



**BOARD OF LICENSE, INSPECTION & REVIEW**

**NOTICE OF DECISION**

**APPLICANT:** John McCafferty

**REFERENCE:** Application 2020-0189

**PUBLIC HEARING DATE:** August 26, 2020

**DATE OF DECISION:** August 26, 2020

**DATE DECISION FILED:** September 15, 2020

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

**SUBJECT PROPERTY:** 109 Hilldale Court, Claymont, DE 19703

**Parcel No.:** 06-057.00-174

**Zoned:** NC-6.5

John McCafferty (the "Applicant") appeals to the Board of License, Inspection & Review (the "Board") from the decision of the New Castle County Department of Land Use (the "Department") issued on February 26, 2020 (the "AHO Decision"). In the AHO Decision, the Department found the Applicant responsible for one violation (hereinafter, the "Code Violation") of Chapter 7 of the *New Castle County Code* (the "*Property Maintenance Code*"), for a property Applicant owns at 109 Hilldale Court, Claymont, DE 19703 (the "Property").

**I. PROCEDURAL HISTORY AND POSTURE**

On January 17, 2020, the Department issued ticket number 2103488 (the "Ticket") to the Applicant. The Ticket charged the Applicant with violating: (1) § PM 302.8.3 of the *Property Maintenance Code* by the storage of an inoperable or unreg[istered] vehicle on the Property; and (2) § PM 302.11 for the outside storage of debris, including broken basketball assembly, metal windows, and other items. The Ticket also noted that the vehicle in question (the "Vehicle") was parked in the driveway but is unregistered. A \$125 civil penalty was assessed. On January 30, 2020, the Applicant timely appealed the Ticket to the Department.

On February 18, 2020, the Department's Administrative Hearing Officer conducted a hearing, during which the Applicant argued that the original violation in September 2019 and subsequent ticket issued in November 2019 were ill-founded and any evidence obtained during that search was obtained illegally as the Code Enforcement Officer needed permission to be in his neighbor's yard. Moreover, the Applicant submitted that the *Property Maintenance Code* is unconstitutional. The AHO Decision was issued on February 26, 2020 and found that there were existing violations of the PM Code on January 17, 2020. The Applicant timely appealed the AHO Decision to this Board on March 13, 2020, pursuant to § PM 106.3.1.6.

On March 16, 2020, the Department received a Stay of Action request from Applicant to have all future investigations of the Property stayed until June 15, 2020, as additional time was needed to address the purported violations on the Property. The Department granted the stay on March 26, 2020 and notified the Applicant that the appeal may be delayed due to the COVID-19 pandemic. On May 11, 2020, the Department further clarified the scope of the stay, notifying the Applicant that the appeal would be stayed until June 30, 2020 to provide him ample time to address the violations.

## **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 must be affirmed if the action was neither arbitrary or capricious nor contrary to law. *Property Maintenance Code* § PM 106.3.6.5. The Board does 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 August 26, 2020 (the “Board Hearing”). Present for the Board Hearing on behalf of the Department were Code Enforcement Officer Christopher Yasik, along with the Department’s counsel, Assistant County Attorney Jordan Perry. The Applicant appeared in opposition. In addition to the testimony and exhibits presented at the Board Hearing, the record before the Board also included the materials considered by the Administrative Hearing Officer.

#### **A. Applicant’s Presentation**

At the outset, the Applicant asserted various arguments to preserve them on appeal. First, the Applicant asserted that the complaint-driven system of Code Enforcement utilized by the Department is unconstitutional as it results in selective enforcement because a similar purported violation at a similar property would go undetected by the Department. Second, the Applicant argued the system is unconstitutional because he cannot confront the person who filed the initial complaint against the Property. The Applicant believes this to be particularly relevant as the original complaint to Code Enforcement from September 2019 was for rats. Finally, the Applicant submitted that the Hearing Officer impermissibly acts as both a prosecutor and a judge at the AHO Hearing.

