

**ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARINGS**

MICHAEL A. and JANICE M. CAPUTO,)	
)	In re: 6410 Adelpia Street
Appellants,)	Pittsburgh, PA 15206
)	
vs.)	
)	
ALLEGHENY COUNTY HEALTH)	
DEPARTMENT,)	
)	
Appellee.)	

**THE ALLEGHENY COUNTY HEALTH DEPARTMENT’S
POST-HEARING MEMORANDUM**

I. Introduction and Background.

AND NOW comes the Appellee, the Allegheny County Health Department (the “ACHD” or “Department”), by and through its counsel, and files this Post-Hearing Memorandum summarizing and supporting its position in the appeal filed by Michael A. and Janice M. Caputo, collectively “the Appellants”.

The Appellants filed an appeal on December 1, 2017 and challenged the ACHD’s denial of a variance request. Hearing Exhibit (“Exhibit”) P. The Appellants own the properties at 6414 and 6410 Adelpia Street, Pittsburgh PA, 15206 (“6414” and “6410”, collectively “the Properties”). Verbatim Transcript of March 7, 2018 Hearing (“Tr.”) at p. 9. On October 14, 2017, the Appellants requested a variance of ACHD Rules and Regulations Article XV (“Article XV”) to extend a common sewer lateral (“CSL”) currently serving the properties at 6414 and 6420 Adelpia Street, Pittsburgh PA, 15206 (“6420”) (“Current Sewer Lateral”) to connect the property at 6410 (“Proposed Sewer Extension”), collectively “the Sewer Lateral”. Exhibit K. The Appellants also requested permission to install a whole house sewage ejector. *Id.* On November 6, 2017, the ACHD denied the request for constructing the Proposed Sewer Extension because an

agreement adequately specifying maintenance responsibilities for the Sewer Lateral was not recorded in the deeds of 6410, 6414, and 6420 pursuant to Article XV § AC-701.3.1 (“Nov. 6th Variance Denial”). Exhibit D2. Sometime after that date, the Appellants submitted two agreements: a Common Sewer Lateral Maintenance and Easement Agreement which addressed the maintenance responsibilities for the Current Sewer Lateral and was recorded in the deeds of 6420 and 6414 (“Maintenance Agreement”), and a Declaration of Easement and Covenants, which addressed the maintenance responsibilities for the Proposed Sewer Extension and was recorded in the deeds of 6414 and 6410 (“Easement Agreement”), collectively “the Agreements”. Exhibits J and M. Subsequently, the Appellants filed an appeal of the Nov. 6th Variance Denial¹ and alleged that although individually the Maintenance Agreement and the Easement Agreement address the maintenance concerns of different portions of the Sewer Lateral, when read together, they address the entire Sewer Lateral. Exhibit P. Pursuant to § 1105 of Article XI, “Hearings and Appeals”, of the ACHD’s Rules and Regulations (“Article XI”),² a full evidentiary hearing was held on March 7, 2018 (“Hearing”).

Prior to the proceedings described above, the Appellants, Appellants’ counsel Kevin F. McKeegan, Hearing Officer Slater, Richard Inesso, counsel for Mr. Inesso, Assistant Solicitor Vijyalakshmi Patel, and representatives of the ACHD convened for a conference on September

¹ During the Hearing, counsel for the Appellants claimed that the appeal was also in response to a November 22, 2017 email from Vijyalakshmi Patel, ACHD Assistant Solicitor, to Kevin F. McKeegan, counsel for Appellants. Exhibit O; Tr. at p. 52. However, the Dec. 1st appeal clearly states that it is appealing the Nov. 6th Variance Denial and Appellants’ Proposed Findings of Fact and Conclusions of Law on Behalf of Appellants, Michael A. and Janice M. Caputo (“Appellants’ Brief”), filed on April 19, 2018, confirms this. Exhibit P. *See also* Appellants’ Brief at p. 17: para. 4.

² In this tribunal’s order dated December 6, 2017, the Hearing Officer acknowledged that the Appellants’ appeal was filed 23 days after the ACHD issued its Nov. 6th Variance Denial. Rather than enforcing the version of Article XI in effect at that time which would have properly dismissed the appeal for being untimely, the Hearing Officer applied the ratified changes to Article XI, effective beginning December 8, 2017, and which provide a 30-day appeal period. Therefore, this brief will apply the ratified changes, which are included in the current version of Article XI.

29, 2017 at the ACHD's premises. Mr. Inesso owns the property at 6420. Tr. at p. 7. At this conference, Mr. Inesso and the Appellants agreed to enter into a mutual maintenance agreement for the maintenance of the Current Sewer Lateral. However, Mr. Inesso specifically stated he will not allow the property located at 6410 to enter into a maintenance agreement between 6414 and 6420. Mr. Inesso passed away after the conference but before the Hearing. Tr. at p. 64.

