

PITTSBURGH LEGAL JOURNAL

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PLJ

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Opinions deemed appropriate for publication are not disqualified because of the identity, profession or community status of the litigant. The guide to publication is the helpfulness of the opinion to practitioners in the particular area of law. All opinions submitted to the PLJ are reviewed for publication and will only be disqualified or altered by Order of Court.

OPINIONS

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CAPSULE SUMMARIES

The Pittsburgh Legal Journal provides the ACBA members with precedent-setting, "Capsule Summaries" or a brief description of opinions from the Family Division of the Court of Common Pleas of Allegheny County.

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In Re: Pittsburgh Citizen Police Review Board

Pittsburgh Citizen Police Review Board—Subpoena—§§228-229 of Home Rule Charter of the City of Pittsburgh

1. Following the City of Pittsburgh's hosting of the G-20 meeting in September of 2009, the Citizen Police Review Board served subpoenas upon the Chief of Police of the City of Pittsburgh seeking arrest reports and related documents as well as documents related to activities of police officers from other jurisdictions serving temporarily as Pittsburgh officers.

2. The City of Pittsburgh would not honor the subpoenas because no complaint had been filed against the police. Section of the Home Rule Charter stating the purpose of the Board included conducting investigations in the absence of a complaint and was enacted by City Council without authority.

3. Interpreting the applicable provisions of the Home Rule Charter, the Court held that the purpose of the 1997 Amendments was to improve the relationship between the police department and the community and that the language thereof stated that the Board was authorized to investigate matters not involving a complaint.

(Lynn E. MacBeth)

Hugh F. McGough for Pittsburgh Citizen Police Review Board.

Paul D. Krepps, Allen E. Johnson, Daniel D. Regan, John F. Doherty, Michael Kennedy.

Wendy Kobe for Nathan E. Harper, Chief, City of Pittsburgh Bureau of Police.

No. GD 10-001338. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDER OF COURT

Wettick, Jr., J., March 18, 2009—The Motion of the Pittsburgh Citizen Police Review Board to Enforce Compliance With Subpoena is the subject of this Opinion and Order of Court.

In a referendum election held on May 20, 1997, voters of the City of Pittsburgh approved an amendment to Article 2 of the City's Home Rule Charter creating the Pittsburgh Citizen Police Review Board ("Police Review Board").

The relevant provisions of the referendum are set forth in §§ 228-229 of the Home Rule Charter:

§ 228. INDEPENDENT CITIZEN REVIEW BOARD.

There is established an Independent Citizen Review Board, comprised of seven members reflecting Pittsburgh's diversity, for the purpose of receiving, investigating and recommending appropriate action on complaints regarding police misconduct and for the purpose of improving the relationship between the police department and the community. The members shall serve four year staggered terms and serve until the appointment of their successors. Four of the seven appointments shall be made from a list of nine nominations submitted to the Mayor by City Council. Members shall be residents of the City, shall not be employed by the City or any of its Authorities, and shall serve without compensation.

§ 229. POWERS OF INDEPENDENT CITIZEN REVIEW BOARD.

The Board shall:

- a. Investigate selected complaints filed by individuals alleging police misconduct;
- b. Establish a mediation program pursuant to which a complainant may voluntarily choose to resolve a complaint by means of informal conciliation;
- c. Provide advice and recommendations to the Mayor and the Chief of Police on policies and actions of the Police Bureau, including recommendations on police training, hiring and disciplinary policies and specific recommendations of discipline for individual officers; provided, however, the Mayor and the Chief of Police shall retain full and ultimate authority to set disciplinary policies or take other actions deemed appropriate relative to the Police Bureau.
- d. Hold public hearings, subpoena witnesses and compel their attendance, administer oaths, take the testimony of any person under oath and in connection therewith require the production of evidence relating to any other matter under investigation or any questions before the board and do all other things necessary to fulfill its purpose.

The Board shall employ and supervise a staff including a solicitor, as necessary. The Board shall adopt procedures and rules necessary to fulfill its purpose. City Council may by ordinance adopt regulations to effectuate this Charter provision.

The final sentence of § 229 provides that "City Council may by ordinance adopt regulations to effectuate this Charter provision." Through an Ordinance effective August 15, 1997, Council adopted legislation to implement the Charter provisions governing the Police Review Board. Ordinance 29-1997 is set forth at §§ 661.01-662.13.