With those introductory legal arguments in place, the Applicant turned to the factual merits of his appeal. The Applicant asserted that the present Ticket stems from a complaint made against the Property and two other homes down the street. The original complaint, raised

in September 2019, was for rats on the three parcels. The Applicant testified that some nearby homes were vacant, though recently occupied, and that there were various “critters” found in the area, including coyotes and foxes. However, the Applicant maintained that any vermin present was natural, as his home was in the woods. The original complaint, the Applicant believed, was unfounded.

Despite not finding any rats on the Property, Code Enforcement issued a Notice of Violation for one violation in September 2019 – outside storage of debris. Code Enforcement’s follow up inspection in November 2019 found two violations – continued outside storage of debris and an inoperable vehicle – and Code Enforcement issued a ticket as a result. At an administrative hearing regarding those violations in December 2019, the Applicant stated that there were no violations, and most of the issues regarding debris stemmed from a section of overgrown ivy on his Property. At the December 2019 hearing, the Applicant also argued that the photographs taken of the alleged debris by the Code Enforcement Officer were taken in his backyard without permission and, thus, the evidence could not be considered. The Applicant testified that the Hearing Officer at the December 2019 hearing agreed with his understanding of the photographs and dismissed the November 2019 ticket.

The Applicant testified that the Code Enforcement Officer returned to the Property even though the original complaint regarding rats was unfounded and the ticket stemming from that complaint was dismissed. Accordingly, the Applicant maintained that the current investigation was impermissible as well. Furthermore, the Applicant noted that he was undertaking efforts to remove the purported debris in his yard but is encountering difficulty due to medical reasons and

the COVID-19 pandemic. The Applicant stressed that the alleged debris in question, including children's toys, a ladder, and a dog pool, is normal for a backyard to have.

With respect to the vehicle, the Applicant testified that the vehicle was in the driveway because the garage was full of other personal property. The vehicle is no longer at the Property; it is in Dover, Delaware getting repaired.

The Applicant further testified that he believes the Code Enforcement Officer overstepped his legal authority in many ways and that the continued investigation of his home violates § PM 106.3.1.2.4.4 of the *Property Maintenance Code*.<sup>1</sup> The Applicant testified the Code Enforcement Officer continued to come to his Property even though he appealed the matter. He further alleged that the Code Enforcement Officer committed perjury while seeking a subpoena to search the Property when the matter was on appeal. The Applicant testified that Code Enforcement visited the Property in November, January, February, twice in March, twice in June, and three times in July. The Applicant claimed that the efforts of Code Enforcement were ridiculous for a non-serious threat. The sole remaining issue was a modest overgrowth of ivy, which the Applicant is trying to remove. The Applicant concluded by noting that Code Enforcement was overzealous and wasteful of taxpayer dollars. He requested the Board dismiss the Ticket and order Code Enforcement to not return to the Property.

B. Department's Presentation

The Department began its presentation by reminding the Board that the November 2019 ticket that ultimately was dismissed by the Administrative Hearing Officer is not at issue in this

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<sup>1</sup> *Section PM 106.3.1.2.4.4, Stay*. Except as provided for in Section 108 of this Chapter, an appeal of a violation under this Section shall act as an automatic stay of the action being appealed.

appeal; rather, the appeal solely pertains to the January 2020 inspection of the Property and the ensuing Ticket. The Department also clarified to the Applicant that the November 2019 ticket was dismissed *without prejudice*, meaning the Department's case was not "closed" with respect to the Property. Moreover, the Department stated that the dismissal by the Administrative Hearing Officer was not due to the reasons stated by the Applicant; instead, the Administrative Hearing Officer dismissed the November 2019 ticket because he could not determine where the photographs were taken. The Administrative Hearing Officer did not agree that the photographs were taken in the Applicant's backyard or in an unlawful location.

