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 SUPPORT OF APPELLANTS' APPEAL OF THE DECEMBER 19, 2018 ENFORCEMENT ORDER

Now come Appellants, by and through counsel, Dennis M. Blackwell, Esquire, and The Blackwell Law Firm, and file the within Brief in Support of Appellants' Appeal of the December 19, 2018 Enforcement Order, and in support thereof aver the following:

SCOPE AND STANDARD OF REVIEW

In an appeal of an enforcement order or a penalty issued by the Allegheny County Health Department (hereinafter the "Department"), the Department bears the burden of proof. Art. XI §1105(c)(7)(a). The Department must prove the facts of the matter by a preponderance of the evidence. Art. XI §1105(c)(7)(a). More specifically, the Department must prove by a preponderance of the evidence that its order/penalty was properly assessed because violations were present and that issuing the order/penalty was a lawful and reasonable exercise of its discretion supported by the evidence presented. *In re: Vilka Bistro*, No. ACHD-18-003 (January 2, 2019); *In re: 916 2nd Street, McKees Rocks, PA 15136*, No. ACHD-18-029 at *4 (December

21, 2018); *Perano v. DEP*, 2011 EHB 623, 633[1]. Preponderance of the evidence is defined to mean "the evidence in favor of the proposition must be greater than that opposed to it" or "proof that an issue is more likely true than not." *Clancy v. DEP*, 2013 EHB 554, 572; Bouvier Law Dictionary.

It is the Department who must affirmatively prove each violation and other material factual allegation, and there is no evidentiary burden on appellant to disprove violations or other factual allegations. *McDonald Land & Mining Co., Inc. v. Dept. of Envtl. Res.*, 1994 EHB 705. Failure of the Department to meet its burden with respect to each of these is ground for vacating the order. *Id.*

Further, 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. Cmwlth. 1982).

PROCEDURAL HISTORY

On December 19, 2018, an Enforcement Order was issued against Mr. John Fries, John Fries Landscape & Maintenance, Premium Landscape Supply, and Daniel B. Pierce Property Group LLC (hereafter "Appellants") by the Department, including a monetary penalty, for alleged violations regarding open burning by Appellants in relation to a complaint filed by a representative of a personal care home (hereinafter "Concordia") on December 2, 2018. *See*, Enforcement Order. Said complaint was regarding substantial smoke filling Concordia's property, that the representative allegedly believed to be coming from Appellants' property. Transcript of Evidentiary Hearing Held July 24, 2019 (hereinafter "Transcript"), p. 6-7. It should

[1] Pennsylvania Environmental Hearing Board cases regarding standard of review interpret 25 Pa. Code §1021.122, which is virtrually identical to Art. XXI §1105(c)(7).

be noted that the complaint does not designate which Appellant is liable for the alleged fire, and the Department cannot establish which party is responsible. Appellants have no knowledge of any burning occurring on their property on December 2, 2018 or of any smoke situation at Concordia on said date. Transcript, p. 53, 58. Appellants appealed the order/penalty, and an evidentiary hearing was held in July of 2019. At the evidentiary hearing, the Department presented a single witness, Mr. Jim Bollinger, a Department Engineering Process Technician who had investigated the December 2, 2018 complaint on December 3, 2018. Transcript, p. 8-9. During Mr. Bollinger's investigation, as he testified at the evidentiary hearing, he never saw any smoke himself and he never saw any fire himself. Transcript, p. 20, 28, 29, 34, 39, 49, 50. All Mr. Bollinger saw was a pile of ash that was the result of the extinguishing of a recreational fire that Appellants burned on December 3, 2018. Transcript, p. 30, 33, 34, 37, 39.

Appellants are in the landscaping business. Transcript, p. 59. Concurrent with their business, Appellants were currently engaged in clearing trees from their land. Transcript, p. 60. The wood from Appellants' clearing activities is sold by them to S and S Processing, who pays Appellants for the product and turns it into mulch. Transcript, p. 53, 60. Appellants have buckets of seasoned wood available, which they often use for recreational fire-burning of a normal bonfire, such as they were doing on December 3, 2018. Transcript, p. 67, 69, 70.

ARGUMENT

I. THE DEPARTMENT HAS FAILED TO MEET ITS BURDEN OF PROOF WITH REGARD TO ANY ALLEGED VIOLATIONS OF ARTICLE XXI BY APPELLANT ON DECEMBER 2, 2018.

The Department fails to meet its burden of proof in establishing that Appellants were in violation of Article XXI relative to any alleged activity on December 2, 2018. The Department claims that Appellants engaged in prohibited activity by burning land clearings without a permit and that regardless of utility any alleged fire was not in compliance due to its size and

composition. However, the Department offers no substantial, credible evidence as to a fire on Appellants land on December 2, 2018. Without evidence of a fire on December 2, 2018, the Department cannot meet its burden that by a preponderance of the evidence violations were present and the order/penalty imposed was a reasonable exercise of discretion.

a. The Department fails to meet its burden of proof that violations occurred on December 2, 2019 because they fail to establish by a preponderance of the evidence that a fire existed on Appellants' land on December 2, 2019.

