

**BEFORE THE ALLEGHENY COUNTY HEALTH DEPARTMENT
545 FOURTH AVENUE
PITTSBURGH, PENNSYLVANIA 15219**

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|----------------------------|---|------------------------------------|
| CHURCHILL COMMUNITY | : | In Re: 1310 Beulah Road/ Churchill |
| DEVELOPMENT, LP; RAMESH | : | Community Development |
| JAIN; VIKAS JAIN; PARADIGM | : | |
| CONSULTANTS, LLC; | : | |
| | : | |
| Appellants, | : | |
| | : | |
| v. | : | |
| | : | |
| ALLEGHENY COUNTY HEALTH : | : | |
| DEPARTMENT, | : | |
| | : | |
| Appellee. | : | |

**APPELLANTS RESPONSE TO THE ALLEGHENY HEALTH DEPARTMENT’S
MOTION TO DISMISS AND IN THE ALTERNATIVE, PETITION FOR
SUPERSEDEAS/STAY**

I. Introduction:

Ramesh Jain, Vikas Jain, Paradigm Consultants, LLC and Churchill Community Development, LP (the “Jains”) appeal of the nearly \$1.5 million penalty levied by the Allegheny County Health Department (“ACHD”) should not be dismissed and a supersedeas/stay should be granted.

After the ACHD levied the penalty the Jains timely appealed. Pursuant to the ACHD regulations, the Jains were required to prepay the penalty or post a bond to perfect the appeal, unless they claimed an inability to pay. The Jains claimed an inability to prepay. A hearing was held only on the Jains claim of inability to prepay the penalty. After the hearing, the ACHD appointed hearing officer, Max Slater, on December 20, 2017, ruled that the Jains

could afford to prepay the penalty or post a bond and issued an order for them to do so within thirty (30) days of the order.

The Jains then timely filed a petition for review of Mr. Slater's order. As grounds the Jains alleged that (1) Mr. Slater should have recused for taking evidence outside of the record on two occasions, (2) Mr. Slater participated in another but related hearing in which the participants (including the ACHD) argued that the Jains were the responsible parties, which the hearing officer, Mr. Slater, with the consent of the ACHD found to be true, (3) that Mr. Slater relied on evidence that should have been excluded, (4) that an improper burden of proof was required, and finally, (5) that the requirement of prepayment or posting a bond of a \$1.5 million fine as a condition precedent to a hearing on the merits of the penalty violates the Jains' due process under both the United States and Pennsylvania Constitutions.¹

The ACHD has taken the position that the Jains nonpayment/non posting of a bond within thirty (30) days, despite properly filing a petition for review of the decision, requires a dismissal of the Jains' appeal and permits the ACHD to essentially execute on the Jains' property to satisfy the penalty. The ACHD proposes that the foregoing take place despite the Jains not receiving due process on the merits of the penalty and filing the petition for review.

II. Due Process Requires a Supersedeas/Stay be Granted:

The Jains are entitled to a supersedeas/stay and their right of appeal has not been waived; it is a right. Under the Pennsylvania Constitution, Section 9, Article V, an appeal from an administrative agency is a right.² That right is not conditioned on posting a bond.

¹ Other grounds were also alleged.

² Such rights also exist under the U.S. Constitution.

And, Pennsylvania statutory law implementing the constitutional right of appeal has no bond requirement. Similarly, under Article I, Section 1, there is an inherent right of all persons to defend their property and reputations, under Article I, Section 11 Courts are to be open to any persons for injury to property or reputation, and under I, Section 13, excessive bail shall not be required, nor excessive fines be imposed. Of note, many of the issues raised by the Jains, including whether the penalty is grossly disproportionate to penalties issued by the ACHD for similar or more egregious conduct, whether the penalty is a punishment for the Jains litigating the case, and whether the ACHD and Mr. Slater abused their discretion are all on appeal to the Pennsylvania Supreme Court. *Hiko Energy, LLC v. Pa. PUC*, 2017 Pa. LEXIS 3632, 2017 WL 6374065 (Pa. 2017), appeal of *Hiko Energy, LLC v. Pa. PUC*, 163 A.2d 1079 (Pa. Commw. 2017).