With that background, the Department called Code Enforcement Officer Christopher Yasik in support of its position that violations existed on the Property on January 16, 2020. Officer Yasik testified that he arrived to inspect the Property on January 16, 2020 because the Property remained in the Code Enforcement computer system as the prior case remained open. He arrived at the Property, noticed the debris and inoperable vehicle on the premises, and took photographs. Officer Yasik testified that the photographs were taken from the backyard of the neighboring property at 107 Hilldale Court – none were taken from the Property itself. As to the specific violations, Officer Yasik testified that he noted an expired registration tag on the Vehicle, and the backyard was littered with broken fencing, pvc pipes, an old window, black plastic items, a pool ladder and other miscellaneous debris.

When questioned by the Board regarding rats, Officer Yasik noted that that original complaint in September 2019 was for rats, purportedly at 105 Hilldale Court, 107 Hilldale Court, and the Property. He found no evidence of rats at any of those parcels but is obligated under the *County Code* to cite any and all violations found at the properties. He noted the aforementioned

violations in September 2019 and November 2019, and stated it was common to find multiple violations on a property, even violations that were not the subject of the original complaint. Officer Yasik testified that he did not cite any of the other properties (105 Hilldale Court and 107 Hilldale Court) for violations of the *Property Maintenance Code*.

Officer Yasik noted that the *Property Management Code* provides Code Enforcement Officers with a general right of entry to inspect private property.<sup>2</sup> Officer Yasik also confirmed again for the Board that he did not go onto the Property during the January 16, 2020 inspection. When questioned as to whether the items in question were considered debris, Officer Yasik confirmed that the definition for debris was material that was stored externally, including

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.<sup>3</sup>

When asked if the debris in question in January 2020 was the same debris that was cited in September 2019 and ticket in November 2019, Officer Yasik could not be sure, but the photographs confirmed debris present during the January 2020 inspection. When asked by the Board about the stay of action, Officer Yasik stated that once a ticket is issued, the Department will not issue another ticket during the pendency of the appeal. However, inspections of a property, without issuing a ticket, may still occur to see if the homeowner addressed the issue. Thus, while the Applicant accused the Department of continuously inspecting the Property, such inspections are permitted (and customary) under the *Property Maintenance Code*. Officer Yasik testified that he personally has not been at the Property since March, and that any recent

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<sup>2</sup> *New Castle County Code*, § 40.01.210.

inspections were performed by a colleague. Officer Yasik testified that there was no stay in place when the Property was inspected in January 2020, and the ensuing Ticket was validly issued. Because the December 2019 Administrative Hearing dismissed the November 2019 ticket *without prejudice*, Officer Yasik re-inspected the Property after that decision was issued in order to take clearer photographs of the violations. Because the original ticket was dismissed without prejudice, the case stayed open. If, conversely, the December 2019 decision decided that there were no issues outstanding, no further inspection would occur. Officer Yasik confirmed his colleague inspected the Property again prior to this hearing, and violations remain.

The Applicant interjected during the Department's presentation and stated that the pandemic impacted his ability to address any potential violations, but the Applicant also insisted that the items in his yard are not debris and stated, "one man's trash is another man's treasure." Moreover, the Applicant testified that his neighbor's yard was fenced and that Officer Yasik needed permission to enter her yard. Officer Yasik clarified that he never entered the Applicant's backyard. The Applicant's backyard is fenced with a gate, and Code Enforcement Officers do not open gates or climb fences. The Applicant disputed this point and argued that because the September 2019 inspection obtained improper photographs, the entire proceeding was tainted and ought to be dismissed by the Board. The Applicant noted that the Hearing Officer expressed doubt as to the propriety of photographs taken in September 2019 and November 2019, so the case was dismissed. The present Ticket stems from the original proceeding.

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<sup>3</sup> *New Castle County Code*, § PM 202.

