

ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARING

THAI BELLIES' BUDDY LLC, on	:	In Re: Thai & Noodle Outlet
behalf of THAI & NOODLE	:	
OUTLET;	:	Docket No. ACHD-19-017
	:	
<i>Appellant,</i>	:	<u>Copies Sent To:</u>
	:	<i>Representative for Appellant:</i>
v.	:	Suriyachat Laohapattanalert
	:	President
ALLEGHENY COUNTY HEALTH	:	Thai & Noodle Outlet
DEPARTMENT,	:	5813 Forbes Avenue
	:	Pittsburgh, PA 15217
<i>Appellee.</i>	:	
	:	<i>Counsel for Appellee:</i>
	:	Vijya Patel, Esq.
	:	ALLEGHENY COUNTY HEALTH
	:	DEPARTMENT
	:	301 39 th Street, Building 7
	:	Pittsburgh, PA 15201

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

I. INTRODUCTION

This case concerns the denial of a seating and toilet room variance to a Thai Restaurant in Squirrel Hill. Appellant Thai Bellies' Buddy LLC ("Appellant") owns the restaurant Thai & Noodle Outlet at 5813 Forbes Avenue, Pittsburgh, PA. In 2017, the previous owner of the restaurant at 5813 Forbes Avenue applied for and received a variance from the Allegheny County Health Department's ("ACHD" or "Department") Rules and Regulations concerning seating capacity and the number of toilet rooms required. The variance allowed the previous owner to have 20 seats for customers and a single unisex toilet room in the basement. The Department

noted in its granting of the previous owner's variance that the variance is not transferrable if the facility changes ownership.

After Appellant took ownership, they applied for a similar variance—20 seats and a single unisex toilet room in the basement. In April of 2019, the Department denied Appellant's request for a variance.

Appellant appealed, arguing that the previous owner received a variance, Thai & Noodle Outlet serves similar food, has the same menu, and has kept the same employees as the previous owner, and that lowering the number of seats from 20 would imperil Appellant's ability to stay in business.

This tribunal finds that Appellant has failed to meet its burden of proving by a preponderance of the evidence that the ACHD wrongly denied its request for a variance. Therefore, Appellant's appeal is **DISMISSED**.

II. EVIDENCE

Pursuant to ACHD Rules and Regulations, Article XI § 1105.A.2, the parties in this matter agreed to waive their right to a hearing. Therefore, no evidence was presented in this matter.

III. FINDINGS OF FACT

The following facts are established:

- 1) On April 4, 2017, the Department granted a variance from ACHD Rules and Regulations, Article III (Food Safety) §§ 315 and 316.1.C and D to Thai Noodle Outlet LLC (the "Former Owner"), the entity that owned Thai Noodle Outlet, the restaurant that was previously at Appellant's location—5813 Forbes Avenue, Pittsburgh, PA 15217.¹ (*ACHD Position Statement, Ex. A*).

¹ The name of the current restaurant at 5813 Forbes Avenue, owned by Appellant Thai Bellies' Buddy, LLC, is "Thai & Noodle Outlet." The previous restaurant, which was owned by the entity Thai Noodle Outlet LLC, was called "Thai Noodle Outlet."

- 2) This variance granted the Former Owner their request to have 20 seats in the restaurant with access to only one unisex toilet room. This deviated from Article III's requirements that separate toilet rooms be provided for each sex, and that toilet rooms not be accessible through food preparation areas. (*Id.*).
- 3) On March 25, 2019, Appellant applied for a Health Department Permit from the ACHD. Appellant also requested a variance to have seats for 20 patrons with 4 employees present per shift, and to have only one toilet room available in the basement. (*ACHD Position Statement, Ex. B*).
- 4) On April 9, 2019, ACHD Food Safety Program Manager Donna Scharding ("Ms. Scharding") denied Appellant's variance request. However, in her letter to Appellant denying the request, Ms. Scharding indicated, "Should you desire to alter the conditions of your request, such as reducing your total occupancy to '15' (number of seats plus number of employees), a new written request is required and may be submitted for review." (*ACHD Position Statement, Ex. C*).
- 5) On May 2, 2019, Appellant appealed the ACHD's denial of its variance request, contending that the Former Owner received a variance for 20 seats, that the menus and employees remained the same even after Appellant took over the business from the Former Owner, that patrons would likely stay at the restaurant to eat for only about 20 minutes, and that Appellant's business would not survive if they had to reduce the number of seats. (*Appellant's Appeal*).
- 6) On November 11, 2019, Appellant filed its position statement, reiterating the main points of its May 2, 2019 Letter. Appellant stated:

"I am requesting a minimum of 20 seats at my restaurant. When I purchased this restaurant[, i]t was approved for 20 seats. We need to fill this small restaurant to its capacity in order to make ends meet. Turning away customers would hurt our business. 15 seats are not enough. Nothing has changed from the previous owner to now except for the seating capacity. Not allowing us the chance for a successful business would be unjust. Please allow us a chance of having a successful business."

(Appellant's Position Statement).

