

**ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARINGS**

ROBERT and WENDY)	
REDINGDER,)	In re:
)	1881 Painters Run Rd.
Appellants)	Pittsburgh, PA 15241
)	
vs.)	
)	
ALLEGHENY COUNTY HEALTH)	
DEPARTMENT)	
)	
Appellee)	

**APPELLANTS ROBERT AND WENDY REDINGER’S SUPPLEMENTAL POST-
HEARING BRIEF**

Now come Appellants Robert and Wendy Redinger (collectively, “Appellants” or “the Redingers”), by and through undersigned Counsel, and file this Supplemental Post-Hearing Brief in the above-captioned matter.

I. Statement of the Case

This appeal arises from the Allegheny County Health Department’s (“the Department”) issuance of a Notice of Violation (“NOV”) on May 31, 2016. The Redingers own and live in a residence having a mailing address of 1881 Painters Run Road. As detailed in the NOV letter, a dye test with video inspection performed on March 15, 2016 revealed that several properties along the southern boundary of Painters Run Road (the 1881 Redinger property, as well as those having mailing addresses of 1885, 1901, and 1909) share a sewer lateral (the “Painters Run Line”). The Department alleges that the existence of the Painters Run Line caused each of the owners of the subject properties to be in violation of the Regulations of the Allegheny County Health Department, Article XV, § AC-701.3.1, which provides as follows:

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.

In turn, the Department's Regulations define a "common sewer lateral" as a "private sewer that collects the sewage discharge of more than one building drain/sewer and conveys it to a public sewer." Article XV, Chapter 2. As such, pursuant to Article XV, § AC-701.3.1, the Department ordered that the owners of the properties utilizing the Painters Run Line either (1) disconnect from the Painters Run Line and connect to a public sewer, or (2) enter into a mutual maintenance agreement and record the same with the recorder of deeds.

The Redingers' timely appeal followed on June 3, 2016.¹ Following discovery, an initial hearing was held on February 10, 2017, at which time the Department and the Appellants each presented evidence and testimony, and an initial round of briefing occurred. The Township of Upper St. Clair ("the Township") was subsequently joined as a party by the Department, given that the Redingers presented evidence at the February 10, 2017 hearing tending to suggest that the sewer line at issue was a public sewer line maintained by the Township on the northern side of Painters Run Road (the "public line"), rather than the Painters Run Line. A second evidentiary hearing was held on October 15, 2018, at which time the Township presented testimony and evidence. The Redingers presently concede that their home is not serviced by the public line, except insofar as the Painters Run Line eventually connects to the public line at a manhole numbered 950-551. *See* Tr. 10/15/2018, 19: 11-12; *See also* Twp.'s Ex. 2.

¹ The other property owners listed in the March 30, 2016 NOV did not appeal.

II. Questions Presented

1. Can a sewer line be regarded as “private”, and therefore a “common sewer lateral” within the regulatory ambit of Allegheny County Health Department Regulations Article XV, § AC-701.3.1, where no evidence is presented establishing the circumstances under which a sewer line was constructed or subsequently maintained?

Suggested Answer: No

2. Does an enforcement action against an owner-occupant under Allegheny County Health Department Regulations Article XV, § AC-701.3.1 violate the United States and Pennsylvania Constitutions where the enforced-against parties have a reasonable, investment-backed expectation that they receive public sewer service?

Suggested answer: Yes

III. Argument

a. The Department Failed to Meet its Burden of Demonstrating that the Subject Sewer is Public

i. The Burden of Proof is With the Department

This Tribunal’s procedural rules, adopted on December 8, 2017, provide that, “[t]he burden of proceeding and the burden of proof shall be the same as at common law, in that the burden shall normally rest with the party asserting the affirmative of an issue,” and specifically provides that “[t]he Department has the burden of proof...[w]hen it issues an Order.” Article XI, § 1105.C.7. Here, the proceedings involve ACHD’s affirmative assertion that the Painters Run line is private (and therefore within the regulatory ambit of Article XV, §701.3.1), rather than public. Moreover, this matter was initiated by a Department Order: the NOV of May 31, 2016.

As such, pursuant to this Tribunal's December 8, 2017 administrative rules, the burden of proof is properly on the Department.