After Officer Yasik testified, the Department's counsel presented legal argument. The Department submitted that any constitutional issues raised by the Applicant, such as his reserved arguments, were better suited for a court of law instead of the Board. The *Property Maintenance Code* allows its Enforcement Officers a broad right to inspect private property for violations. The Department stated the Applicant had no reasonable expectation of privacy in his backyard, as there was no privacy fence installed; anything that the Applicant's neighbor saw from her backyard was the same as what the Department cited. Moreover, the *Property Maintenance Code* applies to the entire yard – a Code Enforcement Officer has a right of entry over one's entire property. Contrary to Applicant's claims, the Hearing Officer did not definitively rule on the propriety of the September 2019 photographs and dismiss the November 2019 ticket; the matter was dismissed without prejudice and the Department returned to better document the purported violations. Originally, Officer Yasik inspected three properties and only the Property contained violations of the *Property Maintenance Code* and was thus cited by the Department. The Applicant's claims that the *Property Maintenance Code* is being arbitrarily enforced ring hollow.

C. Applicant's Rebuttal

On rebuttal, the Applicant argued that entering a fence is illegal, and the Department needed a warrant. Further, the Applicant submitted that debris is not an emergent situation that would require an officer to enter anyone's property. The Applicant then accused Officer Yasik of perjury in March 2020 and questioned his motives during this proceeding. The Applicant continued to protest the selective enforcement of the *Property Maintenance Code*, noting that there are numerous violations found throughout the area.

The Board questioned the applicability of the Department's May 11, 2020 letter clarifying the scope of the stay of action, as the Applicant requested until June 30, 2020 to address any purported violations on the Property. The Department clarified that if the violations were addressed, the Applicant could decide to cancel the hearing; however, the right to cancel the hearing was the Applicant's alone. The Applicant stated that he believed the appeal was necessary, as the Code Enforcement Officer can return to the Property for one year and continue to look for violations. The Board also noted the progress the Applicant made on the debris in question, but the Applicant insisted that the items in question were not debris, just ivy.

#### **THE BOARD'S DECISION**

Upon the conclusion of the presentations of both the Applicant and the Department, Mr. Grieshaber moved that the Board find the County did not act in an arbitrary or capricious manner when it issued the Ticket upon the Applicant and affirm the AHO Decision below (the "Motion"). Mr. McCallister seconded the Motion.

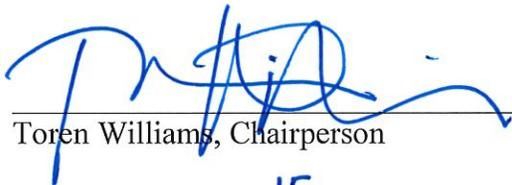
The Board is required to affirm the AHO Decision if the action was neither arbitrary or capricious nor contrary to law. *Property Maintenance Code* § PM 106.3.6.5. Having considered the record below and the presentations by the Applicant and the Department, the Board finds the AHO Decision below not 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 violations existed at the time of the Ticket. The photographs clearly depicted debris in the backyard of the Property, and the Applicant did not dispute that the vehicle was not registered. The Board appreciates the Applicant's difficulties in removing the items in his backyard, but found that the items were debris, and present on the Property on

January 16, 2020. The Board also notes that the *Property Maintenance Code* was applied fairly, as the other properties that were the subject of the original complaint were found not to be in violation. Thus, the Board finds the Department did not act arbitrarily or capriciously in issuing a ticket for outside storage of debris or an inoperable vehicle.

Based on the foregoing, the Board unanimously finds that the Department did not act in an arbitrary or capricious manner or contrary to law when it issued the Ticket upon the Applicant, and therefore, affirms the AHO Decision below.

**VOTE: 4-0 (Affirm: Mr. Williams, Mr. McCallister, Mr. Grieshaber, and Mr. Watts)**

**BOARD OF LICENSE INSPECTION AND REVIEW**



Toren Williams, Chairperson

Dated: September 15, 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.