

WILLIAM PEDUTO
MAYOR



YVONNE HILTON
CITY SOLICITOR

CITY OF PITTSBURGH
DEPARTMENT OF LAW
CITY-COUNTY BUILDING

To: Andrew Dash, Director of the Department of City Planning

From: Yvonne Hilton, City Solicitor

Re: Legal Review of Council Bill 2021-1912

Date: November 3, 2021

Introduction:

The memorandum is written in response to your request for legal review of Council Bill 2021-1912. A copy of the current bill is attached here as Exhibit A. This proposed ordinance would do the following:

1. Require the Zoning Administrator to inform the relevant Council member of zoning applications that require Site Plan Review within 3 days of making such a determination.
2. Allows that Council member to make a determination that such an application "implicates a significant community concern" within 14 days of the application.
3. Establishes that where a Council member determines that an application "implicates a significant community concern," the project will be subject to the different review standards applied to zoning amendments and shall require Council approval.

The proposed ordinance represents a significant change in the review of development applications. Under the Code now, projects that require Site Plan Review are only subject to staff review, though the Zoning Administrator does have discretion to submit applications for review by the Planning Commission for a recommendation. Council is not currently involved in the Site Plan Review process and only engages in development review in two circumstances: 1) review of amendments to the zoning code as detailed in Section 922.05 of the Code; and 2) review of those applications that require Conditional Use approval, as detailed in Sections 911.02 and 922.06 of the zoning code.

The proposed legislation is legally suspect for two reasons. First, the legislation would create an unclear approval path under which similar applications would be subject to drastically different regulatory treatment at the sole discretion of a single Council member without reference to any defined standard of review. Second, the legislation would grant Council members power beyond their statutorily prescribed role.

Vagueness

Under the proposed ordinance, certain planning applications would be subject to significantly different review criteria based on the determination of individual council members.

Projects currently subject to Site Plan Review must meet a wide variety of approval criteria specifically relating to dimensional and design standards. Although the Code allows the Zoning Administrator to refer a Site Plan Review Application to the Planning Commission, this is only in an advisory capacity and the review criteria remain the same. Section 922.04.C.1. In contrast, the review criteria for Code Amendments are more general and focus on wider impacts at a neighborhood and citywide level. This difference reflects the divergent purposes of Site Plan Review and Zoning Code Amendments: Site Plan Review is an administrative function focused on assuring compliance with defined standards while a Zoning Code Amendment is legislative in nature and should reflect broader policy goals.

Under the proposed legislation, applications might be subject to either the typical Site Plan Review criteria or the Zoning Code Amendment criteria, but applicants will not know which until they have filed a completed application. Further, the proposed amendment does not provide any determining criteria for what “implicates a significant community concern,” so that decision will be left to the unfettered discretion of a single Council member.

As such, we believe that the proposed legislation would be found to be impermissibly vague under Pennsylvania and Federal law. Courts have found legislation to be unconstitutionally vague “when persons of common intelligence must guess at its meaning. Vague ordinances ‘proscribe activity in terms so ambiguous that reasonable persons may differ as to what is actually prohibited,’ and invite arbitrary and discriminatory enforcement because they do not set reasonably clear guidelines for law officials and courts.” *Slovak-American Citizens Club of Oakview v. Pennsylvania Liquor Control Board*, 549 A.2d 251, 253 (Pa. Commw. 1988) (Internal citations omitted).

Vague and indefinite ordinances violate “[t]he fundamental rule that an ordinance must establish a standard to operate uniformly and govern its administration and enforcement in all cases, and that an ordinance is invalid where it leaves its interpretation, administration or enforcement to the unbridled or ungoverned discretion, caprice or arbitrary action of the municipal legislative body or of administrative bodies or officials, is fully applicable to zoning ordinances. In other words, zoning ordinances and regulations should establish uniform rules to guide administrative officers in applying them...zoning restrictions must be clear as a rule of law and not left to proof.” *Fisher v. Viola*, 789 A.2d 782, 787-788, (Pa. Commw. 2001.)

In sum, the proposed legislation is vague and indefinite. Similar zoning applications will be subject to dramatically different approval procedures and criteria depending on the inclination of a single Council member, without the benefit of any determining criteria.

Role of Council

Under the proposed ordinance, individual Council members would have the authority to set the standard of review for specified planning applications.

The City's Home Rule Charter sets forth the roles and responsibilities of the various officers and units of government comprising the City of Pittsburgh. Legislative Authority for the City is vested in a council comprised of nine members. HRC Section 301-2. Individual Council members do not have authority under the Home Rule Charter to adopt legislation or take official actions on behalf of the City. To act officially on behalf of the City, the Council must act collectively.

