

**ALLEGHENY COUNTY HEALTH DEPARTMENT  
ADMINISTRATIVE HEARINGS**

PITTSBURGH WATER AND	)	
SEWER AUTHORITY,	)	
	)	
Appellant,	)	In re: Public Sanitary Sewer
	)	2625 Brownsville Road,
vs.	)	Pittsburgh, Pennsylvania 15227
	)	
ALLEGHENY COUNTY HEALTH	)	
DEPARTMENT	)	
	)	
Appellee.	)	

**THE ALLEGHENY COUNTY HEALTH DEPARTMENT’S  
POST-HEARING MEMORANDUM**

**I. Introduction and Background.**

The Allegheny County Health Department (hereinafter “ACHD” or “Department”) files this post-hearing memorandum summarizing and supporting its position in the appeal of the above captioned municipal sewer authority (hereinafter “Appellant”).

The appeal was filed on August 19, 2016 and was based on a Notice of Violation sent to the Appellant by the ACHD dated August 10, 2016 (hereinafter “August 10<sup>th</sup> NOV”) (Exhibit D3). Pursuant to Section 1105 of Article XI (Hearings and Appeals) of the ACHD’s Rules and Regulations (hereinafter “Article XI”), a full evidentiary hearing was held on February 7, 2017 (hereinafter “Hearing”).

The appeal challenges the ACHD’s conclusion found in the August 10<sup>th</sup> NOV that the sewer line extending from manhole 094P021 to manhole 094P020 and ending at manhole 094P017 (hereinafter “Brownsville Rd. Sewer Line”)<sup>1</sup> in Carrick<sup>2</sup> is a public sewer, and

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<sup>1</sup> The Brownsville Rd. Sewer Line crosses several properties between Churchview Ave. and Brownsville Rd., in Carrick, including: 2608, 2612, 2614, 2616, 2618, 2622, and 2706 Churchview Ave.

<sup>2</sup> The City of Pittsburgh annexed Carrick Borough in 1927 and it officially became the 29<sup>th</sup> Ward.

therefore, the Appellant is the responsible party for its repair and maintenance. Exhibit A4. In its letter of appeal, the Appellant alleged that it should not be responsible for repairing the sewer line for the following reasons:

1. The Appellant should not take action for conditions
  - a. caused by a third party which the appellant has no control over,
  - b. caused by events that are beyond the reasonable control of the Appellant, and
  - c. are caused by facilities owned, operated, or maintained by third parties, and not by the Appellant.
2. The August 10<sup>th</sup> NOV directs the Appellant to take actions that are impossible or impracticable.
3. The ACHD failed to join all necessary parties for resolution of the issues that are the subject matter of the August 10<sup>th</sup> NOV.
4. The portions of the ACHD Rules and Regulations cited in the August 10<sup>th</sup> NOV as violations are enabling provisions and do not contain any substantive requirements.
5. The August 10<sup>th</sup> NOV is otherwise arbitrary, unreasonable, an abuse of discretion, and contrary to law.

The Appellant did not request and the ACHD Director did not unilaterally grant a stay of the proceedings, therefore, pursuant to Article XI § 1111, the ACHD's determination found in the August 10<sup>th</sup> NOV remains in full force and effect.

## **II. Proposed Findings of Fact.**

- A. Raw sewage flowing onto the property located at 2625 Brownsville Road emanates from a rupture of the Brownsville Rd. Sewer Line. Exhibit D4;

Verbatim Record of February 7, 2017 Hearing (hereinafter “Record”) at pp. 31-32.

- B. At the time the August 10<sup>th</sup> NOV was issued to the Appellant, the Appellant’s publicly available maps depicted that that the Brownsville Rd. Sewer Line was a public sewer line, and therefore, owned by the Appellant. Exhibit D1. Record at pp. 19-20.
- C. The Appellant changed its map after submitting its appeal in this case to indicate that the Brownsville Rd. Sewer Line is a private line. Exhibit D1; Exhibit A4; Record at p. 18, 20.

