



**IN THE SUPREME COURT OF THE
STATE OF DELAWARE**

KEVIN GARBER t/a CARPENTRY)
UNLIMITED)
) No. 185, 2017
Petitioner Below/Appellant,)
) On appeal from the Superior
v.) Court of the State of Delaware
) C.A. No. N16A-05-012 AML
NEW CASTLE COUNTY DEPARTMENT)
OF LAND USE AND NEW CASTLE)
COUNTY BOARD OF LICENSE,)
INSPECTION & REVIEW)
)
Respondent Below/Appellees.)

APPELLEES' CORRECTED ANSWERING BRIEF

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Dated: August 3, 2017

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NATURE OF PROCEEDINGS

Appellant, Kevin Garber t/a Carpentry Unlimited (“Garber”) has appealed from a Superior Court *certiorari* decision upholding an administrative decision of the New Castle County Board of License, Inspection and Review (the “Board”). Garber is a building contractor who is registered and licensed with the New Castle County Department of Land Use (the “Department”). (B3, 6). The Board hears appeals by anyone aggrieved by a Department administrative order concerning any New Castle County (the “County”) license or inspection.¹

On January 20, 2016, the Department cited Garber for thirteen separate violations of Chapter 6 of the *New Castle County Code*, known as and referred herein as the “Building Code,” concerning construction he performed while building a new home located at 510 Bellevue Road (the “Violation Notice”). (A55-57). On February 9, 2016, a County hearing officer held a five-hour pre-deprivation Rule to Show Cause (“RTSC”) Hearing affording Garber the opportunity to contest the violations. (B3-8). On February 24, 2016, the hearing officer issued a written decision (the “RTSC Decision”) finding Garber responsible for eight of the thirteen Building Code violations.² (B3-8).

¹ *New Castle County Code* § 6.12.003(A)

² Garber provided only the odd pages of the RTSC Decision in his Appendix; the full Decision is provided in the County’s Appendix at B3-8.

Garber appealed the RTSC Decision to the Board. (B9). On May 11, 2016, during an eight-hour hearing, the Board heard extensive argument and testimony and reviewed evidence from each side.³ At the end of the hearing, the Board deliberated and voted to affirm the hearing officer's RTSC Decision, finding the decision was neither arbitrary or capricious, nor contrary to law. (A63-85). On June 21, 2016, the Board issued its twenty-three page written decision ("Board Decision"). (A63-85).

On May 26, 2016, several weeks before the Board Decision was issued, Garber filed a Complaint in *Certiorari* alleging the Board committed legal errors and proceeded with irregularities.⁴ After full briefing of the matter, the Superior Court affirmed the Board's Decision by Order dated March 31, 2017.⁵

On April 28, 2017, Garber filed a notice of appeal to this Court. On June 28, 2017, Appellant filed his Second Corrected Opening Brief.⁶ This is Appellees' Answering Brief.⁷

³ *Garber v. New Castle County Dep't of Land Use*, 2017 WL 1224510, at *1 (Del. Super. Ct. Mar. 31, 2017).

⁴ See docket entry 1 on page A4 of the Appendix of the Opening Brief, herein referred to as (A4 D.I.1).

⁵ *Garber*, 2017 WL 1224510.

⁶ Appellant's Second Corrected Opening Brief shall be cited as "Opening Br."

⁷ Appellees New Castle County Department of Land Use and New Castle County Board of License, Inspection and Review jointly file this Answering Brief.

SUMMARY OF ARGUMENT

1. **Admitted in part; denied in part.** This is an action pursuant to a writ of *certiorari*. This Court has repeatedly held that *certiorari* review is not the functional equivalent of an appeal. The record appropriate for *certiorari* review is very limited.⁸ The record “is limited to the complaint initiating the proceeding, the answer or response if required, and the docket entries.”⁹ Any evidence received by the Board is not part of the record to be reviewed.¹⁰ Portions of the transcript of the Board Hearing may be a proper part of the record but only to the extent it contains the decision of the Board.¹¹ There is no reason for the Court to re-examine the well-established law controlling *certiorari* review.

2. **Admitted in part; denied in part.** If this Court affirms the Superior Court’s decision - which it should - the County intends to execute on a statutory compliance bond in the amount necessary to remediate the code violations and up to the full penal amount of the bond (\$150,000) because Garber has failed to

⁸ *Black v new Castle county Bd. of License, Inspection and Review*, 117A.3d 1027, 1032 (Del. 2015).

⁹ *Id.* at 1031.

¹⁰ *Id.*

¹¹ *Id.* (citing *Maddrey v. Justice of the Peace Court 13*, 956 A.2d 1213, 1216 (Del. 2008) (providing a transcript can be considered only to the extent it provides the lower tribunal’s decision); *Green v. Sussex County*, 668 A.2d 770, 773 (Del. Super. Ct. 1995), *aff’d*, 667 A.2d 1319 (Del. 1995) (“The transcript of the evidence below is not part of the reviewable record and the Court cannot examine the transcript in order to evaluate the adequacy of the evidence which supports the conclusion rendered below.”).

remediate the Building Code violations. The County denies it continues to fine Garber \$200.00 per day during the pendency of the appeal.

3. **Denied.** Garber failed to fairly present, in any proceeding below, a claim that he was deprived of the opportunity to present his case to a legally-trained and detached/neutral magistrate. Garber has failed to establish that the interests of justice now require this Court to consider his newly-raised claim. Consideration of this claim is barred by Supreme Court Rule 8.

4. **Denied.** The County's administrative process satisfies principles of fundamental fairness and due process. As evidenced by the Superior Court's reference to and quotation of RTSC Decision and the Board's decision,¹² the Court properly considered the decisions as part of the record before it for review. The Court should reject Garber's bald argument to the contrary. The Superior Court properly reviewed the limited record pursuant to standards applicable to *certiorari* review.

5. **Denied.** The Superior Court properly rejected Garber's argument regarding the statute of limitations. The Superior Court properly concluded that the Board's decision regarding the statute of limitations was based on its resolution of a factual dispute that was beyond the purview of limited *certiorari* review.

¹² *Garber*, 2017 WL 1224510.

6. **Denied.** The Superior Court properly held that Garber failed to show legal error on the face of the record or irregular proceedings related to the evidence relied upon by the Board or excluded by the Board. The Superior Court correctly held that the Board considered and weighed eight hours of evidence and argument and properly affirmed the hearing officer's RTSC Decision.

STATEMENT OF FACTS

Garber constructed a stucco home that fails to meet the minimum standards of the Building Code. (A55-57, 85). Soon after Garber completed construction, the homeowners noticed signs of water penetration in several areas of the home. (A67). The Department found multiple violations of the Building Code and concluded that Garber's failure to install exterior plaster properly and failure to provide a code-compliant weather-resistive exterior wall envelope were the main causes of the water penetration. (A74-76). Garber has had ample opportunity to correct the violations, but he has failed to do so. (A68). Thus, the County issued a Notice of Intent to collect statutory compliance bond proceeds necessary to correct the illegal work and bring the home into compliance with the Building Code. (A48).

