New Jersey
Appleseed

TO: FILE

FROM: Renée Steinhagen, Esq.

DATE: November 24, 2009

Re: Complaint filed by T.E.Warren, Jr. against Joseph J. Hannagan, S-2009-000215-1715

INTRODUCTION

On October 7, 2009, attorneys for Mr. Warren (Tracey Oandasan of Oandasan & Cooper) submitted a written letter to the Quinton Township Attorney, Gary M. Salber, alleging that Mr. Hannagan had "entered on to Mr. Warren's private property," "ignor[ing]. . . advice" of "all of those who were present" and had unlawfully "scraped up dirt in his hand." The letter went on to state that "Mr. Hannigan is unable to control himself," "cannot be present during any future inspections," and if "the sample is returned to Mr. Warren immediately . . . further action will not be necessary." See Letter dated October 7, 2009 from Oandasan to Salber.

On that same day, a summons and complaint against Mr. Hannagan was issued by the Mid-Salem County Municipal Court charging him with violation of N.J.S. 2C:18-3B (defiant trespass) and N.J.S. 2C:20-3A (theft by unlawful taking). The complaint, like the letter, states that Mr. Hannagan went on to property that was not within the scope of the "permitted inspection that was scheduled," and was given "notice" of such trespass "by the other parties present." The complaint noted that dirt was removed and "then placed in a plastic bag and put in his pocket."See Criminal Complaint dated October 7, 2009.

What follows is a recitation of the factual circumstances giving rise to this complaint, the law governing municipal

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inspections of mining sites holding the Township of Quinton Soil Removal Permit, and an analysis of the two criminal charges asserted against Mr. Hannagan. The scope of investigations authorized by other state statutes applicable to Mr. Warren's permitted mining operations is also discussed to bolster Mr. Hannagan's affirmative defense with respect to the theft charge.

FACTUAL CIRCUMSTANCES

On September 2, 2009, Mr. Joe Hannagan was appointed "Quinton Mine Inspector" by the Mayor.[1] At the time, Mr. Hannagan was a member of the Planning Board and was a candidate for the Township Committee. Currently, Mr. Hannagan is Chair of the Planning Board. He lost his bid for Committeeman by single digits (5 votes).

Once appointed, Mr. Hannagan took a certification course that was given by the United States Mine Safety and Health Administration (MSHA)(operated within the U.S. Department of Labor).

Previous to Mr. Hannagan's appointment, municipal mining inspections of all three mining sites in Quinton were routinely undertaken by Mr. John Moore on a quarterly basis. Mr. Moore is the Township Municipal Engineer, who is employed by T & M Associates. Mr. Moore is also retained by the Planning Board as its engineer.

Mr. Hannagan's first inspection was done in the company of Mr. Moore on October 7, 2009 at 7:30am. Mr. Moore set up the inspection with Continental Aggregates Corp. LLC, which is one of the three mine/quarry operations in Quinton.

Continental Aggregates holds a minimum of three permits with respect to its current mining operations on Block 35, Lot 67 and Block 35, Lot 54: Soil Removal Permit issued by Quinton Township; Soil Erosion & Sediment Control Permit issued by the state Soil Conservation District; and a Mining & Quarrying Activity Stormwater Permit (AR-13) issued by the state Department of Environmental Protection. Both the NJ Bureau of Mines and the federal Mine Safety and Health Administration

[1] The details of who supported Mr. Hannagan's appointment and who did not as well as the broader politics of this mining town are not discussed herein. Suffice it to say that there are those within the town who support the expansion of one or more of the three operating mines and those who do not.

(MSHA) have jurisdiction over the quarry operations, and Continental Aggregates' MSHA Identification No. is 2801014. Accordingly, designated officials from all three levels of government must be given access to investigate the site to satisfy their respective legislative purposes.

On the morning of the 7th, Mr. Hannagan met Mr. Moore at the mine site, and together they proceed to the office of Continental Aggregates. At the office they met Michael Foglietta, the President of the Company and the Operator of the mine, and Michael Chapman, who is the Company's Manager. T.E. Warren is the landowner of the property on which Continental mines.