The Department claims that a complaint was lodged on December 2, 2018 due to a large amount of smoke at Concordia, and that the Department investigated the complaint one day later on December 3, 2018. Transcript, p. 8, 9. However, as proof of a fire on Appellants' property, the Department only offers evidence of a fire that was being burned on December 3rd around the time it conducted its investigation. See Transcript generally. Never once does the Department offer any evidence that anyone saw a fire on Appellants' land on December 2nd. Never once does the Department offer any evidence that proves there was a fire on Appellants' land on December 2nd. The pictures offered at the hearing by the Department were of a fire on December 3rd. Transcript, p. 13, 17, 18. No pictures or testimony of knowledge of any fire present on December 2nd were offered. The sole witness that the Department presented admits that he was not on the property on December 2nd. Transcript, p. 28. In fact, said witness admits that he doesn't know if there was a fire on December 2nd:

> Q: You don't know if there was a three-by-three-by-two fire on Friday?
> A: No, I do not.
> Q: Or Saturday?
> A: That's correct.
> Q: Or Sunday [December 2nd]?
> A: That's correct

Transcript, p. 29. The truth of the matter is that the Department does not have a witness who saw a fire on Appellants' property on December 2nd.

Any mention the Department makes of a West Deer Fire Department report is hearsay and inadmissible. The Department did not admit a copy of the alleged report, and did not call any witnesses from the West Deer Fire Department. Transcript, p. 35, 36, 45. The Department attempts to argue that the Fire Department was so concerned about the smoke at Concordia that they almost cut a hole in Concordia's roof. Department's Brief, p. 3; Transcript, p. 7, 41. If that was the concern, then it can be deduced that at that time the Fire Department clearly believed the smoke was coming from Concordia. Even once the Fire Department determined that the smoke was not coming from inside Concordia, the Department did not present any evidence that the smoke was credibly confirmed to be coming from Appellants' property. To the contrary, the Department's sole witness testified that he personally did not know that the smoke complained of came from Appellants' property. Transcript, p. 42-43. If it were true that the smoke was coming from Appellants' property, given the close proximity between Concordia and Appellants' property, one could logically conclude that the Fire Department would be able to see the smoke coming from Appellants' property or would have at least visited Appellants' property to investigate. Although Mr. Bollinger claims that the fire department went to Appellants' property on December 2nd, said accusations are unfounded as Mr. Bollinger was not at the property on December 2nd , Mr. Bollinger admits that he did not see the Fire Department on the property on December 2nd, and no credible evidence was offered of a Fire Department visit. Transcript, p. 16, 42; Transcript, p. 28; Transcript, p. 16; Transcript, p. 35, 36, 41, 42, 45. Specifically, Appellants never received a visit from the Fire Department on December 2nd. Transcript, p. 57-58. Appellants were never they given any citation or report related to December 2nd, nor were they charged any money for a Fire Department visit on December 2nd. Transcript, p. 41, 42, 57-58.

The only evidence the Department offers of an occurrence on December 2nd is that a representative of Concordia reported a large amount of smoke at Concordia believed to be a

result of smoke on Appellants' property. Transcript, p. 6-7. While the complaint formed the basis for the Department's sole witness to have knowledge of an incident, any statements made by the Concordia resident within the complaint are inadmissible hearsay. The only credible knowledge and admissible fact that Mr. Bollinger gained from this complaint is that Concordia's representative filed the complaint due to a large amount of smoke at Concordia. Transcript, 6-7, 8, 9. The Department's sole witness never saw any smoke on December 2nd for himself, he simply read the complaint. Transcript, p. 50. Moreover, neither the Concordia representative who filed the complaint, nor the Department's sole witness, have any actual knowledge or proof that the smoke present on December 2nd was a result of any action by Appellants. The fact that Concordia's representative believed the smoke was a result of burning by Appellants' is nothing but hearsay. The area in question is a rural area. Transcript, p. 42. Concordia is a ten-minute drive from Appellants' property, in an area where burning occurs frequently. Transcript, p. 10; Transcript, p. 42. The smoke could have been a result of burning on numerous other properties, and the Department offers no evidence that ties the alleged smoke to an alleged fire on Appellants' land. The Department did not offer any witness with personal knowledge of a fire on Appellants' land on December 2nd, and did not present any evidence that shows a fire was burning on December 2nd. The only witness for the Department actually testified that he did not know if there was a fire by Appellants on December 2nd. Transcript, p. 29.

Without any evidence that there was a fire on Appellants' land on December 2nd, the Department cannot establish by a preponderance of the evidence that violations occurred. The existence of a fire on December 3rd, and the alleged existence of smoke without any evidence of fire on December 2nd, do not indicate that it is more likely than not that Appellants had a fire on December 2nd. Any property within ten (10) miles could have had a fire on December 2nd. In order to violate Article XXI in any manner alleged, burning would have to have occurred, and

the Department failed to establish any evidence of a fire on Appellants' property on December 2nd. It is also interesting to note that the recreational fire on December 3rd produced zero smoke.

b. Specifically, the Department fails to meet its burden of proof that Appellants violated Article XXI by allegedly burning without an open burning permit on December 2, 2019.

