

ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARING

ROBERT AND WENDY REDINGER, : In re: 1881 Painters Run Road,
: Pittsburgh, PA 15241
Appellants, :
: Docket No. ACHD-16-011
v. :
: Copies Sent To:
ALLEGHENY COUNTY HEALTH : *Counsel for Robert and Wendy*
DEPARTMENT, : *Redinger:*
Appellee, : Andrew J. Karas, Esq.
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**DECISION AND ORDER OF THE ALLEGHENY COUNTY HEALTH
DEPARTMENT HEARING OFFICER**

I. INTRODUCTION

The central issue in this case is whether a sewer line is public or private. Appellants Robert and Wendy Redinger (“Appellants” or the “Redingers”) own property at 1881 Painters Run Road in Upper St. Clair Township. On May 31, 2016, the Allegheny County Health Department (“ACHD”) issued a Notice of Violation to

the Redingers, for violation of ACHD Rules and Regulations Article XV—Plumbing and Building Drainage, § AC-703.3.1, which provides:

“Existing Common Sewer Lateral. When the [Department] identifies the existence of a common sewer lateral (CSL), that is not recorded in the Recorder of Deeds Office of Allegheny County, it may issue orders to all affected property owners to separately connect to an available public sewer, or in the alternative, to record in the Recorder of Deeds Office of Allegheny County, a document, approved by the [Department], identifying the existence of the CSL and adequately specifying the maintenance responsibilities for property owners.”

The Redingers filed a timely appeal of this Notice of Violation, contending that the sewer line servicing their property (the “Painters Run Line”) is public, not private, and that the Township of Upper St. Clair (“Township”) is responsible for maintaining and repairing that sewer line. A hearing was held on February 10, 2017. However, a ruling on this matter was stayed while the Township was joined as an indispensable party to this proceeding in July of 2017. A continuation hearing was held on October 15, 2018 to allow the Township to present evidence.

The Redingers make two core arguments. First, that the Painters Run Line is public, not private. Second, that the ACHD’s enforcement action is an unconstitutional taking. This tribunal finds that the Painters Run Line is private, and that the ACHD’s enforcement action is not an unconstitutional taking. The Redingers’ appeal is therefore dismissed.

II. EVIDENCE

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

- A and A1: Subdivision and Land Development Plan for Best Oil Company, dated August 1998
- B and B1: Township response to Redingers' Right to Know request
- C: Redinger questions to Township Department of Public Works
- D: Township dye test compliance letter
- E: Township No Lien letter

The following exhibits were offered by the Township of Upper St. Clair and admitted into evidence:

- 1: Notice of Violation dated May 31, 2016
- 2: Color map of public and private lines
- 3a: Color photo of Redinger home and Manhole Numbers 950-553
- 3b-3d: Color photos of Manhole Number 950-552
- 3e: Color photo of Manhole Number 950-551

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

- 1: Inspection Report

III. FINDINGS OF FACT

After reviewing the evidence and having resolved all issues of credibility, this tribunal finds the following facts:

1. Robert and Wendy Redinger (the "Redingers") own property at 1881 Painters Run Road in Upper St. Clair Township, Pennsylvania. (October 15, 2018 Hearing Transcript ("H.T.") at 11).
2. There are two sewer lines near the Redingers' property: a public sewer line with a diameter of 30 inches located across the street on Painters Run Road from the Redingers' property; and a sewer line with a diameter of 6 inches located directly in front of the Redingers' property (the "Painters Run Line"). (October 15, 2018 H.T. at 21-23; Ex. 2).
3. On May 31, 2016, the Allegheny County Health Department ("ACHD") issued a Notice of Violation to the Redingers for violations of ACHD Article XV—Plumbing and Building Drainage ("Article XV") § AC-701.3.1 for failure to either enter into a mutual maintenance agreement concerning a common sewer lateral or to connect to a public sewer.

4. On June 3, 2017, the Redingers filed a timely appeal of the ACHD's Notice of Violation.
5. On February 10, 2017, a hearing was held in this matter, which included legal counsel for the Redingers and the ACHD.
6. On May 19, 2017, the Redingers and the ACHD submitted their briefs pursuant to the February 10, 2017 hearing.
7. On May 26, 2017, this tribunal granted a stay of proceedings to allow for the Townships of Mt. Lebanon and Upper St. Clair to provide documentation regarding the sewer systems near the Redingers' property.
8. On July 18, 2017, the ACHD presented a motion to join the Township of Upper St. Clair (the "Township") as an indispensable party.
9. On July 26, 2017, this tribunal granted the ACHD's motion.
10. On October 15, 2018, a continuation hearing was held in this matter to allow the Township to present evidence because it was not a party to the February 10, 2017 hearing.

IV. DISCUSSION

There are three issues to address here. First, whether the Redingers or the ACHD bear the burden of proof. Second, whether the Painters Run Line, which directly services the Redingers' home, is public or private. Third, whether the enforcement action by the ACHD is an unconstitutional taking.

A. Burden of Proof

The threshold matter here is determining who has the burden of proof: the Redingers or the ACHD? This is tricky because the ACHD's Rules and Regulations concerning burden of proof changed during the course of this litigation. On December 8, 2017, a new version of ACHD Rules and Regulations Article XI—Hearings and Appeals ("Current Article XI") took effect, providing in relevant part,

“The [ACHD] has the burden of proof...[w]hen it issues an Order.” Article XI, § 1105.C.7. The previous version of Article XI (“Former Article XI”) stated, “The person filing the appeal shall bear the burden of proof and the burden going forward with respect to all issues.” Former Article XI, § 1105.D.7.

In determining whether the Current Article XI or Former Article XI applies, this tribunal has previously considered “the times when the appeal was filed, the hearing was held, and the briefs submitted[.]” *Coca Café v. ACHD* (“Coca Café II”), p. 4 (April 16, 2018); *see also Dwelling Dev. v. ACHD* (“816 Selby Way”), p.3 (January 4, 2018); *Mac and Gold Truck LLC v. ACHD*, p. 3 (January 3, 2018); *Churchill Cmty. Dev., LP v. ACHD*, p. 5 (December 20, 2017). In all the above-cited cases, the three key events—the filing of the appeal, the date of the hearing, and the dates in which briefs were submitted—occurred before the adoption of the Current Article XI on December 8, 2017.

Here, as the Redingers point out, the key events fall on both sides of the date on which the Current Article XI was adopted. (*See Appellants Robert and Wendy Redinger’s Supplemental Post-Hearing Brief (“Redinger Brief”) at 5*). The Redingers filed their appeal on June 3, 2016, and the first hearing was held on February 10, 2017. Briefs for that hearing were submitted on May 19, 2017. However, this tribunal stayed the proceedings and granted the ACHD’s motion to join the Township of Upper St. Clair as an indispensable party in July of 2017. After some logistical issues in scheduling a new hearing for the Township to present its

evidence, a second hearing was held on October 15, 2018. Briefs regarding this second hearing were due in November and December 2018.

The Redingers argue that because the three key events straddle the effective date of the Current Article XI, this tribunal should apply the Current Article XI and place the burden of proof on the ACHD. (*Redinger Brief* at 6). They contend that the new rule should apply because it “requires the Department to justify its enforcement before an independent tribunal, rather than leave an enforced-against party to prove its innocence.” (*Id.*).

The ACHD retorts that changing the burden of proof from the Redingers to the ACHD at this stage in the proceeding is “inconsistent with the law,” as well as “arbitrary and capricious.” (*Allegheny County Health Department’s Continuation Hearing Memorandum (“ACHD Brief”)* at 6). In support of its position, the ACHD cites the U.S. Supreme Court’s ruling in *Landgraf v. USI Film. Prod.*, 511 U.S. 244 (1994), concerning the retroactivity of laws. (*ACHD Brief* at 4). The *Landgraf* Court held that a statute should not be applied retroactively if retroactive application would “impose new duties with respect to transactions already completed” or violate “familiar considerations of fair notice, reasonable reliance, and settled expectations. 511 U.S. at 270, 280.

The ACHD contends that applying the Current Article XI retroactively would impose new duties and violate familiar considerations of reasonable reliance because the ACHD’s only opportunity to present evidence was at the February 10, 2017 hearing when the Former Article XI was in place. (*ACHD Brief* at 4). Further,

the ACHD argues that 18 months passed between when the Redingers filed their appeal and when the Current Article XI took effect, during which the parties had a reasonable expectation that the Former Article XI would apply. (*ACHD Brief* at 5).

This tribunal finds that the ACHD has the better argument here. First, most of the key events in this proceeding took place while the Former Article XI was in effect. These include the filing of the Redingers' appeal, the February 10, 2017 hearing, and the filing of briefs by the Redingers and the ACHD pursuant to that hearing. The only key event that took place after the Current Article XI took effect was the October 15, 2018 hearing, which was solely for allowing Upper St. Clair to present its evidence. Second, and relatedly, neither the ACHD nor the Redingers were permitted to present evidence at the October 15, 2018 hearing. Because the Former Article XI was in effect at the February 10, 2017 hearing—the only time that the Redingers and the ACHD could present evidence—this tribunal finds that it is fair to adhere to the rules in effect at that time. Thus, the Redingers bear the burden of proof here.

