

ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARING

| | | |
|--|---|--|
| CHURCHILL COMMUNITY DEVELOPMENT, LP; RAMESH JAIN; VIKAS JAIN; PARADIGM CONSULTANTS, LLC, | : | In Re: 1310 Beulah Road Buildings #401 and 501 Churchill, PA 15235 |
| Appellants, | : | <u>Copies Sent To:</u> <i>Counsel for Appellants:</i> Maurice A. Nernberg, Esq. |
| v. | : | MAURICE A. NERNBERG & ASSOCIATES |
| ALLEGHENY COUNTY HEALTH DEPARTMENT, | : | 301 Smithfield Street Pittsburgh, PA 15222 |
| Appellee. | : | <i>Counsel for ACHD:</i> Jason K. Willis, Esq. 301 39 th Street, Building 7 Pittsburgh, PA 15201 |

DECISION AND ORDER OF THE ALLEGHENY COUNTY HEALTH DEPARTMENT HEARING OFFICER

I. INTRODUCTION

At issue in this case is whether Appellants¹ are capable of prepaying an assessed civil penalty or posting a bond before an adjudication by the Allegheny County Health Department (“ACHD”) Hearing Officer on the merits of their appeal. Under Pennsylvania’s Air Pollution Control Act, when an agency issues a civil penalty against an appellant, the appellant bears the burden of proving it is unable to prepay or post an appeal bond for the civil penalty amount. 35 P.S. § 4009.1(b); *see also Kresge v. Dept. of Env’tl. Prot.*, 2001 WL 568484 (EHB 2001) at *3.

¹ Throughout this Administrative Decision, Churchill Community Development, LP, Ramesh Jain, Vikas Jain, and Paradigm Consultants, LLC are collectively referred to as “Appellants.” Ramesh Jain and Vikas Jain are collectively referred to as the “Jains.”

The chief Appellants in this case are two businessmen, Ramesh Jain and Vikas Jain, whose primary business involves the buying, selling, and maintenance of real estate. On March 2, 2017, the ACHD levied a \$1,471,675 civil penalty against Appellants for numerous violations of ACHD regulations pertaining to the allegedly unlawful removal of asbestos-containing material from a building the Jains own in Churchill, PA. The civil penalty was calculated by ACHD air pollution control engineer Shannon Sandberg. Ms. Sandberg based her calculations on the severity and public impact of the potential asbestos, the quantity of asbestos observed to be improperly removed, the duration and willfulness of the violation, the degree of noncooperation, and the economic benefit that Appellants would obtain from improperly removing the asbestos. (Ex. D9).

Appellants appealed the civil penalty itself, and also contend that they do not have the ability to prepay the civil penalty or post a bond for the penalty's amount before a hearing on the merits is held.

On August 7 and August 29, 2017, a two-part administrative hearing was held to determine whether Appellants have the financial ability to prepay the civil penalty or post a bond. After examining the testimony and evidence presented at the hearing, as well as the briefs submitted by the parties, I find that the Appellants are capable of prepaying the civil penalty or posting a bond. Appellants are therefore ordered to pay the civil penalty of \$1,471,675 or post a bond for \$1,471,675 within thirty days of this Order.

II. EVIDENCE²

The following exhibits were offered by Appellants and admitted into evidence:

- A1: Motion for recusal emails
- A2: Global Host, Inc. tax return
- A3: Franchise agreement for Global Host
- A4: Default notice
- A5: Tax return for AmeriHost Services, LLC
- A6: Federal income tax return for Pittsburgh Studios, LP
- A7: Federal income tax return for SJ Group, LLC
- A8: Federal income tax return 2015 for Vikas Jain and Rachna Jain
- A9: Federal income tax return 2015 for Paradigm Consultants, LLC
- A11: Federal income tax return for Churchill Community Development, LP
- A11-A: Last page of Exhibit A11
- A12: Loan agreement between SJ Group Holding, LLC and Natixis Real Estate Capital, LLC
- A14: 2015 Ramesh Jain tax return
- A15: Transcript of Administrative Hearings for “In Re: Raymond Sida and Pintura Construction (Days 1 and 2)”

