



BOARD OF LICENSE, INSPECTION & REVIEW

NOTICE OF DECISION

APPLICANT: Miroslaw E. Kostyshyn **REFERENCE:** Application 2021-0022

PUBLIC HEARING DATE: March 25, 2021

DATE OF DECISION: March 25, 2021

DATE DECISION FILED: April 14, 2021

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

SUBJECT PROPERTY: 700 Brandywine Boulevard, Wilmington, DE 19809

Parcel No.: 17-002.00-130

Miroslaw E. Kostyshyn (the “Applicant”) appeals from the rule to show cause decision (the “RTSC Decision”) of the New Castle County Department of Land Use (the “Department”) issued on December 4, 2020. In the RTSC Decision, the Department’s hearing officer found the property owner 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”) for a property located at 700 Brandywine Boulevard, Wilmington, DE 19809 (the “Property”).

I. PROCEDURAL HISTORY AND POSTURE¹

On November 14, 2019, the Department issued a Notice of Violation (“NOV #1”) to the Applicant. Ex. 1. The specific violations of the *Property Maintenance Code* cited in NOV #1

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

were protective treatment (§ PM 304.2), roofs and drainage (§ PM 304.7), and clothes dryer exhaust (§ PM 403.5). Regarding the protective treatment violation, a New Castle County Code Enforcement Officer (“Code Enforcement Officer”) observed “multiple areas of peeling/chipping/thinning paint. Multiple deteriorated/warped wood trim.” Regarding the roofs and drainage violation, the Code Enforcement Officer observed missing and deteriorated shingles. Finally, regarding the clothes dryer exhaust violation, the Code Enforcement Officer observed a broken exhaust vent on the side of the structure. The NOV directed the Applicant to correct the first two violations, pertaining to the protective treatment and roofs and drainage violations, by December 17, 2019 and to correct the third violation, pertaining to the clothes dryer exhaust, no later than November 27, 2019 in order to avoid penalties. Nine photographs were included in NOV #1.

On May 1, 2020, the Department issued another Notice of Violation (“NOV #2”) following an inspection of the Property on April 30, 2020. Ex. 2. NOV #2 cited an additional violation of the *Property Maintenance Code*, exterior structure – general (§ PM 304.1), with the Code Enforcement Officer noting that sections of roof shingles were blown off the structure, and the Applicant needed to make necessary repairs to the roof and replace the missing and broken shingles. NOV #2 provided the Applicant until June 3, 2020 to correct the violation.

On September 2, 2020, the Department scheduled a pre-deprivation show cause hearing (“RTSC Hearing”) regarding the exterior structure – general violation (§ PM 304.1) cited in NOV #2, the protective treatment violation (§ PM 304.2) cited in NOV #1, and the roofs and drainage violation (§ PM 304.7) cited in NOV #1 (together, the “Code Violations”). The Notice

scheduling the RTSC Hearing explained that the Department was not limited to presenting information only found in NOV #1, and that it may present additional evidence, including additional photographs of the Property. After the Department received word that the Applicant could not attend the RTSC Hearing as originally scheduled, it was rescheduled for November 10, 2020.

At the RTSC Hearing, the Code Enforcement Officer testified that the investigation resulting in the issuance of NOV #1 stemmed from an anonymous complaint received by the Department on November 12, 2019. During the inspection of the Property on November 13, 2019, the Code Enforcement Officer noted the three violations cited in NOV #1. Repeat inspections of the Property showed no improvement to the condition of the Property, but the Code Enforcement Officer allowed additional time for compliance due to the time of year and the COVID-19 pandemic.

The Code Enforcement Officer further testified that another call was received regarding the Property on April 30, 2020. The same day, the Code Enforcement Officer inspected the Property and observed broken shingles from the Property on a neighboring property. The Code Enforcement Officer took additional pictures of the condition of the Property and spoke with the Applicant regarding the violations. After the April 30, 2020 inspection, NOV #2 was issued, noting the exterior structure general (§ PM 304.1) violation. A final inspection of the Property on November 9, 2020, the day before the RTSC Hearing, confirmed that the Code Violations remained unaddressed by the Applicant.