While paying a fine as a condition to an appeal may, in some cases, be permissible³, it is not where there is no opportunity for substantive or procedural due process on the merits in one's case. *Fuentes v. Shevin*, 407 U.S. 67, (S. Ct. 1983), enunciated the broad principle that any significant taking of property within the protection of the Fourteenth Amendment, however brief or temporary, must be preceded by notice and opportunity for a prior hearing, "the only truly effective safeguard against arbitrary deprivation of property." 407 U.S. at 83. And, that there must be procedures available sufficient to comply with due process prior to any deprivation. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The prepayment requirement has only been upheld as permissible after a party was provided with a hearing on the merits, never before. *Graham v. office of Surface Mining*

³ A permissible limit has yet to be determined by the Pennsylvania Courts as related to ACHD Regulations. *Twelve Vein Coal Co. v. Commonwealth, Dep't of Environmental Resources*, 561 A.2d 1317, (Pa. Commw. 1989).

Reclamation and Enforcement, 722 F.2d 1106 (3rd Cir. 1983), in upholding the prepayment requirement, held that administrative procedures requiring an informal response to the penalty and review thereof, as well as the opportunity for the penalized party to be provided a formal public hearing on the merits without prepayment (along with the option to request temporary relief from an administrative law judge), is sufficient due process prior to a requirement of prepayment (in order for an appeal to be heard before an administrative law judge). See also, *B & M Coal Corp. v. Office of Surface Mining Reclamation & Enforcement*, 699 F.2d 381, (1983 U.S. App.) for the same proposition.

The *Graham* and *B & M* Courts cited *Fuentes* and *Mathews*, *supra* for the requirement of pre-deprivation due process. And, in upholding the prepayment requirement of a \$22,500 penalty, specifically held that due process was satisfied because there was an informal review of the penalty as well as a public hearing without a requirement for prepayment. And, that the party also had an opportunity to seek temporary relief without prepayment.

Here, if the ACHD position were upheld, the Jains would have no opportunity to defend against the penalty levied by the ACHD or the conduct the ACHD alleges the Jains committed. The Jains were only permitted to litigate their ability to prepay the penalty. And, because Mr. Slater held the Jains could prepay, they will not receive any due process on the merits unless they prepay (or are granted a supersedas/stay), or it is conceded that the position of the ACHD is not tenable. This does not satisfy the due process requirements.

Further, the requirement for a pre-deprivation hearing is fact-specific, as due process is flexible and calls for such procedural protections as the particular situation demands.

Ciambriello v. County of Nassau, 292 F.3d 307, (2002 U.S. App. 2nd Cir.) citing *Mathews v.*

Eldridge, 424 U.S. 319, (S. Ct. 1996). Thus, size matters. Prepayment is not a permissible requirement when the size of the fine reaches the outrageous sum in this case. *Fuentes, supra* dealt with a \$22,500 penalty here the penalty is \$1.5 million. Thus, while the *Fuentes* court held that an informal hearing and a public hearing was sufficient due process prior to prepayment of a small penalty, here, with such a large penalty, significant due process is required, and the ACHD contends none is due.

Additionally, here, the hearing officer employed by the body imposing the fine of nearly \$1.5 million, determined that the Petitioners herein have the means to prepay the fine and the ACHD objects to a hearing on the merits of the opposition to the fine (without prepayment). This is an impermissible comingling of the judicial and enforcement functions of government, i.e by imposing a huge fine that a respondent is unable to pay, the body imposing it can avoid the respondent's right to a fair hearing and appeal on the merits.

Nowhere is that more relevant than here given that the Respondents moved, on several occasions, for recusal of the hearing officer due to his having considered facts outside the record in deciding various issues, and participating in another but related hearing in which the participants (including the ACHD) argued that the Jains were the responsible parties which the hearing officer, with the consent of the ACHD, found to be true (among other issues). Thus, by his determination that the respondents can afford to prepay the fine and by refusing to recuse himself due to obvious prejudice and improvident conduct, he, on behalf of his employer, the ACHD, would be able to deny the respondents their constitutional right of appeal from an administrative decision by simply refusing to grant a supersedeas/stay.

A supersedeas/stay must be granted in consideration of due process and pursuant to the following procedure.

III. Applicable Regulations, Rules and Procedure Permit the Hearing Officer to Grant a Supersedeas/Stay:

The ACHD incorrectly contends in its motion to dismiss that Mr. Slater must dismiss the Jains' appeal because they did not prepay the penalty or post a bond within thirty (30) days of Mr. Slater's December 20, 2017 Order.

ACHD Regulation 2109.06(a)(2) requires that if a person wishes to contest the amount of a penalty or the fact of the alleged violation, the person shall prepay the proposed penalty or post a bond in that amount within thirty (30) days of its assessment. And, failure to forward the funds (or post a bond) shall result in the waiver of legal rights to contest the violation or the amount of the penalty *"unless the appellant alleged a financial inability to prepay the penalty or post a bond."* ACHD Regulation 2106(a)(3)⁴. If an appellant alleges an inability to pay, the ACHD is required to hold a hearing to make the determination and issue an order. No prepayment is required once the allegation is made.

The hearing is held pursuant to ACHD Regulation 1105. And a decision is to be rendered by the hearing officer pursuant to ACHD Regulation 1106. ACHD Regulation 1110 provides that "Any party who is aggrieved by any decision of the Director or Hearing Officer rendered pursuant to Section 1106 of this Article, may appeal there from (*sic*) within 30 days after the Hearing Officer's written decision to the Court of Common Pleas of Allegheny County pursuant to 42 Pa.C.S.A § 5571(b)." 42 Pa.C.S.A § 5571(b) only deals with the time

⁴ The Regulation says no dismissal if the claim is raised, not dismissal upon a decision.

period for taking an appeal, which is thirty (30) days. Further, 2 Pa.C.S. §§ 751-754 applies to all appeals of local agencies.⁵

ACHD Regulation 1111 states that a notice of appeal will not stay any ACHD action or ruling of a director or hearing officer. A “notice of appeal” is defined in ACHD Regulation 1104, as the notice of appeal filed by an appellant in response to the initial action of the ACHD. This is the initial appeal of the penalty where the Jains claimed an inability to pay, not a petition for review (filed by the Jains) pursuant to ACHD Regulation 1110 to the Court of Common Pleas. Further, per the regulations, the Jains inability to prepay claim has delayed a hearing on the merits pursuant to the appeal, and thus the appeal itself.

Pursuant to the Pennsylvania Rules of Appellate Procedure, which both discuss a petition for review (Pa. R.A.P. 1511 et.al.), and are applicable by analogy (they do not govern this proceeding but are influential in interpreting it), after an appeal is taken or review of a quasi-judicial order is sought, the trial court or other government unit may no longer proceed further in the matter. Pa. R.A.P. 1701. This is a quasi-judicial order. Thus, once a petition for review is filed pursuant to ACHD Regulation 1110, there is an automatic stay.⁶

Alternatively, if it is determined there is no automatic stay, a supersedeas should be granted by Mr. Slater and, if denied, then by the Court of Common Pleas. See Pa. R.A.P. 1532, 1781, 1731 and 1732 permitting an application for supersedeas after the filing of an

⁵ ACHD is a local agency. See 2 Pa.C.S. § 101 and references title 42 to determine which court is the appellate court, in this case, the Common Pleas Court of Allegheny County, 42 PA. C.S. 5571(b).

⁶ Here, due process requires it as well.

appeal and during its pendency and requiring the same to be presented first to Mr. Slater.⁷ While the ACHD seems to contend otherwise, there must be an appeal before a supersedeas/stay is sought, otherwise there is no purpose. And, time must be afforded to do so prior to taking action.

Mr. Slater must first rule on the request for supersedeas/stay and then, if necessary, an application can be made to the appellate court. Pa. R.A.P. 1701 et.al. This also bears out in related case law. In *Boyle Land & Fuel Co. v. Commonwealth, Environmental Hearing Bd.*, 475 A.2d 928, (Pa. Commw. 1984), Boyle filed a declaratory action alleging that the requirement to prepay a penalty is unconstitutional.⁸ After being denied a supersedeas by the Environmental Hearing Board, Boyle was permitted to seek a supersedeas from the Commonwealth Court.^{9 10}

Stanley T. Pilawa & Disposal, Inc. v. Department of Env'tl. Protection, 698 A.2d 141, (Pa. Commw. 1997), held in similar circumstances, a motion to dismiss is similar to a rule to show cause why the appeal should not be dismissed. A rule to show cause directs an adverse party to explain why a certain action should not be taken, and on the day the rule is returnable the adverse party has the opportunity to present a defense to the rule at a hearing. In this case, whether there is an automatic stay or, Mr. Slater should grant a supersedeas/stay.

⁷ There is no specific procedural rule applicable to this proceeding, however, in the cases cited, the general procedure and the appellate rules are followed in cases similar to this where supersedeas is sought.

⁸ The procedure objected to in *Boyle* is different than the ACHD Regulations as there is opportunity for due process on the merits prior to prepayment.

⁹ The Commonwealth Court denied the supersedeas request and Boyle posted a bond to perfect its appeal and proceeded. The case was not dismissed.

¹⁰ This is also supported by *Tracey Mining Co. v. Commonwealth*, 544 A.2d 1075 (Pa. Commw. 1988) holding that an appellant may appeal and at then seek a supersedeas.

IV. The Appeal Should Not Be Dismissed and a Supersedeas/Stay Should be Granted:

A. The Appeal Should Not Be Dismissed:

The Jains filed a petition for review of Mr. Slater's order, and now seek a supersedeas/stay with regard to their appeal of the ACHD's penalty and Mr. Slater's order requiring prepayment of the penalty. As stated previously in Part II of this response, if not granted, the Jains are denied due process. They cannot challenge Mr. Slater's decision, either factually or on constitutional grounds without prepaying \$1.5 million (or posting a bond, which requires more than the principal \$1.5 million), which they alleged they cannot afford.

Any denial would amount to an end run by the ACHD and Mr. Slater denying the Jains the ability to be heard. *Graham, B & M, Fuentes and Mathews, supra*. This would also cause extreme hardship because without a supersedeas/stay, if the appeal is dismissed, the ACHD will begin to act on the penalty and execute on all the property, businesses and livelihood of the Jains and their families. This will result in excessive legal fees and, ultimately, a deprivation of property far beyond the penalty which cannot be righted even if the Jains are successful in their petition for review. Further, if the Jains are not successful on their petition for review, and the case remanded, they will lose their opportunity for any due process on the merits. This violates all due process norms.

Even if Mr. Slater determines that there is no automatic stay, he should grant a supersedeas/stay against the enforcement of his order by the ACHD and decline to dismiss the appeal. Such should be in effect until a final determination is made upon the Jains petition for review and at such time, if the Jains are unsuccessful, they would be afforded an opportunity to prepay pursuant to the December 20, 2017 order.

No rule or order requires dismissal. The ACHD does not properly cite Mr. Slater's order. The ACHD has argued that Mr. Slater's order requires dismissal pursuant to the ACHD Regulations; this is not the case. Mr. Slater has broad discretion, if any. The only applicable ACHD Regulation specifically states that failure to prepay will NOT result in the waiver of legal rights if appellant alleges an inability to prepay. ACHD Regulation 2106(a)(3). Here, the Jains made that allegation. Mr. Slater rendered an order requiring the payment of the penalty within thirty (30) days, but did not order that failure to do so would result in the dismissal of their appeal and no ACHD Regulation requires the same (if it is determined that it applies, ACHD Regulation 1111 has no timetable). And, the Jains appealed that order by filing their petition for review (a necessary predicate to a request for a supersedeas/stay).

And, pursuant to Pa. R.A.P. 1532, 1701, 1781, 1731 and 1732, *Stanley T. Pilawa, supra* and *Boyle Land & Fuel Co., supra* it is appropriate for Mr. Slater to consider a supersedeas/stay at this time. The seminal Pennsylvania case on prepayment¹¹ *Twelve Vein Coal Co. v. Commonwealth, Dep't of Environmental Resources*, 561 A.2d 1317, (Pa. Commw. 1989) dealt with an appeal of a decision dismissing an appeal for failure to prepay a penalty and held:

We are not, in this case, faced with the situation where one who can afford to prepay the assessment or post a bond is before this Court to complain about the temporary deprivation of funds. We have, instead, a more serious issue; a petitioner who, because of alleged impecunity,

¹¹ Though it did not deal with the ACHD Regulations at issue or discuss whether prepayment was constitutional, it did require that at a minimum, a party alleging it could not prepay must be given a minimum of due process on that issue. Leaving the issue of whether prepayment of a penalty is permissible under due process considerations for another day.

may be denied access to our courts and due process of law. There is ample reason, therefore, to tread carefully in this case. See e.g. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (requiring courts to strike a balance between private and government interests).

The Court then remanded the case for a determination of the Appellant's ability to prepay.

This is an analogous situation. While Mr. Slater and the ACHD determined that the Jains can prepay, the Jains appealed that decision. It would be improper to dismiss the Jains' appeal or permit execution on their property at this time and a supersedeas/stay should be considered and granted.

In either event, in accordance with *Boyle, supra*, the appeal should not be dismissed until an order on the Jains' request is rendered by Mr. Slater and/or the Court of Common Pleas. After which, the Jains receive an opportunity to prepay or obtain a bond (though they cannot).

B. A Supersedeas/Stay Should Be Granted:

If Mr. Slater determines no automatic stay applies, the Jains hereby petition for a supersedeas/stay as follows and incorporates the foregoing:

1. The Jains hereby incorporate this entire response as well as their Petition for Review, Post Hearing Brief, and Response to ACHD's Post Hearing Brief.

2. Dismissing the Jains' appeal at this time would result in a denial of due process as the Jains have not been afforded any process with regard to the merits of the penalty assessed. *Graham, B & M, Fuentes and Mathews, supra*.

3. Dismissing the Jains' Appeal and/or permitting the ACHD to execute on the Jains property would cause undue hardship for the following reasons:

a. The Jains property would be subject to execution without any hearing on the merits of their case, which would violate their due process rights as claimed herein and in their Post Hearing Brief, Response to the ACHD's Post Hearing Brief, and the Jains' Petition for Review (all incorporated herein), *Graham, B & M, Fuentes* and *Mathews, supra*.

b. The Jains' appeal would be dismissed; thus, if they are unsuccessful on the petition for review, they will lose the opportunity litigate their case on the merits.

c. The Jains property is utilized for business purposes, and the execution or liquidation thereof would cause undue hardship as the business would cease to operate, and their families, employees and contractors would suffer.

d. The ACHD would begin to execute on the Jains' property which would result in extreme tax consequences far beyond the penalty amounts, in addition to legal fees, which could never be recouped even if the Jains are successful on their petition for review, essentially, making their petition for review worthless to them.

e. The Jains property, even if liquidated, is not sufficient to pay the penalty.

f. If the Jains are successful on their petition for review and/or their appeal on the merits, the foregoing damages cannot be undone.

4. There is no danger to the public, public health, or environment as the Jains do not seek a stay on the enforcement order regarding the environmental protections at the subject property, just protection from dismissal of their appeal and execution on their property (and the prepayment requirement). Further, there is no continuing violation that is

causing harm to the public, public health or environment and the Jains are complying with the enforcement order.

5. The Jains made out a substantial case on the merits and are likely to prevail:

a. The ACHD process requiring prepayment without any due process on the merits is likely to be overturned on constitutional grounds for the reasons alleged herein and in the Jains' Petition for Review including that the hearing on inability to prepay is not due process in the meaning of both Pennsylvania and Federal law with regard to the penalty assessed (and its amount), that the requirement to prepay such a large penalty deprives the Jains of due process, that the Jains cannot contest the penalty and could have no relief with regard to the merits of the penalty without first being deprived of their property, and, the other reasons set forth in the petition for review.

b. Alternatively, the Jains are likely to be granted a new hearing before Mr. Slater for the reasons set forth herein and in the petition for review, including Mr. Slater's reliance on witnesses and evidence that should not have been admitted.

c. Alternatively, the Jains are likely to be granted a new hearing on their claim of inability to prepay the penalty because the hearing officer, Mr. Slater, should have recused given his actions alleged herein and in the Jains' petition for review, including making findings outside of the record, presiding over a companion case implicating the Jains for liability (and consenting with the ACHD for its dismissal), and for the ACHD holding hearing in front of Mr. Slater in bad faith.

6. The ACHD will not suffer prejudice.

a. The Jains only seek to maintain their appeal and their property during the pendency of the petition for review, this is the status quo.

- b. If the Jains are successful on their appeal, they will either:
 - i. Be given another hearing on their inability to prepay the penalty and, if it is determined they cannot prepay, proceed to a hearing on the merits, or if it is determined they can prepay, be provided an opportunity to do so (the current status quo), or be given the opportunity to appeal on the constitutional issues).
 - ii. Be permitted to proceed directly to a hearing on the merits.
- c. If the ACHD is ultimately successful, the ACHD will still be able to proceed against the Jains' property (or the Jains permitted to prepay or post a bond).
- d. The process on a petition for review is limited and, is likely to be resolved in a short timeframe.

WHEREFORE, it is requested that this Honorable Court grant this Petition for Supersedeas/Stay and stay the requirement for the Jains to post a bond, in order to perfect their appeal, and the dismissal of their appeal until the petition for review is fully resolved, and then comply with the Common Pleas Court.

Respectfully Submitted,

MAURICE A. NERNBERG & ASSOCIATES

Date: February 2, 2018

By: _____

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CERTIFICATE OF SERVICE

I, David M. Nernberg, hereby certify that a true and correct copy of the within **Appellants Response to the Allegheny Health Department's Motion to Dismiss and in the Alternative, Petition for Supersedas/Stay** was served upon all parties to the within matter, this date, by first class mail, addressed as follows:

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Date: 2/2/18



David M. Nernberg