



BOARD OF LICENSE, INSPECTION & REVIEW

NOTICE OF DECISION

APPLICANT: Su-Be LLC

APPLICATION NO: 2022-0679

HEARING DATE: November 2, 2022

DECISION DATE: November 2, 2022

DECISION ISSUANCE DATE: November 22, 2022

MEMBERS OF BOARD PRESENT: Toren Williams, John Grieshaber, Paul Watts

SUBJECT PROPERTY: Tax Parcel No. 1301700119; 1010 Bohemia Mill Road, Middletown, DE.

Counsel for the Applicant: Richard Abbott, Esq.

Counsel for Department: Adam Singer, Assistant County Attorney, Nicholas Brannick, Finance Legal Officer

I. THE APPEAL

Su-Be LLC (the “Applicant”) appeals from the New Castle County Code Official Notice of Rule to Show Decision (the “Decision”) dated September 1, 2022. In the Decision, the Hearing Officer found Applicant responsible for three violations of chapter 7 of the *New Castle County Code* (commonly referred to as the “*Property Maintenance Code*” and specific sections herein designated as “§ PM xx”) and four violations of the zoning provisions of chapter 40 of the *New Castle County Code* (commonly referred to as the “*Unified Development Code*” or “UDC”) and specific sections herein designated as “UDC § xx”) for a property located at 1010 Bohemia Mill Road, Middletown, DE (the “Property”). In his September 12, 2022 letter appealing the Decision to the Board of License Inspection and Review (the “Board”), Applicant fails to identify specific errors but claims “the decision is rife with both factual and legal errors.”

II. JURISDICTION AND LEGAL STANDARDS

The Delaware General Assembly enabled New Castle County Council to establish, by ordinance, a Board of License Inspection and Review to provide an appeal procedure to any person directly affected “by any notice, order or other action as a result of any County inspection. . . .” 9 *Del. C.* § 1315. The appeal procedure shall allow the aggrieved party and the Department to offer such evidence either party desires the Board to hear. *Id.*

County Council established the Board pursuant to § 2.05.103 of the *New Castle County Code* and enumerated its powers and responsibilities in applicable chapters of the *New Castle County Code*. Notably, County Council established that the Board may hear administrative appeals of violations of the *Property Maintenance Code*. § PM 106.3.1.6. 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. § PM 106.3.1.6.5.

“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. PROCEDURAL BACKGROUND¹

On March 21, 2022² and again on June 16, 2022,³ the New Castle County Department of Land Use (“Department”) issued Violation Notices to Applicant citing violations of the *Property*

¹ The information in this section is derived from the Record below that was submitted to the Board.

² Five violations were cited. Two violations were of the Property Maintenance Code: § PM 302.8.4 (Oversized Vehicle Parking) and § PM 302.8.7 (Construction Equipment). Three were violations of the UDC’s zoning provisions: UDC § 40.03.110 (General Use Table); UDC § 40.31.240 (Zoning Permit); UDC § 40.04.110C (Storage and Comments Table).

Maintenance Code and the UDC on the Property. Because the violations were not remedied within the time specified in the Violation Notices, the Department's Hearing Officer held a pre-deprivation show cause hearing ("PD hearing") on July 14, 2022, to provide Applicant an opportunity to defend his conduct prior to the imposition of any penalty. *See* § PM 106.3.1.3; UDC § 40.31.920.A.1.

The Record of the PD Hearing is 292 pages and demonstrates that both the Department and the Applicant provided photographs, documents, testimony, and argument to support their respective positions. During the PD Hearing, the Department explained that the 16.36-acre Property is zoned Suburban (S). According to the Department, 5.45 acres located in the southwest portion of the Property (the "Contested Area") is being used to operate a commercial business known as Split Rock Materials, Inc. The Department alleged that construction equipment, vehicles, and materials used for Split Rock Materials business operations are stored on the Property, including within a pole barn located within the Contested Area. The Department argued that commercial and business uses are not permitted in the S zoning district.

Steven Augusiewicz testified that he and his significant other are the owners of Su-Be LLC. Mr. Augusiewicz explained that Split Rock Materials, Inc. is his business and is engaged in demolition work, snow plowing, and sells aggregate products. Mr. Augusiewicz admitted to storing construction materials, vehicles and other items associated with the business on the Property. Mr. Augusiewicz also contended that the Property is being used for agricultural purposes and has had farmland exemption status since 2003. Applicant argued that pursuant to

³ In addition to the violations cited in the March 21, 2022 Violation Notice, the June 16, 2022 Violation Notice included two additional violations: § PM 302.8.3 (Inoperable or Unreg. Vehicles); UDC § 40.01.110A (Types of Development).

