

Department of Utilities Water Division (the NWD) maintains the records for the Water System which includes Main Books and Register Books that date back to 1878. *Id.* at 26; *see also* Tab 9 – Hearing Transcript, Day 4 (Sep. 3 Tr.) at 65-69.

The Main Books document the locations of water mains throughout the Water System. (Sep 3 Tr. at 65:3-25.) Water mains are “water pipe[s], owned, operated and maintained by a water utility, which is used for the purpose of transmission or distribution of water but [are] not water service pipe[s].” Tab 7 City of Newport, Utilities Department, Water Division’s Exhibits (the NWD’s Exhibits) Ex. 8 at § 1.2(J); *see also* Sep. 3 Tr. at 65:23-66:2. The Register Books document the locations of service pipes throughout the Water System and each property’s connection to a service pipe is assigned a separate register number in the Register Books. *See* Sep. 3 Tr. at 68:23-69:24. Service pipes are “the connection from the water utility’s mains to the curb stop, and the customer’s connection from the curb stop to the meter, and includes all of the pipe, fittings and valves necessary to make the connection.” The NWD’s Exhibits Ex. 8 at § 1.2(O); *see also* Sep. 3 Tr. at 68:14-22. A service connection is “the point of connection of the customer’s piping with the curb stop owned by the water utility.” The NWD’s Exhibits Ex. 8 at § 1.2(N); *see also* Sep. 3 Tr. at 68:7-13. A curb stop is “the company’s shutoff valve located at the service connection.” The NWD’s Exhibits Ex. 8 at § 1.2(E).

Appellant is the owner of 25 Crescent Road (formerly 39 Crescent Road)² in Middletown, Rhode Island (the Property) which receives water from the Water System. (Tab 1 Division Order

number in this decision refers to the internal pagination or to the page number of the PDF document when there is no internal pagination.

² At the time Appellant purchased the Property, there were two cottages on the Property which were addressed as 25 and 39 Crescent Road. *See* Tab 10 – Hearing Transcript, Day 3 (July 30 Tr.) at 9:18-20. After Appellant’s remodel of the Property, there was only one building on the Property which was given the address of 25 Crescent Road. *Id.*

– Final Order (Decision) at 1-2.) Specifically, the Property is connected to the Water System via a pipe (the Crescent Pipe) that begins at a shutoff valve in Aquidneck Avenue (the First Shutoff Valve) and continues under Crescent Road to a second shutoff valve that is located at the boundary line of the Property and Crescent Road (the Second Shutoff Valve). *Id.* at Ex. A (map of the Crescent Pipe). Additionally, the Crescent Pipe includes several branches that provide water to Appellant’s neighbors residing at 41, 43, and 45 Crescent Road.³ *Id.*

B

The Facts Leading to Appellant’s Claims Before the PUC

On November 26, 2018, the NWD received a call that water was surfacing in front of 45 Crescent Road in Middletown, Rhode Island (the First Leak) which was causing ice to form on Crescent Road. (Tab 11 – Hearing Transcript, Day 2 (July 29 Tr.) at 74:7-75:4.) The NWD sent out a team to investigate the First Leak and the team determined that there was a leak somewhere near the shutoff valve in front of 45 Crescent Road. *Id.* at 75:5-13; *see also* Decision Ex. A. However, no one was home at 45 Crescent Road at that time, which forced the NWD to repair the First Leak that same day because of the road hazard (the First Repair). July 29 Tr. at 75:14-76:8.

On November 29, 2018, shortly after the First Repair, the NWD received a call from the property owner of 41 Crescent Road, Gloria Meade (Meade), and she explained that she was hearing noises when the water was running in her home and her cottage behind her home. *Id.* at 76:9-21. The NWD sent a team to investigate and the team determined that there was a leak in the shared service pipe—i.e., the Crescent Pipe—somewhere under the paved island in front of Aquidneck Pizza, which is located between Crescent Road and Aquidneck Avenue (the Second

³ None of the property owners of 41, 43, and 45 Crescent Road intervened in the hearings before the PUC and were not complainants in the matter before the PUC. (Decision at n.1.) Additionally, Appellant did not represent the other property owners’ interests before the PUC. *Id.*

Leak). *Id.* at 76:22-77:13; *see also* Decision Ex. A. Shortly thereafter, the NWD sent letters to Appellant, Meade, and Stephen Neipris (Neipris),⁴ explaining that it was not the NWD's responsibility to repair the Second Leak; instead, it was a shared responsibility between Appellant, Meade and Neipris because, according to the NWD, the Crescent Pipe is a shared and privately owned service pipe. July 29 Tr. at 78:4-79:8, 80:11-81:1. The Second Leak was not repaired at this time. *Id.* at 79:6-14.

