



BOARD OF LICENSE, INSPECTION & REVIEW

NOTICE OF DECISION

APPLICANT: Tri State Properties
HEARING DATE: April 12, 2023
DECISION DATE: April 12, 2023
DECISION ISSUANCE DATE: May 18, 2023
MEMBERS OF BOARD PRESENT: Toren Williams, John Grieshaber, Paul Watts
PROPERTY: Tax Parcel No. 0903700003; 716 Old Baltimore Pike, Newark, Delaware.

APPLICATION NO: 2023-0199

Counsel for the Applicant: Applicant appeared *pro se*.
Counsel for Department: Adam Singer, Assistant County Attorney

I. THE APPEAL

Tri State Properties (the “Applicant”) appeals from the New Castle County Rule to Show Penalty Assessment notice dated March 9, 2023 that assessed a \$4,500 penalty. Ex. A. In all, \$13,800 in penalties and fees, including \$9,300 from prior penalty assessment notices, have been assessed as a result of Applicant’s failure to comply with directives issued in an October 27, 2022 Rule to Show Cause Decision (“Decision”). Ex. B. The Applicant seeks additional time to comply with the Decision’s directives and relief from the assessed 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 *Property Maintenance Code*. § PM 106.3.1.6.¹ Likewise, the Board may hear administrative appeals of violations of the *Building Code*. § 6.12.003(A).² 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. § PM 106.3.1.6.5; § 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

¹ The *Property Maintenance Code* appears as chapter 7 of the *New Castle County Code*.

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 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 BACKGROUND³

On September 27, 2022, a New Castle County Department of Land Use (“Department”) Code Enforcement Officer issued a Violation Notice to Applicant citing a violation of § 06.03.012(B) of the *Building Code*. Ex. C. The Violation Notice directed the Applicant to cease work and “[o]btain all required permits” for the “addition of multiple decks/porches as well as a 3rd story addition added” to a dwelling located at 716 Old Baltimore Pike. *Id.* The Applicant was provided until October 10, 2022 to correct the violation. *Id.*

The violation was not corrected. Thus, on October 17, 2022, the Code Enforcement Officer posted a Violation Notice on the Property again citing § 06.03.012(B) and citing violations of the *Property Maintenance Code* including: PM 108.1.1 (Unsafe Structures), PM

² The *Building Code* appears as chapter 6 of the *New Castle County Code*.

³ The information in this section is derived from the Record below that was submitted to the Board.

108.1.4 (Unlawful Structure), and PM 304.4 (Structural Members).⁴ Ex. D. All four violations pertained to the construction of the addition and the three-story decking. *Id.* The Applicant was directed to “within 72 hours obtain any and all necessary permits so the property can be inspected and deemed safe by New Castle County.” *Id.*

On October 18, 2022, the Department issued a Pre-deprivation Hearing Notice scheduling a hearing on October 27, 2022. All previously noticed violations were again cited in the hearing notice as well as applicable directives. Ex. E.

The Department’s Hearing Officer held the pre-deprivation hearing (“PD Hearing”) on October 27, 2022 to provide Applicant an opportunity to defend its conduct prior to the imposition of any penalty. Ex. B. The Decision indicates that the Department provided photographs, documents, 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 a basement and two floors. He explained that attic and basement space was not designed or approved for occupancy. The Code Enforcement Officer testified that after he issued the September 27, 2022 Violation Notice, he learned that work being done on the interior of the dwelling exceeded the scope of the permit. He explained that, along with the Certified Building and Site Inspector, he performed an interior inspection and observed that the addition was 24 ft. x 29 ft. In addition to exceeding the permitted size, he observed additional living space being added to the basement and to the third-floor attic in violation of the

⁴ Zoning violations of the Chapter 40 of the *New Castle County Code*, commonly referred to as the *Unified Development Code*, were also cited. These violations are not the subject of this appeal.

permit. The October 17, 2022 Violation Notice included the additional violations. Photographs taken on October 26, 2022 indicated the violations remain uncorrected.