### **III. Discussion.**

In an administrative appeal of a final agency action of the ACHD, the appellant “shall bear the burden of proof and the burden of going forward with respect to all issues.” Article XI § 1105.D.7. Therefore, because this matter revolves around ACHD Rules and Regulations Article XIV, Sewage Management, § 1404.1 B, C, E, G and § 1404.2, and Pennsylvania Clean Streams Law, approved June 22, 1937, P.L. 1987 (“PA Clean Streams Law”), § 201 and § 202, in order to prevail in its appeal, the Appellants must prove by a preponderance of the evidence that the Brownsville Rd. Sewer Line is a private sewer line. During the Hearing, the Appellant never disputed that it previously considered the Brownsville Rd. Sewer Line to be public or that its map prior to submitting the Appeal depicted the line as a public sewer, and the Appellant even admitted that it serviced that line in the past. Exhibit D1; Exhibit A4; Record at p. 20. It should be noted that the Appellant did not provide any evidence or discuss the issues raised in its appeal. However, the ACHD will briefly respond to these issues.

As stated above, the regulations upon which this matter must be decided are Article XIV §1404.1 B, C, E, G and § 1404.2 (hereto attached as Exhibit C), and the PA Clean Streams Law, § 201 and § 202 (hereto attached as Exhibit E). Article XIV § 1404.1 and § 1404.2 state as follows:

**Requirements for Sewage Disposal Systems**

1404.1 The Director is authorized to promulgate minimum standards governing the management, design, construction, installation, reconstruction, and operation of individual and community sewage systems. These minimum standards will ensure that the discharge from any individual or community sewage systems:

- A. Does not actually or potentially contaminate any drinking water supply;
- B. Is not accessible to insects, rodents, or other possible carriers of disease which may actually or potentially come into contact with food or drinking water;
- C. Is not a health hazard by being actually or potentially accessible to children;
- D. Is not discharged to any underground mine, well, or cavern;
- E. Does not give rise to a nuisance due to odor or unsightly appearance;
- F. Does not contaminate any stream or other water of the Commonwealth; and
- G. Will not violate the PA Clean Stream Law, as amended; the PA Sewage Facilities Act, as amended; or any other statute or regulation referring to water pollution, sewage disposal, or nuisances.

1404.2 Violations of the standards identified in §1404.1 are declared health hazards and/or nuisances and it shall be unlawful for any person to continue to allow, or fail to eliminate the discharge of sewage in a manner which fails to conform to the requirements of §1404.1, or fail to abate the nuisance caused by such discharge of sewage.

Article XIV § 1404.1 provides the general standards for the discharge of sewage, and subsection G adopts the PA Clean Streams Law. Article XIV §1404.2 states that violations of the standards in § 1404.1 and failure to abate these violations shall constitute health hazards and/or nuisances.

Sections 201 and 202 of the PA Clean Streams Law state as follows:

Section 201. No person or municipality shall place or permit to be placed, or discharge or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any sewage, except as hereinafter provided in this act.

Section 202. No municipality or person shall discharge or permit the discharge of sewage in any manner, directly or indirectly, into the waters of this Commonwealth unless such discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department... A discharge of sewage without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the department is hereby declared to be a nuisance.

In the present case, the ACHD based its determination that the Brownsville Rd. Sewer Line is a public line on site investigations and a review of sewer system maps. Specifically, the ACHD relied on positive dye tests to conclude that the leak was coming from the Brownsville Rd. Sewer Line. Record at pp. 32-33. The ACHD then turned to maps and notebooks provided by the City of Pittsburgh and the Appellant to identify the Brownsville Rd. Sewer Line as a public line. Exhibits A2 and D1. Therefore, based upon its own on-the-ground investigation and a record review, the ACHD lawfully made the determination that the Brownsville Rd. Sewer Line is public, and pursuant to Article XIV §1404.1 and §1404.2 and the PA Clean Streams Law, correctly issued an order to the Appellant to eliminate the flow of sewage. The ACHD contends that the Appellant has failed to meet its burden of proof and thus, its appeal must be dismissed. In the following paragraphs, the ACHD will describe how the law must be applied, how the ACHD properly applied the law to the facts at hand, and how the Appellant failed to present evidence sufficient to meet its burden of proof.

**A. The Appellant Has Not Met Its Burden of Proof in this Appeal Because It Failed to Present Evidence Affirmatively Showing that the Brownsville Rd. Sewer Line is a Private Sewer Line.**

During the Hearing, the Appellant presented nine exhibits as documentary evidence purporting to show that the Brownsville Rd. Sewer Line is a private line, and for reasons outlined below, none of those exhibits are sufficient to meet the Appellant's burden of proof.