Notwithstanding the above argument that the Department failed to prove even the existence of a fire on December 2nd, the Department failed to meet its burden of proof that Appellants engaged in burning land clearings without a permit on December 2nd. The Department argues that "Appellants' West Deer grading permit indicates that extensive brush clearing was occurring on the property at the time." Department's Brief, p. 6. However, the fact that a grading permit exists in no way indicates that brush clearing was occurring on the property on December 2nd. The Department did not present any witness or other evidence that established knowledge of the situation on Appellants' property on December 2nd or if land clearing was taking place that day. In fact, the Department's only witness made it clear that he was not on the property on December 2nd. Transcript, p. 28. Appellants' crew does not work seven days a week clearing this land. It is an occasional activity performed in between other jobs. Transcript, p. 65, 66. Appellants point out that December 2nd was a Sunday, which is not a typical work day. Additionally, the fact that Appellants were clearing trees on December 3rd when Mr. Bollinger was on the property does not establish that clearing was occurring on December 2nd. The Department did not call any witness to testify as to knowledge of any activity occurring on the land on December 2nd.

More importantly, even assuming it could be established that Appellants were clearing land on December 2nd, that still does not establish that Appellants were burning the land clearings on December 2nd, which would be necessary to evidence that a violation occurred. In an attempt to establish such, the Department unartfully argues that "Mr. Bollinger was able to

deduce from the amount of smoke that evergreen brush, as opposed to seasoned firewood, was being burned on site." Department's Brief, p. 6 *citing* Transcript, 46-47. First and foremost, that is not Mr. Bollinger's testifimony. On the pages of the Transcript cited to by the Department, Mr. Bollinger was asked "Do you have an understanding of what clean wood is meant?" and he replied "Clean wood is seasoned wood and it's not clearing wood or evergreen or any other type of wood that's not seasoned and has been sized and the logs would only be less than the tree foot." Transcript, p. 46-47. Relating to the emissions and smoke from seasoned vs. unseasoned wood, the testimony on the cited pages was as follows:

> Q: What's the – and in terms of the emissions, what is the difference between seasoned wood and unseasoned wood?
> A: Well, it depends on the type of wood. It it's pine, it takes longer to season. It can take as long as a year and a half to season wood where it's properly stacked and covered to season and no evidence of anything being covered or stacked and –
> Q: Well, I guess I had a really specific question regarding the smoke that you would see from seasoned wood versus unseasoned wood. Is there a difference?
> A: seasoned wood, practically there is no smoke in the three by three by two other than the start or extinguishment.
> Q: And why would that be?
> A: Because it's seasoned and there's no moisture, less moisture in it.
> Q: I see.
> A: And it doesn't matter the size of the property. The emissions, the visible emissions, cannot leave the property no matter the size of the property.

Transcript, p. 47. Mr. Bollinger does not ever say that evergreen bush was being burned "on site." The Department's argument deliberately mischaracterizes the investigation of Mr. Bollinger and gives Mr. Bollinger credibility in a misleading manner. Mr. Bollinger could not credibly say that evergreen bush was being burned "on site" on December 2nd, because, as he admits, he was not present on Appellants' land on December 2nd. Transcript, p. 28. Moreover, it is not possible for Mr. Bollinger to deduce such a fact in relation to the smoke on December 2nd as neither Mr. Bollinger, nor another witness, actually saw the smoke on December 2nd, nor can he definitively state that the smoke came from Appellants' property. Transcript, p. 50;

Transcript, p. 41, 42-43. Mr. Bollinger cannot deduce from smoke that he did not see that specifically evergreen brush was being burned on site.

The fact that Appellants have a West Deer permit for grading does not mean that on December 2nd they were burning land clearings. In fact, it would make little sense for Appellants to ever burn land clearings given the fact that S and S Processing pays them to take these land clearings and turn them into mulch. Transcript, p. 53, 60. Part of Appellants business is to make money by selling these land clearings. Transcript, p. 53, 60. For no reason would Appellants burn away their business. Given this fact, the existence of a West Deer grading permit does not make it more likely than not that Appellants were burning land clearings on December 2nd, nor can a reasonable mind infer as such.

Further, the Department cannot use evidence of recreational fire burning on December 3rd or the condition of the property on December 3rd to prove that any alleged December 2nd fire was for land use clearings. There was no evidence offered of what any condition on the property on December 2nd was. Any arguments refuting that the December 3rd fire was recreational, such as those set forth in the Department's Brief on p. 7, do not offer substantial proof that the alleged December 2nd fire was for the purpose of burning land clearings. It is further important to note that no citations were issued for the December 3rd recreational fire.

Without offering evidence that land clearing was taking place on December 2nd, that a fire occurred on December 2nd, and that the alleged fire was burning land clearings, the Department failed to establish by a preponderance of the evidence that Appellants needed to obtain a permit or were engaging in burning land clearing without a permit. Accordingly, the Department failed to prove by a preponderance of the evidence that the penalty imposed was a reasonable exercise of discretion. The Department cannot reasonably impose a penalty for a violation it cannot prove. Additionally, the additional cost for the economic benefit of not having

a permit and not renting an air curtain incinerator is not a reasonable exercise of discretion because without proof that burning land clearing occurred, the permit and air curtain are not necessary.

c. Specifically, the Department fails to meet its burden of proof that no matter what its utility was, Appellants' alleged fire on December 2, 2018 violates Article XXI by virtue of its size and composition.

