ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARINGS

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

THE ALLEGHENY COUNTY HEALTH DEPARTMENT'S BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF THE ADMINISTRATIVE DECISION

I. Introduction and Background.

AND NOW comes the Appellee, the Allegheny County Health Department (the "ACHD" or "Department"), by and through its counsel, and files the within Brief in Support of its Motion for Reconsideration of the Administrative Decision issued on January 2, 2018 ("Administrative Decision").

The above-captioned facility ("Appellant") filed an appeal on August 4, 2017 and challenged an inspection report issued by the Department dated July 25, 2017 ("July 25th Report"). Exhibit D8. The July 25th Report found Appellant to be in violation of ACHD Rules and Regulations Article III, Food Safety ("Article III"), § 316.1(C) and 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 § 1105 of Article XI, "Hearings and Appeals",

of the ACHD's Rules and Regulations ("Article XI"),[1] a full evidentiary hearing was held on October 3, 2017 ("Hearing").

In its appeal, Appellant requested a hearing regarding occupancy and bathroom requirements at the facility. Appellant did not deny that its facility contained on average 39 seats, one unisex toilet room, and one employee toilet room as observed by the Department on July 25, 2017. Verbatim Transcript of October 3, 2017 Hearing (hereinafter "Tr.") at p. 15, 36; Exhibits D5-D8. During the Hearing, Appellant claimed that its facility met the requirements to be grandfathered in under Article III § 316.1(C) because it was constructed before October 4, 1976 and therefore, it was not obligated to comply with ACHD regulations that require the installation of separate customer toilet rooms for each sex in proportion to customer seating provided. Appellant proffered newspaper obituaries and hearsay testimony in support of its claim. Appellant did not request, and the ACHD Director did not unilaterally grant, a stay of the proceedings.

The Administrative Decision found Appellant's evidence to be credible and held that the facility was constructed before October 4, 1976 and therefore, was not required to install an additional toilet room for customer use. Administrative Decision at pg. 7. The Administrative Decision deemed the Department's interpretation of Article III § 316.1(C) to be "unpersuasive" as it could not locate "textual or other legal support for the ACHD's contention that a food facility must be continuously and uninterruptedly used as such from October 4, 1976 onward, and that the nature of operations must not change." *Id.* at p. 6. However, the tribunal did acknowledge that the clause was not entirely clear. *Id.* at p. 7. The tribunal viewed the term "Section" to be ambiguous and provided its own interpretation as applying to subsection 316.1(C) only, as opposed to Section 316. *Id.* at p. 7-8.

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[1] This brief will apply the version of Article XI in effect at the time the July 25th Report was issued and the appeal filed.

II. <u>Proposed Findings of Fact</u>.

A. Appellee hereby incorporates all Proposed Findings of Fact articulated in The Allegheny County Health Department's Post- Hearing Memorandum, submitted on November 30, 2017.

B. The structure at 3811 Butler Street, Pittsburgh, PA 15201 (hereinafter "Building on Butler") may have been constructed before October 4, 1976.

C. Appellant operates a food facility located in the Building on Butler.

D. Appellant's facility began occupying the Building on Butler in 2003 or 2004. Tr. at p. 3-4, 19-20.

E. Appellant's permit is a variance of a strict application of ACHD Rules and Regulations. Exhibits D3 & D4.

F. After Appellant's health permit from the Department was issued in 2004, Appellant increased the number of seats beyond 16 *without prior authorization* from the Department. Tr. at p. 17; Exhibits D3-D8.

G. By increasing the number of seats, Appellant violated the terms of its permit. Tr. at p. 17; Exhibits D3-D8.

H. Appellant's facility was not constructed prior to October 4, 1976.

I. Appellant expanded and remodeled the Building on Butler 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.

J. Appellant was issued a permit from the City of Pittsburgh for the installation of a commercial HVAC Cooking Hood in or around 2012 (permit attached hereto as "Exhibit D9").

K. Appellant constructed an atrium to connect the kitchen to the dining area and provide additional seating. Tr. at p. 10.

L. Appellant's alterations to the structure and facility required the submission of plans to the Department for approval. Article III § 334.1.

M. Appellant obtained a liquor license Exhibit D5.

N. The Building on Butler was used as a food facility for coffee and pastries in 2002. (File Record Sheet attached hereto as "Exhibit D10").

O. The facility in operation immediately prior to Appellant's facility had 10 seats and one toilet room. Exhibit D10.

P. The use of the Building on Butler is unaccounted for between the mid-1980s to 2002. Exhibits A1 & D10.

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). Therefore, because this matter revolves around whether Appellant may circumvent ACHD regulations regarding number of customer toilet rooms available at the facility, Appellant must prove by a preponderance of the evidence that its facility is grandfathered in pursuant to Article III § 316.1(C). The preponderance of the evidence standard requires proof "by a greater weight of the evidence" (*Commonwealth v. Roy L. Williams*, 557 Pa. 207, 732 A.2d 1167, 1187 (1999)) and is equivalent to a "more likely than not standard" *Com. v. McJett*, 811 A.2d 104, 110 (Pa. Commw. Ct. 2002).

Relevant provisions of Article III § 316 state 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.

A. <u>The Plain Language of Article III Supports the Department's Assertion That the Term "constructed" Does Not Include Facilities That Were Remodeled or Expanded at Any Time Beginning from October 4, 1976.</u>

If the tribunal determines that the term "constructed" is not ambiguous, the Department's interpretation of the statute should prevail. The Department maintains that in order for a food facility to be grandfathered in under Article III § 316.1(C), the food facility must not have been remodeled or expanded at any time beginning from October 4, 1976 to the present.

The Commonwealth Court of Pennsylvania articulated that "[w]hen considering an administrative agency's interpretation of its own regulation, courts follow a two-step analysis. 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. Commw. Ct. 2002). "[A]n 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. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013)

(quoting *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195 (2011)). This tribunal most recently applied this two-step analysis in *Bakery Living 2.0 v. Allegheny County Health Department,* which concerned the Department's interpretation of ACHD Rules and Regulations Article IX, "Lifeguards, Bathing Places, Bathing Beaches, Hot Tubs and Spas" (attached hereto as "Exhibit D11").

1. The Department's Interpretation of "constructed" as Excluding Remodeled or Expanded is Consistent with Article III And Is Not Plainly Erroneous.

The plain reading of the grandfathering clause in Article III § 316.1(C) is that the *food facility* must have been *constructed* prior to October 4, 1976. 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 follows:

> "whenever an existing ***structure*** is converted for use as a ***food facility***; any structural or significant equipment additions or alterations to the existing food facility; changes, modifications and extensions of plumbing systems, excluding routine maintenance." (emphasis added)

The definition clearly differentiates between "structure" and "food facility", and the definition of "food facility" does not consider "structure". This distinction is consistent throughout Article III. *See also* Article III §§ 330.2(C) and 334.1(A). In this case, the food facility is Coca Café because it is a permanent place "where food is prepared, handled, served, sold, or provided to the consumer." The structure is the Building on Butler which houses Appellant's facility. Therefore, according to the plain language of the grandfathering clause, Coca Café must have been constructed prior to October 4, 1976. This is not the case as Appellant's facility opened around 2003 or 2004. Tr. at p. 3-4, 19-20.

Moreover, Article III § 334.1 clearly differentiates between "constructed", "remodeled", "altered extensively", and "whenever an existing structure is being converted to a food facility" as separate actions that require construction plan review. Therefore, the Department's interpretation of "constructed" in Article III § 316.1(C) as *excluding* structures that were "remodeled", "altered extensively", or "converted to a food facility" is consistent with other provisions in the same regulation. In this case, and to the Department's knowledge,[2] Appellant expanded the existing structure by converting a residential apartment into a commercial kitchen, building an enclosed atrium, and installing a commercial HVAC Cooking Hood which required a permit from the City of Pittsburgh. Tr. at p. 10, 14; Exhibit D9. Appellant's changes easily classify as "remodeled", "altered extensively", and "existing structure ... converted to a food facility". Therefore, Department's interpretation is consistent with Article III and not plainly erroneous, and Appellant's claim that was "constructed" prior to October 4, 1976 is groundless.

