

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

KAMYAR SHAMS and LISA SHAMS,	:	
Appellant	:	
	:	CV- 14-02232
vs.	:	
	:	
BOROUGH OF SOUTH WILLIAMSPORT,	:	(Agency Appeal No. 2014-01)
BOARD OF APPEALS,	:	
Appellee	:	AGENCY APPEAL
vs.	:	
	:	
BOROUGH OF SOUTH WILLIAMSPORT,	:	
Intervener	:	

O P I N I O N A N D O R D E R

Before the Court is an appeal by Mr. and Mrs. Shams under the Local Agency Law, 2, Pa. C.S.A. § 751, *et. seq.*, of an opinion and order dated August 4, 2014 by Borough of South Williamsport, Board of Appeals (“Board”). Upon review of the certified record, arguments and briefs, the decision of the Board is AFFIRMED. The following opinion is provided in support of the decision.

Procedural and Factual Background.

Mathew Peleschak, a civil engineer with the Larson Design Group in Williamsport and an expert in the field of sewer rehabilitation, is the professional engineer responsible for the development and implementation of a property inspection and operation maintenance program for the Borough of South Williamsport (“Borough”). The program arose in part from a consent order between the Pennsylvania Department of Environmental Protection and the Borough for a detailed investigation and rehabilitation of their entire system. Peleschak implemented the program by mandating inspections of all properties to determine any sources of inflow of non-polluted water into the system. 3078 properties were inspected. All but 2 required video

inspection. Pelschak reviewed the videos and issued non-compliance notices when violations were observed. The program was developed to get as much non-polluted water out of the system as quickly as possible by identifying every single property with current defects to comply with the requirement for suitable polyvinyl chloride (PVC) or high density polyethylene (HDPE) pipe material. Under the program, if no structural issues or defects were found at all, the property would go on a monitoring list for more frequent checks to identify defects in the future. The tank and pump station and everything else designed for the system was based on having compliance of laterals within the borough by the time it is done. If the video showed violations, the Borough issued a notice of non-compliance and the requirement to replace the entire lateral with conforming material was imposed.

In accordance with this program, an inspection letter was sent to the Shams dated March 20, 2009. The Shams received notice for access to video the lateral by letter dated January 19, 2010. By letter dated October 20, 2010, the Borough notified the Shams that their property was still missing a required inspection and that “the Borough is under a Consent Order and Agreement with the Department of Environmental Protection and must comply with the time frame established for maintenance and repair of the Borough’s sewer system.” On March 1, 2011 another access letter was sent because the videos only included about 236 feet. On April 11, 2011, a video from Pine Mountain was obtained.

By letter dated April 19, 2011, the Borough Council of South Williamsport issued a notice of non-compliance of one or more of the Borough’s Sewer and Sewage Disposal Ordinances to Mr. and Mrs. Shams. The notice indicated that inspection of the Shams’ property revealed non-compliant items that required correction within 120 days. It identified videos 1, 2 and 3 and described the asbestos cement or concrete pipe. The required repairs were: “[t]he

portion of the building sewer that is not constructed of PVC or cast iron pipe needs to be repaired or replaced (length unknown, at least 372 – feet.)” The summary of findings notified the property owner to contact the Borough for information if the property owner desired to have the sewer lined, to get an extension of time, or to determine eligibility for grant assistance for repairs through the Borough.

The attachment identified a violation of Ordinance § 13-315, which requires that the building sewer shall be of suitable polyvinyl chloride (PVC) or high density polyethylene (HDPE) pipe material in accordance with the International Building Code. The attachment also identified a violation of Ordinance § 18-401, which provides that “It shall be the duty of each property to maintain, clean, and repair private building sewer on his property at his own expense as necessary to keep such building sewer free and clear of obstructions and in good working order.”

Ordinance § 18-401 further provides that “[w]henver a building sewer connected to the sanitary sewer system becomes clogged, broken, out of order *or detrimental to the use of the sanitary sewer system*, the property owner having responsibility for the sewer shall, upon notification by the Borough, employ, without delay, competent tradesmen to reconstruct, alter, clean or repair the building sewer, at his expense. All leaks shall be repaired immediately.”

