STATE OF MAINE
YORK, ss.

SUPERIOR COURT
Civil Action
DOCKET NO. AP-16-0034
AP-16-0035

DANIEL RAPOSA,

SUSAN RAPOSA,

and

JOSHUA GAMMON, d/b/a GAMMON LAWN CARE,

Plaintiffs,

v.

TOWN OF YORK,

Defendant,

and

PETER MARCURI,

Party-in-Interest.

ORDER ON DEFENDANT'S MOTION TO DISMISS

I. BACKGROUND

This case arises out of a decision of the Town of York's Code Enforcement Officer ("CEO") finding no land use violations existed on property owned by plaintiff Joshua Gammon.

The property in question is located at 632 York Street in York, Maine, Lot 46-17A (the "Gammon Property"). (R. 40.) Mr. Gammon purchased this property from party-in-interest Peter Marcuri in 2014. (R. 40.) Marcuri had used the Gammon Property in his excavation business for several decades before selling it to Gammon. (R. 63.)

Mr. Marcuri originally purchased land located at 650 York Street in York in 1983. (R.100.) The Marcuri Parcel was used for Marcuri's excavation business and also served as Marcuri's residence. (R. 35.) Marcuri purchased an abutting parcel from the Estate of Richard Young, Lot 60 in a subdivision that the Town approved in 1975, in November, 2014. (R. 38.) Marcuri then merged the two parcels and then divide it into two lots, one at 650 York Street and one at 632 York Street, which is the subject Gammon Property. (R. 218.)

In November 14, 2014, Mr. Marcuri deeded the Gammon Property to Mr. Gammon. (R. 36.) Gammon has used the property in his commercial landscaping business since purchasing it in 2014. (R. 40.)

Plaintiffs Daniel and Susan Raposa own abutting property located at 660 York Street in York, Maine. On March 26, 2016, the Raposas sent an email to the Town's CEO expressing concern about the division of the Marcuri's property and Gammon's use of the property and requesting the CEO investigate these concerns. (R. 43.)

On April 20, 2016, the CEO sent a reply stating that the division of the property resulted in legally non-conforming grandfathered lots that were exempt from her jurisdiction. (R. 44.) The CEO explained "the uses on the lots are consistent with the previous uses, and no violations are warranted at this time." (R. 44.)

On May 19, 2016, the Raposas appealed the CEO's decision to the Town's Board of Appeals (the "Board"). (R. 42.) The Board held three hearings on the appeal. The first hearing was held on June 8, 2016. (R. 58.) At this hearing, Mr. Raposa testified about his discussions with the CEO, but the matter was continued because the CEO was unavailable. (R. 58-75.) The second hearing was held on June 22, 2016. (R. 131.) At this hearing, the Raposas, their counsel, Mr. Gammon's counsel, the CEO, and other abutters all submitted testimony. (R. 116-154.) The

Raposas' counsel testified that the Raposas sought a finding that the CEO had the authority to issue a citation for a legally non-conforming lot and that the CEO erred by finding no violations at the property. (R. 121-122.) The CEO stated that had she known that the parcel in question was in an existing subdivision, it would have changed her conclusion of whether the parcels were non-conforming. (R. 127.) The Board concluded the hearing without coming to a decision, instead seeking an opinion from the Town Attorney on the legal status of the parcel. (R. 131-133.)

The Board held a final hearing on July 27, 2016, hearing further testimony from the CEO and considering the response from the Town Attorney. (R. 188-189.) The Town Attorney concluded that Marcuri's division of land required Board approval. (R. 180.) Following a discussion about this conclusion, the Board agreed and granted the Raposas' appeal. (R. 197.)

The Board issued a written decision on August 24, 2016 (R. 218-219.) In this decision, the Board stated:

> 14) The lot in question is not a legally created lot of record since Planning Board approval to divide any lot in an existing approved subdivision is required; and 15) The CEO determination of 10 Apr 2016 that because the lots are recorded in the Registry of Deeds they are beyond her jurisdiction is therefore in error.

(R. 219.) The CEO has yet to issue a notice of violation following this decision.

