ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARING

COCA CAFÉ,	:	In Re: Coca Café
	:	3811 Butler Street
Appellant,	:	Pittsburgh, PA 15201
	:	
v.	:	Copies Sent To:
	:	Carrie Rudolph
ALLEGHENY COUNTY HEALTH	:	Owner, Coca Café
DEPARTMENT,	:	3811 Butler Street
	:	Pittsburgh, PA 15201
Appellee.	:	
	:	Vijya Patel, Esq.
	:	Assistant Solicitor
	:	Allegheny County Health Department
	:	301 39th Street, Building 7
	:	Pittsburgh, PA 15201

DECISION AND ORDER OF THE ALLEGHENY COUNTY HEALTH DEPARTMENT HEARING OFFICER

I. INTRODUCTION

This decision is based on a granted Motion for Reconsideration by the Allegheny County Health Department ("ACHD") of an administrative decision issued on January 2, 2018 ("January 2, 2018 Decision") in this case. I granted the Motion for Reconsideration to address the issues of legislative history and administrative agency deference under *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Counsel, Inc.*, 467 U.S. 837 (1984) that were not addressed in the January 2, 2018 decision. The thrust of *Chevron* deference for the purpose of state or local agencies is that courts[1] apply a two-step framework when determining the validity of an agency's regulation. First, if the regulation is not ambiguous, the court will defer to

[1] Although this tribunal is not technically a court, it functions in much the same way: as an arbiter of legal disputes.

the agency's interpretation. Second, if the regulation is ambiguous, the court will defer to the agency's interpretation only if that interpretation is reasonable, rather than arbitrary and capricious. *Chevron*, 467 U.S. at 842-44.

At issue here is whether the Coca Café (the "Café" or "Appellant") is grandfathered in under an ACHD regulation that exempts "any food facility which was constructed prior to October 4, 1976" from having to install separate toilet rooms for each sex. (ACHD Rules & Regulations, Article III § 316(C)). Currently, the Café only has one toilet room for customers. (Ex. D1).

This is a tricky issue. The building that houses the Café was built long before October 4, 1976, and was the location of another restaurant before 1976. (Ex. A1). But the Café did not open until 2003 or 2004, and the owners of the Café remodeled parts of the building to make it more functional for a restaurant.

The question, then, is: Is the Café a "food facility" which was "constructed prior to October 4, 1976?" Appellant contends that yes, the Café was constructed prior to October 4, 1976, and is exempt from the toilet room requirement. The ACHD argues that the Café was not "constructed" prior to October 4, 1976 because it underwent extensive alterations after that date.

I find that although the plain language of the term "constructed" is ambiguous, the ACHD's interpretation of the term "constructed" is reasonable. Therefore, the Café must either reduce its seating capacity to 16 or install an additional toilet room.

II. EVIDENCE

The following exhibits were offered by Appellant and admitted into evidence:

- A1: Obituaries

The following exhibits were offered by the ACHD and admitted into evidence:

- D1: Restaurant map
- D2: Variance
- D3: Application
- D4: Permit
- D5: Inspection report
- D6: Inspection report
- D7: Inspection permit
- D8: Inspection permit
- D9: Certificate of Occupancy for Coca Café, dated August 27, 2012.
- D10: File Record Sheet for Coca Coffee Lounge, dated March 22, 2002.
- D11: Administrative Decision in *Bakery Living 2.0 v. ACHD*.
- D12: Letter from ACHD Secretary Frank B. Clack to Board of County Commissioners on changes to toilet facilities regulations, dated September 15, 1976.
- D13: Proposed amendment to ACHD's changes to toilet facilities regulations.
- D14: ACHD Rules and Regulations, Article III, current through January 1993 Amendments.

III. FINDINGS OF FACT

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

1) Carrie Rudolph ("Ms. Rudolph") is the owner of the Coca Café (Hearing Transcript ("H.T.") at 3).

2) The Café has been in business since 2004. (H.T. at 3-4; Ex. D3).

3) When the ACHD issued a permit for the Café in 2004, the listed seating capacity was 16 guests. (Exs. D3, D4).

4) The Café now seats between 35 and 40 guests. (H.T. at 3).

5) The Café provides one toilet room for customer use. (H.T. at 37).

6) The Café also has a second toilet room near the kitchen ("kitchen toilet room"), which requires customers to walk through food preparation areas to access it. (H.T. at 37-38; Ex. D1).

7) Both toilet rooms are operable, unisex toilet rooms with one toilet each. (H.T. at 13, 17, 38).

8) In or around 2004, Appellant constructed an atrium to connect the kitchen to the dining area and provided additional seating. (H.T. at 10).