Delaware constitutional and statutory law, the Department has no authority or jurisdiction to regulate the uses of agricultural land. Applicant referred to a prior enforcement action (the “Prior Action”), commenced in the Justice of Peace Court and appealed to the Court of Common Pleas, involving essentially the same facts, and contended that the Prior Action precluded this action. Applicant also argued that other S-zoned properties with agricultural exemptions are similarly used, which proves that Mr. Augustewicz is being singled out. Applicant also contended that the statute of limitations barred the Department’s enforcement action.

The Department contended that for agricultural lands to be exempt from the County’s land use regulations, the land must be devoted to agricultural purposes. According to the Department, the Contested Area is being used for commercial purposes and is not dedicated to agricultural purposes therefore it is subject to the County’s land use regulations. The Department further explained that the Contested Area’s farmland exemption status was revoked by the County’s Tax Assessment Division by letter dated May 24, 2022, following the inspection of the Property and Mr. Augustewicz’s statements to the tax assessment inspector. The Department argued that the Prior Action resolved by securing compliance, which resulted in entry of a *Nolle Prosequi* and the dropping of the charges. The Department also argued the statute of limitations did not bar the enforcement of the seven violations.

During the hearing, the Applicant submitted a binder containing documents and a memorandum of law that was not shared with the Department prior to the PD Hearing. The Department asked for an opportunity to review and respond to the Applicant’s submission prior to the issuance of a decision. The Hearing Officer allowed for a response, and the parties then agreed to extend the date for the issuance of a decision to September 14, 2022. The Department

submitted its response on August 3, 2022, and the Applicant submitted a reply to the Department's response on August 5, 2022.

The Hearing Officer issued the Decision on September 1, 2022 finding that all seven violations existed. The Hearing Officer found that the Contested Area was not being used for agricultural purposes but for commercial use by Split Rock Materials, Inc. The Hearing Officer further found that the Prior Action did not preclude this action. The facts show that the charges were *Nolle Prossed* because the Property was voluntarily brought into compliance. The Hearing Officer also found that the Property again became a concern in 2022, at which time the Department conducted inspections of the Property and observed the violations. Based on this, he concluded the statute of limitations did not serve as a defense to the violations. Finally, the Hearing Officer found no credible evidence that suggested the Department was singling out the Applicant. Photographs that indicate the storage of construction-type equipment on other properties with farmland exempt-status do not prove that those property owners are using those properties for commercial uses. And, two enforcement actions over the course of 16-years for reoccurring violations does not suggest the Applicant is a target.

IV. THE BOARD HEARING

The Board held a hearing on the appeal on November 2, 2022 (the "Board Hearing"). Prior to the Board Hearing, the record of the proceedings below was made available to the Board as well as the parties. Additionally, both parties made written submissions to the Board. The Board has considered these submissions in addition to the evidence presented and arguments made at the hearing.

1. Preliminary Matters

A. Continuance Request. At the start of the Board Hearing, Applicant requested that, as a matter of fairness, the hearing be postponed until all five Board members were available to hear the appeal. In response to the Chairman's question of whether the Board had quorum to conduct business, the Board's attorney explained that under article IV, section 2 of the Rules of Procedure of the Board of License Inspection and Review ("Board Rules"), quorum consists of three members and the Board did in fact have a quorum. The Chairman then asked the Department's position on postponing the meeting. The Department argued the request was a delay tactic, and the Department opposed any continuance. The Department further pointed to article IV, section 13 of the Board Rules that provides that once a hearing has been scheduled and noticed, a continuance may be granted only if a request is made in writing at least three days prior to hearing date or if the Board determines exceptional circumstances warrant a rescheduling or continuance. The Department explained that the Applicant did not submit an advanced written request and no exceptional circumstances exist. The Chairman polled the two other Board members who both indicated the hearing should proceed because quorum was met.

B. Jurisdiction to Hear Appeals of the Zoning Violations. In its written submission to the Board, the Department argued that the General Assembly, by adoption of 9 *Del. C.* 1313(a), provided the Board of Adjustment (the "BOA") jurisdiction to hear "appeals in zoning matters," including appeals alleging that the County erred "in the enforcement of any zoning ordinance, code, regulation or map." The Department explained that the four UDC violations clearly pertain to the enforcement of zoning ordinances, and therefore the BOA, not this Board, is the appropriate body to hear Applicant's appeal of those violations. Applicant did

not directly address this issue in its written submission. Thus, the Chairman requested Applicant to explain the legal basis for the Board to hear an appeal of the UDC zoning violations.