This principle was recently affirmed in a 2017 Commonwealth Court decision, which found that the Council members, acting in their official capacity, do not have standing as individuals to appeal a zoning board decisions and that only Council as a whole would have such a right. *O'Neill v. Phila. Zoning Bd. of Adjustment*, 169 A.3d 1241, 1245 (Pa. Commw. 2017).

The proposed legislation at issue violates this prescription by granting individual Council members the authority to determine that an application "implicates a significant community concern." While Council certainly has the power to review zoning applications where authorized in the Code, it may only do so as a body.

Please let us know if you require any further assistance.

Respectfully submitted,

/s/ Jack Miller

Assistant City Solicitor



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File #: 2021-1912 Version: 2 ▾
 Type: Ordinance Status: In Standing Committee
 File created: 9/20/2021 In control: Commission - Planning Commission
 On agenda: 9/21/2021 Final action:
 Enactment date: Enactment #:
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Title: Ordinance amending and supplementing the Pittsburgh Code of Ordinances, Title Nine: - Zoning Code, Article VII. - Review and Enforcement, Chapter 922: - Development Review Procedures, to augment the approval process for certain site plans required under the Zoning Code. (Sent for a Report and Recommendation to the Planning Commission) (Needs to be held for a Public Hearing)

Sponsors: Reverend Ricky V. Burgess
 Indexes: PGH. CODE ORDINANCES TITLE 09 - ZONING
 Attachments: 1. [Summary 2021-1912](#)

[History \(3\)](#) [Text](#)

title
 Ordinance amending and supplementing the Pittsburgh Code of Ordinances, Title Nine: - Zoning Code, Article VII. - Review and Enforcement, Chapter 922: - Development Review Procedures, to augment the approval process for certain site plans required under the Zoning Code. (Sent for a Report and Recommendation to the Planning Commission) (Needs to be held for a Public Hearing)

body
WHEREAS, the Act of March 31, 1927, P.L. 98, No. 69, also known as Act 69 of 1927 ("Act 69") and the Zoning Law for Cities of the Second Class, 53 P.S. § 25051, et. seq., authorized the city to regulate the use of lots and buildings; and,

WHEREAS, Act 69 vested in City Council the power, by ordinance, to establish and, when desired, alter the regulations for the use of lots and buildings; and,

WHEREAS, Act 69 requires City Council to "provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced, and, from time to time, amended, supplemented or changed." And further, that "Such regulations, restrictions and boundaries may, from time to time, be amended, supplemented, changed, modified or repealed."

WHEREAS, Council desires to amend the development review process to provide for Council review of and approval of site plans when Council determines that the issue is one of community significance; and,

WHEREAS, Council intends to do so in a manner that respects the procedural and substantive due process rights of all parties.

Be it therefore resolved that the Council of the City of Pittsburgh hereby enacts as follows:

Section 1. The Pittsburgh Code of Ordinances, Title Nine: - Zoning Code, Article VII. - Review And Enforcement, Chapter 922: - Development Review Procedures is hereby amended as follows:

922.01.D Site Plans

Every application requiring a Site Plan shall locate existing and proposed improvements and graphically demonstrate existing and proposed natural, man-made and legal features on the parcel of the subject development. Site Plans shall be drawn neatly and to scale, using such a scale that all features required to be shown on the plans are readily discernable and shall be submitted on individual sheets of paper no larger than eight and one-half (8.5) inches by fourteen (14) inches. Very large developments may require that plans show the development in sections to accomplish this objective without resorting to plans that are so large as to be cumbersome, or the objective may be accomplished by using different plans or plans drawn to different scales to illustrate different features. In all cases, the Zoning Administrator shall make the final determination as to whether the plans submitted are appropriate. Nothing shall preclude the Zoning Administrator from waiving any of the requirements of Section 922.01.D.

922.01.D.1 Simplified Site Plan

Simplified Site Plans shall be required for the purpose of identifying the intended use or occupancy of a particular lot, the construction or alteration of all accessory structures as defined by Chapter 912.01, or for all extensions and additions to existing primary structures less than 2400 square feet in area, and shall accurately show, as a minimum, the following information:

1. Name of property owner;

2. Date of preparation;
3. Existing and proposed property lines with dimensions identified;
4. Name of development, if applicable;
5. North arrow;
6. Dimensions of lot measured in accordance with Chapter 925, including the square footage of every new lot created by a new subdivision;
7. Name of all streets and ways upon which the lot is located;
8. Street address;
9. The location, height, and dimension of existing and proposed structures including stoops, porches, chimneys, signs, light fixtures and garbage cans or dumpsters, as well as the distances such features are set back from property lines, streets, or street right-of-way lines;
10. The location, height, and dimension of existing and proposed vehicle accommodation areas including parking areas and loading areas as regulated by Chapter 914, all designated by surface material with distance from buildings and property lines indicated;
11. The location and dimension of existing and proposed driveways and vehicle circulation areas including direction of travel lanes and aisles as regulated by Chapter 914, and curb cuts, all designated by surface material;
12. Existing or proposed plantings or other devices constructed to comply with the screening and landscaping requirements of Chapter 918, labeled by common or scientific name, with the distance between plantings and height and width at the time of planting and at mature growth indicated;
13. The location and dimension of areas to remain as usable open space;
14. The location, height, and dimension of existing and proposed above ground and underground utility lines and other facilities including water, sewer, electric power, telephone, gas, and cable television and other easements;

922.01.D.2 Detailed Site Plan

Detailed Site Plans shall be required for the construction or alteration of all principal structures above two thousand four hundred (2,400) square feet in area and all signs as regulated by Chapter 919 and shall accurately show, as a minimum, the following information:

1. All information required for a Simplified Site Plan;
2. The seal of a registered surveyor, engineer or architect;
3. The location of the property in the broad context of the City on a location map;
4. The width of all existing and proposed rights-of-way (streets and ways) upon which the lot is located;
5. The lot number of the subject property and of the abutting lots (if not in a plan of lots, show the block and lot numbers from the Allegheny County Lot and Block system);
6. The name of the Plan of Lots and the Recorded Plan Book Volume and Page;
7. Existing contour lines shown as dotted lines and proposed contour lines resulting from earth movement shown as solid lines with no larger than two-foot contour intervals;
8. The location and type of existing and proposed street fixtures including but not limited to utility poles, street lights, traffic signals and signs, parking meters, fire hydrants and sewer basins;
9. Facade elevations for new buildings or exterior remodeling of existing buildings, and all proposed exterior signs as regulated by Chapter 919, showing heights and lengths as regulated by Chapter 925;
10. The location, height and dimension of all existing and proposed recreational areas, with each area designated as to type of use;
11. The location and dimension of existing and proposed useable open space, with clear indication of whether such open space is intended to be offered for dedication to public use or to remain privately owned;
12. The use made of adjoining properties that lie within fifty (50) feet in any direction of the lot where development is to take place by reference to the Use Table (Chapter 911.02);
13. Existing and natural features including but not limited to the tree lines of wooded areas, individual trees eighteen (18) inches in diameter or more identified by common or scientific name, orchards or other agricultural groves identified by common or scientific name, streams, ponds, drainage ditches, swamps, boundaries of floodways and floodplains;
14. Base flood elevation data;
15. Existing and proposed streets, private roads, sidewalks, and other walkways, all designated by surface material;
16. Existing and proposed curbs, curb inlets, gutters, drainage ditches, and gates, and all storm water and drainage facilities including manholes and pipes.

922.01.D.3 Documentation and Written Information in Addition to Plans

In addition to the written application and the plans, whenever the nature of the proposed development makes information or documents such as the following relevant, such documents or information shall be provided. The following is a representative list of the types of information or documents that may be requested by the Zoning Administrator:

1. Documentation confirming that the applicant has a legally sufficient interest in the property proposed for development to use it in the manner requested, or is the duly appointed agent of such a person;
2. Certifications from the appropriate agencies that proposed utility systems are, or will be, adequate to handle the proposed development and that all necessary easements have been provided;
3. Detailed description of play apparatus or other recreational facilities to be provided in miniparks;
4. Legal documentation establishing homeowners associations or other legal entities responsible for control over required common areas and facilities;

5. Successful application for a Certificate of Appropriateness as necessary by the Historic Review Commission for properties located in all Local Historic Districts;
6. Successful application for a curb cut permit as required by the Department of Mobility and Infrastructure;
7. Verification from the Department of Mobility and Infrastructure that a street address has been assigned for new construction or for any use of land where a new street address is necessary;
8. Verification that uses of the Zoning Code will meet the performance standards set forth in Chapter 915, 916 and 917. Such verification shall be made by a licensed engineer or other qualified expert unless it is utterly apparent to the Zoning Administrator, from the nature of the proposed development, that such expert verification is unnecessary;
9. Time schedules for the completion of phases in staged development;
10. The environmental impact of a development, including its effect on historically significant or ecologically fragile or important areas, and its impact on pedestrian or traffic safety or congestion.

922.01.D.4 Number of Copies of Plans and Documents

With respect to all plans and other documents required by this ordinance, the developer shall submit the number of copies that the Zoning Administrator deems necessary to expedite the review process and to provide necessary permanent records

(Ord. 45-2003, § 12, eff. 12-31-03; Ord. No. 22-2011, § 1, eff. 11-2-11; Ord. No. 2-2018, § 30, eff. 2-15-18)

922.02.I Pending Zoning Map and Text Amendments

During the consideration of any bill introduced before the City Council to amend this ordinance in part, without replacing all of its provisions, and until such bill is either enacted or rejected according to law, the Administrator and other city officials and bodies shall take no action upon any application for Certificate of Occupancy filed to obtain approval of a use or other matter that would be forbidden by such proposed amendment if enacted.

922.04. Site Plan Review.

This section sets out the procedural requirements for Site Plan Review and approval.

922.04.A Applicability.

The Site Plan Review procedures of this section shall apply to:

1. Any new construction, building addition or enlargement or exterior renovation of an existing structure in the NDO, LNC, NDI, UNC or P district on a lot that has an area of two thousand four hundred (2,400) square feet or more;
2. Any new construction or building addition or enlargement or exterior renovation of an existing structure in the HC, UI or GI district on a lot that has an area of eight thousand (8,000) square feet or more;
3. Any off-street parking area in NDO, NDI, LNC, UNC, UI or P district that includes more than ten (10) parking spaces or more than two thousand five hundred (2,500) square feet of surface area;
4. Any construction (includes additions and rehabilitations) in the H district;
5. Any new construction, enlargement or renovation of a multi-unit residence of four (4) or more units; and
6. Any development requiring Site Plan Review listed in Section 911.04 - Use Standards.

Although site plans may be required with applications for other forms of development approval (e.g., Conditional Uses or Special Exceptions), those plans shall be reviewed in accordance with the respective development review procedure. When site plans are reviewed in conjunction with other forms of development approval, separate site plan review under the procedures of this section (Sec. 922.04) shall not be required.

(Ord. 25-2001, § 000, eff. 11-30-01; Ord. 35-2002, § 1E, eff. 12-3-02; Ord. 45-2003, § 14, eff. 12-31-03)

922.04.B Application

A complete application for Site Plan approval shall be submitted to the Zoning Administrator in a form established by the Zoning Administrator, along with a nonrefundable fee that has been established to defray the cost of processing development applications. No application shall be processed until the Zoning Administrator determines that the application is complete and the required fee has been paid.

922.04.B.1 Notification to City Council of Applications Filed

- a. Notwithstanding any contrary provision in the Zoning Code or Pittsburgh Code of Ordinances, within three (3) business days of the Zoning Administrator's determination that any application, filed pursuant to this Chapter, which is subject to Section 922.01.D.2 (relating to detailed site plans) which is subject to review and approval under Section 922.04 (relating to site plan review), Section 922.10 (relating to project development plans) or 922.11 (relating to planned developments), is complete, the Zoning Administrator shall notify and transmit a copy of said application along with all documents and materials submitted, to the member or members of City Council in whose or which district or districts, as the case may be, the land(s) and/or structure(s) is(are) situate. This subsection shall not apply where the application is for the construction, alteration or development of a structure and/or of a lot that has an area less than eight thousand and one (8,001) square feet, or for any application required to be filed under Chapter 919 (relating to signs) of the Zoning Code.
- b. Notwithstanding any contrary provision in the Zoning Code or Pittsburgh Code of Ordinances, if the said member or members of City Council, as the case may be, notify(ies) the Zoning Administrator of their determination that said application implicates a significant community concern within fourteen (14) days of receipt of the notification required by 922.04.B.1(a), the procedures set forth in Section 922.05 (relating to map and text amendments), with the exception of Section 922.05.D (relating to hearing and action by the Planning Commission), shall exclusively govern the approval or denial of the application. The Zoning Administrator, upon receipt of the notification, shall immediately send written notice to all interested parties. If the Zoning Administrator does not receive the notification within the period required by this subsection, the procedures set forth in Sections 922.04.C, 922.10 or 922.11, as the case may be, shall govern, and subsection 922.04.B.1(c) shall not apply.

- c. The Planning Commission shall hold a public hearing on the application. The Commission shall act to recommend approval, approval with conditions or denial of the application within sixty (60) days of the receipt of the completed application. The Commission shall rely upon the review criteria set forth in Sections 922.04.E, 922.10.E.2 or 922.11.B.3, as applicable, in rendering its recommendation. The Commission's recommendations shall be in writing. Where the Commission fails to render said recommendation within the period required by this subsection, the decision shall be deemed a recommendation of approval of the application.
- d. The Zoning Administrator shall promulgate any forms required to effectuate this Section.