In early February 2019, the NWD received a report of another leak in the vicinity of the shutoff valve abutting Meade's property (the Third Leak) and, as a result, the NWD conducted an investigation which determined that there were two active leaks in the Crescent Pipe at that time. *Id.* at 81:2-82:23; *see also* Decision Ex. A. The NWD once again sent letters to Appellant, Meade and Neipris (February Letters) explaining that the NWD was not responsible for the maintenance and repair of the Crescent Pipe; instead, it was the responsibility of Appellant, Meade and Neipris to repair the two leaks in the Crescent Pipe. (Decision at 4.) Shortly thereafter, Appellant, Meade and Neipris retained an attorney to contest the ownership and responsibility for the repairs for the Crescent Pipe. *Id.* Neither the Second nor Third Leak were repaired at this time. *Id.*

On April 9, 2019, the NWD once again sent letters to Appellant, Meade and Neipris (April Letters) explaining that the NWD was not responsible for repairing the Second or Third Leaks. *Id.* Shortly thereafter, Appellant and Neipris retained R.J. Cawley (Cawley) to repair the Second and Third Leaks. (July 29 Tr. at 137:19-139:6.) Appellant and the NWD were onsite on May 6, 2019 when Cawley repaired the Crescent Pipe. *Id.* at 83:3-9, 137:25-138:7, 142:15-25. However, prior to starting said repairs, Cawley could not locate the First Shutoff Valve, which prevented him from being able to determine the precise location of the Second Leak. *Id.* at 83:10-17. In response, the

⁴ Stephen Neipris is the property owner of 45 Crescent Road. (July 29 Tr. at 35:16-19.)

NWD agreed to assume the cost of the repairs if Cawley could not determine the location of the Second Leak, and also instructed Cawley to install a new First Shutoff Valve in Aquidneck Avenue so that the NWD could turn the water off for Cawley to be able to continue his repairs. *Id.* at 84:1-85:10.

During the excavation, Cawley found the original First Shutoff Valve and he was able to determine the precise location of the Second Leak by turning the water on and off via the newly installed First Shutoff Valve. *Id.* at 85:11-86:7. It was determined that the leak was coming from a hole in the Crescent Pipe that was in the direction of Appellant's Property and away from the location of the original First Shutoff Valve. *Id.* at 59:11-62:10; *see also* Decision Ex. A. Cawley removed the original First Shutoff Valve, gave it to Appellant, and then completed the repairs for the Second and Third Leaks. July 29 Tr. at 142:18-143:8.

C

Proceedings Before the PUC

On August 22, 2019, after the Second and Third Leaks had been repaired, Appellant emailed the PUC and requested an informal review to determine the rightful owner of the Crescent Pipe. (Decision at 5.) The PUC conducted the informal review on October 24, 2019 and issued its decision on November 8, 2019, which determined that the NWD did not own the Crescent Pipe. *Id.* On November 8, 2019, Appellant requested a formal evidentiary hearing to determine ownership and responsibility for the Crescent Pipe. *Id.* The evidentiary hearing was held over the course of four days on July 28, 29, 30 and September 3 of 2020. *Id.* at 6.

July 28, 2020 Hearing

On the first day, the hearing officer for the PUC (the Hearing Officer) heard testimony from Jack Kane (Kane) and Robert Schultz (Schultz). *See generally* July 28 Tr. Kane, the Building Official for the Town of Middletown, testified that he issued a building permit to Appellant in October of 2017 that allowed Appellant to tear down the existing cottages on the Property and build a new home (the 2017 Construction). *Id.* at 46:3-20. Additionally, Kane explained that prior to obtaining said building permit, Appellant had to prove that the water service to the Property had been disconnected, which Appellant did, through a letter that explained the NWD had turned the water off for the Property. *Id.* at 47:3-50:2.

Thereafter, Schultz, the Deputy Director for the NWD, explained that when the NWD shut off the water for Appellant in October 2017, the NWD likely shut it off at the Second Shutoff Valve which, as Schultz explained, is owned by Appellant. *Id.* at 53:13-16, 55:10-56:25. It was also explained that the NWD generally owns, and is responsible for the maintenance and repair of, the portion of the water pipes in the Water System that run from the water main to the location of the first shutoff valve thereafter. *Id.* at 61:17-19. Additionally, Schultz testified that Appellant could turn off the water to the Property at the Second Shutoff Valve without the NWD's permission because he is the owner of said valve. *Id.* at 56:10-57:4, 90:17-93:12. Schultz also determined, based on his interpretation of the Register Books and the diagrams of the Water System, that the First Shutoff Valve is owned by the NWD and, as such, Appellant has no authority to control the First Shutoff Valve. *Id.* at 67:5-68:23.

Additionally, Schultz explained that each property serviced by the Water System, including multiple properties that share a single service pipe—which is not an uncommon occurrence—is

assigned a register number that is documented in the Register Books. *Id.* at 57:11-22, 58:17-19, 59:15-21. The Property was assigned register number 8554 in 1943 when John Sullivan (the Property's owner at that time) requested an extension of the Crescent Pipe to the Property; the Register Book also noted that Mr. Sullivan had furnished all of the materials for the extension. *Id.* at 74:12-76:11. Later, the Property was assigned register number 16184 which included notations that (1) the Crescent Pipe was a private shared service line in the Water System, (2) the Property had a previous register number of 8554, and (3) the extension materials for the 1943 extension of the Crescent Pipe were furnished by Mr. Sullivan. *Id.* at 78:7-14, 80:1-18. Schultz explained that based on that information, he was able to conclude that the Crescent Pipe is a privately owned service pipe within the Water System. *Id.* at 58:20-25, 59:22-60:6.

At the conclusion of Schultz's testimony, the hearing was continued to July 29, 2020. *Id.* at 185:9-13.

2

July 29, 2020 Hearing

On the second day, the Hearing Officer heard testimony from Andrew Mendonsa (Mendonsa), Joseph Roque (Roque), and Appellant. *See generally* July 29 Tr. Mendonsa, a water distribution foreman for the NWD, testified that he inspected the First Shutoff Valve on April 24, 2018. *Id.* at 6:23-7:3, 9:16-11:24. During his inspection, Mendonsa was able to determine that the Property was not directly connected to a water main. *Id.* at 21:3-20. Additionally, Mendonsa explained that was he present when Cawley was repairing the Second and Third Leaks and he observed Cawley's installation of the replacement First Shutoff Valve. *Id.* at 15:3-24. However, Mendonsa did not know or personally observe where the Second Leak was coming from during that time. *Id.* at 24:4-11.

Next, Roque, the Supervisor of Distribution and Collection for the NWD, testified that he was the one who sent out the team to make the First Repair. *Id.* at 34:2-8, 35:8-36:22, 50:10-12. Additionally, Roque explained that he believed that the shutoff valve involved in the First Repair was privately owned based on his review of the Register Books and Main Books; but, he authorized the NWD's repair of the First Leak anyways because of the road hazard that was forming. *Id.* at 37:18-38:22, 75:1-76:8. Roque also explained that he was the one who sent the February and April Letters that informed Appellant, Meade and Neipris there were two active leaks in the Crescent Pipe that they were responsible for repairing. *Id.* at 63:15-67:7.

Lastly, the Hearing Officer heard from Appellant who testified that there were originally two small cottages on the Property when he purchased it, which were both serviced by a single waterline. *Id.* at 116:12-119:4. After purchasing the Property, Appellant explained that he obtained a building permit for the 2017 Construction; as part of that process, he had to provide proof to Kane that the water to the Property had been turned off. *Id.* at 119:25-121:25. Appellant attested that he believed the NWD had turned the water off at the Second Shutoff Valve for the 2017 Construction. *Id.* at 122:1-7.

Thereafter, Appellant explained that upon receipt of the February Letter, he did not make any repairs to the Crescent Pipe at that time because he was going to dispute ownership of the Crescent Pipe. *Id.* at 134:1-136:4. Appellant further explained that it was not until after he received the April Letter, which threatened to terminate Appellant's water service, that Appellant and Neipris agreed to retain Cawley to repair the Second and Third leaks in the Crescent Pipe. *Id.* at 136:23-138:2. Appellant testified that the costs of the repairs were approximately \$5,000 and that he and Neipris split the cost evenly. *Id.* at 138:8-139:6.

After completing the direct examination of Appellant, the hearing was continued to July 30, 2020. *Id.* at 179:4-11.

3

July 30, 2020 Hearing

On the third day of hearing, the Hearing Officer heard the continued testimony of Appellant and heard from Dean Prendergast (Prendergast). *See generally* Tab 10 – Hearing Transcript, Day 3 (July 30 Tr.). On cross-examination, Appellant further explained that he became aware that the Property received water via the Crescent Pipe during the 2017 Construction and that the Crescent Pipe also provided water to his neighbors, Meade and Neipris. *Id.* at 28:9-21. Thereafter, Appellant attested that it was not until after he received April Letter, and the repairs to the First and Second Leaks had been completed, that Appellant formally contested ownership of the Crescent Pipe. *Id.* at 62:1-70:9.

Next, Prendergast, the project manager for the construction company that performed the 2017 Construction, explained that his company removed the water line that ran from the Second Shutoff Valve, under the Property, and into Appellant’s home during the 2017 Construction. *Id.* at 92:24-94:6. Additionally, Prendergast testified that after the 2017 Construction was completed, he installed a new water service line leading into Appellant’s home which he connected to the Second Shutoff Valve. *Id.* at 96:19-97:9. Furthermore, Prendergast explained that neither himself, nor anyone from his company, turned on the water for the Property once the 2017 Construction was completed. *Id.* at 98:10-99:2.

At the end of the July 30th hearing, it was clear to the Hearing Officer that additional evidence was needed, so the Hearing Officer adjourned the hearing to a future date to be determined by agreement of the parties. *Id.* at 101:6-16.

September 3, 2020 Hearing

On the final day of hearing, the Hearing Officer heard from Marc Thayer (Thayer) and Julia Forgue (Forgue). *See generally* Sep. 3 Tr. Thayer, a senior land surveyor, testified that he had performed a land survey of the Property for Appellant. *Id.* at 32:22-34:2. During his survey of the Property, Thayer was able to determine the location of the Second Shutoff Valve through GPS technology. *Id.* at 42:7-43:17. It was Thayer's opinion that the Second Shutoff Valve was not on the Property; instead, the Second Shutoff Valve was in the public right-of-way in Crescent Road directly in front of the Property. *Id.* at 48:8-15.

Next, Forgue, the Director of Utilities for the City, explained the history of the creation and scope of the Water System including that the NWD maintains the records for the Water System, which includes the Main Books and Register Books. *Id.* at 62:6-69:3. Furthermore, Forgue clarified that the Register Books also document the shutoff valves that are owned by the NWD. *Id.* at 103:22-104:2. It was also explained that, based on Forgue's examination of the Main Books, the water main in Aquidneck Avenue is owned by the NWD because the Main Books did not include any records of the Crescent Pipe, and the Main Books do not include any records of service pipes. *Id.* at 66:14-67:23, 74:12-75:19, 107:6-17. However, the Register Books include records for the First Shutoff Valve, which is typical for NWD owned shutoff valves throughout the Water System. *Id.* at 105:19-106:24. Forgue therefore concluded that the Crescent Pipe is not owned by the NWD; instead, the Crescent Pipe is a privately owned service pipe. *Id.* at 73:19-74:11, 77:20-80:24.

Additionally, Forgue explained that the Property was assigned register number 8554 and included a reference to register number 7194. *Id.* at 116:17-117:9. Furthermore, the register

number for the Property included notations that the pipe for said extension was furnished by the Property's owner at the time of the extension and it was privately paid for because it was documented in the Register Books, which was typical practice at the time of the extension. *Id.* at 117:15-120:15. At the conclusion of the September 3, 2020 hearing, the parties waived closing arguments and the Hearing Officer permitted the parties to submit post-hearing briefs within sixty days. *Id.* at 132:25-33:15.

D

The Decision

The Hearing Officer issued the Decision on March 5, 2021. *See generally* Decision. In the Decision, the Hearing Officer indicated that the parties had agreed that the PUC's Rules Prescribing Standards for Water Utilities, codified at 815-RICR-40-00-0 (the Standards), govern the outcome of the Appellant's complaint before the PUC. (Decision at 7.) The Hearing Officer explained that, under the Standards, a service connection is "the point of connection of the customer's piping with the curb stop owned by the water utility" and a curb stop is "the company's shutoff valve located at the service connection." *Id.* Additionally, a service pipe is "the connection from the water utility's mains to the curb stop, and the customer's connection from the curb stop to the meter, and includes all of the pipe, fittings and valves necessary to make the connections." *Id.* In addition, the Hearing Officer determined that under the Standards and Rhode Island law, the duty to repair is "allocated between customer and utility based on the location of the Service Connection." *Id.* at 7-8.

In response to Appellant's claim for reimbursement, the Hearing Officer explained that pursuant to G.L. 1956 § 39-4-10, Appellant must make a prima facie showing that "(i) a leak has occurred, (ii) the leak has not been caused by the conduct of the complainant, (iii) the leak is

located on the utility’s side of the Service Connection, and (iv) evidence as to the funds expended by the complainant to repair the leak.” *Id.* at 8. The Hearing Officer determined that the sole issue before him was the location of the service connection, i.e., whether NWD’s ownership of the Crescent Pipe begins at the First Shutoff Valve or at the Second Shutoff Valve. *Id.* at 8-9. The Hearing Officer analyzed ownership of the Crescent Pipe under the four theories Appellant advanced in his post-hearing memorandum: (1) past and existing regulatory frameworks, (2) the doctrine of Dedication by Plat, (3) the 1948 installation of the Purgatory Road Main, and (4) the NWD’s purported dominion and control over the Crescent Pipe and the Second Shutoff Valve. *Id.* at 9.

1

Past and Existing Regulatory Frameworks Analysis

When analyzing the past and existing regulatory frameworks of the NWD’s regulations, the Hearing Officer applied the plain meaning rule of statutory construction to determine the location of the service connection. *Id.* at 9-10. Specifically, the Hearing Officer determined that the NWD’s Regulations do not support a finding that the NWD is responsible for the maintenance and repair of the Crescent Pipe and the Second Shutoff Valve because the Regulations do not delineate any kind of ownership for the service pipes or shut off valves. *Id.* at 10-12. Furthermore, the Hearing Officer applied our Supreme Court’s “incidents of ownership” standard and determined that the NWD was not responsible for the maintenance and repair of the Crescent Pipe. *Id.* at 12.

Consequently, the Hearing Officer determined that the service connection is located at the point where the Crescent Pipe meets the First Shutoff Valve. *Id.* at 20. In support, the Hearing Officer explained that “the Service connection is ‘the point of connection’ where ‘customer piping’

(i.e., the Crescent Pipe) joins ‘the curb stop owned by the utility’ or ‘company’s shutoff valve[.]’”
Id. Accordingly, the Hearing Officer determined that the NWD did not bear responsibility for repairing the Second and Third Leaks because they were located on the customer’s side of the Service Connection. *Id.* at 21-23.

2

Dedication by Plat Analysis

Next, the Hearing Officer rejected Appellant’s argument that the NWD must be responsible for the Crescent Pipe because Crescent Road is a public road because “the character of the roadway does not *ipso facto* determine the legal ownership of any particular facility that lies along or under the roadway.” *Id.* at 23-25. Additionally, the Hearing Officer explained that “the existence of customer owned water service lines under public roads is not an unusual occurrence in Rhode Island or in other jurisdictions where mains are not located directly in front of customers’ homes.” *Id.* at 25.

3

The Purgatory Road Main

Next, the Hearing Officer rejected Appellant’s argument that the NWD’s 1933 rule, which required an easement before installing a water main under privately owned roads, supports that the Crescent Pipe is owned by the NWD because there is no evidence of an easement for the Purgatory Road main and therefore, Crescent Road must have been a public road at the time the Purgatory Main was installed. *Id.* at 27. Furthermore, the Hearing Officer explained that (1) the character of Crescent Road—whether public or private—“does not *ipso facto* determine the character of the underlying facilities[.]” (2) the language of the NWD’s 1933 rule and absence of an easement shed light on the character of Crescent Road in 1948, not in 1921 or 1943 when the extensions of the

Crescent Pipe were completed, and (3) there “could be a myriad of reasons why” the NWD could not locate and produce the requested easement including an inadequate search or the easement could have been lost or never recorded in the first place. *Id.* at 28. Consequently, the Hearing Officer determined that the NWD’s 1933 rule and the absence of an easement for the Purgatory Road Main, had no bearing on the location of the Service Connection and their relationship is “tenuous at best.” *Id.* at 28-29.

4

NWD’s Dominion and Control of the Crescent Pipe

Lastly, the Hearing Officer explained that under Rhode Island law, public water utilities are required to provide reliable service and safe, potable water to their customers and to do so, public water utilities “possess broad authority to reasonable access those parts of their systems that their customers own, such as service pipes, shutoffs or even the premises that are served.” *Id.* at 29-30. Additionally, the NWD’s interactions with Appellant during the 2017 Construction were “aimed at providing reliable service and safe, potable water to the utility’s customers in accordance with NWD’s statutory and regulatory authority and obligations” and “had nothing to do with asserting dominion and control over, and thus, legal ownership of, the Crescent Pipe” or the Second Shutoff Valve. *Id.* at 31-32. Furthermore, the Hearing Officer determined that the NWD’s repair of the First Leak was “not intended as an exercise of dominion and control over” the Crescent Pipe; instead, the NWD was acting within the scope of its responsibility to provide reliable and safe, potable water to its customers. *Id.* at 32-33.

For those reasons, the Hearing Officer (1) denied Appellant’s claim for reimbursement of \$2,500 for the repairs to the Crescent Pipe, (2) denied Appellant’s request for an Order that the NWD is responsible to maintain and repair the Crescent Pipe and the Second Shutoff Valve, and

(3) denied Appellant's request for attorney's fees under the Equal Access to Justice Act codified at chapter 92 of title 42. *Id.* at 34.