The Applicant argued that all the charges should be considered holistically. The Applicant contended that 9 *Del. C.* § 1315 creates the Board and is wide-reaching, extending jurisdiction to the Board over all of the charges. Applicant contended that § 1315 requires the Board to provide an appeal from any County inspection or any other County action. Because the charges arose from County inspections, the Board should have jurisdiction over the appeal of those charges. Applicant further argued that since the Hearing Officer had jurisdiction over all of the charges, so should the Board. The Applicant believes that it would be nonsensical, absurd, and a waste of time and resources if an aggrieved party was required to appeal Department decisions to different Boards. As a matter of economy and efficiency, Applicant believes the Board has jurisdiction to hear an appeal of all charges. The Applicant argued that even if State law creates jurisdiction in the BOA to hear appeals of zoning matters, this Board has concurrent jurisdiction to hear appeals of zoning matters arising from inspections.

The Department responded that the Board has jurisdiction to hear the appeal of the three *Property Maintenance Code* violations only. The Department referred to its arguments on pages 6-10 of its written submission. The Department explained that § 1315 did not create the Board, but is instead an enabling statute, providing authority to County Council to establish the Board. The Department explained that such authority must be exercised consistent with the authority provided by the General Assembly. Importantly, the General Assembly established that the BOA “shall be empowered to hear and decide appeals in zoning matters where error is alleged in any order, requirement, decision or determination made by an administrative officer or agency in

the enforcement of any zoning ordinance, code, regulation or map.” County ordinances addressing land use appeals recognize that different Boards have jurisdiction over appeals emanating from different chapters of the *New Castle County Code*. Accordingly, consistent with state law, County ordinances provide that this Board has jurisdiction to hear appeals of violations of chapter 6 (the *Building Code*), Chapter 7 (the *Drainage Code*) and, as is the case here, chapter 7 (the *Property Maintenance Code*). And, consistent with state law, the UDC provides that the BOA has jurisdiction to hear appeals of zoning matters.

The Department disagreed with the Applicant’s argument that concurrent jurisdiction allows the Board to hear appeals of zoning decisions arising from Department inspections. The Department argued that the General Assembly did not provide for concurrent jurisdiction and there is no legal basis for it. The Department also explained that the Hearing Officer’s authority to provide an aggrieved party an opportunity to explain why penalties should not be imposed is independent from the authority of this Board or the BOA to hear appeals of the Hearing Officer’s decisions.

In rebuttal, Applicant disagreed with the Departments interpretation of § 1315. Applicant contended that if County Council created a Board of License, Inspection and Review, the ordinance must also provide that the Board hears appeals of all inspection-related issues. Thus, Applicant argued, jurisdiction does exist for the Board to hear the appeal of the UDC violations. Applicant contended that having two boards hear an appeal of a violation notice could lead to a nonsensical result and invite chaos. Applicant offered that statutory construction principles dictate that laws should be interpreted to avoid absurd results and the way to do this is to have one board hear one appeal. Alternatively, Applicant suggested that if different boards

have jurisdiction depending on the nature of the decision being appealed, the boards should have a joint hearing, with joint deliberations, with this Board on the left and the BOA on the right, and the decisions could be issued at the same time. Applicant suggested this approach would be more economical and efficient and ensure consistency.

Applicant agreed that the Board clearly has jurisdiction over appeals of *Building Code* and *Property Maintenance Code* issues. But, Applicant explained, in other jurisdictions the BOA hears appeals of *Building Code* issues. Applicant then suggested that appeals of *Building Code* issues will now have to go to the BOA if appeals need to be split up, which will even further split up appeals. Applicant also indicated that if the Violation Notice did not include *Property Maintenance Code* violations and only involved zoning violations, then maybe the BOA would have jurisdiction over the appeal of the UDC violations.