All four men got into a truck driven by Mr. Foglietta. Mr. Moore sat in the front passenger seat while Mr. Hannagan sat in the back with Mr. Chapman. Mr. Moore gave instructions on where he wanted to inspect, and he would direct Mr. Foglietta as to when to stop so he could get out of the truck, look around and take pictures. Mr. Hannagan asked Mr. Foglietta and Mr. Chapman questions based upon complaints he had heard from citizens over the past year.

Upon completion of the quarterly inspection of the mine site, Mr. Foglietta offered to show Mr. Hannagan the adjoining land that is the subject of a mine expansion application made by Continental Aggregates that is currently before the Quinton Planning Board. A soil removal permit has yet to be issued for this property. Mr. Foglietta's explicit offer to permit Mr. Hannagan to inspect the property was not restricted in any manner.

Prior to entering the "new" site, Mr. Hannagan questioned Mr. Foglietta about large bodies of water that he had heard were on the site and which appeared on satellite photos he had obtained from Google Earth. Mr. Foglietta agreed to show Mr. Hannagan the place where water might be located, and all four men proceeded to that place in Mr. Foglietta's vehicle. As Mr. Hannagan was standing at the potential "water location," he noticed a very large mound of dirt that was a different color from the soil on which it was sitting. He asked Mr. Foglietta the origin of the mound. Mr. Foglietta did not answer the question, but referred him to Mr. Moore.

Mr. Moore told Mr. Hannagan that he had received a complaint that the owner of the land, Mr. Warren, was dumping outside soil on to this site in violation of a municipal

ordinance. Upon inspection of the area, Mr. Moore had been informed by Mr. Warren that the mound was created simply by moving dirt from one area of the property to another. Mr. Moore had accepted Mr. Warren's representation and took no further action.

At this point, Mr. Hannagan expressed his intent to sample the dirt mound to determine whether it was outside soil. Mr. Hannagan believed that such mound could constitute a violation of the Quinton Land Use Code. Mr. Foglietta started screaming at him. Specifically, he stated that Mr. Hannagan was "trespassing," "had no right to take a sample," and "was trying to put him out of business." The more he hollered, the more suspicious Mr. Hannagan became. He walked up to the mound, took a handful of soil and put it in a plastic bag.

At this point, all four men got back into Mr. Foglietta's vehicle and Mr. Foglietta drove them back to the main building located at the entrance of Continental Aggregate's mining site entrance. When Mr. Hannagan and Mr. Moore were returning to their personal vehicles, they overheard Mr. Foglietta stating to Mr. Warren via cell phone that Mr. Hannagan had trespassed onto the expansion site and had taken a sample of dirt.

The evening of October 7, 2009, Mr. Warren served, at a Township Committee meeting, a complaint written by his attorney to the Township Attorney requesting that Mr. Hannagan return the soil sample and be removed as inspector. On October 9, 2009, Mr. Hannagan received a copy of the criminal complaint in the mail. On October 10, 2009, Mr. Hannagan wrote his inspection report to the Mayor and reported that he had taken a soil sample. He asked the Mayor whether he wanted to test the sample taken. The Mayor said that he did not want to test the sample until a determination had been made as to the status of the sample.

In early November the Township Committee decided not to represent Mr. Hannagan in Municipal Court. Pursuant to §19-5 of the Quinton Code, the Township "may" provide for the defense of a present or former official, employee or appointee, "if Quinton concludes that such representation is in the best interest of Quinton and that the person to be defended acted or failed to act in accord with the standards set forth in this chapter." No specific findings as to the criteria set forth in the code were made.

SCOPE OF INSPECTION UNDER MUNICIPAL LAW

It is well established that the grant of police powers to New Jersey municipalities encompasses the authority to enact an ordinance reasonably regulating the business of quarrying. See e.g., Dock Watch Hollow Quarry Pit, Inc. v. Township of Warren, 142 N.J. Super. 103, 116 (App. Div. 1976)(confirming provisions of township ordinance, except those regulating the operation days and times of the quarry, as proper exercise of police powers because they protect the public health, welfare and safety)(cases omitted).

Quinton has decided to regulate the quarrying business, but its provision regarding inspections is general, and does not specify the authority of inspectors and to what premises those inspections apply.