2. The Department's Interpretation That "constructed" Excludes Remodeled or Expanded is Consistent with The Local Health Administration Law.

The purpose of the Allegheny County Board of Health ("Board" or "Board of Health") is to formulate rules "for the prevention of disease, for the prevention and removal of conditions which constitute a menace to health, and for the promotion and preservation of the public health generally." Local Health Administration Law, Act 315, August 24, 1951 P.L. 1304 § 12011(c). The Court of Common Pleas of Allegheny County has held that the Board of Health "may regulate only those matters which can be shown to have a direct relationship with public health." *Home Builders Assoc. of Pitts. v. Allg. Cnty Plumbing Board*, 120 PLJ 343, 351 (1972). The Health

[2] Department contends that Appellant did not submit construction plans to Department for review prior to undertaking all alterations that would trigger Article III §334.

Director is the administrator the Department and obligated to apply the regulations in furtherance of that purpose.

The purpose of Article III is to "safeguard the public health through the application of the principles of food safety, foodborne illness prevention and environmental health in food facilities." Article III § 300. The purpose of Article XV is to provide "comprehensive and uniform regulation of plumbing through Allegheny County to protect the public from the health hazards of inadequate or unsanitary plumbing." Article XV §101.3.

Appellant claims that any structure even partially constructed before October 4, 1976 and which housed a food facility before that date is exempt from the toilet room requirements of Articles III and XV. If this interpretation is applied, thousands of food facilities in the County would never be required to comply with toilet room requirements simply because a portion of the structure was constructed before October 4, 1976 despite remodeling, extensive alterations, and conversions of existing structures to food facilities. Not only would this result be an inconsistent interpretation of Article III as discussed previously, but it would also impede the "promotion and preservation of the public health generally." The Department would never be able to apply toilet room regulations uniformly, prevent inadequate plumbing, or progressively promote sanitation and environmental health in food facilities. On the contrary, it is logical for the Department to enforce its toilet room regulations upon facilities at junctures where the structure and facility undergoes changes. This allows the Department to steadily bring all food facilities into compliance with Articles III and XV, provides uniformity in the application of these regulations, and promotes public health generally.

Thus, the Department's plain reading of Article III § 316.1(C) is not inconsistent with Article III or the Local Health Administration Law, and it is not plainly erroneous. Therefore, this tribunal must find that Appellant's facility is not grandfathered in.

B. If the Tribunal Determines That the Term "constructed" in Article III § 316.1(C) is Ambiguous, the Tribunal Must Defer to the Department's Interpretation Because it is Reasonable.

If the tribunal determines that the term "constructed" in Article III §316.1(C) is ambiguous, it must determine whether the Department's interpretation is reasonable. In practice, the Department's interpretation of "constructed" contains three parts: Beginning from October 4, 1976 to the present, no major renovations or expansions were done to the structure or the food facility, the nature of the food facility's operations must not have changed, and the entire structure occupied by the food facility must have always been continuously and uninterruptedly used as a food facility. If any of these prerequisites are not met from October 4, 1976 onwards, the facility may not be grandfathered in.

In *Chevron v. Natural Res. Def. Council, Inc.*, the U.S. Supreme Court held that if the statute is ambiguous with respect to a specific issue, the court must determine whether the agency's interpretation is reasonable. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). The court must analyze the statute using a two-part analysis. First, the court must determine whether congressional intent has addressed the ambiguity. *Id.* at 842. If it has, the court and the agency must defer to the unambiguously expressed intent. *Id.* at 842-43. "If, however, the court determines that the [legislative body] has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute." *Id.* at 843.

"[I]f 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." *Id.*

If the legislative body explicitly allowed the statute to be ambiguous, then express delegation of authority is given to the agency to fill that gap by clarifying the ambiguity by regulation. *Id.* at. 843-44. This regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. If legislative delegation to an agency on a particular question is implicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* The court does not substitute its own interpretation merely because it finds the agency's interpretation to be unpersuasive. "In [the Commonwealth of Pennsylvania], all property is held in subordination to the right of its reasonable regulation by the government, which regulation is clearly necessary to preserve the health, safety, morals, or general welfare of the people." *PA Nw. Distribs., Inc. v. Zoning Hearing Bd. of Twp. of Moon*, 584 A.2d 1372, 1374 (1991).[3]

The Department argues that it was granted implicit authority to provide a reasonable interpretation of the term "constructed", which it did, and that this tribunal erred in dismissing the Department's interpretation. The tribunal is 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, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Therefore, the Department's interpretation of "constructed" should be enforced if it is reasonable.

[3] The tribunal should have only determined whether the Department's construction of the term "Section" in Article III § 316.1(C) was reasonable rather than providing its own interpretation.

1. Unambiguously Expressed Legislative Intent and Previous Regulation Support the Department's Interpretation of the Term "constructed" in Article III § 316.1(C) to Exclude Structures Constructed Prior to October 4, 1976 and Which Subsequently Underwent Alterations.

To assume that Appellant's facility is grandfathered in simply because the front portion may have existed prior to October 4, 1976 ignores the extensive changes Appellant made to the structure and facility. Legislative history supports the Department's claim that the intent of the grandfathering clause was not to provide immunity to structures that underwent alterations after October 4, 1976. In a letter dated September 15, 1976, the Secretary of the Board of Health wrote that the Board ***unanimously*** approved an amendment to ACHD Rules and Regulations, Article III, Restaurants and Eating Establishments, § 304(A)(6), Toilet Facilities (attached hereto as "Exhibit D12"). Specifically, the Secretary wrote that the "proposed amendment requires that toilet facilities for patrons be provided in all new establishments or establishments undergoing major alterations." *Id.* The amendment added the following language:

> 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 and 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. ("Proposed Revision", attached hereto as "Exhibit D13".) (emphasis added) [4]

The amendment was in effect as of January 1993, attached hereto as "Exhibit D14". The amendment clearly distinguishes between restaurants constructed *after* its enactment, restaurants constructed *before* its enactment, and restaurants "undergoing alterations." It applies the toilet

[4] Article XV § 403.1, footnote 1 and the Proposed Amendment exclude facilities that are primarily "take-out" from the toilet room requirements imposed on "restaurants".

room requirements equally to restaurants constructed after its enactment and establishments undergoing alterations and excludes restaurants constructed before its enactment. The Department's interpretation of the term "constructed" as excluding facilities that have undergone alterations beginning from October 4, 1976 to the present is consistent with the previous regulation and legislative intent. In this case, Appellant altered its facility and the structure by converting a residential apartment into a commercial kitchen, building an enclosed atrium, and installing a HVAC Cooking Hood for ventilation, and therefore, equipment requiring ventilation.[5] Tr. at p. 10, 14; Exhibit D9. Therefore, the legislative intent would enforce the toilet room regulations on Appellant's facility because it underwent alterations after October 4, 1976.

2. The Department's Interpretation of the Term "constructed" to Include Unchanging Nature of Operations and Continuous, Uninterrupted Use of the Structure as a Food Facility From October 4, 1976 Onwards is Permissible Because it is Supported by Historical and Current Policy Objectives.

Even if this tribunal finds that the Department has changed or expanded its interpretation of the term "constructed", the tribunal shall not immediately conclude that deference should not be given to the Department's interpretation. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984). "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64. An agency which has been delegated "policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments."

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

Id. at 865. "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail." *Id.* at 866. The judiciary is not empowered to assess the "the wisdom of such policy choices" or resolve "the struggle between competing views of the public interest." *Id.* The Administrative Hearing Officer, which has no constituency, has "a duty to respect legitimate policy choices made by those who do." *Id.* It is not in the tribunal's jurisdiction to determine whether or not the Department's interpretation of the term "constructed" most effectively implements the policy. *Id.* at 863. The tribunal must only determine whether the Department has provided a reasonable explanation for concluding that its interpretation serves the public health objective. *Id.*

The September 15, 1976 letter and the Proposed Revision clearly provide two purposes for the amendment: First, to make Article III as strict as the Department of Environmental Resources' Chapter 151, Food Establishments, which "requires toilet facilities for patrons in 'all new establishments or establishments undergoing alterations.'" Exhibits D12 & D13. Second, that the amendment was "being requested due to numerous complaints from consumers concerning lack of restroom facilities in County restaurants." *Id.* The policy motivations for the Department's interpretation of the term "constructed" remained unchanged.

The Department has the right to change the character of the County "without being locked into pre-existing definitions of what is offensive." *PA Nw. Distribs., Inc. v. Zoning Hearing Bd. of Twp. of Moon,* 584 A.2d 1372, 1378 (1991). Rather than enforcing the toilet room requirements upon all food facilities in the County at once, the Department has chosen to gradually apply it at junctures where the facility changes its structure, nature of operations, ownership, or after a period of closure. This approach to bringing all food facilities into compliance with the Department's

toilet room regulations is consistent with the amendment and reasonable in its execution. Exhibits D12-D14. *See Id.* at 1377 ("[A] a reasonable amortization provision would not be unconstitutional...[A] blanket rule against amortization provisions should be rejected because such a rule has a debilitating effect on effective zoning, unnecessarily restricts a state's police power, and prevents the operation of a reasonable and flexible method of eliminating nonconforming uses in the public interest.") *See also Id.* at 1376. ("A gradual phasing out of nonconforming uses which occurs when an ordinance only restricts future uses differs in significant measure from an amortization provision which restricts future uses and extinguishes a lawful nonconforming use on a timetable which is not of the property owner's choosing.") Factors considered regarding the reasonableness of an amortization provision include the length of time and notice. *Id.* In this case, the amendment was enacted in 1976 and Appellant opened its facility in 2004. Thus, Appellant had adequate notice of the toilet room requirements and was always required to comply with the same during the entire length of its operations.

Appellant has failed to prove that the structure it currently occupies was continuously and uninterruptedly used as a food facility from prior to October 4, 1976 to the present as it has not accounted for the period between the mid-1980s to 2002 or addressed the expansions and renovations. Exhibits A1 & D10. Moreover, the change in the nature of operations prompted Appellant to extensively remodel and expand the facility to offer a different set of services. Tr. at p. 10, 14; Exhibits D3-D10. The purpose of the changes was to offer more than coffee and pastries as is evidenced by the drastic increase in seating capacity from the previous owner's 10 seats to the Appellant's 40 seats, structural expansion, liquor license, menu, and major equipment installation. *Id.* Appellant's changes were drastic enough to require plan approval according to Article III §334 and change the ACHD permit category for the facility.

The Department's interpretation that "construction" means the entire structure the food facility currently occupies was continuously and uninterruptedly used as a food facility from October 4, 1976 onwards and that the nature of the operations did not change in that time period is permissible because in its application, it addresses the patrons' requests for additional toilet rooms in food facilities throughout the County and allows the Department to progressively make its regulation as stringent as the state's law. Therefore, the tribunal must find the Department's three-part interpretation of the term "constructed" to be reasonable and that Appellant did not satisfy any pre-requisite. Thus, Appellant's facility may not be grandfathered in.

IV. Findings of Law.

A. The Department hereby incorporates all Findings of Law articulated in The Allegheny County Health Department's Post- Hearing Memorandum, submitted on November 30, 2017.

B. Appellant's facility is a "food facility" as defined in Article III.

C. Appellant's facility is not a structure as distinguished in Article III

D. Appellant had notice of the Department's regulation requiring toilet rooms for each sex in proportion to the customer seating provided prior to initial operation.

E. Appellant took ownership of the facility when the regulation regarding toilet rooms were in effect.

F. Appellant extensively remodeled and expanded the facility and structure.

G. Appellant changed the nature of its operations from small restaurant to large restaurant with additional services offered, and substantial remodeling was done for this purpose.

H. The Appellant's food facility was not constructed prior to October 4, 1976.

I. The Department's claim that Appellant's facility is not grandfathered in is consistent with the plain reading of Article III §316.1(C) and Article III generally.

J. The Department's interpretation of Article III §316.1(C) is consistent with the Local Health Administration Law.

K. The term "constructed" in Article III §316.1(C) is ambiguous.

L. Legislative history clarifies the meaning of "constructed" to exclude food facilities that underwent alterations after October 4, 1976.

M. The tribunal may not overturn the Department's interpretation of its regulations if it is reasonable and for the promotion and preservation of the public health generally.

N. The tribunal may not substitute its own interpretation for an ambiguous issue if the Department's interpretation is reasonable.

O. A food facility was not in continuous and uninterrupted use from prior to October 4, 1976 to the present in the space currently occupied by Appellant's facility.

V. **Conclusion.**

The Department's plain reading of the statute to determine that Appellant's facility is not grandfathered in must be upheld because it is consistent with Article III and the Local Health Administration Law. If the tribunal finds that the term "constructed" is ambiguous, the outcome is the same because the Department's interpretation is supported by legislative intent and is permissible. Dismissing the Department's interpretation of its regulation would prevent it from ensuring that adequate toilet facilities are provided to patrons in all food establishments in the

County and that its regulations are consistently applied. It would also prevent the promotion of public health generally. Appellant failed to prove that it has satisfied the requirements of the plain reading of the statute or that the Department's interpretation under the ambiguity analysis is unreasonable and not in the furtherance of public health. Therefore, since Appellant failed to meet its burden of proof, the ACHD asserts that its appeal should be dismissed.

Respectfully Submitted,

/s/ Vijyalakshmi Patel
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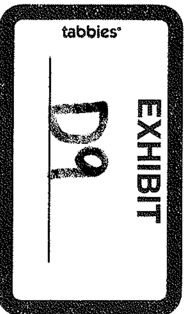
CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2018, I served a true and correct copy of the Allegheny County Health Department's Brief in Support of its Motion for Reconsideration of the Administrative Decision on the following individual by electronic mail and first-class mail, postage paid, and addressed as follows:

Carrie Rudolph
Coca Café
3811 Butler Street
Pittsburgh, PA 15201
Email: coca_cafe@hotmail.com
(*Pro Se*)

/s/ Vijyalakshmi Patel
Vijyalakshmi Patel, Esq.
Attorney for the Appellee



CERTIFICATE OF OCCUPANCY
CITY OF PITTSBURGH

Certificate Number: 12-M-00485 | Date Issued: 08/27/2012

Location: 3811 BUTLER ST | Ward: 6

Parcel ID: 0049E00079000000

Permitted Occupancy: ONE 6.5 FT X 3.16 FT MAKE-UP-AIR HANDLER AND ON 5 FT DIAMETER EXHAUST FAN AT REAR OF EXISTING THREE STORY STRUCTURE

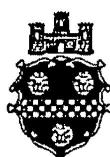
Conditions: ZBA #: | BOA #: | L&I AB#:

Permit Number: 12-M-00485 | Date of Final Inspection: 08/20/2012

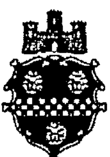
Construction Code Edition: IBC 2009 | Construction Type: | Use Group(s): B

Owner: 3811 ASSOCIATES
5549 BARTLETT ST
PITTSBURGH, PA 15217-1529

Lessee:



Permission is hereby granted for the occupancy above described.