(emphasis added)¹

A reminder of non-compliance was issued on March 11, 2013 and October 16, 2013. The parties met on March 10, 2014. Since the Shams were contesting the findings, by letter dated March 12, 2014, Mr. Michael D. Miller, the Borough Manger, confirmed that the Borough agreed to allow the Shams an opportunity to obtain a private video to detail the lateral from the

¹ Ordinance § 18-406 prohibits infiltration and inflow, such as “roof downspouts, exterior foundation drains, or other sources of stormwater or groundwater.” It prohibits any person from discharging any unpolluted waters, such as storm water, ground water, roof runoff, into the sanitary sewer system.

home to the sewer main to attempt to establish that the Shams' sewer was compliant with the Borough's program by being structurally flawless. If an independent sewer system professional determined that the entire sewer lateral was structurally flawless, then Borough would reimburse the Shams for the cost of the video. However, if the video showed non-compliance, then the Shams would be responsible for the cost of the video and all necessary replacement costs. The Borough gave the Shams until April 1, 2014 to obtain the video. An extension was obtained. The Shams appealed the Board's requirement that their lateral needed to be replaced. The Board held hearings on the Shams' appeal on June 24, 2014 and July 28, 2014. The Board issued a decision on July 28, 2014 denying the Shams' appeal. The Board issued an opinion and order in support of its decision dated August 4, 2014.

The Board made 31 findings of fact. Some of the material findings are as follows. The Board found that Borough sufficiently demonstrated that the Shams' sewer lateral was in violation of the Ordinances. The Board further found that the Borough had an enforcement policy that provided that if any violations with the sewer lateral were observed, the entire lateral would have to be replaced. The Board found that the policy was in response to requirements of the Pennsylvania Department of Environmental Protection's requirements, including a mandate that the Borough eliminate or significantly decrease ground water infiltration into its sewer system of face stiff fines and penalties. The Board found the testimony of Mr. Peleschak, Mr. Anderson and Mr. Edwards credible. In addition, the Board found that the Shams were not treated any differently than other residents under the enforcement policies.

Mr. and Mrs. Shams filed an appeal on August 28, 2014. On September 15, 2014, the Borough of South Williamsport was added as an Intervener. Upon receipt of a case monitoring notice in late November 2014, an Order dated December 1, 2015 scheduled a status conference

which was held on February 2, 2015. At that time, the Shams made an oral motion to open the record, which the Court denied. A briefing schedule was issued. Argument was held on May 5, 2015. Post-argument briefs were filed on May 7 and May 13, 2015. This decision follows.

Discussion

It is well settled that a Court may reverse an agency decision only where the Board's material findings are not supported by substantial evidence or where the Board erred as a matter of law. 2 Pa. C.S. § 754(b); *see also*, Piatek v. Pulaski Twp. 828 A.2d 1164, 1170 (Pa. Cmwlth. 2003). The reviewing Court may only look to the evidence relied upon by the fact-finder and may not make its own findings of fact or substitute its judgment for that of the agency. Ssen, Inc. v. Borough Council of Eddystone, 810 A.2d 200 (Pa. Cmwlth. 2002) "Substantial evidence is "more than a mere scintilla" of evidence and that which a reasonable mind might accept as adequate to support a conclusion." *Id.* "When performing a substantial evidence analysis, the evidence must be viewed in a light most favorable to the party who prevailed before the fact finder." Agostino v. Twp. of Collier, 968 A.2d 258 (Pa. Cmwlth. 2009)(citation omitted). "The presence of conflicting evidence does not mean that there is not "substantial evidence" to support the agency's findings." Direnzo Coal Co. v. Dep't of Gen. Servs., Bureau of Purchases, 825 A.2d 773, 775 (Pa. Cmwlth. 2003)(citation omitted). "It is the hearing officer who must resolve evidentiary conflicts, and it is not the function of the reviewing court to judge the weight and credibility of evidence." *Id.* (citation omitted).