For purposes of this litigation, the relevant provision is set forth at § 662.05(0) which reads as follows:

- (o) The Board, upon motion receiving an affirmative vote of at least four (4) members, may:
 - (1) Initiate investigations of incidents of Police Misconduct for which no complaint has been filed;
 - (2) Initiate studies, investigations, hold public hearings and make recommendations on policy matters, including improvement of the relationship between the police department and the community, police training, hiring and discipline.

In September 2009, the Group of 20 Finance Ministers and Central Bank Governors ("G-20") met in Pittsburgh. During and after the G-20 meeting, more than 200 persons were arrested. The Police Review Board received numerous complaints of alleged police misconduct. On October 20, 2009 and November 10, 2009, the Police Review Board held public hearings regarding police/citizen encounters connected to G-20 activities. These hearings were held in connection with a Board-initiated investigation of the policies, procedures, and circumstances surrounding the police/citizen encounters.

Through a subpoena to the Chief of Police of the City of Pittsburgh, the Police Review Board sought two categories of information.¹ The first category is arrest reports and related documents pertaining to twenty-nine arrests made in connection with G-20

activities.² The second category is large numbers of documents relating to the G-20 activities of the City of Pittsburgh Police and police officers from other jurisdictions serving temporarily as Pittsburgh Police Officers. The second category includes a roster of all police officers serving under Pittsburgh command, the chain of command, training records, summary of injuries reported by officers, procedures relating to the use of chemical agents, LRAD, and canines and the operational/dispersal plans for Oakland and Lawrenceville. These documents are relevant for an overall review of the manner in which law enforcement responded to G-20 activities. The subpoena is attached as Attachment 1 to this Opinion.

At the direction of the Mayor of the City of Pittsburgh, counsel for the City has taken the position that the City shall not honor these subpoenas because the Police Review Board has exceeded its authority in issuing subpoenas for an investigation initiated by the Board. It is the position of the Mayor that the role of the Police Review Board is limited to investigating verified complaints of police misconduct.

Counsel for the Police Review Board contends that the City's position ignores several provisions of the 1997 Ordinance, including § 662.05(0) set forth on pages 2-3 of this Opinion, which permits the Board to initiate investigations of incidents of police misconduct for which no complaint has been filed and to initiate studies, investigations, hold public hearings, and make recommendations on policy matters, including improvement of the relationship between the police department and the community, police training, hiring, and discipline.³

At oral argument at which a court reporter was present, counsel for the City conceded that this provision of the 1997 Ordinance permits the Board to investigate police officers' responses to G-20 activities. However, it is the City's position that City Council had no authority to enact § 662.05(0) and other provisions within this Ordinance authorizing the Police Review Board to initiate any investigations of incidents for which no complaint has been filed. Consequently, it is not compelled to comply with the provisions of any subpoena seeking documents that do not arise out of an incident for which a complaint has been filed.

The controlling issue in this case is whether the 1997 Amendments to the Home Rule Charter establishing an Independent Citizen Review Board authorize City Council to adopt an ordinance giving to the Police Review Board the power to initiate investigations of incidents of police misconduct for which no complaint has been filed, and to initiate studies and investigations for the purpose of making recommendations on policy matters that may improve the relationship between the police department and the community, including matters involving police training, hiring, and discipline.

The parties disagree as to the meaning of the language in § 228 of the Home Rule Charter establishing an Independent Citizen Review Board "for the purpose of receiving, investigating and recommending appropriate action on complaints regarding police misconduct and for the purpose of improving the relationship between the police department and the community."

It is the position of the City that prior to the 1991 Amendment to the Home Rule Charter, the relationship between the police department and the community was impaired because there was no place within the City where complaints of police misconduct would be considered. The sole purpose of § 228 was to improve the relationship between the police department and the community by creating a place where complaints of police misconduct would be considered by an independent body.

It is the position of the Police Review Board that § 228 refers to two purposes. First, the Board is authorized to consider individual complaints regarding police misconduct. Second, the Board may initiate studies and investigations and make recommendations involving police practices that may improve the relationship between the police department and the community.

The language of § 228 clearly supports the Police Review Board's construction of § 228. The word *purpose* is used twice. Furthermore, each purpose addresses a different question: Question 1—Is the Board authorized to investigate and make recommendations concerning specific complaints regarding police misconduct; and Question 2—Is the Board authorized to consider and make recommendations regarding police practices.

