

ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARING

MICHAEL A. CAPUTO AND : In Re: 6410 Adelpia 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 39th 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 Adelpia 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 Adelpia 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 Adelphia 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 Adelpia 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.¹ (*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.

¹ 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.

/s/ _____
Max Slater
Administrative Hearing Officer
Allegheny County Health Department

May 29, 2018
Dated: