



BOARD OF LICENSE, INSPECTION & REVIEW

NOTICE OF DECISION

APPLICANT: AVM Solutions LLC

APPLICATION NO: 2023-0184

HEARING DATE: April 17, 2023

DECISION DATE: April 17, 2023

DECISION ISSUANCE DATE: May 18, 2023

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

PROPERTY: Tax Parcel No. 0903700003; 716 Old Baltimore Pike, Newark, Delaware.

Counsel for the Applicant: Applicant appeared *pro se*.

Counsel for Department: Adam Singer, Assistant County Attorney

I. THE APPEAL

AVM Solutions LLC (the “Applicant”) appeals from the New Castle County Rule to Show Penalty Assessment notice dated March 1, 2023 that assessed a \$1,600 penalty. Ex. A. The penalty was assessed as a result of Applicant’s failure to comply with directives issued in a January 13, 2022 Rule to Show Cause Decision (“Decision”). Ex. B. The Applicant contends that the penalty should not have been assessed because he made efforts to comply with the directives prior to assessment of the penalty.

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 must 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 *Building Code*.¹ *New Castle County Code* § 6.12.003(A). The Board may affirm, modify, reverse, vacate, or revoke the action appealed, provided that such action be affirmed if the action taken was not arbitrary or capricious or was not taken pursuant to law. § *New Castle County Code* § 6.12.003(E). “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)

¹ The *Building Code* appears as chapter 6 of the *New Castle County Code*.

(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 not have 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 BACKGROUND²

On October 30, 2020, the Applicant received a building permit from the New Castle County Department of Land Use (“Department”) to build a 20 ft. x 24 ft., two-story addition, with unfinished attic space and an unfinished basement. A certificate of occupancy was issued for the addition on April 4, 2022. The certificate of occupancy, however, was revoked on October 17, 2022 because the addition was found to be 20 ft. x 29 ft. and the attic and basement spaces were converted to livable area. A large, three-story decking system was also built that was not permitted. The Department posted a Notice of Stop Work Order on the Property on December 19, 2022 identifying the violations and ordering that all work stop. Ex. C. A Rule to Show Cause Hearing–Stop Work Order was issued to the Applicant on December 20, 2022 scheduling a hearing on January 10, 2023. Ex. D.

² The information in this section is derived from the Record below that was submitted to the Board.

The Department's Hearing Officer held a Rule to Show Cause Hearing ("RTSC Hearing") on January 10, 2023 to provide the Applicant an opportunity to refute the violations outlined in the Stop Work Order prior to the imposition of any penalty or other enforcement action. Ex. B. During the RTSC Hearing, the Department provided photographs, documents, and testimony as evidence of the violations. A New Castle County Certified Building and Site Inspector ("Building Inspector") testified that a permit was issued for a 24 ft. x 20 ft. addition that included an unfinished basement, unfinished attic, a bathroom, and expanded bedrooms on two floors. He explained that attic and basement space was not designed or approved for occupancy. When he performed an interior inspection, he observed that the addition was 24 ft. x 29 ft. In addition to exceeding the permitted size, he observed both floors' spaces were constructed with kitchenettes, three large decks were constructed reaching to the third floor, the attic space and the most upper deck were converted into livable space, the basement area was converted into livable space, and access to the addition from the interior of the main dwelling, as required by the *Building Code*, did not exist. Once the additional work was observed and it was determined that it was not part of the approved plans and building permit, the Building Inspector posted a Stop Work Order on the Property.

Tony Adams represented the Applicant at the RTSC Hearing. Mr. Adams admitted that he built the addition and the first and second floor decks but did not construct the most upper deck, enclose that deck, or convert the attic and basement space into livable space. He stated that he is working with the Department and his design professionals to revise the plans to reflect the additional improvements.

The Hearing Officer found that the Applicant violated *New Castle County Code* § 06.03.012 – Permits. That section states in relevant part:

(A) Required. Any permit contractor endorsement holder, or owner in accordance with the excerpts below, who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy or use of a building, structure, swimming pool or spa, or parcel(s), or to erect, install, enlarge, alter, repair, remove, concert or replace any gas, mechanical, or plumbing system, the installation or which is regulated by this Chapter, shall first make application to the Code Official and obtain the required permit.