E

Proceedings Before this Court

On April 2, 2021, Appellant filed a Complaint, pursuant to § 42-35-15, asking this Court to (1) reverse the Decision and order that the NWD is responsible for the maintenance and repair of the Crescent Pipe and the Second Shutoff Valve, (2) award Appellant the \$2,500 he expended in repairs to the Crescent Pipe, and (3) award Appellant attorney's fees and costs under the Equal Justice Act. *See generally* Complaint Seeking Judicial Review of Administrative Order of the Rhode Island Division of Public Utilities and Carriers. On May 5, 2022, the Court entered a Consent Order that established a briefing schedule. (Consent Order (May 5, 2022).) The Consent Order was amended on July 1, 2022 and July 22, 2022 to give Appellant additional time to submit his brief in support of his appeal. *See generally* Docket; *see also* Order (Aug. 18, 2022). Appellant submitted his memorandum on August 2, 2022. (Docket.) The NWD and the PUC submitted separate briefs on October 14, 2022, which Appellant responded to on November 23, 2022. *Id.* The PUC and the NWD submitted their replies to Appellant's response on December 16, 2022. *Id.*

Appellant filed a Motion to Assign the appeal for decision on March 10, 2023 and requested permission to present oral argument on the appeal. (Petitioner-Appellant's Motion to Assign Case to Justice for Review and Decision.) The Court granted Appellant's Motion to Assign on March 29, 2023. (Docket.) Oral argument was heard on May 12, 2023. *Id.*

II

Standard of Review

The Superior Court's review of an administrative decision is governed by § 42-35-15 of the Administrative Procedures Act. *Rossi v. Employees' Retirement System*, 895 A.2d 106, 110 (R.I. 2006). Section 42-35-15(g) provides, in pertinent part:

"The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

"(1) In violation of constitutional or statutory provisions;

"(2) In excess of the statutory authority of the agency;

"(3) Made upon unlawful procedure;

"(4) Affected by other error of law;

"(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

"(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 42-35-15(g).

The Court's review of an administrative decision is limited to a determination of whether legally competent evidence exists in the record to support the agency's decision. *See Johnston Ambulatory Surgical Associates, Ltd. v. Nolan*, 755 A.2d 799, 805 (R.I. 2000); *Arnold v. Rhode Island Department of Labor and Training Board of Review*, 822 A.2d 164, 167 (R.I. 2003). Legally competent evidence is "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance." *Rhode Island Temps, Inc. v. Department of Labor and Training, Board of Review*, 749 A.2d 1121, 1125 (R.I. 2000) (citations omitted). The Court's review is limited to the certified record in its determination as to whether legally competent evidence exists to support the agency's decision. *Barrington School Committee v. Rhode Island State Labor Relations Board*, 608 A.2d 1126, 1138 (R.I. 1992).

The Court cannot “weigh the evidence [or] pass upon the credibility of witnesses [or] substitute its findings of fact for those made at the administrative level.” *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 285, 373 A.2d 496, 501 (1977). “In essence, if ‘competent evidence exists in the record, the Superior Court is required to uphold the agency’s conclusions.’” *Auto Body Association of Rhode Island v. State Department of Business Regulation*, 996 A.2d 91, 95 (R.I. 2010) (quoting *Rhode Island Public Telecommunications Authority v. Rhode Island State Labor Relations Board*, 650 A.2d 479, 485 (R.I. 1994)). The Court will “reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record.” *Baker v. Department of Employment and Training Board of Review*, 637 A.2d 360, 363 (R.I. 1994) (quoting *Milardo v. Coastal Resources Management Council of Rhode Island*, 434 A.2d 266, 272 (R.I. 1981)).

III

Analysis

Appellant argues that the Decision is clearly erroneous because the Hearing Officer erred in failing to determine that the Crescent Pipe and the Second Shutoff Valve are owned by the NWD and, as such, are the NWD’s responsibility to maintain and repair. (Appellant Leon Amarant’s Reasons of Appeal and Memorandum of Law Supporting his Complaint Seeking Judicial Review of Administrative Order of the Rhode Island Division of Public Utilities and Carriers (Appellant’s Mem.) at 6.) First, Appellant contends that the Hearing Officer incorrectly applied the incidents of ownership standard when determining ownership of the Crescent Pipe and the location of the service connection. *Id.* In support, Appellant submits that he does not have any incidents of title to the Crescent Pipe because it is located in a public road and he has no right to control or improve the Crescent Pipe; instead, that authority resides solely with the NWD. *Id.* Moreover, Appellant

argues that the Second Shutoff Valve is the service connection based on the historical records and the NWD's exclusive control over the Second Shutoff Valve, including the NWD's conduct and exercise of control over the Second Shutoff Valve during and after the 2017 Construction. *Id.* at 11-17. In addition, Appellant submits that the Hearing Officer improperly ignored the public nature of Crescent Road, which Appellant contends is an important factor when determining who has title, possession, and control of the Crescent Pipe. *Id.* at 18-19.