The Applicant argued that he did not have ample opportunity to repair the violations cited in NOV #1 and, for this reason, he planned to appeal to the Superior Court. For example, the Applicant testified that he received a notice on September 2, 2020 and he had no time to repair the violations listed that date. In contradiction to this argument, the Applicant also testified that he did make the necessary repairs to the Property; numerous roof shingles were replaced, and, while the roof eave was painted grey instead of white, he still addressed the issue. The Applicant also noted that there was a tornado warning on April 30, 2020. He further noted that he was at the Property during the inspection to address the shingles that had been blown off. The Hearing Officer found that the Applicant was confusing the two mailings he received pertaining to the Property. The Applicant received two notices of violation, NOV #1 and NOV #2, and each afforded the Applicant time to make repairs. The mailing the Applicant received on September 2, 2020 pertained to the scheduling of the RTSC Hearing; no new violation was issued. Based on the notices and the photographs accompanying the notices of violation and present at the RTSC Hearing, the Hearing Officer found that the roofs and drainage and the exterior structure-general violations existed at the time NOV #1 and NOV #2 were issued.

II. LEGAL STANDARDS

The Board is authorized by 9 *Del. C.* § 1315 and Section 2.05.103 of the *New Castle County Code* to hear administrative appeals of the *Property Maintenance Code*. The Board may affirm, modify, reverse, vacate, or revoke the action appealed, provided that such action be affirmed if the action was neither arbitrary or capricious nor contrary to law. *Property*

Maintenance Code § PM 106.3.6.5. The Board shall not have the authority to waive any requirement of the *Property Maintenance Code*. *Property Maintenance Code* § PM 106.3.1.6.1.

“An arbitrary or capricious decision is one that is ‘willful and unreasonable and without consideration or in disregard of the facts.’” *Brandywine Innkeepers, L.L.C. v. Bd. of Assessment Review of New Castle Cty.*, 2005 WL 1952879, at *4 (Del. Super. Ct. June 3, 2005) (quoting Black’s Law Dictionary 96 (5th ed. 1979)). Courts have also found that an arbitrary or capricious decision is one that is taken without consideration of and in disregard of the facts and circumstances of the case. *Liborio, L.P. v. Sussex Cty. Planning & Zoning Comm’n*, 2004 WL 2191052, at *3 (Del. Super. Ct. June 8, 2004) (citing *Willdel Realty, Inc. v. New Castle County*, 270 A.2d 174, 178 (Del. Ch. 1970)). The arbitrary or capricious standard is satisfied when a decision-making body has “a decision-making process rationally designed to uncover and address the available facts and evidence that bear materially upon the issue being decided.” *Harmony Constr., Inc. v. State Dep’t of Transp.*, 668 A.2d 746, 751 (Del. Ch. 1995). In reviewing whether a decision is arbitrary or capricious, the reviewing body should consider the adequacy of (i) “the evidence considered by the [decision maker]” and (ii) “the process by which the relevant evidence and facts were obtained.” *Fox v. CDX Holdings, Inc.*, 2015 WL 4571398, at *31 (Del. Ch. July 28, 2015), *aff’d*, 141 A.3d 1037 (Del. 2016) (quoting *Harmony Constr. Inc.*, 668 A.2d at 750). If a decision-maker relies “solely upon facts or evidence that would support one particular outcome while at the same time blinding itself – or refusing to inquire into – material facts or evidence that might compel an opposite outcome,” the decision may be arbitrary or capricious. *Id.*

