



BOARD OF LICENSE, INSPECTION & REVIEW

NOTICE OF DECISION

APPLICANT: Harold Leonard

REFERENCE: Application 2019-0300

PUBLIC HEARING DATE: October 3, 2019

DATE OF DECISION: October 3, 2019

DATE DECISION FILED: October 23, 2019

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

SUBJECT PROPERTY: 1104 River Road, New Castle, DE 19720

Parcel No.: 10-041.20-012

Zoned: NC-15

Harold Leonard (the "Appellant") appeals from the decision of the New Castle County Department of Land Use (the "Department") issued on April 16, 2019 (the "AHO Decision") to the Board of License, Inspection & Review (the "Board"). In the AHO Decision, the Department found the Applicant responsible for one violation (hereinafter, the "Code Violation") of the New Castle County Maintenance Code (the "Code") for a property Appellant owns at 1104 River Road, New Castle, DE 19720 (the "Subject Property").

I. PROCEDURAL HISTORY AND POSTURE

On March 27, 2019, the Department issued a citation, citation number 20044144, to the Appellant. The citation claimed the Appellant violated § PM 302.11 of New Castle County's Property Maintenance Code on March 26, 2019. Specifically, the Department cited the Appellant for outside storage of debris on his property, in violation of § PM 302.11 of the Code. The citation further directed the Appellant to remove and maintain the premises free from the outside storage of any debris, noting wood debris and building material debris were in the rear yard and not in an enclosed structure, while tree debris was openly stored in the front yard of the Subject Property. On April 2, 2019, the Appellant appealed the citation to the Department, with

the sole basis of the appeal being “there is no violation.” On April 16, 2019, the Department’s Administrative Hearing Officer issued the AHO Decision, finding that a violation of § PM 302.11 of the Code existed at the time the citation was issued. The Applicant timely appealed the AHO Decision to this Board on May 2, 2019, pursuant to § PM 106.3.1.6 of the Code.

II. LEGAL STANDARDS

The Board is authorized by 9 *Del. C.* § 1315 and Section 2.05.103 of the *New Castle County Code* to consider administrative appeals of the 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. *N.C.C. Code* § PM 106.3.6.5. The Board shall not have the authority to waive any requirement of the Property Maintenance Code. *N.C.C. 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 3, 2019 (the “Board Hearing”). Present for the Board Hearing were Shane Miller, of the Department, the Department’s counsel, Jordan Perry, Esquire, and the Appellant. In addition to the testimony presented at the Board Hearing, the record also includes the record considered by the Administrative Hearing Officer in issuing the AHO Decision, as well as the exhibit presented by the Department at the Board Hearing in support of its position. The Appellant did not provide any exhibits for the Board to consider.

A. Applicant’s Presentation

The Appellant testified that he asked the Department's code enforcement officers for a copy of the Property Management Code, as he does not know which portion of the code of which he allegedly is in violation. The Appellant explained that when he makes the request for a code from the Department, such as the building code, he is provided a copy and the Department will explain the code provisions to him. With respect to the Property Management Code, however, the Appellant noted that the violations were only paraphrased, and he remains unaware of the code provision he purportedly violated.

In addition, the Appellant testified that he believes that this entire proceeding is a waste of time, due to the amount of violations he has outstanding. The Appellant noted that he currently has 20-40 citations from the Department, and he submitted that the piecemeal approach to resolving these issues is a waste of the Board's and his time. The Appellant stated he would much rather have all the citations resolved in a single hearing.

With that, the Applicant testified that he did not believe he violated the property management code in this instance, as there was no debris on his property. In fact, the Applicant stated that as long as he owned the property, there has been no debris. He noted that he previously hauled debris for the government for years, and he knows what debris is. The items on his property were not debris, in his opinion. He requested the Board review the pictures taken by Officer Miller and find that the items in the photographs were debris. The Appellant went on to note that he assumed the Board knew what debris was when seen, and reiterated that the items on the Subject Property were not debris. Finally, the Applicant testified that the items in the pictures, which he reminded the Board were not debris, were located in his pavilion on the Subject Property, so there were no items on the Subject Property at all. The Appellant then

excused himself from the Board Hearing and exited the room. His presentation totaled less than five minutes of testimony.