The Department responded that the parade of horrors of which the Applicant spoke is unfounded. The Department then explained that the scope of the BOA's jurisdiction was discussed in *Friends of Paladin v. New Castle Cty. Bd. of Adj.*, 2006 WL 3026240 (Del. Super. Ct. Sept. 12, 2006) ("*Paladin*"). In *Paladin*, the Delaware Superior Court analyzed the division of appellate jurisdiction between the Planning Board and the BOA. The Court explained that if the decision was a "zoning decision," the BOA had jurisdiction. The Court observed that "[b]oth the Delaware Code and the County Code make clear that the Board of Adjustment has the authority to hear and decide all appeals in zoning matters." The Court reviewed the provisions of the UDC, including the definition of "zoning regulation" contained in UDC division 40.33.300, concluded that the Department's decision was about a zoning regulation, and ruled that the BOA, not the Planning Board, had jurisdiction to review that decision. Relying on

Paladin, the Department concluded that the law is clear that Board does not have jurisdiction to hear an appeal of the Hearing Officer's decisions relating to the four UDC violations.

After considering the arguments and submissions of the parties, the Board debated whether it had jurisdiction to hear an appeal of the UDC zoning violations. A motion was made that the Board does not have jurisdiction to hear the UDC matters. The motion was seconded. The Board noted that under applicable law, it hears appeals on the *Building Code* and the *Property Maintenance Code*. The Board explained that it was not a zoning board and has no zoning code expertise. The Board unanimously voted that it does not have jurisdiction to hear the UDC matters. The parties were advised to focus on the three *Property Maintenance Code* violations only.

C. Agricultural Use of the Property. Applicant next proposed that the Board first determine whether the County has authority to regulate the Property before addressing the *Property Maintenance Code* violations. Applicant explained that article II, section 25 of the Delaware Constitution precludes the County's land use regulation of lands devoted to agricultural use. Applicant explained that the Property has farmland exempt status pursuant to 9 *Del. C.* § 8335. Applicant then explained that 9 *Del. C.* § 2601(B)(1) deems land, buildings, and structures with farmland exempt status to be devoted to agricultural use. Applicant explained that farms in the County can do whatever they want because they are exempt from the County's land use regulation. Thus, the County has no authority to impose its land use regulations on the Property and had no authority to notice violations of the *Property Maintenance Code*.

The Department argued that the farmland exempt status was revoked for the Contested Area on May 24, 2022, and accordingly, the Contested Area is subject to the County's land use

regulation and was subject to County's land use regulation when the June 16, 2022 Violation Notice was issued. The Department explained that in the Prior Action, the Justice of the Peace Court found that the farmland exempt status of the Property was determinative of its agricultural status. However, the Department appealed the finding to the Court of Common Pleas, and the Court reversed the Justice of the Peace Court's decision. The Court of Common Pleas opined that the County should be provided an opportunity to present evidence that shows farmland exempt property is not devoted to agricultural use.

Applicant disagreed that the farmland exempt status was revoked effective May 24, 2022 and argued both the March and June Violations Notices were issued when the Property was farmland exempt. The Chairman indicated the Board's desire to hear evidence and additional argument on the issue as well as the *Property Maintenance Code* violations and directed Applicant to proceed with its presentation.

2. Applicant's Presentation

Applicant disagreed with the Department's position that the Property was not farmland exempt when the violation notices were issued. Applicant suggested that fact that the determination of the loss of exempt status was made on May 24, 2022 is irrelevant. Applicant argued that pursuant to the terms of the May 24, 2022 Tax Assessment letter, the decision to change the farmland exemption status of the Contested Area was effective on July 1, 2022.

Applicant then explained that three arguments support reversal of the Hearing Officer's Decision: (1) as discussed, the Property is farmland exempt and immune from prosecution; (2) the three-year statute of limitations contained in 10 *Del. C.* § 8106 bars the action because the

County was aware of the use of the Property since 2006; and (3) the prosecution is barred because of the County's selective enforcement.

Applicant argued that the County was fully aware of the uses at the Property since 2006. According to Applicant, it is far too late for the Department to attempt to enforce Code provisions after it sat on its hands for over a decade. Applicant has made valuable improvements to the Property based on the uses it has long established.

Applicant also argued that the County cannot enforce laws against certain people it is targeting while ignoring the same or similar legal violations against another person. Selective enforcement exists based on the Department's pursuit of charges against Su-Be, LLC, a second attack on the agricultural use of the Property in the past 16 years, despite the fact that other agricultural properties in the County have the same of similar circumstances present on them without any enforcement of Code violations by the Department.

Mr. Augusiewicz testified on behalf of the Applicant. He explained that Su-Be LLC has owned the Property since 2013. He and his significant other (Susan) are owners of Su-Be LLC. Susan individually owned the property from 2006 to 2013. Mr. Augusiewicz explained the Property was originally 21 acres, but the State took approximately 4 acres for the Rt. 301 bypass, reducing the size of the parcel to approximately 16 acres. The Property, including the Contested Area, is easily visible from the Rt. 301 bypass. The Property has been farmed since 2003; corn, soybeans and hay have been grown on the Property. He has shown proof of income from the agricultural uses on the farmland exemption applications. The Property was farmland assessed in March of 2022. He reviewed exhibits that indicated he has received certificates of use for farm structures constructed on the Property in 2005 and 2015.

Mr. Augusiewicz testified that he was subject to an enforcement action in 2006 and Jack Gahan was the County Code Enforcement Officer. He reviewed printouts from the Justice of Peace for the Prior Action that indicated the disposition of the 19 charges was *Nolle Prosequi*. He noted the reason stated on the printout was prosecutive merit. All 19 charges were dropped, and the case was resolved on January 25, 2011. Mr. Augusiewicz testified that from 2006 to January 25, 2011 nothing changed with the use of the Property. No structures, equipment, or buildings were removed. Mr. Augusiewicz referred to a reply brief dated February 23, 2009 drafted by an Assistant County Attorney to demonstrate that the County was aware of strikingly similar use of the Property in 2006. Mr. Augusiewicz stated that the use of the Property between 2006-2022 has basically remained the same. He further testified that the County did not notify him from January 25, 2011 to March 2022 that he was doing anything illegal on the Property. He claimed that he has spent about \$200,000 in improvements on the Property.

Mr. Augusiewicz stated that the County started coming after him in 2022. He testified that based on his own research, he is aware of other properties that have farmland exemptions that also have trucks, heavy equipment, and store materials on the property. He provided aerial photographs and parcel information from approximately 15 other properties that depicted, in his opinion, construction equipment, trucks, and containers on other property that indicated the commercial use of farmland-exempt property. He indicated that he was aware of no County Code enforcement activity against those property owners.

Mr. Augusiewicz testified that the County has executed three search warrants and conducted over 20 inspections at the Property in 2022. He testified that the County had not executed any search warrants at the Property from 2011 to 2021. He testified that he was subject

to one inspection between 2006 and 2009 and received one violation notice. He testified that Mr. Gahan had not been to the Property from 2011 to 2021. Applicant then moved to allow 26 exhibits into evidence in support of Mr. Augusiewicz's testimony. The Department did not object to the admission of the documents but argued that the Board does not have jurisdiction to consider the selective prosecution argument. The Board allowed the documents to be moved into evidence.

The Department was then provided an opportunity to cross-examine Mr. Augusiewicz. Mr. Augusiewicz confirmed he has never lived on the Property and neither he, nor Su-Be, LLC, farms the Property. The farming operation is "subbed out" to another entity. He clarified that he does maintain the Property's ½ mile road and landscaping. He testified that the farmland exemption status allows Su-Be, LLC to receive special tax treatment and has since 2003. Mr. Augusiewicz confirmed that Split Rock Materials, Inc. is his business and it performs snow plowing services both on and off the Property. Split Rock also does demolition work and sells/delivers aggregate product (crushed stone, sand, gravel). He indicated that the aggregate product that is stored on the Property is used on the Property. He provided that Split Rock also does land grading. Mr. Augusiewicz confirmed that Split Rock owns construction equipment that is used for the business. Mr. Augusiewicz confirmed on a photograph of the Property that construction equipment is stored on southwest portion of the Property. Mr. Augusiewicz also testified the snowplows are stored in the pole barn as well as outside. He testified that he has had the snowplows for 3-5 years. He testified that he has replaced and upgraded equipment over the years. Mr. Augusiewicz indicated that he has no intention of removing or relocating the

construction equipment and snowplows despite the Violation Notices unless he is ordered to do so by a court or other tribunal.

Mr. Augustiewicz testified that he researched whether other properties had enforcement actions brought against them by going on the computer and checking the County's ParcelView information. He did not know if resolved violations would appear on ParcelView.

3. The Department's Presentation.

The Department then provided testimony of three witness. Christopher Jackson, a Department employee in the planning section, testified that he got involved in the case in March of 2022 when Code Enforcement reached out to him. Mr. Jackson explained that the Property is located in the Suburban (S) zoning district, which is generally limited to residential uses. He reviewed an aerial photograph of the Property that was taken on March 1, 2022. Mr. Jackson confirmed that the photograph indicated construction equipment was stored on the southwest portion of the Property. Mr. Jackson confirmed that the 5.45 acres referenced in the May 24, 2022 Tax Assessment letter corresponded to the area of the Property where the construction equipment is stored. He also reviewed exhibits that consisted of documents kept and maintained by the Department in the ordinary course of business, including a demolition permit application and a contractor licensing application, that listed the address for Split Rock Materials, Inc. as the Property address. Mr. Jackson next reviewed information he found online for Split Rock Materials, Inc. that highlighted the services the company offers. The Department requested that the exhibits discussed by Mr. Jackson be moved into evidence. Applicant objected on the basis that the document were not relevant to the *Property Maintenance Code* violations. The Board

allowed the documents to be moved into evidence and explained that the Applicant's exhibits were also moved into evidence.

