

**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 REPLY BRIEF**

Now come Appellants Robert and Wendy Redinger (collectively, “Appellants” or “the Redingers”), by and through undersigned Counsel, and file this Supplemental Post-Hearing Reply Brief in the above-captioned matter, in order to respond to points raised in the Allegheny County Health Department’s Continuation Hearing Memorandum (“Dept. Br. 12/24/2018”) and the Brief of the Township of Upper St. Clair (“Twp. Br.”).

Reply point 1: Application of this Tribunal’s current Article XI does not constitute a “retroactive” application of the rules regarding burdens of proof

As a general precept, a court or administrative tribunal “is to apply the law in effect at the time it renders its decision, unless doing so would result in the manifest injustice or there is statutory or legislative history to the contrary.” *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1974). Nevertheless, relying primarily on *Landgraf v. USI Film Productions*, 511 U.S. 244 (1994), the Department argues against what it characterizes as the “retroactive” application of this Tribunal’s rules regarding burdens of proofs. Dept. Br. 12/24/2018 2-6. The Department’s

argument largely ignores the manner in which *Landgraf* and its progeny define the concept of retroactivity in the context of changes to procedural rules during pending litigation.

In *Landgraf*, a plaintiff brought suit alleging claims for workplace sexual harassment under a hostile work environment theory pursuant to Title VII of the Civil Rights Act. 511 U.S. at 249. At the time of the District Court's judgment, Title VII provided only for equitable relief on such claims, to litigated before a judge. *Id.* at 249-250. While the matter was on appeal, Title VII was amended to provide hostile work environment claimants a right to request compensatory and punitive damages before a jury. *Id.* In holding that hostile work environment claimants were not entitled to a jury trial for damages where those claimants' actions were pending at the time of Title VII's revision, the Supreme Court noted that (1) the legislation in question contained no clear command that its protections applied to pending lawsuits, and (2) because the new legislation, if applied to parties with suits pending at the time of enactment, would have affected the vested rights of those parties, application of the newer version of the law would involve giving the new provision "retroactive" effect. *Id.* at 257-283. In the Court's formulation, a retroactive enactment is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past[.]" *Id.* at 269 (internal citations at quotations omitted). "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectation based in prior law. Rather the court must ask **whether the new provision attaches new legal consequences to events completed before its enactment.**" *Id.* at 269-270 (emphasis added). Stated differently, the Court ruled that applying the newer version of Title VII was inappropriate where the revision of the

law amounted to “creating a new cause of action[.]” *Id.* at 283. In so holding, however, the Court noted that:

Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity... Because rules of procedure regulate secondary rather than primary conduct, **the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make the application of the rule at trial retroactive.**

Id. at 275. The *Landgraf* Court specifically noted that, had the legislation in question merely provided a jury trial right (as opposed to expanding the substantive forms of available relief), it would have been appropriate to apply the newer statute to suits pending at the time of enactment:

The jury trial right set out in § 102(c)(1) is plainly a procedural change of the sort that would ordinarily govern in trials conducted after its effective date. If § 102 did no more than introduce a right to jury trial in Title VII cases, the provision would presumably apply to cases tried after November 21, 1991, regardless of when the underlying conduct occurred.

Id. at 280-281. The Court elaborated that whether to apply a new procedural rule to a case arising from pre-enactment conduct turns on the current stage of particular litigation, and the point at which that new rule would be triggered:

A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial. Our orders approving amendments to federal procedural rules reflect the commonsense notion that the applicability of such provisions ordinarily depends on the posture of the particular case.

Id. at 275, n.29. Moreover, while *Landgraf* was a United States Supreme Court case dealing with the interpretation of a federal statute under federal principles of statutory interpretation, its notions on the propriety of utilizing newly-enacted procedural rules to pending litigation also finds support in Pennsylvania law. *Pa. Dept. of Banking v. NCAS of Del., LLC*, 995 A.2d 422 (Pa. Commw. 2010) (“legislation concerning purely procedural matters will be applied not only to litigation commenced after its passage, but also to litigation existing at the time of passage”)

(internal quotations and citations omitted); *see also Wexler v. Hect*, 928 A.2d 973, 978-979 (Pa. 2007) (citing *Landgraf*) (MCARE Act rules regarding the admissibility of expert testimony enacted after the commencement of litigation not “retroactive” because the admissibility of expert testimony “does not alter vested rights of the parties or give material antecedent events a different legal effect”).