The following exhibits were offered by the ACHD and admitted into evidence:

- D1: Assessment information re: 225 McDowell Road
- D2: Parcel information for 2909 Terry Road
- D3: Mississippi limited liability company certificate of formation
- D4: Parcel information for 2750 Sidwell Road
- D5: Greenways grant agreement
- D6: RACP grant document
- D7: JK Group document
- D8: 2015 returns for Windows ‘R Us
- D9: Civil penalty calculation form
- D10: One-page asset summary (excluding portions based on assessment or appraisal values)
- D11: List of assets (excluding portions based on assessment or appraisal values)
- D12: Compilation Phase 2 calculation run

The following exhibit was introduced and admitted by attempted intervenor Pittsburgh Post-Gazette:

² Following the August 29th hearing in this matter, the parties disputed the admissibility of several exhibits. The parties briefed the evidentiary issues, and on September 15th, I rendered a decision on which of the disputed exhibits would be admitted, and whether anything would have to be redacted.

- PG-1: Petition to Intervene and Open Proceedings³

III. FINDINGS OF FACT

Based on my review of the evidence and having resolved all issues of credibility, I find the following facts:

- 1) Appellants Ramesh Jain and Vikas Jain (collectively the “Jains”) are father and son, and businessmen whose primary business involves the buying, selling, and maintenance of real estate.
- 2) Among the Jains’ businesses are:
 - a. Churchill Community Development, LP (“Churchill Community Development”), which purchased the property at issue, 1310 Beulah Road. (Hearing Transcript (“H.T.”) at 98);
 - b. Paradigm Consultants, LLC (“Paradigm”), a managing entity that acts as general partner for Churchill Community Development, LP. (H.T. at 49);
 - c. Pittsburgh Studios, LP (“Pittsburgh Studios”), which rents out space in Churchill, PA to entertainment companies. (H.T. at 52);
 - d. SJ Group Holdings, LLC (“SJ Group Holdings”), which owns three apartment buildings and a shopping center in Jackson, Mississippi. (H.T. at 41, 66-67);
 - e. SJ Group, LLC (“SJ Group”), which buys, sells, manages, and rehabilitates homes in and around Allegheny County. (H.T. at 82-83);
 - f. Global Host, Inc. (“Global Host”), which owns a Motel 6 franchise. (H.T. at 45);
 - g. Amerihost Services, LLC (“Amerihost”), which owns an apartment complex in Beckley, West Virginia. (H.T. at 50-51);
 - h. JK Group, a small company which recently sold an apartment building in Churchill, PA. (H.T. at 161-62);

³ Before the second day of the hearing, the Pittsburgh Post-Gazette presented a motion to open the proceedings to the public. I denied the motion because both Appellants and the ACHD agreed to have the hearing closed.

- i. Windows 'R Us ("Windows"), a residential window and roofing installation company. (H.T. at 163-69).
- 3) On March 2, 2017, the ACHD issued an Emergency Order directed to Appellants, citing numerous violations of ACHD Rules and Regulations, Article XXI, regarding the allegedly unlawful removal of asbestos from a building at 1310 Beulah Road, Churchill, PA 14235.
- 4) The ACHD levied a fine of \$1,471,675 against Appellants for these violations.
- 5) On March 13, 2017, Appellants appealed the ACHD's Emergency Order, contending that Appellants did not run afoul of ACHD regulations pertaining to asbestos abatement.
- 6) On August 7 and August 29, 2017, a two-part administrative hearing was held to determine whether Appellants have the financial ability to prepay the civil penalty or post a bond for the amount of the civil penalty.

IV. DISCUSSION

Under the ACHD Rules & Regulations in operation at the times when the case was filed, the hearing was held, and the briefs submitted, "The person filing the appeal shall bear the burden of proof and the burden of going forward with respect to all issues." ACHD Rules & Regulations, Article XI § 1107(C).

