

IN THE MATTER OF
MILDRED ZIOMECK AND
PHILIP TAGLIAFERRI-APPELLANT/
RESPONDENT
17052 TROYER ROAD

RE: Civil Citation No.: 59731

* BEFORE THE
* COUNTY BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. CBA-10-004

* * * * *

OPINION

This matter comes before the Board of Appeals for Baltimore County (the "Board") as a Record Appeal from Code Enforcement Hearing Officer's June 22, 2009 decision regarding a Code Enforcement Violation at 17052 Troyer Road in which the property owners were found to have failed to cease and desist provided seating for an excess of (8) eight people at the eating establishment located on the premises. The property owners were fined \$1,000.00 (one thousand dollars).

BACKGROUND

As this case comes before the Board as a Record Appeal, the Board's review of the Hearing Officer's decision is solely based on the audio record of the June 10, 2009 Code Enforcement Hearing that the Board was provided and the oral argument presented before the Board at September 9, 2009 Appeal Hearing.

As was testified to at the Code Enforcement Hearing, on May 11, 2009, pursuant to § 3-6-205 of the Baltimore County Code, Inspector Robyn Clark issued a Code Enforcement & Inspections Citation to the owners of 17052 Troyer Road. The citation involved the alleged improper use of the property as a restaurant without the benefit of a change of occupancy permit. The business operated at the property is known as the Painted Pig Café and Consignment.

Testimony was given by Robyn Clark and the business owner, Philip Tagliaferri, stating that the business included a consignment shop, tack store, and a deli.

Inspector Clark testified that when she inspected the property she found (12) twelve seats for patrons inside the building. She also noted picnic tables outside that could also be used for seating. Photographs were admitted into evidence illustrating the table set up inside the premises as well as the tables outside.

Mr. Tagliaferri testified that there are (8) eight chairs inside the premises, plus a picnic table and chairs outside. He also stated that the extra tables outside were for sale as part of the business's consignment operation, and that some have been sold since Inspector Clark's inspection of the premises.

Present in the Board's file is a June 5, 2009 letter from County Building Engineer Donald E. Brand to Mr. Tagliaferri informing him that until the County approves an occupancy classification allowing a restaurant his premises could not be utilized for food consumption for more than (8) eight seats. Inspector Clark's May 11, 2009 citation referenced a December 26, 2006 letter from Mr. Brand that does not exist in the Board's file, however a December 27, 2006 letter does exist from Mr. Brand to Mr. Howard Alderman, Mr. Tagliaferri's former attorney.

BOARD'S OPINION

Although this case comes before the Board as a Record Appeal, the burden to prove the alleged violation is still on the County during the hearing before Code Enforcement Hearing Officer. The Appellants in this matter have been cited with violating BCZR (230), "Use of property as a restaurant without the benefit of a change of occupancy permit". As previously explained, this alleged violation is premised on the assumption that not more than (8) eight seats

for food consumption are allowed in the Appellants' place of business at 17052 Troyer Road. This point is referenced in the letters from Mr. Brand, but no testimony was given by Mr. Brand or any other witness as to how the number "8" was determined, nor is any statutory authority noted creating such a limit. As it is the County's burden to prove each element of an alleged violation, it appears that that it has failed to adequately establish the underlying premise of the violation.

Assuming arguendo that the Board can take judicial notice of the premise that no more than (8) eight seats for food consumption may be present in the Appellants' place of business, Mr. Tagliaferri bases his appeal on BCC § 3-6-304 (a)(3)(iv) that states that the Board of Appeals may "reverse or modify the final order if a finding, conclusion, or decision of the Code Official, the Director, or Hearing Officer . . . is unsupported by competent, material and substantial evidence in light of the entire record as submitted . . .". The Appellants' argument is based on the testimony and photographic evidence that was admitted before the Hearing Officer that they contend proves that they were not in violation of exceeding the (8) eight-person seating limit.

The Appellants argue the point that no evidence was presented during the hearing showing that more than (8) eight persons were ever dining at their place of business. The County correctly rebutted this point by noting that it is the amount of seating present, not the amount of patrons that initiated the citation.

The most compelling evidence presented before the Hearing Officer was the photograph taken by Inspector Clark on the day that the citation was issued. As noted by the Hearing Officer, Inspector Clark's photographs clearly show the amount of available seating, however the Board cannot agree with the Hearing Officer's finding of fact as to how many "seats" are shown

in the picture. First, as the purpose for setting occupancy limits is to guarantee the safety of patrons inside a place of business, this Board is primarily concerned with the seating available inside the building at 17502 Troyer Road. The Hearing Officer determined that since four tables square tables were shown in the picture, (12) twelve available seats existed in the premises. The Hearing Officer made this calculation while noting that only (8) eight actual chairs were shown in the picture and by inferring that additional chairs could possibly be placed at these tables. By relying on what is actually depicted in the photographic evidence presented, this Board finds that a conclusion that seating for (12) twelve existed while there are only (8) eight chairs depicted in the photographs is unsupported by the evidence submitted.

CONCLUSION

Based the findings stated above, the Board finds that the Code Enforcement Hearing Officer's June 22, 2009 decision in this matter was unsupported by competent, material and substantial evidence and is therefore is REVERSED.

ORDER

THEREFORE, IT IS THIS 24th day of September, 2009 by the
County Board of Appeals of Baltimore County

ORDERED that the June 22, 2009 decision of the Code Enforcement Hearing Officer be and the same is hereby **REVERSED**; and it is furthered

ORDERED that the Violation and fine issued by the Code Enforcement Hearing Officer in Citation Number 59731 be and the same is hereby **DISMISSED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY**

Lawrence Stahl /kc
Lawrence M. Stahl, Panel Chair

Andrew M Belt /kc
Andrew M. Belt

Edward W. Crizer Jr /kc
Edward W. Crizer, Jr.

with permission as
to all.