The first piece of evidence introduced was a capital lease agreement dated July 15, 1995 ("Agreement"), which was entered into evidence as Exhibit A1. The Agreement transfers and lets assets from the City of Pittsburgh to the Pittsburgh Water and Sewer Authority, the Appellant in this case. Exhibit A1. The Appellant drew attention to Paragraph 2 on page 1 and Exhibit A of the Agreement to indicate which assets were demised from the City of Pittsburgh to the Appellant. Paragraph 2 makes reference to Exhibit A when it states that water storage facilities and certain land and buildings described in Exhibit A are transferred to the Appellant. Exhibit A1. However, Paragraph 2 also states that "the entire network of water and sewage transmission pipelines as detailed on the Lessee's [Appellant in this case] engineering maps" and "all water and sewage transmission pipelines dedicated by builders or developers subsequent to the Effective Date and all assets associated with or used in connection with such pipelines" are demised. Sewage transmission pipelines dedicated after the Effective Date and engineering maps depicting the entire network of water and sewage transmission pipelines were not included in the Agreement and were not introduced during the Hearing. The Appellant did not indicate whether the notebook map or record plan, introduced into evidence as Exhibits A2 and A3 respectively, are two of the engineering maps referenced in paragraph 2. Exhibit A1. Therefore, without reviewing the complete description of assets that were demised or let to the Appellant

under this Agreement, the Agreement on its own cannot be used as dispositive evidence that the Brownsville Rd. Sewer Line is a private sewer.

The second piece of evidence introduced was a notebook drawing of sewer lines (“Notebook Drawing”), which was entered into evidence as Exhibit A2. The Notebook Drawing was submitted to the City of Pittsburgh and provided by the City to the Appellant. Exhibit A2; Record at p. 10. Appellant did not indicate who gave the Notebook Drawing to the City of Pittsburgh.<sup>3</sup> The Notebook Drawing depicts the Brownsville Rd. Sewer Line and a sewer line running across Churchview Ave. The Appellant claimed that because the Brownsville Rd. Sewer Line, as depicted on the Notebook Drawing, runs across property labeled “Private Property”, that sewer line is private and “most likely [put] by the developer of the homes” and “never transferred over to the City of Pittsburgh at that time.” Exhibit A2; Record at p.10. Contrary to the Appellant’s testimony, the Notebook Drawing does not provide the time of installation. Record at p.10. The Notebook Drawing is not dated and a date for when this document was created was not provided during the Hearing. Moreover, the Notebook Drawing does not include a map legend to differentiate municipal ownership between the Brownsville Rd. Sewer Line and the sewer line on Churchview Ave., both depicted as solid black lines.

*In Natalie Leon Golankiewicz et al. v. Allegheny County Health Department*

(“Homehurst”), the appellants claimed that a sewer line crossing the private properties located between 2805 and 2915 Homehurst Avenue, Pittsburgh, PA 15234 was a public line owned and operated by the Pittsburgh Water and Sewer Authority, whereas the appellee claimed it was a private line. The private properties in question were originally part of Baldwin Township, which

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<sup>3</sup> The ACHD has a copy of the Notebook Drawing in its possession and suspects that it was provided to the City of Pittsburgh by Carrick Borough.

created a sewer system encompassing the area that includes the appellants' properties. In 1930, the City of Pittsburgh annexed the portion of Baldwin Township that included the appellant's properties. Evidence showed that the Township of Baldwin constructed the sewer line on private property and intended to be responsible for its maintenance. In that case, the fact that the disputed sewer line was located on private property carried no weight in the Hearing Officer's determination that the sewer line was public. Therefore, markings on Exhibits A2 and A3 stating "Private Property" next to the Brownsville Rd. Sewer Line should not determine whether the sewer line is public or private.

The Appellant then introduced a record plan ("Record Plan") created by the City of Pittsburgh Department of Public Works Bureau of Engineering and it is dated 1934. The Record Plan was introduced into evidence as Exhibit A3.<sup>4</sup> The Record Plan describes the location of specific sewer lines in the bottom right hand corner that are then represented as solid black lines in the drawing, including the Brownsville Rd. Sewer Line. The Record Plan specifically states that the Brownsville Rd. Sewer Line runs "430° ON PRIV. PROP:E. OF BROWNSVILLE RD." Exhibit A3. The Brownsville Rd. Sewer Line is the only solid black line that runs on private property. Exhibit A3. For comparison purposes, a sewer line that is not listed in the bottom right hand corner but is represented on the map runs as a dotted line along Brownsville Rd. and turns onto Belplain St. Exhibit A3. It does not cross onto private property. Exhibit A3. The map legend uses a solid black line, but it does not differentiate between a private sewer line and public sewer line. Exhibit A3. This would be important information when referring to a sewer map to determine ownership, especially when the municipality clearly states that one sewer line