Chief, Bureau of Building Inspection

Inspector

3811 BUTLER ST
WARD: 6 - Don Schrecen ost, 412-255-8881

CITY OF PITTSBURGH

Luke Ravenstahl - Mayor

Bureau of Building Inspection

John Jennings - Acting Chief

200 Ross Street - Third Floor, Pittsburgh, PA 15219
412-255-2175 412-255-2974 (fax)

Commercial HVAC: Cooking Hood - Permit Number: 12-M-00485

CONTRACTOR: DEALER SUPPLY OUTLET, INC
JACOB CAPLAN
1320 LOGAN RD
GIBSONIA, PA 15044

JOB ADDRESS **3811 BUTLER ST**

PARCEL: 0049E00079000000
WARD: 6

SITE OWNER: 3811 ASSOCIATES
5549 BARTLETT ST
PITTSBURGH, PA 15217-1529

APPROVED BY: E Harless
ISSUE DATE: 7/30/201:

JOB SITE CONTACT: JACOB CAPLAN (724-396-3935)

INSPECTOR: Don Schrecen ost, 412-255-8881

WORK DESCRIPTION: (1) TYPE I HOOD / EXHAUST SYS

BBI VIOLATION NOTICE: YES

HISTORIC DISTRICT: YES

PERMIT INFORMATION:

- LOCATION OF WORK: COCA CAFE / GROUND FL
- REVIEWD UNDER BUILDING CODE: IBC 2009
- USE GROUP(s): B
- ELECTRICAL PERMIT REQUIRED
- SPRINKLER PERMIT REQUIRED

Quantity	Others
1	Type I Hood
1	Exhaust Fan
1	Furnace/MUA Unit

FEE SUMMARY: (Estimated Cost of Work: $10,000.00)

HVAC PERMIT FEE: $154.00
PLAN FEE: $9.00
SETF FEE: $4.00
OCCUPANCY PERMIT FEE: $40.00

TOTAL FEE: $207.00

THIS PERMIT MUST BE IN POSSESSION OF THE NAMED APPLICANT AND ON THE PERMITTED PREMISES AT ALL TIMES DURING THE HOURS FOR WHICH IS HAS BEEN ISSUED.

Notice: All required inspections and acceptance tests are to be scheduled by contacting the inspector between 8am-10am, Monday through Friday. Failure to do so may result in suspension of contractor's license. If you cannot reach your inspector, please contact Brian Hill at 412-255-2184 or brian.hill@pittsburghpa.gov.

BUREAU OF ENVIRONMENTAL QUALITY
FOOD PROTECTION

FILE RECORD SHEET

Facility Name: Coca Coffee Lounge Permit holder: Janice Donatelli / Harry Gauld
Address: 3811 Butler St. Agent: ____
PO/Zip: 15201 Muni/Ward: 6th
Phone: 412-621-3171 Emergency phone: ____

DESCRIPTION OF OPERATION: (ie- type of food prepared)

Coffee & pastries

Category Code: 211 Days/Hrs of Operation: 7am - 7pm No. of Seats: 10

Public Restrooms: (Y) / N Employee Restrooms: Y / (N)

LIST OF MAJOR EQUIPMENT/DESCRIPTION:

Sanitization Equipment: ____ Hot water Dishwasher ____ Chemical Dishwasher 1 3 Compartment Sink ____ 2 Compartment Sink ____ Other

Refrigeration Units: (Nos., Type, Location) TRUE 4 Sided glass Door merchandiser

Hot-Holding Units: N/A

Cooking Equipment: N/A

Sinks: 1 Handwash sink(s) 1 Mop sink ____ Food Preparation sink

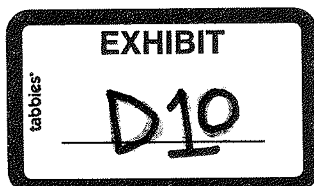
Other: ____

Variances Granted: (Attach copy of variance letter) (Y) / N Date: ____

OTHER: Hours of operation: Tues - Fri 8AM - 3P.M 7-24-17 H.Y.

Completed by: Dustie Speaht

Date: 3/22/02



410-CS-0395

ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARING DECISION

BAKERY LIVING 2.0, Appellant, v. ALLEGHENY COUNTY HEALTH DEPARTMENT, Appellee.	VIOLATION NO. HCE-20150108-1566

OPINION, DECISION AND ORDER OF THE ALLEGHENY COUNTY HEALTH DEPARTMENT HEARING OFFICER

I. INTRODUCTION

The Appellant, Bakery Living 2.0 (hereinafter "Bakery Living"), filed an appeal requesting a hearing regarding violations issued on December 16, 2015. Bakery Living was found to have violated Section 912.A of Article IX, "Lifeguards, Bathing Places, Bathing Beaches, Hot Tubs and Spas," of the Allegheny County Health Department's Rules and Regulations. Section 912.A provides:

> Lifeguard(s) shall be on duty at the waterside at all times when a bathing place or bathing beach is used by swimmer(s) or bather(s) and shall not be assigned other tasks that will divert their attention from the safety of the swimmer(s) or bather(s).

At Bakery Living's request, an Administrative Hearing was held on April 12, 2016. Following the hearing, Bakery Living and the Allegheny County Health Department (hereinafter "ACHD") submitted Briefs in this matter.

II. EVIDENCE

1. The following exhibits were offered into evidence by Bakery Living at the hearing:

Exhibit "A": Photographs of the Bakery Living swimming pool.

Exhibit "B": Bakery Living Condominium Declaration.

Exhibit "C": Bakery Living Certificate of Liability Insurance.

2. The Allegheny County Health Department offered the document "Lifeguard Efficacy in Public Bathing Places"[1] as an exhibit at the hearing.

3. During the hearing, Bakery Living offered the testimony of Todd Reidbord and the ACHD offered the testimony of David Namey (Program Chief for ACHD Housing and Community Environment Program) and Lori Horowitz (ACHD Environmental Health Administrator).

4. The Hearing Officer includes for the record the following documents:

Hearing Officer Exhibit "A": ACHD Determination sent to Bakery Living on 6/11/2014.

Hearing Officer Exhibit "B": Email from Jeff O'Brien to Gregg Perelman dated 6/11/2014.

Hearing Officer Exhibit "C": Bakery Living's Notice of Appeal dated 6/26/2014.

Hearing Officer Exhibit "D": ACHD Inspection Report dated 12/16/2015.

III. FINDINGS OF FACT

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

1. Appellant, Bakery Living 2.0, is an apartment complex located at 6480 Living Place, Pittsburgh, PA 15206.

[1] Bakery Living argued that the document "Lifeguard Efficacy in Public Bathing Places" be excluded on the basis that it contains hearsay and is irrelevant. At the start of the administrative hearing, I excluded portions of the document which I found to be unreliable. The remaining portions primarily concerned ACHD statistics on drownings in Allegheny County. In my Opinion, Decision and Order, I place no reliance on the document. The document merely supported what is commonly known that having a lifeguard present is safer than not having a lifeguard. I also did not place any reliance on the testimony of Lori Horowitz, the ACHD Environmental Health Administrator who authored the document.

2. On May 27, 2014, a Declaration of Condominium for Bakery Living 2.0 was filed in Allegheny County. (Appellant Ex. "B").

3. The Bakery Living condominium complex includes two buildings, unit "A" and unit "B." Each unit has 175 apartments. (Tr. at 12); (Appellant Ex. "B" at p. 5).

4. Condominium unit "A" is owned by Bakery Square 2 Living Holdings Parcel A, L.P., and condominium unit "B" is owned by Bakery Square 2 Living Holdings Parcel B, L.P. (Tr. at 17, 26); (Appellant Ex. "B" at p. 1).