Both the Raposas (No. AP-16-34) and Mr. Gammon (No. AP-16-35) appealed this decision to this court. The Raposas do not challenge the July 27 decision of the Board, but instead challenge several factual findings the Board made in its August 24 written decision. The two appeals were then consolidated. The Town moved to dismiss the appeals, arguing that the Board's decision was purely advisory and had no legal consequence. Gammon declined to submit a reply brief, instead joining the Town's position. The Raposas, however, opposed the motion.

II. STANDARD OF REVIEW

In its intermediate appellate capacity, this court reviews decisions of administrative bodies for abuse of discretion, errors of law, and findings not supported by substantial evidence. *Otis v. Town of Sebago*, 645 A.2d 3, 4 (Me. 1994) (citation omitted). When the court's jurisdiction is challenged, it is the plaintiff's burden of establishing that jurisdiction is improper. *Commerce Bank & Tr. Co. v. Dworman*, 2004 ME 142, ¶ 8, 861 A.2d 662 (citing *Interstate Food Processing Corp. v. Pellerito Foods, Inc.*, 622 A.2d 1189, 1191 (Me. 1993)).

III. DISCUSSION

a. Subject Matter Jurisdiction to Review the Board's Decision

Generally, when an ordinance allows an appeal to a Board of Appeals from violation determination by a CEO, the Board's role is advisory in nature and not subject to judicial review. *Herrle v. Town of Waterboro*, 2001 ME 1, ¶ 9, 763 A.2d 1159 (citing *Pepperman v. Town of Rangeley*, 659 A.2d 280 (Me. 1995)). Because of the Board of Selectmen's discretion to decide whether or not to bring an enforcement action, this is true even though the Board's interpretation of an ordinance is more than a mere "recommendation" and the CEO may have a duty to issue a violation pursuant to the Board's order. *Id.*

For example, the facts in *Herrle v. Town of Waterboro*, 2001 ME 1, 763 A.2d 1159, closely resemble those here. In *Herrle*, the Waterboro Board of Selectmen, in lieu of the CEO because of a conflict of interest, declined an abutting property owner's request to initiate an enforcement operation against an individual who was operating a gravel pit, which the landowners claimed was a grandfathered use. *Id.* ¶ 2. The neighbor appealed this decision to the Zoning Board of Appeals ("ZBA"), arguing that the Selectmen had incorrectly applied the ordinance. *Id.* ¶ 3. The Board affirmed the Selectmen's decision and the neighbors appealed to this court, who reversed the

ZBA's decision. *Id.* ¶¶ 4-5. However, on appeal, the Law Court concluded that the ZBA's decision, as an "interpretation" appeal from a violation determination by the Board of Selectmen, was not subject to judicial review. *Id.* ¶ 9. The Law Court reasoned that because the Selectmen retained discretion to decide whether or not to institute an enforcement action and no such enforcement action had been taken, the ZBA's role in the appeal was merely advisory. *Id.* Consequently, "[t]he only legal significance of the Superior Court's decision, therefore, was to provide a declaratory judgment on the issue of whether that violation determination was correct. Even if we were to affirm the Superior Court's decision finding error in the ZBA's legal analysis, the Board of Selectmen could still decide in their discretion not to bring an enforcement action against [the landowner]." *Id.* ¶ 10.

More recently, in *Farrell v. City of Auburn*, 2010 ME 88, 3 A.3d 385, the Law Court again applied the rule laid out in *Herrle* and held:

> [T]o the extent that the Board's decision can be treated as providing an interpretation of provisions of the zoning ordinance, the only legal significance of that decision is to provide an advisory opinion on the issue of whether the CEO's violation determination was correct. The Board's decision is advisory in nature because the CEO retains the discretion to decide whether or not to initiate an enforcement action.

Id. ¶ 17.

Plaintiffs, however, argue that these cases are inapplicable. Specifically, plaintiffs cite to *Salisbury v. Town of Bar Harbor*, 2002 ME 13, 788 A.2d 598, and *Adams v. Town of Brunswick*, 2010 ME 7, 987 A.2d 502, for the proposition that reliance on *Herrle* and its progeny is misplaced.