Notwithstanding the above argument that the Department failed to prove the existence of a fire on December 2nd, the Department fails to meet its burden of proof in attempting to establish that any alleged fire on December 2nd did not comply with burning size and composition requirements. First, the Department fails to prove by a preponderance of the evidence its allegation that the alleged fire contributes beyond a negligible amount of air contaminants in violation of Art. XXI §2105.50(a)(1). The Department offered Mr. Bollinger's visible emissions training as evidence, but Mr. Bollinger was not present anywhere near the property on December 2nd. Transcript, p. 28. Mr. Bollinger also did not see the smoke that occurred on December 2nd. Transcript, p. 50. He could not determine a negligible amount of air contaminants came from an alleged fire that he did not see by considering alleged smoke that he did not see. At no time did Mr. Bollinger actually see a fire or any smoke on Appellants' property, and the Department did not offer any other evidence that anyone trained to evaluate the smoke saw smoke with a negligible amount of air contaminants on Appellants' property on December 2nd. Transcript, p. 20, 28, 34, 39, 49, 50. In fact, the Department does not call a single witness who saw the alleged smoke on December 2nd. The fact that fire officials allegedly believed they had to cut a hole in the roof of Concordia is not only inadmissible hearsay, but it in no way substantial proof that the smoke was coming from Appellants' property. Transcript, p. 7, 41.

Second, the Department fails to meet its burden of proof in establishing that any alleged fire burning on December 2nd was larger than 3' wide x 3' long x 2' high in violation of Art. XXI §2105.50(a)(1)(B). Without offering any evidence of a fire on December 2nd, the Department cannot prove that any alleged fire was not within the size requirements. The Department did not call any witness that saw a fire not within these size restraints on December 2nd. Mr. Bollinger's testimony as to the size requirements of the December 3rd fire, and the accompanying photographs (one of which Appellant contends is inadmissible as argued below), do not evidence that any fire that was too large occurred on December 2nd. Transcript, p. 13, 17, 18, 19, 20, 32.

Third, the Department fails to meet its burden of proof in established that any alleged fire burning on December 2nd was not seasoned firewood in violation of Art. XXI §2105.50(a)(1)(B). The fact that Appellants had a West Deer grading permit does not evidence that they were burning unseasoned wood on December 2nd. The Department attempts to use this permit as well as the fact that smoke was present at Concordia as evidence that Appellants' were burning their land clearings. However, the Department fails to provide evidence that anyone actually saw Appellants burning land clearings on December 2nd or evidence that confirms the smoke came from Appellants' property. Again, Mr. Bollinger was the Department's only witness, and he was not on the property on Sunday, nor did not see the smoke. Transcript, p. 28; Transcript, p. 50. Mr. Bollinger cannot credibly testify to what was burning when he never even saw anything being burned. Further, no substantial evidence was presented that proves the smoke at Concordia was a result of Appellants' actions. Mr. Bollinger admits that he does not know for sure that the smoke complained of came from Appellants' property. Transcript, p. 42-43. It is not reasonable discretion to cite a violation in regard to what was allegedly burning, without any proof that anything was burning on Appellants' land at all on December 2nd.

II. THE DEPARTMENT HAS FAILED TO MEET ITS BURDEN OF PROOF WITH REGARD TO ANY ALLEGED VIOLATIONS OF ARTICLE XXI BY APPELLANT ON DECEMBER 3, 2018.

Due to the fact that the evidence offered by the Department actually relates to a recreational fire, the condition of, and the situation on, Appellants' land on December 3, 2018, Appellants would like to articulate their position that the Department has also failed to meet its burden of proof for any allegations that may be made that the order/penalty relates to the burning on December 3rd. Appellants admitted that they were burning a fire on December 3rd, but said fire was recreational and not in any violation of Article XXI.

a. The Department fails to meet its burden of proof that Appellants violated Article XXI by burning without a permit.

The Department fails to establish by a preponderance of the evidence that Appellants violated Article XXI by burning land clearings without a required permit. The Department contends that extensive brush clearing was occurring on the property on December 3rd and thus the fire that Appellants were asked to cover up was not a recreational fire, but open burning of clearing and grubbing wastes, which required a permit. *See generally*, Department's Brief. However, the Department fails to prove the facts supporting this argument by a preponderance of the evidence.

Appellants admit that a fire was burning on December 3rd for recreational purposes. The Department attempts to argue that said fire was not recreational because Mr. Bollinger testified that there "were no food preparation areas, no grill, no food, and no one standing around the fire for warmth when he arrived." *See* Department's Brief, p. 7 (*emphasis added*). First of all, Article XXI does not require that all of those items be present. *See* Art. XXI §2105.50(a)(1). Second, the fact that Mr. Bollinger did not observe anyone cooking over the fire or standing around the fire for warmth when he arrived is not evidence that this fire was not for recreational purposes. When Mr. Bollinger arrived on the property, there was no longer a fire. Transcript, p. 11. All Mr. Bollinger

saw was a pile of ash from an extinguished fire that no longer existed. Transcript, p. 30, 33, 34, 37, 39. No one would be standing over a nonexistent fire cooking food or for warmth. The absence of these activities does not offer substantial evidence that would lead a reasonable mind to believe it was more likely than not that the fire was not recreational. The Department offers no other evidence or testimony as to what the individuals on the property were doing with the fire when it was still burning on December 3rd. Mr. Bollinger testifies that a code enforcement officer was on the property earlier and a photograph that said code enforcement officer took of the fire was admitted[2]. Transcript, p. 11, 17-19, 22. However, said photograph only shows the condition of the property as constrained by what can be seen in the dimensions of the picture. Mr. Bollinger was not there when the fire was burning, so he did not have the personal knowledge of what was occurring as the fire was burning at the time the picture was taken in order to testify as to what was occurring between the individuals and the fire. Transcript, p. 11, 20, 28, 34, 39, 49, 50. Additionally, the Department did not call the code enforcement officer as a witness to testify as such.

Further, Mr. Bollinger, the Department's only witness, testified that the fire was too large for the recreational fire requirements. Transcript, p. 19-20. Yet, Mr. Bollinger never saw this fire. Transcript, p. 20, 28, 34, 39, 49, 50. He bases his estimate upon a photograph that he did not take and a pile of ash that he saw. Transcript, p. 13-14, 19-20. Mr. Bollinger never saw the fire, he never saw what was burning, he never saw any smoke. Transcript, p. 20, 28, 34, 39, 49, 50. The Department offers no further evidence as to these matters, and the evidence offered does not make it more likely than not that the fire was too large to be recreational.

The Department further attempts to conclude that the fire was for the purpose of burning clearing and grubbing waste and as such required a permit. *See*, Department's Brief, p. 7. Again,

[2] Appellants maintain their argument that said photograph is inadmissible.

no one who saw this fire was present to testify at the hearing. The Department did not offer testimony of what was burning in the firepit by someone who actually saw the fire burning. By the time Mr. Bollinger arrived, the fire was covered over. Transcript, p. 11. The photograph taken by the code enforcement officer of the fire does not show what kind of wood was burning. The Department does not prove by a preponderance of the evidence that land clearings were being burned such that a permit was required. In light of the evidence to the contrary, it is not more likely than not that land clearings and unseasoned wood were being burned. Appellants have recreational fires on this land, and they have seasoned wood stocked for the purpose of having recreational fires. Transcript, p. 67, 70. Mr. Bollinger did not testify as to smoke present on the land on December 3rd. The only smoke he discussed, was smoke that he did not see, but that was allegedly at Concordia, ten minutes down the road from Appellants' property, on the day prior. No evidence was presented of smoke on December 3rd such to indicate land clearings were being burned. Specifically, the fact that brush was being cleared on the land on December 3rd does not make it more likely than not that said land clearings were being burned. Appellants make money by selling their unseasoned wood for a profit to S and S Processing. Transcript, p. 53, 60. It would be nonsensical for them to be burning this wood instead of bolstering their business by selling it for money.

Logically, the Department's argument fails. If burning land clearings created smoke on December 2nd, then the same land clearings being burned on December 3rd would create smoke. However, there was no evidence of smoke on December 3rd. Therefore, no land clearings were being burned on December 3rd. Only seasoned, recreational wood was being burned.

The evidence presented by the Department does not establish that it was more likely than not that the burning was of land clearings which required a permit and resulted in a violation. Accordingly, reasonable discretion was not exercised in deciding that a violation occurred

because Appellants did not have a permit. The fire was recreational, and a permit was not needed. Reasonable exercise was further not exercised in deciding that Appellants violated Article XXI by not having an air curtain incinerator. Said machinery is not necessary for a recreational fire.

b. The Department fails to meet its burden of proof that Appellants' December 3, 2018 fire did not comply in size and composition.

First, the Department failed to prove by a preponderance of the evidence that the December 3rd fire contributed beyond a negligible amount of air contaminants in violation of Art. XXI §2105.50(a)(1).The Department argued that "the volume of smoke generated by Appellants' open burn was beyond such 'negligible' threshold to enforcement" and "Mr. Bolinger [SIC], relying on his expertise (specifically his visible emissions training) was able to determine as much during his visit." *See*, Department's Brief, p. 7-8. The Department goes on to argue "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." *See* Department's Brief, p. 8. The Department's argument is not only not supported by evidence, but attempts to muddle the existing evidence in such a fashion to mislead the court. The only proof of a fire on Appellants' property was on December 3rd. However, the volume of smoke in question relates to smoke occurring on December 2nd. The Department cannot credibly reference "the volume of smoke generated by Appellants' open burn" when it does not offer a single shred of credible evidence that anyone saw a high volume of smoke directly coming from a fire on Appellants' property on any day. The only smoke anyone saw was down the road, on a completely different day then any confirmed fire. Accordingly, the Department cannot credibly say that Mr. Bollinger was able to determine as much during his visit. How could Mr. Bollinger determine this during his visit on December 3rd, when he did not personally see any fire or any smoke on December 3rd and when the large volume of smoke discussed occurred on December