In the present case, the Court concludes that the Board's findings of fact in support of its decision are supported by substantial evidence and that the Board did not err as a matter of law in rendering its decision. The Shams contend that the Board's finding that the lateral was noncompliant was not supported by substantial evidence. Specifically, the Shams contend that

video 2, Shams #8, could not be used to support the Board's decision because no witness with personal knowledge testified that the video was of the Shams sewer lateral. The Shams also appear to contend that the finding that the entire lateral had to be replaced rather than just repaired is an error of law under the express language of the ordinances at issue.

There was sufficient evidence to support the Board's finding that the Shams' sewer lateral contained violations of the ordinances requiring replacement under the Board's enforcement program. The testimony of Mr. Peleschak, Mr. Anderson and Mr. Edwards, found credible by the Board, established that the Shams' lateral contained defects requiring replacement with PVC or HDPE piping in conformance with the Ordinance and management program implemented by Mr. Peleschak. Mr. Peleschak testified that he reviewed a video of the Shams' property and found violations by observing roots from 18 feet to 24 feet. N.T. 6/24/14 at 90: 23-24. Once the violation was identified, the Shams were required to bring the entire lateral up to code. Mr. Miller maintained the file for the Shams' property and essentially testified that the videos reviewed were those in the file associated with the Shams' property. Mr. Miller also received a video from Brian Andrews on 3/21/14, which admits a crack at 115 feet and a possible crack. Furthermore, Brian Andrews admitted to Mr. Miller that the video was not of the complete length of the lateral. Notes of Testimony on July 28, 2014 (N.T. 7/28/14) at 15. Dean Edward, an excavator for Pine Mountain Excavating, testified that he believed all the videos he reviewed (the first 3 videos, including the contested second video, Shams 8, marked Shams 7, 8 and 9) were of the Shams Property. Notes of Testimony on June 24, 2014 (N.T. 6/24/14) at 67-28; 69: 1-9; 82. There was no evidence to support Mr. Shams' testimony that the second video, Shams 8, did not portray his lateral. The videos were in the file associated with the property and were reasonably relied upon by the Borough in making its determination.

At the request of the Shams, Daniel Martin, a professional engineer reviewed a video dated April 18, 2014, also known as the fifth video and Shams No. 6, and observed minor defects, some scratches, flat, debris, little bit of effluent, which splashed up, but he did not observe evidence of infiltration or roots. Martin conceded that if the ground water level was below the lateral on April 18, 2014, the video would not reflect infiltration. Martin further conceded that the scratch could be a crack. Significantly, Martin did not review the contested second video, Shams #8.

In addition to the affirmative direct evidence in support of the Board's findings, reasonable inferences from Martin's testimony also support the Board's findings. It is reasonable to infer that the Shams' lateral violated the ordinance because the Shams failed to provide a complete video of their lateral or testimony that the lateral is flawless, despite ample opportunity to do so. *See, e.g., Merling v. Commonwealth, Dep't of Transp.*, 79 Pa. Commw. 121, 468 A.2d 894 (Pa. Cmwlth 1983). Similarly, an inference arises that the disputed video was in fact the Shams' lateral from the failure of the Shams to provide expert testimony that it was not, despite ample opportunity to do so. In fact, the Shams obtained expert testimony but inexplicably did not have that expert review the disputed video to support the Shams' assertion that it was not of their lateral. There was no evidence to support Mr. Shams' testimony that Shams 8 did not portray his lateral.

Finally, this Court concludes that the Board did not err in determining that that the defects in the Shams' lateral required replacement of the entire lateral with PVC or HDPE piping in conformance with the Ordinance and management program implemented by Mr. Peleschak.

ORDER

AND NOW, this 6th day of August, 2015, following argument on Mr. and Mrs. Shams' appeal of the Borough of South Williamsport's Board of Appeals determination, it is ORDERED and DIRECTED that the decision is AFFIRMED and the appeal is denied. Specifically, the Court concludes that there was substantial evidence to support the Board's findings, and specifically the finding that the Shams' sewer lateral contained violations which triggered the requirement to repair the sewer lateral by replacing the entire lateral pursuant to the Borough Ordinances and enforcement policy. This Court concludes that the Board did not abuse its discretion or commit an error of law.

BY THE COURT,

August 6, 2015
Date

Richard A. Gray, J.

cc: Michael J. Zicoello, Esq.
J. Michael Wiley, Esq.
Joseph F. Orso, Esq.