

penalty was assessed, which due to other outstanding assessment and penalties on the Property brought the total amount assessed and unpaid civil penalties against the Property to \$490.00. On June 1, 2019, the Appellant timely appealed the Ticket to the Department, stating, in its entirety:

There is no violations [*sic*]. County Employees broke the law, violated my property and the Warrant; also damaged my property. Violated my civil rights! County sends/uses uneducated fools! Also dishonest criminals!

On July 1, 2019, the Department's Administrative Hearing Officer conducted a hearing, during which the Appellant objected to the decision of the Hearing Officer, the hearing process, and continued to state that there was no violation on the Property. The Appellant then excused himself from that hearing, and the Hearing Officer found a violation of § PM 302.8.3 of the Code at the time the Ticket was issued. The AHO Decision was issued the same day, and the Applicant timely appealed the AHO Decision to this Board on July 11, 2019, pursuant to § PM 106.3.1.6.

II. LEGAL STANDARDS

The Board is authorized by 9 *Del. C.* § 1315 and Section 2.05.103 of the *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 10, 2020 (the “Board Hearing”). Present for the Board Hearing on behalf of the Department were Shane Miller and Jack Gahan, along with the Department’s counsel, Assistant County Attorney Jordan Perry. The Appellant and his counsel, James Edwards, Esquire, appeared in opposition. In addition to the testimony and exhibits presented at the Board Hearing, the record also includes the record considered by the Administrative Hearing Officer in issuing the AHO Decision.

A. Applicant’s Presentation

Through counsel, the Appellant argued that the Ticket issued to him is yet another in a long line of harassment by the Department against him and his Property. The Appellant testified that the first violation notice related to vehicles the County issued was in August 2014 for failure to properly register vehicles on the premises.¹ Ex. 1. The Appellant then had the vehicles registered, but received another violation notice that the vehicles were inoperable in January 2015. Ex. 2. After speaking with officials at the Department, including Officer Morgan who issued the notice of violation, Appellant believed the issue was resolved. Instead, yet another violation notice was issued, this time by Officer Perez, in September 2015. Ex. 3. After speaking with Officer Perez, the Appellant confirmed the issue was resolved again. However, in October of 2018, Appellant received a ticket no. 1970011 for an inoperable vehicle for a flat tire. Ex. 4. This vehicle, which the Appellant used daily, was promptly repaired. Appellant appealed this ticket no. 1970011 to the Department’s Administrative Hearing Officer, who determined that the photographs presented by the Department do not “clearly or convincingly show” evidence of

¹ The Board admitted testimony of prior notices of violation and tickets issued to the Appellant, over the Department’s objection, so that it would have the full history of Appellant’s complaint.

any vehicle that would be considered inoperable. Ex. 5. Accordingly, the Hearing Officer reversed his initial decision made at the hearing and granted Appellant's ticket appeal by written decision issued on January 4, 2019. *Id.* The written decision provided "[a]ny previous citations that were issued and non-payment penalties assessed before October 18, 2018 are not part of this appeal and need to be satisfied." *Id.* The Appellant also received another letter from the Department dated January 17, 2019 that Appellant claims dropped other civil penalties assessed against the Property for a related appeal. Ex. 6. Appellant argued that despite this letter and the Hearing Officer's determination that the Department failed to adduce evidence to support ticket no. 1970011, the Appellant received the Ticket that is the subject of this Hearing – for the same purportedly inoperable Vehicle. Ex. 7. The Department did not drop the cases as Appellant claimed; instead, on May 23, 2019, the Department obtained a search warrant and gathered additional evidence regarding the purported violation. Ex. 8.

With that background, the Appellant discussed the merits of his current appeal. The Ticket is for an inoperable vehicle, but the Appellant asserts the Department is incorrect for two reasons. First, the Department's search warrant is only for the exterior of the vehicle, and the Department's enforcement officers opened the hood of the car. This, Appellant argues, exceeds the scope of the warrant, meaning the evidence should be suppressed. Second, even if the photographs taken by the Department of the Vehicle's engine compartment are admitted by the Board, the Vehicle is still operable. The engine runs, and interior of the Vehicle is immaterial as to whether or not it actually is operable. Specifically, the Appellant claims the Ticket notes that the car has no air filter, no ignition switch, and no battery. But the Vehicle runs.

The Appellant disputes the impartiality of the Department's process. Specifically, the Appellant believes Officer Miller, the Department official who issued the Ticket, to be prejudiced against him. The Appellant stated that Officer Miller claims to treat everyone the same, but he has cited only the Property in the immediate vicinity. Moreover, the Appellant stated that Department official Joe Day also is prejudiced against Appellant, in that he knew Appellant's neighbors and therefore took their side in neighborhood disputes, thereby arbitrarily enforcing the *Property Maintenance Code* in a stricter manner against the Appellant.

As far as the actual dispute, the Appellant testified that the Vehicle, a 1963 Chevy Impala, runs fine and is properly registered. When asked why the Vehicle was on his Property, the Appellant stated that he paid a neighbor to paint the car, but the deal fell through. He wanted it painted, and the interior of the Vehicle is in such a condition in order to paint it. Once the Vehicle was painted, it was removed. The Vehicle is no longer at the Property. At the time of the Ticket, the Appellant testified that the Vehicle's engine ran. The car hood was closed, and the door handle was removed. While the Vehicle only had a driver's seat, it still was operable.

Department's Presentation

The Department called Shane Miller in support of its position that a violation existed on May 23, 2019. Officer Miller testified he is a Code Enforcement Officer for the Department and he began his employment in August 2018. He was assigned this matter after Officer Perez issued a violation notice on August 16, 2018. Officer Miller testified that after the required time passed and the violation remained unaddressed, a ticket was issued for an inoperable vehicle due to the condition of the interior of the vehicle. The Appellant's prior appeal was granted and the civil penalty was removed, because there was not enough information regarding the

“inoperableness” of the Vehicle. Despite this, the Department felt that a violation still remained unaddressed, so it obtained a search warrant. Officer Miller, accompanied by his supervisor, Officer Gahan, inspected the Vehicle and observed no battery, no alternator, and no air filter under the hood. As a result, the Department issued the Ticket.

When questioned regarding the ignition switch, Officer Miller testified that he did not see one, which matched his recollection of May 2, 2019, when he performed another inspection of the Property. Officer Miller confirmed he knew what an ignition switch was, and again confirmed that it was not present on the Vehicle on May 23, 2019. Officer Miller confirmed that his observation on May 2, 2019 was through the car’s window, and that no owners were present when the inspection on May 23, 2019 occurred – despite knocking loudly on the door. Officer Miller performed a later inspection in July 2019, and the Vehicle had been removed from the Property.

When asked by the Chairperson of the Board, Officer Miller testified that the matter was never “reopened” after the first appeal was granted. The only issue was the photographs from ticket no. 1970011 were unclear as to the Vehicle’s inoperability; the Department always maintained that a violation still existed on the Property. The County could, after the violation notice was issued, still issue tickets if a violation remained on the Property. Officer Miller confirmed that the issues with the photographs from the prior notices of violation and tickets were that the photos only captured the interior of the vehicle which, in the Hearing Officer’s opinion, were insufficient to determine if a car was operable or inoperable. So, with that in

mind, the Department obtained the search warrant.² When questioned by the Board, the Department's attorney confirmed the definition of "inoperable motor vehicle" under the Code:

Inoperable Motor Vehicle. A vehicle that cannot be driven upon the public streets for reason including but not limited to being unlicensed, wrecked, abandoned, in a state of disrepair, or incapable of being moved under its own power.

§ PM 202

Mr. Grieshaber inquired regarding the procedure of obtaining a search warrant for an inoperable vehicle violation. Officer Miller testified that he did not know how typical a search warrant was for this type of violation, but this Ticket was the first in his experience that required a search warrant. Officer Miller did not know if the Department ever previously obtained a warrant, but he reminded the Board of his relative new experience as a code officer.

Mr. McAllister then inquired as to the registration of the Vehicle. The Appellant testified that the Vehicle was registered in Pennsylvania in 2014, and that antique registrations do not expire in Pennsylvania. Thus, the car was registered at the time of the Ticket.

Officer Miller testified that he believed the Vehicle to be inoperable due to the overall condition of the Vehicle. With respect to the interior of the Vehicle, it lacked seats, with the exception of the driver's seat; there was no dashboard; and no ignition switch could be seen. Once the Department checked under the hood, Officer Miller noted that there was no battery, air filter, or alternator, making the Vehicle inoperable. Board member Cochran noted that parts can fail on cars, and inquired as to whether the Vehicle appeared to be under repair. Officer Miller noted that if an automobile was being repaired, a person who receives a violation notice or ticket

² The Appellant objected to the admission of the photographs taken under the hood of the Vehicle, as he believed the Department exceeded the scope of the search warrant. This evidentiary objection was overruled by the Board, which specified it wanted a complete picture of the evidence from both parties.

would normally call Code Enforcement to explain the situation. Here, Officer Miller confirmed that the Appellant never contacted him to discuss the Ticket or any possible repair work being performed on the Vehicle. Officer Miller concluded his testimony by noting that the Vehicle did not appear to have been moved from location on the Property during his multiple inspections of the Property.