However, a prior version of this Tribunal's rules carte-blanche placed on the appellant "the burden of proof and the burden going forward with respect to all issues." *See, e.g., Golankiewicz v. Allegheny Cty. Health Dep't ("Homehurst Ave. I")*, p. 4 (Dec. 22, 2016)² (citing prior version of Article XI § 1105.D.7). In factually and legally similar cases under the prior regime of Administrative Rules, a party receiving notice that they were in violation of Article XV § 701.3.1 essentially bore the burden of disproving the Department's position on the public or private status of a particular sewer line. *See id.; see also Pittsburgh Sewer & Water Auth. v. Allegheny Cty. Health Dep't ("2625 Brownsville Road")*, p.3, (May 18, 2017) ("PWSA bears the burden of proof of showing that the sewer line behind the Property is private"); *Pittsburgh Sewer & Water Auth. v. Allegheny Cty Health Dept. ("Homehurst Ave. II")*, p.5 (October 2, 2017) ("Appellants bear the burden of proving by a preponderance of evidence the sewer line...is public, rather than private"). The burden lay with the enforced-against party, irrespective of whether the enforced-against party was a municipal or governmental organization capable of marshalling its resources toward common sewer maintenance, or a private homeowner. *Cf. Homehurst Ave. I* (owner-occupant appellants), at 4, with *2526 Brownsville Road, Homehurst Ave. II* (sewerage Authority appellants).

In determining whether the old or new Rules apply, this Tribunal has previously considered "the times when the appeal was filed, the hearing was held, and the briefs

² Available at http://www.alleghenycounty.us/uploadedFiles/Allegheny_Home/Health_Department/Resources/Legal/Homehurst_Administrative_Decision.pdf

submitted[.]” *Coca Café v. Allegheny Cty Health Dep’t* (“*Coca Café II*”), p. 4 (April 16, 2018).³ See also *Dwelling Dev. v. Allegheny Cty Health Dep’t* (“*816 Selby Way*”), p. 3 (January 4, 2018)⁴; *Mac and Gold Truck, LLC v. Allegheny Cty Health Dep’t*, p.3, (January 3, 2018);⁵ *Coca Café v. Allegheny Cty Health Dep’t*. (“*Coca Café P*”), p.4 (January 1, 2018)⁶; *Churchill Cmty. Dev., LP v. Allegheny Cty. Health Dep’t*, p.5 (December 20, 2017)⁷. In each of the aforementioned decisions, these three lodestar events (the filing of the appeal, the date of the hearing, and the date of any submittal of briefs) uniformly occurred prior to the adoption of the December 8, 2017 updated Rules. While the instant appeal was filed on June 3, 2016, and an initial hearing was held on February 10, 2017, a time during which the prior Rules were in effect, the close of the evidentiary record did not formally occur until after a second evidentiary hearing on October 15, 2018, after which the new Administrative Rules had come into force. Moreover, the instant brief, submitted on November 26, 2018, was filed following the adoption of the new Rules on December 8, 2017.

The application, construction, and interpretation of the rules of a particular tribunal are matters primarily to be determined by the tribunal that promulgated the rules in question. *Reaves v. Knauer*, 979 A.2d 404, 414 (Pa. Commw. 2009) (discussing local rules of court). Because the

³ Available at http://www.alleghenycounty.us/uploadedFiles/Allegheny_Home/Health_Department/Resources/Legal/Coca-Cafe-2-Administrative-Order.pdf.

⁴ Available at http://www.alleghenycounty.us/uploadedFiles/Allegheny_Home/Health_Department/Resources/Legal/816-Selby-Way-administrative-decision.pdf.

⁵ Available at http://www.alleghenycounty.us/uploadedFiles/Allegheny_Home/Health_Department/Resources/Legal/Mac-n-Gold-administrative-decision.pdf.

⁶ Available at http://www.alleghenycounty.us/uploadedFiles/Allegheny_Home/Health_Department/Resources/Legal/Coca-Cafe-administrative-decision.pdf.

