ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARINGS

ZHITONG ZHANG, Appellant, v. ALLEGHENY COUNTY HEALTH DEPARTMENT, Appellee.	Docket No. ACHD-17-032 Re: 2650 S. 18th Street Pittsburgh, PA 15210

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 appellant (hereinafter "Mr. Zhang" or "Appellant").

The appeal was filed on November 9, 2017 by Three Rivers Property Management, LLC on behalf of the Appellant and it challenges a civil penalty assessed by the Department dated October 30, 2017 (hereinafter "October 30th Penalty Assessment"). The Department assessed a penalty in the amount of $2,500.00 for violations of the Department's Rule and Regulation Article VI, Housing and Community Environment, ("Article VI") § 649.A observed at 2650 S. 18th Street, Pittsburgh, PA 15210 ("Property"). Pursuant to § 1105 of the Department's Rule and Regulation Article XI, Hearings and Appeals, ("Article XI"), a full evidentiary hearing was held on December 18, 2018 (hereinafter "Hearing").

In its appeal, the Appellant claimed that the majority of the lead violations were addressed and only a few minor items remained. Moreover, the Appellant requested permission to correct the remaining violations after the tenants vacated the Property. The Appellant did not request, and the Department's Director did not unilaterally grant, a stay of the proceedings, therefore, pursuant to Article XI § 1111, the October 30th Penalty Assessment remains in full force and effect.

II. Discussion.

In an administrative appeal of a final agency action of the Department, the Department bears the burden of proof when it assesses a penalty or issues an order. *See* Article XI § 1105.C.7. Therefore, the Department must prove by a preponderance of the evidence that the penalty was properly assessed in light of any violations present at the Property. *Id.* The preponderance of the evidence standard requires proof "by a greater weight of the evidence" (*Commonwealth v. Roy L. Williams*, 732 A.2d 1167, 1187 (1999)) and is equivalent to a "more likely than not standard" *Com. v. McJett*, 811 A.2d 104, 110 (Pa. Commw. Ct. 2002). The Appellant has never disputed the application of Article VI.

Appellant, Zhitong Zhang, owns the Property. *See* Verbatim Transcript of December 18, 2018 Hearing (hereinafter "Tr.") at p. 6. Three Rivers Property Management, LLC was the Appellant's property manager during the events leading up to the penalty and Roth and Hogan was hired as a contractor to address the lead hazards at the Property.

A. <u>The civil penalty was assessed against the Appellant because the lead hazards at the Property were not repaired in a timely manner.</u>

The Department assessed a civil penalty against the Appellant after the third official inspection showed that lead hazards remained at the Property. Exhibit D5.

Article V § 649.A states that "when the Director determines that the presence of lead-based paint or a lead-based paint hazard on any premises creates a health hazard to any child or other person, the Director may issue an order to the owner to eliminate the hazard within a reasonable period prescribed by the Director." Considering that young children are at greater risk of lead poisoning and it affects their neurological development, 30 days to make repairs is a reasonable time. Tr. at p. 36, 57.

Sources of lead poisoning include paint on trim surfaces, walls, exterior paint, and dust from repairs or remodeling projects. Tr. at p. 37. Sources of lead poisoning do not arise from failure to remove trash. Exhibit D1. Although the tenant is responsible for regular cleaning of the premises, the owner is responsible for the physical structure of the house to prevent exposure to lead hazards. Tr. at p. 37-38, 55, 80. Moreover, once the landlords are done with the construction, they are required to clean the area where work was completed before clearance sampling tests are performed. Tr. at p. 61, 80. This is more than what the tenant is responsible for. *Id*. Tenants are informed to maintain the property after the contractor completes their work. Tr at p. 57.

On July 25, 2017, the Appellant was informed in writing that lead-based paint hazards were located at the Property on July 18, 2017 and that he had 30 days to correct all the lead hazards. Exhibit D2. He was instructed to hire a Lead Certified Contractor and was provided a copy of the lead-based paint risk assessment report. Exhibits D1-D2. The lead-based paint risk

assessment report is a 25-page report that provides the Appellant in-depth information about the location and severity of the lead hazards at the Property, treatment options, and prohibited methods, among other information. Exhibit D1; Tr. at p. 80-81. Areas that required lead hazard reduction included bedrooms, bathrooms, the kitchen, and the living room. Exhibit D1. As the Record demonstrates, the lead hazards at the Property were too extensive to be satisfactorily addressed by just simply wiping dust as the lead-based paint risk assessment report required remodeling, encapsulating, and other repairs beyond what is required of tenants. Exhibits D1, D4, D6.