Under cross examination, Officer Miller testified that he did not see an ignition switch on the steering column of the Vehicle, the location where, per his experience, most ignition switches are located. He admitted however, that it was possible the ignition switch could be on the dashboard of the Vehicle. Officer Miller also admitted that he did not know the exact location of the alternator or the battery in this particular model of automobile. Officer Miller also admitted that he was unsure if the interior of a vehicle needed to be removed in order to paint it. The Appellant submitted that this was evidence that Officer Miller did not know if the Vehicle was inoperable at the time of the Ticket. Officer Miller did note that if the Appellant had been present and showed that the Vehicle was operable, the Ticket would not have been issued.

Next, the Department called Jack Gahan to testify regarding the search warrant. Officer Gahan testified he has worked in Code Enforcement for over twenty years and that he is familiar with the Ticket and facts of this matter. Officer Gahan testified he was present during the May 23, 2019 inspection of the Property, and that he is somewhat familiar with cars. Officer Gahan confirmed that there was no air filter, battery, or dashboard on the car. With respect to the ignition switch, Officer Gahan testified he was aware that certain models of automobiles have the ignition switch on the dashboard (as opposed to the steering column), and he did not see an

ignition switch present. The lack of an ignition switch, Officer Gahan explained, was part of the probable cause that justified obtaining the search warrant.

When asked about the search warrant itself, Officer Gahan testified that he has sought and obtained numerous search warrants over his career, and that this specific search warrant was to open the hood and doors of the Vehicle to confirm its inoperability. The entire search warrant permitted the full inspection of the Vehicle; however, the first page of the search warrant does not mention the scope. Officer Gahan testified that this was normal, and that entire search warrants are not normally posted on a property.³ When asked by the Board as to whether the history of the Appellant's course of dealings with the Department impacted their enforcement of the Code, Officer Gahan said no. If an appeal is granted, but, in the eyes of the Department, a violation still exists, the Department often obtains search warrants. Under cross examination, Officer Gahan admitted that the Court's order granting the search warrant does not mention opening the hood of the Vehicle, but Officer Gahan noted that search warrants often do not.

During rebuttal, the Appellant testified that the Vehicle's battery and alternator are mounted in the trunk of the Vehicle, which is common for this model. Moreover, the Appellant testified that air filters are often removed from automobiles to improve horsepower, and the lack of an air filter does not make a vehicle inoperable. The Board noted, however, that this was the first time the Appellant raised this argument, instead of contacting Officer Miller or raising it at the Administrative Hearing below.

³ The Appellant again objected to the scope of the search warrant, and the Department argued that the scope of the search warrant should be objected to at the issuance of the warrant in a court of law, not at this administrative hearing. The Board again overruled the objection.

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 Ticket upon the Appellant and affirm the AHO Decision below. Mr. Cochran seconded the Motion.

The Board is required to affirm the AHO Decision if the action was neither arbitrary or capricious nor contrary to law. *Property Maintenance 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 and testimony before the Board support the Department's conclusion that the Vehicle was inoperable at the time of the Ticket. The photographs of the interior of the Vehicle clearly showed a vehicle in "a state of disrepair," which renders it inoperable under the Code. The Board also notes that the Appellant had ample opportunity to discuss the Vehicle with the Department, including whether a battery and ignition switch were present. In fact, the Board notes that the Appellant previously spoke to Department officials regarding the Vehicle, but did not do so here, to his detriment. Thus, the Board finds the Department did not act arbitrarily or capriciously in issuing a ticket for an inoperable vehicle.

With regard to the unique circumstances regarding the previous appeal and the need for a search warrant, the Board credits Officer Gahan's testimony that he has sought and received numerous search warrants, and there was nothing unique or unusual with respect to the execution of the search warrant on the Property. Under the circumstances of the case and consideration of

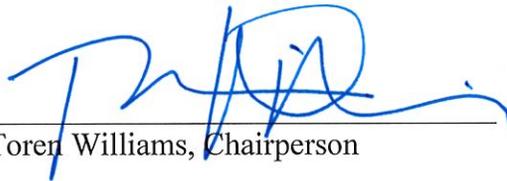
all facts presented in the record and by the parties, the Board finds the AHO Decision is supported by the evidence.

In dissent, Mr. McAllister noted that it was not clear to him that the Vehicle was inoperable, and he voted to deny the Motion.

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 the Notice of Violation upon the Appellant, and therefore, affirms the AHO Decision below.

VOTE: 4-1 (Affirm: Mr. Williams, Mr. Cochran, Mr. Grieshaber, and Mr. Watts; Deny: Mr. McAllister)

BOARD OF LICENSE INSPECTION AND REVIEW



Toren Williams, Chairperson

Dated: June 10, 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. VII, § 1 of the Rules of Procedure of the Board of License, Inspection and Review.