A. Building Permit and Construction Issues

The Building Code requires contractors to register with the Department and to be licensed, insured and bonded prior to receiving building permits.¹³ Garber

¹³ *New Castle County Code* §§ 6.03.001, 002, 012. All references to "Article 3 - Administration" provisions of Chapter 6 of the *New Castle County Code* are to the provisions adopted by New Castle County Ordinance No. 08-118, effective January 1, 2009 until March 1, 2015. These code provisions were effective during Garber's 2011-2012 building contractor's license period and are applicable to construction work performed by Garber at 510 Bellevue Road. All references to "Article 12 - Violations, Enforcement, Administrative Appeal" provisions are to the provisions adopted by New Castle County Substitute 1 to Ordinance No. 15-010, effective March 1, 2015. These code provisions were effective and applicable

was a registered and licensed contractor in 2012 when he applied for, and was issued, a building permit to construct a 2,800 square foot single family home at 510 Bellevue Road. (A51, B4).

Garber broke ground in August of 2012, and the Department issued a certificate of occupancy for the home on July 26, 2013. (A67). Immediately upon moving into the home, the homeowners noticed problems with the home's construction, including water penetration in and around doors and windows, water inside of a wall above the fireplace, water inside of a closet, as well as miscellaneous window, roofing and stucco issues. (A67). The homeowners reported the problems to Garber and provided ample opportunity for Garber to correct the construction defects. (A68). As the water and moisture problems persisted, the homeowners pursued a claim under the new home warranty. (A68). During the course of the warranty litigation, the homeowners hired Frank Peter ("Peter") of Cogent Building Diagnostics. (A68). Peter prepared a fifty-seven (57) page report detailing construction defects for the primary purpose of providing guidelines for repair ("Cogent Report"). (A68).

On or about October 10, 2015, the Department's certified building and site inspector Michael Fox ("CBSI Fox"), received a complaint from the homeowners

to Garber's administrative enforcement action and are currently in effect. All referenced *New Castle County Code* sections are included in the County's appendix. The complete current *New Castle County Code* is available online at: "https://library.municode.com/de/new_castle_county/codes/code_of_ordinances".

concerning the issues identified in the Cogent Report. (B4 ¶ 2). The homeowners provided CBSI Fox a copy of the Cogent Report. (A74). CBSI Fox reviewed the Cogent Report and discussed the construction issues with Peter and the homeowner during a November 15, 2015 site inspection. (A74). CBSI Fox visually inspected the Property, both inside and out, and used the Cogent Report as a roadmap to facilitate his inspection and to confirm his observations. (A74). CBSI Fox reviewed the photographs in the Cogent Report and confirmed those photographs represented what he personally viewed. (A74). During his inspection, CBSI Fox identified myriad violations of the Building Code. (A74-76).

B. The Violation Notice

The Department has the power and authority to administer and enforce all provisions of the Building Code.¹⁴ Pursuant to this authority, the Department may issue violation notices and orders.¹⁵ On January 20, 2016, and based on his personal observations, CBSI Fox issued a Violation Notice for case #201509121, citing Garber for thirteen violations of the Building Code for work performed at the Property. (A55). For each violation referenced, CBSI Fox provided: 1) the applicable section of the Building Code that was violated; 2) directive for corrective action; 3) comments that explain the violations; and, 4) a reference to

¹⁴ 9 *Del. C.* § 2506.

¹⁵ 9 *Del. C.* §§ 2512-2514; *New Castle County Code* § 6.12.002(C)(1)(b).

the Cogent Report to help identify the area of violation. (A55-56). The Violation Notice notified Garber that a RTSC hearing would be held on February 9, 2016 to provide it an opportunity to contest the violations. (A57).

C. The Rule to Show Cause Hearing

If violations are not timely remedied, the Building Code provides that the hearing officer shall schedule a pre-deprivation show cause hearing allowing the contractor the opportunity to defend his conduct prior to any penalty being imposed.¹⁶ During the five-hour RTSC Hearing, the following individuals provided testimony concerning the violations associated with case #201509121: CBSI Fox; Mark Nauman, MacIntosh Engineering; Steven Szypulski, American Home Inspection Technologies; Kevin Garber, Carpentry Unlimited; Frank Peter, Cogent Building Diagnostics; Amy Podolsky, homeowner; and, Debbie Wartel, homeowner. (B3-8).¹⁷ During the RTSC Hearing, Garber presented several issues that are now before this Court.

¹⁶ *New Castle County Code* § 6.12.002(C)(1)(c). This section uses the term “Code Official” rather than “hearing officer.” Pursuant to the Building Code, “Code Official means the Department of Land Use employee designated by the General Manager who has the authority to administer and enforce this Chapter, or his or her duly authorized representative.” *New Castle County Code* § 6.02.001(definitions).

¹⁷ The hearing officer heard two separate cases concerning 510 Bellevue Road during the February 9, 2016 hearing. The official RTSC transcript provided in Record Exhibit 5 contains the transcription of both cases. The first 32 pages of the transcript pertain to case #201600071 and are not relevant to this matter. The relevant transcript for case #20150912 begins after page 32. Garber included

First, Garber argued that certain inspection reports indicate the statute of limitations had run on the named violations, and, therefore, the Department could no longer pursue corrections of the violations. (B5 ¶ 3). Competing argument was provided by the homeowner's attorney, who argued that the statute of limitations had not yet run because the Violation Notice was based upon the issuance date of the certificate of occupancy or, in the alternative, the time of discovery doctrine. (B5 ¶ 4). The hearing officer was unpersuaded by Garber's statute of limitation defense. (B6 ¶ 4). The hearing officer determined that statute of limitation started to run upon the issuance of the certificate of occupancy, and, accordingly, that the Violation Notice was timely. (B6 ¶ 4).

Second, Garber contended that it was inappropriate for CBSI Fox to reference the Cogent Report when he inspected the property. (B5 ¶ 3). CBSI Fox testified that he inspected the property and personally observed the violations or evidence of the violations. (B4 ¶ 2). In some instances, while evidence, such as water penetration or staining, of a code violation was plainly evident, CBSI Fox explained that some defects were hidden within the building envelope, i.e. between the stucco and the interior walls, and would not be visible without actual home deconstruction. (B4 ¶ 2, B4 ¶ 10). Ultimately, the hearing officer held:

miscellaneous pages of an unofficial transcription of the RTSC Hearing in his Appendix to the Opening Brief at A98-127.

It appears that New Castle County did perform an inspection using the Cogent report as a reference document (only) and violations that were found at the time of the inspection were based off visual observation by CBSI Fox. Some of the code violations listed overlap each other but nevertheless all violations do exist.

(B6 ¶ 5). Also, although CBSI Fox could not view certain defects without deconstructing a portion of the home's exterior, Garber admitted that he installed only one layer of Tyvek wrap between the stucco and the wood-based sheathing and contended that a single layer was code-compliant. (B7 ¶ 11). The hearing officer disagreed with Garber and held that the Building Code requires a "water resistive vapor-permeable barrier with the performance at least equivalent to two layers of Grade D paper" and the single layer of Tyvek did not meet this requirement. (B7 ¶ 11). The hearing officer further provided that any deviation from this code requirement would require the Department's approval of a code modification - which did not occur. (B7 ¶ 11).