B. Department's Presentation

The Department called its only witness, Shane Miller, in support of its position that a violation existed on March 26, 2019. Officer Miller testified he is a Code Enforcement Officer for the Department and is charged to investigate purported violations of the New Castle County Code, including the Property Maintenance Code. Officer Miller stated that the Office of Code Enforcement typically receives a complaint from a member of the general public in relation to a Code violation on a particular property, and the Code Enforcement Officer would then visit the property to determine if it is in violation of any Code provisions. Photographs are taken of the property's violation(s), and a Notice of Violation is then generated by the Department. The Notice of Violation includes Officer Miller's contact information and also gives the property owner a deadline to correct the violation. The Code Enforcement Officer will then reinspect the property, and if the violation is not corrected by the given deadline, a civil penalty may be issued at that time. The Notice of Violation also includes the ability to request an extension, wherein the property owner may request additional time from the Department to comply with the directive.

Officer Miller then testified as to the specifics of this particular violation. Section 302.11 of the Property Maintenance Code, titled "outside storage or accumulation of debris," reads as follows:

Except during active construction the outside storage or accumulation of debris, including but not limited to, garbage, trash, rubbish, refuse, rock, rubble, broken concrete, wood, (excluding stacked firewood), tires or automobile parts (irrespective of age or condition), is prohibited in any residential zoning district.

Board Chairperson Toren Williams then asked if the automobiles were part of the violation, as there were pictures in the Notice of Violation of automobiles on the Subject Property. The Department's attorney confirmed that this particular violation did not include the automobiles on the Subject Property, but only the other forms of debris in the photographs taken by Officer Miller.

Board Member John Grieshaber asked specifically about the type of debris found on the Subject Property, and the Department's attorney distributed the Department's exhibit, which included larger photographs of the violations on the Subject Property that were included in the Notice of Violation issued by the County. When Mr. Grieshaber asked him to elaborate on the specific debris, Officer Miller set forth the timeline of events for this citation. On July 31, 2018, the Department received an anonymous complaint about the Subject Property from a member of the community regarding inoperable vehicles in the driveway. Officer Miller reminded the Board he is tasked with documenting *all* violations existing on a property. During Officer Miller's inspection of the Subject Property on October 18, 2018, Officer Miller noted debris in the backyard, including tires, a wooden pallet, and other wood used for construction. Officer Miller considered that the Subject Property might be under construction, and thus exempt from violation, but he did not see any active construction on site or find an open construction permit for the Subject Property. Accordingly, the Department issued a Notice of Violation on October 18, 2019.

On February 6, 2019, Officer Miller conducted his reinspection of the Subject Property. Officer Miller testified on that date he observed additional debris in the backyard of the Subject Property, including wood used for construction and other construction materials stacked under

the pavilion. Thus, the violation still existed at the time of reinspection, and the Department issued a civil penalty.

Officer Miller testified that he conducted another inspection on March 26, 2019, and the violation still existed. Specifically, Officer Miller saw wood used for construction and other building materials stacked in the rear yard in violation of the Property Maintenance Code. Another civil penalty was issued as a result, and it is this penalty that is the subject of the present appeal before the Board. When asked by Mr. Cochran, Officer Miller noted that he cannot enter properties, but can only document violations from a point that the public could view. He cannot open gates or climb fences. Accordingly, the photographs provided are from Officer Miller's view, and while he admitted the photographs could be clearer, Officer Miller believes they clearly depict the presence of debris on the Subject Property. Mr. Cochran then asked about the wood in the pavilion, and Officer Miller confirmed the wood was there as well, and that he had observed the code violation numerous times.