During the Hearing, the Appellants introduced expert testimony to support their claim that the Agreements together adequately address the ACHD's maintenance concerns regarding the Sewer Lateral. Moreover, the Appellants relied entirely on hearsay testimony to support their claim that the only option available to them was for 6410 to connect to the Current Sewer Lateral, located directly to the east of 6410. Appellants did not request, and the ACHD Director did not unilaterally grant, a stay of the proceedings.

II. Proposed Findings of Fact.

- A. The Appellants own the properties at 6414 and 6410 Adelpia Street, Pittsburgh PA, 15206. Tr. at p. 9
- B. Richard Inesso owned the property at 6420 Adelpia Street, Pittsburgh PA, 15206. Tr. at p. 7.
- C. Mr. Inesso passed away before the Hearing. Tr. at p. 64.
- D. A public sewer line does not exist directly in front of 6410. Exhibits D3-D5.
- E. 6414 and 6420 are connected to the Current Sewer Lateral. Exhibits J and K.
- F. 6410 is not connected to the Current Sewer Lateral. Exhibits J, K, and M.
- G. The Maintenance Agreement addresses the maintenance responsibilities for the Current Sewer Lateral. Exhibit J.

- H. 6420 and 6414 are parties to the Maintenance Agreement. Exhibit J.
- I. 6410 is not a party to the Maintenance Agreement. Exhibit J.
- J. The Easement Agreement addresses the maintenance responsibilities for the Proposed Sewer Extension. Exhibit M.
- K. 6414 and 6410 are parties to the Easement Agreement. Exhibit M.
- L. 6420 is not a party to the Easement Agreement. Exhibit M.
- M. Prior to his death, Mr. Inesso refused to allow 6410 to enter into a mutual maintenance agreement with 6420 and 6414.
- N. A single maintenance agreement addressing the maintenance of the entire Sewer Lateral has not been entered into and recorded by 6410, 6414, and 6420.
- O. Appellants applied for a variance of the Article XV requirement to separately and independently connect to an available public sewer. Exhibit K.
- P. The ACHD denied the variance request because a single maintenance agreement addressing the maintenance of the entire Sewer Lateral has not been entered into and recorded by 6410, 6414, and 6420. Exhibit D2.
- Q. The distance from 6410 to the Western Terminus is 140 feet. Tr. at p. 28-29.
- R. Properties surrounding 6410 are connected to CSLs. Exhibits H and D3.

III. Discussion.

In an administrative appeal of a final agency action of the ACHD where the ACHD denies a license, permit, approval, or certification, the party appealing the action shall have the burden of proof. Article XI § 1105(C)(7)(b)(i). The ACHD did not issue a violation to the Appellants regarding the Sewer Lateral. Tr. at p. 101. The Appellants contacted the ACHD on their own

accord to request a variance of Article XV. *Id.* Therefore, because this matter revolves around whether the ACHD properly denied a request for a variance of the Article XV requirement to connect directly to a public sewer, the Appellants must prove by a preponderance of the evidence that a public sewer is *not available* and therefore, the Department is *required* to grant the variance. The preponderance of the evidence standard requires proof “by a greater weight of the evidence” (*Commonwealth v. Roy L. Williams*, 732 A.2d 1167, 1187 (Pa. 1999)) and is equivalent to a “more likely than not standard” (*Commonwealth v. McJett*, 811 A.2d 104, 110 (Pa. Commw. Ct. 2002)).

Relevant provisions of Article XV state as follows:

§ AC-701.2.1 Dwelling Units. The water distribution and drainage system of any dwelling unit shall be separately and independently connected to a public water supply and sewer system respectively if available. Multiple dwelling units stacked vertically, directly above or below, do not require separate and independent connections, but each vertical column of dwelling units must be separately and independently connected to a public water supply and sewer system respectively if available. Other buildings including apartment buildings, as defined in this Code, shall be separately and independently connected to the available public sewer and public water supply. (Emphasis added.)

§ AC-701.2.2 Public Sewer System Available. A connection conforming to the standards set forth in this Code shall be made between a Qualifying Premises and an available public sewer system. A public sewer system shall be deemed available to a Qualifying Premises and its building(s) if the occupied building components of such a premises are located within two hundred fifty (250) feet of such sewer system built in or after 1994, or within one hundred fifty (150) feet of a sewer system build before 1994, measured along the premises, street, alley or easement. Where public sewer systems are made available to a premises, its occupied building systems shall be connected to the available public sewer system to protect the health of building occupants. An Administrative Authority may issue notices giving Qualifying Premises owners or occupants up to ninety (90) days to discontinue the use of private systems and to connect to a public sewer system.

§ AC-701.3.1 Existing Common Sewer Lateral. When the Administrative Authority identifies the existence of a CSL (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 Administrative Authority, identifying the existence of

the CSL and adequately specifying the maintenance responsibilities for property owners. (Emphasis added.)