As the Redingers have noted in their previous brief, a factfinder’s deliberation only begins upon the parties’ submission of evidence and the close of the evidentiary record. *See, e.g., Pa.R.Crim.P.* 604 (closing arguments occur “[w]hen the evidence is concluded”); *see also Commonwealth v. Safka*, 141 A.3d 1239, 1256 (Pa. 2016) (Donohue, J. dissenting) (judge’s role as factfinder in a bench trial begins “at the close of the evidence”). Whether a particular party has adduced sufficient facts to carry a particular evidentiary burden is a question this Tribunal simply has not assessed – and necessarily would not have assessed – at any time in this matter prior to the close of evidence on October 15, 2018 and the parties’ submission of arguments thereafter. The posture of the case, therefore, dictates that the burden of proof to be applied is the one presently in place, consistent with *Bradley*’s command that an adjudicative body “is to apply the law in effect at the time it renders its decision[.]” 416 U.S. at 711, *see also Landgraf*, 511 U.S. at 275, n.29 (posture of case determines which rule applicable). Moreover, placing the burden of proof on the Department in no way alters any vested right of the parties or gives the material events of this appeal a different legal effect. *Wexler*, 928 A.2d at 979. The material facts of this appeal concern the existence, construction, maintenance, and ownership of a sewer line beneath the Redinger property. Placing evidentiary burdens on the Department in no way alters the legal effect of these on-the-ground facts *vis-à-vis* whether this sewer line is or is not a “common sewer

lateral” within the meaning of Article XV, § AC-701.3.1. As such, there is nothing “retroactive” about the application of Article XI in its current form.

The Department’s apparent counterargument is that the application of the newer Article XI unfairly prejudices them because of their reliance and expectation that the older version of this Tribunal’s Rules and Regulations would govern. Dept. Br. 12/24/2018 4-5. However, placing the burden of proof on the Department in this matter presents the Department with nothing more than the exact same burdens under which the Department will be operating in all future enforcement actions brought pursuant to Article XV, § AC-701.3.1. To the extent that the Department complains its presentation of evidence might have been more comprehensive but for its reliance on the old Article XI rules, such an assertion is unavailing absent some proffer as to what such additional evidence might include. In this respect, the Department’s argument is entirely lacking. *See* Dept. Br. 12/24/2018 4. Indeed, the thrust of the parties’ prehearing investigation and subsequent presentation of evidence before this Tribunal tends to suggest that no such additional evidence exists. In any event, the Department’s assertion that applying the newer Article XI is unfairly retroactive because “[t]he burden of proof applies to the introduction of evidence,” *Id.* at 4, has been squarely rejected by Courts deciding the propriety of applying new rules regarding which party bears the burden of proof. *Thomas & Betts Corp. v. Panduit Corp.*, 108 F.Supp.2d 976, 991-992 (N.D. Illinois 2000) (citing *Graffam v. Scott Paper Co.*, 870 F.Sup. 389, 393 (D. Me. 1994) *aff’d* 60 F.3d 809 (1st Cir. 1995)). In *Thomas & Betts*, the issue was as follows:

In 1999, Congress enacted the Trademark Amendments Act of 1999 (the "Amendment" or "TAA"), which amended the Lanham Act by requiring parties claiming infringement of unregistered trade dress to bear the burden of proving non-functionality as part of their prima facie case. 15 U.S.C. § 1125(a)(3). [Plaintiffs] argue that the Amendment must not be applied to cases pending when

the Amendment was enacted. Defendant ...asserts that the Amendment properly governs pending cases.