The Applicant (Tri State Properties Management) did not appear at the PD Hearing but was represented by the contractor, Tony Adams. Mr. Adams testified he applied for the permit for the 24 ft. x 20 ft. addition that included an unfinished basement and two floors. Mr. Adams explained that the Applicant did additional work when Mr. Adams was out of town. He stated that he was informed by a building inspector that he could put in for a permit revision to include the additional work but Mr. Adams did not believe that 72 hours was sufficient time to apply for the revised permit. He also provided testimony regarding the new HVAC systems and which area of the dwelling they are intended to serve. He explained that he is working with an engineer and an architect to prepare plans to submit to the County and intends to apply for a revised permit in the next week or two.

The Hearing Officer confirmed the existence of violations of § 06.03.012(B), PM 108.1.4 (Unlawful Structure), and a zoning violation, as cited in the October 18, 2022 Violation Notice. In the Decision, the Hearing Officer assessed a \$300 hearing fee and provided until November 28, 2022 to pay the fee and correct all remaining violations. The Decision 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 (there are 3 open violations pertaining to this case), 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.

Code Enforcement Officer Aaron Prickett was listed as the contact point and his phone number and email address were provided.

The Applicant failed to correct the three code violations by November 28, 2002. Several months later, on February 7, 2023, the Hearing Officer issued a penalty assessment notice to the Applicant in the amount of \$4,800.⁵ This amount included the \$300 hearing fee and a penalty of \$300 per day for 15 days (January 24, 2023-February 7, 2023). The Applicant did not appeal the penalty assessment, did not pay the amount due, and did not correct the violations.

As of February 14, 2023, the Applicant failed to correct the three code violations. Thus, the Hearing Officer issued another penalty assessment notice to the Applicant in the amount of \$9,300. This amount included the \$4,800 that was previously assessed and a new penalty of \$4,500 that amounted to \$300 per day for 15 days (February 7, 2023-February 22, 2023). The Applicant did not appeal the penalty assessment, did not pay the amount due, and did not correct the violations.

As of March 9, 2023, the Applicant failed to correct the three code violations and the Hearing Officer issued another penalty assessment notice to the Applicant in the amount of \$13,800. This amount included the \$9,300 previously assessed and a new penalty of \$4,500 that

⁵ 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). The *Property Maintenance Code* contains similar language and provides the penalty for each day the violation continues shall be a fine of not less than two hundred fifty dollars (\$250.00) nor more than one thousand dollars (\$1,000.00). *See New Castle County Code* §§ PM 106.3.1.5.1; PM 106.3.2.3.

amounted to \$300 per day for 15 days (February 23, 2023-March 9, 2023). The Applicant did not pay the amount due and did not correct the violations.

The Applicant timely filed an appeal with the Board. On the Application for Hearing, the Applicant stated that it is seeking an extension of time within which to comply because “it is working with multiple engineering, structural, & architectural firm on plan to comply.” Ex. F.

IV. THE BOARD HEARING

The Board held a hearing on the appeal on April 12, 2023 (the “Board Hearing”).

1. The Applicant’s Presentation

Naveed Baqir represented the Applicant. Mr. Baqir and Tony Adams provided testimony. Mr. Adams explained that the Applicant is seeking leniency. Mr. Adams explained that he and Mr. Baqir were attempting to resolve several cases with violations around the same time. They are in the process and working with structural engineers and architects to resolve the issues and are waiting for professional reports. He has already sent the Department lines and grades plans that the Applicant received in December. Mr. Baqir testified that the Applicant has been in working with the Department to resolve the issues. He offered that he did not know that employees working with permits did not communicate with the Code Enforcement Officer but everyone within the Department should have known of the Applicant’s efforts and should not have assumed that no progress was being made. Mr. Baqir offered that he did not know that it was his obligation to personally inform the Code Enforcement Officer of his communications with Department employees and the progress toward compliance that has been made. Mr. Baqir offered that the assertions that the Applicant did not communicate with the Code Enforcement

Officer are unfair. Mr. Adams explained that he has a permit that is open and active and it just needs to be revised. Lines and grades have been submitted but they are waiting for updated structural plans to submit to the County. They met with the permit division on March 8 and resolved several issues. The Applicant believes they were in communication with the right people in the Department even though they did not communicate directly with the Code Enforcement Officer.