Third, Garber argued that because the Department inspected the home and issued a certificate of occupancy, Garber should be absolved of all liability for the violations. (B5 ¶ 3). The attorney for the homeowner aptly explained that approved inspections and the issuance of a certificate of occupancy do not equate to a contractor's "pass" to violate the Building Code. (B5 ¶ 4).

On February 24, 2016, the hearing officer issued a written decision finding Garber responsible for eight of the thirteen violations identified by CBSI Fox;

specifically, violation numbers 1, 2, 3, 4, 5, 6, 12, and 13.¹⁸ (B7 ¶ 13). Upon a finding of violation, the hearing officer may impose administrative penalties, including fines, refusal to issue additional permits, and revocation or suspension of a contractor license, and take necessary remedial action to cure defective or illegal work.¹⁹ In the RTSC Decision, the hearing officer provided that, if the violations are not corrected, Garber would be assessed \$200.00 per day beginning on May 2, 2016 until the violations are corrected. (B7). In bold, all capital print, the RTSC Decision also provided: “You may appeal this decision pursuant to New Castle County Code, chapter 6, section 6.12.003. . . . Details of the New Castle County Code and the appeal process can be reviewed at www.nccdelu.org.” (B8). The referenced section allows a stay of the imposition of penalties during the pendency of the appeals process.²⁰ If a stay is requested, it will be granted unless the stay “would jeopardize the health, safety or welfare of the public.”²¹ Garber has made no representation of whether he has exercised his right to request a stay of the hearing officer’s penalty assessment.

¹⁸ The RTSC Decision also makes findings relevant to case #201600071 that are not relevant to this matter and should be disregarded.

¹⁹ 9 Del. C. §§ 2512-2514; *New Castle County Code* § 6.12.002(C)(9).

²⁰ *New Castle County Code* § 6.12.003.

²¹ *New Castle County Code* § 6.12.003(F).

D. Board of License, Inspection and Review Hearing

If a contractor is aggrieved by the decision of the hearing officer, the Building Code provides an appeal procedure to the Board.²² On March 7, 2016, Garber filed an application for a Board hearing to appeal the RTSC Decision. (B9). Appended to the appeal application form, Garber attached a list specifying eight (8) issues on appeal. (B11). Garber failed to raise any issue concerning the qualifications or education of the hearing officer. (B11). He also failed to allege that he was entitled to a detached/neutral decision maker. (B11).

A Board hearing was held on May 11, 2016. (A205). At the beginning of the Board hearing, the Department informed the Board that it intended to call Robert Bayshore as a witness. (A67 n.6). Garber's attorney objected and moved to exclude Bayshore's testimony because he did not testify at the show cause hearing. (A67 n.6). Garber then informed the Board that he intended to call Bill Driscoll as a witness. (A67 n.6). The Department's attorney objected and moved to exclude Driscoll's testimony because he did not provide testimony at the RTSC Hearing. (A67 n.6). The Board chairman sustained both objections and neither Bayshore nor Driscoll were permitted to testify at the Board hearing. (A67 n.6). The Board accepted testimony from the following individuals that previously testified at the RTSC concerning case #201509121: Kevin Garber, Carpentry

²² *New Castle County Code* § 6.12.003.

Unlimited; Steven Szypulski, American Home Inspection Technologies; CBSI Fox; Frank Peter, Cogent Building Diagnostics; Amy Podolsky, homeowner; and Debbie Wartel, homeowner. (A65-66).

During the approximately eight-hour hearing, the Board heard extensive testimony and argument from each side.²³ (A63-85). Both Garber and the Department provided argument and evidence concerning Garber's statute of limitations defense. (A82-83). The Board considered the factual and legal arguments made by the parties and concluded that the earliest the statute of limitations period began to run on July 26, 2013, the date the Department issued the certificate of occupancy. (A83). Thus, the Board found that Garber's statute of limitations defense was without merit. (A83).

The major point of the contention during the administrative proceedings was item 13 on the Violation Notice that cites Garber for failing to install the exterior plaster in compliance with the adopted standards. (A76-80). Throughout the

²³ The Board provided an audio recording of the entire hearing as part of the official record if the Superior Court deemed reference to the hearing was necessary. However, due to the length of the hearing and court precedent providing the transcript is not a proper part of the record, the Board did not transcribe the entire hearing. (*see, e.g., Black v New Castle County Board of License, Inspection and Review*, 117 A.3d 1027 (Del. 2015); *Mumford & Miller Concrete, Inc. v. Delaware Dept. of Labor*, 2011 WL 2082940, at *3 (Del. Super. Ct. Apr. 19, 2011) ("the transcript of the evidence below is not part of the reviewable record . . ."). In his attempt to reargue the merits of the case before the Superior Court, Garber provided selected excerpts from an unofficial transcript of the Board hearing that is not part of the record sent to the Superior Court by the Board. (A128-204).

proceedings, Garber admitted that he applied only one layer of Tyvek stucco wrap and maintained that one layer is a suitable water-resistive barrier and complies with the Building Code and the permit drawings. (A77, 79-80). The Board upheld the hearing officer's finding that both the Building Code and the permit drawings required the equivalent of two layers of Grade D paper under the stucco, and one layer of Tyvek stucco wrap is not the equivalent. (A79, B7 ¶ 11).

The record is clear. At no point before or during the Board hearing did Garber raise any issue concerning the qualifications or education of the hearing officer or of the Board members. At no point before or during the Board hearing did Garber contend that he is entitled to an opportunity to present his case to a detached/neutral decision maker. At no point before or during the Board hearing did Garber contend that Board was not a detached/neutral decision maker.

At the hearing's conclusion, the Board openly deliberated the issues before it and articulated its findings that the hearing officer's action was neither arbitrary, capricious, nor contrary to law. (A85). On June 21, 2016, the Board issued a twenty-three page decision affirming the hearing officer's findings. (A63-85).

E. New Castle County's Initiation of a Bond Claim

Garber provided the County with the Statutory Compliance Bond No. 8181400 issued by Fidelity & Deposit Company of Maryland. (A51). The compliance bond was executed by Garber and the surety. (A52). The compliance bond names the County as the beneficiary and is intended to cover costs and expenses relating to the enforcement of the Building Code, including the repair, replacement, or correction of any defective or illegal work performed by a licensed contractor if the licensed contractor fails to correct a violation.²⁴ (A51 ¶ 1). The compliance bond covers work performed under any permit issued during the January 1, 2012 to January 2013 license period and provides a penal sum of \$150,000. (A51, 52 ¶ 4). If the Superior Court's decision is affirmed by this Court, the County will file a demand with the surety to collect compliance bond proceeds to perform remedial work necessary to correct the code violations.