It should be noted that a variance to *construct* a CSL when a public sewer or water main is unavailable also requires that “A *mutual maintenance agreement* shall be recorded in the deeds of all such properties connected to a private sewer or water main system to affix equal responsibility in maintaining the private sewer(s) or water main(s).” (Emphasis added.) Article XV § AC-701.3. The Appellants are requesting to construct a CSL that connects to the Current Sewer Lateral.

To support their position that the variance should be granted, Appellants’ rely on three arguments: the variance was improperly denied because a strict application of the requirement to enter into one mutual maintenance agreement creates practical difficulties due to the Appellant’s special circumstances and therefore, the ACHD should accept two mutual maintenance agreements; the ACHD may not take into consideration private rights before granting or denying a variance; and this tribunal is not the appropriate forum to resolve ownership of private property.

The ACHD will first demonstrate that Appellants’ failed to preserve all three arguments for administrative review. If this tribunal finds that these claims were properly preserved, the ACHD will show that the variance was appropriately denied because Appellants failed to prove that practical difficulties due to special circumstances prevents them from entering into one mutual maintenance agreement, and that even if they did prove the claim, the ACHD does not have a mandatory duty to grant a modification or variance request. Moreover, the ACHD will show that Appellants did not present legal arguments that have any precedential value over the ACHD’s authority to interpret its regulations since the ACHD is not taking into consideration private rights or attempting to direct this tribunal to resolve disputes over personal property rights.

A. Appellants failed to preserve for administrative review its claims that requiring 6410, 6414, and 6420 to enter into one mutual maintenance agreement causes practical difficulties due to the Appellants' special circumstances and therefore, the provision should be read with a modification; the ACHD may not consider private rights before granting or denying a variance; and that this tribunal is not the appropriate forum to address competing ownership claims of private property.

In the Appellants' Brief, Appellants claim that strictly applying the requirement that one mutual maintenance agreement addressing the maintenance of the entire Sewer Lateral be recorded in the deeds of all properties connected to the CSL, as required by Article XV §§ 701.3 and 701.3.1 prior to granting a variance, results in practical difficulties due to the Appellants' special circumstances. Therefore, Appellants argue that the requirement should be applied with a modification, pursuant to Article XV § AC-105.1, such that the ACHD should accept the Agreements in place of one mutual maintenance agreement. Moreover, the Appellants alleged that the ACHD may not consider private property rights prior to granting or denying a variance and that this tribunal is not the appropriate forum to address disputes of private property. All these claims were introduced in the Appellants' Brief but were not included in the Dec. 1 notice of appeal. Exhibit P.

The Appellant's variance request was denied because "there [was] not an agreement adequately specifying maintenance responsibilities for the sewer recorded in the deeds" of 6410, 6414, and 6420. Exhibit D2. In their notice of appeal, the Appellants' only ground for appeal was that the "combination of these two recorded instruments satisfies the stated ground for denial of the Caputo's variance request." Exhibit P. The plain understanding of Appellants' statement is that the two agreements can satisfy the maintenance responsibilities of the sewer equally as if they

were one agreement. That statement cannot be logically or reasonably expanded to include all the claims raised in the above paragraph because those claims are in no way related to how two agreements are equivalent to one agreement. The Appellants were represented by counsel at every stage of these proceedings. If the Appellants wanted to preserve the claims in the above paragraph, they should have included them as grounds for appeal in the Dec. 1 notice of appeal. Article XI § 1104(B). As such, the Appellants waived these claims and this tribunal may not adjudicate these issues.

B. Appellants failed to prove that the ACHD must accept the Agreements in satisfaction of the requirement to enter into one mutual maintenance agreement because the Appellants' faced practical difficulties due to their special circumstances.

The Appellants' argument that they are entitled to a modification of the variance requirement of one mutual maintenance agreement is predicated on their belief that a public sewer is not available for direct connection, they cannot enter into one mutual maintenance agreement due to restrictions placed upon them by the PWSA and prohibitive costs, and therefore, the ACHD must grant the variance. The ACHD will demonstrate that a public sewer is available for direct connection from 6410, the Appellants failed to provide compelling evidence in support of their claim that "practical difficulties due to special circumstances" prevent them from entering into one mutual maintenance agreement with other property owners connected to the Sewer Lateral, and that regardless of any factual findings, the ACHD does not have a mandatory duty to grant a modification to an Article XV provision or a variance.

- a. The ACHD appropriately denied the variance because the Western Terminus is “available” for direct connection to 6410.

Appellants insist that a public sewer is not available for direct connection to 6410 and that the only option available to them is connecting to the Current Sewer Lateral.