Pursuant to §170-55(M) of the Quinton Land Use Code,

> The permittee shall permit inspection of the premises at all reasonable business hours by the Mayor, members of the Township Committee or by such designated township officials as the Mayor or Township Committee may lawfully authorize to inspect and report therein to the Mayor administratively or the Committee legislatively.

Inspections are thus authorized to occur without notice and without a warrant, but must occur during "reasonable business hours." See Donovan v. Dewey, 452 U.S. 594, 603 (1981)(permitting administrative inspections without notice of mines, including stone quarries, and citing legislative history that asserts that a warrant requirement would "seriously undercut [the Federal Mine Safety and Health Act]'s objectives" or "frustrate effective enforcement of the Act."). Cf. State of New Jersey v. Rednor, 203 N.J.Super. 503, 546-547 (App. Div. 1985)(upholding warrantless administrative searches in industries subject to "pervasive and longstanding government regulation;" here, an administrative inspection of a pharmacy)

However, the code does not define the term "permittee." That is, who is the permittee of what premise that is subject to this inspection? The common sense use of the term permittee would imply a person holding a permit, but the legislature uses the phrase "person holding a permit" in other parts of the Code when referring to such persons. E.g., §170-55(E)(7)(d)(1) and (7)(e). In addition, the definition of "applicant" for a soil removal permit includes "licensees and permittees who shall apply for a permit" and the definition of "person" also includes

"licensees and permittees." A review of the code (that often uses the term applicant, owner or person in charge of operations or person holding a permit) therefore does not clearly establish if only the operator of a mining operation that holds a permit must permit inspections of the property, or a person applying for a permit or even an owner of land on which quarrying operations are occurring but for which no permit has been secured. Nonetheless, this ordinance, like statutes seeking to protect the public health and welfare, which includes environmental protection, are "entitled to a liberal construction so that their beneficial objective may be accomplished." In re Department of Environmental Protection, 177 N.J.Super. 304, 318 (App. Div. 1981)

The municipal code is also silent as to the powers or authority of a person authorized to inspect the premises once upon the property.

Notwithstanding the code's silence as to the power of the inspector entering the premises (as defined in the code), the code further states that "all existing land mining operations" are subject to the following requirement: "No storage, stockpiling or landfilling of any type of waste or other materials shall be permitted." §170-55(O)(3) of the Quinton Code. Again, it is uncertain whether property that is solely the subject of a soil removal permit application in contrast to property for which a permit has been received and on which removal activities are occurring is considered an "existing land mining operation." A liberal interpretation of this provision, however, would dictate that whether Mr. Warren's proposed expansion site is subject to this provision would depend on whether any mining operations are occurring on that property even if they do not include soil removal.

STATUTORY FRAMEWORK AND ANALYSIS OF CHARGES

Mr. Hannagan has been charged with N.J.S. 2C:18-3B (defiant trespass) and N.J.S. 2C:20-3A (theft by unlawful taking). Each will be discussed below.

Defiant Trespass

In accordance with N.J.S. 2C:18-3B, "a person commits a petty disorderly persons offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by: (1)Actual communication to the actor; or (2) Posting in a manner

proscribed by law or reasonably likely to come to the attention of intruders; or (3)Fencing or other enclosure manifestly designed to exclude intruders."

The statute requires personal notice, which is authorized by law, to a defendant forbidding him from entering or remaining on private property, State v. Pierce, 175 N.J.Super 149 (Law Div. 1980)(holding that municipality was not permitted to use trespass complaints as a coercive measure to remove persons claiming to be tenants when it should have sought a civil order of possession in an *in rem* tax foreclosure proceeding); and a defendant must know that he is not, licensed or privileged to enter or remain in any place. See Roth v. Golden Nugget Casino/Hotel, Inc., 576 F.Supp. 262,266 (D.N.J. 1983)(the statute requires knowledge on the part of the accused, and Roth's assertion that she had entered the casino twenty times since her 1981 eviction supports the inference that she "believed she had permission to enter" the premises).

