



IN THE SUPREME COURT OF THE STATE OF DELAWARE

Supreme Court Case No. 185, 2017

KEVIN GARBER t/a CARPENTRY UNLIMITED,

Petitioner Below/Appellant,

v.

NEW CASTLE COUNTY DEPARTMENT OF LAND USE
AND NEW CASTLE COUNTY BOARD OF LICENSE,
INSPECTION & REVIEW,

Respondents Below/Appellees.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE
COUNTY OF NEW CASTLE

APPELLANT'S SECOND CORRECTED OPENING BRIEF

COHEN SEGLIAS PALLAS
GREENHALL & FURMAN, P.C.
Edward Seglias, Esq. (I.D. No. 2822)
Scott T. Earle, Esq. (I.D. No. 4541)
Nemours Building, Suite 1130
1007 North Orange Street
Wilmington, DE 19801
302-425-5089
*Attorneys for Appellant, Kevin Garber
t/a Carpentry Unlimited*

Date: June 28, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
NATURE OF THE PROCEEDINGS	1
SUMMARY OF THE ARGUMENT	4
STATEMENT OF FACTS	6
ARGUMENT	9
I. Whether on Certiorari Review the Transcripts of the Interior Tribunals Should Have Been Part of the Record on Review for the Limited Purpose of Determining Whether the the Inferior Tribunals Exceeded Their Jurisdiction, Committed Errors of Law, or Proceeded Irregularly	9
A. Questions Presented	9
B. Scope of Review	9
C. Merits of Argument	9
1. Common-law Writ of Certiorari	11
2. Review on Certiorari is Confined to the Record	13
3. <i>Black v. LIRB</i>	16
II. Whether Carpentry Unlimited was Afforded Adequate Due Process in the County Code Proceedings Under Circumstances Where the County is Pursuing Payment on the Statutory Compliance Bond in the Amount of \$150,000 Without Carpentry Unlimited Having an Opportunity to Present its Case to a Legally-Trained and Detached/Neutral Decision Maker	19
A. Questions Presented	19
B. Scope of Review	20
C. Merits of the Argument	20
1. Right to a Legally-Trained Judge	21

2.	Right to a Detached and Neutral Magistrate	22
III.	Whether the Superior Court Committed Legal Error by Failing to Find That the Inferior Tribunals Failed to Adequately Set Forth its Factual Findings and Appropriate Legal Standards as to why the Statute of Limitations did not Bar the Alleged Code Violations	24
A.	Questions Presented	24
B.	Scope of Review	24
C.	Merits of the Argument	24
IV.	Whether Superior Court Committed Legal Error by Failing to Find Inferior Tribunals Proceeded Irregularly and Contrary to Law by Relying on the Homeowners' Expert to Establish the Code Violations and Precluding the Testimony of Certified Site & Building Inspector Driscoll at the LIRB Hearing	30
A.	Questions Presented	30
B.	Scope of Review	30
C.	Merits of the Argument	30
CONCLUSION	33

TABLE OF AUTHORITIES

Cases	Page(s)
<i>395 Associates, LLC v. New Castle County</i> , 2006 WL 2021623 (Del. Super. 2006)	18, 27
<i>Black v. LIRB</i> , 117 A.3d 1027, 1031 (Del. 2015)	16
<i>Butler</i> , 609 A.2d 1080 (Del. 1992)	10
<i>Christiana Town Center, LLC v. New Castle County, LLC</i> , 2004 WL 2921830 (Del 2004)	25, 27
<i>Commissioners v. Supervisors</i> , 27 Ill. 143	15
<i>County Council of Sussex County v. Green</i> , 516 A.2d 480, 481 (Del. 1986)	25
<i>Dambro v. Meyer</i> , 974 A.2d 121 (Del 2009.)	25
<i>Gerdes v. Rosell Champion</i> , 108 Ill. 137 (Ill. 1883)	15
<i>Goldberg v. Kelly</i> , 397 U.S. 254, 90 S. Ct. 1011	22, 23
<i>Lake v. State</i> , 928 N.E.2d 1251 (Ill. 2010)	15
<i>Lecates v. Justice of Peace Court No. 4</i> , 637 F.2d 898 (Del. 1990)	17, 21
<i>Maddrey v. Justice of the Peace Court 13</i> , 956 A.2d 1204 (Del. 2008)	1, 16, 17
<i>Ploof v. State</i> , 75 A.3d 811 (Del. 2013)	9, 20, 24, 30

<i>Reise v. City of Newark</i> , 746 A.2d 271 (Del. 2000)	15
<i>Shoemaker v. State</i> , 375 A.2d 431 (Del. 1977)	15, 19, 20
<i>U.S. v. James Daniel Good Real Property</i> , 510 U.S. 43, 114 S. Ct. 492, 126 L.Ed.2d 490 (1993)	22
<i>Ventura v. Shalala</i> , 55 F.3d 900 (3rd Cir. 1995)	22
<i>Vichi v. Koninklijke Philips Elecs. N.V.</i> , 62 A.3d 26.....	26, 28
<i>Wiercinski v. Brescia Properties, LLC</i> , C.A. No. 11C-12-015.....	31
Statutes	
9 <i>Del. C.</i> § 1315	22
10 <i>Del. C.</i> § 8106	24, 28
Supr. Ct. R. 8.....	19
Regulations	
Code Section 6.12.002	24
County Code Section 02.05.103	22
County Code Section 6.03.011(G).....	31
IRC 703.1	27, 28
IRC 703.6.3	27, 28
IRC 703.8	27, 28
Rules of Procedure, Board of License, Inspection & Review	
Section 7	2
Article V, Section 6	31
Treatises	
14 <i>Am. Jur. 2d Certiorari</i> § 82	15
Woolley on Delaware Practice (Vol. I)	11, 12, 13, 14, 15, 16