Applicant declined the opportunity to cross-examine Mr. Jackson.

The Board asked Mr. Jackson when the Property was first zoned S, and he explained that he believed it has been zoned S since the UDC was adopted in 1997. The Board then asked how the farmland exemption worked in conjunction with the zoning. Mr. Jackson explained that the zoning district dictates the allowable uses of the Property; whereas the farmland exemption designation is a tax exemption that is available for any agricultural land located in any zoning district. The Board then questioned if the construction equipment was used on the Property and also used off-site, at what point does it become associated with a commercial use rather than the agricultural use of the Property. The Board rephrased the question to ask at what point in time did the use change from an agricultural use to a commercial use. Mr. Jackson discussed that the property, structure, or building need not only be tangentially used for agricultural use, but the primary use must be agricultural – it must be devoted to agricultural use. Applicant objected to Mr. Jackson's testimony because he was giving legal opinions. The Board overruled the objection. Mr. Jackson then provided that based on his research, it appeared the construction equipment and machinery is used primarily for business operations of Split Rock Materials, Inc. that provides services off of the Property.

Applicant then proceeded to cross-examine Mr. Jackson. Applicant asked Mr. Jackson whether he agreed that 9 *Del. C.* § 2601(B)(1) deems land, buildings, and structures with farmland exempt status to be devoted to agricultural use. Before Mr. Jackson could respond, Applicant asked if the Property was assessed farmland exempt until at least June 30, 2022 to

which Mr. Jackson agreed. Applicant next asked how the Department can just get past the fact that the Property had farmland exempt status to assert it was not being used for an agricultural purpose. Mr. Jackson referred to the *New Castle County v. Augusiewicz* Court of Common Pleas decision. Applicant stopped Mr. Jackson and asked him where in the statute was the language that allowed the County to disregard the Property's farmland exempt status. Mr. Jackson indicated he did not see such language. Mr. Jackson also testified that he has no personal knowledge regarding the amount of maintenance and upkeep that Mr. Augusiewicz undertakes at the Property.

The Department requested an opportunity for redirect examination, which the Board allowed. The Department asked Mr. Jackson how many times the word "devoted" is used in 9 *Del. C. § 2601(B)*. Mr. Jackson stated the word devoted appears four times. Mr. Jackson also stated he read and was familiar with the *New Castle County v. Augusiewicz* Court of Common Pleas decision. He quoted language from the decision that states "the County, under the statute, is entitled to put forth facts in support of its position that the property is not devoted to agricultural uses."

Applicant then questioned Mr. Jackson regarding the *New Castle County v. Augusiewicz* case. Applicant pointed to language in the opinion that stated it is the County's burden to demonstrate that the property should be reassessed. Perhaps rhetorically, the Applicant asked whether the issue before the Board is the proper assessment of the Property or the existence of *Property Maintenance Code* violations. After a lively exchange between the parties, the Board dismissed the witness.

The Department next called Jack Gahan as witness. Mr. Gahan explained that in the 2006-2010 period, he was employed as a Code Enforcement Officer for the County. He testified that he inspected the Property on January 12, 2011 in relation to an ongoing enforcement action at the Property due to its use for a demolition business. He testified that on January 12, 2011, the Property had been brought into compliance and there was no longer evidence of construction equipment or construction vehicles being stored on the Property. All the storage containers were inspected; two were completely empty, and other containers had only agricultural related items. Based on this inspection, the Property was deemed to be Code-compliant.

Applicant then questioned Mr. Gahan. Applicant asked Mr. Gahan if he lives near the Property such that he drives by frequently. Mr. Gahan admitted that between 2006 and 2021, he has driven by the Property dozens of times. Mr. Gahan stated he was aware of the Property's use between 2006 and 2010. Mr. Gahan agreed that the uses of the Property between 2006 and 2010 were similar to the allegations in the Violation Notices that are presently before the Board.

