

ALLEGHENY COUNTY HEALTH DEPARTMENT  
ADMINISTRATIVE HEARING

GMH ASSOCIATES, INC., : In re: Cork Factory Pool  
: 2349 Railroad Street  
Appellant, : Pittsburgh, PA 15222  
: SR# HCE-201405619-3119  
v. :  
: ALLEGHENY COUNTY HEALTH :  
DEPARTMENT, :  
: Appellee. :

**DECISION AND ORDER OF THE ALLEGHENY COUNTY HEALTH  
DEPARTMENT HEARING OFFICER**

**I. INTRODUCTION**

Pool brought trouble—not to River City, but to the Cork Factory Lofts in the Strip District. In 2007, Dr. Bruce Dixon, the then-Director of the Allegheny County Health Department (“ACHD”), unilaterally issued a waiver to the Cork Factory (“2007 Waiver”), allowing it to operate a swimming pool without a lifeguard. In 2015, the ACHD revoked the 2007 Waiver, and required the Cork Factory to have a lifeguard on duty at its pool. GMH Capital (“GMH”), the operator of the Cork Factory pool, appealed the revocation of the 2007 Waiver. GMH argues that the 2007 Waiver was lawfully issued, and that the ACHD’s revocation of the waiver was arbitrary and capricious.

The ACHD makes three counter-arguments. First, that GMH’s appeal is untimely. Second, that the 2007 Waiver was unlawfully issued. Third, that even if the 2007 Waiver was valid, it expired on its own terms due to a new operator. I find that although the appeal was timely, the 2007 Waiver was unlawfully issued, and is

therefore void as a matter of law. As such, there is no need to address the issue of whether the 2007 Waiver expired on its own terms. Additionally, I find that the revocation of the 2007 Waiver was not arbitrary and capricious because it was based on extensive research regarding lifeguards in public bathing places.

## **II. EVIDENCE**

1. The following exhibits were offered into evidence by GMH:

A1: Letter from James Asali dated 8/25/16

A2: Letter from Dr. Dixon dated 12/19/07

A3: Letter from James Asali dated 5/21/15

2. The following exhibits were offered into evidence by the ACHD:

D1: Article IX

D2: Definitions section of Article IX

D3: Sections 906-909 of Article IX

D4: Email chain

D5: Lifeguard Advocacy in Public Bathing Places

## **III. FINDINGS OF FACT**

Based on my review of the evidence and having resolved all issues of credibility, I find the following facts:

1. On December 19, 2007, ACHD then-Director Bruce Dixon (“Dr. Dixon”) gave the Cork Factory a waiver (“2007 Waiver”) from the lifeguard requirement of Article IX. (A2).
2. The 2007 Waiver states that the Cork Factory may operate their pool without a lifeguard, and that the waiver would remain in effect “as long as the Cork Factory remains the owner but needs to be re issued [sic] should there be a change of ownership or usage.” (A2).
3. The 2007 Waiver was issued to Big River Development (“Big River”), the then-operator of the Cork Factory pool. (*Transcript* at 8).
4. In June of 2014, GMH acquired its interest in the Cork Factory by acquiring the interests of Big River. (A3, *Transcript* at 29).

5. Once the ACHD became aware of GMH's acquisition of Big River's interest in the Cork Factory, it began to investigate whether or not to revoke the 2007 Waiver. (*Transcript* at 27).
6. In 2014 and 2015, the ACHD conducted a study of lifeguard efficacy in public bathing places, and concluded that apartment pools without lifeguards tend to have more instances of drowning than apartment pools with lifeguards. (*Transcript* at 30, D5).
7. On April 17, 2015, David Namey, the Program Chief of the ACHD's Housing and Community Environment Program, emailed GMH's Senior Vice President Rand Ginsburg, and informed Mr. Ginsburg that the 2007 Waiver is null and void, and would not be reissued. (D4).
8. On May 15, 2015, the ACHD sent GMH a formal notice of violation indicating that the 2007 Waiver is revoked. (A3).
9. On May 21, 2015, GMH appealed the notice of violation. (A3).

#### IV. DISCUSSION

In an administrative appeal of a final agency action of the ACHD, the appellant "shall bear the burden of proof and the burden going forward with respect to all issues." Article XI § 1105.D.7. Therefore, Appellant bears the burden of proving by a preponderance of the evidence that the appeal was timely, and that the 2007 Waiver was lawfully issued and currently valid.

##### **GMH's Appeal Was Timely.**

The ACHD's first argument is that GMH did not timely appeal the revocation of the 2007 Waiver. An appellant has ten days after "written notice or issuance of the action by which the Appellant is aggrieved" to file a Notice of Appeal. (Art. XI, § 1104(A)). On April 17, 2015, David Namey of the ACHD, sent an email to Rand Ginsburg of GMH, saying that the 2007 Waiver "is now null and void." (D4). The

email also states, “You will need to provide a lifeguard during the hours Cork Factory Pool is open.” (D4).