NATURE OF THE PROCEEDINGS

On May 26, 2016, Appellant/Petitioner-Below, Kevin Garber t/a Carpentry Unlimited (“Petitioner” or “Carpentry Unlimited”), filed a *Writ of Certiorari* seeking review of two decisions issued by the New Castle County Department of Land Use (“County” or “Respondent”).¹ The two proceedings under review are a Rule to Show Cause (“RTSC”) hearing held on February 9, 2016 and the following appeal to the Board of License, Inspection and Review (“LIRB”) held on May 11, 2016 (collectively, the “Code Violation Proceedings.”) (A59, A63). The Code Violation Proceedings arise out of a code violation notice issued to Carpentry Unlimited January 20, 2016 (A89-A97; Resp. 3, Violation Notice Nos. 20150912 and 201600071).

The RTSC hearing was presided over by an Administrative Hearing Officer (A92, A98). On February 24, 2016, the Hearing Officer issued the RTSC Decision, resulting in the dismissal of ten out of the eighteen violations charged. (A96, ¶13). The Hearing Officer found Mr. Garber responsible of violations #1, #2, #3, #4, #5, #6, #12, and #13 under Violation Notice 201509121.

¹ The Superior Court has original and exclusive jurisdiction under the Delaware Constitution to issue common law writs of certiorari to inferior tribunals. *Maddrey v. Justice of the Peace Court 13*, 956 A.2d 1204 (Del. 2008).

Carpentry Unlimited appealed the RTSC Decision to LIRB on March 07, 2016 (Resp. Ex. 7). The RTSC was presided over by a chairman and two other board members. After the hearing, the LIRB found, by split vote—2 affirm and 1 oppose, that the Hearing Officer’s findings were not arbitrary or capricious (A116; Resp. Ex. 13, 14, pg. 6). After the petition of *Writ of Certiorari* had been filed, as the time for the appeal had expired, the LIRB untimely issued a voluminous written decision on June 21, 2016.² (A205).

On March 31, 2017, the Superior Court issued an order denying Carpentry Unlimited’s requests for relief on the basis the scope of review was too limited to provide relief. (A true and correct copy of the Order is attached hereto as **Exhibit 1**.)

On or about April 28, 2017, Carpentry Unlimited filed a notice of appeal to the Delaware Supreme Court seeking review of the Order issued by the Superior Court.

² Section 7 of the *Rules of Procedure of the Board of License, Inspection and Review of New Castle County, State of Delaware*, state that “[i]n every matter the Board shall make findings of fact and render a decision in writing based upon the record created at the public hearing within five days of that hearing.” In this case, the hearing was held on May 11, 2016, but the LIRB did not issue a written decision until June 21, 2016, which was 41 days after the LIRB hearing.

This is Carpentry Unlimited's Opening Brief on appeal to the Delaware Supreme Court.

SUMMARY OF THE ARGUMENT

1. This case raises issues about the scope of the record on *certiorari* review of code violation proceedings to the Superior Court of New Castle County and whether the process affords adequate due process of law.

2. The County wishes to execute on a statutory compliance bond in the amount of \$150,000. Carpentry Unlimited is the principal of the bond and disputes any liability under the bond. Additionally, the County has fined and continues to fine Carpentry Unlimited \$200.00 per day until the alleged code violations are remediated.

3. With such significant property interests at stake, Carpentry Unlimited should have had the opportunity to present his case to a legally-trained and detached/neutral magistrate, violating the principles of fundamental fairness and due process.

4. Notwithstanding the violations of due process, the Superior Court committed reversible error by failing to consider the order issued by the Hearing Officer and the decision of the Licensing, Inspection and Review Board as part of the record on *certiorari* review.

5. On the face of the record, the Hearing Officer and the Board erroneously applied that statute of limitations, resulting in errors of law on the face of the record.

6. The proceedings were irregular and contrary to law because (1) the County relied upon an unauthorized expert to support the alleged code violations in violation of the County Code and (2) the LIRB Chairmen excluded CSBI William Driscoll from testifying (the county inspector who initially approved the construction of the property) which was contrary to the Board's rules.

STATEMENT OF FACTS

Kevin Garber, trading as Carpentry Unlimited, constructed 510 Bellevue Road, Wilmington, Delaware 19809, under contract with Deborah Wartel and Amy Podolsky (“Homeowners”). The County issued the building permit to Carpentry Unlimited on August 21, 2012 (A228). Every phase of construction of 510 Bellevue was inspected and approved by Certified Building and Site Inspector (“CBSI”) William Driscoll (A11, A146).

CBSI Driscoll inspected the weather barrier and the door and window flashings (identified as Weather Barrier Inspection P-032) on 12/11/2012. (A148, A146, A168, A136, A232, A242). The weather barrier was ultimately approved on 6/10/2013 after submission of the window detail (A117, A148, A168, A233, A242). The lath and the stucco accessories (identified as Lath Inspection P-042) were inspected and approved by CBSI Driscoll on 12/21/2012 (A169, A224, A232, A241). CBSI Driscoll passed 510 Bellevue for final inspection (Final Inspection P-095) on 6/19/2013 (A118, A234).

The building envelope items comprising the code violations were constructed by Carpentry, and inspected and approved by CBSI Driscoll, on or before the lath inspection which occurred on 12/21/2012 (A118, A157). None of the items in the code violation notices were cited or even noted by CBSI Driscoll during the inspection process. The Certificate of Occupancy (“CO”) was issued on

July 26, 2013, in which the County certified that 510 Bellevue was code compliant (A228).

510 Bellevue was designed by Russell Johnson under contract with the Homeowners (A115, A119, A147, A158-A159). Mr. Johnson was a friend and neighbor of the Homeowners. (*Id.*) There is no record of Mr. Johnson being a licensed Delaware architect. 510 Bellevue was designed with atypical techniques and materials for residential construction, and its design was more typical for commercial construction (A245).

Defects in the designs of 510 Bellevue was addressed in litigation, and the matter was settled for a nominal settlement payment to the Homeowners. (*Id.*) Not being able to achieve their goals in litigation, the Homeowners contacted the County on or about 10/07/2015 (A180, A237). As the Homeowners explained at the LIRB hearing, it “was our last chance. So October 5th, we made a call” (A180).

On 11/5/2015, CBSI Michael Fox met with the Homeowners and their expert witness Mr. Frank Peter of Cogen Building Diagnostics. (A110, A182, A239). They walked the premises together and discussed the expert report submitted in the litigation (“Cogent Report”). CBSI Fox inspected the premises of 510 Bellevue with the Homeowners and Mr. Peter for a total of 44 minutes from 9:44 a.m. to 10:28 a.m. (*Id.*; A102). It was revealed during the Litigation that Mr. Peter is not a Delaware licensed structural engineer, architect, or home inspector

(A195). In fact, Mr. Peter admitted during the LIRB hearing that he does not hold a professional license in any state (A176, A195).

CBSI Fox did not perform any invasive testing, despite citing Carpentry Unlimited for numerous items that are hidden underneath the building exterior (A103, A105, A189). CBSI Fox did not inspect the second-floor window, although he cited Carpentry Unlimited for the window not closing properly (A89, A104, A132, A187). The Homeowners admitted during the LIRB hearing that the window could be closed (A179).

CBSI Fox did not inspect the roof, although he cited Carpentry Unlimited for numerous violations pertaining to the roof (A132, A164, A184, A193-A194). CBSI Fox did not witness any water penetration into the building envelope, although he cited Carpentry Unlimited for numerous code violations related to the water penetration (A106, A185). CBSI Fox did not take photos of the alleged violations (A184). Every violation cited by CSBI Fox refers to the Cogent report (A89-A91)³.

³ Based on RTSC and LIRB Decisions, the County is pursuing Carpentry Unlimited's bonding company in amount of One Hundred Fifty Thousand Dollars and No Cents (\$150,000.00).

ARGUMENT

- I. WHETHER ON *CERTIORARI* REVIEW THE TRANSCRIPTS OF THE INFERIOR TRIBUNALS SHOULD HAVE BEEN PART OF THE RECORD ON REVIEW FOR THE LIMITED PURPOSE OF DETERMINING WHETHER THE INFERIOR TRIBUNALS EXCEEDED THEIR JURISDICTION, COMMITTED ERRORS OF LAW, OR PROCEEDED IRREGULARLY.

A. Question presented.

Whether the Superior Court committed legal error by failing to consider the hearing transcripts of the RTSC and the LIRB proceedings for the limited purpose of determining whether the inferior tribunal exceeded its jurisdiction, committed errors of law, or proceeded irregularly (A255-A257).

B. Scope of review.

Legal and constitutional questions are reviewed *de novo* by the Delaware Supreme Court. *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013), *as corrected* (Aug. 15, 2013).

C. Merits of argument.

The Superior Court committed legal error by failing to consider the hearing transcripts and other documents returned by County as part of the certified record when determining whether County exceeded its jurisdiction, committed errors of law, or proceeded irregularly.

Carpentry Unlimited did not ask the Superior Court to evaluate the evidence presented to the inferior tribunal but asked the trial court to review the hearing transcript and other documents returned in response to the writ to verify errors of law and irregularities that occurred during the proceedings below.

The irregularities complained of such as the exclusion of a critical witness, inappropriate burden shifting, and the agency's failure to adhere to its own procedural requirements raises issues of fundamental fairness and adequate due process that warrant a more stringent review by the Superior Court.

Unlike the Justice of the Peace Courts, RTSC and LIRB proceedings do not have pleadings or docket entries available for review. The entire RTSC and LIRB proceedings are recorded, however.

The Superior Court's Order stated "[t]he bases for the petition involve alleged errors and irregularities in the Board's decision, but consideration of those alleged errors would require a searching review of the Board's decision and the underlying factual record."

The scope of review as described by the Superior Court above constitutes legal error because the RTSC and LIRB decisions should have been considered by the Superior Court. *In re Butler*, 609 A.2d 1080, 1082 (Del. 1992).