The Hearing Officer found that the Applicant made additional improvements that were done in the absence of the required approvals. The additional improvements constituted a health, safety and welfare issue. The Hearing Officer found that the Stop Work Order was properly issued and directed the Applicant to obtain the required permits. The Applicant was directed to pay the \$300 hearing fee and correct the violations no later than February 13, 2023. If the Department determined that the additional permits could not be issued due to safety or other concerns, the Applicant was ordered to remove the additional improvements no later than 30 days from such determination. The Decision also contained the following language:

Should the Respondent fail to meet the timelines above, the Respondent will have been considered to have allowed the violations to continue and a \$100.00 fine shall be assessed per day, per violation [] until compliance is achieved and maintained for a period of twelve months. Failure to pay fines, fees, and penalties when due may result in those unpaid fines, fees, and penalties being moved to the property's tax bill.

The Respondent shall ensure any deviation from the compliance date is approved in writing by the New Castle County representative listed below BEFORE the compliance date directive expires.

Building Inspector Robert Michael was listed as the contact point and his phone number and email address were provided.

The Applicant failed to correct the violations by February 13, 2023. On March 1, 2023, the hearing officer issued a penalty assessment notice to the Applicant in the amount of \$1,600. Ex. A. This amount included a penalty of \$100 per day for 16 days (February 13, 2023-February 28, 2023).³

The Applicant timely filed an appeal with the Board on March 15, 2023. On the Application for Hearing, the Applicant stated that he “applied for an extension online but has not received any notification until calling and speaking with Land Use to resolve issues and received permit prior to 01 March 23.” Ex. E.

IV. THE BOARD HEARING

The Board held a hearing on the appeal on April 17, 2023 (the “Board Hearing”).

1. The Applicant’s Presentation

Tony Adams represented the Applicant and provided testimony. Mr. Adams explained that that he originally secured a permit for the Property in 2020, completed work at the Property, and the permit was then closed out. After the work was completed, the property owner had another contractor come in and perform the work that was not included in the 2020 permit. After the Stop Work Notice was posted, the property owner contacted the Applicant and requested that he return to the Property to reopen the permit and resolve the violations. Since then, he has been working diligently to resolve the violations. He was told by the Department that a new permit would need to be issued so he was gathering the information necessary for a new permit. However, the Department then decided to re-open the prior permit. Mr. Adams then explained

³ The *Building Code* provides that any person who is found to have violated a directive of the Code Official may be assessed an administrative fine of up to one thousand dollars (\$1,000.00) for each day the violation continues. See *New Castle County Code* § 6.12.002(C)(9).

he was violated for performing work under an expired permit due to the Department's decisions to reopen the 2020 permit. Mr. Adams explained that he then applied for a permit extension online before the penalty was assessed.

2. The Department's Presentation

The Department presented testimony, photographs, and documents to support its position. The Department presented testimony from Janine Knieriem, who works as a certified permit processing technician and has been with the Department for twelve years. Ms. Knieriem explained the licensing process for contractors and stated that the licensing packet, including the required contractor bond, was made available online for contractors on or about October 5, 2022 for licenses that be effective on January 1, 2023. Contractor license applications for 2023 were available beginning on November 7, 2022.

Building Inspector Robert Michael testified that the Property is zoned residential and is owned by Tri State Properties. He further testified that he inspected the Property and observed that construction exceeded the work authorized by the 2020 permit. He provided photographs of the Property. He explained that the size of the addition exceeded the permitted size. Building Inspector Michael testified that during the inspection, he observed that the building was occupied, and that construction was ongoing in the basement and the attic without an active permit. One of the obvious safety issues was the basement unit had no egress from the area that appeared to be a bedroom. On December 19, 2022, Building Inspector Michael posted a Stop Work Order. A RTSC Hearing was held on January 10, 2023 at which Building Inspector

Michael provided testimony. He explained that the Applicant was directed to secure a permit and correct the violations no later than February 13, 2023.

On cross-examination, Building Inspector Michael indicated that Department records indicate that the Applicant submitted a permit extension request that was received by the Department on February 27, 2023. Mr. Adams argued that he submitted the permit extension request on February 22, 2023 or before and asked Building Inspector Michael if this could be verified (it could not). Mr. Adams commented that the Department had the permit extension request and only documented the submission on February 27, 2023.

Ms. Knieriem was recalled to provide testimony regarding when the Department received the permit extension request from the Applicant. Ms. Knieriem testified that the permit extension request was received at 8:17 a.m. on February 27, 2023. She explained that when permit requests are submitted online, an automatic message is generated and forwarded to a permit processing technician. Based upon this automatic message, she is confident the permit extension request was submitted through the online permitting system the morning of February 27, 2023.

