

**ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARINGS**

COCA CAFÉ,)	
)	
Appellant,)	In re: Coca Café
)	3811 Butler Street
vs.)	Pittsburgh, PA 15201
)	Client ID: 200203270001
)	
ALLEGHENY COUNTY HEALTH)	
DEPARTMENT,)	
)	
Appellee.)	

**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 food facility (hereinafter “Appellant”).

The appeal was filed on August 4, 2017 and challenges an inspection report issued by the Department dated July 25, 2017 (hereinafter “July 25th Report”). Exhibit D8. The July 25th Report instructed Appellant to remove all seats or provide a second toilet room for customer use at Appellant’s facility, located at 3811 Butler Street, Pittsburgh, PA 15201. *Id.* Pursuant to Section 1105 of Article XI, “Hearings and Appeals”, of the ACHD’s Rules and Regulations (hereinafter “Article XI”), a full evidentiary hearing was held on October 3, 2017 (hereinafter “Hearing”).

In its appeal, Appellant requested a hearing regarding occupancy and bathrooms requirements at the facility. Appellant did not deny that its facility contains 39 seats, one unisex toilet room, and one employee toilet room as observed by the Department on July 25, 2017. *Id.* Appellant did not request, and the ACHD Director did not unilaterally grant, a stay of the

proceedings. Therefore, pursuant to Article XI § 1111, the Department's order found in the July 25th Report remains in full force and effect.

II. Proposed Findings of Fact.

- A. Appellant chose to provide 16 seats. Verbatim Transcript of October 3, 2017 Hearing (hereinafter "Tr.") Tr. at p. 21; Exhibit D3.
- B. Appellant is permitted to provide 16 seats¹ only. Exhibits D3 & D4.
- C. After Appellant's health permit from the Department was issued in 2004, Appellant increased the number of seats beyond 16. Tr. at p. 3, 10; Exhibits D3-D8.
- D. Appellant first communicated to the Department that it provides or intends to provide more than 16 customer seats in April 2016, 12 years after its permit was issued. Tr. at p. 4-5. 16-18; Exhibit D2.
- E. Appellant currently provides on average 40 seats. Tr. at p. 15, 36; Exhibits D5-D8.
- F. Appellant currently provides one toilet room for customer use. Tr. at p. 37.
- G. Appellant's second toilet room (hereinafter "kitchen toilet room") requires customers to walk through food preparation areas for access. Tr. at p. 37-38; Exhibit D1².
- H. Both toilet rooms are operable, unisex rooms with one toilet each. Tr. at p. 13, 17, 38.

¹ Throughout the Hearing, Appellant claims that the Department approved the occupancy of the Facility. Tr. at p. 29. The Department does not approve the occupancy of a food facility. Building occupancy for Appellant is regulated by the City of Pittsburgh. The Department regulates the number of toilet fixtures for the building occupancy. Tr. at p. 26-27. See <http://pittsburghpa.gov/pli/commercial-permits/occupancy-cert-info.html>

² Department's Exhibit D1 is an illustration of Appellant's facility and Appellant confirmed the depiction is accurate. Tr. at p. 14.

- I. From 2004 to just prior to the Hearing, the toilet room in the kitchen was used as a storage area for food items. Tr. at p. 13-14, 39.
- J. Appellant expanded the food facility by converting the rear from a residential apartment to a commercial kitchen and removed the bathtub in the kitchen toilet room to add shelving. Tr. at p. 14-15.
- K. Appellant constructed an atrium to connect the kitchen to the dining area and provided additional seating. Tr. at p. 10.

III. Discussion.

In an administrative appeal of a final agency action of the ACHD, the appellant “shall bear the burden of proof and the burden of going forward with respect to all issues.” Article XI §1105(D)(7).

ACHD Rules and Regulations, Article III, Food Safety (hereinafter “Article III”), §315 states that plumbing must be maintained and installed according to ACHD Rules and Regulations, Article XV, Plumbing and Building Drainage (hereinafter “Article XV”)³. Relevant provisions of Article III §316 provide as follows:

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.

³ The Department adopted the International Plumbing Code in its entirety and any amendments made by the Department are reflected in Article XV.

Pursuant to Article XV §403.1, a restaurant must have two men's water closets⁴ for 1-50 male occupants, resulting in one commode, one urinal, and one sink, and one female water closet for 1-25 female occupants, resulting in one commode and one sink. The number of occupants for the purposes of this section is based upon square footage or the building occupancy of the facility. The square footage or occupancy information was not provided by Appellant during the Hearing; therefore, this brief will use the number of customers and employees at the facility to calculate the number of occupants. To determine the number of water closets required, the total number of occupants is divided in half to reflect an equal proportion of men and women. For example, if the building occupancy is ten, the Department would consider five men and five women for the purposes of determining the number of water closets required. Article XV §403.1 only applies to facilities that sell food primarily to be consumed on the premises.

Article XV §419.2 states the following:

The number of urinals for males shall be at least 50% of the total number of water closets required for males. The number of water closets may be decreased by the number of urinals which are used, but the number of remaining water closets shall not be less than 50% of the original tabulated total.

Additionally, Article XV §403.3.1 provides as follows:

The route to the *public* toilet facilities required by Section 403.3 shall not pass through kitchens, storage rooms or closets. Access to the required facilities shall be from within the building or from the exterior of the building. All routes shall comply with the accessibility requirements of the *International Plumbing Code*. The public shall have access to the required toilet facilities at all times that the building is occupied.

Therefore, because this matter revolves around whether Appellant may provide more than 16 seats for customers without installing a second toilet room for customer use, Appellant must

⁴ Water closet is a toilet room and both are for single use. The term "toilet room" will be used in subsequent sections.

prove by a preponderance of the evidence that its request is permitted under Articles III and XV. The preponderance of the evidence standard requires proof “by a greater weight of the evidence” (*Commonwealth v. Williams*, 732 A.2d 1167, 1187 (Pa. 1999)) and is equivalent to a “more likely than not standard” *Commonwealth v. McJett*, 811 A.2d 104, 110 (Pa. Commw. Ct. 2002). Appellant has never disputed the application of Articles III or XV.

A. The Department is Ordering Appellant to Comply with ACHD Regulations by Installing a Second Toilet Room for Customer Use or Accept an Offer of a Variance of ACHD Regulations by Reducing the Number of Customer Seats to 16.

Appellant requests the Department to approve a two-and-a-half-fold increase in the number of customer seats currently provided at its facility without increasing the number of toilet rooms for customer use.

Article III §316 declares that if seating is provided in a food facility, toilet rooms separate for each sex must be installed. Article XV §403.1 states that a restaurant must have two men’s toilet rooms for 1-50 male occupants and one female toilet room for 1-25 female occupants. Moreover, the customer toilet rooms must be in a location that does not require the patron to pass through food preparation or food storage areas. Article III §316.D; Article XV §403.3.1; Tr. at p. 24.

Appellant stated that it had three employees when it opened in 2003 or 2004. Tr. at p. 12. However, Appellant provided conflicting testimony regarding the number of customer seats it requested in its application for a health permit from the Department. Appellant’s representative initially stated the facility was permitted for 30 seats and then claimed that the 16 seats indicated

on the application was never changed from the previous owner. Tr. at p. 10-11. An application for a Department health permit is required whenever a new facility opens, ownership changes, or any change is made to the facility or its operations. Article III §330; Tr. at p. 20-21. The permit application is completed at the facility by the Department based on information provided by the owner. Tr. at p. 19; 22. The owner verifies the information in the application by signing it. *Id.* In this case, the application for a Department health permit was completed on or around April 7, 2004. Exhibit D3. Appellant provided the information to Joe Wetzel, a former Supervisor who no longer works for the Department, and Appellant signed the application. Tr. at p. 19-22; Exhibit D3. Appellant's application for a Department health permit states that it provides 16 seats. Tr. at p. 21; Exhibit D3. Although Appellant alleges that her business partner merely repeated the contents of the previous owner's permit, she was not obliged to do so and her signature on the application indicates that she verified, as true and correct, the information provided to Mr. Wetzel. Tr. at p. 22; Exhibit D3. Appellant should have been aware that it is permitted for 16 seats as the capacity is also printed on its health permit that is issued annually by the Department to the facility and posted on-site. Article III §330; Tr. at p. 17-18, 23; Exhibit D4. Therefore, when Appellant was issued a health permit by the Department in 2004, the total number of customers and employees was 19. Toilet rooms would be required for 9.5 men and 9.5 women.

Appellant's facility has two operable, unisex toilet rooms with one toilet in each room. Tr. at p. 13, 38. One toilet room can only be accessed through the food preparation area and therefore cannot be used by customers. Tr. at p. 37; Exhibit D1. The second toilet room is located in the dining area and is accessible for customers. *Id.* In April 2004, when the Department issued the health permit to the current owners, the Department could have strictly enforced its regulations by denying the permit application until a second customer toilet room was installed, one for each sex

and a urinal in the men's room, for 9.5 men and 9.5 women. Instead, the Department approved the permit. Exhibits D3 & D4.