- 7) On December 6, 2019, the Department filed its position statement, contending that the ACHD's Rules and Regulations concerning variances gives the Department unrestricted authority to grant variances, and that Appellant does not point to any authority indicating that the ACHD was in the wrong when it denied Appellant's variance request. (*ACHD Position Statement* at 1-2).

IV. DISCUSSION

A. Burden of Proof

According to ACHD Rules and Regulations, Article XI § 1105.C.7.b.i, the party appealing an action of the ACHD bears the burden of proof when the ACHD denies a license, permit, approval, or certification. Here, Appellant requested a variance of the customer seating and toilet room requirements in ACHD Rules and Regulations, Article III (Food Safety) ("Article III") §§ 315 and 316.1.C and D. The ACHD denied this variance request. Therefore, to prevail in its appeal, Appellant must prove by a preponderance of the evidence that the ACHD erroneously denied the variance request.

B. Relevant Regulations

Article III, § 315 provides, "Plumbing shall be properly maintained and installed according to the Allegheny County Health Department Plumbing Code." Article III, § 316.1.C provides in relevant part, "Toilet rooms, separate for each sex, shall be required for patrons in food facilities where seating is provided." Article III, § 316.1.D provides, "Toilet rooms for patrons cannot be accessed through food preparation or food storage areas."

Regarding variances, Article III § 337.3 provides, “The Director [of the ACHD] may grant variance or conditional variance from any of the requirements of this regulation if the Director so determines that the granting of such variance poses no real or potential hazard to the health, safety, or welfare of the public.”

C. Appellant’s Arguments in Support of Its Variance Request

In its appeal, Appellant’s President, Suriyachat Laohapattanalert, lists four reasons why the ACHD should have granted his request for a variance to have 20 seats and a single unisex toilet room:

“1. When I bought the restaurant[, the] previous owner showed me that [s]he got [a permit for 20 seats...]

2. I just ke[pt] Thai Noodle Outlet[‘s] name, [m]enus and all [e]mployees[. N]othing change[d]. I [j]ust changed owner name and company name. I[t] does not make sense to reduce seats.

3. We sell Thai street food that takes around 5 minutes to prepare. Patrons will stay around 20 minutes to eat[,] not like a fine dining restaurant[. T]hat means [p]atrons will not stay long like formal restaurant’s.

4. I have to pay restaurant rent and pay all of my employees[. I]f the seats are reduce[d,] sales will drop. If our sales drop, then my business would not survive.”
(Appellant’s Appeal).

Appellant’s position statement essentially restates these four points.

Appellant’s argument falls short for several reasons. First, the variance granted to the Former Owner explicitly states that the variance is not transferable if the facility changes ownership. *(ACHD Position Statement, Ex. A)*. Second, the variance regulation that is applicable here gives vast discretion to the Department in denying or approving a variance. It states, “The Director *may* grant variance or

conditional variance from any of the requirements of this regulation if the Director so determines that the granting of such variance poses no real or potential hazard to the health, safety, or welfare of the public.” Art. III § 337.3 (emphasis added). The operative word here is *may*, which gives the Department wide discretion to deny or approve a variance. It does not *require* the Department to grant a variance. And, as the Department points out, Appellant “does not point to any authority that grants a food facility the unrestricted right to adopt the variance conditions of a *previous* owner. (*ACHD Position Statement* at 2 (emphasis in original)).

Appellant does not cite any authority for its position that the ACHD wrongly denied a variance here. Pennsylvania courts have long held that agency actions are generally valid unless they are “arbitrary and capricious.” In order for an action to not be arbitrary and capricious, the agency or its officials “must examine the relevant data and articulate a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made. In reviewing that explanation, [the court] must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment[.]” *In re: Appeal of the Board of Auditors of McKean Twp.*, 201 A.3d 252, 260 (Pa. Commw. Ct. 2018) (quoting *Cary v. Bureau of Professional and Occupational Affairs, State Bd. of Medicine*, 153 A.3d 1205, 1210 (Pa. Commw. Ct. 2017) (en banc) (internal citations omitted).

Here, Appellant has the burden of proof, and points to nothing indicating that the Department made any clear error of judgment or failed to “establish a

rational connection between the facts found and the choice made.” Therefore, this tribunal upholds the Department’s denial of a variance to Appellant.

As an additional point, the April 9, 2019 letter from Ms. Scharding, denying Appellant’s variance request, stated that if Appellant revised its request to possibly reduce its total occupancy to 15, this request “may be submitted for review.” Ms. Scharding also clarifies that the variance denial “applies only to the conditions identified in your request for the subject facility.” (*ACHD Position Statement*, Ex. C). These statements suggest that the Department may be open to working with Appellant on a revised seating and toilet room plan.

V. CONCLUSION

This tribunal finds that Appellant has failed to meet its burden of proving by a preponderance of the evidence that the ACHD wrongly denied its request for a variance. Therefore, Appellant’s appeal is **DISMISSED**. This decision may be appealed to the Court of Common Pleas of Allegheny County, Pennsylvania.



Max Slater
Administrative Hearing Officer
Allegheny County Health Department

Dated: January 6, 2020