On cross-examination, Mr. Adams stated that the construction work on the Property is two-fold. First, a permitted addition was completed and he did that work. Second, someone else did work on the exterior and in the attic area and that work is the subject of the violation notices. Mr. Adams also clarified that Mr. Baqir is one of the owners of the Property.

2. The Department's Presentation

The Department then provided testimony and argument. Code Enforcement Officer Prickett testified that he visited the Property along with a Building Inspector and observed violations that consisted of unpermitted two-story decking and conversion of the attic and basement space into livable area. Officer Prickett testified that he observed separate means of egress into the basement area and into the attic that indicated these areas are intended to be separate dwelling units. The basement area was essentially complete and the attic area was roughed-in. He observed that building appears to have four dwelling units (including the two new units) which is a violation of the zoning code. Photographs of the decking and the addition were submitted into evidence. He quantified the safety concerns as a 10 out of 10. He issued violation notices by mailing a copy to the Applicant and posting a copy on the Property. Officer Prickett and the Building Inspector attended the October 27, 2022 PD Hearing and provided

testimony. The November 28, 2022 compliance date passed and Officer Prickett received no communications from the Applicant or Mr. Adams regarding progress towards compliance. Officer Prickett explained that a different set of violation notices was issued directly to the contractor concerning work being done without the required permit.

Mr. Adams cross-examined Officer Prickett. Officer Prickett explained that even if the Applicant was working with the permits or zoning staff to resolve issues, the Applicant would need to keep Officer Prickett apprised of the progress and request additional time, but no contact was made with him. Officer Prickett would be able to see on the County's computer system when a building permit was issued but would not be able to see meeting dates, submissions, or other progress or steps made toward compliance.

Mr. Adams then provided rebuttal. He explained that the lines and grades and building plans were submitted on January 30, 2023 but they have not yet submitted structural engineering plans. Mr. Adams testified that structural engineering plans were not required until March 8, 2023, when the Department had a meeting with Mr. Adams and requested the plans for the first time. Mr. Adams also explained that the dwelling was always allowed to be multi-family and the permit that was issued was to expand the two existing units. He believes that once the Department reviews the plans, all four units will be allowed by right. Mr. Adams explained that he is seeking leniency and relief from whatever penalty amount the Board is willing to grant. Mr. Adams explained that he did not receive any notice other than the March 9, 2023 Penalty Assessment notice and therefore did not appeal any other decision.

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. Grieshaber moved to affirm the Hearing Officer's March 9, 2023 Rule to Show Cause Penalty Assessment notice because it was not arbitrary or capricious or contrary to law. Mr. Watts seconded the motion.

Mr. Watts explained that the Applicant is responsible for following the applicable rules and laws. Building permits are required in order to protect public health, safety, and welfare. Here, the safety of the occupants and the integrity of the building are clearly concerns, and the required permit should have been secured before the work was started. Pursuant to the Decision, compliance was required by November 28, 2022 and it is now April of 2023 and the Applicant still has not secured the necessary permit(s). It is clear that the violations existed as cited and the penalties were properly assessed. It would send the wrong message if the Applicant was provided relief from the penalty amount.

Mr. Williams offered that the deck structure likely posed health and safety issues. If the decking was the sole means of egress into any of the units and a fire occurred, tragedy would happen. The structure is unlawful and was built without the required permit(s) and approvals. Without the required plan reviews and document submissions that occur in the permit application process, public health and safety cannot be protected. The penalty amount is high but the assessment of the penalties was justified, was not arbitrary or capricious, and was done pursuant to law.

Mr. Grieshaber agreed with the other Board members. He explained that the penalties are a means for the County to enforce compliance with public health and safety codes. Unfortunately, the efforts by the Applicant to secure compliance occurred after the structure was constructed, violation notices issued, and penalties assessed. The Applicant provided no credible

evidence that sufficient efforts were made towards compliance before November 28, 2022 as required by the Decision's directive.

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 9, 2023 Rule to Show Cause Penalty Assessment.

Vote: Yay 3-0 (Mr. Williams, Mr. Grieshaber, Mr. Watts)

BOARD OF LICENSE, INSPECTION AND REVIEW



Toreh Williams, Chairperson