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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0943-22**

TOWNSHIP OF DEPTFORD,

Plaintiff-Respondent,

v.

**MALACHITE GROUP, LTD., and
DEPTFORD COMMONS, LLC,**

Defendants-Appellants.

Submitted January 17, 2024 – Decided June 20, 2024

Before Judges Sumners and Rose.

On appeal from the Superior Court of New Jersey, Law
Division, Gloucester County, Municipal Appeal No.
A-07-22.

DeSimone Law Offices, LLC, attorneys for appellants
(John Gaetan DeSimone, on the briefs).

Charles Anthony Fiore, attorney for respondent.

PER CURIAM

Alleging a violation of § 106.4 of its municipal code, the Township of Deptford sought to fine defendants Deptford Commons, LLC and Malachite Group, Ltd., a total of \$1,013,750—a rate of \$1,250 "each day" for 811 days between November 7, 2019 and February 11, 2021 (the violation period)—due to defendants' failure to remove rubbish and garbage at 1800 Clements Bridge Road, Deptford Township (the property). Defendants contested the fine amount. After trial, the municipal court reduced the daily fine rate to \$500, equating to total fines of \$405,500 over the violation period. Defendants' reconsideration motion to reduce or suspend the fines was denied.

Defendants' trial de novo appeal to the Law Division was denied. Enforcement of the fines was stayed pending appeal to this court after defendants posted a bond in the fine amount.

Before us, defendants contend § 106.4's "each day" fine provision should be suspended or the fines should be dramatically reduced as the "continuous" penalty is "excessive," "unnecessary," "arbitrary," and "capricious." Moreover, they contend the trial court's affirmance of the "each day" penalty, despite the municipal court's reduction, was an abuse of discretion considering the courts' failure to treat their separate offenses as a single violation. They contend the trial court "misappli[ed] . . . the [Township's] illegal adoption . . . of the

International Property Maintenance Code['s]" (IPMC) "each day" penalty provision. They further request we reduce their penalties based on their calculation of the hours the Township dedicated to inspecting their property or on the number of inspections the Township performed during the violation period.

We reverse the trial court's order, concluding its application of § 106.4 is not authorized by the municipal code's legislative mandate, N.J.S.A. 40:49-5, and remand the matter to the Law Division for resentencing in accordance with N.J.S.A. 40:49-5.

I.

The Township's statutory authority to enact an "each day" penalty under § 106.4 was not raised before the municipal court, Law Division, or this court. However, we consider the issue sua sponte as an examination of the statutory basis for the municipal code provision is necessary to resolve this appeal. State v. Laurel Mills Sewerage Corp., 46 N.J. Super. 331, 334 (App. Div. 1957) ("A conviction under a void statute is of sufficient public concern to warrant the court's attention, as '[p]ublic policy is ill-served by convictions as for crime under a void statutory provision.'" (quoting State v. Guida, 119 N.J.L. 464 (E.

& A. 1937))). But resolution of this appeal requires an examination of the statutory basis for § 106.4 to impose a "each day" penalty.

The statutory authority for § 106.4 is N.J.S.A. 40:49-5. Under N.J.S.A. 40:49-5, the Township is permitted to impose an "additional fine" for "a repeated violation of any municipal ordinance" that may not exceed the statutory maximum of \$2,000 or be less than the statutory minimum of \$100. Section 106.4 imposes a fine of \$1,250 for "[e]ach day that a violation continues" and provides that each day the violation continues to exist is "deemed a separate offense." (Emphasis added).