On cross-examination, Ms. Knieriem testified that she has access to emails sent to the County's permit address. The Applicant asked if she could locate emails that he sent. She explained that she can search for emails sent after February 23, 2023 and emails sent before then have been archived. Mr. Adams explained that his emails were sent prior to February 23, 2023.

The Department then moved Land Use Exhibits 1-6 into evidence. Ex. F.

In response to the Board's question, Mr. Adams testified that the Department approved the permit extension on March 15, 2023. That was one week after he met with Department

personnel on March 8, 2023 to discuss the path forward to resolve the violations and secure the permit extension.

3. The Closings

The Department closed by arguing that Mr. Adams has not submitted any documents or offered any credible evidence that indicate he was in compliance with the Decision's directive by compliance deadline (February 13, 2023). Indeed, the penalty was not issued until fifteen days after the compliance deadline passed. Furthermore, Mr. Adams failed to demonstrate that he was in compliance Decision's directive prior to the penalty being issued (March 1, 2023). Mr. Adams has demonstrated that he submitted a permit extension application on February 27, 2023 which did not satisfy the Decision's directive. Notably, no penalties were assessed after February 28, 2023, despite the fact that a permit extension was not granted until March 15, 2023. Thus, the penalty assessment was not arbitrary or capricious or contrary to law.

Mr. Adams closed by arguing that he did his due diligence as a contractor and kept in contact with the Department. He believes the Department failed to communicate internally and to timely process his submissions. He believes the penalty was unjustly assessed since he was working to resolve the issues and it was the Department that delayed the approvals. He stated that no one is living in the spaces that were improved without a permit, thus he believes any reference to health, safety and welfare issues are irrelevant. He is seeking relief from the penalty because he feels like he has done everything he can possibly do to comply with the Decision's directive.

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. Mr. Watts moved to affirm the Hearing Officer's March 1, 2023 Rule to Show Cause Penalty Assessment notice because it was not arbitrary or capricious or contrary to law. Mr. Grieshaber seconded the motion.

Mr. Watts explained that the Applicant, as a licensed contractor, is responsible for following the applicable rules and laws. The directive given by the Hearing Officer required Applicant to secure a building permit no later than February 13, 2023. This did not occur. Although the penalty was not assessed until March 1, 2023, it covered a period of non-compliance from February 13, 2023 to February 28, 2023. While the Applicant may have begun the process to secure a permit extension on February 27, 2023 by submitting a permit application, Mr. Adams testimony indicates the permit was not issued until March 15, 2023. Thus, compliance did not occur until March 15, 2023.

Mr. Grieshaber agreed with Mr. Watts. He believes the evidence demonstrates that the penalties were issued because the Applicant had not yet secured a building permit extension and therefore violated the Decision's directive. The Department followed the appropriate process delineated in the *Building Code* for issuing the Stop Work Order, conducting the RTSC hearing, issuing the directive, and assessing the penalty. The issuance of the March 1, 2023 Rule to Show Penalty Assessment notice was pursuant to law and was not arbitrary or capricious.

Mr. Cochran noted that timing in the case seemed to be an issue but the Applicant failed to produce any evidence that substantiated the claim that he did all he was required to do by the compliance date and the permit extension should have issued but for the delays caused by the Department. While it appears progress was being made after the compliance deadline passed, at best the permit application was submitted on February 27, 2023. Permit applications are not

processed instantly and the Department advises contractors that permits may take 7-10 days to issue after the application is made. The directive was to secure a permit – not to apply for a permit - and the permit was not actually issued until March 15, 2023. Notably, additional penalties were not assessed once the Department determined that the Applicant was actually making progress towards compliance. This lends to the reasonableness of the Department's actions.

Mr. Williams recognized that the Applicant was working to make it right but there are time limits. The Department must enforce the rules and its enforcement of the rules in this case was not arbitrary and capricious or contrary to law. It is important that the Department enforce its laws fairly so that all contractors are treated equally, and the public health, safety and welfare is protected. Based on the facts of this case – the Department did its job. It is not the Board's job to provide relief to an Applicant where the Department is simply, and appropriately, enforcing its public health, safety and welfare codes.

In conclusion, the Board is required to affirm the Department's action if the action was neither arbitrary or capricious nor contrary to law. Based on the evidence presented and the applicable law, the Board affirms the Hearing Officer's March 1, 2023 Rule to Show Cause Penalty Assessment in the amount of \$1,600.

Vote: Yay 4-0 (Mr. Williams, Mr. Cochran, Mr. Grieshaber, Mr. Watts)

BOARD OF LICENSE, INSPECTION AND REVIEW



Toren Williams, Chairperson