IN THE COMMONWEALTH COURT OF PENNSYLVANIA

901 Pub, Inc.	:	
Petitioner	:	
	:	
v.	:	No. 876 C.D. 2013
	:	Argued: December 9, 2013
Department of Health, Bureau of	:	
Health Promotion and	:	
Risk Reduction	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge (P.)
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: January 6, 2014

The 901 Pub, Inc. (Applicant) petitions for review of an order of the Department of Health (Department) upholding the decision of the Department's Bureau of Health Promotion and Risk Reduction (Bureau) to deny its application for an exception to the Clean Indoor Air Act (Act)[1] as a Type II Drinking Establishment. For the reasons that follow, we reverse and remand to the Department for further proceedings consistent with this Opinion.

[1] Act of June 13, 2008, P.L. 182, 35 P.S. §§637.1–637.11.

Applicant is a restaurant and bar located at 1639 Sunbury Road in Pottsville, Pennsylvania. On September 10, 2008, Applicant submitted an application to the Department requesting an exemption for its bar area from the Act's general prohibition against smoking in a public place[2] on the basis that the bar area qualifies as a Type II Drinking Establishment. One of the requirements to be considered as a Type II Drinking Establishment is that the establishment has an enclosed area on the effective date of the Act. After the Bureau conducted an on-site inspection, it issued a report which stated, *inter alia*, that the establishment's bar area is adjacent to but separated from its restaurant area; the bar and restaurant areas have separate outside entrances and ventilation systems; there are two sets of bathrooms and a kitchen in the area between the bar and restaurant; patrons and employees must go through an "air curtain" system installed above an open doorway in order to access the kitchen or bathrooms from the bar area; and the establishment has the appropriate signs posted. (Reproduced Record (R.R.) at 19a-20a).

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[2] Section 3 of the Act, 35 P.S. §637.3, provides, in relevant part:

> **(a) General rule.--**Except as set forth under subsection (b), an individual may not engage in smoking in a public place. Nothing in this act shall preclude the owner of a public or private property from prohibiting smoking on the property.
>
> **(b) Exceptions.--**Subsection (a) shall not apply to any of the following:
>
> ***
>
> (10) A drinking establishment.

After initially denying the application for another reason, in March 2010, the Bureau again denied the application for the exception because Applicant's bar area is not fully enclosed.[3] Applicant appealed the denial to the Department, arguing that the air curtain door effectively encloses the bar room and confines smoke to that area and, alternatively, that it should be allowed to replace the air curtain with a conventional door if the air curtain is insufficient. In support of its appeal, Applicant submitted a DVD containing a 51-second demonstration of the air curtain system, as well as additional printed information about the device.

The Department, through the Deputy Secretary for Administration, issued a final agency determination upholding the Bureau's decision. The Department explained that while the stream of compressed air from the air curtain may stop smoke from entering the non-smoking area, it "does not create an 'enclosed area' which seals off the smoking area from the non-smoking area." (Department's April 25, 2013 Final Determination at 12). The Department expressed concern that the air curtain would be insufficient to "enclose" the smoking area when it is turned off at closing time or in the event of a malfunction, and further explained that even if the device effectively restricts smoke from entering the non-smoking section, it provides easy access to and an unobstructed view of the smoking area to children

[3] The Bureau previously denied the application on October 29, 2009, on the basis that food consumed in the smoking area was greater than 20% of combined annual gross sales. However, Applicant requested reconsideration of that decision and submitted revised sales projections to the Bureau. While the Bureau's March 19, 2010 denial does not specifically state that Applicant met the sales requirements, the Department ultimately concluded, based on the record, that Applicant satisfied those requirements and did not consider the issue. (*See* Department's April 25, 2013 Final Determination at 3 n.3).

under the age of 18. The Department also rejected Applicant's alternative argument that it should be permitted to replace the air curtain with a conventional door, explaining that "an existing establishment cannot be renovated to meet the criteria for a Type II Drinking Establishment after September 11, 2008."[4] (*Id*. at 14 (citing *Moonlite Café, Inc. v. Department of Health*, 23 A.3d 111, 1116 n.7 (Pa. Cmwlth. 2011)). This appeal followed.[5]