9) In April of 2016, Appellant requested a variance to allow the Café to increase its listed seating capacity to 36, without constructing an additional toilet room. (Ex.D2).

10) The ACHD denied Appellant's request for a variance. (H.T. at 17).

11) On July 25, 2017, the ACHD issued an inspection report ("July 25th Report") to Appellant, instructing her to remove all seats or provide a second toilet room for customer use at the Café. (Ex. D8).

12) On August 4, 2017, Appellant appealed the July 25th Report.

13) On October 3, 2017, an administrative hearing was held to resolve this matter.

IV. DISCUSSION

Under the ACHD Rules & Regulations in operation at the times when the appeal was filed, the hearing was held, and the briefs submitted, "The person filing the appeal shall bear the burden of proof and the burden of going forward with respect to all issues." ACHD Rules & Regulations, Article XI § 1107(C).

Courts have held that the scope of a motion for reconsideration is "extremely limited. Such motions are not to be used as an opportunity to relitigate the case; rather, they may be used only to correct manifest errors of law or fact or to present newly discovered evidence." *Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011)

(citations omitted). Here, there was newly discovered evidence regarding the legislative history of Article III § 316, as well as evidence concerning the manner in which the ACHD has interpreted this regulation.

The ACHD makes two core arguments: First that the plain language of Article III indicates that the term "constructed" does not include facilities that were remodeled or expanded after October 4, 1976. Second, that if the term "constructed is ambiguous, the tribunal should defer to the ACHD's interpretation because that interpretation is reasonable. I find that the plain language of the term "constructed" is ambiguous. However, I find that the ACHD's interpretation of the term "constructed" is reasonable.

Pennsylvania courts have articulated a two-step analysis for considering an administrative agency's interpretation of its own regulation: "First, the administrative interpretation will be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. Second, the regulation must be consistent with the statute under which it is promulgated." *Moyer v. Berks Cty. Bd. of Assessment Appeals*, 803 A.2d 833, 844 (Pa. Cmwlth. Ct. 2002). The U.S. Supreme Court has further announced: "An agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it 'unless that interpretation is plainly erroneous or inconsistent with the regulation.'" *Decker v. Nw. Entl. Def. Ctr.*, 568 U.S. 597, 613 (2013) (quoting *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 207 (2011)).

In *Chevron*, the U.S. Supreme Court laid out a two-step framework for analyzing an agency's interpretation of a regulation:

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. 837, 842-43.

Pennsylvania courts have tracked *Chevron* regarding interpretation of agency regulations. *See, e.g.*, *Moyer v. Berks Cty. Bd. of Assessment Appeals*, 803 A.2d 833, 844 (Pa. Cmwlth. Ct. 2002).

In other words, and for the purpose of this case, the steps are: (1) Is the language of the regulation ambiguous? (2) If not, is the ACHD's interpretation reasonable? I find that the applicable regulation—Article III § 316—is ambiguous, but the ACHD's interpretation is reasonable.

A. The Language of the Regulation at Issue is Ambiguous.

The relevant provisions of Article III § 316 state:

> "(C) Toilet rooms, separate for each sex, shall be required for patrons in food facilities where seating is provided. Any ***food facility which was constructed*** prior to October 4, 1976 is exempt from this Section.

> (D) Toilet rooms for patrons cannot be accessed through food preparation or food storage areas.
>
> (E) Minimum number of toilet room fixtures shall conform to the Allegheny County Health Department Plumbing Code." Article III, § 316 (emphasis added).

The question is: Are the terms "food facility" and "constructed" ambiguous in the context of the Café? The ACHD contends that plain language of Article III indicates that the Café was "extensively remodeled" after October 4, 1976, and is therefore not exempt from the toilet room requirements. (*Allegheny County Health Department's Brief in Support of Motion for Reconsideration of the Administrative Decision ("ACHD Brief")* at 5).

Article III defines "food facility" as "any place, permanent or temporary, where food is prepared, handled, served, sold, or provided to the consumer." Article III defines "extensively remodeled" as "whenever an existing *structure* is converted for use as a *food facility*; any structural or significant equipment additions or alterations to the exiting food facility; changes, modifications and extensions of plumbing systems, excluding routine maintenance." (emphasis added).

Here, the ACHD attempts to distinguish "structure" and "food facility," asserting that the Café should be regarded separately from the building that houses it at 3811 Butler Street ("Building on Butler"). (*ACHD Brief* at 6). The ACHD argues therefore that in order to be grandfathered in, the Building on Butler must have been constructed prior to October 4, 1976, which it was not. (*Id.*). The ACHD further argues that because Appellant allegedly expanded the existing structure by doing such things as converting an apartment into a commercial kitchen and

building an enclosed atrium, these changes "extensively remodeled" the Building on Butler. (*Id.* at 7).