1. Common-law writ of *certiorari*

“A writ of *certiorari* is a writ issued by a superior court to an inferior court of record, requiring the latter to send to the former some proceeding therein pending, or the record and proceedings in some cause already terminated, to the end that a party who considers himself aggrieved by the determination of his rights by the inferior court, without or in excess of its jurisdiction or without compliance with the requirements of law....” Woolley, *Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware*, § 894, pg. 623 (1906).

At common law the writ of *certiorari* was an original writ issuing out of the King’s Bench or Common Pleas, and become a part of the judicial process of the court of Delaware by force of the statute which provides, that ‘The judges of the Superior Court may hear and determine all and all manner of pleas *** as fully and amply, *** as justices of the King’s Bench, Common Pleas and Exchequer of England *** may or can do.

[*Id.*]

The jurisdiction of the King’s Bench, as described by Sir William Blackstone in the *Commentaries of the Laws of England* (1765-1769), suggests that the application of the writ in the Sixteenth Century was more expansive than its present application:

THE jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove the proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and other to do what their duties requires, in

every case where there is no other specific remedy. **It protects the liberty of the subject, by speedy and summary interposition.**

[Sir William Blackstone, Commentaries of the Laws of England, Book 3, Chapter 4, Of the Public Courts of Common Law and Equity (1765-1769) (emphasis added).]

Sir William Blackstone describes the King's Court as a court of appeal:

FOR this court is likewise a court of appeal, into which may be removed by writ of error all determinations of the court of common pleas, and of all interior courts of record in England: and to which a writ of error lies also from the court of king's bench in Ireland. Yet even this so high and honorable court is not the *dernier resort* [last resort] of the subject; for if he be not satisfied with any determination here, he may remove it by writ of error in the house of lords, or the court of exchequer chamber, as the case may happen, **according to the nature of the suit, and the manner in which it has been prosecuted.**

[*Id.* emphasis added].]

The nature of the suit and how the proceedings were conducted are within the purview of court in response to the writ. Blackstone's language suggests that the King's Court had significant authority to ensure that inferior tribunals were exercising their authority in compliance with law. If not, the King's Court had the power to remove or enjoin the proceedings. *Id.*

Blackstone's description of the jurisdiction of the King's Court is consistent with Victor B. Woolley's description of the Superior Court's jurisdiction on *certiorari* review:

As a broad general rule, a writ of certiorari lies from the Superior Court to inferior tribunals, to correct errors of law, to review

proceedings not conducted according to law, and restrain an excess jurisdiction.

[Woolley § 896, pg. 624.]

2. Review On Certiorari Is Confined To The Record

Victor Woolley describes *certiorari* review as a limited review on the record:

It is a general rule that on *certiorari*, in ascertaining whether or not the inferior court or tribunal has exceeded its jurisdiction or has proceeded irregularly in making the determination complained of, the reviewing court is confined to the consideration of the record returned in obedience to the writ, by which error, if any, must appear, and the **court can hear no evidence aliunde** to show jurisdiction or regularity of the want of it.

[Woolley § 896, pg. 624 (emphasis added.)]

According to Woolley, the first step in the process is for the inferior tribunal “to make and certify ***a true transcript of all the docket entries of any cause before him” . . . “without indicating to him the purpose for which the transcript is being used.” [Woolley § 902, pg. 628.] The transcript is obtained at the inception of the proceedings for two purposes:

[F]irst, to possess evidence of the form and contents of the record, so as to be protected against any subsequent alternation or amendment of the record by the justice, and second, to produce before the prothonotary evidence of a judgment below, showing the names of the parties, the determination of the action and the amount of the debt, thereby enabling him before the writ issued, to take the recognizance in favor of the proper party for a sufficient amount.

[Woolley § 902, pg. 629.]

After the filing of the transcript and *praecipe*, the Superior Court issues the writ of *certiorari* which contains very broad language:

DO COMMAND YOU that the Record and Proceedings aforesaid, **with all things touching the same and concerning the same, as fully and entire as before you they remain,** to OUR JUDGES OF OUR SAID SUPERIOR COURT

[Woolley § 907, pg. 333 (emphasis added).]

If hearing transcripts would have been available, the expansive language of the writ suggests that they would have been made part of the record for the limited purpose of examining how the inferior tribunal conducted the proceedings. The language used by Woolley is equally broad:

He is not bound send up matters of evidence, but he must send up **everything which shows the proceeding**. While the writ of *certiorari* commands that the record be returned, a transcript of the record, for the purpose has long considered the record.

[Woolley § 907, pg. 333 (emphasis added).]

A hearing transcript, something not in existence at the time of Woolley, contains evidence in the form of witness testimony, but the transcript equally shows procedure or how the inferior tribunal conducted the proceedings.

Because the hearing transcript shows both evidence and procedure and the writ requires to send up everything that shows the proceedings, this lends to the conclusion that the hearing transcript, if available at the time, would have been part of the record.

This view is consistent with the Supreme Court of the State of Illinois' interpretation of *certiorari* review:

That writ brings up a full and complete transcript of the record of the proceedings of which complaint is made, and when brought up the superior court tries the case on the record alone. * * * The trial is had by an inspection of the record,--not on any issue of fact, but of law, rather, as on a writ of error." In *Commissioners v. Supervisors*, 27 Ill. 143, it is said: 'When issued and served, it becomes the duty of the inferior court, or body to whom it is directed, to transmit a full and complete transcript of the record of the proceedings of which complaint is made, properly certified, to the court awarding the writ.'