⁷ Available at http://www.alleghenycounty.us/uploadedFiles/Allegheny_Home/Health_Department/Resources/Legal/Churchill-Inability-to-Pay-Administrative-Decision.pdf.

three lodestar events controlling which version of Article XI, § 1105.D.7 applies straddle the effective date of the updated Rules, this Tribunal should apply the new rules to this case and place the burden of proof on the Department. First, following the newer rule adheres to the general precept that a factfinder's deliberation occurs only upon the close of the evidentiary record. *See, e.g.*, Pa. R.Crim.P. 604 (closing arguments occur “[w]hen the evidence is concluded”). Additionally, as discussed above, the previous version of the Department's rules uniformly placed the burden of proof on the party appealing from a determination of the Department. In the context of a private resident defending against a Department-issued notice of violation, the appellant was thus placed in a position being required to disprove the elements of the Government's case. *See Homehurst Ave. I*, at 4. Justice, equity and fairness are better served by the newer rule, which, in its current form, requires the Department to justify its enforcement before an independent tribunal, rather than leave an enforced-against party to prove its innocence. This is especially true in the instance of a homeowner subject to an Article XV, § 701.3.1 enforcement proceeding, as it essentially requires an owner-occupant (a class not customarily engaged in sewer construction, maintenance, and repair, or the retention of records related thereto) to disprove the factual and legal basis for his supposed maintenance responsibilities. *See Tr. 2/10/2017*, at 21 (prior to the enforcement action, the Redingers were not aware of the path their sewage took from their home). The superior wisdom of the December 8, 2017 rules can be gleaned from the very fact of their revision. As such, the burden of proving that the Painters Run Line is private should be borne by the Department.

ii. The Health Department's Evidence is Insufficient to Meet its Burden of Demonstrating that the Subject Sewer is Privately-owned

In determining whether a particular sewer line is public or private, this Tribunal has previously identified two essential factors: (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. *2625 Brownsville Road*, at 4 (citing *Homehurst Ave. I*, at p.8). This Tribunal has also previously looked to the physical characteristics of a sewer's construction. *Homehurst II*, 6, 9. None of these factors favors the conclusion that the subject sewer line is private.

Of the several maps submitted into evidence as a part of these proceedings, none depict the Painters Run Line except those produced after the May 15, 2016 inspection and dye test which gave rise to this appeal. *See* Tr. 2/10/2017, at 32: 10-12 (“Q: Was this line previously depicted on this map that was provided to you by the appellant’s attorney? A: No. I just drew it on there now”); Twp’s Ex. 2 (depicting approximate location of Painters Run Line). *See also* Appellants’ Ex. A, A.1, B.1 (depicting different, not-at-issue public line of Upper St. Clair on northern side of road, and not depicting Painters Run Line). The Township’s Exhibit 2 is a map depicting the approximate location of the Painters Run Line. Notably, this map was created following the March 15, 2016 dye test which gave rise to the instant enforcement proceedings. This Tribunal has previously recognized the limited value that a map produced post-inspection can have in illustrating the public-versus-private distinction. *See Homehurst Ave. I*, at 7 (“this testimony was not the cartographic sockdolager that the ACHD may have hoped for, as the maps that PWSA produced were made *after* the inspection of the sewer line, rather than *before*”) (emphasis original); *See also 2625 Brownsville Rd.*, at 5 (map did not demonstrate private status of sewer where it “was produced after the Notice of Violation was issued”). Here, as in *Homehurst Ave. I*, while the map depicting the Painters Run Line is “relevant,” it is also “self-serving.” *Id* at 7. While the post-enforcement maps depicting the Painters Run Line (along with the Department’s dye test) serve to confirm the presence and approximate location of the

Painters Run Line, such evidence reveals nothing about the Line's ownership, construction, or which parties have historically borne the burden of its maintenance. Accordingly, the cartographic evidence submitted is not sufficient for the Department to meet its burden of proving the Painters Run Line private.

For similar reasons, the Department's pointing toward a lack of recorded public sewerage easements should not be understood as having any bearing on the private-versus-public distinction. *See* Dep't. Br. May 19, 2017, at pp. 9-10. The lynchpin of the Department's argument – that a lack of recorded easements for a line underlying private property allows the assumption that a line is private, *see* Tr. 25 – was specifically rejected in each of *Homehurst Avenue I*, *2625 Brownsville Road*, and *Homehurst Avenue II*. In *Homehurst Ave. I*, for instance, the Pittsburgh Water and Sewer Authority presented a title abstractor opinion on the sewer line at issue and, observing that “[n]one of the chain deeds make reference to sewer easments[,]” argued “[e]asements should have been recorded if a public sewer line was constructed on Homehurst Avenue.” *Id.* at 8. However, this Tribunal specifically rejected the notion that “the absence of sewer easements indicates the presence of a private sewer line.” *Id.* As this Tribunal further explained in rejecting a similar argument *2625 Brownsville Road*, “the absence of evidence is not evidence of absence.” In *Homehurst II*, this Tribunal again rejected the notion that a lack of public records relating to a sewer necessarily establishes its privacy. *Id.* at 8 (rejecting argument that “if the Sewer Line were built by or assumed by Pittsburgh or Baldwin Township, it would have been in PWSA's system”). The fact that no party to the instant proceedings has been successful in discovering any relevant records of sewerage right-of-way on the subject properties (whether for the benefit of a municipal corporation or private person) does not counsel in favor