A public sewer system is deemed “available” if the property is “located within two hundred fifty (250) feet of such sewer system built in or after 1994, or within one hundred fifty (150) feet of a sewer system build before 1994, measured along the premises, street, alley or easement.” Article XV § AC-701.2.2. If a public sewer system is “available”, the dwelling unit must connect “separately and independently” to the public sewer and the ACHD would not grant a variance. Article XV §§ AC-701.2.1 and AC-701.2.2; Tr. at p. 97-98. The creation of or connection to a CSL is a type of variance to the requirement to connect “separately and independently” to a public sewer if the public sewer is not “available”. Article XV §§ AC-701.3 and AC-701.3.1; Tr. at p. 98-99.

The Appellants rely on statements made by plumbers not present at the Hearing to conclude that the closest public sewer located to the east and west of 6410 (“Eastern Terminus” and “Western Terminus” respectively) were built before 1994. Tr. at p. 44-45; Appellants’ Brief at p. 20: para. 15. Therefore, Appellants did not provide any non-hearsay evidence to support its claim that the Eastern and Western Terminuses were built before 1994. Mr. Caputo personally measured the distance from 6410 to the Western Terminus and testified that it was 140 feet. Tr. at p. 28-29. However, he relied on a plumbing company’s video of the Current Sewer Lateral and plumbing receipts to conclude that the distance from 6410 to the Eastern Terminus was 240 feet. Exhibit I; Tr. at p. 28-33, 77. The receipts were not offered into evidence and therefore, they are hearsay evidence regarding 6410’s proximity to the Eastern Terminus.

Mr. Caputo's measurements conclude that the Western Terminus is "available" and that pursuant to Article XV §§ AC-701.2.1 and AC-701.2.2, 6410 must separately and independently connect to it. Due to the fact that Appellants rely on inadmissible hearsay statements regarding the age of the Eastern and Western Terminuses, it is inconclusive as to whether the Eastern Terminus is "available". If the Eastern Terminus was built before 1994, it is not "available". However, if the Eastern Terminus was built in 1994, then it is "available" to 6410. Nevertheless, Andrew Grese, the ACHD Plumbing Program Manager, affirmed Mr. Caputo's finding that a public sewer is "available" to 6410 for connection. Tr. at p. 97, 101, 104. Since a public sewer is "available" to 6410 for separate and independent connection, the ACHD appropriately denied the variance.

- b. Appellants failed to prove that practical difficulties due to their special circumstances prevent them from entering into one mutual maintenance agreement with owners of all other properties connected to the Sewer Lateral.

If this tribunal determines that the Western Terminus is not "available", then 6410 is not required to separately and independently connect to it. The only condition placed on the ACHD prior to granting a variance of Article XV §§ AC-701.2.1 and AC-701.2.2 is finding that a public sewer is not "available"; but even if a public sewer is found to not be "available", the *ACHD is not required to grant a variance*. Article XV § AC-701.3. The ACHD is also not required to make any determination prior to denying a variance. *Id.* Therefore, if a public sewer is not "available", a variance *may* be granted for the construction of or connection to a CSL *if* all properties connected to the CSL enter into one mutual maintenance agreement that outlines the maintenance responsibilities of the CSL and is then recorded in the deeds of all the properties connected to the

CSL. Article XV §§ 701.3. *See also* Tr. at p. 98, 100.

Appellants claim that requiring one mutual maintenance agreement for the maintenance of the Sewer Lateral results in practical difficulties due to their special circumstances. Therefore, the Appellants' point to Article XV § AC-105.1, "Modifications", and claim that the ACHD should accept two agreements, the Maintenance Agreement and the Easement Agreement, because although independently they discuss the maintenance of different parts of the Sewer Lateral, when read together, they address the maintenance of the entire Sewer Lateral. 6410 is not a party to the Maintenance Agreement and 6420 is not a party to the Easement Agreement. Exhibits J and M.

Article XV § AC-105.1, "Modifications", states as follows:

Whenever there are practical difficulties involved in carrying out the provisions of this code, the Director and/or his designee **shall have** the authority to approve modifications **on a case by case basis, provided that the Director and/or his designee shall first find that special circumstances make the strict letter of this code impractical.** Such modifications shall be in conformity with the intent and purpose of this code, such that they do not negatively impact human or environmental health or fire safety. The details of an action granting a modification to this code shall be recorded and maintained in the files of the Plumbing Program. (Emphasis added.)

In support of their claim of practical difficulties due to special circumstances preventing them from entering into one mutual maintenance agreement, Appellants allege that the PWSA will only allow them to connect to the Current Sewer Lateral and no sewer line to the west of 6410, and that the cost of connecting to the Eastern Terminus is prohibitive. The ACHD will demonstrate that Appellants did not attempt to enter into one mutual maintenance agreement in compliance with the strict application of the variance prerequisite, the Appellants circumstances are not "special", the Appellants failed to demonstrate that they fully and adequately explored other points of sewer connection that would allow them to comply with Article XV without any modifications to the provisions, and that even if Appellants proved all of this, the Department is not required to

grant a modification to the variance prerequisite.