Permission, once given, may be revoked, State v. Brennan, 344 N.J.Super. 136 (App. Div. 2001), cert. denied, 171 N.J. 43 (2002) (finding that although defendant had been lawfully on the premises of the municipal town hall, when police reasonably asked him clearly and repeatedly to leave, that privilege was revoked); and an owner can put restrictions on a license to enter a premise, State ex rel Qarmont v. Cavallo, 340 N.J. Super 365, 368 (App. Div. 2001)(reversing dismissal of case where complainant admitted giving permission to defendant to enter his property for purpose of dumping clean fill and no other, because defendant could not justify remaining on premises when the purpose for which he had been licensed to enter had been concluded).

Applying this case law to the facts as presented by Mr. Hannagan, it is apparent that the charge of defiant trespass cannot be sustained. First, contrary to the letter written on Mr. Warren's behalf to the Quinton Attorney and the criminal complaint filed, Mr. Foglietta invited Mr. Hannagan and Mr. Moore to enter the expansion site in order to "show them around." His invitation to inspect the property and his willingness to take Mr. Hannagan in his vehicle to a particular spot on the property in response to certain questions belies Mr. Warren's assertion that "all those present cautioned Mr. Hannagan that the areas he wanted to see were not permitted, nor were they scheduled to be inspected," and, implicitly, that he could not enter such areas. Furthermore, Mr. Foglietta did not actually communicate any restrictions to Mr. Hannagan, and

immediately after he tried to revoke his initial permission, Mr. Hannagan and Mr. Moore did not remain on the property.

Although there is a legal question as to whether Mr. Foglietta had the authority to revoke his permission to inspect the property (that is, whether the property for which no soil removal permit had been obtained is subject to warrantless administrative searches during reasonable business hours pursuant to the Quinton code), there is no doubt that Mr. Hannagan did not know that he did not have a license to enter the premises or remain on such property for the time that he did so. As stated above, soon after Mr. Foglietta starting screaming at him, he left the property with Mr. Foglietta driving him, Mr. Moore and Mr. Chapman back to the main office of the mining property that was subject to the scheduled inspection. Under these circumstances, Mr. Hannagan did not have the requisite knowledge to convict him of defiant trespass.

Theft By Unlawful Taking

Pursuant to N.J.S. 2C:20-3A, "a person is guilty of theft if he unlawfully takes, or exercises unlawful control over movable property of another with the purpose to deprive him thereof."

Theft under this statute requires property to be taken without the consent of the owner or possessor and with "the intent to deprive the owner or possessor permanently of the property taken." State v. Leicht, 124 N.J.Super. 127, 133 (App. Div. 1973) Typically, a person does not have to have prior knowledge of the precise value and nature of the property taken in order to be convicted of larceny, (State v. Combariati, 186 N.J. Super. 375 (Law Div. 1982), aff'd 192 N.J.Super 131 (App. Div. 1983), cert. denied 97 N.J. 694 (1984)), but knowledge is relevant when a defendant raises an affirmative defense of claim of right. When a defendant raises such defense, the State must prove that he knew that he had no authority to take the property. State v. Galiyano, 178 N.J.Super. 393, 397 (App. Div. 1981).

Under N.J.S. 2C:20-2C, a "claim of right" defense exists when a defendant is (1)unaware that property taken was that of another; (2) acted under an honest claim of right to property or service involved; or (3)took property exposed for sale intending to purchase and pay for it. A good argument can be made in support of Mr. Hannagan pursuant to section (2)of this defense.

Prior to undertaking such analysis, however, two other provisions should be noted. First, in accordance with N.J.S. 2C:20-2(b), a theft offense involving property valued at less than $200 is considered a disorderly persons offense. Notwithstanding the minimal value of the property implicated in this case, the state must produce evidence of the value of the property stolen in order to secure a conviction. State v. Smith 2006 WL 452664 (App. Div. 2006)(unpublished decision).[2] There is a question of whether the dirt taken here has any value.

Related to the de minimis value of the property admittedly removed here, one should also note that under N.J.S. 2C:2-11 (De minimis infractions) an assignment judge may dismiss a prosecution if, "having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

a. Was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;

b. Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

c. Presents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in forbidding the offense. The assignment judge shall not dismiss a prosecution under this section without giving the prosecutor notice and an opportunity to be heard."