of the line being private; rather, it militates toward finding that the Department has failed to meet their burden of proof.

Arguments advanced by the Department relating to the line's physical characteristics have also been previously rejected by this Tribunal. The Department and Township both suggest that the Painters Run Line's use of six-inch terracotta pipe and the absence of any manholes is inconsistent with public construction or ownership. Tr. 2/10/2017, 24, 33; Tr. 10/15/2018 23-25. First, this ignores that the sewer line at issue in *Homehurst Avenue I and II*, found by this Tribunal to be public, was also a six-inch terracotta pipe that lacked manholes. *See Homehurst Ave. II*, at 9, 11-12, n.5. Moreover, the flaw in the Department's and Township's arguments as to professional standards is that they are based on *contemporary* sewer construction practices. *See* Tr. 10/15/2018, 25: 13-20 (testimony of Jennifer of Gateway Engineers, conceding that she can not speak to the Township's sewer construction standards prior to Gateway's employ as Township Engineer). As such, accepting the Department's position requires several inferential leaps which are wholly lacking in evidentiary support, including, for instance, that the construction practices testified to by Gateway Engineering were also in effect at a time prior to their employ as the Upper St. Clair Township Engineer, that the Painters Run Line was built following the advent of these contemporary construction practices, or that governmental subdivisions are incapable of acting in default of these standards. Because there is no evidence relating to when the Painters Run Line was built, who built it, and what professional standards its builder employed, the mere fact of its six-inch diameter is insufficient for the Department to meet its burden of proving the line public.

In sum, no evidence has been submitted in this proceeding regarding the circumstances under which the Painters Run Line was constructed, and which persons (municipal or private)

have historically been responsible for its maintenance. To the extent the Department's task was to depict the existence and general location of the Painters Run Line, it is conceded that they have done so. For the reasons articulated above, however, none of the evidence presented is sufficient to meet the Department's burden of proof that the Painters Run Line is privately owned. Accordingly, the issuance of the Department's NOV of May 30, 2016 should be reversed, and this Tribunal should remand with instructions that the Painters Run Line be treated as public.

b. The Department's Issuance of the May 30, 2016 NOV Violates the Pennsylvania and United States Constitutions

Assuming, *arguendo*, that the Painters Run Line is a "common sewer lateral" within the meaning of Article XV, Chapter 2 of the Allegheny County Health Department's Regulations, the instant enforcement action should nevertheless be regarded as constitutionally infirm. A state in the exercise of its police power may, within constitutional limitations, enact regulations to promote public health, morals, or safety and the general well-being of the community.

Commonwealth v. Harmar, 306 A.2d 308, 316 (Pa. 1973). In order for an exercise of police power to be valid in a particular instance, (1) the public interest must require such interference; (2) the means chosen must be reasonably necessary for the accomplishment of the purpose, and (3) the means chosen must not be unduly oppressive on individuals. *Id.*; *Lawton v. Steele*, 152 U.S. 133, 137 (1894). The Redingers' previous filings with this Tribunal argue that the instant enforcement action is neither needed for the accomplishment of the Department's purposes in promoting public health, nor does it avoid being unduly oppressive on individuals, especially in light of the alternative enforcement mechanisms provided for in Allegheny County Health

Department Regulations Article 14, §§ 1409.5 – 1409.6. *See* Br. May 19, 2017, pp. 8-13. The Redingers renew these arguments instantly.