5. The Bakery Living condominium association is known as "Bakery Square 2 Living A and B Condominium Association" (hereinafter "Bakery Living Condominium Association"). (Appellant Ex. "B" at p. 2).

6. Todd Reidbord is the President of Bakery Square 2 Living Holdings Parcel A, L.P., and Bakery Square 2 Living Holdings Parcel B, L.P. (Tr. at 33).

7. Bakery Square 2 Living Holdings Parcel A, L.P., and Bakery Square 2 Living Holdings Parcel B, L.P., are the only members of the Bakery Living Condominium Association and each has only one vote in the Association. (Tr. at 34); (Appellant Ex. "B" at p. 5).

8. Walnut Capital Management is the managing agent for the Bakery Living Condominium Association. (Tr. at 22).

9. Todd Reidbord and Gregg Perelman are the only members of the Executive Board of the Bakery Living Condominium Association. (Tr. at 34).

10. The Bakery Living Condominium Association owns the common elements of the Bakery Living Condominiums. (Tr. at 17). The swimming pool is the only common element identified in the Bakery Living Condominium Declaration. (Tr. at 20); (Appellant Ex. "B" at p. 7).

11. The Bakery Living swimming pool[2] is available to all 350 apartment units. The swimming pool is not accessible to the public. (Tr. at 14).

12. All of the Bakery Living apartment units are leased to tenants and the owners of the Bakery Living condominiums do not reside in any of the units. (Tr. at 21).

13. The Bakery Living tenants do not have any ownership interest in their housing unit or any of the commons areas. (Tr. at 21).

14. The Bakery Living tenants are not members of the Bakery Living Condominium Association and do not have voting rights in the Association. (Tr. at 21).

15. Bakery Living condominium unit "A" opened on June 1, 2014, and unit "B" opened in June, 2016. (Tr. at 12, 36).

16. Before Bakery Living opened on June 1, 2014, Todd Reidbord forwarded a copy of the Condominium Declaration to Jeff O'Brian, a plan review inspector from the ACHD. (Tr. at 37-38, 54).

17. On June 11, 2014, the ACHD issued a determination that Bakery Living "does not meet the definition, and intent, to be classified as a Condominium Pool" because the "residents of the facility not owning their units, or have any control of the common elements of the property." The determination required that Bakery Living have a "lifeguard present pool side at all times pool is open." (Hearing Officer Exhibit "A"). The determination was sent by email on June 11, 2014, from Jeff O'Brian to Gregg Perelman. (Hearing Officer Exhibit "B").

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[2] During the Administrative Hearing in this matter, Bakery Living offered pictures and testimony as to the size and square footage of the Bakery Living swimming pool. For purposes of this Appeal, I do not find that the dimensions of the pool is relevant to the issues to be resolved. Bakery Living does not argue that the swimming pool is a "wading pool" or "spray pool" under Article IX or should be granted a de minimis variance. Additionally, it should be noted that when formulating Article IX, the Board of Health did not include a provision to permit the Health Director the power to grant a variance from any provision of the regulation. Therefore, regardless of its size, it is still considered a "swimming pool" under Article IX.

18. On June 26, 2014, Bakery Living filed a Notice of Appeal in which it appealed the Department's determination on the basis that it was exempt from the lifeguard requirements under section 912.A of Article IX. (Hearing Officer Exhibit "C").

19. On December 16, 2015, the Bakery Living swimming pool was inspected by the ACHD. (Hearing Officer Exhibit "D").

20. Bakery Living did not have a lifeguard present at the swimming pool during the ACHD inspection.

21. On December 17, 2015, the ACHD issued a determination that Bakery Living was in violation of Section 912.A of Article IX of the Department's Rules and Regulations for failing to have a certified lifeguard on duty.

22. On December 23, 2015, Bakery Living filed a Notice of Appeal of the December 17, 2015 ACHD determination.

IV. CONCLUSIONS OF LAW

Under Administrative Agency law, a fact finder is required to include findings necessary to resolve issues raised by the evidence and relevant to the decision. Popowsky v. Pa. Pub. Util. Comm'n, 683 A.2d 958, 962 (Pa. Commw. Ct. 1996). The credibility and weight to be accorded evidence presented to a local agency is a determination solely within the discretion of the agency. Wilson v. City of Philadelphia, Bd. Of License & Inspection Review, 329 A.2d 908, 910 (Pa. Commw. Ct. 1974). "An agency has broad discretion under this rule in admitting or rejecting evidence." Gwinn v. Pennsylvania State Police, 668 A.2d 611, 614 (Pa. Commw. Ct. 1995).

A. TIMELINESS OF APPEAL

The ACHD requests that Bakery Living's appeal be dismissed on the basis that the appeal is untimely. The requirements for filing an appeal is set forth in Section 1104 of Article XI, "Hearings and Appeals," of the ACHD's Rules and Regulations. Section 1104.A states that the "Notice of Appeal shall be filed no later than ten (10) days after written notice or issuance of the action by which the Appellant is aggrieved." Section 1104.C further provides that "[a]ll actions of the Department shall become final ten (10) days after written notice or issuance if no appeal has been perfected within that period under the provisions of this Section."

On June 11, 2014, ACHD inspector Jeff O'Brian emailed Gregg Perelman the ACHD's determination which stated that Bakery Living "does not meet the definition, and intent, to be classified as a Condominium Pool" and, therefore, a lifeguard was required to be present at all times the pool was open. Mr. Perelman is one of only two members of the Executive Board of the Bakery Living Condominium Association. Fifteen days later, on June 26, 2014, Bakery Living filed a "Notice of Appeal" in which it appealed the ACHD's determination on the basis that it was exempt from the lifeguard requirements under section 912.A of Article IX.

Bakery Living had ten days to file an appeal from the time the "written notice or issuance of the action" by the ACHD. Bakery Living's appeal was filed four days past the deadline for filing the appeal. Accordingly, I find that because an appeal had not been perfected within ten days, the June 11, 2014 determination denying Bakery Living's lifeguard exemption and requiring it to have a lifeguard present became final on June 21, 2014. Later, on December 16, 2015, the ACHD issued a violation against Bakery Living for failing to have a lifeguard present at poolside. Because the issue of whether Bakery Living qualified for an exemption under Section 912.E had been resolved by the June 11, 2014 determination, the only basis for an appeal was whether Bakery Living had a lifeguard present during pool hours. It is undisputed that

Bakery Living did not have a lifeguard on duty at the time of the inspection. Therefore, Bakery Living has failed to meet its burden and its appeal must be denied.

Bakery Living takes issue with the ACHD waiting nearly two years until the filing of their Brief to argue that Bakery Living's June 26, 2014 appeal was untimely. Bakery Living notes that there have been several meetings between the counsel for the parties and the Hearing Officer without any indication that they would rely on this defense to dismiss the appeal. I recognize that if this matter was filed in the Court of Common Pleas, Bakery Living's waiver argument may have some validity. However, the ACHD's Rules and Regulations do not require the ACHD to file an answer or new matter to Bakery Living's appeal or the filing of preliminary objections or judgement on the pleadings. There was no requirement under the Department's Regulations to assert the defense prior to the filing of their Brief. Therefore, I find that the Department did not waive the defense that the appeal was untimely.

Bakery Living further argues that if the June 26, 2014 appeal was untimely, then the ACHD should have filed a motion to dismiss at that time and the Hearing Officer should have issued an Order dismissing the appeal as untimely. Bakery Living contends that following this procedure would have preserved its due process rights by permitting Bakery Living the opportunity to appeal the order that its appeal was untimely. Again, the Department's regulations do not require either the ACHD or the Hearing Officer to follow such a procedure. The regulations only state that if the appeal is not perfected within 10 days, then all actions of the Department shall become final. It should be noted that Bakery Living is permitted under the Local Agency Law to appeal this Order and the Hearing Officer's finding that the June 26, 2014

appeal was untimely.[3] See 2 Pa.C.S.A. § 752. Therefore, Bakery Living has not been deprived of any due process rights.