The second official inspection took place on August 22, 2017 and the Appellant was notified that lead hazards remained at the Property. Exhibit D3. At this inspection, Lawrence Robinson, the Department's Senior Sanitarian, met with the Appellant's contractor, John, from Roth and Hogan at the Property. Exhibit A1; Tr. at p. 35, 42. Mr. Robinson is a certified Lead Risk Assessor by the State of Pennsylvania and he created the lead-based paint risk assessment report for the Property. Exhibit D1; Tr. at p. 35. Mr. Robinson testified that John was unprepared to address the lead hazards because he had only been provided some of the pages from the lead risk assessment report, therefore he was unable to identify all the sources of lead hazard that needed corrected. Tr. at p. 41; 43; 67. Mr. Robinson provided a complete copy of the report to John via email. Tr. at p. 42. Mr. Robinson testified that he walked through the Property with John, reviewed some of the areas that were lead risks and potential treatment options, and that he informed him to work in a way that will not create more lead dust and paint chips. Tr. at p. 73-74. At the time of this inspection, repairs to the lead violations had not begun.

On September 13, 2017, Ms. Wheeler informed Mr. Robinson that the Property was ready for reinspection. Mr. Robinson visited the property three days later and found that only

65% of the lead hazards were corrected and repairs were not performed in a safe manner. Exhibit D4. Although Appellant alleged that only minor items remained, the percentage does not indicate the magnitude of the actual or potential harm of the remaining lead violations. Tr. at p. 44-45. Moreover, the Appellant is not a certified Lead Risk Assessor and the third inspection report and two failed clearance sampling reports prove that high levels of lead remained at the Property even after the penalty was assessed. Exhibits D5, D7, D8; Tr. at p. 50-51, 79-80. After this inspection, Ms. Wheeler was informed via email that paint chips and dust created by the repairs must be cleaned. Exhibit D4. Mr. Robinson testified that at this point, at least 90% of the work should have been completed and the contractor should have been nearing the cleaning stage of his work. Tr. at p. 63.

Evidence of lead hazards being corrected and ready for analytical sampling include absence of paint chips and loose paint, a new layer of paint that is keeping the entire surface intact, presence of other treatments methods, etc.. Exhibit D1; Tr. at p. 49. The third official inspection took place on October 17, 2017 and the Department found that lead violations that were the responsibility of the Appellant remained. Exhibit D5. Immediately following the third inspection, Ms. Wheeler was reminded again of the need to clean the area after repairs are completed and that the contractor had not even begun work on some sources of lead hazards. Exhibit D6; Tr. at p. 47. The photographs provided to Ms. Wheeler by Mr. Robinson clearly depict structural disrepair and paint chips, dust, and dirt which demonstrate that the contractor had not prepared the surface to be painted. Exhibit D6; Tr. at p. 48-49.

Thus, the continued exposure to lead hazards despite being provided an additional 60 days to correct all repairs supports the Department's assessment of the civil penalty.

B. <u>The Department was permitted to have assessed a significantly larger penalty against the Appellant.</u>

The Department complied with relevant regulations when it assessed a penalty against the Appellant. Moreover, the Department could have assessed a much higher penalty against the Appellant, but instead, it chose to be very lenient.

Pursuant to the Department's Rule and Regulation Article XVI, Environmental Health Civil Penalties, ("Article XVI"), the Department may assess civil penalties for violations of Article VI. *See* Article XVI § 1604. The Department may assess a penalty up to $10,000.00 for each violation and an additional penalty up to $2,500.00 for each day of continued or repeated violation, whether or not the violation was willful. *See* Article XVI § 1605. When determining the penalty amount, the Department *may* consider economic benefit gained by failing to comply with the regulation, willfulness of the violation, the actual and potential harm to the public, frequency and magnitude of the violation, and any other relevant factors. *Id*. In this case, the Department only issued a $2,500.00 penalty after two penalty warnings, two grants of extension requests, and 90 days of continued exposure to lead hazards. Exhibits D1-D3, D5.

