

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MICHAEL A. CAPUTO AND JANICE M.  
CAPUTO,

Petitioners/Appellants,

vs.

ALLEGHENY COUNTY HEALTH  
DEPARTMENT,

Respondent/Appellee.

CIVIL DIVISION

Case No. SA-18-525

PETITION FOR REVIEW  
(Decision of Government Unit)

Code:

Filed on Behalf of:  
Petitioners/Appellants,  
Michael A. Caputo and Janice M. Caputo

Counsel of Record for this Party:

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**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA**

MICHAEL A. CAPUTO AND JANICE M.	)	
CAPUTO,	)	
	)	
Petitioners/Appellants,	)	
	)	Case No.
vs.	)	
	)	
ALLEGHENY COUNTY HEALTH	)	
DEPARTMENT,	)	
	)	
Respondent/Appellee.	)	
	)	
	)	

**PETITION FOR REVIEW**

Petitioners/Appellants, Michael A. and Janice M. Caputo, file this Petition for Review (the "Petition") appealing and challenging the decision of the Allegheny County Health Department Hearing Officer (the "Hearing Officer") described below, and in support thereof states as follows:

**I. Summary**

1. In the absence of Local Rules regarding the form or content of a notice of appeal from a local agency proceeding, the Petitioners are filing the instant Petition for Review. Pa.R.A.P. 1502 ("The petition for review ... shall be the exclusive procedure for judicial review of a determination of a government unit."); *see also City of Pittsburgh v. Kisner*, 746 A.2d 661, 664 (Pa. Commw. Ct. 2000) (affirming decision of the Court of Common Pleas for Allegheny County allowing an individual to make an appeal through the filing of a Praecipe for Hearing Date, where the Local Rules were silent regarding the form or content of a notice of appeal from a local agency proceeding).

2. This Petition for Review thus functions as notice of an appeal under 42 Pa. C.S. §5571(b).

3. Petitioners/Appellants Michael and Janice Caputo (collectively "Petitioners" or "Caputos") file this Petition for Review of an Administrative Order of Hearing Officer Max Slater of the Respondent/Appellee, the Allegheny County Health Department ("Respondent" or the "Department"), dated May 29, 2018, following a hearing during which evidence was taken and a record was established.

4. This Petition is therefore filed to challenge a local agency action under 42 Pa. C.S. § 5571(b), 2 Pa. C.S. § 933(a)(2), and the Local Agency Law, 2 Pa. C.S. §§ 751-754.

5. A copy of the Administrative Order to be reviewed is attached hereto as Exhibit "A" and incorporated herein by reference.

6. In his determination, the Hearing Officer denied the Caputos' claims that the Department erred in denying their request for a variance of a sewer line from a private residence to a common sewer lateral.

## **II. The Parties**

7. Petitioners Michael and Janice Caputo own adjacent properties in Pittsburgh's Morningside neighborhood.

8. Respondent is the Allegheny County Health Department. The Department's offices are located at 542 Fourth Avenue, Pittsburgh, Pennsylvania 15237.

## **III. The Property**

9. The Caputos purchased the property then known as 6414 Adelphia Street in January 2012.

10. The Caputos thus own adjacent properties at 6410 and 6414 Adelpia Street (“6410” and “6414,” respectively) and hold record title to 6410 and 6414 by virtue of a Deed dated January 30, 2012 and recorded in the Allegheny County Department of Real Estate.

11. The Caputos subsequently subdivided the property then known as 6414 Adelpia Street into two (2) adjacent, contiguous lots, which now are known as 6414 Adelpia Street, also known as “Lot 1,” and 6410 Adelpia Street, also known as “Lot 2.”

12. At the time of the Caputos’ purchase of the properties now known as 6414 Adelpia Street and 6410 Adelpia Street, which were on the same deed prior to subdivision by the Caputos, the property that is now 6414 contained a house and a detached garage, and the property that became 6410 contained a two-bay garage.

13. The Caputos’ intention when purchasing 6414 and 6410 was to subdivide the land, keep the existing house on 6414, and build a new house on 6410.

**IV. Statement of the Basis for the Jurisdiction of the Court**

14. There is a right of appeal from the final order of every government unit which is an administrative agency within the meaning of Section 9 of Article V of the Constitution of Pennsylvania. 42 Pa. C.S. § 5105(a)(2).

15. The Court of Common Pleas has statutory authority to hear an appeal from a determination of a local government unit. 2 Pa. C.S. § 933(a)(2) (“each court of common pleas shall have jurisdiction of appeals from final orders of government agencies in the following cases: “Appeals from government agencies, except Commonwealth agencies, under Subchapter B of Chapter 7 of Title 2 (relating to judicial review of local agency action) or otherwise.”).

16. Subchapter B of Chapter 7 of Title 2 (2 Pa. C.S. §§ 751-754 (“Judicial Review of Local Agency Action”)) applies to all local agencies. 2 Pa. C.S. § 751.

17. Under this subchapter, “Any person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure).” 2 Pa. C.S. § 752.

18. Because the Department denied the Caputos’ requested relief in the form of a variance, and the Hearing Officer held that the Department did not err in doing so, the Caputos are an aggrieved party with a direct interest in appealing the Administrative Order.

19. Sitting as an appellate court in the present case, the Court of Common Pleas has the authority to vacate, set aside, and reverse the Administrative Order. 42 Pa. C.S. § 706 (“An appellate court may affirm, modify, vacate, set aside or reverse any order brought before it for review...”); 42 Pa. C.S. § 701(a) (“The provisions of this subchapter shall apply to all courts of this Commonwealth, including the courts of common pleas when sitting as appellate courts.”)

20. This Petition is timely filed. *See* 42 Pa. C.S. §5571(b); 1 Pa. C.S. §1908.

21. Contemporaneous with this filing, the Petitioners hereby notify the Department from which the appealed decision is being filed in accordance with Rule 3 of the Local Rules of the Summary Appeals Branch of the Court of Common Pleas.