Second, Appellant argues that the Hearing officer erred and misconceived the evidence when he determined that the records and notations in the Register Books supported the determination that the Crescent Pipe is privately owned. *Id.* at 6-7. In support, Appellant submits that the Register Books do not contain any indication of ownership of the Crescent Pipe or service connections, nor do the diagrams contained within the Register Books indicate the ownership of the Crescent Pipe. *Id.* at 7. Specifically, Appellant argues that the references and notations in the Register Books indicate that he is responsible for the maintenance and repair of the portion of the Crescent Pipe that runs from the Second Shutoff Valve, under the Property, and into his home. *Id.* at 8.

Lastly, Appellant contends that Forgue and Schultz' testimonies that the Crescent Pipe is privately owned because it is referred to in the Register Books and not the Main Books is flawed because the Main Books "[do] not depict the portion of service pipe owned by NWD including NWD curb stops or service connections." *Id.* at 8. In support, Appellant submits that the NWD owns the portion of the Crescent Pipe from the water main in Aquidneck Avenue to the Second Shutoff Valve, but none of said infrastructure is depicted in the Main Books; instead, it is depicted in the Register Books. *Id.*

A

Ownership of the Crescent Pipe and the Second Shutoff Valve

The Hearing Officer's determination that the Crescent Pipe is a privately owned service pipe is a factual one and it will be upheld as long as it is supported by legally competent evidence. *See Auto Body Association of Rhode Island*, 996 A.2d at 95. Specifically, the Hearing Officer's determination of "[w]hat constitutes an incident of ownership is considered a question of fact." *Estate of Dodenhoff v. Clark*, 572 A.2d 1326, 1329 (R.I. 1990) (citing *United States v. Rhode Island Hospital Trust Co.*, 355 F.2d 7, 9-10 (1st Cir. 1966)). In accordance with § 42-35-15, this Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." *Rocha v. State Public Utilities Commission*, 694 A.2d 722, 725 (R.I. 1997) (quoting § 42-35-15(g)). Accordingly, this Court may only reverse the Hearing Officer's findings if they are "totally devoid of competent evidentiary support in the record." *See Baker*, 637 A.2d at 363.

Upon this Court's review of the Decision, if "more than one inference may be drawn from the record evidence, [this Court] is precluded from substituting its judgment for that of the [Hearing Officer] and must affirm the [Hearing Officer's] decision unless the [Hearing Officer's] findings in support of its decision are completely bereft of any competent evidentiary support." *Rocha*, 694 A.2d at 726. After reviewing the Decision, it is clear to the Court that the Hearing Officer thoroughly combed through the extensive amount of evidence that was presented to him and carefully provided his analysis of the weight he afforded said evidence when making his determination that the Crescent Pipe and the Second Shutoff Valve are privately owned. *See generally* Decision. Therefore, it is this Court's determination that the Decision is supported by legally competent evidence in the record based on the analysis that follows.

The Hearing Officer's Analysis of Past and Existing Regulatory Framework

First, the Hearing Officer applied our Supreme Court's statutory rules of construction and determined that the NWD rules from 1933, as cited by Appellant, do not support a finding that the NWD is responsible for the maintenance and repair of the Crescent Pipe because said rules do not identify the owner of the service pipes or shutoff valves, nor do they make any indication as to the location of the demarcation line between customer and utility facilities. (Decision at 9-11.) Furthermore, the Hearing Officer's application of the plain and ordinary meaning of the NWD rules from 1991, as cited by Appellant, explained that the 1991 rules also did not specify the location of the service connection, define the term service connection, nor identify legal ownership of water distribution facilities. *Id.* at 11-12. The Court finds no error in the Hearing Officer's application of our rules of statutory construction.

Next, the Hearing Officer went on to analyze ownership of the Crescent Pipe by applying our Supreme Court's "incidents of ownership" standard, "[r]ather than cherry pick fragments from past or existing [PUC] or NWD regulations out of context to arrive at a particular outcome." *Id.* at 12. The Hearing Officer relied upon (1) the notations and diagrams in the Register Books for register numbers 8554 and 7194, including the notations of who furnished the materials for the extensions of the Crescent Pipe, (2) Shultz' and Forgue's testimonies about the NWD's recordkeeping system, including that the Register Books document the pipes within the Water System that are customer owned, and (3) Appellant's failure to present testimony or documentation to rebut the information contained in the Register Books or the NWD's recordkeeping practices, to conclude that Appellant and the "property owners served by the Crescent Pipe own that pipe

and the shutoffs abutting their properties.” *Id.* at 14-20; *see also id.* Ex. B (Register No. 7194), *id.* Ex. C (Register No. 8554).

