

Special Report

**CONDITIONAL USE HEARING PROCESS:  
1635 WEST CARSON STREET**

Report by the  
Office of City Controller

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June, 2010

July 12, 2010

To the Honorables: Mayor Luke Ravenstahl  
And Members of Pittsburgh City Council,

The Office of City Controller is please to present this examination of the Planning Commission hearing process and specifically the missed hearing regarding the Marquis Adult Entertainment Club on West Carson Street.

A conditional use decision by the Zoning Board of Adjustment requires a public hearing by City Council within 45 days. In this case, the hearing was never scheduled, adversely affecting both the ability of City Council and the community to express its voice regarding the zoning use.

Our examination showed that while the missed hearing was undoubtedly caused by human error along the line, it is difficult to pinpoint exactly where the process ran aground. But the major cause isn't human error as much as the procedure applied.

The major cause of delay was a delayed notification to City Council of the ZBA decision, caused by a paperwork problem. However, the City Code does not require the paperwork to trigger the hearing; the decision starts the clock. Secondly, City Council should be the first department notified of the decision, not the last as currently practiced.

We hope that this examination is satisfactory to the President and Members of City Council, and results in an improved operation in the future.

Sincerely,

Michael E. Lamb  
City Controller

## **1635 West Carson Street Adult Club Conditional Use History**

On November 18, 2008, the City Planning Commission unanimously delivered a negative recommendation to a conditional use application for Sonnynick Inc., which wanted to use a vacant property at 1635 West Carson Street as an adult entertainment club.

This action should have triggered a City Council public hearing and vote, according to City Code section 922.06.D.1. Council had 45 days after the Planning Commission decision to schedule a hearing, and 45 days afterward to vote on the conditional use status.

A public hearing should have been scheduled by January 2, 2009, and a City Council vote held by February 16, 2009.

But because notice of the required hearing was not received by the City Clerk, no hearing was ever scheduled. This resulted in a de facto denial, as specified in the same Code section, and that decision was appealed by Sonnynick to Common Plea Court.

Judge Joseph James received the appeal in January of 2009, and on March 9<sup>th</sup> ordered the City to hold its required hearing.

A conversation was held between Law and the Clerk's Office on March 12<sup>th</sup>, requesting Planning's paperwork, as required to schedule the hearing. However, there was a considerable lag until the paperwork found its way to City Council. Law asked the City Clerk for a status report on June 12<sup>th</sup>, and found that the paperwork had not been received (although the Clerk cannot verify receipt of the request). The paperwork reached City Council on July 29<sup>th</sup>.

The cause of this delay is a matter of conjecture. The City Clerk and City Council were awaiting action from the Law department. The principals, City Solicitor George Specter and Assistant Solicitor Lawrence Baumiller, are no longer working for the City, and so were unavailable for interview. There are conflicting versions of when Law provided the Clerk/Council with the necessary documents, so this time period remains speculative.

The legislation to schedule the public hearing wasn't introduced until August 3 and approved after recess, on August 28. The public hearing was set for October 6, but Judge James had set a prior Common Pleas deadline that made the proposed hearing moot. Members of City Council and the City Clerk have stated they were unaware that there was a pending cut-off date. While there was never any official notice to Council from the Law department of the cut-off date, it appears that there was some informal communication between the law department and various members of council and/or staff as to the Common Pleas deadline.

In December of 2009, Judge James ruled that there was no legal basis to deny the application, and overruled the Planning Commission by allowing Sonnynick Inc., the

property owner, to open its club, which would be operated by Marquise Investments. The City has appealed the decision.

He explained his decision by stating that the appellants met the criteria presented in the City Code. This is the area where a hearing and Council action would have bolstered the City's conditional use denial, or at least added stipulations to help mitigate the decision.

The most actionable community concern involved traffic, and Council could have placed conditions requiring a traffic study and the need for a stoplight that could have placed additional financial and timing burdens on the appellants. Of course, this strategy runs the risk that the developer could meet the condition and thereby be approved.

It also could have been argued in Council that the conditional use violated other Code requirements, as the Planning Commission had ruled, placing conditions of occupancy on the appellant and adding weight to the Law Department's argument against conditional use.

Beyond the legal ramifications, this process also denied the community a voice in the proceedings. Community input is critical to the public decision making process and the lack of a true public forum for this issue left many community concerns unaddressed. The community concerns that were raised, likely had less impact.