A. Preliminary Issues: Recusal and Constitutionality

Before addressing the core issue of whether Appellants have demonstrated an inability to prepay the civil penalty amount, I will tackle two threshold questions that Appellants have raised: (1) Should I recuse myself from this case? and (2) Is prepayment an unconstitutional deprivation of due process? The short answer to both of these questions is No.

1. Recusal

Since the outset of this case, Appellants have filed numerous motions for me to recuse myself, so I will briefly address the issue here. Pennsylvania law states, “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned[.]” 33 Pa. Code, Rule 2.11.

Appellants assert two reasons for recusal: First, that I allegedly made “findings of fact not of record,” and second, that I “evidently took testimony in a prearranged ‘show trial’ orchestrated to cast blame upon the Jains, who were not participants to that proceeding.” (*Appellants Reply to the ACHD’s Brief in Opposition to Appellants’ Inability to Pay Claim (“Appellants’ Reply Brief”)* at 1-2).

Appellants’ “findings of fact not of record” argument is based on my initial decision in this case to allow the hearing to be open to the public, based in part on the Jains receiving public grants for their business endeavors. But Appellants’ argument is unpersuasive because I ultimately decided to close the hearing to the public. Therefore, the issue is moot.

Appellants’ argument that there was a “show trial” is similarly faulty. This argument is based on the ACHD’s decision to bring a separate action against a man named Raymond Sida, whom the Jains employed for various construction projects. A two-part hearing on the ACHD’s claims against Raymond Sida was held on September 26, 2017 and October 19, 2017. At the conclusion of the hearing, Mr. Sida’s lawyer moved to dismiss the claims against his client based on a lack of evidence. The ACHD chose not to contest the motion.

Appellants' assertion that the ACHD and Mr. Sida colluded against the Jains is unfounded. First, no evidence or testimony from Mr. Sida's hearing was used in this case. Second, I granted Mr. Sida's Motion to Dismiss because the ACHD elected not to contest it, based on the evidence and testimony presented during Mr. Sida's hearing. If both parties to a proceeding agree to have a case dismissed, then there is no contested legal issue for me to adjudicate. In short, Appellants have not made a persuasive argument that my impartiality might be reasonably questioned.

2. Constitutionality of the ACHD's Hearing Procedure

Appellants allege that the ACHD's hearing procedure and prepayment/bond requirements are unconstitutional. (*Appellants' Reply Brief* at 3-11). Article XXI of the ACHD's Rules and Regulations provide, in relevant part:

“Failure to forward the money or the appeal bond at the time of the appeal shall result in a waiver of all legal rights to contest the violation or the amount of the civil penalty unless the appellant alleged financial inability to prepay the penalty or to post the appeal bond. If alleged, the [ACHD] shall conduct a hearing to consider the appellant's alleged inability to pay within 30 days of the date of the appeal.” Art. XXI, § 2109.06(3).

Pennsylvania courts have long upheld the validity of prepayment and bond requirements, especially in administrative cases in which a party challenges the action of a public agency in the realm of environmental health. In *Boyle Land and Fuel Co. v. Env'tl. Hearing Bd.*, a case relied on by both sides, the Commonwealth Court rejected a party's challenge to the constitutionality of a statutory prepayment/bond requirement because it serves the public interest in preventing frivolous appeals. *Boyle Land and Fuel Co. v. Env'tl. Hearing Bd.*, 475 A.2d 928, 930

(Pa. Cmwlth. Ct. 1984). The *Boyle* court declared, “The bond requirement ensures the underlying validity of appeals and serves to protect the public interest in a safe and clean environment.” *Id.*

B. Standard for Inability to Pay

Under Pennsylvania law, “the Appellant bears the burden of proving that it is unable to prepay or post an appeal bond in the amount of the civil penalty.” *Paul Lynch Investments, Inc. v. DEP*, 2011 WL 4943804 at *2 (EHB 2011) (citations omitted).

To meet its burden of proof of inability to prepay, the Appellant must “[p]roduce hard evidence that gives the Department a reasonable opportunity to challenge the claim and this Board a reasonable opportunity to independently assess the claim. That evidence must, among other things, include proof of the appellant's assets and liabilities.” *Hrivnak Motor Co. v. DEP*, 1999 EHB 437 at *3 (1999) (citations omitted).

