

for violating § PM 304.2 of the Property Maintenance Code, Protective Treatment, with the inspector noting a “Rusty’ area of corrugated [*sic*] metal siding” advising the Appellant of the “need to apply protective coating.” Second, the inspector found a violation of § PM 304.7 of the Property Maintenance Code, Roofs and Drainage, with the inspector noting:

large sections of the roof have either fallen in or have been removed. Vegetation [*sic*] growing on the roof. Roof should be maintained in good order and condition.

A second inspection of the Property on July 16, 2018 revealed another violation of the Property Maintenance Code, § PM 108.1.1, Unsafe Structures. A July 17, 2018 violation notice noted that:

N.C.C. position is that the structure may be “unsafe,” falling into “demolition by neglect.” N.C.C. requiring a licensed structural engineer evaluate the structure and provide a “sealed” report for N.C.C. review.

The report was due to the Department on July 22, 2018; however, on July 24, 2018, the Appellant informed the Department that the Property was to be sold and that an inspection would occur later in the summer. Eventually, a new deadline of November 30, 2018 was reached between the Appellant and the Department, and a report from MacIntosh Engineering (the “MacIntosh Report”) was provided to the Department on that date. The MacIntosh Report made numerous recommendations for the Appellant to implement to the structure on the Property, and opined that if such improvements were made, the building would be structurally stable.

On March 26, 2019, the Department scheduled a Rule to Show Cause (“RTSC”) Hearing to take place on June 12, 2019 to discuss the three code violations cited by the Department on May 22, 2018 and July 17, 2018. At the RTSC Hearing, Code Enforcement Officer Frank Walsh

testified that the violation found on May 22, 2018 for Protective Treatment (§ PM 304.2) no longer exists, but the remaining violations of the Code, § PM 108.1.1, Unsafe Structures, and § PM 304.7, Roofs and Drainage remained. Representative for the Appellant Kathy Barrett testified that the Appellant would like to sell or redevelop the Property, and that the Appellant remains hopeful that the Property would be sold within the year. Ms. Barrett also noted that fixing the issues with the Property would be very expensive, and the cost incurred would be wasteful should the property be sold and the new owner opt to tear the structure down. Accordingly, the Appellant wished to comply with only the recommendations of the MacIntosh Report despite the holes in the roof. The Administrative Hearing Officer noted that even if the building was structurally sound, the Property Maintenance Code requires that roofs be free of holes.

On June 21, 2019, the Administrative Hearing Officer issued the RTSC Decision finding that the Unsafe Notice was properly issued. The RTSC Decision provided directed the Appellant to either (1) provide evidence that the Property was sold no later than August 21, 2019; or (2), if the Property was not sold by August 19, 2019, complete all the recommendations listed in the Macintosh Report *and* make all necessary repairs to ensure the roof is “safe and weather tight” no later than August 21, 2019.

On July 10, 2019, the Appellant appealed the RTSC Decision to the Board. The Appellant sought additional time to make repairs as required by the MacIntosh Report, and also reiterated that it did not want to make the Property’s roof watertight given the interior of the building is concrete slab with and drains, the building is secure, and no safety hazard is present.

II. LEGAL STANDARDS

The Board is authorized by 9 *Del. C.* § 1315 and Section 2.05.103 of the *Code* to hear administrative appeals of the *Property Maintenance Code*. The Board may affirm, modify, reverse, vacate, or revoke the action appealed, provided that such action be affirmed if the action was neither arbitrary or capricious nor contrary to law. *Property Maintenance Code* § PM 106.3.6.5. The Board shall not have the authority to waive any requirement of the Property Maintenance Code. *Property Maintenance Code* § PM 106.3.1.6.1.

“An arbitrary or capricious decision is one that is ‘willful and unreasonable and without consideration or in disregard of the facts.’” *Brandywine Innkeepers, L.L.C. v. Bd. of Assessment Review of New Castle Cty.*, 2005 WL 1952879, at *4 (Del. Super. Ct. June 3, 2005) (quoting Black's Law Dictionary 96 (5TH ed. 1979)). Courts have also found that an arbitrary or capricious decision is one that is taken without consideration of and in disregard of the facts and circumstances of the case. *Liborio, L.P. v. Sussex Cty. Planning & Zoning Comm'n*, 2004 WL 2191052, at *3 (Del. Super. Ct. June 8, 2004) (citing *Willdel Realty, Inc. v. New Castle County*, 270 A.2d 174, 178 (Del. Ch. 1970)). The arbitrary or capricious standard is satisfied when a decision-making body has “a decision-making process rationally designed to uncover and address the available facts and evidence that bear materially upon the issue being decided.” *Harmony Constr., Inc. v. State Dep't of Transp.*, 668 A.2d 746, 751 (Del. Ch. 1995). In reviewing whether a decision is arbitrary or capricious, the reviewing body should consider the adequacy of (i) “the evidence considered by the [decision maker]” and (ii) “the process by which the relevant evidence and facts were obtained.” *Fox v. CDX Holdings, Inc.*, 2015 WL 4571398,