Ms. Rudolph disputes the ACHD's "extensively remodeled" argument in her letter dated February 1, 2018 ("February Letter"). She declares that contrary to the ACHD's argument, "the back area is much smaller tha[n] the front and was only added on (six months after we first opened) to alleviate the problem of traveling outside from the kitchen to the dining area." (*February Letter* at ¶ 3).

Thus, there is a dispute over how extensive the alleged remodeling of the Building on Butler. The ACHD contends that the owners of the Café extensively remodeled the Building on Butler when the Café opened in 2003 or 2004. The Café rebuts this, arguing that there were only minor structural changes, and that the Building on Butler is in similar structural shape as it was before the Café opened. Although Ms. Rudolph does not mention the atrium or the alleged apartment conversion by name, she alludes to them in the February Letter, and contradicts the ACHD's findings. Considering that Ms. Rudolph is a co-owner of the Café, I give considerable weight to her description of the building that houses her restaurant.

Moreover, in the January 2, 2018 Decision, I held that before the Coca Café opened, the Building on Butler housed a restaurant called "The Original Coffee and Hot Dog Shop," which operated prior to October 4, 1976. (*January 2, 2018 Decision* at 5-7). As the Original Coffee and Hot Dog Shop was a "food facility," the question of whether the Building on Butler was "extensively remodeled" becomes murkier.

Therefore, I find that there is textual ambiguity as to whether the Café was a "food facility which was constructed prior to October 4, 1976."

B. The ACHD's Interpretation of the Regulation is Reasonable.

Although the language of Article III § 316 is ambiguous, I find that the ACHD's interpretation of that language is reasonable. I am required to afford "considerable weight…to an executive department's construction of a statutory scheme it is entrusted to administer and the principle of deference to administrative interpretations." *Chevron*, 467 U.S. at 844.

In the January 2, 2018 Decision, I found that the ACHD did not provide much support for its support that the grandfather clause was not meant to cover restaurants like the Café, which opened after October 4, 1976. (*January 2, 2018 Decision* at 6). But here, the ACHD has provided ample support for its position. In its brief, the ACHD points to a 1993 amendment to Article III, which indicates that restaurants that were either constructed after 1976 or were undergoing alterations after 1976 were not grandfathered into the toilet room requirement:

> "In restaurants hereafter constructed or ***undergoing alterations***, toilet facilities including hand-wash sinks, separate for each sex, shall be provided on the premises for patrons shall be located so as not to require the patrons to pass through any food preparation area. Toilet facilities need not be installed for the patrons whenever food is not consumed within an eating or drinking place or when only carry-out food is provided." (Ex. D13) (emphasis added).

The amendment took effect in January 1993. (Ex. D14). It clearly differentiates among restaurants constructed after its enactment, restaurants constructed before its enactment, and restaurants "undergoing alterations." The

amendment only excludes restaurants constructed before its enactment from the toilet room requirement.

Here, Appellant altered its facility and structure by building an enclosed atrium, installing an HVAC cooking hood for ventilation, and converting an apartment into a kitchen. (Exs. D1, D9; H.T. at 10, 14). All of these changes occurred after 1976 and 1993. Based on the 1993 amendment and these facts, I find that the ACHD's interpretation of the term "constructed" to include facilities altered after 1993 is a reasonable one.

Moreover, the ACHD's interpretation of the term "constructed" to include facilities which underwent alterations after 1976 is consistent with the ACHD's public health objectives. In September of 1976, Frank Clack, the then-Secretary of the Allegheny County Board of Health, clearly indicated that the purposes of the new toilet room regulations were to (1) align Article III with state food establishment law, and (2) to ensure that restaurant customers had sufficient access to restrooms. (Exs. D12, D13). Whether Article III § 316 provides the *best* method for achieving these goals is not relevant. What matters is whether an agency has provided a reasonable rationale for its interpretation. Based on the facts of the case and the legislative materials presented here, I find that the ACHD's interpretation of the term "constructed in Article III § 316 is reasonable.

V. CONCLUSION

I find that although the language of Article III § 316 is ambiguous, the ACHD's interpretation of it is reasonable. Therefore, the ACHD's interpretation of

the term “constructed” is upheld. Appellant must either lower its seating capacity to 16 or construct an additional customer toilet room. This administrative decision may be appealed to the Court of Common Pleas of Allegheny County, Pennsylvania.

___/s/_____
Max Slater
Administrative Hearing Officer
Allegheny County Health Department

Dated: April 16, 2018