The October 30th Penalty Assessment could have been around $235,000 with an additional daily penalty to cover the period between October 31, 2017 to February 23, 2018 when the violations still remained. However, the Department did not assess any daily penalty against the Appellant. Moreover, the Record does not indicate that the penalty took into account economic benefit gained by the Appellant by not completing the repairs in a reasonable manner and ceasing to expose the tenants to the lead hazards. If this was taken into account, it is reasonable to assume that the penalty could have been higher, considering the magnitude of the actual and potential harm caused by lead exposure on young tenants. Finally, the Record does

not suggest that the penalty was adjusted for willfulness of not maintaining the Property free from exposure to lead hazards or correcting the hazards within 30 days.

Thus, despite having the authority to impose a significantly larger penalty amount for the violation, totaling in excess of $500,000.00, the Department imposed a negligible fine of $2,500.00.

C. Appellant's statements about the Tenant's alleged behavior are inadmissible hearsay and must be disregarded.

Throughout the hearing, it became clear that Appellant had not only not visited the Property during the events of this case, but he had never even met the tenant, and any information he obtained about the tenant's alleged behavior were inadmissible hearsay and unreliable. Tr. at p. 25-26. The Department properly objected to all statements made by the Appellant regarding the tenant's behavior towards the Property. Tr. at p. 26. All statements and observations Appellant relied upon could have been offered by simply introducing Diane Wheeler of Three Rivers Property Management, and John, the contractor from Roth and Hogan, as witnesses to be cross-examined. Instead, the Appellant relied on text messages and hearsay statements from over one year ago to argue that his representatives acted expeditiously whereas the tenant was obstructing efforts to address the lead hazard.

To support his position, Appellant pointed to the tenant's failure to remove trash and wipe the dust. Yet, Mr. Robinson never testified that failure to remove trash or wipe some dust without first painting, encapsulating, or performing other structural repairs required in the lead-based paint assessment would have prevented lead poisoning. Moreover, the Appellant introduced numerous photos to claim that the tenant damaged the Property possibly for the

purpose of insinuating that her behavior caused the lead poisoning. However, as the Appellant has not visited the Property in over four years, and without Ms. Wheeler's testimony, the Appellant's allegations lack credibility.

The Appellant alleges that because the Property passed the annual Section 8 housing inspection in early 2017, and he only become aware the Property's conditions *after* the Department notified him of the lead hazards on July 25, 2017, the tenant must have caused the damage to the Property. Tr. at p. 27, 31-32. This raises numerous unanswerable questions such as: Does the Section 8 housing inspection have a lower passing standard than a lead-based paint risk assessment inspection which uses a Nitron XLp 300 series, Portable X-ray Fluorescence Analyzer to detect lead in paint? Exhibit D1. If the Section 8 housing inspection standard is lower, did the Property begin to deteriorate before the tenant occupied it in 2015? Tr. at p. 25. If Ms. Wheeler and the Appellant were in constant communication, why didn't Ms. Wheeler inform the Appellant of the continuing deterioration of the Property? It is important to note that no information about Section 8's annual housing inspection was provided. As there is no proof that Section 8 housing inspections have any bearing on lead-based paint risk assessments, and coupled with the Appellant's apparent lack awareness of the Property's conditions or firsthand observations of the Property in the past four years, any allegations of the tenant's alleged behavior should be dismissed as merely speculative without any evidentiary support.

D. <u>Mr. Robinson provided adequate support to the Appellant's agents in order to address the violations at the Property in a timely and safe manner.</u>

As previously discussed, Mr. Robinson visited the property four times before the Department assessed the penalty, he was in continuous contact with Ms. Wheeler and provided

explanations every time when he determined that the Property was not satisfactorily repaired, he explained the hazards and treatment measures to the allegedly Lead Certified Contractor, and ensured that all parties involved in the repair of the Property had a copy of the lead-based paint risk assessment report. Thus, any hearsay testimony about being unable to contact Mr. Robinson and any assurances he allegedly provided that the Appellant may delay the repairs are questionable and at best irrelevant.