at *31 (Del. Ch. July 28, 2015), *aff'd*, 141 A.3d 1037 (Del. 2016) (quoting *Harmony Constr. Inc.*, 668 A.2d at 750). If a decision-maker relies “solely upon facts or evidence that would support one particular outcome while at the same time blinding itself – or refusing to inquire into – material facts or evidence that might compel an opposite outcome,” the decision may be arbitrary or capricious. *Id.*

In addition, a decision is “contrary to law if it violates a statute, legal regulation, or settled common law principle.” *Brandywine Innkeepers, L.L.C.*, 2005 WL 1952879, at *4. The fact that a reviewing body might have not reached the same conclusion does not make a decision contrary to law. *Ferrara v. Bd. of Assessment Review for New Castle Cty.*, 1995 WL 945549, at *4 (Del. Super. Ct. June 29, 1995).

III. THE BOARD HEARING

The Board held a hearing on the appeal on October 15, 2020 (the “Board Hearing”). Present for the Board Hearing on behalf of the Department were Frank Walsh and Joe Day, along with the Department’s counsel, Assistant County Attorney Jordan Perry. The Appellant was represented by its counsel, Pam Scott, Esquire, as well as its witnesses Justine Fitzsimmons and Kathleen Barrett. In addition to the testimony and exhibits presented at the Board Hearing, the record also includes the record considered by the Administrative Hearing Officer in issuing the RTSC Decision.

A. Applicant’s Presentation

Through counsel, the Appellant stated that the current appeal stemmed from the June 21, 2019 RTSC Decision wherein the Administrative Hearing Officer found the Appellant in

violation of two Code provisions: § PM 108.1.1, Unsafe Structures, and § PM 304.7, Roofs and Drainage. The RTSC Decision indicated that if the Property were not sold by August 21, 2019, all recommendations from the MacIntosh Report must be satisfied in order to improve the structural integrity of the structure on the Property. The structural repairs were completed in 2019, and MacIntosh confirmed in a memorandum dated August 12, 2019 that the Appellant completed all the recommendations in the MacIntosh Report. The Appellant retained MacIntosh for continued structural assessments of the building; MacIntosh returned biannually to the Property to ensure that the structure remains sound. MacIntosh inspected the Property on January 23, 2020 and found no issues. An inspection on May 27, 2020 noted no structural issues but did reveal additional deterioration of the roofing when compared to its earlier inspection and that additional work be performed on the roof. The Appellant represented that the additional work recommended by MacIntosh was completed, and another inspection is scheduled to take place in December. In short, the Appellant noted that it complied with the RTSC Decision in that while it did not sell the Property as expected, the Appellant did perform the maintenance recommended in the MacIntosh Report.² The Chairperson of the Board questioned why the Appellant was before the Board if it complied with the MacIntosh Report's recommendations.

Justine Fitzsimmons, head of construction at The Rosen Group, provided context as to why the Appellant contests the RTSC Decision. Ms. Fitzsimmons testified that the structure on the Property has been vacant since 2006, and since that time the Appellant has marketed the

² The Board admitted this evidence of the structure's present condition over the Department's objections of relevance to the condition of the Property at the time of the two inspections that revealed the Code Violations.

Property for sale. At the RTSC Hearing, the Administrative Hearing Officer directed the Appellant to comply with the MacIntosh Report's recommendations *and* to make the building "watertight." Ms. Fitzsimmons testified that making the roof "watertight" would be burdensome for the Appellant and provided an estimate of \$1,618,720 to replace the roof on the structure.³ Ms. Fitzsimmons further testified that absent a new roof, there was no other way to make the structure "watertight" and in compliance with the Code. The other option would be to tear down the structure, which would also be expensive; however, the Appellant did not wish to demolish the building (even without considering the cost considerations) because the prospective new owner may wish to keep the existing structure. Ms. Fitzsimmons then discussed the history of the Appellant's efforts to sell the Property, with multiple parties showing interest but no sale yet, with the latest tentative sales agreement falling through due to the COVID-19 pandemic. Ms. Fitzsimmons remained optimistic, however, that a sale of the Property would occur soon, as interest remains strong. When asked by the Board, Ms. Fitzsimmons stated that the cost to demolish the building would be \$1,165,511.00.⁴ Ms. Fitzsimmons concluded by stating that there were no options for the Appellant to make the structure "watertight."

³ This evidence was admitted over objection by the Department as to relevance given the time period of the initial violations. The Board overruled the objection to obtain a complete picture of the facts asserted by the Appellant.