The Department next called Officer Hoban, who is employed as a Code Enforcement Officer for the County. His responsibilities involve investigating property maintenance complaints. He testified that code enforcement is 95% complaint-driven, and Code Enforcement Officers primarily respond to complaints that are reported to the Department. He testified that he inspected the Property, made observations, took photographs, and issued the March 21, 2022 Violation Notice. He explained that he observed oversized vehicles and construction equipment on the Property. He reviewed photographs that were part of the Record below and stated the photographs depict the violations that he observed. The photographs were moved into evidence without objection. Mr. Hoban next testified about June 16, 2022 Violation Notice. He testified

that he inspected the Property, made observations, took photographs, and issued the June 16, 2022 Violation Notice. He reviewed photographs that were part of the Record below and stated the photographs depict the violations that he observed. The photographs were moved into evidence without objection.

The Department asked Mr. Hoban if he had heard Mr. Augusiewicz's testimony regarding other properties in New Castle County that Mr. Augusiewicz had claimed never received violation notices although violations existed on the properties. Mr. Hoban testified that Mr. Augusiewicz was incorrect and he did not know the basis of Mr. Augusiewicz's conclusions. He testified that he reviewed the properties that the Applicant had raised at the PD Hearing to support its claim of selective prosecution. Mr. Hoban testified that some property owners received violation notices that were resolved, and ParcelView would not reflect closed cases. Mr. Hoban testified that other properties had not had violations reported, but he subsequently inspected the properties. He testified that no violations were observed on one property. Another property is currently under investigation. Mr. Hoban testified that he has not had the opportunity to review the properties that were raised for the first time before the Board.

Applicant asked Mr. Hoban who filed a complaint against Su-Be, LLC in 2022. Mr. Hoban responded that he could not answer the question. The Board intervened and asked if it was necessary to know the name of the complainant. Applicant indicated he needs to know if there actually was a complaint to know if the County was just selectively prosecuting it. Mr. Hoban testified that there was a complaint. Applicant again asked who filed the complaint. The Board stated that the witness is under oath and testified that a complaint was made and Applicant should move on. Applicant then asked if the containers on the Property were validly

permitted and legally on the Property. Mr. Hoban testified that, in his judgment, he did not have a problem with the containers.

Applicant next asked Mr. Hoban to go through the exhibits provided by Applicant at the PD Hearing to identify which of the 15 properties actually had a violation notice filed against it. Mr. Hoban could not recall the specific properties. Applicant then asked Mr. Hoban if he is an IT professional and if he knew whether closed cases may appear on the ParcelView. Mr. Hoban testified that it was not his experience to find closed cases on ParcelView. Applicant asked Mr. Hoban if there was enforcement action at the Walker Farm. Mr. Hoban testified that he believed that an investigation had been opened and closed. The Applicant asked about the status of the investigation and whether violation notices were issued. Mr. Hoban testified that he is unaware of the current state of the Walker Farm and the status of any enforcement action.

On redirect, Mr. Hoban confirmed that ParcelView was not a reliable way to research the Department's enforcement activity for a specific property.

The Board questioned when the *Property Maintenance Code* violations were issued. Mr. Hoban explained that the violations were included on the June 16, 2022 Violation Notice based on an inspection of the Property on June 14, 2022.

The Applicant provided no rebuttal.

The Department provided no rebuttal.

V. THE BOARD'S DECISION

Upon the conclusion of the presentations of both the Applicant and the Department, the members of the Board conducted discussion on the issues before it. The Board is required to affirm the Decision if the action was neither arbitrary or capricious nor contrary to law. *Property*

Maintenance Code § PM 106.3.6.5.

During its deliberations, the Board asked the Department whether the Property was considered farmland exempt until July 1, 2022. The Department explained that if it demonstrated the Property was not being used exclusively for agricultural purposes, the date of the revocation of the farmland exemption status is not relevant. The Board then questioned when protections afforded by the farmland exemption status ceased, therefore allowing the Department to engage in enforcement activity on the Property. In conjunction with this question, the Board again questioned if the July 1, 2022 date noted in the May 24, 2022 Tax Assessment letter would be the operative date. The Department explained that July 1 is the date that changes are made to the County tax rolls concerning the tax status of a property. However, on May 24, 2022, the decision was made by the Tax Assessment Division that the Contested Area no longer meets the criteria for farmland exempt tax status. Thus, the relevant date is May 24, 2022 not July 1. Applicant strongly disagreed and argued that the farmland exempt status remains effective until July 1, 2022, and that is earliest date the Contested Area could be considered to have lost its agricultural status. However, Applicant added that the May 24, 2022 Tax Assessment letter has been appealed to the Board of Assessment Review and the farmland exempt status remains on the entire Property until resolution of that appeal and the issuance of a final decision. The Department stressed that the Applicant provided no legal authority for the existence of a stay of County action changing the Contested Area's tax-exempt status, and the appeal before the Board of Assessment Review in no way stays or delays the change of tax status noticed in the May 24, 2022 Tax Assessment letter.