The terms of the compliance bond require that a claim must be instituted before the expiration of three years from the date the certificate of occupancy is issued, subject to tolling and accrual provisions of 10 *Del. C.* § 8106. (A52 ¶ 3). The compliance bond also provides that the principal will have the opportunity to contest the violations prior to collection of bond proceeds. (A52 ¶ 1). Since the certificate of occupancy was issued on July 26, 2013, to preserve the right to file a

²⁴ *New Castle County Code* § 6.03.001(B)(2).

claim under the Bond, the County notified the surety company of its intent to collect on July 7, 2016. (A48). The Notice of Intent clearly indicates that the County will not make a final demand for compliance bond proceeds until Garber exhausts his rights to appeal the administrative enforcement action. (A49).

F. Superior Court *Certiorari* Review

On May 26, 2016, Garber filed a Complaint for Writ of *Certiorari* seeking review of the RTSC Decision and the Board Decision. (A4 D.I.1). Garber's complaint failed to allege he was entitled to have his case heard by a legally-trained and detached/neutral decision maker. On March 31, 2017, after the parties fully briefed the issues, the Superior Court issued an Order denying Garber's petition and dismissing the writ.²⁵ The Court held, *inter alia*, that: 1) Garber failed to show that the Board proceeded illegally or in a manner manifestly contrary to the law when it reached its findings regarding the statute of limitations; 2) Garber failed to show a legal error on the face of the record or reversible irregularity in the Board finding that the hearing officer who issued the RTSC Decision acted neither arbitrarily or capriciously when finding that the violations exist; and 3) Garber failed to show the Board committed legal error or reversible irregularity by not allowing the testimony of Driscoll.

²⁵ *Garber*, 2017 WL 1224510.

ARGUMENT

I. GARBER WAIVED HIS CLAIM THAT THE COUNTY’S ADMINISTRATIVE ENFORCEMENT PROCESS DID NOT AFFORD HIM DUE PROCESS AND THERE ARE NO INTERESTS OF JUSTICE WARRANTING REVIEW OF THIS NEWLY-RAISED ISSUE.²⁶

A. Question Presented

Whether Garber waived his claim that procedural due process requires the opportunity to be heard by a legally-trained and detached/neutral magistrate where he failed to fairly raise the issue below; and, whether the interests of justice require this Court to consider this newly-raised claim.

B. Standard and Scope of Review

In general, this Court declines to review issues that were not fairly presented to the court below.²⁷ This Court reviews Rule 8 exceptions parsimoniously.²⁸ Newly-raised issues may be reviewed on appeal only in the interests of justice and for plain error.²⁹ This Court will review a newly-raised issue, only where “the trial court’s failure to confront an issue is basic, serious and fundamental in its character, and which results in manifest injustice.”³⁰ Plain errors are limited to

²⁶ This Argument is in response to Argument II of the Opening Brief.

²⁷ *Cassidy v. Cassidy*, 689 A.2d 1182, 1184 (Del. 1997) (citing Supr. Ct. R. 8).

²⁸ *Sabree Envtl. & Constr. v. Summit Dredging*, 2016 WL 5930270 (Del. Oct. 12, 2016).

²⁹ Supr. Ct. R. 8; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

³⁰ *Sabree Envtl. & Constr.*, 2016 WL 5930270, at *1 (citing *Cassidy*, 689 A.2d at 1184).

material defects on the face of the record and “must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”³¹

C. Merits

Garber contends that he is entitled to an unbiased, legally-trained judge at some time during the County Code proceedings.³² Garber’s argument cannot be considered in this appeal because: 1) Garber failed to fairly present the issue in the proceedings below; and, 2) the interests of justice do not warrant review of this newly-raised issue because the County’s administrative enforcement proceedings provide adequate due process.

1. Garber Failed to Fairly Present the Issue in the Prior Proceedings

Rule 8 provides in relevant part that “only questions fairly presented to the trial court may be presented for review. . . .” Garber explains that he raised the issue in his reply brief to the Superior Court and contends this constitutes a fair presentation of the issue.³³ Garber’s argument fails for two reasons.

First, Garber states that he presented the issue on pages 8 and 9 of his reply brief before the Superior Court.³⁴ On those pages of his reply brief, Garber argued that the Board’s Decision should be reversed because the Board excluded

³¹ *Cassidy*, 689 A.2d at 1184.

³² Opening Br. 20.

³³ Opening Br. 19 n.4.

³⁴ *Id.*

testimony of Driscoll and heard testimony of Peters. (A258). Garber’s argument was focused on the Board’s evidentiary rulings, not the qualifications or education of the hearing officer and Board members. Buried in his evidentiary argument, and consisting of two lines in the reply brief, Garber contended the County cannot maintain a claim on Garber’s compliance bond because, according to Garber, a defendant has a right to a jury trial and to a legally trained judge at some point during adjudication.³⁵ (A259) This clearly cannot constitute a fair presentation of the issue to Superior Court as contemplated by Rule 8. This Court should reject Garber’s attempt to bootstrap a newly-raised issue into his previously-raised evidentiary argument before the Superior Court in an attempt to claim he preserved it for appeal.

Second, it is well-settled Delaware law that the failure to raise a legal issue in “the opening brief generally constitutes a waiver of that claim in connection with a matter under submission to the court.”³⁶ The reason for this rule is clear: a

³⁵ Garber curiously relies on *Lecates v. Justice of the Peace Court No. 4*, 637 F.2d 898 (Del. 1990), which addresses whether the appeal bond requirement required on certain appeals to Delaware courts operates to deny indigent defendants due process of law. (Opening Br. 8, 9.) This case has no bearing on the evidentiary issue argued by Garber nor does it support his claim that statutory compliance bonds required under the Building Code for licensed contractors implicate constitutional rights to a jury trial.

³⁶ *In re Asbestos Litig.*, 2007 WL 2410879, at *4 (Del. Super. Ct. Aug. 27, 2007) (citing *Stilwell v. Parsons*, 145 A.2d 397, 402 (Del. 1958); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993)).

reply brief is an opportunity to respond to the arguments set forth in an answering brief and is not an opportunity to present new issues.³⁷ Reply briefs should consist of only those materials necessary to respond to the answering brief and not to raise new issues.³⁸ Garber’s failure to raise the issue in his opening brief in the Superior Court constitutes a waiver of the claim.

The face of the record clearly shows that this issue was not fairly presented in the prior proceedings. Garber did not include the issue in the application for a hearing before the Board. (B9-11). Additionally, Garber did not include the issue in his *Certiorari* Complaint. (A4 D.I.1). Neither the Board’s Decision nor the Superior Court’s Order addressed the issue. A cursory reference to inapplicable case law as part of an unrelated argument is insufficient to preserve the matter for appeal. Consequently, Garber waived the issue.

³⁷ See, e.g., *Beatty v. New Castle County Bd. of Adjustment*, 1999 WL 743329, at *2 (Del. Super. Ct. July 8, 1999).

³⁸ See *Alston v. Pritchett*, 2015 WL 849689 (Del. Feb 26, 2015) (citing Supr. Ct. R. 14(c) (“Appellant shall not reserve material for reply brief which should have been included in a full and fair opening brief.”)); *Lampkins v. State*, 2010 WL 4735029, at *1, n.5 (Del. Nov. 22, 2010) (declining to address claim raised for first time in reply brief).