B. The Painters Run Line Is Private

A principal issue in this case is whether the sewer line servicing the Redingers' house (the "Painters Run Line") is public or private. As discussed in Section (A) above, the burden of proof is on the Redingers to prove the line is public. The Redingers are correct that the two essential factors that this tribunal has looked at to determine whether a sewer is public or private are: "(1) the historical and cartographical evidence of the sewer system encompassing the properties at

issue; and (2) the results of a title search for easements on the property.” (*Redinger Brief* at 6-7 (citing *In re: 2625 Brownsville Road* at 4)).

The Redingers state that none of the maps submitted into evidence depict the Painters Run Line except those produced after the May 15, 2016 inspection and dye test which gave rise to this appeal. (*Redinger Brief* at 7). They then cite this tribunal’s previous holding in *Golankiewicz v. ACHD* (2016) (“Homehurst I”) for the proposition maps produced post-inspection have limited value in illustrating the public-versus-private distinction. (See *Redinger Brief* at 7 (citing *Homehurst I* at 7). In *Homehurst I* and its successor, *Homehurst II* (2017), this tribunal held that a sewer line servicing residents in Pittsburgh’s Overbrook neighborhood was public, and that the Pittsburgh Water and Sewer Authority (“PWSA”) was therefore responsible for the sewer line’s maintenance and repair. See *Homehurst II* at 16.

The Redingers argue because the maps here were produced after the inspection that sparked this litigation, like the ones in the *Homehurst* cases, this tribunal should hold that the maps are insufficient to prove that the Painters Run Line is private. (*Redinger Brief* at 7). Additionally, the Redingers argue that the lack of recorded public sewerage easements concerning the Painters Run Line should not have “any bearing on the private-versus-public distinction.” (*Id.* at 8). Again, the Redingers point to the *Homehurst* cases, as well as *In re: 2625 Brownsville Road*, in which this tribunal found that the absence of sewer easements was not especially probative of whether a sewer line was public or private. (*Id.*) (citing *Homehurst I* at 8).

However, the Redingers fail to note a key difference between the present case and the *Homehurst* cases: In the *Homehurst* cases, the parties presented a bevy of evidence that the line was public. This evidence includes, but is not limited to:

1. An ordinance adopted in 1929 by Baldwin Township showing the creation of a sanitary sewer district that encompassed Homehurst Avenue;
2. Documentation showing that the City of Pittsburgh annexed this portion of Baldwin Township in 1930;
3. Deeds in the area which showed the existence of a private sewer line, whereas the deeds for the properties in question had no such language;
4. An Ordinance which set forth the standard for sewer lines in Baldwin Township, requiring them to be six inches in diameter. *See Homehurst II* at 13-15.

As the Township points out in its brief, no similar evidence was presented here:

“In this case, there are two lines at issue, not one. There is not a single ordinance or document presented that suggests that the Township owns the 6 inch private sewer line. There are not conflicting deeds that distinguish certain properties which connect to a private sewer line.... Most tellingly, unlike in *Homehurst* there was not an ordinance showing ownership of public sewer lines by the public body.” (*Brief of the Township of Upper St. Clair (“Township Brief”)* at 6).

The Township makes a strong point. This case is readily distinguishable from the *Homehurst* cases, in which there was substantial evidence presented that the line was public. Here, there was no such evidence presented. Furthermore, the

evidence that was presented indicates that the Painters Run Line is private. At the October 15, 2018 hearing, George Kostelich, Jr., the Director of Public Works for the Township of Upper St. Clair, presented a series of maps indicating public sewer lines in one color, and the Painters Run Line in a different color. (October 15, 2018 Hearing Transcript (“H.T.”) at 11-15; Township Ex. 2. The map in Township Exhibit 2, was created “thirty-plus years ago.” (H.T. at 13).

The Township also presented the testimony of Jennifer Slagle, the Township Engineer for Upper St. Clair. Ms. Slagle presented a series of photographs showing the manholes that service the public sewer line across the street from the Redingers’ home. Ms. Slagle identified that line as 30 inches in diameter, as opposed to the Painters Run Line, which is only 6 inches in diameter. (H.T. at 23). Ms. Slagle also testified that public lines in Upper St. Clair must be at least 8 inches in diameter. (H.T. at 24).