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<sup>4</sup> The Notebook Drawing is referenced in the Record Plan by the notation "N.B. – 274 P.119" next to the Brownsville Rd. Sewer Line. Exhibits A2 and A3. The top of the Notebook Drawing says "NOTEBOOK NO. 274" and the top right corner has encircled "119". Exhibit A2.



runs on private property. Therefore, the exclusion of this crucial information indicates that the municipal authority that created this map viewed the specifically enumerated, solid black lines as having the same characteristics.

The Record Plan also states that it is a “REPRODUCTION OF OLD CARRICK BORO. SH NO. 15-0 DATED NOV. 1908: W. McCLURG CONLEY BORO ENGR.” Exhibit A3. This demonstrates that Carrick Borough and the City of Pittsburgh kept record of the Brownsville Rd. Sewer Line. The portion of the Record Plan that is identical to the Notebook Drawing shows the Brownsville Rd. Sewer Line crossing a single property and a sewer line running along Churchview Ave. Exhibits A2 and A3. The identification of the Brownsville Rd. Sewer Line begs the question of why Carrick Borough and then the City of Pittsburgh continue to document a single private sewer line from 1908 and after the map was adopted by the City in 1934, unless that line was in fact public.

The fourth piece of evidence introduced by the Appellant is a map (“2017 Map”) depicting public and private sewer lines in the Brownsville Road area. The 2017 Map was admitted into evidence as Exhibit A4. The 2017 Map was created by the Appellant after conducting investigations in preparation for this Hearing. Exhibit A4; Record at pp. 13-14, 20. The map is dated January 4, 2017 and when compared to Exhibit D1, dated July 25, 2016 (“2016 Map”), the 2017 Map now indicates that the Brownsville Rd. Sewer Line is private. Exhibits A4 and D1. When comparing the Notebook Drawing (unknown date), the Record Plan (dated 1908 and reproduced in 1934), the 2016 Map (2016), and the 2017 Map (2017), it is clear that the only line the Appellant changed is the Brownsville Rd. Sewer Line. Exhibits A2, A3, D1, and A4. The sewer line running along Churchview Avenue in front of Kirk Avenue towards Spencer Avenue is depicted on all four maps and its status as a public sewer line remains unchanged.

Exhibits A2, A3, D1, and A4. Presumably this is because this sewer line is on public property, but as stated before, the Hearing Officer in Homehurst did not find private property to be a relevant factor in determining that the disputed sewer line was public. The 2017 Map provides no evidence regarding the historical ownership of the Brownsville Rd. Sewer Line, therefore, it is not dispositive of Appellant's position and should be disregarded for this purpose only.

The 2017 Map does suggest that the Brownsville Rd. Sewer Line is a public line due to its size and the existence of manholes throughout the line. The map states that the sewer line begins with a diameter of eight inches, expands to ten inches, and then reduces to eight inches. Exhibit A4. These sewer line diameters were also depicted on the 2016 Map before the line, but not the sewer diameters, was changed to indicate the Appellant's current claim that it is private line. Exhibits D1 and A4. The diameters of the Brownsville Rd. Sewer Line are identical to the size of the other public sanitary sewer lines, illustrated in solid green, on the 2017 Map and 2016 Map. Exhibits A4 and D1; Record at p.13. Moreover, the Brownsville Rd. Sewer Line, like the other public sewer lines depicted in the 2017 Map and 2016 Map, has several manholes, as opposed to small cleanouts commonly found on private sewer lines. A sewer line with identical characteristics identical to other public sewer lines in that area implies that the Brownsville Rd. Sewer Line is also a public sewer.

The final five pieces of evidence Appellant introduced during the Hearing are the result of a title search. Apart from the final exhibit, Appellant did not offer any argument as to the relevance of these documents and how they support its position.

The Appellant introduced an easement to Equitable Gas Company for right of access to a property located in Mifflin Township<sup>5</sup>. This easement was admitted into evidence as Exhibit A5. The Appellant also introduced an easement from multiple individuals to the South Pittsburgh Water Company for right of access to their properties located in Mifflin Township. This easement was entered into evidence as Exhibit A6. The Brownsville Rd. Sewer Line is located in Carrick. The City of Pittsburgh annexed Carrick Borough in 1927 and it officially became the 29<sup>th</sup> Ward. Prior to annexation, Carrick was not part of Mifflin Township. Exhibits A5 and A6 concern properties that the Brownsville Rd. Sewer Line does not pass through, and therefore, are irrelevant in determining whether the disputed sewer line is public or private. Thus, Exhibits A5 and A6 should be disregarded insofar as they are irrelevant.

The next pieces of documentary evidence the Appellant presented during the Hearing are deeds for properties presumably affected by the resolution of this case.<sup>6</sup> The document presented and admitted into evidence as Exhibit A7 is a deed for property in Carrick and is dated 1947. The deed states that the conveyance is subject to a sewer line running across the rear of the property. Exhibit A7. The deed does not state that the sewer line is private or that a sewer line does not currently exist. The document introduced and entered into evidence as Exhibit A8 is a conveyance of property in Carrick and is dated 1948. This deed acknowledges that a sewer line exists but does not say that the conveyance is conditioned on the sewer line being public or private. Exhibit A8. Assuming the properties conveyed in Exhibits A7 and A8 are serviced by

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<sup>5</sup> Mifflin Township existed at the time of this easement. It was later divided into the following present-day communities: Baldwin (part), Clairton, Duquesne, Dravosburg, Hays, Homestead, Jefferson Hills, Lincoln Place, Munhall, Pleasant Hills, West Elizabeth, West Homestead, West Mifflin, and Whitaker. Carrick was not formerly a part of Mifflin Township. Mifflin Township Historical Society, *Municipalities*, <http://mifflintownship.org/> (last visited April 5, 2017).

<sup>6</sup> The present-day addresses for Exhibits A7 and A8 were not provided during the Hearing but they are located in the 29<sup>th</sup> Ward.

the Brownsville Rd. Sewer Line, the language referring to sewer lines in Exhibits A7 and A8 does not clarify the ownership of those lines. Exhibit A7 and A8; Record at p.17. Exhibit A7 does not even acknowledge the existence of the Brownsville Rd. Sewer Line. Exhibit A7. Therefore, these pieces of evidence are irrelevant as to whether the Brownsville Rd. Sewer Line is public or private.

The final piece of evidence presented by the Appellant is an indenture (“Indenture”) for property located in lot 7 and part of lot 8 of the Margaret B. McWilliams Plan of Lots as recorded in Plan Book Volume 16, Page 56 (McWilliams Plan)<sup>7</sup> (hereto attached as Exhibit F). Exhibit A9.

Appellant drew attention to paragraphs 4 and 5 which state the “right to lay, use and forever maintain sewer, water pipes and gas pipes...[together] with the right at all times to enter upon said property for the purpose of repairing or renewing the same.” Exhibit A9; Record at pp. 17-18. This paragraph gives an easement to the heir to enter lot 6, but it gives no indication that a private sewer line exists. If the ACHD is meant to understand the easement in paragraphs 4 and 5 signifies that the sewer on the neighboring property is private and now owned and maintained by the heir, then it must also conclude the water and gas lines on lot 6 are private and owned and maintained by the heir since they are included in the same paragraphs. This requires substantial speculation about the ownership of the gas and water lines. Because the Brownsville Rd. Sewer Line was already constructed by the date of this Indenture and current ownership regarding the water and gas lines at this property has not been provided, paragraphs 4 and 5 should be read as a general conveyance to the heir. Exhibits A9 and A3. The Appellant’s

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<sup>7</sup> The Indenture frequently makes reference to the McWilliams Plan. The Appellant did not introduce the McWilliams plan in the Hearing, but it is an important reference when reading the Indenture. Exhibit A9.

interpretation of paragraphs 4 and 5 is speculative and inconclusive evidence regarding the ownership of the sewer line, therefore, the significance of these paragraphs should be dismissed.