On May 15, 2015, Mr. Namey sent a formal letter to James Asali, GMH’s Vice President and General Counsel, re-iterating the two basic points of the April 17<sup>th</sup> email: 1) The 2007 Waiver is now void; and 2) The Cork Factory is required to have a lifeguard on duty during all hours that the pool is open. (A3). Mr. Asali appealed the May 15<sup>th</sup> Letter six days later, on May 21, 2015. (A3). The ACHD contends that the appeal was untimely because it was not made within ten days of the April 17<sup>th</sup> email. (*ACHD Post-Hearing Memorandum (“ACHD Memo”) at 3*).

But this restrictive interpretation of Article XI is not persuasive. First, the April 17<sup>th</sup> email does not specify that it is a Notice of Violation or other final departmental action. All it does is communicate that the ACHD will be revoking the 2007 Waiver, and that the Cork Factory will need to provide a lifeguard. It doesn’t indicate when the revocation would take effect, or when the lifeguard requirement would begin to be enforced. It’s also written in a conversational tone. (D4). In short, the April 17<sup>th</sup> email is a digital heads-up, not a formal departmental action. As such, it is reasonable to think that GMH did not consider the April 17<sup>th</sup> email to be an appealable action.

Second, ACHD’s timeliness argument is unpersuasive because the May 15<sup>th</sup> letter explicitly gives GMH ten days “from the date of this letter to file an appeal.” (A3). The letter is dated May 15, 2015. Mr. Asali filed his appeal on May 21, 2015,

well within the ten-day window indicated by the May 15<sup>th</sup> letter. I therefore find that GMH's appeal was timely.

**The 2007 Waiver Was Unlawfully Issued.**

The ACHD's second argument is that even if the appeal is timely, Dr. Dixon had no authority to unilaterally issue the 2007 Waiver. The ACHD contends that unlike several other ACHD regulations, Article IX, which governs public bathing places, does not explicitly or implicitly allow for waivers or variances. (*ACHD Memo* at 4-5). I agree.

In its memorandum, the ACHD points to three regulatory provisions that explicitly authorize variances or waivers. These are Article III (Food Safety) § 337.3, Article VI (Community and Environment) § 659, and Article XV (Plumbing and Building Drainage) § 105. (*ACHD Memo* at 4-5). All of these provisions specifically allow the Director to make exceptions to ACHD regulations as long as certain requirements are met.

Article IX, by contrast, does not contain any provision authorizing waivers or variances. There was nothing presented at the Hearing that suggests that Dr. Dixon had implicit or explicit authority to issue the waiver. Indeed, the testimony at the Hearing suggests that Dr. Dixon issued the waiver without consulting or informing anyone else at the ACHD:

HEARING OFFICER SLATER: I just wanted to interject with a question. Do you know why Dr. Dixon issued this waiver in the first place?

MR. NAMEY: No. There was never any explanation or reason given to us. (*Transcript* at 20-21).

There is no testimony, evidence, or law presented indicating that Dr. Dixon had the authority to issue the 2007 Waiver. I therefore find the 2007 Waiver to be unlawfully issued, and therefore null and void. Because I find the 2007 Waiver to be unlawfully issued, there is no need to address whether the 2007 Waiver expired by its own terms.

**The Revocation of the 2007 Waiver Was Not Arbitrary and Capricious.**

GMH argues that when the ACHD revoked the 2007 Waiver, it acted in an arbitrary and capricious way. GMH contends, “[T]he passage of time has created a course of dealing by the Health Department and established a precedent that cannot simply be revoked at whim.” (*GMH Post-Hearing Memorandum* at 2).

This is a reasonable argument, but not a winning one, for two reasons. First, as explained above, Dr. Dixon had no authority to issue the 2007 Waiver, and the revocation of the waiver was an attempt to correct a mistake. Second, the ACHD’s requirement for apartment complexes to have lifeguards at their pools is based on an extensive research survey.

The testimony presented at the Hearing indicates that the ACHD revoked the 2007 Waiver because Dr. Dixon had no right to issue it in the first place. At the hearing, Dave Namey testified:

MR. NAMEY: [Dr.] Bruce Dixon never informed the program that there was a waiver in place. And all of the senior management staff were opposed...to that letter. We were actually appalled at all that it happened and that it happened that it did because, as I said, all apartment pools in Allegheny County are required to have lifeguards. (*Transcript* at 20).

This statement, coupled with the rest of Mr. Namey's testimony, suggest that the ACHD revoked the 2007 Waiver because there was no valid basis for issuing it in the first place. (*Transcript* at 19-21).

Additionally, the requirement for apartment pools to have a lifeguard is not arbitrary and capricious because the ACHD's research report indicated that having a lifeguard at public bathing places decreases the risk of drownings and other pool-related injuries. (D5 at 15). Based on the extensive research contained in their report, "Lifeguard Efficacy in Public Bathing Places," the ACHD concluded that requiring lifeguards at apartment pools is a reasonable regulation. (D5). Based on the evidence presented in the report, I agree. The regulation is sensible policy, not bureaucracy run amok.

## V. CONCLUSION

Based on the evidence presented during the Hearing, I find that the 2007 Waiver was unlawfully issued because there is no authority for the Director of the ACHD to unilaterally issue a waiver under Article IX. As a result, the Cork Factory must provide a lifeguard at its pool during the hours that the pool is open.

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Max Slater  
Administrative Hearing Officer  
Allegheny County Health Department

Dated:\_\_\_\_\_