2nd? Transcript, p. 20, 28, 30, 34, 39, 49, 50. A reasonable mind could not accept that hearing about the occurrence of a large amount of smoke on one day is substantial evidence that someone could know that smoke came from a certain source or contributed a certain amount of air contaminants during his investigation on an entirely different day. Further, in his testimony Mr. Bollinger explained that he measured the amount of a pollutant by "Visible emission evaluations that I'm certified every six months in... And if I was there and it was smoking when it was burning – this is a smothering effect in the visibility of what you can see through and it's how you determine." *Transcript*, p. 45. Based upon this explanation, in order to measure the pollutant and determine that a volume of smoke from a fire is beyond the negligible threshold to enforcement set forth in Art. XXI, Mr. Bollinger needs to actually be there and see the smoke. However, Mr. Bollinger did not see any fire or any smoke on December 3rd. Transcript, p. 20, 28, 34, 39, 49, 50. He also did not see the smoke on December 2nd. Transcript, p. 50. He could not possibly have used his "expertise" as the Department claims to conclude that Appellants were in violation of Art. XXI § 2105.50(a)(1). The Department's argument mixes smoke and a fire from two separate days that did not occur simultaneously and places credibility and expertise on Mr. Bollinger that he has not exhibited. Second, the Department failed to prove that it was more likely than not that Appellants' recreational fire was not within the proper size requirements. The Department offered no testimony from anyone who actually saw the fire. Mr. Bollinger based his size estimate of a fire he did not see upon a photograph that he did not take. Transcript, p. 17-18, 19, 20. Further, Mr. Bollinger's testimony at times makes it clear that he cannot say with certainty the size of the fire:

> Q: D-3 shows, you would agree, that flame is not over two foot high, correct?
> A: It **might** be.
> Q: Did you measure it?
> A: **I have to see the flames first.**
> Transcript, p. 30-31.

> Q: And you also said "if the flames were above." You don't know that either?
> A: **I didn't see the flames.**
> Transcript, p. 39.

Additionally, Mr. Bollinger had no knowledge as to if any other fires were burned on the property such that would have affected the base of the fire and allowed it to appear larger in the photograph. Transcript, p. 29, 33. Moreover, in its Brief, the Department admits that the photograph "is not being offered to prove the dimensions of the fire." *See*, Department's Brief, p. 10. Without using the photograph to attempt to prove the dimensions of the fire, there is no other evidence presented by the Department that the fire was too large. Mr. Bollinger did not see the fire, yet he attempts to prosecute the case without evidence and testifies as to the dimensions of the fire. This testimony is entirely unreliable as Mr. Bollinger had no knowledge upon which to base his estimates. Mr. Bollinger's estimate of a fire that he never saw does not establish that it is more likely then not that the fire exceeded the size requirements, as no substantial, concrete evidence is offered to prove the actual size of the fire.

Third, the Department failed to establish that it was more likely than not that unseasoned wood was being burned on December 3rd. The Department argues the "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* Department's Brief, p. 8. While the grading permit may indicate that Appellants were engaged in land clearing, it in no way indicates that Appellants were burning unseasoned wood. As argued above, Appellants sell their land clearings for profit. Transcript, p. 53, 60. No reasonable mind would burn their profit. Further, there is no evidence of smoke generated from Appellants' burn on December 3rd. The Department's only witness does not testify to any smoke from the December 3rd fire. It cannot reasonably be concluded that the fire Appellants' had on December 3rd generated smoke that indicated the material burning

was unseasoned when there is absolutely no evidence of any smoke on December 3rd. The Department did not offer any testimony from anyone who saw what was being burned on December 3rd, and a photograph of the fire does not clearly establish what type of wood is being burned. Further, while the smoke a fire gives off can be an indicator if the wood is seasoned, Mr. Bollinger did not see any smoke on December 3rd, or ever. Transcript, p. 50. In fact, at times during his testimony, Mr. Bollinger makes it clear that he does not personally know what was being burned: "The wood that's being burnt needs to be seasoned wood to begin with. And **if** he is burning – I'm saying **if** he's burning any of the wood that he's clearing, it's not seasoned." Transcript, p. 15. Mr. Bollinger's use of the word "if" makes it clear that he cannot definitively say what was being burned. Mr. Bollinger actually admits that he does not know what was burned:

> Q: I understand why you are at the scene.
> A: Okay.
> Q: But you personally cannot tell this Court what was burned?
> A: The material, no.

Transcript, p. 34. It is disingenuous for the Department to act as though it can be definitively stated that unseasoned wood was burned when their only witness makes it clear that he does not know what was burned.

III. THE DEPARTMENT FAILED TO MEET ITS BURDEN OF PROOF THAT THE $1,870.00 PENALTY LEVIED BY THE DEPARTMENT AGAINST APPELLANTS SHOULD BE AFFIRMED.

Given the aforementioned arguments as to why the Department failed to prove that it is more likely than not that violations of Article XXI occurred, the Department did not reasonably exercise its discretion in imposing a fine for each of these alleged violations that the Department cannot prove occurred. Additionally, the fines stemming from the economic benefits realized as a result of Appellants' not having a permit and not applying for a permit should not be upheld. The Department failed to prove by a preponderance of the evidence that Appellants were burning

land clearings and required a permit. Therefore, it fails to prove that the penalty imposed is a reasonable exercise of discretion because without a permit being required, no economic benefit of burning without a permit is realized. Similarly, the fines stemming from the economic benefits accrued from not renting the necessary pollution control equipment should not be upheld because the Department failed to prove that it was more likely than not the burning was of the type that required such equipment.

IV. THE PHOTOGRAPH TAKEN BY WEST DEER CODE ENFORCEMENT PRIOR TO MR. BOLLINGER'S ARRIVAL ON THE PREMISES IS NOT ADMISSIBLE.