In paragraph 7 of the Indenture, an easement was granted to John F. Sankey in 1906 for the purpose of laying and maintaining sewer, water, and gas pipes on lot 7. Exhibit A9. However, the Appellant has not shown any proof of whether Mr. Sankey actually constructed the Brownsville Rd. Sewer Line, when the line was constructed, a construction plan depicting which properties it would run through, and whether Mr. Sankey retained ownership of any part of the line. Secondly, the description of the easement granted to John F. Sankey in paragraph 7 ends with the statement that the purpose of the line is for draining and supplying gas and water to lots 9 and 10 in the McWilliams Plan. As the Appellant stated before, water lines are not the same as sewer lines. Record at p. 16. The Indenture is merely a conveyance of property and lacks any evidence supporting the Appellant's claim that the Brownsville Rd. Sewer Line is private.

**B. The Allegations Appellant Raised in Its Letter of Appeal do not Preclude the Appellant from Responsibility for the Repair and Maintenance of the Brownsville Rd. Sewer Line.**

Although the Appellant did not present any evidence in support of the allegations raised in its letter of appeal, the ACHD will address them below.

**1. The Appellant is Required to Take Action to Repair the Brownsville Rd. Sewer Line Even if the Conditions Were Caused by a Third Party or Conditions Beyond Its Reasonable Control, Regardless of Whether the Sewer Line is Public or Private.**

If the Brownsville Rd. Sewer Line is a public sewer, then the Appellant, as the owner of the line, is responsible for its repair and maintenance regardless of who caused the condition or whether it was caused beyond the Appellant's control. Article XIV and the PA Clean Streams Law do not eliminate or reduce the owner's responsibility to maintain and repair a sewer line based on the cause of the condition. Exhibits C and E.

The ACHD does not claim that the Appellant caused the initial flow of sewage in this case. The ACHD argues that the Appellant permitted the continued flow of raw sewage without authorization, in violation of the PA Clean Streams Law §201 and §202. Exhibits D3, D4 and E. The PWSA was made aware of the flow of sewage from the Brownsville Rd. Sewer Line in February 2016, and was involved in the investigation of the cause of the flow led by the ACHD. Exhibit D4. The ACHD issued the August 10<sup>th</sup> NOV to formally notify the Appellant that the condition exists and as owner of the sewer line, it is required to prevent the continued flow of sewage. Exhibit D3. According to the ACHD, the Brownsville Rd. Sewer Line continues to discharge sewage.

If the Brownsville Rd. Sewer Line is determined to be a common sewer lateral, a private sewer, then Article XIV §1409.5 applies (hereto attached as Exhibit G). This clause states as follows:

**Common Sewer Laterals.** It shall be the responsibility of the municipality to manage the repair, upgrade, and maintenance of common sewer laterals within its boundaries in so far as it is necessary to undertake action to eliminate a public health problem. In the event that a municipality expends public funds for the purpose of addressing such a public health problem caused by the illegal discharge of sewage from a common sewer lateral or in the event that it becomes necessary to upgrade

the lateral to meet current code requirements, nothing shall prevent the municipality from assessing such costs to the property owners whose property is connected to the common sewer lateral.

In Article XIV § 1403, “common sewer lateral” is defined as “[a] private sewer that collects the sewage discharge of more than one building sewer and conveys it to a public sewer. A common sewer lateral does not include a private sewer conveying wastes from more than one building under one ownership (i.e. shopping centers, etc.).” (hereto attached as Exhibit H).

The only relevant factors in determining whether the Appellant must repair the Brownsville Rd. Sewer Line if it is a private sewer are whether a public health problem exists and whether the Appellant is the municipal sewer authority providing the boundaries surrounding the public health problem. Exhibit G. According to Article XIV §1409.5, the cause of the hazard is not a factor in determining the municipality’s responsibility. Exhibit G; Record at pp. 25-26. The August 10<sup>th</sup> NOV acknowledges that the condition at the Brownsville Rd. Sewer Line is a health hazard. Exhibit D3. The Appellant is the municipal sewer authority that surrounds the Brownsville Rd. Sewer Line. Exhibit A4 and D1. Therefore, pursuant to Article XIV §1409.5, the Appellant is responsible for repairing common sewer laterals within its boundaries to the extent necessary to eliminate a public health hazard. Exhibit G; Record at pp. 24-25. The Appellant may charge the property owners the costs of repairing the line if it is found to be a common sewer lateral. Exhibit G; Record at p. 25-26.

Although the extent of responsibility may change depending on whether the Brownsville Rd. Sewer Line is public or private, in all cases, the Appellant is still responsible to at least abate the situation in order to eliminate a public health hazard. In

this case, at the very least, the Appellant would have to repair the Brownsville Rd. Sewer Line to the extent necessary to prevent the continued flow of sewage.

**2. The ACHD's Order Directing the Appellant to Take Actions Are Not Impossible or Impracticable.**

In the August 10<sup>th</sup> NOV, the ACHD ordered the Appellant to “submit to this office in writing by August 26, 2016 a plan and schedule for eliminating [the] sewage discharge” accumulating at the rear of 2625 Brownsville Rd., in the City of Pittsburgh. Exhibit D3. The Appellant has alleged that a plan, schedule, and act of eliminating the sewage discharge from the Brownsville Rd. Sewer Line is “impossible or impracticable.”

If the Brownsville Rd. Sewer Line is a public sewer, then the Appellant has ownership of the line and has the authority to enter the property to maintain and alter and repair the sewer line while damaging private property as little as possible and making compensation to the owner. (53 P.S. § 2201 included herein as Exhibit I). The PA Clean Streams Law and Article XIV hold the owner of the sewer line responsible for its maintenance and repair. Neither regulation limits the owner's responsibility based on the location of the sewer line. Exhibits C and E.

If the sewer line is found to be private, then the Appellant is still required to enter private property to repair the line to extent necessary to eliminate a public health hazard. Exhibit G. In this case, Article XIV § 1409.5 acknowledges that the municipality does not own the sewer line, but for the protection of the public, it requires a targeted response.

The Appellant has not shown how submitting a plan and a schedule, and repairing a portion of the Brownsville Rd. Sewer Line is impossible or impracticable when regulations require an owner or municipality to undertake abatement action.



3. **The ACHD Held the Owner of the Brownsville Rd. Sewer Line Responsible for the Abatement of the Sewage Flow.**

The Appellant alleges that the ACHD failed to join all necessary parties for resolution of the issues that are the subject matter of the August 10<sup>th</sup> NOV. The August 10<sup>th</sup> NOV states that the NOV was issued to the Appellant based on the ACHD's investigations showing the Brownsville Rd. Sewer Line to be a public sewer. Exhibit D3. If it is a public line, then the municipal owner of the line, the Appellant, is the responsible party to repair and maintain the sewer line, as discussed in Paragraph B.1 above. The ACHD has not suggested that other parties should not be included for the resolution of the issues that are the subject of the August 10<sup>th</sup> NOV, but the Appellant did not provide any evidence stating which other party should be included.

4. **The ACHD Admits that One Provision of the ACHD Rules and Regulations Cited in the August 10<sup>th</sup> NOV as a Violation is an Enabling Provision, but the Second Regulation Does Carry a Substantive Requirement.**

In the August 10<sup>th</sup> NOV, the ACHD cited the Appellant for violating ACHD Rules and Regulations, Article XIV, § 1404.1 B, C, E, G and § 1404.2, and the PA Clean Streams Law, § 201 and § 202. Exhibit D3. The ACHD admits that Article XIV § 1404.1 is an enabling regulation because it manifestly gives the agency power to create regulations to uphold standards identified in its subsections. Exhibit C. (“An agency derives its power to promulgate regulations from its enabling act.” *Germantown Cab Co. v. Philadelphia Parking Auth.*, 993 A.2d 933, 937 (Pa. Commw. Ct. 2010), *aff'd*, 614 Pa. 133, (2012)). However, the inclusion of the PA Clean Streams Law in Article XIV §1404.1.G is not a standard that the Director will promulgate a

regulation on, it is a state regulation that the ACHD must enforce. Exhibit E. This interpretation is strengthened by the lack of any other reference to the PA Clean Streams Law in Article XIV.

Article XIV § 1404.2 is not an enabling statute as defined in *Campo v. State Real Estate Comm'n.* because its language does not clearly give the agency the ability to create regulations and it does not provide the bounds of the statutory authority to regulate. (“The rulemaking power of administrative agencies is limited by statutory grant of authority and can only be conferred by clear and unmistakable language setting the exact bounds of the statutory grant.” *Campo v. State Real Estate Comm'n.*, 723 A.2d 260, 262 (Pa. Commw. Ct. 1998).) Whereas Article XIV § 1404.1 states that the “Director is authorized to promulgate minimum standards governing the management, design, construction, installation, reconstruction, and operation of individual and community sewage systems,” Article XIV § 1404.2 does not contain similar explicit language. Exhibit C. Article XIV § 1404.2 merely states that violations of the standards the agency may promulgate regulations upon in Article XIV § 1404.1 will be declared public health hazards and/or nuisances, and continued violations or failure to abate the violations will be unlawful. Exhibit C. The language of Article XIV § 1404.2 does not clearly grant the ACHD authority to promulgate any regulations, and therefore, it is not an enabling statute.