## **V. The Facts**

22. When the Caputos purchased 6414 and 6410 in 2012, they believed that public sewer access existed.

23. Notably, the Seller Disclosure Statement for the properties at 6414 and 6410 specifically represented that public sewer access existed.

24. With respect to public sewer access, as part of the process for construction of the house at 6410, the Caputos submitted an application dated July 8, 2016 to the Pittsburgh Water and Sewer Authority ("PWSA") - the government agency authorized to issue sewer permits.

25. On July 8, 2016, PWSA issued a permit for the Caputos to connect their home being constructed on 6410 to the public sewer system.

26. Amidst constructing the house at 6410 pursuant to a building permit on October 26, 2016, the Caputos discovered that there is no public sewer line directly in front of 6410.

27. Therefore, on April 4, 2017, the Caputos hired a company named American Leak Detection to camera the interior of the private sewer lateral extending into 6414 (the "Sewer Lateral"), which serves 6414.

28. The Sewer Lateral connects to the public sewer line to the east of 6414 and 6410.

29. The camera footage revealed that the only properties with connections to the Sewer Lateral were 6420 Adelphia Street, the Caputos' adjacent neighbors, and the Caputos' property located at 6414 Adelphia Street.

30. The property at 6420 Adelphia Street ("6420") is owned by husband and wife Richard and Annette Inesso (collectively, the "Inessos").

31. On September 29, 2017, a conference was held at the Department's premises, which included the Caputos, the Caputos' counsel, the Inessos, the Inessos' counsel, the Hearing Officer, Max Slater, the Department's Assistant Solicitor Vijya Patel, and other representatives for the Department.

32. At the conference, the Inessos and the Caputos agreed to enter into a mutual maintenance agreement for the maintenance of the Sewer Lateral at 6420 and 6414.

33. On October 10, 2017, the Caputos and the Inessos recorded with the Allegheny County Prothonotary a Common Sewer Lateral Maintenance and Easement Agreement (the "Agreement") concerning the properties at 6420 and 6414.

34. The Agreement provides, among other things, for the complete maintenance and repair of the entirety of the Sewer Lateral.

35. The Agreement states in paragraph 7 that the Agreement "and all rights, duties, obligations and/or privileges" thereunder is binding upon the Caputos, the Inessos, "and their respective successors and assigns."

36. The Agreement states in paragraph 7 that "[a]ll easements, covenants and restrictions herein granted shall be deemed covenants running with [6414 Adelphia Street and 6420 Adelphia Street]."

37. On October 14, 2017, the Caputos requested a variance of the Department's Rules and Regulations Article XV – Plumbing and Building Drainage ("Article XV") in order to extend the Common Sewer Lateral currently serving the properties at 6414 and 6420 to connect the property at 6410.

38. The Caputos argued that a variance was necessary because connecting to the nearest public sewer was impractical and that, under the Department's Plumbing Code, they should be granted a modification.

39. The Caputos further argued that the Agreement should be read together with another document, hereinafter described as the Declaration, and the two should be collectively treated as one mutual maintenance agreement.

40. On November 6, 2017, the Department denied the Caputos' request for a variance.

41. Andrew Grese, the Department's Plumbing Program Manager, sent the Caputos a letter, informing them of the grounds for the denial of the variance as follows:

Section AC-701.3.1 states that in order to connect to an existing common sewer lateral, a maintenance agreement must be recorded in the deeds of all properties involved. Presently there is not an agreement adequately specifying maintenance responsibilities for the sewer recorded in the deeds of the properties located at 6410, 6414 and 6420 Adelpia Street. For this reason, your request to connect to the [Sewer Lateral] is denied. Please be advised that your request to install a grinder pump would have been approved provided the required maintenance agreement issue was resolved.

42. On November 16, 2017, the Caputos recorded with the Allegheny County Prothonotary a Declaration of Easement and Covenants (the "Declaration"), which provides for, *inter alia*, the maintenance and repair of a new private sewer lateral extending from 6410 to 6414, where it would connect to the existing Sewer Lateral.

43. The Declaration states in paragraph 2 that the Caputos declare and create "an easement over and across" 6414 for the benefit of 6410 for purposes of installing the New Sewer Lateral.

44. The Declaration states in paragraph 4 that "the covenants, restrictions and agreements set forth in this Declaration shall be considered covenants running with the land and shall bind, burden and benefit [6410 Adelpia Street and 6414 Adelpia Street]."

45. The Declaration also states in paragraph 4 that "[e]ach grantee accepting a deed, lease or other instrument conveying any interest in [6410 Adelpia Street or 6414 Adelpia Street] or any part thereof, whether or not the same incorporates or refers to this Declaration, covenants individually and for such grantee's heirs, personal representatives, successors and assigns to observe, perform and be bound by this Declaration."

46. Subsequently, the Caputos responded in writing to Mr. Grese's November 6, 2017 denial letter.

47. Specifically, in the Caputos' correspondence responding to Mr. Grese's November 6, 2017 denial letter, the Caputos provided Mr. Grese with copies of both the Agreement (which addresses the maintenance of the Sewer Lateral) and the Declaration (which addresses the maintenance of the New Sewer Lateral) and included citations to where each document is recorded with Allegheny County.

48. In response, Vijya Patel, Esquire, Assistant Solicitor for the Department ("Attorney Patel"), sent e-mail correspondence dated November 22, 2017 to Kevin F. McKeegan, Esquire, counsel for the Caputos ("Attorney McKeegan").

49. In her November 22, 2017 e-mail, Attorney Patel advised that the Department "cannot approve [the Caputos'] variance request unless all the properties on an existing sewer lateral and those wishing to connect to the common sewer lateral have signed one mutual maintenance agreement that is then recorded in the deeds of all the properties."