Adding further harm is the fact that the council seat for the district in which the subject property is located sat vacant for much of the time that this process was underway. From the date of the original Planning Commission recommendation in November, 2008, through the date the public hearing should have been scheduled in January of 2009, Council District 2 went without representation. It is probable that community pressure on the local council member, had there been one, would have ensured the proper scheduling of the council public hearing.

### **City Conditional Use Procedure**

The following conditional use procedure was provided by former Assistant City Solicitor Lawrence Baumiller:

- All conditional uses follow the same process. After the conditional use application is complete, a public hearing is scheduled before the Planning Commission. Certain parties must be given at least 21 days notice of the hearing, as specified in Zoning Code § 922.06.B. City Planning sends out the agenda for the Planning Commission by e-mail, and City Council is on the mailing list.

- There is a public hearing before the Planning Commission on the application for the conditional use, and the Planning Commission is required to render its decision within 45 days of the hearing. The Planning Commission can approve, approve with conditions, approve in part, or deny the request, per Zoning Code § 922.06.C.
- After the Planning Commission makes its decision, Planning must put together a packet of the minutes from the hearing, the zoning administrator's report and recommendation, and the conditional use application. The paperwork is not explicitly set forth in the Code, but is a procedure that has evolved over time.
- The packet is sent to the City Solicitor to review, and then the packet is forwarded to the Office of Management and Budget (OMB). This is also not specified by the Zoning Code, but a practice that has been established over time.
- The Office of Management and Budget submits the packet to the Mayor's Office, which sends it to City Council as part of the Mayor's weekly legislative agenda.
- City Council is required to hold a public hearing on the conditional use application within 45 days of the Planning Commission's recommendation. Then within 45 days of City Council's public hearing, City Council must act on the conditional use application, per Zoning Code § 922.06.D.1.
- If the Planning Commission gave a conditional use application a negative recommendation, City Council approval requires an affirmative vote of a supermajority of seven members, according to Zoning Code § 922.06.F. The supermajority requirement is the only difference between applications receiving positive and negative recommendations from the Planning Commission. A positive recommendation requires only a simple majority to pass City Council.
- The basis for an appeal from City Council's decision is found in the Pennsylvania Local Agency Law, 2 Pa.C.S. § 751-754. While City Council is primarily a legislative body, it acts in a quasi-judicial adjudicative capacity when deciding conditional use applications. Thus, an adjudication may be appealed to the Court of Common Pleas.
- The basis for the appeal of an aggrieved applicant is that the applicant has met all of the objective criteria in the Zoning Code, and so City Council made an error in denial or that the Zoning Code itself is facially invalid.

## **City Council Conditional Use Procedure**

Linda Johnson-Wassler, Chief Clerk, provided City Council's part of the procedure:

- All legislation coming from the departments is sent to and reviewed by OMB and then put on the Mayor's agenda for presentation by Council.
- The Mayor's office sends the legislation and Mayor's agenda to City Clerk/City Council by noon Friday. The Clerk's office then distributes the Mayor's agenda to City Council that day and inputs legislation received from the Mayor's office in Legistar in order to generate City Council's Regular Meeting agenda so that these bills can be introduced the following Tuesday.
- This Council agenda is also posted on Council's website under the Legislative Information Center (LIC) icon for the public by no later than Tuesday morning prior to the 10:00 A.M. meeting of Council.
- Once introduced, the bill is then scheduled for the Standing Committees Meeting agenda the following week.
- The bill is then motioned for a public hearing which is scheduled by the President of Council. A letter is sent to notify City Planning of the hearing date and invite to attend the public hearing.
- After the hearing the bill is referred back to the next Standing Committees Meeting agenda for preliminary vote and then on to the Regular Tuesday Meeting of Council agenda for final vote.
- If the bill receives final vote of Council, it is sent to the Mayor's office for his signature, which he has up to 10 days to sign. It is then sent back to the Clerk's office for advertising and certification.

## **The Current Process**

The process currently in place, is that once Planning Commission reaches its decision, no matter what the outcome, Council must hold a hearing and vote on any conditional use application within 90 days. That triggers the following paper route:

Planning puts together the case paperwork packet after the decision, and sends it to the Law Department for its review. Law then sends it to the Office of Management and Budget, which submits it to the City Clerk for Council action scheduled through the Mayor's Office with other housekeeping legislation. There are several potential bottlenecks in this legislative journey.