Factors that Pennsylvania courts consider in determining whether a party can prepay a civil penalty include:

- “a. accounts and notes receivable;
- b. marketable securities owned by appellant;
- c. interests appellant owns in closely held corporations or partnerships;
- d. intangible property owned by appellant;
- e. vehicles owned by appellant;
- f. real estate owned by appellant;
- g. oil, gas, or mineral rights owned by appellant;
- h. recent loan applications filed by appellant;
- i. insurance policies naming appellant as the insured or beneficiary; and, property appellant recently sold for value or transferred as a gift.”

Kresge, 2001 WL 568484 (EHB 2001) at *3 (citing *Goetz v. DEP*, 1998 EHB 955, 967-68).

An appellant is only excused from its prepayment obligation if making the prepayment causes “undue financial hardship.” *Hrivnak*, 1999 EHB at *3. An undue financial hardship occurs “if making the prepayment or submitting a bond would interfere with the appellant’s ordinary and necessary expenses, considering the appellant’s current and reasonably anticipated future needs.” *Id.* In the instant case, the Jains bear the burden of proving that they are unable to prepay the civil penalty assessed by the ACHD or post an appeal bond for the penalty’s amount by demonstrating an undue financial hardship.

C. Appellants’ Arguments for Undue Financial Hardship

Appellants’ counsel proclaimed in his opening statement at the hearing, “I point out, most emphatically, that [ability to pay] is not based upon [Appellants’] assets, it is not based upon their income, it is based upon liquidity, whether or not there are sufficient liquid assets that can be raised immediately without destroying their families, their homes, their businesses.” (H.T. at 23).

While Appellants’ counsel’s liquidity argument touches on financial hardship, the standard for undue financial hardship is not liquidity, but rather whether paying the penalty would “interfere with the appellant’s ordinary and necessary expenses.” *Hrivnak*, 1999 EHB at *3.

Vikas Jain

Appellants begin by arguing that the Jains' tax returns and testimony about these tax returns indicate that they "do not have the ability to pay the penalty or acquire a bond in thirty (30) days." (*Appellants' Post-Hearing Brief ("Appellants' Brief)* at 12). In support of their argument, Appellants cite to portions of the Jains' testimony at the hearing. Vikas Jain ("VJ") was the first witness called by Appellants. VJ testified that he does not have the funds to pay the penalty or acquire a bond. (H.T. at 56).

On direct examination, VJ stated that he had income of his own, but not enough to pay the penalty levied by the ACHD, so he sought a bond from the Bowers Agency, an insurance broker. (H.T. at 56-57). VJ said he requested a bond from the Bowers Agency for the approximately \$1.4 million civil penalty, but they would not secure a bond for him because he could not provide "125 percent of cash collateral." (H.T. at 57).

There are a couple problems with VJ's testimony here. First, he states that he has "income," but never specifies what his income is, or from what sources the income derives. Second, VJ never indicates any other effort to obtain a bond other than the above exchange with the Bowers Agency. The Jains did not explain whether they reached out to any other insurance broker or bonding agent to try to secure a bond.

On cross examination, VJ stated that in 2016, Appellants were awarded a Redevelopment Assistance Capital Project ("RACP") grant from the Commonwealth

of Pennsylvania for \$2.5 million. (H.T. at 99-100). VJ admitted that in order to receive that \$2.5 million grant, he had to have \$1.25 million secured previously:

“Q (by ACHD counsel Jason Willis): In order to be awarded the grant, and correct me if I’m wrong, but there has to be a—50 percent of that, that money has to be secured, somehow, by the applicant?

A: Right. So when I do decide to tap the grant, or get involved with the grant, at that time you need to have financials from auditors and accountants to give private opinions, there’s a whole process, and when they make sure that you have enough funds to actually get the grant.” (H.T. at 101).

Pennsylvania law requires that any recipient of an RACP grant “have at least a 50% non-State financial participation documented *at the time of the application*, including a portion of any funds reserved for future physical maintenance and operation of the project.” 72 P.S. § 3919.302 (emphasis added).

