

CITY OF PITTSBURG
Special City Council Minutes
May 31, 2007

Mayor Ben Johnson called the Special Meeting of the City Council to order at 8:06 A.M. in the City Council Chambers at City Hall, 65 Civic Avenue, Pittsburg, California.

MEMBERS PRESENT: Casey, Kee, Parent, Johnson

MEMBERS EXCUSED: Evola

MEMBERS ABSENT: None

STAFF PRESENT City Manager, Marc Grisham
Assistant City Manager, Matt Rodriguez
City Attorney, Ruthann Ziegler
City Clerk, Alice Evenson
Director of Engineering and Building, Joe Sbranti
Director of Economic Development, Brad Nail
Director of Redevelopment, Randy Starbuck
Director of Planning, Melissa Ayres
Director of Human Resources, Marc Fox

PLEDGE OF ALLEGIANCE

Ronald Johnson, Sr. led the Pledge of Allegiance.

COUNCILMEMBER REPORTS/REMARKS

There were no Council Member remarks.

CITY MANAGER REPORTS/REMARKS

There were no City Manager remarks.

CITIZEN REMARKS

There were no Citizen Remarks on items not on the agenda.

PUBLIC HEARING

1. **RESOLUTION 07-10810** Appeal of Planning Commission Decision to Waive 180-Day Waiting Period Required for Demolition of Scampini Building

The Planning Commission adopted a resolution waiving the otherwise required 180-day prior written notice for demolition of the Scampini Building. The site is located in a PD (Planned Development) District and is one of 39 parcels that comprise the Black Diamond (Vidrio) Redevelopment Project site. The Council is requested to consider an appeal of that decision.

City Attorney Ziegler stated that the Council had three appeals before it; one by the City Manager and two which are identical, filed by the Pittsburg Society for the Preservation of Historic Resources and Ms. Linda Johnson as a resident. Ms. Ziegler clarified what is and is not before the Council. What is not before the Council are environmental issues related to the Scampini Building. The Council evaluated that issue at the last regular meeting, May 21, 2007, at which time the Supplemental EIR was certified. In doing so the determination was made that the Scampini Building was not a historic resource, but rather a contributing building to a historic district. The determination was also made that its demolition would not be a significant impact on the environment or on the New York Landing District itself. Ms. Ziegler emphasized the issues under CEQA and the environment, etc. historic resources as to the Scampini Building are not before the Council today.

Secondly, Ms. Ziegler clarified what was before the Planning Commission at its duly noticed meeting Tuesday evening. The issue before the Planning Commission which is now before the Council was the request for a waiver by the owner of the Scampini Building, A. F. Evans, for the waiver of the normal 180 day notice period. Under the Municipal Code, again, not required by State or Federal law, but merely implemented by this Council in the Municipal Code, there is the normal requirement for a 180 day prior notice before either an historic building or a contributing building to an historic district can be demolished. However, the Municipal Code also allows the owner of the building to request a waiver of that 180 notice period by filing that request with the Planning Commission.

There are several grounds on which the Planning Commission may decide to grant or deny the waiver. One of the grounds is financial hardship. There was extensive information, evidence and documentation put before the Planning Commission last Tuesday, and some of it is in the staff report before the Council today. A.F. Evans indicated that there could be a loss of \$1.2 million if they had to wait 180 days to demolish the Scampini Building. A.F. Evans also raised significant questions as to the overall financial viability of the project should it have to wait that period. The issue before the Planning Commission was not an environmental issue, and was also not if the Scampini Building should be demolished, but merely a question of when. Based on the information in front of it as to the significant financial hardship, the Planning Commission decided the question of when and granted the waiver.

The third point Ms. Ziegler raised is what is before the Council today. There is an interesting question as to whether the Planning Commission decision is even appealable to the City Council. As the staff report and resolution is reviewed, that question is raised saying it is not clear whether it is an appealable decision.

Ms. Ziegler stated that Planning Commissions are created by City Councils. State law does not mandate a Planning Commission to exist and Planning Commissions generally have that authority which City Councils through its Municipal Code grant or do not grant.

She stated there is an appeal process applicable to the Planning Commission in Title 18 of the Municipal Code. Title 18 refers to zoning and land use decisions. There is reference in Title 18 as to appeal procedures by the applicant related to zoning and findings. However, the 180 day waiver procedure and the issue that was before the Planning Commission Tuesday evening is not in Title 18; it is in Title 15 and is furthermore not a zoning decision. There is nothing in Title 15 that says that decision by the Planning Commission as to the 180 day waiver is appealable to the City Council. Ms. Ziegler stated that it was her opinion, as the City Attorney, that the decision by the Planning Commission Tuesday evening is not appealable.

It is Ms. Ziegler's recommendation to the City Council that the Council take a two-prong approach - that the Council determine if they agree based on the information presented, as well as what is heard from public comment, that the Planning Commission decision is not appealable to the Council, and determine that there is no appeal right, but that if there is a right of appeal, based on the information in the staff report, based on the City Manager's appeal, based upon the appeal by Ms. Johnson both as a resident of the City and also on behalf of the historic group, that the Council deny the appeal and sustain the decision of the Planning Commission.

Ms. Ziegler stated she would respond to any issues brought forth during the public comment portion.

Mayor Johnson opened the Public Hearing.

MARC GRISHAM, CITY MANAGER, stated that he was in concurrence with the City Attorney. His goal in filing the appeal was to make sure that the process was clearly defined to the Council so that Council knew what the issues were.

LINDA JOHNSON stated that she requires ten days written notice for a date on which her appeal is to be heard. She refused to speak on her appeal. She also objected to holding a meeting at 8:00 a.m. when most people are at work and when the demolition crew was ready to begin.

RON JOHNSON, SR. stated he was speaking not specifically about the Scampini Building. His intention is to speak to the demolition of the building. He commented on an Ordinance in 2004 which was defective as it provided that nonresident members can be part of a Historical Resource Commission. He stated we already had an Ordinance that stated you must be a resident to serve on a City Commission. The other defect was that when an Ordinance is changed, the Department of the Interior was to be notified. He was not aware that this has ever taken place. The Department of the Interior granted the right as the taxing entity both for destruction and rehabilitation of the historical district in question

when it was formed. The people at the time of the inception of the district wanted and had an interest in the history of the area. The Scampini Building was part of the district at that time. The Department of the Interior provided a method of notification to them when demolition or rehabilitation of properties was planned. He stated there was a subsequent Ordinance in 2005 where the residency requirement was rectified. He believes this Ordinance was also not forwarded to the Department of the Interior. The issue with the Scampini Building is that it was a part of this historical district. He believes the procedures were not followed correctly when calling for its demolition, and failure to follow the laws led to the lawsuit. Economic pressure on a particular project should not allow the Council to subvert the rules and the law. The integrity of the community is at stake and it is time to run the City with the existing rules and laws.

MUHAMMAD NADHIRI, A.F. Evans Co. Senior Project Manager on the Vidrio Project, thanked the Council for the opportunity to speak. He wanted to reiterate the A.F. Evans request for the waiver as it represents a very significant and real financial hardship. It was mentioned at the Planning Commission that financial hardship was a very vague concept and in general he would tend to agree with that, but this is a very specifically defined situation. He stated they were looking at a loss of \$1.2 million potentially on a project that is already very thin on margin. They have investors lined up both from equity and debt side and presently they do meet the return thresholds that they require. Very bluntly, a delay of 180 days, which actually translates into a delay of about 9 months because of weather patterns that they would expect to happen in January and February results in a year delay of getting to market, which results in increased competitive pressures, which results in the financial hardships he is referring to. Primarily they have a 2-1/2 percent construction cost increase they would expect to incur during that time above and beyond what they are actually ready to sign the contract now. The combination of all these factors result in a 9-1/2 percentage point reduction in return to our investors which simply makes the deal very difficult for us to move forward on.

Mr. Nadhiri stated that A.F. Evans had a significant investment in the City of Pittsburg both with Vidrio and with some other activities that have been undertaken as a new City resident. They would like to maintain and continue their investment and would like to continue working with the City of Pittsburg and hoped that the City Council would uphold the Planning Commission's decision.

RON JOHNSON, JR. wanted to make it abundantly clear that Mr. Grisham has said there is no way to appeal any particular decision on this. First of all, the Historic Resource Commission, the only Commission that was supposed to make any decision on this, which has never been activated, and had not in fact hasn't met for seven years. When they reconstructed it back in 2004 the President on record was deceased. The Department of the Interior specifically states that there must be a 180 day notification and that they were supposed to review that. When it was changed in 2004, the Planning Commission can now deal with the 180 day waiting period. If you followed what happened at the Planning Commission, the City Attorney was on the phone with the Planning Director to determine which Ordinance was being followed. The next morning, Mr. Grisham filed an appeal and stated what happened at the Planning Commission was not true.

Mr. Johnson stated the Scampini Building represents more than just the building itself. It represents the historical district. His own civic pride is also not being considered when demolishing buildings in the historical district. When the Scampini Building was placed in the federally recognized district, it was considered a historic resource. We should be protecting the resource. The CEQA standards have not been met. Mr. Johnson questioned why this meeting was held as the demolition crews were ready to begin work.

TOM LAFLEUR, Pittsburg, a member of the Pittsburg Society for the Preservation of Historical Resources, stated he wondered if he could get to work in time to see the building come down. He knows he wouldn't convince anyone about the value of the building. He thinks there are more important things for the City to do – to get along and work together and air our differences in a civil manner. Processes of civic discourse need to be followed.

Mr. LaFleur stated this has been a very unusual procedure. Transfers of the property in order to facilitate the application of a waiver have been done; the waiver being heard at special meetings. This is not the way we generally do business in our City and it's not the way we should. He stated he has come to Councils over a 40 year period and probably lost more times than he's won but been able to maintain friendships and respect for folks. He wants to be able to do that.

He stated a larger issue is the importance of a Historic Resource Commission. This all should have gone through them. When the district was set up in 1982, the Federal Register required a couple of things, as well as an amendment to our Ordinance. Every building in the district, whether it's contributing or historic or not is entitled under the Ordinance to the 180 day notice period. That is because the Secretary of the Interior says that over time some of those buildings that you didn't think were historic may be. The Department of the Interior requires that notices and actions on historic properties be heard by a commission that is educated and interested in that and that know the standards of the Department of the Interior. We should really have the Historic Resources Commission active and functioning and there are a lot of people interested in historic resources and their time could more constructively be spent working that way. That Commission should have staff support so that they understand what the Department of the Interior standards are.

The Planning Commission is a group of very competent people, but they have no special interest as a body or special expertise in this and that's why we should have a Historic Resources Commission that's active. Mr. Johnson is correct that when we enacted the Ordinance and we accepted the Federal Register rules. In those rules it states that when we're going to change the Ordinance we submit it to the Secretary of Interior for their comment and advice so that the district remains eligible. There are tax credits that are involved and it is a resource. He stated that when the dust clears from the Scampini Building we can continue to talk to each other in ways that enhance and save some of our historic resources and build on a very unique quality that we have. The 1920's commercial district is very special and we cannot replace it when it's gone. It is of value not just culturally, but economically, to the City.

There being no one to speak further, Mayor Johnson closed the Public Hearing.

City Attorney Ziegler responded to several points raised. She reiterated that CEQA issues are not before the Council; any recourse if anyone disagrees with the adequacy of the Supplemental EIR is to the courts. That right to seek any recourse to the courts have existed since May 21 when the Council certified the supplemental EIR. The second point is which version of the Ordinance was being used. With complete confidence, she stated that the correct version of the Municipal Code was before both the Council and the Planning Commission. The litigation filed previously raised several issues, including the validity of an Ordinance that had been adopted. Pursuant to that litigation, an Ordinance was rescinded and put in place the Ordinance under which we are operating. The attorney of record of that litigation was fully informed of that and no objections were received from her when the prior Ordinance was put into place. There is also some concern that some people do not like the current Ordinance. Disagreeing with an Ordinance and operating under an incorrect Ordinance are different things.

Ms.Ziegler stated the two appeals not filed by the City Manager covered six points, one of which was the jurisdiction of granting a waiver which relates to the Planning Commission's jurisdiction. Clearly the Planning Commission had that jurisdiction because the Ordinance grants them that jurisdiction.

The second point was lack of grounds for extreme financial hardship, for which ample evidence before the Planning Commission was heard. The draft Planning Commission minutes presented to the Council this morning show there was no evidence that there was not an extreme financial hardship from a potential 180 day or longer delay.

The third point raised was inadequate adherence to CEQA requirements: 1) as to the historic building nature, which has already been addressed, 2) whether the Planning Commission decision was under CEQA, when in fact that decision is not the sort of action that is subject to CEQA, but merely a decision as to when the building would be demolished, not if, and thus there was no physical effect on the environment stemming from the decision.

The fourth point was lack of adequate adherence to mitigating procedures of historic preservation by City Ordinance. The Ordinance has been complied with, and there is a certified EIR.

The fifth point is the legality of the City Ordinances. The Planning Commission and the City Council are acting under the proper Ordinances. If the appellants do not like the current Ordinances, they may either seek changes or file a suit challenging them, but there is no such litigation as of his point.

The sixth issue is failure of due process. All notices have been complied with as required by applicable law as required by the Municipal Code and as required by the Brown Act.

A few additional points: A question raised by Ms. Johnson about her right under

Municipal Code Section 1.08.070 to which she believes she is entitled to ten days prior notice. Even if there is a right of appeal from the Planning Commission decision, that section is inapplicable here. That section (1.08.080) applies only if there are no other appellant procedures set forth and in fact if there is an appeal allowed from the Planning Commission's decision, there are separate appellant procedures set forth in Title 18 concerning Planning Commission appeals.

Ms. Ziegler also summarized that when the resolution is ready for consideration, there are a few suggested changes she would make to the resolution as follows. It is her opinion that an appeal does not lie before the City Council from the Planning Commission's decision. As further reinforcement of that point, Chapter 15 does include some appeal procedures but only for issuance of an historic resources permit not relating to the granting or denial of the Planning Commission. Further evidence of the fact that the Council in adopting those procedures did not intend for there to be an appellant procedure.

On page 3 of 4 of the draft resolution, Ms. Ziegler recommended the following changes. Under Findings of Section 1: the first paragraph is fine. Leave item one as is. Add a new section 2 that says: "The City Council determines that the Planning Commission is not appealable to the City Council." Change what is currently section 2 to section 3 and state "alternatively if the decision by the Planning Commission is appealable to the Council the Council hereby finds" and have the remainder of section 2 as section 3 and add a new section 4 that says "the City Council determines that the three appeals before it are hereby denied."

Council Member Kee inquired about notification to the Department of the Interior and would like that addressed, and also regarding the 10 day period for appeal does the Council have to wait within the 10 days if action is taken now and another appeal is filed within the 10 day period, is that still a valid appeal.

Ms. Ziegler stated it is her opinion that if there is another appeal filed on day 8 or 9, they are too late. Even if the decision is appealable, an appeal has been filed, today's meeting has been duly noticed, the people who appeared before the Planning Commission to raise any objections last Tuesday are present as well today, and this morning's decision will be final as to the Planning Commission's action.

In response to Council Member Kee's question as to the first appeal filing starting a clock on the process, Ms. Ziegler stated that that appeal, plus whether or not Ms. Johnson had filed the two appeals, we were already in the process of notifying the people that spoke in opposition to the Planning Commission's proposed action Tuesday evening to let them know there was going to be a Special City Council meeting this morning to let them know that to the extent they had any issues it would be addressed by the Council this morning.

As to the Council Member Kee's first question, Ms. Ziegler deferred to Ms. Ayres or Ms. Luna who have both been more actively involved in those issues.

Planning Director Melissa Ayres stated the City has had quite a few conversations

with the Department of Park Services over the last few years as a result of the settlement agreement. Provisions that are in the current Ordinance that allow the Planning Commission to waive the 180 day notice are in the 2004 Ordinance and also in the 2005 Ordinance and are also in the new set of rules that have been sent to the Department of National Park Services who has commented back to us and said they are valid. We will be coming forward this year with revisions to that to replace the Ordinance that was rescinded. It will have that information in it and the Park Services has no issue with it and see no reason for it to violate their rules for us to have those provisions in place.

Council Member Parent stated she appreciated the attendance of the Planning Commissioners that voted on the matter. She commended them for carefully deliberating their decision and stated the Council has read their minutes as part of the record today. She stated it was clear that the future of the Black Diamond project is threatened by the economic situation that will occur if there is an additional delay to A.F. Evans. The project is not just one section of the three blocks that is to be done, but the whole project, and the cornerstone of what this Council is trying to do in the revitalization of the core of the Old Town. She stated she thinks it's very real not only from what A.F. Evans has said but the economic report that the Council had as part of the previous consideration of the effect of the existence of the building and made it clear how tight things were economically for the project. Member Parent stated she has not heard anything today that would indicate that it was not an economic hardship and that is what they are here to decide.

Mayor Johnson stated the key things that he looks at are economics for the City. Downtown was vacant for such a long time, with key buildings on Railroad Avenue. He agrees that the building is old, but there is no historical significance and does not fit the Vidrio Project. He appreciates the feelings of the people that have spoken today.

On Motion by Council Member Parent, seconded by Council Member Kee to adopt Resolution 07-10810, with the amendments suggested by the City Attorney, and carried by the following vote:

Ayes: Member Casey, Kee, Parent, and Mayor Johnson
Absent: Member Evola

ADJOURNMENT

The City Council adjourned at 9:03 A.M. to June 4, 2007.

Respectfully submitted,

Alice E. Evenson, City Clerk