Finally, the Hearing Officer relied upon his previous analysis when he reviewed the Standards’ definitions for a curb stop and a service connection to aid in his determination of the location of the service connection. *Id.* at 20. The Hearing Officer applied our Supreme Court’s precedent that “rules and regulations of an administrative agency should be construed in accordance with their plain and ordinary meaning” to determine that the service connection “is located at the point where the Crescent Pipe connects to the First Shutoff [Valve].” *Id.* Consequently, the Hearing Officer relied upon Roque and Appellant’s testimonies of their observations of said leaks during Cawley’s repairs to conclude that the duty to repair the Second and Third Leaks was that of Appellant and others serviced by the Crescent Pipe. *Id.* at 21-23.

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The Hearing Officer’s Analysis of Dedication by Plat

Second, the Hearing Officer relied upon his prior application of the incidents of ownership standard to dismiss Appellant’s dedication by plat argument as legally flawed because the “character of the roadway does not *ipso facto* determine the legal ownership of any particular facility that lies along or under a roadway.” *Id.* at 23-25. The Hearing Officer also explained that it is “not an unusual occurrence in Rhode Island” for customer owned water lines to be located under public roads and the 1943 extensions of the Crescent Pipe from the water main in Aquidneck Avenue “was typical of the process employed by utilities to extend their systems to new customers at these times.” *Id.* at 25-26. Accordingly, the Hearing Officer determined that Appellant’s dedication by plat argument did not have merit. *Id.* at 27.

The Hearing Officer’s Analysis of the Relevancy of the Purgatory Main

Third, the Hearing Officer determined that the NWD’s 1933 rules and the lack of evidence of an easement for the Purgatory Road water main installation, “as a matter of law, do not bear on the location of the Service Connection in this matter. Moreover, the nexus between these items and the location of the Service Connection on the disputed facilities is tenuous at best.” *Id.* at 28-29. In making this determination, the Hearing Officer relied upon (1) his previous discussion regarding the lack of impact that the character of Crescent Road has on the ownership of the Crescent Pipe and Second Shutoff Valve, (2) that even if the language of the NWD’s 1933 rule had bearing on the characterization of Crescent Road, then it would shed light on the character of Crescent Road in 1948, not during the 1921 or 1943 extensions of the Crescent Pipe which were relevant to his ownership determination, and (3) the testimony of Schultz that NWD’s search for said easement may have been inadequate or the record could have been lost or not created in the first place. *Id.* For those reasons, the Hearing Officer determined that the NWD’s 1933 rules and lack of evidence of an easement for the Purgatory Road main had no bearing on the ownership of the Crescent Pipe. *Id.*

The Hearing Officer’s Analysis of the NWD’s Dominion and Control

Finally, the Hearing Officer determined that the NWD’s role in turning the water off and on for the 2017 Construction and the NWD’s repair of the First Leak was not an exercise of dominion and control over the Crescent Pipe by the NWD; instead, it was the NWD using its broad authority to reasonably access parts of their water system that their customers own—including service pipes and shutoff valves—to provide reliable service and safe, potable water to their

customers pursuant to G.L. 1956 §§ 39-2-1, 39-4-3, 39-4-10, 39-4-11, and 39-4-11.1 and the NWD rules and regulations. *Id.* at 29-33. To make this determination, the Hearing Officer relied upon (1) Appellant's testimony as to the NWD's conduct during the 2017 Construction, (2) Schultz's testimony that the NWD had turned the water off and on at the Second Shutoff Valve rather than the First Shutoff Valve to avoid disrupting the water service to Appellant's neighbors during the 2017 Construction, and (3) Roque's testimony that the NWD considered the First Leak an emergency which is why the NWD repaired the First Leak. *Id.* at 31-33.

IV

Conclusion

After review of the entire record, the Court finds that there is legally competent evidence to support the Hearing Officer's determination that the Crescent Pipe and Second Shutoff Valve are privately owned by Appellant, and, as such, are not the responsibility of the NWD to maintain and repair. Therefore, this Court **AFFIRMS** the Decision in its entirety. Counsel shall prepare and submit the appropriate order for entry.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: **Amarant v. city of Newport, Utilities Department,
Water Division, et al.**

CASE NO: **PC-2021-02341**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **July 28, 2023**

JUSTICE/MAGISTRATE: **Cruise, J.**

ATTORNEYS:

For Plaintiff: **Joseph F. Hook, Esq.**

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