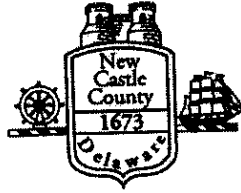


**Thomas P. Gordon**  
County Executive



**Eileen P. Fogarty**  
General Manager

## OFFICE OF LAND USE

### NOTICE OF DECISION

REFERENCE: Application 2013-07229      DECISION FILED: May 20, 2014  
15 Waterton Dr., Parcel No. 1201900254

APPLICANT: **Toll Brothers, Inc.**  
c/o William J. Rhodunda, Jr., Esquire  
Rhodunda & Williams  
1220 N. Market St., Ste. 700  
Wilmington, DE 19801

PUBLIC HEARING DATE: April 4, 2014      DATE OF DECISION: April 4, 2014

Toll Brothers, Inc. (the "Appellant") appeals from the decision of the New Castle County ("the County") Department of Land Use (the "Department") issued on January 28, 2014. In that decision, the Department found the Applicant responsible for two violations of the 2000 International Residential Code (the "Code") for a property located at 15 Waterton Drive (the "Property"). Specifically, the Department found that the Applicants were responsible for failing to provide the exterior walls of the Property with a weather-resistant barrier, in violation of the section 703.1, as well as failing to properly install approved flashing in the exterior wall of the property, in violation of Code section 703.8. In addition, the Department found that the violations were properly noticed prior to the expiration of the relevant statute of limitations.

#### PROCEDURAL POSTURE

On September 3, 2013, the Property owner, Roger Jackson ("Jackson"), initiated a complaint with the Department regarding stucco issues with the home. Mike Connors ("Connors"), a Certified Building & Site Inspector, conducted a site inspection on September 9, 2013. On November 6, 2013, the Department issued a violation notice to the Appellant citing the following: failure to provide coverage of exterior cement plaster to the proper thickness, in violation of Code Section 703.6.2; failure to provide structure with a weather resistant barrier in

violation of Code Section 703.1; and failure to install approved corrosion-resistive flashing in violation of Code Section 703.8 (“Violation Notice”).

On November 25, 2013, the Department held a Rule to Show Cause hearing regarding the violations contained in the Notice. At the hearing, Connors indicated that he met with Jackson, who explained that Jackson had purchased the home on December 21, 2012. During the sales negotiations, a stucco evaluation was completed by Cogent Building Diagnostics on December 5, 2012 (“Cogent Report”). Despite several violations listed in the Cogent report, the Department issued violations for only those items that would have been Code violations in 2004, the year in which the home was constructed. Connors explained that the Violation Notice was based on the findings and pictures outlined in the Cogent report.

At the hearing, Mr. Rhodunda appeared on behalf of the Appellant and indicated that there were several reasons for which the case ought to be dismissed: the statute of limitations had expired; adjudication of a contractual matter is outside the purview of an administrative hearing; the County should be estopped from issuing the violation; and the violations did not toll the statute of limitations.

After hearing the evidence, the Hearing Officer found that, according to the County’s legal interpretation, “in cases arising out of the faulty construction or design of a project, the construction professional may remain exposed to liability for many years after the project was completed and accepted and this means once the violation is *discovered*, the three year time clock to use the administrative hearing process begins.”<sup>1</sup> In the decision, the Hearing Officer noted that the composition of a typical home could preclude any noticeable water penetration for several years. Therefore, the statute of limitations is tolled because it is unreasonable to discern water penetration until enough time has passed for water to work its way through to the interior of a house. The Hearing Officer noted this Board’s previous decision in a similar case where, based upon the testimony of the homeowner, the Board found that the 3 year statute of limitations did not begin to run until the defect was discovered by the homeowner. In the case at bar, the Hearing Officer found that the date the defect was first noticed by the homeowner was documented in the December 5, 2012 Cogent Report. As the Violation Notice was within the 3 year time frame, the Hearing Officer found that the statute of limitations had not expired.

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<sup>1</sup> January 28, 2014 Rule to Show Cause Decision, page 4.

In consideration of the Appellant's second argument, the Hearing Officer found that, while the County may not "be involved in remedying any civil or contractual complaints," the administrative hearing process allows consideration of building code issues. The Hearing Officer further found that the statute of limitations may be tolled for various reasons which extend liability into the future, and is not limited to health, safety and welfare considerations. Lastly, because only the issue of stucco thickness was evaluated in 2005, the County was not estopped from consideration of the weather-resistant exterior wall envelope and flashing code violations.

The Applicant was commanded to correct the two code violations noted in the Department's decision, or they would otherwise be assessed \$200.00 per day beginning on April 1 or April 29, 2014, depending on the specific directive. On February 18, 2014, the Applicant filed an appeal of the Department's decision.

#### **THE RECORD BEFORE THE BOARD**

On April 2, 2014, a hearing was held before the Board of License, Inspection and Review (the "Board"). Present for the hearing were William Rhodunda, Esquire, on behalf of the Applicant, and Mary Jacobson, Esquire, on behalf of the Department. As an initial matter, Mr. Rhodunda stated that the Department's decision was arbitrary and capricious, as well as an error of law. Mr. Rhodunda then presented the same argument that he made before the Hearing Officer:

##### Statute of Limitations

Mr. Rhodunda indicated that the 3 year statute of limitations began to run in October 2004, when the home was built and the Certificate of Occupancy was issued. Because the Violation Notice was not issued until November 6, 2013, the statute of limitations had expired. In addition, because the health, safety and welfare of the public were not jeopardized by the stucco issue, there existed no exception to the 3 year statute of limitations.