B. CONDOMINIUM EXEMPTION

I further find that even if the appeal of the June 11, 2014 determination was timely, I must still deny Bakery Living's appeal on the basis that Bakery Living is not entitled to a lifeguard exemption. Section 912.A of Article IX requires that lifeguards be on duty at the waterside at all times when a bathing place is used by swimmers. Bakery Living argues that it is not required to have a lifeguard because it qualifies for an exemption under Section 912.E. Section 912.E states that "[b]athing places owned and operated by a condominium association . . . as defined by the PA Uniform Condominium Act, for the exclusive use of residents and their guests," are exempt from the lifeguard requirements. The ACHD interprets the exemption language to only apply to condominiums in which the residents have an ownership interest in their units or have control over the management of the swimming pool. (Tr. at 57). The Bakery Living condominiums are owned by two limited partnerships. The housing units are leased to tenants who do not have any ownership interest in the swimming pool and do not have any voting rights in the Bakery Living Condominium Association. The ACHD concludes that based on its interpretation of Article IX, Bakery Living is not entitled to the exemption under Section 912.E because the Bakery Living tenants do not own their units and do not have any control over whether a lifeguard should be present at the swimming pool. The ACHD views the Bakery Living Condominium as akin to a rental apartment complex which is required to have a lifeguard present at its swimming pool.

[3] It should be further noted that in its Reply Brief, Bakery Living did not offer any evidence to dispute that Bakery Living received the ACHD's determination on June 11, 2014, and that it did not file its appeal until 15 days later on June 26, 2014. Additionally, after learning of the ACHD's timeliness defense, Bakery Living did not request an evidentiary hearing on the issue of whether the appeal was filed within ten days of the notice.

The issue before me is whether the ACHD's interpretation that the lifeguard exemption is only applicable to swimming pools owned by condominium residents should be applied. It is well established that deference must be accorded to an administrative agency's reasonable interpretation of its own regulation.[4] Port Auth. of Allegheny Cty. v. Unemployment Comp. Bd. of Review, 48 A.3d 1288, 1292 (Pa. Commw. Ct. 2012). "When considering an administrative agency's interpretation of its own regulation, courts follow a two-step analysis. 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. Commw. Ct. 2002). It is important to emphasize that "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. Envtl. Def. Ctr., 133 S. Ct. 1326, 1337 (2013) (quoting Chase Bank USA, N.A. v. McCoy, 562 U.S. 195 (2011)).

I find that the ACHD's interpretation is consistent with Article IX and is not plainly erroneous. The most significant language in Article IX in support of the ACHD's interpretation is under the definition of "Bathing Place" which states that a "bathing place shall include a ***swimming pool owned and operated by . . . the residents of a condominium***." Article IX § 903 (emphasis added). This language is clearly consistent with the ACHD's interpretation that the exemption is only applicable to swimming pools owned by the residents of the condominium.

[4] The ACHD and Bakery Living both rely on Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), to support their respective positions regarding whether the ACHD's interpretation should be followed. I do not believe that the Chevron standard is applicable in this matter. See F.T.C. v. Wyndham Worldwide Corp., 799 F.3d 236, 249-52 (3d Cir. 2015). The Chevron standard applies to an agency's interpretation of a ***statute***. In the present matter, it is the ACHD's interpretation of its ***own regulation*** that is at issue, and not of a federal or Pennsylvania statute.

The definition of "condominium" in Article IX is also consistent with the ACHD's interpretation. Article IX defines "condominium" as a "building or complex in which units of property, such as apartments, are owned by ***individuals*** and common parts of the property, such as the grounds and building structure, are owned by the unit owners." Article IX § 903 (emphasis added). Article IX does not specifically define "individual." The regulation does define "Person" to be a "natural person, ***individual***, ***corporation***, municipality, county, political subdivision, ***partnership***, association, institution, cooperative enterprise, municipal authority, Federal Government or agency, State institution, authority, agency, or any other legal entity whatsoever which is recognized by law as the subject of rights and duties." Article IX § 903 (emphasis added). The use of the term "individual," and not "person," under the definition of condominium indicates that the ACHD did not intend when it drafted the regulation that the lifeguard exemption applied to condominium units that are owned by a partnership or corporation. Further, Section 912.E states that "Section 912.C will apply to condominium and residential owners unit associations if they provide ***individuals*** at pool side identified as 'lifeguards.'" Again, the term "individual" is used in such a context that it is clearly not applicable to a business entity. Thus, the definition of "condominium" is consistent with the ACHD's interpretation that in order to be entitled to a lifeguard exemption, the condominium must be owned by the individual residents of the condominiums and not by a business entity such as a partnership or corporation.

Bakery Living argues that the ACHD's interpretation of its own regulation should not be followed because it is inconsistent with Section 912.E that exempts "[b]athing places owned and operated by a condominium association . . . as defined by the PA Uniform Condominium Act,[5]

[5] The Pennsylvania Uniform Condominium Act defines "association" simply as a "unit owners' association organized under section 3301 (relating to organization of unit owners' association)." 68 Pa.C.S.A. § 3103.

for the exclusive use of residents and their guests." I do not find that this language is inconsistent. This exemption is limited to "bathing places" which the regulation defines to "include a swimming pool owned and operated by . . . the residents of a condominium." Article IX § 903. By reading the definition of "Bathing Place" and Section 912.E together, the most logical understanding is that the exemption is limited to swimming pools that are owned by the residents who are members of a condominium association as defined by the Pennsylvania Uniform Condominium Act. Further, the language "for the exclusive use of residents and their guests" is also consistent with the interpretation that the swimming pool must only be used by condominium residents who own and operate the swimming pool.

I further find that the ACHD's interpretation is consistent with the statute under which it is promulgated. Article IX states that the "regulations are promulgated under the powers granted to counties by the Local Health Administration Law." Article IX § 900. The Local Health Administration Law provides that the Board of Health is responsible for formulating rules and regulations "for the prevention of disease, for the prevention and removal of conditions which constitute a menace to health, and for the promotion and preservation of the public health generally." 16 P.S. § 12011(c). The Court of Common Pleas of Allegheny County has held that the Board of Health "may regulate only those matters which can be shown to have a direct relationship with public health." Home Builders Assoc. of Pitts. v. Allg. Cnty Plumbing Board, 120 PLJ 343, 351 (1972).

Article IX, Section 902, states under "Statement of Policy" that "the inadequate provision for the management of bathing places, hot tubs and spas endangers the public health by causing or contributing to . . . injuries, and drowning, . . . and that the establishment and maintenance of proper management standards to control these problems are essential to the public health, safety

and welfare." It is logical that having a lifeguard present at a swimming pool is safer for the public than not having a lifeguard. Therefore, I find that the ACHD's interpretation requiring a lifeguard to be on duty at condominiums that lease their units to tenants will help prevent drownings and other injuries to the residents and is consistent with the "promotion and preservation of the public health generally."

V. CONCLUSION

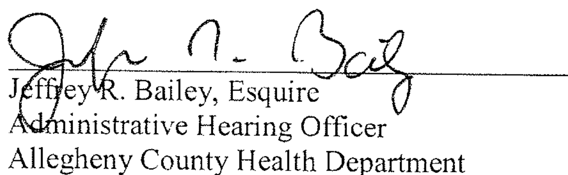
For the reasons set forth above, I find that Appellant, Bakery Living 2.0, violated Article IX, Section 912.A, of the Allegheny County Health Department's Rules and Regulations for failing to have a lifeguard present at its bathing place during the ACHD's inspection on December 16, 2015. Accordingly, I issue the following Order:

ORDER

AND NOW, on this 24th day of June, 2016, it is hereby ORDERED that the Appeal filed by Appellant, Bakery Living 2.0, for violations issued on December 16, 2015, by the Allegheny County Health Department, is DENIED.