In *Salisbury*, the Law Court found that Bar Harbor's ZBA had jurisdiction to hear an appeal from the issuance of an occupancy permit following the revocation of a stop work order. *Salisbury*, 2002 ME 13, 788 A.2d 598. The Law Court noted that although *Herrle* "precludes the court's intrusion into municipal decision-making when a municipality decides whether or not to undertake an enforcement action," an action may still be subject to judicial review if the Town undertakes a

subsequent enforcement action and review is authorized by an appropriate law and ordinance. *Id.* ¶ 11. Because the Law Court had held previously that the issuance of a certificate of occupancy was reviewable and the plaintiff did not collaterally attack the permit or applicable ordinance, it declined to address whether the revocation of the stop work order was reviewable and instead directly reviewed the certificate of occupancy. *Id.* ¶¶ 13, 15.

In *Adams*, plaintiff sought the CEO's opinion on whether a property owner's plan to house eleven students would create a boarding house, which was prohibited in the applicable zone. *Adams*, 2010 ME 7, ¶ 4, 987 A.2d 502. After reviewing the proposed leases, the CEO wrote a memo concluding that the owner's plan was an allowable "two unit residential" use. *Id.* On appeal to the Law Court, the Town and owner argued that the CEO's denial to find a violation was final and therefore the ZBA and court lacked jurisdiction to hear any appeal. However, the Law Court disagreed, reasoning: (1) "[S]ection 705.2 of the Ordinance gives the CEO prosecutorial discretion when a complaint is filed asserting that][the] Ordinance *is being* violated,'" and the neighbors only complained that the ordinance was going to be violated; and (2) Because "[t]he CEO's May 30 memorandum was an advisory opinion, not a decision declining to take an enforcement action, because absent a violation occurring at that time there was nothing to enforce," the CEO did not exercise prosecutorial discretion. *Id.* ¶¶ 9, 10.

These cases are distinguishable from both *Herrle* and this appeal. As in *Herrle*, the CEO in the instant case was tasked to determine whether there was a current violation, not a potential violation as in *Adams*. Additionally, unlike *Stewart*, there has been no subsequent, reviewable enforcement action. Under the Town of York's Zoning Ordinance, the Board of Selectmen retains discretion to decide whether or not to bring an enforcement action even though the CEO may have

a duty to issue a notice of violation.[1] (R. 31; York, Me., Zoning Ordinance §§ 19.3-19.4.) Consequently, the Board's review of the CEO's decision is advisory and unreviewable by this court.

Further, the legislature recently amended the statute governing municipal boards of appeals, 30-A M.R.S.A. § 2691, to provide:

> Absent an express provision in a charter or ordinance that certain decisions of its code enforcement officer or board of appeals are only advisory or may not be appealed, a notice of violation or an enforcement order by a code enforcement officer under a land use ordinance is reviewable on appeal by the board of appeals and in turn by the Superior Court under the Maine Rules of Civil Procedure, Rule 80B.

30-A M.R.S.A. § 2691(4). It is clear that this legislation was intended to permit Board review of notices of violation and enforcement orders. However, by the plain terms of the statute, only notices of violation and enforcement orders are reviewable. Because no notice of violation or enforcement order has been issued and the Board only ruled on the failure to find a violation, its decision remains advisory and this court lacks subject matter to review it. Consequently, defendant's motion to dismiss is granted.

[1] Section 19.4 of York's Zoning Ordinance Provides, "The Board of Selectmen, upon notice from the Code Enforcement Officer, is hereby authorized and directed to institute any and all actions and proceedings, either legal or equitable, including seeking injunctions of violations and the imposition of fines, *that may be appropriate or necessary* to enforce the provisions of this Ordinance in the name of the Town." (R. 31.) (emphasis added)

IV. CONCLUSION

For the reasons set forth above, this court lacks subject matter jurisdiction to review this matter. Defendant's motion to dismiss is granted.

The clerk shall make the following entry on the docket:

Defendant's motion to dismiss is hereby GRANTED.

SO ORDERED.

DATE: JANUARY 25, 2018

John O'Neil, Jr.
Justice, Superior Court

ENTERED ON THE DOCKET ON: 1/26/18