2. The Interests of Justice Do Not Warrant Consideration of Garber’s Newly-Raised Claim

Although this Court reviews Rule 8 exceptions parsimoniously, it may review a newly-raised issue on appeal when the interests of justice so require.³⁹ Garber cannot establish the interests of justice require review of his newly-raised issues. Garber’s contention that he was deprived adequate due process because he was not afforded an opportunity to present his case to legally-trained and detached/neutral decision maker somewhere during the process is simply erroneous. Initially, assuming *arguendo* that such a right could be established, Garber completely disregards the fact that the *certiorari* review provided by the Superior Court and the appeal provided by this Court provides an opportunity to be heard by neutral, legally-trained judges. However, and more importantly, the Building Code’s administrative enforcement provisions provide adequate due process.

a. Due Process Does Not Require an Opportunity to be Heard by a Legally-Trained Judge

To provide for the health and safety of its citizens, the General Assembly has provided the County broad authority to adopt rules and regulations to control, regulate and supervise “persons engaged in construction activities” and to provide for matters relating to construction of buildings and structures located in the

³⁹ Supr. Ct. R. 8.

County.⁴⁰ The County may adopt regulations requiring persons engaged in construction activities to register with the Department.⁴¹ The *Delaware Code* provides that the County shall require a building permit for all regulated construction work, and the permit holder shall perform all construction in compliance with the Building Code.⁴² State law specifically provides that no building “shall be constructed in any manner that would be in violation of the New Castle County Building Code as promulgated by the County Council or of any authorized order or rule of the Department of Land Use made and issued thereunder.”⁴³

The Department also has the power and authority to administer and enforce all provisions of the Building Code.⁴⁴ The Department may issue rules, notices or orders as necessary, assess fines, and take necessary remedial action to cure defective or illegal work.⁴⁵ The General Assembly also provided the County the authority to establish a Board of License, Inspection and Review and provide an appeal procedure for “any person aggrieved by the issuance, transfer, renewal,

⁴⁰ 9 *Del. C.* § 2502.

⁴¹ 9 *Del. C.* § 2504.

⁴² 9 *Del. C.* §§ 2509-2511.

⁴³ 9 *Del. C.* § 2509(b).

⁴⁴ 9 *Del. C.* § 2506.

⁴⁵ 9 *Del. C.* §§ 2512-2514.

refusal, suspension, revocation or cancellation of any County license, or by any notice, order or other action as a result of any County inspection”⁴⁶

Although the County has broad authority under state law to adopt and enforce a building code, its administrative processes must provide adequate due process. Due process is flexible, is based upon the procedures a particular situation demands, and requires the consideration of three factors: 1) the private interest affected by the administrative action; 2) the risk of erroneous deprivation of such an interest; and 3) the Government’s interest, including the fiscal and administrative burdens, that a substitute procedural requirement would create.⁴⁷

The property interests that Garber seeks to protect include the imposition of administrative fines and the collection of statutory compliance bond proceeds.⁴⁸ There is not a risk of erroneous deprivation of that property interest. The administrative enforcement provisions require a pre-deprivation hearing and an opportunity to correct violations before penalties are assessed.⁴⁹ Garber had a right to appeal from the RTSC decision, which he exercised. Garber also had the right to request a stay of the imposition of fines, penalties, or any Department action

⁴⁶ 9 *Del. C.* § 1315.

⁴⁷ *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁴⁸ Opening Br. at 21.

⁴⁹ *New Castle County Code* § 6.12.002(C)(1)(c).

while the appeal is pending.⁵⁰ The Building Code provides that the “stay will be granted unless the Code Official can demonstrate that the granting of the stay would jeopardize the health, safety or welfare of the public.”⁵¹ Garber has provided no evidence that such a request was made or denied.

Similarly, the statutory compliance bond provides that proceeds will not be collected until the principal has an opportunity to contest the violations:

If Principal fails to correct any code violation after being noticed and having an opportunity to contest such violations pursuant to the applicable violation, enforcement, and penalty provisions enumerated in the New Castle County Building Code, then Surety shall remedy the default within sixty (60) days of notification by New Castle County.

(A52 ¶ 1.). The County will not make a demand of final payment for bond proceeds until Garber exhausts his rights to appeal the administrative enforcement action. (A49). Thus, three factors weigh in favor of a finding that the administrative action will not risk an erroneous deprivation of Garber’s property interests: 1) he is entitled to, and was provided, a pre-deprivation hearing; 2) he may request a stay of any enforcement action during the appeal process; and 3) the compliance bond language provides collection will not occur until the principal has had an opportunity to contest the violations. Additionally, when a contractor avails himself of the privilege of obtaining a license under the Building Code, it is

⁵⁰ *New Castle County Code* § 6.12.003(F).

⁵¹ *Id.*

axiomatic that he is subjecting himself to the administrative enforcement of provisions therein, including the imposition of fines and collection of compliance bond proceeds.⁵²

What is relevant, yet ignored by Garber, is the government's interest in a non-judicial administrative enforcement process. State law charges the County with the responsibility of adopting and enforcing a Building Code to provide for the health and safety of County citizens.⁵³ Courts have longed recognized the importance of a local government's authority to administratively enforce building codes to protect the public's health, safety, general welfare.⁵⁴

Garber relies on *Lecates*, a case that addressed whether Delaware's appeal bond requirements operated to deny indigent defendants due process of law when they could not afford to post bond and would thereby be deprived of an appeal.⁵⁵

The case did not address an administrative process, nor did it state that a litigant

⁵² See, e.g., *New Castle County Code* § 6.03.001.

⁵³ 9 *Del. C.* § 2502.

⁵⁴ *Goldstein v. City of Wilmington*, 1986 WL 6586 (Del. Super. Ct. June 3, 1986) (reviewing an administrative enforcement action and providing “[m]unicipalities are accorded wide latitude in the enactment and enforcement of Building Codes and ordinances dealing with public health, safety, and welfare. Though their provisions may be penal in nature, these statutes are to be liberally construed in order to fully achieve their beneficent purposes, and they will be presumed valid so long as any rational ground supports their enactment. Enforcement of Building Codes will not be deemed improper if it can be determined that the exercise of power bears a reasonable relationship to the public health, safety, morals or general welfare” (internal citations omitted)).