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

III. THE BOARD HEARING

The Board held a hearing on the appeal on March 25, 2021 at 3:30 PM (the “Board Hearing”). At the Board Hearing, the Applicant made two primary arguments. First, the Applicant argued that the Code Violations must be dismissed at the discretion of the County Attorney, pursuant to § PM 106.3.2.1 and PM § 106.3.1.3. PM § 106.3.1.3 provides that after a Rule to Show Cause or pre-deprivation hearing, “the Code Official shall render a decision within twenty (20) days and send a written letter to the person informing them of his or her decision and detailing the reasons for any adverse action taken.” Here, the Applicant argued, dismissal of the charges under the *Property Maintenance Code* is appropriate, because the RTSC Hearing was held on November 10, 2020, yet the decision was not issued until December 4, 2020 – four days *after* the time specified in the *Property Maintenance Code*.

Similarly, § PM 106.3.1.6.2 provides in pertinent part that after a Rule to Show Cause decision is appealed to the Board, “a public hearing will then be afforded to the appellant [Applicant] within forty-five (45) days of the filing of the appeal.” Here, the Applicant argued, dismissal is appropriate because although he appealed the RTSC Decision timely by filing his appeal on December 20, 2020, the Board did not schedule the Board Hearing until March 25,

2021 – well outside the forty-five (45) day window by which the Board was specified to schedule the hearing. These administrative failures, the Applicant argued, required the County Attorney to dismiss the Code Violations pursuant § PM 106.3.2.1, which allows the County Attorney to dismiss criminal charges in his or her discretion or otherwise have the County enter a *nolle prosequi* with or without prejudice.

In response, the Department submitted that the dismissal of the charges by the County Attorney relates to criminal matters before the Justice of the Peace Court, as § PM 106.3.2 and its progeny specifically refer to criminal enforcement of the *Property Maintenance Code*. This is an administrative proceeding, however, and the criminal standards do not apply to this matter. Moreover, the Department argued that the guidelines that the Department “shall” issue a decision within 20 days of its hearing and the Board “shall” schedule a hearing within 45 days of an appeal are directory, rather than mandatory. The Department argued that the purpose of the *Property Maintenance Code* is not to strictly adhere to the time limitations specified within, but to advance the public health, safety, and welfare.

In addition, the *Property Maintenance Code* does not specify that failure to issue a decision or schedule a hearing in a specified time frame means that the violations subject to those decisions and hearings are somehow invalidated. Certain provisions, such as § PM 108.4 and § PM 108.6, which pertain to placarding of a property and abatement, provide that if a property owner fails to comply with a deadline set forth by the *Property Maintenance Code* by a certain time, the Code Official is authorized to act. Conversely, the *Property Maintenance Code* provisions offered by the Applicant do not state that the failure to issue a decision or schedule a

hearing as stated in the *Property Maintenance Code* somehow invalidates the underlying violations. The nature of the *Property Maintenance Code*, and its goal to advance the public health, safety, and welfare, would not be satisfied if the Applicant's violations were dismissed or time-barred as is suggested.

The RTSC Hearing Officer, Dante Tibieri, testified that the RTSC Hearing was more complex than the average hearing, and he took care to ensure that the decision was complete and that each of the Applicant's arguments was addressed substantively. The Board's counsel stated that the Board lacked a quorum, as required by its Rules, until the current hearing date of March 25, 2021. The Department also submitted that there was no prejudice to the Applicant whatsoever in the delay in issuing the RTSC Decision and scheduling the Board Hearing; there were no enforcement actions at the Property during that time, and the Applicant's appeal period to the Board did not begin until the RTSC Decision was issued. At this point, the Applicant repeated his request to dismiss the violations, however, the Board stated it wished to hear the full record concerning the violations at issue. While the Board was undecided regarding the timing issue raised by the Applicant, the Board wished to hear argument regarding the specific Code Violations.

The Applicant then raised his second argument stating that he did not have sufficient time to correct the violations. The RTSC Hearing took place in November 10, 2020, and the Department offered photographs at that hearing that were taken the previous day. The Applicant argued that he had no time to correct any problems found at the Property.