[*Gerdes v. Rosell Champion*, 108 Ill. 137, 141 (Ill. 1883).]

The American Jurisprudence also provides that the return of the writ should include the entire record or the full transcript of the below proceedings. 14 *Am. Jur. 2d Certiorari* § 82.

A more expansive reading of the writ is more consistent with its purpose which is to ensure adequate due process. See *Reise v. City of Newark*, 746 A.2d 271, 274 (Del. 2000) and *Shoemaker v. State*, 375 A.2d 431 (Del. 1977); see also *Lake v. State*, 928 N.E.2d 1251, 1256 (Ill. 2010).

A more expansive view of the writ is also consistent with the procedures outlined in *Woolley On Delaware Practice*. Under limited circumstances, the Superior Court was permitted to review and even hear additional evidence to resolve an issue of jurisdiction or to determine whether the inferior tribunal proceeded contrary to law.

In its pertinent parts, Woolley’s reads:

The court heard evidence upon certiorari when an exception alleged as error a matter of irregularity which did not appear upon the record, as in the case where the fact as assigned as error, was that the plaintiff below, who sued as administrator, had been removed from his office before judgment, and this error did not appear upon the record. . .

[T]he court heard evidence as to the fact of abode, and permitted proof to be given that the defendant did not reside in the State, but on certiorari to a justice’s judgment rendered by confession, the court refused to allow the defendant to contradict the record by denying that he confessed the judgment for the sum stated.

[Woolley § 898, pg. 626.]

Thus, *certiorari* review does not entirely preclude the court from reviewing any evidence. The court may review evidence, on a limited basis, to fill gaps in the record to determine if the inferior tribunal exceeded its jurisdiction, proceeded irregularly, or contrary to the requirements of law. Woolley notes, however, that the “court will avoid as much as it can, any consideration of the evidence produced at the trial below.” [Woolley § 938, pg. 651.]

3. *Black v. LIRB*

In *Black v. LIRB*, this Court noted that “the transcript of the proceedings is not a proper part of the record, at least in the context of certiorari review of a Justice of the Peace proceeding.” 117 A.3d 1027, 1031 (Del. 2015). The *Black v. LIRB* decision was referring to *Maddrey v. Justice of the Peace Court 13* which

addressed the scope of *certiorari* review of summary judgment possession cases in the Justice of Peace Courts. 956 A.2d 1204 (Del. 2008).

In *Maddrey*, the Court noted that General Assembly intended summary possession cases to end quickly without any further evidentiary review. *Id* at 1215. The Court explained that “[l]andlords need to know whether they may move forward and tenants need to know whether they may remain on the premises for the balance of the lease or whether they must move on.” *Id.* County code proceedings do not have the same exigency and involve more substantial property rights.

The United States Appeals Court for the Third Circuit in *Lecates v. Justice of the Peace No. 4* has stated that Delaware’s Justice of the Peace Courts “are not courts of record; proceedings neither recorded nor accompanied by published precedential opinions.” 637 F.2d 898 (D. Del. 1980). In most cases, aside from summary possession cases, parties are entitled to trial *de novo* in the Court of Common Pleas.

Both the RTSC and LIRB proceedings are recorded and the rules for each require a written decision at the conclusion of the hearing. Unlike the Justice of the Peace Courts, there is not a detached and neutral magistrate available in County code proceedings. Except for writ of *certiorari*, the County’s actions are only reviewed by the LIRB, which comprises of three County Executive appointees.

The County essentially reviews its own actions in issuing code violations, which could potentially lead to decisions which are self-serving.

Carpentry Unlimited suggests that this Court should adopt the approach used by the Superior Court in *395 Associates, LLC*, 2006 WL 2021623 (Del. Super. 2006). In *395 Associates, LLC*, the Superior Court reversed the LIRB's finding that the plaintiff waived the statute of limitations based upon the LIRB's erroneous application of the doctrine of waiver. *Id.* at *9.

The Superior Court also remanded another issue back to the LIRB to make adequate factual findings to support its conclusion that the statute of limitations had not expired. *Id.* It appears that the Superior Court, when making these findings, had reviewed the transcript but only within the confines of *certiorari* review. *Id.* at 3-5.

Carpentry Unlimited suggests that this Court adopt the approach taken in *395 Associates LLC* and remand these proceedings back to the Superior Court for further consideration.

II. WHETHER THE CARPENTRY UNLIMITED WAS AFFORDED ADEQUATE DUE PROCESS IN THE COUNTY CODE PROCEEDINGS UNDER CIRCUMSTANCES WHERE THE COUNTY IS PURSUING PAYMENT ON THE STATUTORY COMPLIANCE BOND IN THE AMOUNT OF \$150,000 WITHOUT CARPENTRY UNLIMITED HAVING AN OPPORTUNITY TO PRESENT HIS CASE TO A LEGALLY-TRAINED AND DETACHED/NEUTRAL DECISION MAKER.