Appellant increased the number of customer seating to an average of 40 without obtaining the Department's approval. Tr. at p. 10, 15, 36; Exhibits D5-D8. Appellant requested a variance in April 2016 for 36 customer seats, 6-9 employees per shift, and no additional toilet room. Tr. at p. 16-17; Exhibit D2. The total number of customers and employees in the variance request is 45, amounting to 22.5 men and 22.5 women. According to Article XV §403.1, this would still require one toilet room for each sex and a urinal in the men's room. The Department is providing the Appellant with two options: Either Appellant may increase its customer seating to 36 and install a second toilet room, a female room with a commode and sink and a men's room with a commode, a urinal, and a sink, or accept the Department's offer of a variance of its regulations by reducing its customer seating to 16 and continue to provide one unisex toilet room for customers. As explained above, a strict enforcement of the Department's regulations would still require a female room with a commode and sink and men's room with a commode, a urinal, and a sink for 16 customer seats.

B. Appellant May Not Circumvent the Toilet Room Requirements Promulgated in the Department's Regulations Because Appellant Failed to Establish That It Was Grandfathered in Pursuant to Article III 316(C).

Appellant made vague statements that it was grandfathered into Article III regulations and therefore does not have to comply with the toilet room requirements promulgated in Articles III or XV. Tr. at p. 4. However, Appellant failed to demonstrate that it met the requirements to be grandfathered in.

Article III §316(C) states that any food facility that was constructed prior to October 4, 1976 is exempt from enforcement of Article III §316. Appellant must demonstrate that the facility was continuously used as a food facility from prior to October 4, 1976 onward, and that the nature of the operations did not change.

Appellant offered two obituaries from the Pittsburgh Post-Gazette to argue that she meets the exemption requirements. Tr. at p. 7-8; Exhibit A1. The obituaries state that a Mrs. Zaborowski operated a coffee and hot dog shop on Butler and 38th Street before closing during World War II and a pizza shop on Butler and 39th Street from the 1960s to the mid-1980s. Exhibit A1. Appellant also claimed that Mrs. Zaborowski's family visited the facility and indicated that in the past, they owned food facilities at that location. Tr. at p. 8.

These obituaries are insufficient to find that Appellant is grandfathered in for numerous reasons. First, the obituaries do not provide the exact address for the coffee and hot dog shop and pizza shop. By failing to provide this information, this tribunal cannot assume that Appellant's facility was used as a food facility prior to October 4, 1976. Second, Appellant failed to demonstrate that the facility was continuously operated as a food facility from prior to October 4, 1976 and onwards. There is a 20-year gap from when the food facility closed to when Coca Café opened. Tr. at p. 4; Exhibit A1. Third, Appellant's entire facility was not always used as a food facility. Appellant admitted that the rear portion of the facility was a residential apartment that she converted into a commercial kitchen. Tr. at p. 14. Moreover, the bathtub in the kitchen toilet room was removed and shelving was installed soon after Appellant took ownership of Coca Café. *Id.* Appellant further expanded the Facility to connect the kitchen to the dining area and added additional seating. Tr. at p. 10. Thus, the conversion from a residential to commercial property in or around 2003 and the construction of the atrium

demonstrate that the facility was not constructed prior to October 4, 1976. The shops operated by Mrs. Zaborowski, if it was located at the Appellant's address, could have entirely operated out of the front of Appellant's facility, currently where the customer dining area is located. Finally, the nature of Appellant's operation has changed. Appellant was initially permitted as a restaurant but now it serves alcohol, which requires a different permit. Tr. at p. 33; Exhibit D5⁵. Moreover, Appellant cannot establish that the number of customer seats have remained the same since prior to October 4, 1976 because it is asking for an increase in seats and it failed to offer evidence indicating the number of seats provided by food facilities at that location from prior to October 4, 1976 to when it took ownership.

Therefore, Appellant's claim that it was grandfathered in is groundless and should be dismissed.

IV. Findings of Law.

- A. If Appellant intends to increase the number of customer seats provided, it must install additional toilet facilities pursuant to the Department's regulations.
- B. Appellant may accept the Department's offer of a variance to maintain 16 customer seats at all times without installing an additional toilet room.
- C. The kitchen toilet room is in the food preparation area and may not be used by customers.

⁵ On page 4 of Exhibit D5, the ACHD inspector comments that Appellant carries a liquor license as of January 5, 2017.

- D. Appellant may use the kitchen toilet room for its intended purpose for employees only if Appellant ceases to store food equipment, food contact items, and food items in that room.
- E. Appellant may only store toiletries, cleaning materials, chemicals, and similar items in the kitchen toilet room if it will be used as a toilet room. Tr. at p. 37.

V. Conclusion.

This case arises from the Appellant's negligence in ensuring that all changes in the facility and its operation comply with Department regulations and receive Department approval in advance. Appellant wholly failed to demonstrate that it should be exempt from the Department's toilet room requirements. The Department is generously offering a variance to its regulations even though it retains the right to strictly enforce the provisions. Therefore, since Appellant failed to meet its burden of proof, the ACHD asserts that its appeal should be dismissed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2017, I served a true and correct copy of the Allegheny County Health Department's Post-Hearing Memorandum on the following individual by electronic mail and first class mail, postage paid, and addressed as follows:

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