The Department argued that this same argument was raised and rejected at the RTSC Hearing. NOV #1 was issued in November 2019, and that violation was one of two that was the topic of the RTSC Hearing in November 2020. Hearing Officer Tibieri testified that the Applicant was confusing NOV #1 with the pre-deprivation hearing, which is scheduled only *after* a notice of violation is issued and the property owner has failed to correct the violation(s). Hearing Officer Tibieri further testified that photographs taken immediately prior to the hearing are used to confirm that the property owner has failed to correct the violation(s) and the violation(s) still exist at the time of the hearing. Without an inspection immediately preceding a RTSC hearing, if a property owner stated that he had repaired the violations, the Hearing Officer would be left without confirmation of the repairs. For this reason, the Code Enforcement Officer reinspects properties prior to hearings to refute or confirm, as necessary, a property owner's testimony regarding the status of the violations. Contrary to the Applicant's position, the photographs dated November 9, 2020 were not offered as evidence of the Code Violations; instead, the photographs are offered only to show the status of the Property immediately prior to the RTSC hearing. The Applicant was afforded ample time to address the Code Violations prior to the Code Enforcement Officer's pre-RTSC hearing inspection.

The Applicant then argued that the violations found on NOV #1 were all addressed shortly after its issuance in November 2019. When asked by the Board if he notified the Department that the violations were addressed, the Applicant stated that the Property Maintenance Code does not require such notifications and the Code Enforcement Officer ought to have reinspected the Property on his own accord. The Board then asked if the Applicant had

proof that the repairs were made as stated, such as photographs, and if such proof was shared with the Department. Again, the Applicant stated he did not. Hearing Officer Tibieri testified that there is no requirement that the Department notify property owners that a violation has been corrected, but that property owners can always call the Code Enforcement Officer to discuss the status of their violation(s).

Code Enforcement Officer Frank Walsh testified regarding the timeline of the violations issued and the photographs taken. There were two violation notices, NOV #1 and NOV #2, and each had firm dates for the Applicant to comply. There were follow-up inspections of the Property on November 27, 2019, December 19, 2019, January 24, 2020, and March 25, 2020. The Property did not pass those inspections due to painting and the roof issues cited in NOV #1. Officer Walsh noted that the weather during this period was not conducive to painting. He noted that the dryer vent violation was corrected, but that the other violations noted in NOV #1 remained unaddressed. When the Property was reinspected on April 30, 2020 and NOV #2 was issued, the painting and roof violations cited in NOV #1 still existed. The photographs taken in August 30, 2020 (prior to the originally scheduled date of the RTSC Hearing) and taken on November 9, 2020 both show that the violations remained on the Property.

The Board then asked Officer Walsh the process of a typical *Property Maintenance Code* violation. Officer Walsh explained that certain enumerated violations that are minor in nature are subject to a civil penalty if a violation continues after the property is provided notice and time to correct the violation. No pre-deprivation hearing is afforded prior to the imposition of the civil penalty for these ticketable violations. For all other violations, a property owner is afforded

thirty (30) days to repair the violation. If the violation remains unaddressed, a pre-deprivation hearing is scheduled. After a decision is issued at the pre-deprivation stage, the property owner is afforded another period by which to comply with the *Property Maintenance Code*. If the property owner still does not comply, the Department may pursue an administrative penalty or go to the Justice of the Peace Court to seek compliance through the criminal process.

The Applicant interjected that the repairs were made and that he desires to appeal this decision to the Superior Court to require the Department to notify a property owner if the repairs are made and the property is compliant.

The Department restated the issues for the benefit of the Board - the Code Violations found on NOV #1 and NOV #2 were not corrected by the Applicant. The Applicant claimed that repairs were made, but the Department offered photographic evidence and testimony that they were not. At the Board's request, Hearing Officer Tibieri then reviewed the photos taken in November 13, 2019, April 30, 2019, and November 9, 2020 that showed the Code Violations.

When that review concluded, the Applicant explained why the Code Violations were not present in the Department's photographs, and he went on to explain the various steps he had taken to repair the Property, including replacing shingles on the roof, replacing rotten wood, and painting the underside of the roof. The Applicant further testified that the April 30, 2020 inspection purportedly showed an issue with the gutter, but the structure was always designed without a gutter; the Applicant suggested he actually caused more damage to the Property when trying to address the violation. The Applicant again stated that the violations were fixed months ago. The Board asked Officer Walsh whether some property owners notify the Code

Enforcement Officers of addressed violations, and Officer Walsh confirmed that some do, but most do not. The Code Enforcement Officer will reinspect properties anyway, so a phone call by the property owner will not impact the inspection in any event.

IV. THE BOARD'S DECISION

Upon the conclusion of the presentations of both the Applicant and the Department, Mr. Watts moved (the "Motion") that the Board find the County did not act in an arbitrary or capricious manner nor contrary to law when it issued NOV #1 and NOV #2.

With respect to the procedural argument advanced by the Applicant, the Board finds the Department's position that the timing provisions of the *Property Maintenance Code* § PM 106.3.2.1 and PM § 106.3.1.3 are directory rather than mandatory. As the Delaware Supreme Court has held, the general rule with respect to statutes that fix a time for a public officer to perform a duty is that "the requirement of time will be construed as directory rather than mandatory and not as a limitation of the exercise of the power, unless by reason of the act to be performed, or the manner of its performance, it will have an adverse effect upon some public interest or private right." *Pitts v. White*, 111 A.2d 217, 218-19 (Del. 1955). "Unless there is an injury to the public interest or some private right by reason thereof, such an act will be construed as merely a guide for the officers in the conduct of the public business so as to insure the orderly and prompt performance of public duties." *Id.* at 219. *See also C & D Contractors, Inc. v. Div. of Mental Health*, 1981 WL 15105, at *6 (Del. Ch. Dec. 8, 1981) (holding that the language in 29 *Del. C.* § 6907 stating that the State "shall award" a contract within thirty (30) days of receiving bids as directory)).

Here, the Board finds that the default standard that the timeframe is directory is appropriate. Moreover, the Applicant has alleged no injury to the public interest or private right. To the contrary, there is strong public interest in having the *Property Maintenance Code* enforced, as it provides for the public health, safety, and welfare of the citizens of New Castle County. And with respect to the private rights of the Applicant, the Board finds that no injury has occurred, as the Department noted that the Applicant's appeal rights were not impacted by any delay by the Department or the Board. The Applicant's arguments that the Code Violations are time-barred are rejected.

With respect to the Code Violations themselves, the Board is required to affirm the RTSC Decision if the action was neither arbitrary or capricious nor contrary to law. *Property Maintenance Code* § PM 106.3.6.5. The Applicant's confusion regarding the timing of the photographs is without merit, as the Department explained the photographs taken the day prior to the RTSC Hearing are used determine the status of the Property immediately prior to the RTSC hearing and refute or confirm a property owner's position, as needed, whether violations exist on the date of the RTSC hearing. The photographs taken on November 9, 2020 were used for precisely that reason. Here, the record shows that the Applicant received two Notices of Violation, NOV #1 and NOV #2, each of which provided a timeframe to perform repairs. The photographs of the Property taken on November 9, 2020 show that, contrary to Applicant's testimony, the repairs were not made and the Code Violations still existed. The Applicant testified that repairs were made to the Property to resolve the Code Violations, but the Department had evidence that they were not. Under the circumstances of the case and

consideration of all facts presented in the record and by the parties, the Board finds the RTSC Decision is supported by the evidence.

Based on the foregoing, the Board finds that the Department did not act in an arbitrary or capricious manner or contrary to law when it issued NOV #1 and NOV #2, and therefore, affirms the RTSC Decision below.

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

BOARD OF LICENSE, INSPECTION AND REVIEW



Toreh Williams, Chairperson

Dated: April 14, 2020

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