- i. Due to Mr. Inesso's passing, events preventing 6410 from entering into the Maintenance Agreement have changed such that Appellants' may be able to comply with the variance prerequisite.*

The only obstacle preventing Appellants from complying with the single mutual maintenance agreement requirement for a variance is that at one time, Mr. Inesso would not allow 6410 to enter into the Maintenance Agreement. Tr. at p. 73-74. Therefore, the Appellants created a second agreement, the Easement Agreement, to address the maintenance of the Proposed Sewer Extension only. Exhibit M; Tr. at p. 74. Notably, Appellants insist that Mr. Inesso's statements are inadmissible hearsay and irrelevant to the proceedings even though his refusal is the only reason preventing the Appellants from complying with a strict enforcement of the variance prerequisite. Appellants' Brief at p. 20: para. 13-14. Mr. Caputo testified that since Mr. Inesso's passing, he has not confirmed who the current owners of 6420 are. Tr. at p. 64. If Mr. Caputo had approached the new owners, he could determine whether they may allow 6410 to enter into the Maintenance Agreement currently between 6414 and 6420, thereby making the Easement Agreement obsolete, satisfying the prerequisite for granting a variance, and rendering this appeal and claim for modification of the variance prerequisite moot.

- ii. Appellants failed to demonstrate how the circumstances they face are unique to them and not shared by their neighborhood.*

In a grant to a modification of an Article XV provision, the ACHD must find that the petitioners special circumstances create practical difficulties. Article XV § AC-105.1. Appellants

admitted that their situation is not unique because, as Appellants testified, there is no public sewer in front of their Properties or “10-12” other properties. Tr. at p. 23. The parties confirmed this by introducing maps showing that a public sewer does not exist on the 6400 block of Adelpia St. and that at least four CSLs connect properties from that block to the Eastern and Western Terminuses. Exhibits H and D3. This demonstrates that other properties in the Appellants’ immediate surrounding experience or experienced the same difficulties of connecting to a public sewer directly or through a CSL and having to comply with Article XV. Therefore, Appellants’ circumstances are neither special nor unique.

iii. Appellants failed to adequately demonstrate that entering into one mutual maintenance agreement for the Sewer Lateral results in practical difficulties.

Appellants argue that they face impractical difficulties in trying to enter into one mutual maintenance agreement for two reasons. They claim that connecting to the Current Sewer Lateral is their only option because the PWSA will not allow connection to sewers west of 6410, and connecting to the Eastern Terminus is financially prohibitive. However, Appellants failed to sufficiently prove they are prohibited from connecting to any other sewer line, public or private, either due to restrictions from the PWSA or cost.

1. Mr. Caputo’s testimony regarding statements allegedly made by Rick Obermeier are inadmissible hearsay, irrelevant, and inconsistent, and therefore, should be dismissed on these grounds.

The Appellants claim that the PWSA restricted their options regarding which sewer 6410

may connect to. The Appellants rely entirely on inadmissible hearsay based on alleged phone conversations and emails with Mr. Obermeier in support of their claim. Presumably, the Appellants contend that PWSA's restrictions contribute to practical difficulties in entering into one mutual maintenance agreement. However, Appellants' failed to demonstrate what authority Mr. Obermeier had to make supposedly binding restrictions over telephone and email on behalf of the PWSA.

The Pennsylvania Local Agency Law states that "[l]ocal agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross-examination shall be permitted." 2 Pa.C.S.A. § 554. The only exception is that hearsay evidence, properly objected to, is not competent evidence to support a determination by a Hearing Officer. *Sule v. Philadelphia Parking Auth.*, 26 A.3d 1240, 1243 (Pa. Commw. Ct. 2011). However, if the hearsay evidence is admitted without objection, it may support a finding by the Hearing Officer, "if it is corroborated by any competent evidence in the record." *Id.*

Upon the ACHD's objection to Mr. Obermeier's statements on the grounds of hearsay, Appellants' counsel claimed that Mr. Obermeier's statements were not offered to show whether Appellants can or cannot connect to certain sewers. Tr. at p. 40-41. In fact, Appellants' counsel stated that they were not at the Hearing to "delve" into the options available to the Appellants. Tr. at p. 41-42. If this is true, then all testimony by Appellants and related evidence regarding options available and unavailable to them for sewer connection are irrelevant and should be disregarded. The only other conclusion is that Mr. Obermeier's statements are being offered to prove which options for sewer connection are available to the Appellants and therefore, are inadmissible hearsay and cannot be relied upon by this tribunal when making its determination.

If this tribunal does not determine that Mr. Obermeier's alleged statements are irrelevant or inadmissible hearsay, then Mr. Caputo's testimony regarding Mr. Obermeier's statements must be dismissed because they are inconsistent. For example, Mr. Caputo testified that PWSA would not allow connection from 6410 to the Western Terminus. Tr. at p. 40. However, Mr. Caputo later states that Mr. Obermeier did not reply when he asked Mr. Obermeier if he could connect in the western direction. Tr. at p. 63. Mr. Caputo admits that his conversations with Mr. Obermeier regarding connection from 6410 to the Western Terminus were "[v]ery brief and vague" and that if he knew connection to the Western Terminus was possible, he would have explored it further. Tr. at p. 42-43, 78-79. Additionally, Mr. Caputo testified that he never spoke to the owners of 6400 or 6406 Adelphia St. about connecting to their CSL, which is located directly to the west, and adjacent, to 6410, because Mr. Obermeier told him connection to that CSL was not an option. Tr. at p. 60-61. However, Mr. Caputo admitted that he did not ask Mr. Obermeier whether can go through the CSL on the west side of 6410. Tr. at p. 62. Mr. Caputo's inconsistent testimony casts doubt as to what Mr. Obermeier actually told the Appellants, if anything, and whether they understood the alleged statements as intended. Therefore, Mr. Caputo's statements should not be relied upon by this tribunal.

Next, Appellants rely on a map allegedly provided by Mr. Obermeier to draw inferences as to what Mr. Obermeier is prohibiting. Exhibit H; Tr. at p. 24. Appellants believe that because Mr. Obermeier did not annotate the map on the west side of 6410, this somehow signifies that sewer connections in the western direction are prohibited. Exhibit H; Tr. at p. 111. However, closer examination of the map does not show any restriction placed on Appellants whatsoever in any direction. Exhibit H. The portion west of 6410 was not annotated because it already depicted two CSLs and a public sewer. *Id.* The portion east of 6410 was annotated because Mr. Obermeier

drew four private sewer laterals that were not already depicted on the map, including the Current Sewer Lateral. Exhibit H. Appellants' conflate Mr. Obermeier's silence as to whether Appellants can connect 6410 in a westerly direction with 6410 being prohibited from connecting in that direction without having offered any proof at all. Exhibit H, Tr. at p. 111. Therefore, the lack of markings on one side of Exhibit H is non sequitur and cannot be used to establish a prohibition of connecting to the Western Terminus, either directly or through a CSL.

Moreover, Appellants failed to corroborate their testimony and inferences regarding Mr. Obermeier's statements and beliefs by introducing a witness from the PWSA to testify on their behalf, a written order or a notarized affidavit signed by the PWSA explaining what options are available or unavailable to Appellants, or at the very least, the email communications with Mr. Obermeier referred to in Mr. Caputo's testimony. Tr. at p. 40, 63. For these reasons, Mr. Obermeier's alleged statements and Appellants' inferences drawn from Exhibit H and Mr. Obermeier's silence are immaterial. Since Appellants are relying on Mr. Obermeier's alleged statements and silences to claim that connecting to the Current Sewer Lateral is their only option, it is imperative for the PWSA to provide a clear statement regarding any restrictions they are placing on the Appellants ability to connect to the public sewer directly or through any other CSL prior to issuing an administrative decision of this appeal. If Appellants are able to connect to the CSL that is west of 6410, they may be able to enter into a mutual maintenance agreement with all the properties connected to that CSL, and therefore, Appellants would not require a modification to the variance prerequisite.

2. Appellants provided no evidence to demonstrate how connecting to the Western Terminus or the CSL directly to the west of 6410 is impractical due to prohibitive costs.

Although Mr. Caputo testified to estimated expenditures related to connecting to the Eastern Terminus, he provided no evidence for estimated costs for connecting 6410 to the Western Terminus directly, which as discussed above is “available”, or connecting to the CSL that begins next to 6410, at 6406 Adelpia St. Based on the maps entered into record, the CSL beginning at 6406 Adelpia St. and the Current Sewer Lateral appear to be equidistant from 6410. Exhibits H and D3. Therefore, the expense in excavating and constructing the sewer line from 6410 to either of those CSLs would be similar and clearly not cost prohibitive since Appellants are already requesting to connect to the Current Sewer Lateral. Thus, Appellants have another practical option that they can explore without having to modify the variance prerequisite.

- iv. Even if Appellants successfully demonstrated that special circumstances created practical difficulties in entering into one mutual maintenance agreement for the Sewer Lateral, the ACHD is not obligated to grant the modification.*

The grant for modification of Article XV provisions is discretionary. Article XV § AC-105.1. The provision does not place a condition upon the ACHD before denying the modification. The only condition on the ACHD is that if it chooses to grant the modification, it must first determine that “special circumstances make the strict letter of this code impractical.” Article XV § AC-105.1. As discussed above, the ACHD does not find that the condition for granting a modification was met. Therefore, the ACHD has not abused its discretion in refusing to modify

its variance prerequisite so that it may accept the Maintenance Agreement and Easement Agreement in place of one mutual maintenance agreement between all parties connected to the Sewer Lateral.

v. The Seller Disclosure Statement does not create practical difficulties for the property at 6410 in entering into one mutual maintenance agreement.

Appellants rely on the seller disclosure statement to conclude that when they purchased the Properties in 2011 before the subdivision (“Lot”), the seller disclosure statement indicated the Lot was served by a public sewer rather than private. Exhibit B and D; Tr. at p. 11-12, 16. Appellants testified that when they purchased the Lot, there was one house and a detached garage on what is now 6414, and a garage on what is now the 6410. Tr. at p. 13. Therefore, the only livable structure at the time of purchase was the house on what is now 6414. The parties agree that the house on 6414 is connected to the public sewer, managed by the PWSA, through the Current Sewer Lateral. Appellants are under the mistaken belief that a “public sewer” means a public sewer runs directly in front of their Properties for separate and independent connection without the aid of CSLs. Tr. at p. 75. Article XV Chapter 2 defines “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.” Moreover, PWSA Rules and Regulations Chapter 6 § 605.1 states as follows:

Ownership of Sewer Laterals serving Residential Properties and Business Use Properties, up to and including the connection of the Sewer Lateral to the Sewer Main, lies with the property Owner. The property Owner is responsible for the operation, inspection, maintenance, repair, replacement, abandonment, and removal of the Sewer Lateral as so described.

PWSA clearly states that it does not own the portion of the sewer that connects a property to the public main. This means that a seller disclosure statement would still mark a property as

having “public sewer” regardless of whether the property was connected to the public sewer by a CSL or separate or independent sewer. Appellants failed to demonstrate that its sewage from the Lot at the time of purchase was not conveyed by the PWSA, therefore, indicating that the seller disclosure statement falsely stated the type of sewage system available. Moreover, Mr. Caputo claimed that he is not an expert so his interpretation “is not really truly important.” Tr. at p. 75. For these reasons, Appellants’ claim that the seller disclosure statement is relevant as to their belief whether a public sewage system was available at the time of purchasing the Lot is irrelevant. Finally, the seller disclosure statement has no bearing on whether 6410 can enter into one mutual maintenance agreement regarding the Sewer Lateral or a different CSL, or whether it can separately and independently connect to a public sewer. It is merely a description of the Lot as it existed in 2011 and places no restrictions on 6410, therefore, it must be dismissed.

C. Appellants’ arguments that the ACHD may not consider private property rights when granting or denying a variance are irrelevant because the ACHD is merely attempting to enforce the plain language of its regulation, it is not taking into consideration or attempting to resolve private property rights.

Appellants claim that the ACHD may not consider private property rights before granting or denying a variance because these issues may not be resolved before an administrative tribunal. The ACHD claims that it is not attempting to make any determinations regarding disputes of private property rights, it is merely attempting to enforce the unambiguous and plain language of *its own* regulations.

In *Chevron v. Nat’l. Res. Def. Council, Inc.*, the U.S. Supreme Court held that if the statute has directly and unambiguously addressed the precise question at issue, then the Court must defer

to the interpretation of the agency charged with enforcing the statute. *Chevron, U.S.A., Inc. v. Nat'l. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

At issue in this case is whether there can only be one maintenance agreement for a CSL and whether all properties connected to that CSL must be a party to the agreement. To obtain a variance of Article XV §§ AC-701.2.1 and AC-701.2.2, the regulation clearly states that all the parties connected to the CSL must enter into “A mutual maintenance *agreement*” or record “*a document*...adequately specifying the maintenance responsibilities of the property owners.” Article XV §§ AC-701.3 and AC-701.3.1. By using the term “a” and the singular of “agreement” and “document”, the statute clearly and unambiguously requires that all property owners connected to a CSL, or requesting to connect to it, enter into one mutual maintenance agreement for the maintenance of that CSL. *Id.* Nowhere does the regulation imply that properties connected to a CSL can enter into multiple maintenance agreements regarding the maintenance of that CSL or that properties connected to the CSL can be excluded from being a party to the agreement. The ACHD interprets “a” and the singular of “agreement” and “document” as requiring all property owners connected to a CSL, or requesting to connect to it, to enter into only one mutual maintenance agreement for the maintenance of that CSL. Therefore, the Agreements do not satisfy the requirement for *one* mutual maintenance agreement.

Moreover, the regulation clearly states that all property owners connected to the CSL must enter into and record a “*mutual* maintenance agreement” and that “all such properties” and “all affected properties” must be a party to the agreement or document. Article XV §§ AC-701.3 and AC-701.3.1. The word “mutual” is unambiguous on its face and the tribunal must defer to the ACHD’s interpretation of that term. The ACHD defines “mutual” in the context of maintenance agreements for CSLs as all parties connected to a CSL, and those requesting to connect to it, must

agree to the maintenance responsibilities of the entire CSL. The ACHD has determined that since 6420 will not allow 6410 to connect to the Current Sewer Lateral, as Appellants inability to secure one mutual maintenance agreement for the Sewer Lateral indicates, the Proposed Sewer Extension is not *mutual*. In fact, all parties connected to the Current Sewer Lateral entered into a single mutual maintenance agreement, but all parties connected to the Sewer Lateral have not entered into a single maintenance agreement. Exhibits J and M. Therefore, the ACHD may not grant the variance because a *mutual* maintenance agreement does not exist for the Sewer Lateral.