As the Department sets forth, the veracity of photograph 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." *Nyce v. Muffley*, 119 A.2d 530, 532 (Pa. 1956). "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).

During the evidentiary hearing held on July 24, 2019 related to this matter, the Department used, and the Hearing Officer admitted, Exhibit D3, which was a picture alleged to have been taken of the December 3, 2018 fire by Mr. Payne of West Deer Code Enforcement prior to Mr. Bollinger's arrival. Transcript, 17-18, 22. Said photograph was admitted through the testimony of Mr. Bollinger. However, Mr. Bollinger's testimony does not authenticate the photograph in accordance with the requirements set forth above. First, as admitted, Mr. Bollinger is not the person who took the photograph. Transcript, p. 17. Second, and most important, Mr. Bollinger in no way qualifies as "another person with sufficient knowledge to state that it fairly and accurately represents" the fire as it existed at the time it is alleged that it did. As he admits, Mr. Bollinger never saw the fire. Transcript, p. 17, 20, 28, 34, 39, 49, 50. Without having ever seen the fire, he cannot possibly have any knowledge, let alone sufficient knowledge, to state that

the picture fairly and accurately represents the fire as it was burning. Mr. Bollinger is not another witness who can authenticate the content of the photograph. He does not possess any knowledge to authenticate the photograph as to the fire depicted at the time it was taken without having ever actually seen the fire as it was burning or at the time the photograph was taken. Upon arriving on the scene, all Mr. Bollinger saw was a pile of ash. Transcript, p. 17, 30, 33, 34, 37, 39. Knowledge of what this ash looked like when he arrived in no way gives him knowledge of what the fire looked like when it was burning. Without this knowledge, he cannot testify that the photograph fairly and accurately represented the fire, and thus he cannot authenticate the photograph. Without proper authentication, the photograph is inadmissible.

Even if the photograph was considered to be properly authenticated by Mr. Bollinger[3], all that he could authenticate was the background of the picture, *i.e.*, the same objects and scene that he personally observed when he saw the pile of ash. In its Brief, the Department contemplates as such when it states that "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." *See* Department's Brief, p. 10. With this admission, even if the photograph were admissible, its only use could be in relation to the circumstantial evidence of what surrounded the area of ash that Mr. Bollinger observed, which still does not rise to the level of evidence that proves it is more likely than not that the alleged violations occurred.

[3] Appellants maintain their argument that the photograph was not properly authenticated and is inadmissible, and in no way waive said argument.

V. THE ALLEGHENY COUNTY HEALTH DEPARTMENT'S PERFORMANCE OF BOTH PROSECUTORIAL AND ADJUDICATORY FUNCTIONS IN THIS MATTER VIOLATES APPELLANTS' DUE PROCESS RIGHTS.

The guarantee of due process of law is one of the most basic rights set forth by the Pennsylvania Constitution. "While not capable of exact definition, the basic elements of procedural due process are adequate notice, opportunity to be heard, *and the chance to defend oneself before a fair and impartial tribunal having jurisdiction of the case*." *Commonwealth v. Thompson*, 444 Pa. 312, 316, 281 A.2d 856, 858 (1971)(*emphasis added*)." In determining what process is due, the Pennsylvania Supreme Court has established a clear path in regard to commingling prosecutorial and adjudicatory functions: "There is a strong notion under Pennsylvania law that even an *appearance* of bias and partiality must be viewed with deep skepticism." *Lyness v. Commonwealth*, 529 Pa. 535, 542, 605 A.2d 1204, 1207 (1992). "A mere possibility of bias under Pennsylvania law is sufficient to raise the red flag of protection offered by the procedural guaranty of due process." *Id.* at 544.

Specifically in regard to administrative proceedings, the Pennsylvania Supreme Court has further stressed that the mere appearance of bias must be avoided. Due process is preserved so long as the functions are separated adequately, such as "where both functions were handled by distinct administrative entities with no direct affiliation to one another." *State Dental Council and Examining Board v. Pollock*, 457 Pa. 264, 271-72, 318 A.2d 910, 914-15 (1974). However, "a man cannot sit as judge when he is a member of a board which has brought the accusations." *Gardner v. Repasky*, 434 Pa. 126, 130, 252 A.2d 704, 706 (1969). A violation of due process occurs "where the very entity or individuals involved in the decision to prosecute are significantly involved in the adjudicatory phase of the proceedings." *Commonwealth, Department of Insurance v. American Bankers Insurance*, 478 Pa. 532, 546, 387 A.2d 449, 456 (1978). Moreover, "whether or not any actual bias existed as a result of the Board acting as both

prosecutor and judge is inconsequential; the potential for bias and the appearance of non-objectivity is sufficient to create a fatal defect under the Pennsylvania Constitution. *Lyness*, 529 Pa. at 548 (ultimately holding that there existed no such constitutional buffer between the Board as prosecutor and the Board as adjudicator because the accused was forced to face the same body which heard allegations and formed prosecutorial judgments now dressed in the robe of impartial jurist).