First, the evidence shows that Ms. Wheeler did not inform the Appellant about the tenant's intent to vacate the Property until November 2, 2017, which was after the penalty was already assessed. Exhibits A1 and D5. Mr. Robinson disputes that on November 6, 2017, he permitted Ms. Wheeler to delay repairing the lead hazards until the tenant moved and Ms. Wheeler was not present at the hearing to explain her understanding of her alleged conversation with Mr. Robinson. Exhibit A5; Tr. at p. 70. However, Ms. Wheeler's alleged conversation with Mr. Robinson is irrelevant concerning the penalty which is the subject of this appeal because it had been assessed on October 30, 2017 and known by the Appellant and Ms. Wheeler by November 3, 2017 at the latest. The Record demonstrates that no assurances regarding the penalty were provided to the Appellant.

Second, Mr. Robinson testified that if he was made aware that the tenant was obstructing the repair process, the Department would have mailed a letter encouraging the tenant to be cooperative. However, no such letter was sent to the tenant in this case because the Department was not made aware of the tenant's alleged behavior. As the Record demonstrates, Ms. Wheeler was in regular contact with Mr. Robinson throughout this case and was represented by counsel. Exhibits A1, D4, D6, D9. If the tenant was indeed preventing repairs at the Property, Ms. Wheeler or her counsel should have informed the Department in a timely manner. Instead, the

first time the tenant's alleged disruptive behavior became known to the Department was on January 19, 2018, which was six months after the initial inspection of the Property and after the first clearance sampling took place. Exhibit D7, D9; Tr. at p. 74. Moreover, no competent evidence was introduced to demonstrate that the tenant was preventing repairs at the Property during the events in this case and that the Department was notified of this.

Third, Ms. Wheeler allegedly sent the lead-based paint risk assessment report to John on July 31, 2017. However, John did not do a walk-through of the Property until August 22, 2017, twenty-two days after allegedly receiving the report and around the time the 30-day compliance period ended, and the proposal was not generated until August 23, 2017. Exhibits A1-A3. At this time, the Department provided the Appellant with another 30 days to repair the lead violations. Moreover, as stated before, Mr. Robinson testified that he emailed a copy of the lead-based paint risk assessment report to John. Therefore, if John needed to reach Mr. Robinson and Mr. Robinson was not available by telephone, he could have emailed him. Tr. at p. 75. Mr. Robinson disputes that John left voicemails for him and John was not present at the Hearing to testify. Tr. at p. 77.

Finally, the Appellant takes great pains to demonstrate that John created his proposal according to his conversation with Mr. Robinson on August 22, 2017. However, John is supposed to be a Certified Lead Contractor who would presumably have specialized knowledge of best practices for lead hazard reduction. Mr. Robinson maintains that he was not requested to grant approval to John's proposal, he did not see the proposal until after John was hired, he did not instruct the contractor on how to perform his trade, and he is not an employee of Roth and Hogan. Tr. at p. 73, 74, 78. Despite John's certifications, his conduct at the Property casts doubt to the Appellant's claim that the tenant caused the increased lead levels at the Property. John

was unprepared during his walk-through with Mr. Robinson on August 22, 2017 and his work practice created unsafe conditions. As previously stated, Mr. Robinson informed Ms. Wheeler and John that the area must be cleaned after repairs were made. However, on multiple occasions, Mr. Robinson observed paint chips and dust generated by the work had not been cleared and therefore, the Property was not ready for clearance sampling. The pace of the lead hazard reduction repairs and John's work practice contributed to the continued exposure to lead. Thus, not only could the work have been completed in a timely manner, but it also could have been completed as safely as would be expected of a Lead Certified Contractor.

Thus, despite Mr. Robinson's availability and repeated advice to Ms. Wheeler and John, their delay in beginning lead hazard reduction at the Property and poor work practices contributed to the prolonged exposure to lead and the assessment of the civil penalty.

V. Conclusion.

For the reasons set forth above and at the Hearing, the civil penalty should be enforced against the Appellant in its entirety and judgment entered in favor of the Department.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2019, I served a true and correct copy of the THE ALLEGHENY COUNTY HEALTH DEPARTMENT'S POST-HEARING MEMORANDUM on the following persons by electronic mail PDF and first-class mail, postage paid, and addressed as follows:

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