Appellants rely on zoning and building permit cases³ to direct this tribunal to force the owner of 6420 to accept the Proposed Sewer Extension. However, these cases have no bearing on the ACHD's authority to interpret and enforce the unambiguous language of its regulations. Moreover, the cases put forth by the Appellants do not involve agency regulations that clearly and unambiguously require a showing of acceptance by all parties connected to a property. Instead, these cases involve assertions made by private parties for enforcement of private rights. In the case before this tribunal, the ACHD is not attempting to define or enforce the private rights of 6420, and a third party has not intervened to enforce any such rights. Instead, the ACHD is only trying to enforce its own regulations. It has merely noted that a mutual maintenance agreement for the entire Sewer Lateral does not exist, which is a prerequisite for granting a variance for a CSL. Therefore, Appellants' claim that 6420's rights should not be considered is irrelevant because the ACHD does not seek to determine or enforce the limits of 6420's rights over the Current Sewer Lateral and the Sewer Lateral. 6420 is relevant only to the extent that one mutual

³ *BR Associates v. Board of Commissioners of the Township of Upper St. Clair*, 136 A.3d 548 (Pa. Commw. Ct. 2016); *Michener Appeal*, 115 A.2d 367 (Pa. 1955); *Anderson v. Board of Supervisors of Price Township*, 437 A.2d 1308 (Pa. Commw. Ct. 1981); *Gulla v. North Strabane Twp.*, 676 A.2d 709 (Pa. Commw. Ct. 1996); *Borough of Braddock v. Allegheny County Planning Department*, 687 A.2d 407 (Pa. Commw. Ct. 1996); and *Kaufman v. Borough of Whitehall Zoning Hearing Board*, 711 A.2d 539 (Pa. Commw. Ct. 1998).

maintenance agreement does not exist for the Sewer Lateral. Therefore, the variance was properly denied.

IV. Findings of Law.

- A. Appellants failed to preserve for administrative review its claim that requiring 6410, 6414, and 6420 to enter into one mutual maintenance agreement causes practical difficulties due to the Appellants' special circumstances and therefore, the provision should be read with a modification.
- B. Appellants failed to preserve for administrative review its claim that the ACHD may not consider private rights before granting or denying a variance.
- C. Appellants failed to preserve for administrative review its claim that this tribunal is not the appropriate forum to address competing ownership claims of private property.
- D. The Western Terminus is an available public sewer for 6410.
- E. According to Article XV, 6410 must separately and independently connect to the Western Terminus.
- F. The ACHD is not required to grant a variance of Article XV §§ AC-701.2.1 and AC-701.2.2.
- G. The ACHD did not improperly deny Appellants' variance request because Appellants were not entitled to one.
- H. The ACHD has discretion in granting or denying a request to modify a provision of Article XV.

- I. Appellants did not demonstrate that they faced impractical difficulties due to special circumstances that prevented them from entering into a single mutual maintenance agreement.
- J. The Appellants did not demonstrate how their circumstances are unique compared to the rest of their neighborhood.
- K. Mr. Caputo's testimony regarding Rick Obermeier's statements are inadmissible hearsay.
- L. Mr. Caputo's testimony regarding statements made by any plumbers is inadmissible hearsay.
- M. The request for modifying the requirement for all property owners connected to a CSL to enter into one mutual maintenance agreement was properly denied.
- N. This tribunal must defer to the ACHD's interpretation of its own regulations regarding the requirement for one mutual maintenance agreement for all properties connected to a CSL because the language of the statute is unambiguous regarding the number of maintenance agreements accepted by the ACHD and which parties must be part of that agreement.

V. Conclusion.

Therefore, since Appellant failed to meet its burden of proof, the ACHD asserts that the variance should not be granted and its appeal should be dismissed. Appellants failed to demonstrate that they faced practical difficulties due to their special circumstances and that therefore, the ACHD must accept two maintenance agreements regarding one CSL even though the regulation allows for only one agreement. Appellants also failed to prove that the ACHD is required to grant a modification to a regulatory provision and that it is also required to grant a

variance. Finally, Appellants did not sufficiently counter why the ACHD may not enforce its regulations. For these reasons, this tribunal must deny the variance.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2018, I served a true and correct copy of the Allegheny County Health Department's Post-Hearing Memorandum on the following individuals by electronic mail and first-class mail, postage paid, and addressed as follows:

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