A. Question Presented.

Whether Carpentry Unlimited was afforded adequate due process through the County code proceedings, under circumstances where the County wishes to execute on \$150,000 statutory compliance bond, without Carpentry Unlimited having the opportunity to present his case to a legally-trained and detached/neutral decision maker. (A258-A259).⁴

⁴ The issue presented under Prong II was initially raised on pages 8 and 9 of the Reply Brief submitted by Carpentry Unlimited in the below proceedings. (A258-259). The Order issued by the Superior Court finding such a restrictive scope of review even when determining whether the inferior tribunal violated Carpentry Unlimited's due process rights raises grave public policy concerns. Therefore, under Supr. Ct. R. 8, the interests of justice warrant review by this Court whether the County's code violation proceedings afford adequate due process prior to the County depriving individuals of substantial property interests without meaningful judicial review. *See Shoemaker v. State*, 375 A.2d 431, 438 (Del. 1977).

B. Scope of Review.

Constitutional questions are reviewed *de novo* by the Delaware Supreme Court. *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013), *as corrected* (Aug. 15, 2013).

C. Merits of the Argument.

To the extent that the hearing transcript cannot be considered on *certiorari* review to the Superior Court, or even if the Superior Court could review the transcript without considering the evidence below, the County code proceedings, at least in this case, involve significant property rights and warrant adequate judicial review. Despite significant property interests at stake, there is no legally-trained and neutral/detached judge as part of the County's Code proceeding process.

This Court has stated:

A question of grave public policy and interest is involved, and whatever may be the rule in other jurisdictions, whether founded on statute or practice, we know of no authority in this state which forbids this court, in a *certiorari* proceeding, to determine the constitutionality of a statute....

[*Shoemaker v. State*, 375 A.2d 431, 438 (Del. 1977).]

Under the principles of fundamental fairness and due process of law, Carpentry Unlimited was entitled to have his case heard by an unbiased, legally-trained judge at some time during the County Code proceeding proceedings. The Administrative Procedures Act does not apply to County Code proceedings leaving a gap in the statutory framework.

1. Right To A Legally-Trained Judge Somewhere During The Process

This Court has held “that in Delaware, by virtue of the state constitution and general due process principles, a civil defendant’s due process right to a ‘meaningful opportunity to be heard’ entails the right to a jury trial and to a legally-trained judge at some point during the process.” *Lecates v. Justice of Peace Court No. 4*, 637 F.2d 898, 911 (Del. 1990). Debt actions are encompassed within this constitutional guarantee. *Id.* at 910.

In this case, the County wishes to execute on a statutory bond in the amount of \$150,000.00 based upon the outcome of these proceedings (A51-A57). The bond comprises of contractual obligations and these obligations are currently in dispute. Carpentry Unlimited is the principal of the statutory compliance bond, Fidelity & Deposit Company of Maryland is the surety, and the County is the obligee. These are contractual rights that warrant adjudication by a court.

In accordance with *Lecates*, due process requires that Carpentry Unlimited have the opportunity to present his case to a legally-trained judge sometime during the process. In addition to executing on the statutory compliance bond, County has fined and continues to fine Carpentry Unlimited \$200 per day until the alleged violations are remediated (A96). Thus, Carpentry Unlimited is in jeopardy of losing significant property rights without any availability of relief, but through *certiorari* review.

2. Right To A Detached and Neutral Magistrate

The United State Supreme Court has held that procedural due process requires that an administrative hearing be conducted by a neutral magistrate. *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S. Ct. 1011, 25 L.E.2d 287 (1970). It is critically important that there be a neutral and detached magistrate under circumstances where the government has a pecuniary interest in the outcome of the proceeding. *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 55-56, 114 S. Ct. 492, 126 L.Ed.2d 490 (1993).

“Essential to a fair hearing is the right to an unbiased judge....The due process requirement of an impartial decision maker is applied more strictly in administrative proceedings than in court proceedings because of absence of procedural safeguards normally available in judicial proceedings.” *Ventura v. Shalala*, 55 F.3d 900, 902 (3rd Cir. 1995).

In this case, Carpentry Unlimited had a RTSC hearing before the Hearing Officer employed by the County followed by a subsequent hearing on appeal to the LIRB. The LIRB is also a subdivision of the County’s Department of Land Use. The LIRB is comprised of three board members who are appointed by the County Executive. 9 *Del. C.* § 1315; Section 02.05.103 of the County Code. Except for

certiorari review, there is no independent review of RTSC or LIRB decisions outside of the Department of Land Use.

The County inspected all phases of construction of 510 Bellevue and issued the CO on July 26, 2013 (A14). The weather barrier was inspected and approved by County (A224-A225). The major source of contention between the parties was the installation of one layer of Tyvek stucco wrap (A301-A305). During the deliberations, the dissenting Board Member Williams stated he “put a number of projects in New Castle County, Wilmington, Delaware area where one layer of WRP stucco wrap Tyvek is a condition” (A312).

Interestingly, if the County approved the installation of one layer of Tyvek stucco wrap on this project, and numerous other projects as noted by Mr. Williams during his deliberations, the County could potentially have a great interest in shaping the outcome of these proceedings. Therefore, the County is an interested party and should not be able to make the final decision with respect to Carpentry Unlimited’s liability under the statutory compliance bond. Therefore, adequate review is necessary to ensure that Carpentry Unlimited was afforded adequate due process by the County.

