespass by County officials on his property; (3) the fines for Citation 47 and Citation 91 were miscalculated; (4) the fine in Citation 47 is reduced to $5,400 and the fine in Citation 91 is reduced to $3,000,

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[4] There is no such confusion in the Final Order for Citation 91. That Order is dated April 19, 2018 and provides for remediation by the County if the situation is not remedied by April 26, 2018.

[5] Nothing in this Opinion is intended to preclude any other remedy the County may have. *See e.g.* BCC § 33-2-906.

reducing the collective fine of $48,700 to $8,400; and (5) the permission to the County to enter and correct the situation in Citation 47 is stricken.

ORDER

THEREFORE, IT IS THIS 6th day of July, 2018, by the Board of Appeals of Baltimore County:

ORDERED that the decision of the Administrative Law Judge in Citation No. 1608947 that John C. Rosero had violated BCZR Section 428 be and the same is **AFFIRMED**; and it is further

ORDERED that to the extent the Administrative Law Judge's Final Order dated March 23, 2018, finds that John C. Rosero had violated any provision other than Section 428, such findings are stricken; and it is further

ORDERED that the fine in Citation No. 1608947 is reduced to $5,400; and it is further

ORDERED that the portion of the Administrative Law Judge's Final Order dated March 23, 2018, commanding John C. Rosero to correct the violation by March 20 and enabling the County to enter the Rosero property to itself correct the violation at the property owner's expense, is hereby stricken; and it is further

ORDERED that the decision of the Administrative Law Judge in Citation No. 1802191 that John C. Rosero had violated BCZR Section 428 be and the same is **AFFIRMED**; and it is further

ORDERED that the fine in Citation No. 1802191 is reduced to $3,000; and it is further

ORDERED that to the extent the Administrative Law Judge's Final Order dated April 19, 2018, finds that John C. Rosero had violated any provision other than Section 428, such findings are stricken.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Jason S. Garber, Panel Chairman

Kendra Randall Jolivet

Joseph L. Evans

Board of Appeals of Baltimore County

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July 6, 2018

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RE: In the matter of: John C. Rosero
Case Nos.: CBA-18-027 and CBA-18-029

Dear Mr. Rosero and Ms. Merrick:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Sunny Cannington

Krysundra "Sunny" Cannington
Administrator

KLC/
Enclosure
Duplicate Original Cover Letter

c: Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Lawrence M. Stahl, Managing Administrative Law Judge
Lionel Van Dommelen, Chief of Code Enforcement/PAI
Michael E. Field, County Attorney/Office of Law
Nancy C. West, Assistant County Attorney/Office of Law
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