An examination of this provision strongly suggests that this case should be dismissed because taking a sample is the customary practice of inspectors, Mr. Hannagan did not actually cause the harm sought to be prevented by the theft provision (indeed, he acted to protect the public welfare), and Legislature could not have envisaged the application of this statute under the circumstances surrounding this charge.

Notwithstanding the applicability of all three prongs of the De Minimis infraction provision, a strong argument can be made on behalf of Mr. Hannagan that he acted under an "honest claim of right to the property" he removed for purposes of

[2]Please note that at this time, I have yet to read this case due to my limited access to Lexus/Nexus.

sampling under N.J.S. 2C:20-2C(2), and therefore has a valid affirmative defense.

First, although the Quinton Land Use Code does not explicitly authorize persons undertaking inspections to take samples, a liberal construction of the ordinance requires that it be interpreted to permit such remedial action. In re Department of Environmental Protection, 177 N.J.Super. at 318 (requiring liberal interpretation of statute to ensure that "the beneficial objectives" of the code be accomplished). In this case, a Quinton mine inspector such as Mr. Hannagan or Mr. Moore must be able to take actions to fulfill the legislative purposes of their inspection, *i.e.*, to ensure that no violations of the municipal code or other state or federal law that applies to the site occurs.

In this case, Mr. Hannagan reasonably believed that 170-55(O)(3) of the Quinton Code applied to the Mr. Warren's property prohibiting the "storage, stockpiling or landfilling of any type of waste or other materials" on such premises. Accordingly, in order for him to determine whether the dirt mound was in violation of the ordinance it was necessary for him to remove a fistful of dirt for testing purposes. There is no evidence that Mr. Hannagan removed the dirt for any other purpose nor that he did not intend to return the sample upon completion of the testing (i.e., no intent for permanent deprivation as required by the statute).

Furthermore, many permits and statutes allowing inspection under warrantless administrative searches explicitly allow an inspector to obtain samples as part of the reasonable powers of inspection. In re Department of Environmental Protection, 177 N.J.Super. at 307 (stating that Vineland's permit was granted subject to the right of DEP "to enter the premises of a licensed operator for the purposes of inspection, sampling, copying or photographing."); New Jersey Department of Environmental Protection, 251 N.J.Super 55, 61-62 (App. Div. 1991)(pursuant to N.J.S.A 23:10-20 a member of the Fish and Game Council may examine any boat and seize other articles when he "has a reason to believe that a provision of this Title, or any law supplementary thereto, or the State Fish and Game Code has been violated.")

In specific, the statutes and regulations that govern inspections of Continental Aggregate's mining operations in Quinton also permit inspectors to sample. For example, a representative of DEP has the right to "sample or monitor, at

reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Federal or State Acts, any substances or parameters at any location." N.J.A.C. 7:14A-211. Similarly, an employee of the New Jersey Bureau of Mines responsible for mine safety is authorized to "inspect, investigate, inquire and examine into the operation" of the mine, N.J.S.A. 34:6-98.3(c), and shall have the power and authority . . . at all reasonable hours to enter and examine any part of a mine, mining plant, equipment or workings." N.J.S.A. 34:6-98.3(d). For purposes of clarification, the act indicates that powers of inspection go so far as to include conducting scientific tests of the premises and for the inspector to do "other related work as required." N.J.S.A. 34:6-98.39(c). This state scheme also does not limit the right of any municipality or other government subdivision to inspect mining operations. N.J.S.A. 34:6-98.10.[3]

For the foregoing reasons, it was reasonable for Mr. Hannagan to believe that his powers of inspection also included those held by other inspectors entering the property (especially since Mr. Hannagan received his certification as an inspector after attending a course given by MSHA). Simply put, Mr. Hannagan could not determine whether the dirt mound violated a municipal ordinance unless he took a sample to test, and thus he "acted under an honest claim of right to [such] property." N.J.S. 2C:20-2C(2).

CONCLUSION

In short, both charges should be dismissed. I am available to do further research and to talk with you when I return form abroad next week.

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[3] At this time, I have yet to examine the statutory scheme governing Continental Aggregate's Soil Erosion and Sediment Control Permit (i.e., N.J.S.A 4:24-39) or federal provisions applicable to MSHA inspectors under the federal Mine Safety and Health Act, 30 U.S.C. §801 et seq.