Either party shall have the right to file an appeal to the Court of Common Pleas of Allegheny County, pursuant to Local Agency Law, within thirty (30) days of the date of the within Decision.

Date: 6/24/2016



Jeffrey R. Bailey, Esquire
Administrative Hearing Officer
Allegheny County Health Department

a. H. Grunewald Joe Hetzel D. Brown

Allegheny County Health Department

COUNTY COMMISSIONERS

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THOMAS J. FOERSTER

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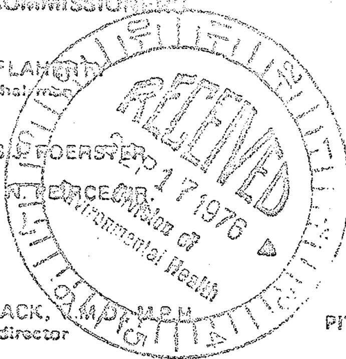
FRANK B. CLACK, V.M.D., M.P.H. director



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CYRIL H. WECHT, M.D., J.D.

September 15, 1976

Board of County Commissioners
119 Court House
Pittsburgh, Pa. 15219

Gentlemen:

The Allegheny County Board of Health at a meeting held September 14, 1976, unanimously approved amendment of Article III, Restaurants and Eating Establishments, Allegheny County Health Department Rules and Regulations, Section 304 A 6, Toilet Facilities.

The proposed amendment requires that toilet facilities for patrons be provided in all new establishments or establishments undergoing major alterations. This section is being revised to make Article II as stringent as the Pennsylvania Department of Environmental Resources regulations for food establishments. Numerous complaints have been received from consumers concerning lack of restroom facilities for the public in county restaurants.

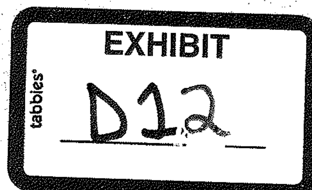
Act 315 of 1951 empowers the Board of Health to formulate rules and regulations and to submit them to the Board of County Commissioners for approval or rejection. This Act also provides written notice be given to the Secretary of the Board of Health of their approval or rejection within thirty (30) days after receipt of the rules and regulations. Enclosed is a copy of the proposed amendment to Article III, Restaurants and Eating Establishments, for your approval.

Sincerely yours,

Frank B. Clack

Frank B. Clack, V.M.D., Secretary
Allegheny County Board of Health

FBC:jdp
CC: Commissioner Jim Flaherty, Chairman
Commissioner Thomas J. Foerster
Commissioner Robert N. Peirce, Jr.



Joe Holzel

A.C.H.D.

PROPOSED REVISIONS OF

ARTICLE III, RESTAURANTS AND EATING ESTABLISHMENTS

Underlining indicates addition to existing section.

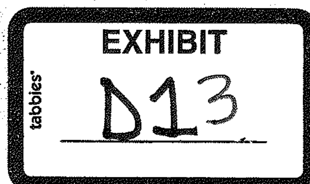
OCT. 1976

Taken directly from State Reg...

Section 304.A.6. *Toilet Facilities.* Every restaurant shall be provided with adequate and conveniently located toilet facilities for its employees. 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 and 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. Also, in restaurants hereafter constructed, toilet rooms shall not open directly into any room in which food, drink, or utensils are handled or stored. The doors of all toilet rooms shall be self-closing. Toilet rooms shall be kept in a clean condition, in good repair, and well-lighted and ventilated.

REASON: This section is being revised to make Article III, Restaurants and Eating Establishments, as stringent as the Department of Environmental Resources' Chapter 151, Food Establishments. Section 151.75 of this Rule and Regulation requires toilet facilities for patrons in "all new establishments or establishments undergoing alterations." Chapter 151 was revised in September, 1971, to provide for toilet facilities for patrons. This revision is also being requested due to numerous complaints from consumers concerning lack of restroom facilities in County restaurants.

emp
8/10/76



ALLEGHENY COUNTY HEALTH DEPARTMENT

Rules and Regulations

ARTICLE III. RESTAURANT AND EATING ESTABLISHMENTS

301. PURPOSE

This article provides for the regulation of Restaurants and Eating Establishments; setting forth definitions; requiring permits for the operation of such establishments; prohibiting the sale of adulterated, unwholesome or misbranded food or drink; regulating the inspection, grading and placarding of such establishments; providing for the examinations of employees; regulating the construction, reconstructions and alteration of restaurants; providing the schedule of fees, and, providing for penalties.

302. DEFINITIONS

The following definitions shall apply to the interpretation and the enforcement of these regulations.

A. **DIRECTOR.** The term "Director" shall mean the Director of the Allegheny County Health Department or his authorized representative.

B. **FOOD.** The term "food" shall mean articles used for consumption by humans and articles used for components thereof, but shall not include drugs or liquor.

C. **FOOD ESTABLISHMENT.** The term "food establishment" shall mean any room or place where food is prepared, cooked, mixed, baked, smoked, preserved, exposed, bottled, packed, handled, stored, manufactured, offered for sale or sold.

EXHIBIT
tabbies
D14

D. **EMPLOYEE.** The term "employee" shall mean any person who handles food or drink during preparation or serving, or who comes in contact with any eating or cooking utensils, or who is employed in a room in which food or drink is prepared or served.

E. **ITINERANT RESTAURANT.** "itinerant restaurant" shall mean one operating for a temporary period in connection with a fair, carnival, circus, public exhibition, or other similar gathering.

F. **PERSON.** The word "person" shall mean an individual, firm, corporation, partnership or association.

G. **POTENTIALLY HAZARDOUS FOOD.** "Potentially Hazardous Food" shall mean any perishable food which consists in whole or in part of milk or milk products, eggs, meat, poultry, fish, shellfish, or other ingredients capable of supporting rapid and progressive growth of infectious or toxigenic microorganisms.

H. **PUBLIC SERVICE FOOD ESTABLISHMENT.** The term "public service food establishment" shall mean food establishments serving or operating in schools, hospitals, governments, or any benevolent, educational, philanthropic, humane, patriotic, religious, scientific or eleemosynary organization which offers its services of facilities gratuitously or at a nominal rate to the public so that such services or facilities act in relief of the public burdens or for the advancement of the public good. Concessionaires operating food establishments in public service food establishments that donate all proceeds to said establishment shall be included in this definition.

I. **NONABSORBENT.** The word "nonabsorbent" shall mean any material which will not retain and is not permeable to water, other liquids, and liquified matter, especially grease and other organic materials, so as to prevent the growth of bacteria.

J. **RESTAURANT.** The term "restaurant" shall mean restaurant, coffee shop, cafeteria, short order care, luncheonette, tavern, sandwich stand, soda fountain and all other eating or drinking establishments, as well as kitchen or other placed in which food or drink is dispensed or prepared for sale elsewhere.

K. **UTENSILS.** "Utensils" shall include any kitchenware, tableware, glassware, cutlery, utensils, containers, or other equipment with which food or drink comes in contact during storage, preparation or serving.

303A. PERMITS

It shall be unlawful for any person to operate a restaurant in the County of Allegheny who does not possess an unrevoked permit from the Director. Every person in those municipalities designated by Commonwealth of Pennsylvania Department of Health under the provisions of the "Local Health Administration Law", Act 315 of August 24, 1951, P.L. 1304 as being under the jurisdiction of Allegheny County Health Department shall apply to the Allegheny County Health Department upon forms supplied the Department for a health permit.