The central issue in this appeal is whether an "air curtain" installed in the doorway of Applicant's bar area satisfies 35 P.S. §637.2(2)(ii)'s requirement that the area around that portion of the establishment be "enclosed" so that Applicant's premises qualifies as a Type II Drinking Establishment. Applicant contends that it meets that requirement because an air curtain effectively "encloses" the smoking area and is more effective than a physical barrier in preventing smoke from being released into the non-smoking area. Applicant asserts that in denying the application, the Department improperly focused on the structure of the bar room's enclosure rather than on the high degree of effectiveness of the air curtain. Moreover, Applicant contends that because there are disputed issues of fact as to the effectiveness of the air curtain, it was entitled to an evidentiary hearing to resolve that issue.

The Act does not define the term "enclosed area." In *Moonlight Café*, however, we held that the Department's interpretation of the phrase "enclosed area"

[4] The Act went into effect on September 11, 2008.

[5] Our review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law, and whether necessary findings of fact are supported by substantial evidence. *Sal's Restaurant, Inc. v. Department of Health, Bureau of Health Promotion and Risk Reduction*, 67 A.3d 57, 59 n.5 (Pa. Cmwlth. 2013).

in the Act as "an area surrounded on all sides" was reasonable and not inconsistent with the Act. 23 A.3d at 1116. In that case, we concluded that the establishment's bar area was not enclosed for purposes of the Act because it was connected to the dining area by a hallway which did not contain doors or other partitions physically separating the two areas. In *Sal's Restaurant*, we also held that an enclosed area must be "surrounded on all sides." 67 A.3d at 60. In that case, we held that the establishment's bar area was not enclosed where the bar area and dining room were separated by a hallway, but there was only a set of swinging "saloon" style doors between the bar area and the hallway rather than a solid floor-to-ceiling door.

Applicant argues that *Moonlight Café* and *Sal's Restaurant* are distinguishable from the instant matter because the establishments in those cases did not have an effective barrier in place to impede secondhand smoke from exiting their bar rooms, while here, the air curtain utilized by Applicant "creates a ceiling to floor barrier to effectively keep the smoke from entering outside that area." (Petitioner's Brief at 16). In essence, what Applicant is arguing is that "enclosed" does not mean a physical enclosure.

Although *Moonlight Café* and *Sal's Restaurant* held that an area is "enclosed" when it is "surrounded on all sides," those cases stopped short of stating that an enclosed area must be surrounded on all sides by a permanent physical barrier, especially in an area with a door which opens or closes, where there is always going to be a certain amount of "seepage" between the smoking and non-smoking area. Here, in finding that Applicant's bar area was not enclosed, the Department focused primarily on the problems that may arise when the air curtain is not functioning such

as at closing time or in the event of a malfunction. However, the Department made no factual findings with respect to Applicant's operation of the air curtain or the device's effectiveness or reliability, making those concerns speculative and not based on substantial evidence. Moreover, the Department expressed concerns, though at oral argument admitted that they were not determinative, over the air curtain's ineffectiveness in preventing minors in the establishment from easily accessing or looking into the bar area. However, those concerns would still exist if there was a permissible floor-to-ceiling glass door.

Because we find none of the Department's reasons for denying the application here to be compelling, we find no reason to conclude that a door area must be surrounded on all sides by a *physical* barrier. The key inquiry here is whether the air curtain device utilized by Applicant is as effective as a door in preventing smoke from entering the establishment's non-smoking areas.

Accordingly, the Department's Final Determination is reversed and the matter is remanded to the Department for a hearing on the effectiveness of the air curtain utilized by Applicant.

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DAN PELLEGRINI, President Judge

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O R D E R

AND NOW, this 6th day of January, 2014, the Final Determination of the Department of Health, dated April 25, 2013, at Docket No. CIAA APP 005-2010, is reversed. The matter is remanded to the Department for a hearing on the effectiveness of the air curtain utilized by Petitioner.

Jurisdiction relinquished.

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DAN PELLEGRINI, President Judge