Accordingly, the RTSC and LIRB decisions should be quashed in their entirety as the proceedings violated Mr. Garber’s right to adequate procedural due process. *Goldberg*, 397 U.S. at 271.

III. WHETHER THE SUPERIOR COURT COMMITTED LEGAL ERROR BY FAILING TO FIND THAT THE INFERIOR TRIBUNALS FAILED TO ADEQUATELY SET FORTH ITS FACTUAL FINDINGS AND APPROPRIATE LEGAL STANDARDS AS TO WHY THE STATUTE OF LIMITATIONS DID NOT BAR THE ALLEGED CODE VIOLATIONS.

A. Questioned Presented.

Whether the Superior Court committed legal error by failing to find on the face of the record that the RTSC and LIRB decisions failed to adequately set forth sufficient factual findings and the appropriate legal standards as to why the statute of limitations should not bar the alleged code violations. (A17-A21; A252-A257.)

B. Scope of Review.

Legal questions are reviewed *de novo* by the Delaware Supreme Court. *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013), *as corrected* (Aug. 15, 2013).

C. Merits of the Argument.

Section 6.12.002 of the Code provides that “[v]iolations subject to administrative enforcement shall be commenced within three (3) years as provided in 10 *Del. C.* § 8106.” Accordingly, the County does not have authority to issue code violations outside of three years from time the violations came into existence.

In its answering brief, the County concedes that the “time of injury” is the appropriate legal standard to determine the date as to when the statute of limitations begins to run (Resp. Answering Br., p. 12). Despite making this

concession for the first time, the County appears to still maintain the position that the issuance of the CO is the date when the statute of limitations began to run.

There is no legal basis to measure the “time of injury” from the issuance of the certificate of occupancy. This "bright-line rule" as described by the County is arbitrary and capricious and contrary to long-standing principles of Delaware law. Under Delaware law, the statute of limitations begins to run on the date of the wrongful act/or the time of injury.

The law is well established “that a quasi-judicial tribunal must state the basis for its decision in order to allow judicial review.” *Christiana Town Center, LLC v. New Castle County, LLC*, 2004 WL 2921830, *2 (Del 2004). Furthermore, the decision issued by the administrative agency must state the reasons underlying the result and must adhere to the controlling statutory and decisional standards. *Id.* (citing *County Council of Sussex County v. Green*, 516 A.2d 480, 481 (Del. 1986)). The RTSC and LIRB decisions fail to satisfy the minimal standards of an administrative decision, i.e., to set forth the appropriate controlling and decisional standards and to adequately set forth the reasoning behind the decision to permit judicial review.

It is well established under Delaware law that the time of injury occurs at the time of the wrongful act. *Dambro v. Meyer*, 974 A.2d 121, 126 (Del 2009.) The RTSC and LIRB decisions are devoid of any factual findings or analysis to

establish the time of injury (A95, p. 7; A224-A225, pp. 136-137). The “time of injury” was not discussed in the RTSC and LIRB decisions nor was the term “time of injury” mentioned during the LIRB deliberations (A311-A316; Resp. Ex. 14). Likewise, there is no adequate factual basis or appropriate legal analysis to establish tolling, which is the County’s burden. *Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26 at 43.

The County admitted that **“the question of whether the inspections occurred, or were approved, was never in factual dispute and the County introduced evidence of the inspections into evidence.”** (Answering Br., p. 31). Thus, the County cannot be “blamelessly ignorant” of lack of knowledge of the alleged code violations because it admittedly inspected and approved the building envelope and the installation of the stucco construction more than three years prior to the issuance of the code violations.

During the LIRB hearing, the County erroneously represented to the Board that there were judicial decisions to support its position that CO in code violation establishes the time period when the SOL begins to run:

The hearing officer’s findings is consistent with the County’s long-held position that’s also been represented in issues before this case and **upheld in courts that the three years begins at the date the final c.o. for the property is issued. And that date was July 26, 2013.**

[A171 p. 83 (emphasis added).]

The County's representation did not accurately reflect Delaware law, and resulted in an erroneous finding by the LIRB. The statement was highly prejudicial to Carpentry Unlimited because the members of the LIRB are not legally trained. (See Prong II discussing Carpentry Unlimited's fundamental right of having the opportunity to present his case to a legally-trained judge at some time during the process.)

Notably, the issue as to whether the certificate of occupancy constitutes the "time of injury" was not before the court in *395 Associates, LLC v. New Castle County*, 2006 WL 2021623 (Del. Super. 2006). An administrative agency is required to base its decision on valid statutory and decisional standards, which the LIRB decision does not satisfy. *Christiana Town Center*, 2004 WL 2921830 at *2.

On the face of the record, the LIRB misapplied the statute of limitations:

Applicant relied upon the lath inspection in support of its statute of limitations argument. That inspection was approved on 12-21-2012. The County showed, however, through its Exhibits A and B, the Applicant's reliance on the date of the Lath inspection to support its statute of limitations argument was misplaced. County Exhibit A, page five demonstrated that the **weather barrier inspection (P-032) failed on 12/11/2012. This is significant as it put Carpentry Unlimited on notice of certain Code defects. The weather barrier inspection did not pass until June 10, 2013 (less than three years before issuance of the Carpentry Unlimited Violation Notice.)** County Exhibit A, page six, County Exhibit B shows some of the Code violations that are subject of this appeal are explicitly included on the weather barrier checklist that did not pass until June 10, 2013, including IRC 703.1, IRC 703.8, and IRC 703.6.3.