⁵⁵ Opening Br. 21 (citing *Lecates*, 637 F.2d 898).

has right to a legally trained judge or a neutral/detached magistrate in an administrative process. In fact, the United States Supreme Court has refused to accept such a formalistic view of due process required in administrative proceedings and instead provided:

The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision making in all circumstances and [] where the prescribed procedures not only provided the claimant with an effective process for asserting his claim prior to any administrative actions but also assure a right to an evidentiary hearing as well as subsequent judicial review before denial of his claim becomes final, there is no deprivation of due process.⁵⁶

As discussed below, this Court has likewise refused to require legally trained judges or neutral/detached magistrate to preside over administrative proceedings.

b. The Building Code's Administrative Process Provides Adequate Due Process

When reviewing a decision of New Castle County Board of License, Inspection and Review, this Court has held that the administrative proceeding provides adequate due process if four fundamental protections are provided: 1) adequate notice to all concerned; 2) a full opportunity to be heard by any person potentially aggrieved by the outcome; 3) a decision which reflects the reasons underlying the result; and 4) adherence to the statutory or decisional standards then

⁵⁶ *Matthews*, 424 U.S. at 322.

controlling.⁵⁷ This Court has further opined that a party also has a constitutional due process “right to notice and a hearing in a meaningful time and a meaningful manner.”⁵⁸ These due process rights are subject to waiver if voluntarily, knowingly and intelligently made or through the “intentional relinquishment or abandonment of a known right or privilege.”⁵⁹

The administrative enforcement provisions of the Building Code generally, and as applied to Garber specifically, clearly provided adequate due process. First, the Department is required to issue a Violation Notice that: 1) is in writing; 2) identifies the property sufficiently for identification; 3) includes a reference to the Building Code section that is violated; and 4) includes a correction order and a time the correction must be complete.⁶⁰ That occurred here. CBSI Fox issued a written Violation Notice for case #201509121 that was provided to Garber and the property owners. (B6 ¶ 1; A55). For each violation referenced, CBSI Fox

⁵⁷ *Christiana Town Center v. New Castle County*, 2004 WL 2921830, at *3 (Del. Dec. 16, 2004); *See also Goldstein v. City of Wilmington*, 1986 WL 6586 (Del. Super. Ct. June 3 1986) (“In administrative proceedings, if the sole notice sent to a building owner informs them of a Code violation, the necessity for repairs, and the opportunity to appear at a hearing, due process of law is satisfied so long as these steps are taken prior to the time the abatement or other proposed action becomes final.”).

⁵⁸ *Formosa Plastics Corp. v. Wilson*, 504 A.2d 1083, 1098 (Del. 1986) (citing *Fuentes v. Shevin*, 407 US 67, 80 (1972)).

⁵⁹ *Christiana Town Center*, 2004 WL 2921830, at *3 (citing *D.H. Overmyer Co., v Frick*, 405 U.S. 174, 192 (1972)).

⁶⁰ *New Castle County Code* § 6.12.002(C)(1)(b).

provided: 1) the applicable section of the Building Code that was violated; 2) a directive for corrective action; 3) comments that explained the violations; and 4) a reference to the Cogent Report to help identify the area of violation. (A55).

Second, the administrative process provided a full opportunity to be heard by any person potentially aggrieved by the outcome the Violation Notice. The Building Code provides that the hearing officer shall schedule a show cause hearing allowing the contractor the opportunity to defend his conduct prior to any penalty being imposed.⁶¹ The Violation Notice informed Garber that a RTSC Hearing would be held on February 9, 2016, providing him an opportunity to contest the violations. (A57). The RTSC Hearing lasted over five hours. (B3). Garber presented testimonial evidence from the builder, a structural engineer and a licensed home inspector. (B3-8). He provided a rebuttal witness and a closing argument (B3-8).

If a contractor is aggrieved by the decision of the hearing officer, the Building Code provides an appeal procedure to the Board of License, Inspection and Review.⁶² The Board hearing, here, occurred over an eight-hour period during which Garber again presented evidence in the form of witness testimony and conducted vigorous cross examination of the Department's witnesses. (A63-85).

⁶¹ *New Castle County Code* § 6.12.002(C)(1)(c).

⁶² *New Castle County Code* § 6.12.003.

He was provided a full opportunity to present all evidence and arguments appropriate and legal in Board appeals. (A63-85).

Third, the decision of a quasi-judicial tribunal is sufficient if it states the basis for its decision, in order to allow judicial review.”⁶³ The Building Code requires that both the hearing officer and the Board shall issue a detailed, written decision that reflects the reasons for the underlying result.⁶⁴ The record shows that the hearing officer issued a six page, single-spaced RTSC Decision reciting facts that support his findings. (B3-8). The record also shows that the Board issued a comprehensive written opinion that delineated the reasons for its vote and explicitly ruled against each of Garber’s arguments. (A63-85).

Fourth, the administrative process adhered to controlling statutory and decisional standards then controlling. Garber has failed to show that the Board did not adhere to the applicable statutory or decisional standards when rendering its decision. Rather, as he did below, Garber invites the Court to delve deep into the record to reconsider the rulings of the Board, even where the face of the record shows that the Board adhered to the applicable law when reaching its decisions.

The administrative process afforded to Garber satisfied due process requirements. Contrary’s to Garber’s assertion, the County’s administrative

⁶³ *Christiana Town Center*, 2004 WL 2921830 at *3.

⁶⁴ *New Castle County Code* §§ 6.12.002(C)(1)(c), 6.12.003(D).

enforcement of the Building Code comports with the *Delaware Code, the New Castle County Code* and due process requirements. Garber cannot meet the rigorous plain error standard and has failed to establish a compelling interest of justice that mandates review of this newly-raised issue.

II. THE SUPERIOR COURT PROPERLY ACTED WITHIN THE LIMITED SCOPE OF *CERTIORARI* REVIEW AND CORRECTLY DETERMINED THAT THE BOARD'S DECISION SHOULD BE AFFIRMED.

A . Question Presented

Whether the Superior Court properly affirmed the Board's Decision.

B. Standard and Scope of Review

This Court exercises the same standard of review utilized by the Superior Court when the Superior Court considers applications for writs of *certiorari*.⁶⁵ *Certiorari* review is strictly limited to correcting errors of law, irregularity of proceedings, and jurisdictional issues that appear on the face of the record.⁶⁶

C. Merits

1. Certiorari Review Is Extremely Limited.⁶⁷

Garber contends that the Superior Court's refusal to engage in an expansive review of the transcripts of the RTSC and Board hearings constitutes legal error.⁶⁸ The Superior Court appropriately restricted its review to the face of the record and declined to treat Garber's writ for *certiorari* as the functional equivalent of an appeal.

⁶⁵ *Future Ford Sales, Inc. v. Public Service Comm'n of the State of Delaware*, 654 A.2d 837, 842 (Del. 1995).

⁶⁶ *Black*, 117 A.3d at 1031.

⁶⁷ This Section is in response to Argument I of the Opening Brief.

⁶⁸ Opening Br. at 9-18.

Because no statutory right of appeal exists from decisions of the Board, the Superior Court and this Court review the Board's decision using common law *certiorari* standards.⁶⁹ This Court has recently reinforced long-standing precedent that “strictly limits” *certiorari* review.

Certiorari review is not the functional equivalent of an appeal.⁷⁰ The court does not review the case on its merits.⁷¹ The court does not review the Board’s factual findings.⁷² Thus, claims that require weighing of the evidence or reviewing the lower tribunal's factual findings are not appropriate for *certiorari* review.⁷³ Likewise, the court does not review substantive decisions or correct mistakes of fact or erroneous conclusions from facts even in situations where the Board’s interpretation of the facts or law may be erroneous.⁷⁴ The court does not conduct a plenary review of the record to determine whether the Board committed an error of

⁶⁹ See *Reise v. Bd of Building Appeals of the City of Newark*, 746 A.2d 271, 272 (Del. 2003).

⁷⁰ *Black*, 117 A.3d at 1030, 32; *Maddrey*, 956 A.2d 1213.

⁷¹ *Christiana Town Ctr.*, 2004 WL 2921830, at *2.

⁷² *395 Associates, LLC v. New Castle County* 2006 WL 2021623, at *3 (Del. Super. Ct. July 19, 2006).

⁷³ *Luby v. Town of Smyrna*, 2001 WL 1729121, at *2 (Del. Super. Ct. Dec. 27, 2001); *aff'd*, 801 A.2d 10 (Del. 2002); *Castner v. State*, 311 A.2d 858, 859 (Del. 1973) (“Under principles of law well established in this State, *certiorari* involves a review of only such errors as appear on the face of the record being considered.”).

⁷⁴ *395 Associates*, 2006 WL 2021623, at *8.

law.⁷⁵ Rather the court will correct only those errors that appear on the face of the record being considered.⁷⁶

The record appropriate for *certiorari* review is very limited.⁷⁷ The record “is limited to the complaint initiating the proceeding, the answer or response if required, and the docket entries.”⁷⁸ Any evidence received by the Board is not part of the record to be reviewed.⁷⁹ Portions of the transcript of the Board hearing may be a proper part of the record but only to the extent it contains the decision of the Board.⁸⁰ A record is sufficient for *certiorari* review when the lower tribunal documents its decision and the basis for its decision.⁸¹

Garber cannot point to error or irregularity on the face of the record. Thus, Garber contends the Superior Court should have delved into the record and

⁷⁵ *Black*, 117 A.3d at 1032.

⁷⁶ *Castner*, 311 A.2d at 859.

⁷⁷ *Black*, 117A.3d at 1032.

⁷⁸ *Id.* at 1031.

⁷⁹ *Id.*

⁸⁰ *Id.* (citing *Maddrey*, 956 A.2d at 1216 (providing a transcript can be considered only to the extent it provides the lower tribunal’s decision); *Green v. Sussex County*, 668 A.2d 770, 773 (Del. Super. Ct. 1995), *aff’d*, 667 A.2d 1319 (Del. 1995) (“The transcript of the evidence below is not part of the reviewable record and the Court cannot examine the transcript in order to evaluate the adequacy of the evidence which supports the conclusion rendered below.”)).

⁸¹ *Drake v. Bd. of Parole*, 2011 WL 5299666, at *4 (Del. Super. Ct. Oct. 25, 2011).

engaged in an in-depth review of the transcript and other documents.⁸² To facilitate the court’s review of the transcript, Garber appended his Superior Court opening brief with seventy-six pages of an unofficial transcript of the Board Hearing. (A128-204.) Garber again includes the seventy-six pages of transcript for this Court’s review. (A128-204.) Rather than accept this Court’s well-established precedent requiring a limited *certiorari* review, Garber urges this Court to adopt a more expansive review consistent with a decision issued by Supreme Court of the State of Illinois - in 1883.⁸³ Alternatively, Garber suggests this Court rely on *Reise v. City of Newark*, and adopt a less restrained *certiorari* review.⁸⁴ This Court has overruled *Reise* on the specific issue on which Garber relies.⁸⁵ Finally, Garber requests this Court adopt an approach wherein the Superior Court found a Board committed legal error by finding a party waived an affirmative defense.⁸⁶ Garber provides that it “appears” that the Superior Court reviewed the

⁸² Opening Br. 9.

⁸³ Opening Br. 15.

⁸⁴ Opening Br. 15. *Reise*, 746 A.2d 271.

⁸⁵ Opening Br. 15. See *Black*, 117 A.3d 1027, 1034 n.24 (“to the extent that aspects of *Reise* or other cases can be read as inconsistent with the constrained view of *certiorari* review we take today, those cases are overruled only to that extent.”).

⁸⁶ Opening Br. 15. The legal issue under the court’s review was whether a violation notice is sufficiently analogous to a complaint to trigger the need to file a responsive pleading and state an affirmative defense with five days. 395 *Associates, LLC*, 2006 WL 2021623, at *9.

transcripts when making its decision.⁸⁷ However, the Superior Court found legal error on the face of the record – within the written Board Decision - and did not rely on the transcripts to uncover legal error.⁸⁸

As aptly noted by this Court, Garber’s invitation to partake in “the kind of deep, Cousteau-like exploration of a complicated administrative record” is simply not appropriate on *certiorari* review.⁸⁹ The Superior Court correctly noted the record on *certiorari* is strictly limited and reviewed the limited record according to this Court’s standards.⁹⁰ Garber cannot show legal error.

2. Garber Failed to Show the Board Proceeded Illegally or in Manner Manifestly Contrary to the Law.⁹¹

The Superior Court correctly concluded that Garber failed to show any legal error manifest on the face of the record concerning the Board’s determination of the date of accrual of the statute of limitations, which was based on the Board’s consideration of the facts before it.

The Building Code provides that administrative enforcement of violations shall be commenced within three (3) years as provided in 10 *Del. C.* § 8106.⁹²

⁸⁷ Opening Br. 18.

⁸⁸ *395 Associates*, 2006 WL 2021623 *9 (finding what “[t]he Board explained in its decision” to constitute an error of law).

⁸⁹ *Black*, 117 A.3d at 1027.

⁹⁰ *Garber*, 2017 WL 1224510, *passim*.

⁹¹ This section is in response to Argument III of the Opening Brief.

When interpreting section 8106, courts have held that an accrual of an action occurs at the time of injury.⁹³ While the Building Code requires that violation notices be issued within three (3) years, it does not define what constitutes the time of injury that accrues the action.

During the Board hearing, the Department argued that the that “time-of-discovery” rule was applicable and pursuant to this rule, the limitations period does not accrue until a party discovers, or exercising reasonable diligence should have discovered, the injury.⁹⁴ (A83). The Department explained that with violations obscured from view by stucco, application of this doctrine is justified since the injury does not occur until the signs of moisture or water penetration become apparent. (A83). The Department presented evidence regarding when the homeowners first saw signs of moisture and water penetration in the home. (A83).

The Department also explained that courts have found that a contractor will lose the right to claim a statute of limitations defense if the contractor has promised to repair the defects but has failed to do so.⁹⁵ (A83). The Department provided

⁹² *New Castle County Code* § 6.12.002(C).

⁹³ *See, e.g., Nardo v. Guido DeAscanis & Sons, Inc.*, 254 A.2d 254 (Del. Super. Ct. 1969).

⁹⁴ *See Nardo*, 254 A.2d 254; *Rudginski v. Pullella*, 378 A.2d 646 (Del. Super. Ct. 1977).

⁹⁵ *See, e.g., Lee v. Linemere Homes, Inc.* 2008 WL 4444552 (Del. Super. Ct. Oct. 1, 2008).

evidence showing the contractor continuously promised to correct issues but never came through on those promises. (A83).

Garber urged the Board to adopt the date of the lath inspection as the accrual date. (A82). The Department explained that if the Board was to tie the date of injury to an inspection, the violations could not have been discovered until the weather barrier inspection – not the lath inspection as suggested by Garber. (A83).

The Board found the Department’s arguments to be persuasive and provided:

Applicant relied upon the lath inspection in support of its statute of limitations argument. That inspection was approved on 12-21-2012. The Department showed, however, through its Exhibits A and B, that Applicant’s reliance on the date of the Lath inspection to support its statute of limitations argument was misplaced. . . . The Department alternatively argued that tolling should apply here. The Board agrees. There is ample evidence in the record that each of the doctrines of inherent unknowable injury and equitable tolling apply here. . . . By applying the tolling doctrines, the earliest Carpentry Unlimited could argue that the cause of action started to accrue was the date of the issuance of the CO. The CO was issued on July 26, 2013.

(A83). The record clearly shows the Board heard and considered argument and facts pertaining to the timeliness of the Violation Notice. (A82-83). Based upon the facts presented, the Board determined that the earliest date the statute of limitations began to run would be July 26, 2013. (A83). The Board then properly concluded that the January 20, 2016 Violation Notice was timely issued within the applicable three-year statute of limitations period. (A83).

In this case, determining the accrual date of the statute of limitations was not a matter of law, but a question of fact.⁹⁶ The Superior Court recognized that “the Board discussed (for two pages) when the injury occurred and specifically why the statute had not run.”⁹⁷ The Superior Court properly held that the Board’s conclusions were based on its consideration of the factual record and should not be disturbed on *certiorari* review.⁹⁸

3. Garber Failed to Show the Board Proceedings Were Conducted with Irregularity⁹⁹

Irregularity of proceedings refers to the process that is required of the lower tribunal to create a proper record for the Superior Court to review.¹⁰⁰ Reversal for irregularities in the proceeding is warranted only where the lower tribunal fails to create an adequate record for review or proceeds in a nefarious or unfair way.¹⁰¹ The Court’s function is to determine whether the judgment rendered is supported by any component in the record, “and if that be the fact, to issue a mandate of

⁹⁶ See, e.g., *Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d 838 (Del. 2004).

⁹⁷ *Garber*, 2017 WL 1224510, at *3.

⁹⁸ *Id.*

⁹⁹ This section is in response to Argument IV of the Opening Brief.

¹⁰⁰ Victor B. Woolley, *Woolley on Delaware Practice* § 923, p. 645 (1906).

¹⁰¹ *SC & A Construction v. Dep’t of Licenses and Inspections of the City of Wilmington*, 2014 WL 1724846, at *3 (Del. Super. Ct. Apr. 11, 2014).

affirmance.”¹⁰² The party asserting these claims carries the burden of persuasion.¹⁰³

The Board Decision provided the Court an adequate record of review. (A63-86). The Board Decision clearly shows the Board took the arguments before it seriously and received evidence from both sides during a lengthy eight-hour hearing. (A63-86). The Board Decision addresses Garber’s factual arguments, and provides the reason for its vote. (A63-86). The Board expressly ruled against each of Garber’s arguments and established a comprehensive record of the reasons for its decision in conformance with applicable law.¹⁰⁴ (A63-86). Thus, the Board Decision, on its face, shows there was no irregularity in the proceedings.

Garber, however, alleges the Board hearing was conducted with irregularity because Driscoll was not permitted to testify. The factual dispute before the Board was whether Driscoll offered testimony at the Board hearing concerning case number no. 20150912.¹⁰⁵ A combined RTSC Hearing was held for two separate Building Code cases involving 510 Bellevue Road. (A64). Driscoll attended the

¹⁰² *Luby v* 2001 WL 172912, at *2 (citations omitted).

¹⁰³ *395 Associates, LLC*, 2006 WL 2021623, at *3.

¹⁰⁴ Boards must set forth the reasons for their decisions to enable a reviewing court to test the Board’s decision against constitutional and statutory mandates. *Blake v. Sussex County Council*, 1997 WL 525844, at *6 (Del. Ch. July 15, 1997); *Deskis v. County Council of Sussex County*, 2001 WL 1641338, at *4-5 (Del. Ch. Dec. 7, 2001).

¹⁰⁵ *Garber*, 2017 WL 1224510, at *1.

portion of the RTSC Hearing for issues not involving case #20150912. (A59).

The Board found that Driscoll did not testify on case #20150912 at the RTSC Hearing and provided:

At the commencement of the Board Hearing, Attorney Earle objected to and moved to exclude a Bayshore Builders witness who did not testify at the RTSC Hearing and was proffered by the Department. That objection was sustained. Attorney Jacobson objected to and moved to exclude Mr. Driscoll, who did not testify at the RTSC Hearing and was a witness proffered by Carpentry Unlimited. That objection was also sustained.

(A67 n.6). The Superior Court pointed to the myriad factual disputes surrounding the witness testimony and correctly concluded *certiorari* review does not allow the court to review a factual disagreement decided by the Board.¹⁰⁶

It is curious what harm Garber could even allege from the Board's exclusion of Driscoll's testimony because the question of whether the inspections occurred was never in factual dispute. Garber admits the Board considered evidence of the date of the lath and weather barrier inspections.¹⁰⁷ Indeed, the Board Decision clearly reflects consideration of these inspections. (A82-83). Furthermore, the record shows that during the Board's deliberations, a Board member claimed that he has applied one layer of Tyvek on projects in the County. (A198). Consequently, the Board ostensibly reached its findings with full knowledge and

¹⁰⁶ 2017 WL 1224510, *4.

¹⁰⁷ Opening Br. 27-29.

benefit of the information that Driscoll would have provided. Regardless, the Superior Court correctly found that the Board's Decision to exclude Driscoll's testimony was consistent with the Board's understanding of its authority pursuant to the Building Code's administrative appeal provisions.¹⁰⁸

Garber also alleges the Board hearing was conducted with irregularity because CBSI Fox referred to the Cogent Report in the Violation Notice. The record clearly shows that CBSI Fox testified that he personally performed an inspection of the home and verified the existence of the violations or visually observed evidence of violations – including staining caused by water penetration. (A70-76). Based upon CBSI Fox's testimony at the RTSC Hearing, the hearing officer made factual findings that the violations did exist. (B6-7 ¶ 4, 10, 13). Likewise, after considering CSBI Fox's testimony at the Board hearing, the Board held that the hearing officer did not act arbitrarily or capriciously by finding the violations exist. (A80). The Superior Court correctly refused to delve into the Board's factual findings and correctly found it must give deference to the Board's Decision.¹⁰⁹

The Superior Court reviewed the limited *certiorari* record and correctly found that Garber failed to show the Board proceeded illegally or in a manner

¹⁰⁸ *Garber*, 2017 WL 1224510, at *3; See *New Castle County Code* § 6.12.003(C).

¹⁰⁹ 2017 WL 1224510 at *4.

manifestly contrary to law. Additionally, the Superior Court correctly found that Garber failed to show any reversible irregularity in the proceedings. The Superior properly affirmed the Board's Decision.

CONCLUSION

Based upon the foregoing, Appellees/Respondents-Below New Castle County Department of Land Use and New Castle County Board of License Inspection and Review respectfully requests this Honorable Court affirm the judgment below.

NEW CASTLE COUNTY OFFICE OF LAW

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