⁴ This evidence was entered over the ongoing objection of the Department, as this was not available to the County at the time of the RTSC Hearing.

On cross-examination, Ms. Fitzsimmons admitted that she did not know the specific Code provision § PM 304.7, Roofs and Drainage. After reading § PM 304.7 into the record⁵, the Department's attorney questioned whether Ms. Fitzsimmons believed the Property was compliant currently. Ms. Fitzsimmons reiterated that the building on the Property was not compliant with the Property Maintenance Code.

The Appellant's next witness, Kathleen Barrett, was only questioned by the Department's attorney. Ms. Barrett testified that she attended the RTSC Hearing and admitted that the estimates to replace the roof and to demolish the building were not provided at the RTSC Hearing. Ms. Barret admitted that the structure on the Property is not fully compliant with the Property Maintenance Code, but insisted that the reports included after the RTSC Hearing were part of the discussion between the Appellant and the Administrative Hearing Officer, as the Appellant argued at the RTSC Hearing that it would be very expensive to replace a roof should the building ultimately be torn down after it was sold. When questioned by a member of the Board about the directive in the RTSC Decision, Ms. Barrett testified that the Appellant satisfied all the requirements of the MacIntosh Report but cannot make the building weather tight.

Department's Presentation

The Department called Code Enforcement Officer Frank Walsh Miller in support of its position that violations of the Property Maintenance Code existed at the time of the inspections,

⁵ § PM 304.7 of the Code reads “**Roofs and Drainage.** The roof and flashing shall be sound, tight and not have defects that admit rain. Roof drainage shall be adequate to prevent dampness or *deterioration* (emphasis supplied) in the walls or the interior portion of the structure. Roof drains, gutters and downspouts shall be maintained in good repair and free from obstructions. Roof water shall not be discharged in a manner that creates a public nuisance.

and the Roof and Drainage violation remains unaddressed by the Appellant. Officer Walsh explained that having a roof be “weathertight” is an important part of a building, as the roof of a building is the best protection against the elements. The building, Officer Wash explained, was not meant to be an atrium, and water will affect the metal of the structure itself; another freeze and thaw cycle will damage the structure and make it unsafe. Officer Walsh testified that at the time of the hearing, the building was not compliant with the Property Maintenance Code, as the large hole in the roof remained.

When asked by the Chairperson of the Board as to the Appellant’s efforts to make the improvements as required by the MacIntosh Report, Officer Walsh testified that the Department was satisfied with the Appellant’s efforts in compliance so far. However, Officer Walsh continued, the code violation regarding the roof (§ PM 304.7) remained, and it is a potential safety factor. A section of the roof blew off the building in April 2020, so safety is a concern. Moreover, Officer Walsh testified he was concerned about the even application of the Property Maintenance Code.⁶ If a Property Maintenance Code violation exists, the owner of the property is cited and required to bring the parcel into compliance; here, the Appellant was provided time to address the roof, but it chose not to do so. When asked by the Department’s attorney, Officer Walsh confirmed that financial considerations *are not* a metric considered by the Department in considering violations. At most, the Department can provide additional time to comply (which was provided here), but if an owner cannot afford to comply with the Code, it must find a way to do so or face the consequences.

⁶ This testimony was admitted over the Appellant’s objection.

On cross-examination, Officer Walsh admitted that the Appellant was very responsive to the Department's concerns and worked to comply with the recommendations of the MacIntosh Report. Officer Walsh further confirmed that the violation still existed as of the week prior to the Board Hearing, as the hole in the roof remained. Officer Walsh admitted that he could not see the hole in the roof, but that drone footage of it existed. With regard to the issue in April 2020, Officer Walsh testified he was unsure as to why the roof was damaged but surmised it could have resulted from bad weather in the spring. When asked about leeway or discretion in the Property Maintenance Code, Officer Walsh testified that the discretion is generally the individual code officer's opinion as to whether a violation exists. As far as discretion for a remedy, Officer Walsh testified that his job is only to make the determination of the violation itself – not how best to correct that violation. When asked about the leeway afforded by the Property Maintenance Code in § PM 108.1.1⁷, Officer Walsh testified that the Code Official retains some discretion as to how to address unsafe structures, and here he relied on the engineering report from MacIntosh Engineering, provided upon order by the Department, as guidance for how best to proceed.

The Department then called Joseph Day, III to testify in support of its position. Mr. Day clarified that § PM 108.1.1. provides little leeway for unsafe structures; while other code provisions may provide for a modification or “wobble room,” no such exceptions exist with the Unsafe Structures provision. With respect to the expense to make a repair, Mr. Day testified that

⁷ § PM 108.1.1 reads, in part, “[a]ll unsafe structures shall be taken down and removed or made safe and secure as deemed necessary by the Code Official and as provided for in this Chapter.”

not having the funding to fix a violation is not a defense to a Property Maintenance Code violation, but the Department does try to work with owners to provide a reasonable time for compliance. Here, the Department provided the Appellant over one year to comply with the Property Maintenance Code, but the Property remains noncompliant. Mr. Day further clarified the Department's position that the Property is still in violation of the Property Maintenance Code as it pertains to Roofing and Drainage (§ PM 304.7). Put another way, despite the Appellant's efforts to make the building structurally sound, the roof is still not watertight and is therefore in violation of the Property Maintenance Code. Upon questioning from the Board's Chairperson, Mr. Day clarified that the scope of the present hearing was whether the RTSC Decision was arbitrary or capricious – independent of the work the Appellant performed at the Property since that was issued. However, even taking that into account, one violation did remain.

On cross-examination, Mr. Day admitted that there were numerous discussions with the Appellant as to how to proceed with the parcel, and Mr. Day stated that the Appellant was concerned about tearing down the building might impact its development prospects for its new owner. Mr. Day further admitted that the Appellant cooperated with the Department overall, but he also expressed that the open roof violation still was an area of contention. When asked by a Board member as to whether there was some sort of compromise available to the Appellant, Mr. Day testified that no temporary installation could satisfy the Property Maintenance Code, and that the Department provided ample time to comply with Code requirements. At some point, Mr. Day testified, the building must simply be brought into compliance with the Property Maintenance Code, and this building is not. Mr. Day explained that the Department was

reasonable throughout the process, but there was no guarantee when a sale would actually occur or when the building would be compliant.

Public Comment

Matthew Morris, a former Claymont resident, testified that the Property was a heavily discussed topic at the Claymont townhall civic action group, and that its members wanted the building torn down. It was very clear that the structure on the Property did not comply with the Property Maintenance Code and that, regardless of the cost to repair, the structure ought to be torn down. The Board's attorney reminded the Board that demolition of the building on the Property is not the topic of today's Board Meeting, and Mr. Morris still requested that Board order the demolition of the building.

IV. THE BOARD'S DECISION

Upon the conclusion of the presentations of both the Appellant and the Department, along with consideration of public comment, Board Member Watts moved (the "Motion") that the Board find the Department did not act in an arbitrary or capricious manner when it issued Violation Notices upon the Appellant and affirm the RTSC Decision below. Mr. Grieshaber seconded the Motion.

The Board is required to affirm the RTSC Decision if the action was neither arbitrary or capricious nor contrary to law. *Property Maintenance Code* § PM 106.3.6.5. Having considered the record below and the presentations by the Appellant and the Department, the Board finds the RTSC Decision below not to be arbitrary and capricious, and thus affirms the decision. The Board finds that testimony before the Board supports the Department's conclusion that the

building is an unsafe structure with significant damage to its roof at the time of the inspections. Importantly, the Appellant did not contest the conclusions of the Department that the building was unsafe at the time of inspection and that a large hole in the roof existed (and still exists) in the structure on the Property. The Appellant focused on its efforts in complying with the MacIntosh Report to make the building structurally safe *after* the initial inspections of the Property. Moreover, the Appellant's representatives agreed in testimony that the issues with the building's roof remain present to this day in violation of the Property Maintenance Code.

The Board is aware of the Appellant's position that it does not want to pay the costs associated with constructing a new roof or demolishing the building, as the Property remains marketed for sale. However, the Board does not have the authority to waive any requirement of the Property Maintenance Code. *Property Maintenance Code* § PM 106.3.1.6.1. The financial burden on an applicant in complying with the Code is not a consideration by the Department, and the Board can only rule as to whether the Department acted arbitrarily or capriciously in issuing the Code Violations. It is evident that the Department did not. And regardless of whether the cost of repair hindered the Appellant's ability to comply with the RTSC Decision and make the roofing watertight, the violation existed at the time of the Code Violations.

Based on the foregoing, the Board finds that the Department did not act in an arbitrary or capricious manner or contrary to law when it issued the Code Violations upon the Appellant, and therefore, affirms the RTSC Decision below.

Board of License Inspection and Review

Application No. 2019-0445

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VOTE: 3-0 (Affirm: Mr. Williams, Mr. Grieshaber, and Mr. Watts)

BOARD OF LICENSE INSPECTION AND REVIEW

A handwritten signature in black ink, appearing to read 'T. Williams', is written over a horizontal line.

Toren Williams, Chairperson

Dated: November 17, 2020

NOTE: Appeals from a decision of the Board shall be taken in accordance with § 2.05.105 of the *New Castle County Code* and Art. VII, § 1 of the Rules of Procedure of the Board of License, Inspection and Review.