This evidence and testimony is probative for several reasons. First, the fact that the key map at issue was created thirty years ago contradicts the Redingers’ contention that the maps were created after litigation began. Second, the map clearly distinguishes between the private Painters Run Line and the public line across the street. Third, Ms. Slagle’s testimony bolsters the Township’s argument that the 30-inch sewer line is public, and the 6-inch Painters Run Line is private.

Additionally, the Redingers presented scant evidence that the Painters Run Line is public. After the February 10, 2017 hearing, the Redingers presented Exhibits B and B1, which were sewer maps of Painters Run Road. (*Appellants’*

Closing Statement at 3). The Redingers argue that the lines depicted on those maps indicate that the Painters Run Line takes the exact same path as the public line located on Painters Run Road, and that the Painters Run Line is therefore public. (*Id.* at 3-4). The Redingers also refer to a series of deeds which indicate, among other things, “the right of the Township of Mt. Lebanon to operate, maintain, repair and renew its existing thirty inch sanitary trunk sewer extending across but beneath the surface of the land herein described,” and that Upper St. Clair eventually took ownership of these lines. (*Id.* at 4). The Redingers argue that the deeds “support Appellants’ position that Upper St. Clair township eventually took ownership of the Sewer Line and is currently maintaining [it].” (*Id.* at 5).

This evidence is unpersuasive. First, with regard to the maps presented in Exhibits B and B1, the Redingers’ assertion that the public line and the Painters Run Line take an identical path is speculative, and was contradicted by the evidence presented by the Township clearly indicating that the public line is 30 inches in diameter while the Painters Run Line is only 6 inches in diameter. Second, with regard to the deeds that the Redingers cite, they only reference the right of Mt. Lebanon to “operate maintain, repair and renew its existing *thirty inch* sanitary trunk sewer[.]” (emphasis added). This thirty-inch sewer referenced here is assuredly not the same as the Painters Run Road Line, which again, is only six inches in diameter. Taken as a whole, the evidence presented indicates that the Painters Run Line is private, not public.

C. Taking of Private Property

The Redingers additionally argue that the ACHD's enforcement action against them is an unconstitutional taking under both the Fifth Amendment to the U.S. Constitution and Article I § 10 of the Pennsylvania Constitution. (*Redinger Brief* at 10-11). The U.S. Supreme Court has articulated a three-part balancing test to determine whether a government action is an unconstitutional taking. *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Under this test, courts look to (1) the type of governmental interference; (2) the economic impact of the regulation; and (3) the extent to which the regulation interferes with reasonable, distinct, investment-backed expectations. 438 U.S. at 124.

The crux of the Redingers' taking argument is that the enforcement action interferes with the Redingers' "reasonable, investment-backed expectation to use their property for residential purposes." (*Redinger Brief* at 11-12). Specifically, the Redingers contend that they have a reasonable expectation of receiving sewerage service from Upper St. Clair, and the ACHD's finding that the Painters Run Line is private "has the effect of vitiating this expectation[.]" (*Id.* at 12). Further, the Redingers assert that the ACHD has "singled out the Redingers for enforcement" by requiring them to either connect to the public line or contract with the other parties which are using the Painters Run Line. (*Id.* at 13).

This tribunal finds the Redingers' taking argument unpersuasive. The Redingers have not demonstrated how either connecting to the public sewer or entering into a mutual maintenance agreement prevents them from using their

property for residential purposes. The Redingers also do not provide any support for their contention that the ACHD has singled them out for enforcement, especially when the regulation at issue, Article XV, § AC-701.3.1, applies to all common sewer laterals, not just the one servicing the Redingers. Finally, the Redingers' argument that they will not receive sewerage service misses the mark. Regardless of whether the Painters Run Line is private, it connects to a public sewer owned and operated by the Township and will thus receive sewerage service.

V. CONCLUSION

This tribunal finds that the burden of proof in this case is on the Redingers to show by a preponderance of the evidence that the Painters Run Line is public, not private. The Redingers have failed to meet this burden. Additionally, this tribunal finds the Redingers' argument that the ACHD's enforcement action was an unconstitutional taking unpersuasive. The Redingers' appeal is therefore dismissed. This administrative decision may be appealed to the Court of Common Pleas of Allegheny County, Pennsylvania.

Max Slater
Administrative Hearing Officer
Allegheny County Health Department

Dated: _____