50. By way of his response letter dated November 29, 2017, Attorney McKeegan filed with the Department an appeal ("Appeal") on behalf of the Caputos with respect to the Department's November 6, 2017 denial of the Caputos' request for a variance under Section AC-701.3.1 of the Department's Plumbing Code.

51. In their Appeal, the Caputos' Attorney McKeegan advised the Department: "The combination of these two recorded instruments [the Agreement and Declaration] satisfied the stated ground for denial of the Caputos' variance request."

52. On March 7, 2018, an administrative hearing was held in this matter, beginning at 9:30 a.m. at the Clack Health Center, Building 7, 301 39<sup>th</sup> Street, Pittsburgh, Pennsylvania,

before Max Slater, Esquire, Administrative Hearing Officer for the Allegheny County Health Department.

53. The Caputos offered the testimony of two (2) witnesses in support of their case during the Hearing: (1) the testimony of Mr. Caputo as a fact witness; and (2) Stephen Emery, Esquire, Head Underwriter/Area Manager, Chicago Title Insurance Company, as an expert witness.

54. Mr. Caputo testified that connecting 6410 directly to the public sewer line at the closest eastern terminus on Adelpia Street is not an option, and after speaking with 10 to 12 plumbers, no one has even provided him with an estimate because no one wants to do this work.

55. Of note, and as specifically observed by Mr. Caputo during excavation, there are extensive gas, water and sewer lines servicing each house in that area of Adelpia Street, which he described as "a spider web of pipes."

56. Additionally, Mr. Caputo testified that no direct sewer line could be placed near any pre-existing sewer lines because they are constructed of 70-year-old terra-cotta pipe, and no digging should be done in that area.

57. Notwithstanding that construction of a direct sewer line from 6410 Adelpia Street to the east terminus of the closest public sewer line is not possible, the cost to repair just 70 feet of the road in front of 6410 Adelpia Street would be \$17,000.00 to \$18,000.00 based on estimates received from three (3) or four (4) asphalt companies.

58. Additionally, the distance from 6410 Adelpia Street to the terminus of the closest public sewer line to the east is 160 feet.

59. The Caputos had multiple communications with Mr. Obermeier from PWSA regarding connecting 6410 Adelpia Street directly to the public sewer line.

60. Mr. Obermeier advised the Caputos that connecting 6410 Adelphia Street directly to the public sewer line at the closest western terminus on Adelphia Street is not an option.

61. Given the circumstances, Mr. Obermeier advised the Caputos to connect 6410 Adelphia Street to the public sewer line through the existing Sewer Lateral located on 6414 Adelphia Street.

62. Stephen Emery, Esquire, Head Underwriter/Area Manager, Chicago Title Insurance Company ("Mr. Emery"), was qualified and accepted as an expert witness by the Administrative Hearing Officer at the time of Hearing in this matter without objection.

63. Mr. Emery testified that the Agreement was signed, recorded with Allegheny County, provides for the maintenance and repair of the Sewer Lateral, runs with the land of the burdened parcels (6414 Adelphia Street and 6420 Adelphia Street), and is binding not only upon the parties (the Caputos and the Inessos), but also their successors and assigns.

64. Mr. Emery also testified that the Declaration was signed, recorded with Allegheny County, provides for the maintenance and repair of the New Sewer Lateral, runs with the land of the burdened parcels (6414 Adelphia Street and 6410 Adelphia Street), and is binding not only upon the parties (the Caputos), but also their successors and assigns.

65. Mr. Emery further testified that the Declaration in paragraph 2 creates an easement across 6414 Adelphia Street for the benefit of 6410 Adelphia Street to accommodate the New Sewer Lateral and its connection to the existing Sewer Lateral.

66. Mr. Emery testified that the Agreement and the Declaration, when viewed together, fully address the maintenance and repair responsibilities for the Sewer Lateral and the New Sewer Lateral, which would account for all of the private sewer laterals extending from 6410 Adelphia Street all the way to the public sewer line to the east.

67. Mr. Emery also testified that the Agreement and the Declaration, when taken together, are tantamount to one agreement amongst the property owners, and while there physically may be two documents that were signed on different dates, they really should be read together in terms of the maintenance obligations.

68. The Caputos also offered Exhibits A through Q in support of their case during the Hearing, each of which was introduced into evidence.

69. The Department offered the testimony of one (1) witness in support of its case during the Hearing: Andrew F. Grese, Plumbing Program Manager, Allegheny County Health Department, as a fact witness.

70. Mr. Grese testified that the concern of the Department in this instance is that it wants to make sure that there is not a break in maintenance responsibilities with respect to the Sewer Lateral and New Sewer Lateral.

71. The Department offered Exhibits D1 through D5 in support of its case during the Hearing, each of which was introduced into evidence.

72. The Department did not present any expert witness(es), nor did it offer any expert witness testimony.

73. The Inessos, the record owners of 6420 Adelpia Street, did not appear at the Hearing in this matter, nor did they present any testimony or evidence during the Hearing to contradict the testimony of Mr. Caputo or Mr. Emery.

74. No evidence whatsoever was presented at the time of Hearing even suggesting that the proposed connection and use of the New Sewer Lateral to the Sewer Lateral would in any way present a health hazard or constitute inadequate or unsanitary plumbing.

## VI. The Decision

75. The Department's decision to deny the Caputos' requested relief was confirmed by the written decision (the "Administrative Order") dated May 29, 2018 attached hereto as Exhibit "A".

76. The Administrative Order observed that the matter before it concerned only "whether the ACHD properly denied a request for a variance of the Article XV requirement to connect directly to a public sewer[.]" *See* Ex. A, p. 6.

77. The Administrative Order first held as a threshold issue that the Caputos did not waive their arguments regarding impracticality and private ownership. *See* Ex. A, p. 7.