[A224-A225.]

The LIRB admits, particularly identifying IRC 703.1, IRC 703.8, and IRC 703.6.3, that many of the Code violations were part of the weather barrier inspection. Based upon the above findings, the LIRB found that the weather barrier was inspected on 12/11/2012 and initially failed but was subsequently passed by the County on June 10, 2013. Also noteworthy is that the lath inspection occurred on 12/21/2012. The LIRB then erroneously measured the statute of limitations from June 10, 2013.

The County was on clear notice of all violations relating to the lath and weather barrier in December of 2012, particularly those violations involving IRC 703.1, IRC 703.8, and IRC 703.6.3. Once the County is on notice or should have been on notice of the violations, the statute of limitations begins to run. *Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 43 (Del. Ch. 2012).

The County inspected the weather barrier on 12/11/2012 and apparently found some violations which Carpentry Unlimited apparently corrected prior to June 10, 2013. The factual findings are not clear in this regard. Thus, by December 21, 2012, the statute of limitations began to accrue and expired prior to the County issuing the code violations on January 20, 2016 (A89-A91).

On the face of the record, it is clear that both the RTSC and LIRB decisions erroneously applied 10 *Del. C.* § 8106. The County had no statutory authority to

issue the code violations outside of three years from time the violations came into existence.

Thus, this Court should quash the RTSC and LIRB decisions in their entireties as contrary to law.

IV. WHETHER THE SUPERIOR COURT COMMITTED LEGAL ERROR BY FAILING TO FIND THAT THE INFERIOR TRIBUNALS PROCEEDED IRREGULARLY AND CONTRARY TO LAW BY RELYING ON THE HOMEOWNERS' EXPERT TO ESTABLISH THE CODE VIOLATIONS AND PRECLUDING THE TESTIMONY OF CERTIFIED SITE & BUILDING INSPECTOR DRISCOLL AT THE LIRB HEARING.

A. Questions Presented.

Whether the Superior Court committed legal error by not finding on the face of the record that the inferior tribunals proceeded irregularly and contrary to law by relying on the homeowners' expert, Frank Peter of Building Diagnostic, when issuing the County code violations (A23-A28; A258-A262) and excluding the testimony of a critical witness, Certified Site & Building Inspector Driscoll (A32-A34; A258-A262).

B. Scope of Review.

Legal questions are reviewed *de novo* by the Delaware Supreme Court. *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013), *as corrected* (Aug. 15, 2013).

C. Merits of the Argument.

The County proceeded irregularly and contrary to law by relying on the homeowners' expert report to support the alleged code violations. Each any every violation on the notice references the Cogent report: "Area of Violation: see "Cogent" report 5/12/14 (updated 9/30/2015)." If the expert report was not needed

to form the basis of the code violations, then Investigator Fox had no basis to reference the report to support each alleged code violation.

The County is only authorized to accept reports of inspection “by approved agencies or individuals.” Section 6.03.011(G) of the County Code. Mr. Frank Peter of Cogent Building Diagnostics is not an approved inspector or expert for the County, therefore, the County violated its own procedures.

The Cogent report was biased as it was prepared on behalf of the Homeowners for litigation against Carpentry Unlimited. Notably, Mr. Peter’s testing methods had been previously rejected by the Superior Court in *Wiercinski v. Brescia Properties, LLC*, C.A. No. 11C-12-015.

Next, there was no basis in the LIRB rules for the Chairman to exclude the witness testimony of CSBI Driscoll. CSBI Driscoll was the inspector who approved the lath and weather barrier inspection of 510 Bellevue in December 2012. His testimony would have been probative to establish the timeline when the statute of limitations began to accrue and to establish the County’s practice of authorizing one layer of Tyvek stucco wrap.

The LIRB rules allow witnesses to testify on subjects that were previously discussed at the RTSC hearing. Article V, Section 6, of the Rules of Procedure of the Board of License, Inspection and Review of New Castle County, State of Delaware, reads:

Article V Section 6. All witnesses who wish to testify before the Board shall testify under oath if the Board deems necessary. The applicant and the County may submit to the Board such evidence that they desire to offer....

Thus, the Chairman of the Board under the LIRB rules had no basis in law to exclude Mr. Driscoll's testimony, and his action was contrary to law and deprived Carpentry Unlimited of adequate due process.

CONCLUSION

For the reasons stated herein, Appellant/Petitioner-Below Carpentry Unlimited submits that the Superior Court committed errors of law and respectfully requests that this Court remand the proceedings back to the Superior Court in accordance with Argument I or quash the RTSC and LIRB decisions in their entireties pursuant to Arguments II-IV.

COHEN SEGLIAS PALLAS
GREENHALL & FURMAN, P.C.

/s/ Scott T. Earle

Scott T. Earle, Esq. (DE I.D. No. 4541)

Nemours Building, Suite 1130

1007 N. Orange Street

Wilmington, DE 19801

(302) 425-5089

Searle@cohenseglias.com

*Attorneys for Appellant, Kevin Garber t/a
Carpentry Unlimited*

Dated: June 29, 2017