108 F.Supp. at 977. In rejecting the plaintiffs' argument that they relied on a previous version of the Lanham Act's rules regarding which party bears the burden of proof, and that application of the new rule would thus have been unfairly retroactive, the Court noted:

[T]he issue of who bears the burden of proving the functionality of a trademark at trial does not change the acceptable standard of behavior. Nor is it not the kind of law that would affect a party's decision making process regarding his conduct prior to the filing of the lawsuit. The burden of proof only affects a party's conduct after the filing of the lawsuit...A statutory clause regarding a burden of proof does not govern conduct that would give rise to a lawsuit. It merely governs conduct after a lawsuit is already filed. To this end, the Supreme Court in *Landgraf* stated that the statutory amendment at issue in that case which gave one party a right to a jury trial, was "plainly a procedural change of the sort that would ordinarily govern in trials conducted after its effective date . . . regardless of when the underlying conduct occurred." The provision in this case is similar, in that it only affects a party's conduct at trial, and thus has no retroactive effect.

Id. at 986. Similarly, nothing in the newer version of Article XI can be said to have affected the Department's pre-enforcement actions with regard to the Painter's Run Line, because, crucially, nothing in the newer Article XI affects the substantive legal question governing an Article XV, § AC-701.3.1 enforcement action like this one, namely, whether a line qualifies as a "common sewer lateral" pursuant to Article XV, Chapter 2.

For the foregoing reasons, there is nothing "retroactive" in the application of this Department's revised procedural rules regarding which party bears the burden of proof, and this Tribunal should place the burden of proof in this matter squarely on the Department consistent with the principle that an adjudicative body is to apply the law in effect at the time it renders its decision. 416 U.S. at 711.

Reply point 2: The Department’s Arguments as to Cartographic Evidence Do Not Counsel in Favor of Their Having Met their Burden

The Department next suggests that, if it bears the burden of proof, it has met its burden in proving the Painters Run Line is private. Dept. Br. 12/24/2018 7-8. The Department raises one new argument in this respect: that the maps introduced by the Department and the Redingers are not post-inspection maps used to demonstrate ownership of the line in question, but rather pre-inspection maps which, lacking any depiction of or reference to the Painter’s Run Line, tend to establish that the Painters Run Line is not maintained or owned by any of the municipalities that made those maps. *Id.*¹

This argument commits the same “absence of evidence” sin that this Tribunal identified with respect to a lack of recorded sewerage easements in *Homehurst I*, *Homehurst II*, and *2625 Brownsville Road*. In those cases, this Tribunal properly held that where a particular piece of evidence does not explicitly declare public ownership of a sewer line, that in and of itself does nothing to imply the sewer is private. *Homehurst I*, at 8; *Homehurst II*, at 8; *2625 Brownsville Rd.*, at 6. Similarly, the Department would have this Tribunal declare a lack of municipal construction or ownership of the Painters Run Line based on something the maps in question do not contain, rather than something they do. Moreover, the inference underpinning the Department’s argument – that a municipality does not generate maps depicting sewer lines over which it does not maintain ownership or control – is belied by the very maps the Department uses to put the argument forward, because the maps in question depict portions of the Public Line at locations maintained by both Scott and Upper St. Clair Township. *See* Dept’s Ex. D5, Apps.’ Exs. A, A.1, B.1. Moreover, it is clear that private sewer lines, contrary to the assertions

¹ The Department’s brief does not refer to the Township’s Exhibit 2, which is a post-enforcement map depicting the rough location of the Painters Run Line.

of the Department, do sometimes appear on publicly-created maps, because the *Homehurst* cases featured exactly such a map. *See Homehurst II*, at 7-8 (describing Fernland Way sewer). Here, as in *Homehurst II*, the fact that no maps identify or label the subject sewer line at issue as “private” casts doubt on the Department’s position that the line must be private.

Reply point 3: The Redingers take no position on the particular municipal owner of Painter’s Run Line