78. The Administrative Order continued by disagreeing with the Caputos that the Agreement and Declaration are to be read as one agreement and held that because "[t]here is nothing in the ACHD's Rules and Regulations requiring the ACHD to consider two separate agreements to be read together as one document" and because the Inessos "will not allow 6410 to connect to the Sewer Lateral," the Proposed Sewer Extension does not satisfy the Department's Rules and Regulations. *See* Ex. A, pp. 6-9.

79. Next, the Administrative Order considered the Caputos' assertion of impracticality and special circumstances, and simply held that the Department was not **required** to approve the Caputos' request for a modification. *See* Ex. A, pp. 9-10.

80. Finally, the Administrative Order held that the Department was not "defining the rights of private parties" and instead "enforcing its own regulations" and thus had the authority to resolve the instant matter. *See* Ex. A, p. 11.

## VII. Grounds for Appeal

- A. The Hearing Officer's Decision in Refusing to Grant the Caputos' Request for a Variance is Arbitrary, is an Abuse of Discretion, is Not Supported By Substantial Evidence, and is Not in Accordance with the Law.

81. The Hearing Officer's interpretation of the Department's Article XV Regulation is not in accordance with the law as the Agreement and Declaration, when appropriately read together, satisfy Article XV.

82. "It is well settled that the rules of statutory construction apply to the interpretation of agency regulations." *Chevalier v. Gen. Nutrition Ctrs.*, 177 A.3d 280, 301 (Pa. Super. Ct. 2017) (citing 1 Pa. Code § 1.7; *Dep't of Env'tl. Res. v. Rannels*, 610 A.2d 513, 515 (Pa. Commw. Ct. 1992)).

83. "Section 1921(a) of the Statutory Construction Act of 1972 provides that statutes (and thus regulations) should be construed, if possible, to give effect to all provisions." *Chevalier*, 177 A.3d at 301 (citing 1 Pa.C.S. § 1921(a)). "In other words, '[s]tatutory provisions must . . . be read together and construed with reference to the entire act, and no provision should be construed in such a way as to render some other provision without effect.'" *Chevalier*, 177 A.3d at 301 (citing *Rannels*, 610 A.2d at 515).

84. When an appellate court reviews an administrative agency's interpretation of its own regulations, it must follow a two-step analysis: "First, '[i]n construing administrative regulations, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation . . . .' Second, the regulations 'must be consistent with the statute under which they were promulgated.'" *Popowsky v. Pa. PUC*, 589 Pa. 605, 910 A.2d 38, 52-53 (Pa. 2006) (citing *Commonwealth of*

*Pennsylvania, Dept. of Public Welfare v. Forbes Health System*, 492 Pa. 77, 422 A.2d 480, 482 (Pa. 1980)).

85. Importantly, the governing rule of statutory construction, 1 Pa.C.S.A. § 1902, provides: “The singular shall include the plural, and the plural, the singular.”

86. Thus, courts have refused to interpret statutes using the plural or singular version of a word to be so limited. *See, e.g., Commonwealth v. Adams*, 524 A.2d 1375, 1377-1378 (Pa. Super. Ct. 1987) (holding that based on 1 Pa.C.S.A. § 1902, the trial court “was not free to attach such significance to the presence or absence of an ‘s’ at the end of the word ‘communication.’”).

87. The stated intent of the Department’s Plumbing Code is “...to protect the public from the health hazards of inadequate or unsanitary plumbing...” AC-101.3.

88. The Department can grant a variance for a private residence to connect to a public sewer line through a private sewer lateral. AC-701.2.1.2; AC-105.1

89. Indeed, AC-701.3 provides:

When private sewers and/or water mains must cross another property or properties to connect with a public sanitary sewer, storm sewer and/or water main, an easement shall be recorded in the deeds of all affected property owners. 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).

90. The Hearing Officer’s Administrative Order holds that Article XV requires **one** mutual maintenance agreement per Common Sewer Lateral on the basis of the use of singular wordage, all the while recognizing how “strict” such an interpretation is. *See Ex. A.*, p. 9.

91. The Hearing Officer’s Administrative Order further holds 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.” *See* Ex. A, p. 9.

92. The Hearing Officer, therefore, holds that because the Agreement and Declaration cannot be read together, and because the Agreement does not provide for the inclusion of 6410 and the Inessos did not allow the connection of such, it does not satisfy Article XV.

93. Notably, as Pennsylvania’s appellate courts have long held, it is well settled that issues concerning property rights in instruments of title must be resolved in the courts, **not** in administrative proceedings. *BR Associates v. Board of Commissioners of the Township of Upper St. Clair*, 136 A.3d 548, 561 (Pa. Commw. Ct. 2016).

94. As is the case here, the Hearing record contains sufficient evidence to determine whether the Caputos are entitled to a variance under Section AC-701.3.1 of the Department’s Plumbing Code – **without** dabbling in references to the Inessos’ purported position on ownership/usage.

95. While references to the Inessos’ purported position on the ownership and/or use of the Common Sewer Lateral may have been suggested by witnesses during the Hearing, which testimony constitutes inadmissible hearsay and must be disregarded, the Inessos did not appear, testify, or present any evidence – oral or written – at the Hearing.

96. The foregoing factual findings of the Inessos’ intentions thus were “not supported by substantial evidence,” under 2 Pa. C.S. §754(b).

97. The Inessos’ stance on the ownership or use of the Sewer Lateral is simply not relevant or material to these proceedings. Indeed, any dispute, which may or may not exist, involving the ownership or use of the Sewer Lateral is a private matter between the Caputos and the Inessos that would have to be decided by the courts, not by a local government body such as

the Department in connection with a request for a variance from the Department's Plumbing Regulations.

98. Furthermore, the Agreement and the Declaration, when viewed together, fully address the maintenance and repair responsibilities for the Sewer Lateral and the New Sewer Lateral, which would account for the entirety of the private sewer laterals extending from 6410 Adelphia Street all the way to the public sewer line to the east.

99. The Agreement and the Declaration, when taken together, are tantamount to one agreement among the property owners of 6410 Adelphia Street, 6414 Adelphia Street and 6420 Adelphia Street.

100. While the Agreement and the Declaration may be two documents that were signed on different dates, they must be read together in terms of the maintenance and repair obligations of the Sewer Lateral and New Sewer Lateral.

101. The Agreement and the Declaration, when taken together, adequately address the maintenance and repair concerns of the Department and satisfy the requirements of Section AC-701.3.1 of the Department's Plumbing Code.

102. The Agreement and the Declaration, when taken together, fulfill the intent of Section AC-101.3 of the Department's Plumbing Code "...to protect the public from the health hazards of inadequate or unsanitary plumbing..."

103. In fact, when both documents are taken into consideration and read collectively together as they must be, they provide for mutuality of maintenance over **all** properties sought to connect to the Common Sewer Lateral in accordance with the purpose of the Department's Plumbing Code and, as such, the Hearing Officer erred by not acting in accordance with the law

as his interpretation of both the Agreement and Declaration and the Regulations as well as relying upon and finding facts which were not supported by **any** evidence of record.

104. Furthermore, AC-105.1 states:

**Modifications.** 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.

105. As the Caputos were advised by PWSA, and as the Hearing record demonstrates, connecting 6410 Adelpia Street directly to the public sewer line at the closest western terminus on Adelpia Street is not an option.

106. As the Hearing record demonstrates, connecting 6410 Adelpia Street directly to the public sewer line at the closest eastern terminus on Adelpia Street is not an option.

107. Moreover, the theoretical connection point on the public sewer line to the east near the 6400 Block of Adelpia Street, which was constructed prior to 1994, in closest proximity to 6410 Adelpia Street is in excess of 150 feet away and, thus, not "available" as defined by Section AC-701.2.2 of the Department's Plumbing Code.

108. Distances to the public sewer line notwithstanding, as the Hearing record demonstrates, 6410 Adelpia Street does not have direct access to a public sewer line.

109. Accordingly, a public sewer line is not "available" to 6410 Adelpia Street per Section AC-701.2.2 of the Department's Plumbing Code.

110. Notwithstanding the provisions of Section AC-701.2.2 of the Department's Plumbing Code, the Caputos have demonstrated that they do not have the ability to connect 6410 Adelphia Street directly to a public sewer line.

111. The clear purpose of Section AC-701.3.1 of the Department's Plumbing Code is to ensure that maintenance and repair responsibilities of any private sewer lateral are properly accounted for and addressed.

112. The Agreement and the Declaration have been executed by the parties and are properly recorded with Allegheny County.

113. The rights, duties and obligations set forth in the Agreement and the Declaration run with the land of all the burdened parcels (6410 Adelphia Street, 6414 Adelphia Street and 6420 Adelphia Street).

114. There is no portion of the private sewer laterals extending from 6410 Adelphia Street all the way to the public sewer line to the east (the Sewer Lateral and New Sewer Lateral) that is not accounted for by a common maintenance agreement that is recorded with Allegheny County (the Agreement and the Declaration).

115. Special circumstances exist in this case with respect to the ability – or in this case inability – to connect 6410 Adelphia Street to the public sewer system, thus making the strict letter of the Department's Plumbing Code impractical.

116. The granting of the Caputos' request for a variance under Section AC-701.3.1 of the Department's Plumbing Code is in conformity with the intent and purpose of the Department's Plumbing Code.

117. The granting of the Caputos' request for a variance under Section AC-701.3.1 of the Department's Plumbing Code will not negatively impact human or environmental health or fire safety.

118. Thus, the Hearing Officer's denial of the Caputos' request for a variance under Section AC-701.3.1 of the Department's Plumbing Code was arbitrary, an abuse of discretion, not supported by substantial evidence, and/or contrary to law under 2 Pa. C.S. §754(b).

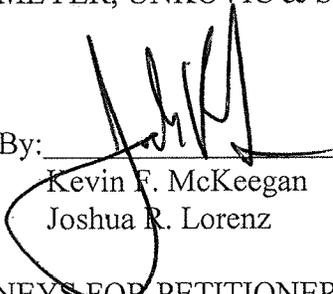
**VIII. Conclusion**

WHEREFORE, Petitioners respectfully request that this Court enter an order in Petitioners' favor, hold that the Hearing Officer's denial of the variance was arbitrary, an abuse of discretion, not supported by substantial evidence, and/or contrary to law, and order that the variance under Section AC-701.3.1 of the Department's Plumbing Code be granted.

Respectfully submitted,

Date: June 27, 2018

MEYER, UNKOVIC & SCOTT, LLP

By:   
\_\_\_\_\_  
Kevin F. McKeegan  
Joshua R. Lorenz

ATTORNEYS FOR PETITIONERS/APPELLANTS,  
MICHAEL A. AND JANICE M. CAPUTO

# EXHIBIT "A"

ALLEGHENY COUNTY HEALTH DEPARTMENT  
ADMINISTRATIVE HEARING

MICHAEL A. CAPUTO AND : In Re: 6410 Adelphia Street  
JANICE M. CAPUTO, : Pittsburgh, PA 15206  
: :  
Appellants, : Copies Sent To:  
: *Counsel for Appellants:*  
v. : Kevin F. McKeegan, Esq.  
: Joshua R. Lorenz, Esq.  
ALLEGHENY COUNTY HEALTH : MEYER, UNKOVIC & SCOTT LLP  
DEPARTMENT, : 535 Smithfield Street, Suite 1300  
: Pittsburgh, PA 15222  
Appellee. :  
: *Counsel for ACHD:*  
: Vijya Patel, Esq.  
: 301 39<sup>th</sup> Street, Building 7  
: Pittsburgh, PA 15201

**DECISION AND ORDER OF THE ALLEGHENY COUNTY HEALTH  
DEPARTMENT HEARING OFFICER**

**I. INTRODUCTION**

The issue in this case is whether the Allegheny County Health Department (“ACHD”) was within its legal rights to deny a variance of a sewer line from a private residence to a common sewer lateral. Appellants Michael and Janice Caputo (collectively “Appellants” or “Caputos”) own adjacent properties at 6410 and 6414 Adelphia Street (“6410” and “6414,” respectively) in Pittsburgh’s Morningside neighborhood. After constructing a house at 6410, the Caputos found out that there is no public sewer line directly in front of 6410. However, the properties at 6414 and 6410 are connected to a common sewer lateral (“Current Sewer Lateral”). The Caputos’ neighbors, Richard and Annette Inesso (the “Inessos”) own an adjacent property at 6420 Adelphia Street (“6420”).

In September of 2017, the Caputos, the Inessos, personnel from the ACHD, and their respective counsel convened for a conference. At this conference, the Inessos and the Caputos agreed to enter into a mutual maintenance agreement for the maintenance of the Current Sewer Lateral (“Sewer Lateral Maintenance and Easement Agreement”) concerning the properties at 6420 and 6414. However, Mr. Inessos specified at the conference that he will not allow the property at 6410 to enter into a mutual maintenance agreement between 6414 and 6420.

The ACHD Rules and Regulations Article XV (“Article XV” or “Plumbing Code”) requires that all properties on a common sewer lateral enter into a mutual maintenance agreement. In October of 2017, the Caputos requested a variance from the ACHD, claiming that connecting to the nearest public sewer is impractical, and that under the Plumbing Code, they should be granted a modification. The Caputos also argued that the Sewer Lateral Maintenance and Easement Agreement should be read together with another instrument that the Caputos recorded with Allegheny County (“Declaration of Easement and Covenants”), and should be treated as one mutual maintenance agreement. The ACHD denied the Caputos’ variance request, and the Caputos appealed to this tribunal.

After considering the evidence and testimony offered at the hearing, as well as the applicable Rules and Regulations, this tribunal finds that the Caputos are not entitled to a variance, and that the ACHD was within its rights to deny the variance.

## II. EVIDENCE

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

- A: Approved subdivision plan
- B: Deed transfer dated 1/30/12
- C: Building permit for 6410 Adelpia St.
- D: Disclosure agreement
- E: Application
- F: Tap approval
- G: Reimbursement dated 3/8/17
- H: Annotated map
- I: CD dated 4/4/17
- J: Common sewer lateral maintenance agreement
- K: Letter
- L: Denial letter dated 11/6/17
- M: Shared maintenance agreement
- N: Letter dated 10/14/17
- O: Email dated 11/22/17
- P: Appeal
- Q: Mr. Stephen Emery's CV

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

- D1: Customer application
- D2: Letter dated 11/6/17
- D3: Map dated 2/12/18
- D4: Two-page map
- D5: City of Pittsburgh sewer index

## III. FINDINGS OF FACT

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

- 1) The Caputos own the properties at 6410 Adelpia Street and 6414 Adelpia Street. (Hearing Transcript ("H.T.") at 9).

- 2) The Caputos originally purchased 6410 Adelpia Street ("6410") and 6414 Adelpia Street ("6414") on the same deed, and built a new house at 6410. (H.T. at 13-14).
- 3) On October 26, 2016, in the midst of construction of the house at 6410, the Caputos learned from their builder that there is no public sewer system access to 6410. (H.T. at 22-23).
- 4) Upon excavation by the Caputos' builder, no public sewer line was located. (*Id.*).
- 5) On April 4, 2017, the Caputos hired a company named American Leak Detection to camera the interior of the private sewer lateral extending into 6414 (the "Sewer Lateral"), and serving 6414. The Sewer Lateral connects to the public sewer line to the east of 6414 and 6410. (H.T. at 24-33; Exs. H, I).
- 6) The property at 6420 Adelpia Street ("6420") is owned by husband and wife Richard and Annette Inesso (collectively the "Inessos"). 6420 is adjacent to 6414. (H.T. at 7).
- 7) On September 29, 2017, a conference was held at the ACHD's premises. This conference included the Caputos, the Caputos' counsel, the Inessos, the Inessos' counsel, Hearing Officer Max Slater, ACHD Assistant Solicitor Vijya Patel, and representatives for the ACHD. (H.T. at 7).
- 8) At this conference, The Inessos and the Caputos agreed to enter into a mutual maintenance agreement for the maintenance of the Current Sewer Lateral. However, Mr. Inesso stated that he will not allow the property at 6410 to enter into a mutual maintenance agreement between 6414 and 6420. (H.T. at 64).
- 9) Mr. Inesso passed away after the conference, but before the administrative hearing on March 7, 2018. (H.T. at 64).
- 10) On October 10, 2017, the Caputos and the Inessos recorded with Allegheny County a Common Sewer Lateral Maintenance and Easement Agreement ("Sewer Lateral Maintenance and Easement Agreement") concerning the properties at 6420 and 6414. (H.T. at 38-40; Ex. J).
- 11) On October 14, 2017, the Caputos requested a variance of ACHD Rules and Regulations Article XV—Plumbing and Building Drainage ("Article XV") to extend a common sewer lateral ("CSL") currently serving the properties at 6414 and 6420 ("Current Sewer Lateral") to connect the property at 6410. (Ex. K).

12) On November 6, 2017, the ACHD denied the Caputos' request for a variance. (Ex. D2). Andrew Grese, the ACHD's Plumbing Program Manager sent the Caputos a letter stating the grounds for the denial of the variance:

"Section AC-701.3.1 states that in order to connect to an existing common sewer lateral, a maintenance agreement must be recorded in the deeds of all properties involved. Presently there is not an agreement adequately specifying maintenance responsibilities for the sewer recorded in the deeds of the properties located at 6410, 6414 and 6420 Adelpia Street. For this reason, your request to connect to the [Sewer Lateral] is denied." (H.T. at 47; Ex. L).

13) On November 16, 2016, the Caputos recorded with Allegheny County a Declaration of Easement and Covenants ("Declaration of Easement and Covenants"), which provides for the maintenance and repair of a new private sewer lateral extending from 6410 to 6414, where it would connect to the existing Sewer Lateral. (H.T. at 48-49; Ex. M).

14) On December 1, 2017, the Caputos appealed the ACHD's denial of their variance request. (Ex. P).

15) In their appeal, the Caputos' counsel advised the ACHD, "The combination of these two recorded instruments [the Sewer Lateral Maintenance and Easement Agreement and the Declaration of Easement and Covenants] satisfies the stated ground for denial of the Caputos' variance request." (H.T. at 52; Ex. P).

16) On March 7, 2018, an administrative hearing was held in this matter.

#### IV. DISCUSSION

In an administrative appeal of a final agency action of the ACHD in which 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. (H.T. at 101). The Appellants contacted the ACHD on their own accord to request a

variance of Article XV. *Id.* Therefore, because this matter concerns 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 the ACHD is required to grant the variance. The preponderance of the evidence standard is equivalent to a “more likely than not standard.”

*Commonwealth v. McJett*, 811 A.2d 104, 110 (Pa. Commw. Ct. 2002).

#### **A. Waiving Arguments on Appeal**

A threshold issue in this case is whether the Caputos waived certain arguments by not raising them in their Notice of Appeal. In their brief, the Caputos argue that the ACHD should grant them a variance because of the alleged impracticality of connecting to the nearest public sewer. (*Proposed Findings of Fact and Conclusions of Law on Behalf of Appellants, Michael A. and Janice M. Caputo* (“*Caputo Brief*”) at 17). The Caputos also argue that any dispute involving ownership or use of the Sewer Lateral is a private matter which should be decided by courts, not by this tribunal. (*Id.* at 20).

The ACHD contends that because the Caputos did not raise the issues of impracticality and private ownership in their appeal, they cannot argue these issues in their brief. (*The Allegheny County Health Department’s Post-Hearing Memorandum* (“*ACHD Brief*”) at 7). In the Notice of Appeal, the Caputos’ asserted ground for appeal was that two agreements regarding sewer maintenance responsibilities are tantamount to one agreement among the property owners of 6410, 6414, and 6420. (Ex. P). The ACHD posits that this assertion “cannot be

logically or reasonably expanded to include [impracticality and private ownership] because these claims are in no way related to how two arguments are equivalent to one agreement.” (*ACHD Brief* at 8).

The Caputos have the better argument here. The purpose of a Notice of Appeal is for the Appellant to set forth “the grounds for his or her appeal.” (*ACHD Art. XI § 1104(B)*). The grounds for an appeal is an explanation of why a party is appealing an action by the ACHD. It is not an exhaustive list of each and every legal theory that an appellant will raise. To require such an exhaustive list would be extraordinarily cumbersome and unfair. Therefore, this tribunal finds that the Caputos have not waived their impracticality and private ownership arguments.

#### **B. Two Agreements or One?**

The thrust of the Caputos’ argument is that Sewer Lateral Maintenance and Easement Agreement and the Declaration of Easement and Covenants are functionally one agreement. (*Caputo Brief* at 22). In other words, that two agreements are tantamount to one.

In support of their argument, the Caputos offered the expert testimony of Stephen Emery, the Head Underwriter and Area Manager for Chicago Title Insurance Company. (H.T. at 80-96; Ex. Q). Mr. Emery was accepted as an expert in real estate issues, including sewer and utility easements, covenants, declarations, and mutual maintenance agreements. (H.T. at 83). Mr. Emery concluded that the Sewer Lateral Maintenance and Easement Agreement and the Declaration of Easement and Covenants should be read as one agreement:

“My own view is that there are two documents, but that the two documents taken together are tantamount to one agreement amongst the property owners, and while there physically may be two documents that were signed on different dates, they really should be read together in terms of the maintenance obligations.” (H.T. at 90).

Mr. Emery’s view squares with the Caputos’—the two agreements are functionally one. However, he prefaces his conclusion about whether the two agreements constitute one with a hedge, “Well, I -- I’m not sure I can speak to the Health Department’s view of it.” (H.T. at 90). Mr. Emery’s candor here underscores a crucial point: that this tribunal must consider how the ACHD interprets its own regulations, and accord significant weight to this interpretation. While Mr. Emery is an expert on such issues as sewer and utility easements and mutual maintenance agreements, his expertise does not extend to the ACHD’s interpretation of its regulations that address these areas. Thus, the scope of Mr. Emery’s expertise is somewhat limited here.

The applicable Article XV regulations state that all 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.” Art. XV §§ AC-701.3 and AC-701.3.1 (emphasis added). The ACHD explains that because the applicable regulations use singular language like “a mutual maintenance agreement” and “a 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.” (*ACHD Brief* at 20). This interpretation is consistent with Mr. Grese’s letter to the Caputos explaining why the ACHD denied them a variance: “Presently there is not *an* agreement adequately specifying maintenance responsibilities for the sewer...at 6410, 6414 and 6420 Adelphia Street.” (Ex. L) (emphasis added).

Although this interpretation regarding singular language is strict, it is also reasonable, as it conforms to the letter of the law. There is nothing in the ACHD’s Rules and Regulations requiring the ACHD to consider two separate agreements to be read together as one document.

Article XV 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.” Art. XV §§ AC-701.3 and AC-703.3.1. Here, because the Inessos, who own 6420, will not allow 6410 to connect to the Current Sewer Lateral, the Proposed Sewer Extension is not “mutual,” as not all the property owners on the line are parties to it. The bottom line is that the ACHD’s interpretation of the pertinent Article XV regulations is that there be *one* mutual maintenance agreement or similar document, and this interpretation is consistent with the regulatory language.

### **C. Impracticality and Special Circumstances**

The Caputos also argue that practical difficulties have prevented them from entering into one mutual maintenance agreement with the owners of all other properties connected to the Sewer Lateral. (*Caputo Brief* at 23).

The Caputos argue that connecting to the public sewer line at the closest western terminus on Adelpia Street is “not an option.” (H.T. at 60-63, 78-79; Ex. H). Likewise, the Caputos argue that connecting to the public sewer line at the closest eastern terminus on Adelpia street is “not possible,” as the distance is 160 feet, and the cost of road repair alone would cost at least \$17,000. (H.T. at 30, 44-45, 77; *Caputo Brief* at 9-10).

In support of their argument, the Caputos point to the applicable ACHD regulation on Modifications, which states:

**“Modifications.** 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.” Art. XV § AC-105.1. (emphasis added).

The Caputos catalog a series of circumstances that allegedly make connection from 6410 to a public sewer impractical. (*Caputo Brief* at 23-24). These circumstances range from the infeasibility of connection to the eastern and western terminus to the Inessos’ intransigence to an apparently dishonest Seller Disclosure Statement. (*Caputo Brief* at 4, 9-10; H.T. at 73).

Unfortunately for the Caputos, the language of § AC-105.1 indicates that the ACHD’s power to grant modifications is discretionary, not compulsory. This section specifies that the Director and the Director’s designee “shall have the authority to approve modifications on a case by case basis...” The language does not say that the

Director or designee *must* approve modifications, only that they have the authority to do so. The clear implication from this is that modifications are at the discretion of the ACHD. Here, the ACHD considered the Caputos' request for a modification and denied it. The ACHD was not required to approve this request.

#### **D. Private Ownership**

The Caputos' final argument is that "the Inessos' stance on the ownership of the Sewer Lateral is not relevant or material to these proceedings." (*Caputo Brief* at 20). The implication from this argument is that because the ACHD allegedly does not have the authority to adjudicate property rights among private parties, the Sewer Lateral Maintenance and Easement Agreement and the Declaration of Easement and Covenants are beyond the ACHD's ambit to second-guess. In support of their position, the Caputos cite to a series of cases indicating that issues of individuals' private property rights must be resolved in courts, not in administrative tribunals like this one.<sup>1</sup> (*Caputo Brief* at 18-20).

But the Caputos' argument misses the mark. The ACHD is not defining the rights of private parties, but rather is enforcing its own regulations. Therefore, the Caputos' private ownership argument is unpersuasive.

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<sup>1</sup> Cases cited by the Caputos in support of this argument are: *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).

## V. CONCLUSION

Based on the evidence and testimony presented at the hearing, as well as the relevant Rules and Regulations, this tribunal finds that the Caputos are not entitled to a variance, and the ACHD's denial of a variance to the Caputos is upheld. The ACHD's Plumbing Code indicates that the ACHD's authority to grant or deny variances on plumbing issues is discretionary, not mandatory. Furthermore, the ACHD's interpretation of the Plumbing Code's requirement that one mutual maintenance agreement be submitted for all parties along a CSL is reasonable. Therefore, the Caputos' variance was properly denied. 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

May 29, 2018  
Dated:

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing PETITION FOR REVIEW was served upon the following this 27<sup>th</sup> day of June, 2018, addressed as follows:

**VIA ELECTRONIC AND US MAIL**

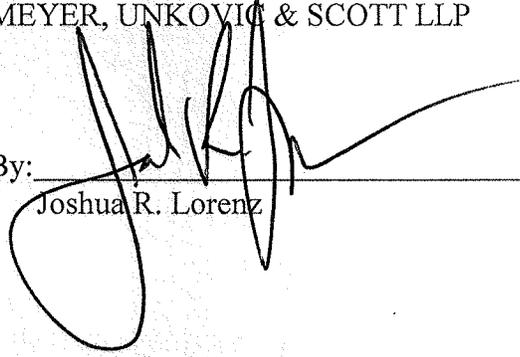
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MEYER, UNKOVIC & SCOTT LLP

By: \_\_\_\_\_

Joshua R. Lorenz

A handwritten signature in black ink, appearing to read 'Joshua R. Lorenz', is written over a horizontal line. The signature is stylized and includes a large loop at the bottom left.

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA**

MICHAEL A. CAPUTO AND JANICE M. )  
CAPUTO, )

Petitioners/Appellants, )

) Case No.

vs. )

ALLEGHENY COUNTY HEALTH )  
DEPARTMENT, )

Respondent/Appellee. )

**ORDER OF COURT**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2018, upon consideration of the Petition for Review, hearing transcript, record on appeal, and briefs of the parties, and having found that the Hearing Officer's denial of the variance was arbitrary, an abuse of discretion, not supported by substantial evidence, and contrary to law, it is hereby ORDERED and DECREED that the Administrative Order issued by the Hearing Officer on May 29, 2018 is vacated, set aside, and reversed.

It is further ORDERED and DECREED that the variance requested by the Petitioners/Appellants under Section AC-701.3.1 of the Department's Plumbing Code be and hereby is GRANTED.

BY THE COURT:

\_\_\_\_\_

**CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provision of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Michael A. and Janice M. Caputo

Signature: \_\_\_\_\_

Name: Joshua R. Lorenz

Attorney No. (if applicable): 84397