This permit shall be good for a period of one licensing year; is not transferable; is valid for use only the person or persons owning the business establishment at the address given at the time of issuance. Such permit shall be posted in a conspicuous place. Only persons who comply with the requirements of these Rules and Regulations shall be entitled to receive and retain such a permit. A person conducting an itinerant restaurant shall also be required to secure a permit.

Such a permit may be temporarily suspended by the Director upon the violation by the holder of any of the terms of these Rules and Regulations or revoked after an opportunity for a hearing by the Director upon serious or repeated violation.

303B PERMIT FEE

Each person at the time he makes his application shall be required to pay fees applicable to his particular business as set forth in the following schedule.

1. **RESTAURANT AND ITINERANT RESTAURANTS.**

   Minimum fee of $80.00 plus $30.00 for each additional 20 seats or fraction thereof over 30 seats. Restaurants that serve alcoholic beverages shall be assessed $30.00 in addition to the previously listed fees in this subsection or other applicable fees. Bar stools shall not be counted as seats under this section. Itinerant restaurants will be assessed at fees of $25.00 per event.

2. PUBLIC SERVICE FOOD ESTABLISHMENT

   A. Complete preparation kitchen. All public service food establishments which operate a complete preparation kitchen shall be assessed a fee of $80.00 for establishments measuring 0 to 1,000 square feet; $115.00 for establishments measuring 1,001 to 2,000 square feet; $155.00 for establishments measuring 2,001 to 2,500 square feet plus $40.00 for each additional 2,500 square feet or fraction thereof, the area to be measured for the purpose of determining the fee will consist of the area in which food is prepared, cooked, mixed, baked, smoked, preserved, exposed, bottled, packed, handled, stored, manufactured, offered for sale or sold.

   B. Limited preparation kitchen. All public service food establishments which operate a limited preparation kitchen shall be assessed a fee of $15.00 for establishments measuring 0 to 200 square feet; $30.00 for establishments measuring 201 to 400 square feet; plus $15.00 for each additional 200 square feet or fraction thereof. A limited preparation kitchen shall be one which stores and handles for sale or distribution of precooked food or food prepared at another location.

   C. Fee exempt categories. Public service food establishments, as defined in this article, which are either all volunteer not-for-profit group establishments or schools, for grades one through twelve, but excluding hospitals and government agencies, shall be fee exempt.

3. In the event that the business of a person dealing in food and foodstuffs, including persons serving meals for a price and/or operators of soda fountains and bars, is not completely in the above schedule he shall pay the fee applicable to the business described above most nearly resembling the business in which he is engaged.

4. Establishments conducting more than one different category of business within the same structure, of the business described in the categories above shall pay only the highest fee applicable. Establishments conducting more than one business activity of the same category above in the same structure, shall pay a separate fee for each business activity.

5. PRO-RATING FEES

   ESTABLISHMENTS OPENING

1st Quarter	100%
2nd Quarter	75%
3rd Quarter	50%
4th Quarter	25%

   Of Total Fees

A transfer fee of $20.00 shall be charged for any change of ownership for a continuing establishment during a calendar year.

No refunds due to termination of business or temporary seasonal suspension of business shall be permitted.

6. The maximum fee for any single establishment shall be $750.00.

304. GRADING STANDARD

A. Grade A restaurant sanitation requirements.

1. Floors. The floor surfaces in kitchens, in all other rooms in which food is stored or prepared and in which utensils are washed, and dressing or locker rooms shall be smooth, nonabsorbent materials and so constructed as to be easily cleanable. The floors of non-refrigerated, dry-food storage areas need not be non-absorbent. All floors shall be kept clean and in good repair. Floor drains shall be provided in all rooms where floors are subjected to flooding type cleaning or where normal operations release or discharge water or other liquid waste on the floor. All exterior areas where food is served shall be kept clean and properly drained, and surfaces in such areas shall be finished as to facilitate maintenance and minimize dust.

2. Walls and Ceilings. Walls and ceilings of all rooms shall be kept clean and in good repair. All walls and ceilings of rooms in which food or drink is stored or prepared shall be finished in a material of light color which will not conceal the presence of dirt.

The walls of all rooms in which food or drink is prepared or utensils are washed shall have a smooth, washable surface.

3. Doors and Windows. When flies are prevalent, all openings into the outer air shall be effectively screened and doors shall be self-closing, unless other effective means are provided to prevent the entrance of flies.

4. Lighting. All areas in which food is prepared or stored or utensils are washed,

hand-washing areas, dressing or locker rooms, and garbage and rubbish storage areas shall be well lighted. During all clean-up activities, adequate light shall be provided in the area being cleaned and upon, or around equipment being cleaned. The electric lighting fixtures shall be a type which is shatter-proof and will prevent the glass from a broken bulb contaminating food.

5. Ventilation. All rooms in which food is prepared or served or utensils are washed, dressing or locker rooms, and garbage and rubbish storage areas shall be well ventilated. Ventilation hoods and devices shall be designed to prevent grease or condensate from dripping into food or onto food preparation surfaces. Filters, where used, shall be readily removable for cleaning or replacement. Ventilation systems shall comply with applicable State and local fire prevention requirements and shall, when vented to the outside air, discharge in such manner as not to create a nuisance.

6. Toilet Facilities. Every restaurant shall be provided with adequate and conveniently located toilet facilities for its employees. In restaurants constructed after Oct, 4, 1976 or under going alterations, toilet facilities including handwash sinks, separate for each sex, shall be provided on the premises for patrons and shall be located so as not to require patrons to pass through any food preparation area. Toilet facilities need not be installed for the patron whenever food is not consumed within an eating or drinking place or when only carryout food is provided. Also, in restaurants constructed after Oct. 4, 1976, toilet rooms shall not open directly into any room in which food, drink, or utensils are handled or stored. The doors of all toilet rooms shall be self-closing. Toilet rooms shall be kept in a clean condition, in good repair, and well-lighted and ventilated.

7. Water Supply. The water supply shall be adequate, of a safe, sanitary quality, and from an approved source. Hot and cold running water, under pressure, shall be provided in all areas where food is prepared, or equipment, utensils, or containers are washed.

   Water, if not piped into the establishment, shall be transported and stored in approved containers, and shall be handled and dispensed in a sanitary manner.

   Ice used for any purpose shall be made from water which comes from an approved source, and shall be used only if it has been manufactured, stored, transported, and handled in a sanitary manner.

8. Hand-Washing Facilities. Each food-service establishment shall be provided with adequate, conveniently located hand-washing facilities for its employees, including a lavatory or lavatories equipped with hot and cold or tempered running water, hand-cleansing soap or detergent, and approved sanitary towels or other approved hand-drying devices. Such facilities shall be kept clean and in good repair. No employee shall resume work after using the toilet room without first washing his or her hands. Such facilities shall be convenient to the food preparation area.

9. Construction of Utensils and Equipment. All multi-use utensils and all show and display cases or windows, counters, shelves, tables, refrigerating equipment, sinks and other equipment or utensils shall be kept in good repair. All equipment and utensils used in connection with the operation of a restaurant shall be so constructed as to be easily cleaned and shall conform to the National Sanitation Foundation Standards, a copy of which is on file in the office of the Health Department of' Allegheny County. Utensils containing or plated with cadmium or lead shall not be used; provided, that solder containing lead may be used for jointing.

10. Cleaning and Bactericidal Treatment of Utensils and Equipment. All equipment, including display cases or windows, counters, shelves, tables, refrigerators, stoves, hoods, sinks, and non-food contact surfaces, shall be kept clean and free from dust, dirt, insects, and other contaminating material. All cloths used by waiters, chefs, and other employees shall be clean.

    All eating and drinking utensils shall be thoroughly cleaned and sanitized after each usage.

    All kitchenware and food-contact surfaces of equipment exclusive of cooking surfaces of equipment, used in the preparation or serving of food

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Includes all Amendments to 1/93