When asked by Mr. Cochran as to the Appellant's response to the Notice of Violation, Officer Miller testified that he never heard from the Appellant. In fact, Officer Miller noted that this proceeding is not the first violation the Appellant received, yet Officer Miller has never interacted with the Appellant. At an appeal hearing for an earlier violation, the Appellant did not ask Officer Miller any questions regarding the debris on his property, despite the Appellant personally requesting Officer Miller attend. With regards to the Appellant's request to see the full Property Maintenance Code, Officer Miller noted he personally had never received a request from the Appellant, despite his contact information being included at the bottom of each Notice of Violation. Moreover, Officer Miller further noted that the Code is publicly available on the

County's website. Had the Appellant reached out, Officer Miller testified he would have been happy to provide the full Property Maintenance Code to the Appellant, as well as answer any specific questions regarding the violations the Appellant accrued.

When asked by Chairperson Williams what would occur if an appellant did dispute the findings of the Department, Officer Miller testified regarding the contents of the Notice of Violation. The Notice of Violation states the Code section that is purportedly violated, a description of what the Code Officer observed on site, and a directive is given explaining what must be done to fix the violation. For example, the Notice of Violation of October 18, 2018 noted the presence of debris and directed the Appellant to remove it. The photographs taken by the code enforcement officer are always attached to the notice of violation, so any person wishing to contest the violation would be aware of what specifically caused the Code Officer to issue the notice of violation. Officer Miller's contact information is included with each citation he issues, inviting members of the public to discuss the issue (and how to correct it) with him.

Mr. McAllister asked Officer Miller if the type of debris the Appellant was cited for, including the wood, construction materials, pallets, and tires, was consistent with other violations Officer Miller cited in the community. Officer Miller confirmed that he routinely issued violations for this sort of debris, as the definition of debris is very broad under the Code. This violation was not unusual. Mr. McAllister reiterated that he wanted to ensure the Code was applied consistently, and Officer Miller confirmed that it was. The Department's attorney then directed the Board's attention to Section 202 of the Property Maintenance Code, which contained the full definition of debris (as opposed to the shortened definition in § PM 302.11). Debris is defined in the Property Maintenance Code as:

material which is stored externally and exposed to the elements or partially covered with tarps or plastic. This definition includes, but is not limited to, the following: indoor furniture, discarded household goods or appliances and appliance parts, inoperative or discarded machinery, automobiles, automobile parts, airplane and helicopter parts, refuse, rubbish trash or junk, broken concrete, bricks, blocks or other mineral matter, bottles, scrap or discarded lumber, pipe, steel, paper, cardboard, insulation or other building materials.

N.C.C. Code § PM 202.

The Board's attorney questioned Officer Miller whether the Department was aware of the Appellant's pavilion when it issued the violation, as the Appellant testified that items on his property were stored under his pavilion. Officer Miller testified that because the structure was not enclosed, like a shed, items underneath a pavilion are still exposed to the elements and considered outside for purposes of the Code. Officer Miller further testified that this provision is uniformly applied throughout the County, and he has cited other property owners for similar storage of materials.

Mr. Grieshaber asked Officer Miller about the person who filed the complaint against the Appellant and whether that person lived in the vicinity. Officer Miller advised that complaints are kept confidential. Mr. Grieshaber then questioned whether the Appellant's property was inconsistent with the character of the community. Officer Miller testified that he did not canvas all the surrounding properties to see if they were in violation of the Code, but he did note that this violation was consistent with other violations found throughout the County.

Finally, Mr. Watts asked Officer Miller if his contact information at the bottom of the Notice of Violation was correct. Officer Miller testified that it was indeed correct, although the phone number given was the general customer service line of the Code Enforcement Department. If anyone dialed that number in response to a notice of violation, Officer Miller testified he

would receive either those telephone calls or messages from the Customer Service Department, depending upon whether he was physically located in the Department. With that, the Department ended its presentation, which took approximately twenty-five minutes. As the Appellant dismissed himself after his presentation, there was no cross-examination or rebuttal.