In the present matter, a violation of Appellants' due process rights occurs as a result of the Department acting as both prosecutor and adjudicator. The annotated version of Article XI of the Department's Rules and Regulations, regarding hearings and appeals, specifically states that the Department "has one Hearing Officer. The current Hearing Officer is Max Slater, who presides over all hearings for the Department." Art. XI §1102. According to public record regarding Allegheny County employees and their departments, Mr. Slater is listed as an employee of the Department. The same entity that investigates and prosecutes alleged violations, *i.e.* the Department, is significantly involved in adjudicating this matter as its own employee fulfills the adjudicatory function. The fact that the same Department fulfills both rules demonstrates the potential for bias and the appearance of non-objectivity, which creates a fatal violation of due process. Whether or not Mr. Slater actually demonstrates any bias is irrelevant, the structure of the Department and its hearings and appeals system creates the appearance of bias, which sufficiently violates due process under Pennsylvania law.

Additionally, Article XI of the Department's Rules and Regulations, relating to hearings and appeals, gives interchangeable and identical power to the Director of the Department and to the Hearing Officer. *See generally*, Art. XI. The fact that the Director of the Department, who overseas all of the Bureaus and other areas that could prosecute violations can equally partake in and control the adjudicatory process further demonstrates an appearance of impropriety.

A review of the case docket available on the Department's website indicates that Mr. Slater has never decided against the Department when rendering a decision on the merits of a case. This alone creates an appearance of impropriety.

VI. THE DEPARTMENT FAILS TO EVEN ESTABLISH WHICH INDIVIDUAL/ENTITY CITED IS RESPONSIBLE FOR THE ALLEGED VIOLATIONS.

The Department has cited one individual and four entities in this matter. However, the Department fails to establish which of these four Appellants would actually be liable. During its case in chief, the Department did not present any evidence as to which entity is liable for the alleged violations. On cross-examination, the Department's sole witness presented limited testimony that John Fries Landscape and Maintenance should be responsible. Transcript, p. 26. However, the witness cannot explain why John Fries, Premium Landscape Supply, or Daniel B. Pierce Property Group LLC are also cited. Not only does the Department attempt to prosecute this case without any concrete, credible evidence, but it also does so against individuals and entities that it cannot explain or justify their involvement.

CONCLUSION

To establish by a preponderance of the evidence that the alleged violations of Article XXI were present at any point by Appellants, the Department must establish the following: (1) Appellants were burning land clearings without a permit and without an air curtain incinerator, and (2) regardless of permitting, the fire contributed more than a negligible amount of air contaminants, was too large, and was burning unseasoned wood. In order to prove that these facts are more likely than not to be true, the testimony from Mr. Bollinger about how to measure what is burning and the air emissions makes it clear that smoke is required. Obviously for a violation relating to burning, the existence of burning is also required. Thus, providing evidence that the violations occurred requires two key components: smoke and fire.

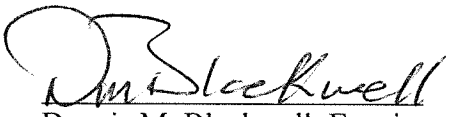
Even considering the evidence that Appellants contend is inadmissible and/or improperly admitted at the hearing, the Department fails to prove that smoke and fire existed on Appellants' property at the same time. In fact, the Department fails to prove that smoke ever existed on Appellants' property. The only evidence of the existence of smoke at all in this case is smoke that allegedly filled Concordia on December 2nd. Yet, there is no evidence that makes it more likely than not that there was a fire on Appellants' property on December 2nd, or that said smoke is tied to any alleged fire. There is no testimony or evidence that a fire even existed on December 2nd. Conversely, the only evidence of the existence of a fire on Appellants' property is a fire on December 3rd. Yet, there is no evidence of any smoke created by this fire on December 3rd. The photograph does not depict smoke in a sufficient manner to test the type of materials being burned, and Mr. Bollinger never even saw the fire, let alone the smoke. Without the evidence of smoke, it cannot be proven what was burning and the level of air contaminants.

The reality of the evidence presented by the Department is minimal. They allege there was smoke ten minutes down the road from Appellant on December 2nd which caused a complaint to be filed, yet offer no testimony from anyone who personally observed that smoke, who had any actual knowledge of the source of the smoke, or who saw a fire that caused the smoke. Mr. Bollinger investigated the complaint on December 3rd, and in doing so received a photograph of a December 3rd fire that he did not see himself. Mr. Bollinger merely observed a pile of ash from a covered-up fire on December 3rd, yet saw no fire itself or any smoke. The Department admits that the picture is not being offered to prove the dimensions of the fire, and no other evidence was offered as to the size of the fire.

No credible legal evidence was presented by the Department of fire and smoke correlating to that fire. The sole witness at the hearing never saw smoke and he never saw a fire, let alone both on the same day. Accordingly, the Department fails to establish by a

preponderance of the evidence that the alleged violations occurred or that the Department reasonably exercised its discretion in issuing the order/penalty.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Dennis M. Blackwell, Esquire, hereby certify that a true and correct copy of the foregoing Brief in Support of Appellants' Appeal of the December 19, 2018 Enforcement Order has been served this 30th day of September, 2019, via electronic mail, upon the following:

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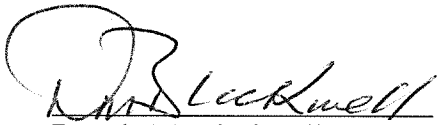

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