Accordingly, the Township was authorized to impose an additional fine for repeated violations, and the \$1,250 per day fine for a repeated violation initially sought by the Township was within the statutory \$100 minimum and \$2,000 maximum range. But there is no statutory basis for imposing a successive "each day" fine for the failure to cure the violation. See Laurel Mills Sewerage Corp., 46 N.J. Super. at 334 ("The amount or limitation of a penalty imposed by an ordinance must comply with the statutory authority."); see also State v. Capaci, 260 N.J. Super. 65, 68 (App. Div. 1992) (holding the municipal ordinance's penalty provision subjecting a violator to a punishment of up to six months was invalid given its statutory authority limited incarceration to ninety

days). While a municipality can "impose an additional fine upon a person for a repeated violation of any municipal ordinance," it does not allow a municipality to repeatedly or continuously fine a person for each day a violation continues. N.J.S.A. 40:49-5 (emphasis added). To be clear, we do not conclude defendants' ongoing accumulation of garbage and rubbish "may [not] furnish [a] basis for separate charges for which separate punishments may be imposed." State v. Elmwood Terrace, Inc., 85 N.J. Super. 240, 248 (App. Div. 1964) ("For example, if an unlicensed operator of a motor vehicle drove his car at an excessive rate of speed through a red light while intoxicated, this single act might furnish the basis for separate charges against him for which separate punishments might be imposed.").

The Township has the authority under N.J.S.A. 40:49-5 to impose an additional fine for "a repeated offense." Yet, N.J.S.A. 40:49-5 does not authorize an "each day" enforcement manner as § 106.4 prescribes. Imposing an "each day" fine, as opposed to an "each offense" fine, effectively allows the municipality to exceed the allowable statutory maximum of \$2,000 for each offense as directed by N.J.S.A. 40:49-5. See Laurel Mills Sewerage Corp. 46 N.J. Super. at 334-35 (declaring that a municipal ordinance penalty provision's non-compliance with Legislative directives negates the penalty). Because an

"each day" fine is inconsistent with the municipality's statutory authority, N.J.S.A. 40:49-5, we conclude § 106.4 is invalid and unenforceable.

Section 106.4's "each day" fine ordains an enforcement penalty like that our Supreme Court addressed in Perrine Terrace Land Co. v. Brennan, 101 N.J.L. 487 (Sup. Ct. 1925). There, a Trenton ordinance provided that under specified situations, appendages to buildings could not be constructed to project into any part of a public street, and "any person violating any of the provisions of the ordinance 'shall, upon conviction, forfeit and pay to the city of Trenton the sum of two hundred . . . dollars for each offense, and each day any such violation shall be continued shall be deemed and taken to be a separate and distinct offense." Id. at 490 (emphasis added). The Court struck down the penalty provision, reasoning the enforcement of the ordinance's daily penalty provision

assumes that there was a separate and distinct violation of the ordinance each day from the time such appendage continued to exist after the alterations were made up to the time of the hearing before the magistrate and the rendering of judgment, and that such offense would continue in futuro.

It is clear that the ordinance does not authorize any such absurdity, but, to the contrary, in clear terms provides that each day that the appendage is permitted to remain shall be a separate and distinct offense for which distinct offense there shall be a penalty of \$200.

To enforce this provision a complaint is required of each distinct violation.

[Id. at 491-92.]

Although Perrine Terrace Land Company was practically rendered a century ago, this principle has not been overturned and applies here.

In this case, § 106.4 sets forth a successive penalty, imposing a \$1,250 fine for "EACH DAY" the offender is "NOT IN COMPLIANCE." Like the appendages ordinance in Perrine, the ordinance provides the same "each day" sanction, instead of per violation or complaint. Id. at 490. With that, the "each day" enforcement manner would, at minimum, require the Township to fine defendants for each complaint, or alternatively each inspection, to comply with N.J.S.A. 40:49-5's per offense directive.

Additionally, the per offense or complaint enforcement manner provides a measurable mechanism that aligns with our case law addressing the validity of an ordinance with a successive penalty provision. Accord Caldwell Terrace Apartments, Inc v. Borough of Caldwell Township, 224 N.J. Super. 588, 592-93 (App. Div. 1988) (holding the defendant landlord who filed a single lease application "only [committed] one violation and not 110" when he failed to comply with the municipality's fire and building ordinance, because only one license was issued (emphasis added)); State v. Portney, 229 N.J. Super. 171,

176-78 (App. Div. 1988) (reversing the Law Division's order imposing a \$75 fine for each tree the defendant cut or removed without a permit in violation of the municipal ordinance requiring a permit to remove trees, and instead imposed a fine following the ordinance's maximum of \$1,000 based on the defendant's failure to obtain a permit). Thus, the Township's failure to impose a fine for each complaint it issued, or at minimum, each inspection it conducted, makes the 811-day fine invalid and unenforceable.

Still, "the invalidity of a penalty clause does not necessarily invalidate all of an ordinance." Verona v. Shalit, 96 N.J. Super. 20, 24 (App. Div. 1967) (citing Scharf v. Recorder's Ct. of Borough of Ramsey, 137 N.J.L. 231 (Sup. Ct.), aff'd 1 N.J. 59 (1948)). Rather, the provision is merely "unenforceable until the penalty clause is validly amended." Ibid. Moreover, "[w]here an ordinance contains a severability clause, there is a rebuttable presumption of severability." State v. McCormack Terminal, Inc., 191 N.J. Super. 48, 52 (App. Div. 1983) (citing Helmsley v. Borough of Fort Lee, 78 N.J. 200, 237 (1978), appeal dismissed, 440 U.S. 978 (1979), opinion clarified, 82 N.J. 128 (1980)). "The question of severability of the invalid provision is one both of legislative intent . . . and of whether the remaining provisions are functionally self-

sufficient as containing the essentials of a complete enactment." Ibid. (quoting Gross v. Allan, 37 N.J. Super. 262, 269 (App. Div. 1955)).

The Township's code includes a severability provision, stating:

If any chapter, section, subsection or paragraph of this [r]evision shall be declared to be unconstitutional, invalid or inoperative, in whole or in part, by a court of competent jurisdiction, such chapter, section, subsection or paragraph shall, to the extent that it is not unconstitutional, invalid or inoperative, remain in full force and effect, and no such determination shall be deemed to invalidate the remaining chapters, sections, subsections or paragraphs of this [r]evision.

[Township of Deptford, N.J., Code § 1-4.]

Therefore, invalidating § 106.4's penalty provision does not affect the Township's adoption of the IPMC via Ordinance 2.15.¹

¹ Ordinance 2.15 provides:

An Ordinance of the Township of Deptford adopting the most current edition of the International Property Maintenance Code, regulating and governing the conditions and maintenance of all property, buildings and structures; by providing the standards for supplied utilities and facilities and other physical things and conditions essential to ensure that structures are safe, sanitary and fit for occupation and use; and the condemnation of buildings and structures unfit for human occupancy and sue, and the demolition of such existing structures in the Township of Deptford; providing for the issuance of permits and collection of fees therefore


Under § 1-5.3 of the Township's Code and N.J.S.A 40:49-5, a municipal court may impose an additional fine on repeat offenders. The Township code provides:

Any person who is convicted of violating this Code or an ordinance within one year of the date of a previous violation of the same provision of this Code or of the same ordinance and who was fined for the previous violation, shall be sentenced by a court to an additional fine as a repeat offender. The additional fine imposed by the court upon a person for a repeated offense shall not be less than the minimum [\$100] or exceed the maximum [\$1,250] fine fixed for a violation of the ordinance or Code provision"

[Township of Deptford, N.J., Code § 1-5.3 (emphasis added).]

Except for a higher authorized maximum fine amount of \$2,000, N.J.S.A. 40:49-5 is identical to § 1-5.3. Here, even invalidating § 106.4's "each day" penalty provision, the remaining portions of Ordinance 2.15 are "fully operable and conform[] to [the] statutory authority" of N.J.S.A. 40:49-5. McCormack Terminal, Inc., 191 N.J. Super. at 53. Thus, considering the Township's severability clause and § 1-5.3, we remand to the Law Division so it may issue a fine in accordance with the statutory minimum and maximum fines set forth in N.J.S.A. 40:49-5.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office

CLERK OF THE APPELLATE DIVISION