The Township’s brief repeatedly characterizes the Redinger’s position as being that because the Painters Run Line is not privately-owned by the Redingers, it therefore is necessarily owned by the Township of Upper St. Clair. *See, e.g.*, Twp. Br. at unnumbered p.3 (“Issue Presented”). To be clear, this somewhat overstates the Redingers’ position on the matter. The Redingers have maintained throughout this appeal, and continue to maintain now, that the Painter’s Run Line is not a “common sewer lateral” within the Regulatory ambit of Article XV because the line is not “private” as required by Article XV, Chapter 2. Redinger Br. 11/26/2018 at 1-10. Moreover, the Redingers assert that their payment of utilities to the Township has imbued them with a reasonable expectation (unconstitutionally interfered with by the instant Department enforcement action) that the Township provides them sewer service. *Id.* at 10-13. However, as to whether the Township or some other governmental authority actually owns the Painters Run Line, for the purposes of this enforcement action the Redingers do not take any position. The essence of the Redingers’ on-the-merits position in this matter is that no credible evidence has been put to this Tribunal which demonstrates the alleged private status of the Painters Run Line. To the Township’s credit, the limitations of the evidentiary record in this matter might just as well counsel against declaring the Painters Run Line to be Township property. Fortunately for this Tribunal, the actual ownership of the Painters Run Line need not be

resolved by this appeal, and indeed, could not be resolved by this appeal, because this Tribunal does not declare private property relations. *See Caputo v. Allegheny Cty. Health Dept.* (“*In re: 6410 Adelpia Street*”), p.11 (May, 29 2018).² As in *6410 Adelpia Street*, this Tribunal need not declare who owns the Painters Run Line in order to resolve this appeal; it must merely decide whether the Department’s enforcement action is justified. As such, the Township’s arguments regarding its lack of ownership are no impediment to the Redingers’ requested relief.

Reply point 4: The Township mischaracterizes the facts of the *Homehurst* decision

Finally, the Township argues “[t]he facts in the *Homehurst* case are completely different than the facts in this case,” and that therefore the Department has met its burden of demonstrating that the Painters Run Line is private. Twp. Br. at unnumbered pp. 7-9. This argument seriously mischaracterizes the weight with which this Tribunal treated the evidence before it in the *Homehurst* cases. For instance, with respect to the Township point toward *Homehurst*’s involving “an Ordinance which set forth the standard [diameter] for Baldwin Township Sewer lines,” *Id.* at unnumbered p. 7, this Tribunal merely found “that this Ordinance suggests that perhaps some public lines could be six inches, rather than eight inches.” *Homehurst II* at 11. Additionally, with regard to the Township’s “certain deeds in the area which showed a private sewer line while the deeds for the properties in question had no such language,” Twp. Br. at unnumbered pp. 7, this Tribunal specifically noted that deed language for unrelated properties “is not especially strong evidence of a public sewer line underneath *Homehurst Avenue*.” *Homehurst II* at 11.

² Available at https://www.alleghenycounty.us/uploadedFiles/Allegheny_Home/Health_Department/Resources/Legal/6410-Adelpia-Street-Administrative-Decision.pdf.

In sum, while the Township is correct to note that the *Homehurst* cases involved a quantitatively more replete evidentiary record than that in the instant case, the quality of the evidence regarding private ownership is scarcely distinguishable. While this Tribunal found ordinance language relating to the establishment of a sewer district and the annexation of portions of that district to be dispositive in *Homehurst I*, this Tribunal’s subsequent decisions in *2526 Brownsville Road* and *Homehurst II* are better understood in terms of this Tribunal finding that the relevant evidentiary burden was not satisfied. *Cf. Homehurst I*, at 8 (“I find that the sewer line is public”); *Homehurst II*, at 15 (“I find that the PWSA has not met its burden of proof showing that the sewer line...is private, rather than public”); *2625 Brownsville Road*, at 4-5 (“the fact that a sewer line is located on private property does not indicate that the sewer line itself is private”), 7 (“The bottom line is that the title search exhibits presented by PWSA are insufficient to show the existence of a private sewer”). This case falls into the latter category. The thrust of the pre-hearing investigation and subsequent presentation of evidence to this Tribunal in this matter is that there is a decided paucity of evidence as to when and how the Painters Run Line was built and which parties have subsequently maintained it. The Department and Township’s inelegant solution to this paucity of evidence – to foist the maintenance obligations of the line upon the Redingers – is not warranted, and accordingly this Tribunal should find that the Department has failed to meet its burden of proof in this matter.

Conclusion

For the reasons previously articulated, and for the reasons set forth in the brief above, 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 January 7, 2019 on the following individuals via the following methods:

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