Here, VJ admits that he must have secured at least \$1.25 million (50% of the \$2.5 million RACP) grant *at the time he applied for it*, which was in 2016, only a year before the ACHD levied a civil penalty against the Jains. When ACHD’s counsel asked him about this on cross-examination, VJ tried to explain away the significance of the grant money: “[T]here’s a whole process, and that when they make sure that you have enough funds to actually get the grant.” (H.T. at 101).

Notably, VJ fails to explain what the “whole process” is, and who “they” refers to, regarding the grant. After considering VJ’s testimony, I find that it obscures, rather than clarifies the Appellants’ financial situation.

Ramesh Jain

After VJ's testimony, Ramesh Jain ("RJ") testified about his finances. On direct examination, RJ provided nothing aside from his tax return to indicate the financial health of the Jains or the businesses they control. His direct testimony consisted primarily of conclusory statements:

"Q (by Appellants' counsel Maurice Nernberg): Mr. Jain, do you have sufficient liquid assets to post a bond of approximately \$1,450,000 that the county has requested?

A: I never dreamed that money in my account to deposit as a bond.

Q: And with access to the companies you own or that you own with your son, is there sufficient liquid assets to post a bond of \$1,450,000?

A: Not at all." (H.T. at 138).

RJ's bare-bones assertion that he and VJ are unable to pay the penalty or post a bond mirrors Appellants' conclusory argument in their brief: "VJ and RJ do not have the ability to pay the penalty or acquire a bond in thirty (30) days." (*Appellants' Brief* at 12) (citing H.T. at 138-41, 142-43).

However, on cross-examination, RJ conceded that he personally infused Churchill Community Development with a capital contribution of \$1.3 million. (H.T. at 169-70; Ex. A11). RJ also acknowledged that one of his businesses, Windows 'R Us had gross receipts of \$2.4 million. (H.T. at 164; Ex. D8). Additionally, RJ noted that an undefined portion of a \$5,000,000 loan the Jains received to manage property in Mississippi was channeled to Churchill Community Development. (H.T. at 148, 172). As with VJ, RJ's testimony indicates that the Appellants may have more financial resources than their conclusory arguments would suggest.

The Jains' Businesses

In their brief, Appellants itemize the companies owned by the Jains, and explain why these businesses do not have funds available to pay the civil penalty. (*Appellants' Brief* at 12-15).

With respect to Churchill Community Development, Appellants conclude, “[T]here is no buyer that would purchase it in its current condition and with this litigation. Thus, there is no value.” (*Appellants' Brief* at 12). The only support Appellants provide for this speculative statement is RJ’s declaration that Churchill Community Development has no value. (H.T. at 174).

Regarding Paradigm, SJ Group, Global Host, Amerihost, Pittsburgh Studios, JK Group, and Windows ‘R Us, Appellants merely say that these businesses “do not have funds available to pay the penalty.” (*Appellants' Brief* at 14).

Finally, with respect to SJ Group Holdings, Appellants argue that this business “is owned by VJ and his wife (who is not a subject of the penalty) and is thus, not available for use to pay any penalty.” (*Appellants' Brief* at 14). Even if this statement is true, the testimony and evidence indicates that Appellants have several other income sources. In short, Appellants’ *ipse dixit* litigation strategy here is unpersuasive.

D. The ACHD’s Evidence and Testimony

After Appellants presented their case, the ACHD offered two witnesses. First, the ACHD presented Shannon Sandberg, one of its air pollution control engineers. (H.T. at 276). Ms. Sandberg’s testimony related to how she calculated the

\$1,471,675 that the ACHD levied against Appellants. (H.T. at 276-343; Ex. D9; *see also Introduction supra*).