For the reasons outlined above, PA Clean Streams Law § 201 and § 202 are not enabling statutes because they lack explicit language granting the agency to promulgate regulations.

**5. The August 10<sup>th</sup> NOV is Not Arbitrary, Unreasonable, An Abuse of Discretion, or Contrary to Law.**

The Appellant has provided no justification for why it believes the August 10<sup>th</sup> NOV is “arbitrary, unreasonable, an abuse of discretion, and contrary to law.” The Appellant appears to

make this claim based on its belief that it is not the responsible party for the violations stated in the August 10<sup>th</sup> NOV. The validity of the argument rests on the hearing officer's determination of whether the Brownsville Rd. Sewer Line is a public or private sewer. If the line is declared public, the Appellant's claim has no merit because it is the owner of the line and the responsible party for abatement action. If the line is declared private, then the ACHD should have cited the Appellant under Article XIV § 1409.5, Common Sewer Laterals. The extent of the Appellant's responsibility was discussed in Paragraph B.1 above.

As noted above, pursuant to Article XI § 1105.D.7, the Appellant carries the burden of proof in this appeal. The Appellant introduced nine exhibits, the majority of which were either irrelevant, inconclusive, or actually favored the ACHD's position. The Appellant also presented a series of legal claims to evade responsibility for repairing and maintaining the sewer line, but as outlined above, the Appellant, as the municipal authority, is the appropriate party to abate the public health hazard.

#### **IV. Conclusions of Law.**

- A. Historical maps show that the Brownsville Rd. Sewer Line is a public sewer owned by the Appellant.
- B. The ACHD lawfully ordered the Appellant to eliminate the public health hazard caused by the flow of sewage from the Brownsville Rd. Sewer Line.
- C. The order issued by the ACHD in its August 10<sup>th</sup> NOV is limited in scope to prevent the continued flow of sewage from the Brownsville Rd. Sewer Line.
- D. The Appellant must repair and maintain the Brownsville Rd. Sewer Line to prevent the flow of sewage.

**V. Conclusion.**

This case arose from a misunderstanding of the historical maps introduced by the Appellant. The Appellant believes that since the Brownsville Rd. Sewer Line crosses private property, the sewer line must be private. This belief is not correct as not all sewer lines in the City of Pittsburgh were constructed on public property. The ACHD used the historical maps introduced by the Appellant and current maps that were publicly available on the Appellant's website to determine that the Brownsville Rd. Sewer Line was a public sewer before issuing the August 10<sup>th</sup> NOV. The Appellant, having the burden of proof, failed to present any evidence proving that the Brownsville Rd. Sewer Line is a private line. Therefore, since the Appellant failed to meet its burden of proof, the ACHD asserts that its appeal should be dismissed.

Respectfully Submitted,

/s/ Vijyalakshmi Patel  
Vijyalakshmi Patel, Esq.  
Pa. Id. No.: 319945  
Assistant Solicitor  
Allegheny County Health Dept.  
301 39<sup>th</sup> Street, Building No. 7  
Pittsburgh, PA 15201  
Tel.: 412-578-2653  
Fax: 412-578-8144  
Email: [vijya.patel@alleghenycounty.us](mailto:vijya.patel@alleghenycounty.us)

**CERTIFICATE OF SERVICE**

I hereby certify that on April 10, 2017, I served a true and correct copy of the Post-Hearing Memorandum on the following persons by first class mail, postage paid, and addressed as follows:

Rick Obermeier  
Director of Sewer Operations  
Pittsburgh Water and Sewer Authority  
Penn Liberty Plaza I  
1200 Penn Avenue  
Pittsburgh, PA 15222

Danny P. Cerrone, Jr. (Email PDF also)  
Clark Hill PLC  
One Oxford Center  
301 Grant Street, 14<sup>th</sup> Floor  
Pittsburgh, PA 15219

/s/ Vijyalakshmi Patel  
Vijyalakshmi Patel, Esq.  
Attorney for the Appellee