##### Contractual issue

Mr. Rhodunda also indicated that the issue before the Hearing Officer was contractual in nature. Specifically, the Applicant and the original homeowner entered into a settlement regarding the stucco issue and also that Jackson had received a reduced sales price for the home

due to the issues outlined in the Cogent Report. Therefore, Mr. Rhodunda argued, the stucco issue constituted a civil matter that should not be addressed in an Administrative hearing.

Estoppel

Lastly, Mr. Rhodunda indicated that in 2005, the County informed the Applicant that in the subdivision in which the Property was located, 15 homes had to be evaluated regarding exterior covering issues. The record reflects that the Property was one of the 12 homes that was analyzed by KSE Engineering. KSE's report, which included a stucco evaluation, was subsequently approved by the County. Based upon this approval, Mr. Rhodunda argued, the County should be estopped from issuing the violations.

In addition, Mr. Rhodunda argued that the Hearing Officer was not able to determine when the defect was first observed and, therefore, arbitrarily assigned a date for the statute of limitations to begin to run. This assignment, according to Mr. Rhodunda, was arbitrary and capricious and a deviation from the law.

The Department noted that under the Code, the Hearing Officer was prohibited from considering contractual issues in reaching his decision. The County must only consider building code issues. Nevertheless, the County has the responsibility to enforce the code, regardless of the types of remedies individual parties mutually agree upon via settlement negotiations or contracts. The Department noted that the biggest issue in the instant case deals with the statute of limitations, as set forth in 10 *Del. C.* § 8106. Under this statute, an action must be commenced within 3 years from the time the cause of action accrues. With respect to building code issues, the County generally utilizes the date the Certificate of Occupancy was issued to determine when a cause of action accrues. Even so, the statute of limitations may be tolled if there are no observable factors to put a party on notice of an injury. With many construction cases, the statute of limitations begins to run with discovery of the defect. The Department noted that the party asserting that tolling applies bears the burden of pleading specific facts to demonstrate that the statute of limitations is tolled. Furthermore, the limitations period is tolled only until the party discovers, or should have discovered, the defect. The fact finder must make a determination of when the defect was or should have been discovered. In the instant case, the Department contends that until the Cogent report was completed, there was no knowledge of the violations. The Department noted that "absent any evidence otherwise, and based on his

inquiries and the responses provided during the hearing,” the Hearing Officer made a factual determination that the date the defect was first noticed was December 5, 2012 – the date of the Cogent report. Therefore, according to the Department, the County had until December 5, 2015 to pursue the relevant Code violations.

With respect to the contractual and estoppel issues, the Department agreed with the Applicant’s factual characterization of the sale of the Property and the settlement between the Applicant and the first homeowner. However, the Department noted that the County cannot be estopped from duly exercising its police power and protecting the public welfare. The County must be permitted to enforce the code regardless of the contractual agreements entered into between homeowners and builders. The Department acknowledged that in 2005, stucco issues were on the County’s “radar” because an investigation of the stucco on 15 houses was requested by the County. Nevertheless, according to the Department, the use of the estoppel doctrine against a government is not generally favored. Lastly, the Department noted that the general grant of authority, pursuant to State and County Code, requires the County to protect the public health and safety. The building code was promulgated to meet this duty.

On rebuttal, Mr. Rhodunda noted that none of the issues has risen to the level where the homeowner has been told he must vacate the house due to health and safety issues. Without this type of health and safety issue, the statute of limitations should not be tolled. Lastly, Mr. Rhodunda stated that it was unreasonable for the Department to base the discoverability of the defect on the date the Cogent Report was completed. Without the testimony of Mr. Morowski or Mr. Jackson to state when the defect was first apparent, there was no way for the Hearing Officer to conclude that the defects were first noticeable on December 5, 2012.

## **LEGAL STANDARDS**

The Board hears appeals regarding the issuance, transfer, renewal, refusal, suspension, revocation or cancellation of a County license or with respect to the effect of any County inspection. The Board is authorized by 9 *Del. C.* §1315 and Section 02.05.103 of the New Castle County Code, and is vested with the authority to consider administrative appeals pursuant to Section 06.09.003 of the New Castle County Code. Pursuant to Section 06.11.003, the Board may affirm, modify, reverse, vacate, or revoke the action appealed, provided that such action by

the County shall be affirmed if the action was not arbitrary or capricious or was not taken contrary to law. Appeals shall be heard based solely upon the materials (e.g., plans, documents, reports, studies, drawings, and testimony) available to the official or body rendering the initial decision. Appeals shall not be used to consider new or additional information. Information submitted but not discussed in rendering a decision shall be considered part of the original record and may be considered on appeal. Testimony may be given based upon the material submitted to the decision-maker.


#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Upon deliberation, the Board finds that the Hearing Officer's decision was arbitrary and capricious. Due to the lack of evidence regarding the date on which the defect was first noticeable, it was manifestly unreasonable for the Hearing Officer to have used the date of the Cogent Report, December 5, 2012, as the date upon which the statute of limitations began. The record reflects that the defect was *actually noticed* prior to December 5, 2012, as set forth in the November 2012 home inspection report obtained by Mr. Jackson. Because neither homeowner gave testimony at either hearing, it is impossible to determine the specific date the defect was visible.

Based upon the foregoing, the Board unanimously finds that the Department's decision that the defect was first visible on December 5, 2012 and, therefore, the violations notice to the Applicant did not violate the statute of limitations, was arbitrary or capricious. Accordingly, Appellant's appeal is **GRANTED**.

VOTE: 3-0 (Schorah, K. Williams and T. Williams).

#### **BOARD OF LICENSE, INSPECTION AND REVIEW**

  
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Joseph Schorah  
Chairperson  
MAY 20<sup>th</sup> 2014  
\_\_\_\_\_  
Date