Additionally, in considering whether a particular enforcement action is “unduly oppressive,” Pennsylvania Courts have specifically held that “an unconstitutional taking of private property would be unduly oppressive.” *Mock v. Department of Environmental Res.*, 623 A.2d 940, 948 (1993) (citing *Willowbrook Mining Co.*, 499 A.2d 2, 5 (Pa. Commw. 1985)). The taking of private property without just compensation is prohibited by both the Fifth Amendment to the United States Constitution as well as Article I, § 10 of the Pennsylvania Constitution. *Mock*, 623 A.2d at 947.⁸ An unconstitutional taking may occur both by the direct physical appropriation of private property, as well as circumstances where a “regulation goes too far” in depriving the owner of his property’s usefulness. *Id.* at 948 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992)). Takings without compensation are constitutionally infirm where “the regulation has unfairly singled out a property owner to bear a burden that should be borne by the public as a whole.” *Yee*, 503 U.S. at 523. In determining which enforcement actions constitute impermissible regulatory takings, Courts adhere to the tripartite balancing test announced in *Penn Central Transportation Company v. New York City.*, which looks 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. 104, 124 (1978); *see also Mock*, 623 A.2d at 948. Here, the record evidences the the interference the instant enforcement action

⁸ The Fifth Amendment of the United States Constitution and Article I, Section 10 of the Pennsylvania Constitution are coextensive in their protections, and the analysis as to whether an unconstitutional taking occurred under either source of constitutional authority is identical. *Mock*, 623 A.2d at 947 n.10.

has posed to the Redinger's reasonable, investment-backed expectation to use their property for residential purposes.

The Redingers' expectations are "investment-backed" in multiple senses: first, the property owners subjected to the Department's March 30, 2016 NOV pay utility bills for sewage service to the Township. *See* Appellant's Ex. E, *see* Tr. 10/15/2018, 20: 15-17. This fact naturally forms a reasonable expectation on the part of the Redingers that they receive some form of sewerage service from Upper St. Clair. By contrast, the Department's enforcement of Article VI, § 701.3.1, by which the Painters Run Line is regarded as private, has the effect of vitiating this expectation, especially in light of the fact that the Painters Run Line actually connects to the public line at a location maintained by *Scott* Township. Tr. 10/15/2018, 19: 9-19, 20: 6-14. The Department's argument that "all [common sewer laterals] eventually tie into a public sewer" disregards the Redingers' distinct and investment-backed expectation that it is Upper St. Clair Township who is providing them municipal sewer service. Dep't. Br. 5/17/2017, 7.

Moreover, the record establishes that the Redingers purchased their property for the purposes of maintaining their residence there. At the time, they were unaware of the path sewage waste took when leaving their home. Tr. 2/20/2017, 18-21. The expectation that the use of their home would include municipal sewer service is reasonable in light of the fact that a title search conducted at the time of the purchase would not have revealed any reason to expect anything to the contrary. Indeed, while much has been made of the lack of any recorded public sewer easements, this "absence of evidence" argument applies with equal force to the lack of any recorded sewer easements that would benefit a *private* party. That the Redingers' expected use of their property is "reasonable" is supported by precedent's clear indication that the Redingers'

intended use of their property – *i.e.*, to use and enjoy their home as their personal residence – is the most baseline “reasonable” expectation of all. *See Murr v. Wisconsin*, 137 S.Ct. 1933, 1949 (2017) (no taking where landowners “can use the property for residential purposes”); *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (no regulatory taking where the landowner was still permitted to build a “substantial residence”). By requiring the Redingers to either (1) engage in a cost-prohibitive construction project to connect their residence to the public line, or (2) attempt to contract with the other properties utilizing the Painters Run Line, irrespective of those parties’ willingness to do so, the Department has singled out the Redingers for enforcement and demanded they assume sewer construction and maintenance responsibilities which are better borne by the public as a whole. *Yee*, 503 U.S. at 523. As such, the Department’s interference with the Redingers’ use of their property is constitutionally infirm.

For the foregoing reasons, even accepting the Department’s argument that the Painters Run Line should be regarded as private, the instant enforcement action nevertheless runs afoul of the United States and Pennsylvania Constitutions, and the Department’s NOV of May 30, 2016 should be reversed.

IV. Conclusion

For the foregoing reasons, it is respectfully that the Department’s issuance of the March 31, 2016 NOV be **REVERSED**, and the matter **REMANDED** with instructions that the Painters Run Line be regarded as a public line.

Respectfully submitted,



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Certificate of Service

I, the undersigned, verify that I served a true and correct copy of the foregoing Supplemental Post Hearing Brief on November 26, 2018 on the following individuals via the following methods:

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