The Board considered the Applicant's arguments regarding the farmland exempt status of

the Property. Mr. Williams explained that based on the arguments and evidence presented and the findings contained in the May 24, 2022 Tax Assessment Letter, he is considering May 24, 2022 as the date the Contested Area was no longer farmland exempt. **Regarding PM 302.8.3, PM 302.8.7, and PM 302.8.4, Mr. Williams moved that the Department did not act in an arbitrary or capricious manner in adding these three violations to the Property. The Motion was seconded by Mr. Grieshaber.** Mr. Watts explained that based on the arguments presented, he agrees that the farmland exempt status was removed from the Contested Area on May 24, 2022. Mr. Grieshaber agreed that the May 24, 2022 Tax Assessment letter established the farmland-exempt status was removed from the Contested Area on May 24. Mr. Grieshaber also explained that Mr. Hoban's testimony regarding the inspections conducted, and specifically the photographic evidence taken during those inspections that was provided to the Board and discussed during the Department's presentation, clearly support the Hearing Officer's determination that violations of PM 302.8.3, PM 302.8.7, and PM 302.8.4, existed at the Property on the date of the June 16, 2022 Violation Notice. The other Board members agreed.

VOTE:

1. Violation of § PM 302.8.3 (Inoperable or Unreg. Vehicles). Yay 3-0 (Mr. Williams, Mr. Grieshaber, and Mr. Watts).
2. Violation of § PM 302.8.7 (Construction Equipment). Yay 3-0 (Mr. Williams, Mr. Grieshaber, and Mr. Watts).
3. Violation of § PM 302.8.4 (Oversized Vehicle Parking). Yay 3-0 (Mr. Williams, Mr. Grieshaber, and Mr. Watts).

The Board next discussed the selective enforcement argument presented by the Applicant. The Board indicated that the evidence presented by the Applicant to support the claim of selective enforcement lacked credibility. Furthermore, the Board noted that if there are

active enforcement cases on these other properties, those cases may eventually be presented to the Board on appeal. The Board found that it would be wholly inappropriate to consider the disposition of potential code violations on other properties that are not before the Board. Ultimately, the Board stated it was not part of its purview to consider such a claim and the Board is limited to application of the County Code. **Mr. Williams moved that the Board does have jurisdiction to consider Applicant's selective enforcement claim. Mr. Watts seconded the motion.** Mr. Watts explained that none of the properties discussed by the Applicant is before Board for alleged Code violations. What is properly before the Board is the review of the Hearing Officer's decision regarding the *Property Maintenance Code* violations at the Property. The other Board members agreed that addressing a selective enforcement claim is not within the Board's jurisdiction.

VOTE:

The Board Lacks Jurisdiction to Consider Applicant's Selective Enforcement Claim.
3-0 Yay (Mr. Williams, Mr. Grieshaber, and Mr. Watts).

The Board next discussed the Applicant's argument that the Department's enforcement action is barred by the statute of limitations. Mr. Grieshaber referred to the testimony offered by Mr. Gahan. **Mr. Grieshaber then moved that the Hearing Officer did not err in his decision regarding the statute of limitations. Mr. Williams seconded the motion.** Mr. Grieshaber explained that the condition of the Property had changed over an extended period of time. Whatever the condition of the Property was at the time of the Prior Action is not indicative of the condition of the Property now. Mr. Williams found that the evidence presented indicated that the condition of the Property had indeed changed over time; buildings and equipment had been

added to the Property over time, as evidenced by the testimony of Mr. Augustiewicz. Mr. Watts stated he agreed with the reasoning of Mr. Williams and Mr. Grieshaber.

VOTE:

The Hearing Officer did not err in his decision regarding the statute of limitations. Yay 3-0 (Mr. Williams, Mr. Grieshaber, and Mr. Watts).

The Board concludes that Hearing Officer's Decision was neither arbitrary or capricious nor contrary to law and is hereby affirmed.

BOARD OF LICENSE, INSPECTION AND REVIEW



Toren Williams, Chairperson

Dated: November 22, 2022

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. VI, § 1 of the Rules of Procedure of the Board of License, Inspection and Review.