The Clerk's Office receives the legislation electronically. The only other documentation required electronically is the legislative summary, which is also provided by the Mayor's office. All supporting documentation is sent as hard copy.

If any paperwork is missing, the Clerk's Office will request and normally receive the information prior to the legislation's introduction, so the legislation is rarely delayed. The cover letter that is a required part of any packet is often dated well before the information is received by the Clerk, providing a starting point for the Planning paperwork trail.

The 45-day clock begins as soon as Planning makes a decision; information must then be compiled and go through four or five different City government offices. The two offices with Code responsibilities, the Law department and City Council, mark the beginning and end of the paperwork process when they should both be involved from the start.

### **Findings and Recommendations**

**Finding:** The transfer of the Planning documentation package between the Law department and the City Clerk's Office was a major factor in the failure to schedule a hearing in a timely manner.

**Finding:** The documentation packet, even though not required by City Code, contains pertinent information and is properly part of the decision-making process. However, it is not the trigger to starting the hearing clock.

**RECOMMENDATION #1:** The Planning Commission should notify the City Clerk's Office once a decision that requires a City Council hearing is reached. The decision is the event that starts the countdown date to the hearing process, not the receipt of the documentation package, which is not required by City Code.

The City Clerk could then schedule the hearing on the City Council Hearings agenda.

**Finding:** The documentation package is hard copy while the legislative schedule is electronic. This could lead to the loss or delay of a complete Planning package along the process, which involves at least four City offices.

**RECOMMENDATION #2:** Prepare the entire documentation packet electronically. This would improve the pace of the process, help insure the integrity of the packet and prevent the loss of documentation or delays in forwarding among offices.

**RECOMMENDATION #3:** A complete electronic packet should be sent to the Law department and copied to the other involved parties concurrently to facilitate the hearing and legislative process. The Law department would forward just its decision to OMB and the City Clerk rather than the documentation package, which should streamline the interdepartmental process.

**Finding:** Other hearings required under Section VII of Title Nine (Review and Enforcement) of the City Zoning Code for Zoning Map/Text changes and Institutional Master Plans specify a 120 day period before a hearing must be scheduled and a 90 day period after that hearing for City Council action.

**RECOMMENDATION #4:** While the above mentioned zoning changes are more complex than Conditional Use decisions, City Council may consider extending the hearing period to 60 days or more to allow the approval and scheduling process sufficient time to proceed while maintaining the 45 day action window.

**City Controller’s Performance Audit of December, 2008 “Pittsburgh City Council:”**

It was observed that the notification to City Council to initiate action often was dependant on other departments, making it difficult to be pro-active in scheduling required sessions and increasing the odds of procedural delay. The City Code has an array of time tables and deadlines for many of its processes that require City Council action. The audit stated:

**Finding:** City Council’s primary role is legislative, and several of its ordinances require action by a City department or board within a certain time span to become legally binding. Sometimes these actions are delayed for a variety of reasons. The legislation then becomes invalid, and is dropped or has to be reintroduced and enacted a second time.

**RECOMMENDATION:** City Council should consider creating a position in the City Clerk’s Office for a legislative tracker, who would be responsible for scheduling the required actions for legislation and following the responsible department/board to make sure that they are performing their obligations in a timely manner.

**CITY COUNCIL RESPONSE TO THE RECOMMENDATION**

The City Clerk believes additional staffing is warranted to handle a multitude of legislative tasks. City departments should responsibly follow their legal mandates in accordance to the Home Rule Charter, the City Code, and departmental policies. For example, with respect to zoning matters under the purview of the Planning Department and Planning Commission, there are a multitude of rules and timeframes governing different matter types, including posting notices, advertising, scheduling hearings and final vote.

We would again recommend to City Council to consider a full-time legislative tracker in the City Clerk’s Office so that it can proactively schedule events rather than be dependant on outside departments to initiate the process.

The audit examined hearings scheduled for 2006-07, and determined that all the required hearings were held. However, there was at least a Historic Review Board hearing and this Zoning event following the audit period that should have resulted in hearings, but did not.

So this is not a one-of-a-kind case. Although rare, hearings are sometimes missed. City Council, through the City Clerk's Office, is often at the end of the hearing process. The system should be designed so that City Clerk/Council is the first contact, not the last, to prevent further occurrences from happening in the future.