IV. THE BOARD'S DECISION

Upon the conclusion of the presentations of both the Appellant and the Department, Chairperson Williams moved (the "Motion") that the Board find the County did not act in an arbitrary or capricious manner when it issued the Notice of Violation upon the Appellant and affirm the AHO Decision below. Mr. Watts seconded the Motion.

The Board is required to affirm the AHO Decision if the action was neither arbitrary or capricious nor contrary to law. *N.C.C. Code* § PM 106.3.6.5. Having considered the record below and the presentations by the Appellant and the Department, the Board finds the AHO Decision below not to be arbitrary and capricious, and thus affirms the decision. The Board finds that photographs provided in the record support the Department's conclusion that there was debris stored outside at the Subject Property, in violation of the Code. The photographs clearly showed debris stored outdoors, despite a prior directive to remove the debris. Thus, the Board finds the Department did not act arbitrarily or capriciously in issuing a citation for the improper storage of said debris. Moreover, the Department specifically addressed the Board's concerns regarding the enforcement of this particular provision, in that the Appellant's property was not subject to a different or more stringent standard of enforcement than the rest of the County. The Board credits Officer Miller's testimony that he has cited similar properties with similar debris for violations and that no open construction was present on the Subject Property that merited the

storage of such debris outdoors.¹ Under the circumstances of the case and consideration of all facts presented in the record and by the parties, the Board finds the AHO Decision is supported by the evidence.

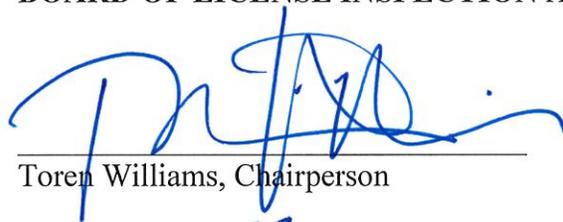
The Board carefully considered the Appellant's arguments, but finds they lack merit. First, the Appellant argues that he was unable to retrieve a complete copy of the Code; however, the Board finds that the Code citation on the Notice of Violation, together with the explanation on the citation itself, is sufficient to put Appellant on notice of the provision the Department claims he violated. Moreover, the Code is publicly available, and Officer Miller credibly testified that he never received a request for the Code from the Appellant. Second, the Appellant claims that the items stored on his property were not debris. The Board finds the definition of debris in the Code, § PM 202 and the shortened definition of debris found in § PM 308.11 both provide that the items stored outside on Appellant's property, specifically the wood and wood and building materials, are debris. The Appellant's argument fails, and Officer Miller testified that he routinely issues citations on similar properties for similar debris. The Code is not arbitrarily or capriciously being enforced upon the Appellant. Third, the Appellant argues that the items stored were not stored outside, but were stored in a pavilion on his property. The Board credits Officer Miller's testimony, during which he stated that because a pavilion or similar structure is not enclosed, it is still exposed to the elements and thus considered outside for purposes of the Code. Officer Miller further testified that he has cited property owners for similar violations, thus confirming that the Code is not arbitrarily or capriciously being enforced upon the Appellant.

¹ While not specifically addressed by either party, the Board takes judicial notice that the Subject Property is zoned residential, thereby satisfying the requirement of § PM 302.11 that prohibits the outdoor storage of debris on

Based on the foregoing, the Board unanimously finds that the Department did not act in an arbitrary or capricious manner nor contrary to law when it issued the Notice of Violation upon the Appellant, and therefore, affirms the AHO Decision below.

VOTE: 5-0 (Affirm: Mr. Williams, Mr. Cochran, Mr. Grieshaber, Mr. McAllister, and Mr. Watts)

BOARD OF LICENSE INSPECTION AND REVIEW



Toren Williams, Chairperson

Dated: October 23, 2019