Next, the ACHD presented Dean DeLuca, its enforcement chief for Air Quality, who was admitted as an expert in environmental economic modeling. (H.T. at 366). Mr. DeLuca used Appellants' tax returns and other financial information to determine whether Appellants had the ability to pay the civil penalty. The system that Mr. DeLuca used to calculate Appellants' ability to pay was INDIPAY, a program used by the U.S. Environmental Protection Agency ("EPA") to calculate a party's ability to pay a civil penalty. Mr. DeLuca reasoned that he used INDIPAY because the ACHD does not have its own program, and because it was the best model of which he was aware. (H.T. at 349). He proceeded to explain in detail the information that goes into the INDIPAY program, and how the program can calculate with close to 100% certainty whether a party can pay a civil penalty. (H.T. at 359-61).

Based on his calculations using INDIPAY, Mr. DeLuca concluded that the most conservative estimate as to Appellants' ability to pay the civil penalty would be approximately \$1.23 million, *excluding* the assets of both RJ and VJ. (H.T. at 393). Mr. DeLuca also calculated that RJ and VJ have approximately "13 to 14 million" in assets. (H.T. at 393-94). Based on this evidence, the ACHD made a strong argument that Appellants are able to pay the civil penalty.

Appellants vigorously questioned Mr. DeLuca on cross-examination, and attempted to cast doubt on his findings. In their brief, Appellants contend,

“DeLuca’s testimony should be stricken as he is not an expert in either environmental economic modeling or ability to pay models. His only experience is entering numbers into a form without any knowledge of how the mystery program, which then analyzes the form, makes the ultimate calculation which DeLuca relies upon as ‘almost 100 percent certain.’ It does not take an expert to enter numbers into a form, however, it does take an expert to explain what those numbers and the ultimate calculation mean.” (*Appellants’ Brief* at 10-11) (citations to Hearing Transcript omitted).

Appellants’ claims as to Mr. DeLuca are without merit. I admitted Mr. DeLuca as an expert in environmental economic modeling, and found him credible, based on the information he provided and his answers to questions from both Appellants’ counsel and ACHD’s counsel. Under Pennsylvania law, credibility and evidentiary weight are within my discretion as the fact-finder in this case. *See Birdsboro & Birdsboro Mun. Auth. v. Dep’t of Env’tl Protection*, 795 A.2d 444, 447-48 (Pa. Cmwlth. Ct. 2002) (“It is axiomatic that questions of resolving conflicts in the evidence, witness credibility, and evidentiary weight are properly within the exclusive discretion of the fact-finding agency.”).

After Mr. DeLuca finished his testimony, Appellants proffered business evaluator Thomas Lusk as a rebuttal witness. (H.T. at 421). Mr. Lusk testified that Mr. DeLuca’s calculations may be “flawed” because they were made on a pre-tax basis. (H.T. at 428). Specifically, Mr. Lusk declared, “Uncle Sam is still going to want his—is still going to want his pound of flesh for taxes[.]” (*Id.*).

Notwithstanding this financially apropos Shakespearean allusion, I did not find Mr. Lusk’s testimony particularly persuasive. Mr. Lusk performed no analysis

of his own regarding Appellants' financial ability to pay the civil penalty. The thrust of his argument was that he would just have used a different payment calculation method than the one that Mr. DeLuca used. (H.T. at 424-25). Mr. Lusk did not even say that Mr. DeLuca's findings were inaccurate: "I don't have—I'm not questioning, I want to be clear with this, I am not questioning the conclusions, I'm saying I cannot make conclusions based on what I'm looking at." (H.T. at 428).

In sum, I find that Mr. DeLuca made a credible case that Appellants are financially capable of paying the civil penalty. And Appellants' attempts to discredit Mr. DeLuca's findings miss the mark.

V. CONCLUSION

Appellants have not met their burden of proof of demonstrating an inability to prepay the civil penalty or post a bond for the amount of the civil penalty. The evidence and testimony that Appellants presented was largely self-serving and conclusory, and thus fell short of the standard of showing that paying the civil penalty would "interfere with [their] ordinary and necessary expenses." *Hrivnak*, 1999 EHB 437 at *3 (1999). Appellants are ordered to pay the civil penalty of \$1,471,675 or post a bond for \$1,471,675 within thirty days of this Order.

/s/

Max Slater
Administrative Hearing Officer
Allegheny County Health Department

December 20, 2017
Dated: