

**ALLEGHENY COUNTY HEALTH DEPARTMENT  
AIR QUALITY PROGRAM**

In the Matter of:

Mr. John Fries  
806 Breezewood Drive  
Glenshaw, PA 15116

John Fries Landscape & Maintenance  
4802 Gibsonia Road #1  
Allison Park, PA 15101-5000

Premium Landscape Supply  
4802 Gibsonia Road #2  
Allison Park, PA 15101

Daniel B. Pierce Property Group LLC  
4802 Gibsonia Road  
Allison Park, PA 15101

Violation No. 181202

Violations of Article XXI  
("§2105.50 OPEN BURNING") at  
property:

Parcel ID: 1215-R-148-0000-00

**BRIEF IN OPPOSITION TO APPELLANTS' APPEAL OF THE DECEMEBER 19, 2018  
ENFORCEMENT ORDER**

Now comes Appellee, Allegheny County Health Department ("ACHD" or the "Department") filing its Brief in Opposition to Appellants' Appeal of the December 18, 2018 Enforcement Order, and in support thereof, sets forth as follow:

**SCOPE AND STANDARD OF REVIEW**

The Department has the burden of proof when it assesses a civil penalty, as is the case here. Art. XI §1105(C)(7)(a)(i). As such, it must prove the facts of the matter according to a preponderance of the evidence standard. Art. XI §1105(C)(7)(a)(i). The Hearing Officer may only consider and admit testimony and evidence relevant to the matters and issues set forth in the Notice of Appeal. Art. XI §1105(C)(8). The substantial evidence required to support a finding of an administrative agency must be such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. *See City of Pittsburgh v. Comm'n on Human Relations of City of Pittsburgh*, 444 A.2d 182, 185 (Pa. Cmwlt. 1982). Moreover, the Department is "under no affirmative duty

to produce any witness or evidence not requested by the parties before it.” *Riojas v. Bd. of Licenses & Inspections Review of City of Philadelphia*, 364 A.2d 986, 987 (Pa. Cmwlth. 1976). Additionally, the case law is clear that with respect to Pennsylvania's administrative agency proceedings that the fact finder is not required to issue findings specifically rejecting each and every allegation that is made by a party. *Gwinn v. Pennsylvania State Police*, 668 A.2d 611, 614 (Pa. Cmwlth. 1995) (citing *Roth v. Workmen's Compensation Appeal Board (Armstrong World Industries)*, 562 A.2d 950 (Pa. Cmwlth.1989)).

It is axiomatic that questions of resolving conflicts in the evidence, witness credibility, and evidentiary weight are properly within the exclusive discretion of the fact finding agency.... Even assuming *arguendo* that [specific] testimony was not contradicted, the [fact-finding agency] is not under an obligation to accept it. Additionally, the [fact-finder] need not provide specific reasons for finding one witness credible over another.

*Birdsboro & Birdsboro Mun. Auth. v. Dep't of Env'tl. Prot.*, 795 A.2d 444, 447–48 (Pa. Cmwlth. 2002) (internal quotations and citations omitted).

### PROCEDURAL HISTORY

On Sunday, December 2, 2018, ACHD received a complaint via its 24/7 answering line from Mike Kaufman, the Personal Care Manager at Concordia, a personal care home located at 3746 Cedar Ridge Road, Allison Park, PA 15101. Notes of Testimony (NT) Evidentiary Hearing, 7/24/19, at 7, 9. The complaint, as received the next day, alleged that an illegal open burn was taking place down the road, specifically stating:

Landscaping company [sic] is burning all sorts of material such as rubber and painted wood. The Borough has spoken to him previously. Sunday 12-02-2018 the smoke from his fire was so bad the assisted care home was though [sic] to be on fire because it was covering the building itself.

*See* ACHD Complaint 12/3/18 (Exhibit A1); NT Evidentiary Testimony at 8-9. The landscaping company mentioned in the complaint was John Fries Landscape & Maintenance, located at 4802

Gibsonia Road #1, Allison Park, PA 15101-5000. *Id.* The West Deer Township Police and Fire Department responded to a similar report on the day of the alleged violation. NT Evidentiary Hearing at 6; Incident Report. The smoke was so bad at Concordia, that emergency personnel thought the building was on fire and were preparing to put a hole in the roof. NT Evidentiary Hearing at 6-7; 41. This first blaze was ultimately extinguished by the fire department. NT Evidentiary Hearing at 44.

On Monday, December 3, 2018, Jim Bollinger, an ACHD Engineering Process Technician, responded to the Complaint. NT Evidentiary Hearing at 8-9. While at Concordia conducting further investigation, he received a call from a West Deer Code Enforcement Officer who was at that moment speaking with John Fries, the owner of the landscaping company (as well as the two other above-captioned businesses) (“Appellants”). NT Evidentiary Hearing at 11, 59. When the officer arrived earlier, there was apparently another fire on the premises, which he had Mr. Fries extinguish. NT Evidentiary Hearing at 11, 44. Mr. Bollinger was also presented with a photograph taken by William Payne from West Deer Code Enforcement just prior to his arrival. NT Evidentiary Hearing at 18; Exhibit D3. It depicted a fire on the property which Mr. Bollinger estimated to be about 6’x6’x6’. NT Evidentiary Hearing at 11; Exhibit D3. There was no air curtain incinerator (ACD) present in the photograph. NT Evidentiary Hearing at 21; Exhibit D3.

Upon his arrival, Mr. Bollinger took a photograph of the area from roughly the same vantage point as Mr. Payne’s photograph. NT Evidentiary Hearing at 13. *See also*, Exhibit D2. Mr. Bollinger observed that there was now a mound of dirt where there had previously been a fire. Evidentiary Hearing at 13-14. Mr. Fries freely admitted during his conversation that he “had a fire.” NT Evidentiary Hearing at 26. Based on Fries’ West Deer Township permit for grading, Mr. Bollinger was able to further deduce that the wood being burned was “green” and had not been

properly seasoned. NT Evidentiary Hearing at 14-15. This conclusion was bolstered by Mr. Bollinger's observation that the fire created an excessive amount of smoke which was left the property, which is not only a violation in and of itself but is also an indicator of the heightened moisture content associated with unseasoned wood. NT Evidentiary Hearing at 14. A heightened moisture content has a smothering effect on the fire, thus creating more smoke. *Id.*

The Department has no record of Appellants having received the requisite open burn permit, nor did Appellants have any recollection of having been issued such County permits. NT Evidentiary Hearing at 48, 62. On December 19, 2018, the Department issued an enforcement order alleging violations of Article XXI, § 2105.50.d.1.E and 2105.50.a.1.B. *See*, Enforcement Order. Based on the nature of the violation and the economic benefit realized by the Appellants by virtue of not applying for the requisite permits, the Department levied a civil penalty of \$1,870.00. Exhibit D4. John Fries subsequently appealed and an evidentiary hearing was held on July 24, 2019. NT Evidentiary Hearing at 1.

### **Regulatory Framework**

At the outset of this discussion, the Department deems it necessary to set forth the regulatory framework for open burning. Article XXI, § 2105.50.d.1.E details the requirements a party must meet in order to obtain a permit for open burning for the purpose of clearing and grubbing wastes. A party's failure to obtain a permit prior to such activity is a violation of Article XXI. Specifically, Section 2105.50 provides, in relevant part, as follows:

#### **§ 2105.50 OPEN BURNING**

{Subsection f amended May 8, 2007, effective, August 17, 2007, and amended July 16, 2009, effective July 26, 2009. Subsections a, b, and d amended, and e & f renumbered November 13, 2014, effective, January 1, 2015.}

##### **a. General**

1. ***No person shall conduct, or allow to be conducted, the open burning of any material, except where the Department has issued***

*an open burning permit* to such person in accordance with this Section or where the open burning is conducted solely for the purpose of preparation of food for human consumption, recreation, light, or ornament, and in a manner which contributes a negligible amount of air contaminants, and which is in accordance with Subparagraphs A through C, below.

\* \* \*

B. *Any volume of clean wood being burned shall be no larger than 3' wide x 3' long x 2' high* and shall be at least 15 feet from the nearest neighbor's dwelling or inhabited area, any property line, roadway, sidewalk, or public access way.

\* \* \*

d. **Permits**

1. The Department may issue a permit for open burning during a period specified by the Department, but only where the open burning is solely for:

E. Clearing and grubbing wastes subject to, at a minimum, the following requirements:

i. Air curtain incineration units shall be used at all times when burning clearing and grubbing wastes.

ii. The use of air curtain incineration units shall not be permitted unless approved by the Department in writing with respect to equipment arrangement, design, and existing environmental conditions prior to commencement of burning.

iii. Approval for use of an air curtain incineration unit at one site may be granted for a specified period not to exceed three months, but may be extended for additional limited period upon further written approval by the Department.

iv. The application for said permit must be accompanied by a non-refundable permit application fee, by check or money order payable to the "Allegheny County Air Pollution Control Fund," to cover the costs associated with processing, reviewing, and action upon the application. The amount of the fee shall be set by the Board of Health.

v. If operated at commercial, industrial, or institutional facilities, the air curtain incinerator may also be subject to

the NSPS requirements of 40 CFR 60 Subpart CCCC or EEEE.

Article XXI, Section 2109.50.

Based on the preceding provisions, Article XXI dictates that an individual or entity must apply for and obtain an open burning permit before disposing of clearing and grubbing waste in such a manner if the volume of material being burned is larger than 3'x3'x2'. Appellants failed to apply for and receive such a permit. Further, as a part of the permit application process, applicants must pay the requisite fee and use air curtain incineration units at all times. The use of such units is subject to the Department's approval of a written request detailing the equipment arrangement and design as well as the condition of the surrounding environment. Appellants have failed with respect to all these requirements.

### **ARGUMENT**

**In failing to obtain the requisite open burning permit, Appellants clearly violated Article XXI's permitting requirement on its face.**

The Department never issued an open burning permit to John Fries or any of his businesses, and as such engaged in prohibited activity by burning land clearings. *See*, Art. XXI § 2105.50(a)(1); NT Evidentiary Hearing at 16, 48, 62. Article XXI states “[t]he Department may issue a permit for open burning during a period specified by the Department, but only where the open burning is solely for ... [c]learing and grubbing wastes...” Art. XXI §2105.50(d)(1)(E). Though Article XXI excepts permitting requirements for fires intended for purposes of food preparation, recreation, light, or ornament, these circumstances clearly do not apply. *See*, Art. XXI § 2105.50(a)(1). Appellants' West Deer grading permit indicates that extensive brush clearing was occurring on the property at the time. NT Evidentiary Hearing at 14. Additionally, Mr. Bollinger was able to deduce from the amount of smoke that evergreen brush, as opposed to seasoned firewood, was being burned on site. *Id.* at 46-47.

Though Mr. Fries contends that the fire was used by his employees as a recreational space, Mr. Bollinger noted that this blaze did not meet such criteria. *Id.* at 40-41, 65-66. Specifically, in his testimony, Mr. Bollinger stated that “a recreational fire is three by three, a firepit, seasoned wood, no smoke leaving the property.” *Id.* at 40-41. Additionally, he indicated that there were no food preparation areas, no grill, no food, and no one standing around the fire for warmth when he arrived. NT Evidentiary Hearing at 45-46. In sum, it is clear that this fire was primarily for the purpose of burning clearing and grubbing waste and as such Appellants were obligated to obtain a permit, which they failed to do.

In addition to not having the permits necessary for open burning of clearing and grubbing waste; Appellants failed to meet the County’s coextensive requirements with regards to maintaining permitted burns. *See*, Art. XXI §2105.50(d)(1)(E); NT Evidentiary Hearing at 48, 62. Article XXI states that “[a]ir curtain incineration units shall be used at all times when burning clearing and grubbing wastes.” Art. XXI § 2105.50(d)(1)(E)(i). The photographs taken both before and after clearly show that no ACD was being kept on site. Exhibit D3. As such, even if Appellants had acquired the necessary permit, they still failed to comply with Article XXI by virtue of it failing to rent the requisite equipment. For the foregoing reasons Appellants clearly violated Allegheny County’s permitting regulations and are thus subject to the penalties prescribed by such infractions.

**Regardless of permitting, the fire was in violation of Article XXI.**

No matter what its utility was, this blaze did not comply with Article XXI by virtue of its size and composition. First, though Article XXI allows for fires “contribut[ing] a negligible amount of air contaminants,” the volume of smoke generated by Appellants’ open burn was beyond such “negligible” threshold to enforcement. Art. XXI §2105.50(a)(1). Mr. Bolinger,

relying on his expertise (specifically his visible emissions training) was able to determine as much during his visit. NT Evidentiary Hearing at 5, 14, 49. What is more, the amount of smoke generated was so great as to lead fire officials to believe they had to cut a hole in the roof of the retirement home situated on a property near the location of the open burn. NT Evidentiary Hearing at 41. Second, Article XXI also dictates that “any volume of clean wood being burned shall be no larger than 3’ wide x 3’ long x 2’ high.” Art. XXI §2105.50(a)(1)(B). This pile, from base to flame, was as much as 6’x6’x6’ and thus too large to be an allowable recreational fire. NT Evidentiary Hearing at 20. Third, as previously discussed, this was not “clean,” seasoned firewood. Art. XXI §2105.50(a)(1)(B); NT Evidentiary Hearing at 14. The aforementioned West Deer grading permit indicated that Appellants were engaged in land clearing while the amount of smoke generated from the burn indicated that the material had a heightened moisture content and was likely “green” and unseasoned. *See, supra*, NT Evidentiary Hearing at 14, 15. Therefore, Appellants’ open burn constituted a *per se* violation of Article XXI.

**The \$1,870.00 penalty levied by the Department against Appellants should be affirmed.**

As discussed, Appellants violated Article XXI both by conducting an open burning that was too large and composed of improper material, as well as by foregoing the permit requirements for such open burning. Exhibit D4. The minimum penalty for each of these violations is Nine Hundred Dollars. *Id.* Based on several regulatory factors, including the violator’s level of cooperation and the size of the Appellants’ enterprise, these penalties were reduced by a factor of 0.65. *Id.* As such, Appellants were fined Five Hundred Eighty Five Dollars for each violation (i.e., One Thousand One hundred Seventy Dollars in total) for its open burning activities. *Id.*

In addition to penalties related to the open burning itself, the fines stemming from economic benefits realized by John Fries as a result of the Department’s permitting requirements should be upheld (i.e., Seven Hundred Dollars). *Id.* ACHD regulations require that all permit

applications be submitted with a non-refundable fee. Art. XXI § 2105.50(d)(1)(E)(iv). Such fee is currently Three Hundred Dollars, and since no application was received, Appellants saved \$300 by burning grubbing waste without properly applying for a permit. Additionally, there is the economic benefit accrued from not renting the necessary pollution control equipment (i.e., the Air Curtain) which Mr. Bollinger opined had a daily rental rate of \$400.00 (Four Hundred Dollars). NT Evidentiary Hearing at 23; Art. XXI § 2105.50(d)(1)(E)(ii); Exhibit D4. Had Appellants foregone the basic permitting requirements but still used an ACD, they would have reduced their economic benefit penalties by an amount equaling the daily rental rate for ACD. *Id.*

**The photograph taken by West Deer prior to Mr. Bollinger's arrival on the premises (Exhibit D3) is admissible**

During the evidentiary hearing held on July 24, 2019, Appellants' counsel questioned the extent to which Mr. Bollinger had personal knowledge of the size of the fire prior to his arrival on the premises. NT Evidentiary Hearing at 17, 37-39. As such, the Department would like to articulate its position that Exhibit D3 (the picture taken by Mr. Payne of West Deer Code Enforcement prior to Mr. Bollinger's arrival) may be admitted as a basis of Mr. Bolinger' personal knowledge.

Generally speaking, the trial judge, in this case the hearing officer, has wide discretion regarding the admission of photographs. *Nyce v. Muffley*, 119 A.2d 530, 532 (Pa. 1956). The veracity of such evidence must be confirmed "either by the testimony of the person who took it *or by another person with sufficient knowledge* to state that it fairly and accurately represents the object or place reproduced as it existed at the time of the accident" (or in this case, intentional conduct). *Id.* Furthermore, "[f]or authentication, proof of every step in making a photographic representation is not required. For example, even the photographer need not be called if another witness can authenticate the content." *Pierce v. Unemployment Compensation Bd. of Review*, 641

A.2d 727, 729 (Commw. Ct. 1994). In *Pierce*, the Commonwealth Court was satisfied with a witness who could authenticate the representation “as to the objects depicted at the relevant time.”

*Id.*

Given that the photograph was taken shortly before Mr. Bollinger arrived on the scene, the Exhibit D3 can be both authenticated and presented by Mr. Bollinger as a basis for his enforcement decision. NT Evidentiary Hearing at 44. Such evidence is being offered along with the report from the fire department, the testimony of witnesses, and Mr. Bollinger’s own personal observations and the basis for the Department’s conclusion that Appellants violated Article XXI. As such, this picture is not being offered to prove the dimensions of the fire so much as circumstantial evidence validating the information relayed to him by the code enforcement officials which ultimately formed the basis of his enforcement decision.

#### CONCLUSION

For the foregoing reasons, the Department requests that this tribunal affirm the Department’s December 19, 2018 Enforcement Order directing John Fries to pay a \$1,870.00 civil penalty.

Respectfully submitted,

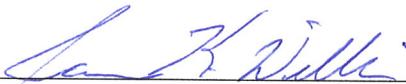
By:   
Jason K. Willis, Esquire  
Attorney for Appellee Allegheny County  
Health Department

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing **BRIEF IN OPPOSITION TO APPELLANTS' APPEAL OF THE DECEMBER 18, 2018 ENFORCEMENT ORDER** has been served upon Appellant's counsel via electronic mail, this 9th day of September, 2019 as follows:

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