In addition, § 229 supports only the Police Review Board's reading of § 228.

As to Question 1, § 229(a) provides the same answer as is provided in § 228; namely that the Board shall "investigate selected complaints filed by individuals alleging police misconduct."

As to Question 2, § 229(c) requires the Board to "Provide advice and recommendations to the Mayor and the Chief of Police on policies and actions of the Police Bureau, including recommendations on police training, hiring and disciplinary policies...." The provision would need to disappear before I could rule that the Board was only authorized to investigate selected complaints filed by individuals alleging police misconduct.⁴

The City also contends that certain documents cannot be produced because the G-20 Summit was designated a National Special Security Event by the Secretary of the United States Department of Homeland Security and that many of the documents which the Police Review Board requests are United States Secret Service documents that the City of Pittsburgh may not unilaterally divulge.

If the City believes that certain documents cannot be produced because they are privileged under federal law, the City shall prepare a Privilege Log which identifies each document and sets forth the basis for the claim that the document cannot be produced.

For these reasons, I enter the following Order of Court:

ORDER OF COURT

On this 18th day of March, 2010, it is hereby ORDERED that the Motion to Enforce Compliance With Subpoena issued to Nathan E. Harper, Chief of the Pittsburgh Bureau of Police, is granted and the documents described in this Subpoena shall be produced within twenty (20) days. Specific documents may be withheld if identified in a Privilege Log.

BY THE COURT:
/s/Wettick, J.

¹ Section 662.07 of the 1997 Ordinance permits the Board to issue subpoenas.

² Only five of these twenty-nine persons who were arrested filed complaints with the Police Review Board.

³ At least four members of the Board voted to initiate the investigation that is the subject of this Opinion.

⁴ Under accepted rules for construing any law, every law shall be construed, if possible, to give effect to all its provisions, 1 Pa.C.S. § 1921(a); 1 Pa.C.S. § 1922(2). Also, in construing a constitution, effect must be given to all of its provisions whenever possible. *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008); *In re Larsen*, 812 A.2d 640, 649 (Pa. Spec. Trib. 2002).

CPRB #: 325-09
 Inquiry into Community/Police Relations during the
 G-20 period of 9/19/09 through 9/26/09 Authorized 10/27/09.

SUBPOENA

CITIZEN POLICE REVIEW BOARD
 818 Fifth Avenue, Suite 400, Pittsburgh, PA 15219
 412-765-8023 (V) 412-765-8059 (F)

This Subpoena is issued pursuant to the authority of the CITIZEN POLICE REVIEW BOARD at Title Six, Article VI of the Pittsburgh Code as authorized by Sections 228-230 of the Home Rule Charter of the City of Pittsburgh and in accord with the Rules and Operating Procedures of the CITIZEN POLICE REVIEW BOARD.

TO: Nathan E. Harper, Chief of Police
Pittsburgh Bureau of Police, 1203 Western Avenue, Pittsburgh, PA 15233

You are hereby directed to deliver the following to the CITIZEN POLICE REVIEW BOARD at 816 Fifth Avenue, Suite 400, Pittsburgh, PA 15219 no later than **5:00 p.m. on 12/16/09**:

Documents and information related to policies, procedures, planning, training, supervision, deployment, outcomes and related influences and factors affecting police/civilian encounters during the G-20 period of 9/19/09 through 9/26/09 as detailed in the attached Exhibits:

Exhibit A: List of specific reports related to 29 specified incidents originally directed to Ms. Kathy Kraus (Manager, Office of Municipal Investigations) in a request dated 11/5/09.

Exhibit B: "G-20 Related Document and Information Request of the Pittsburgh Bureau of Police" originally submitted to the attention of Dep. Chief Paul Donaldson in a request dated 11/9/09.

This subpoena shall remain in effect until the issuing authority releases you. Failure to comply with this subpoena may result in the CPRB petitioning the Court of Common Pleas for enforcement of it and may subject you to *contempt of court charges*.

*Issued on December 1, 2009 by
 Marsha V. Hinton, Chair*

**EXHIBIT 1
 ATTACHMENT 1**

EXHIBIT A

To: Kathy Kraus
 From: Beth Pittinger
 Date: 11/5/09
 Subject: Document Request G-20 Related Incidents

The CPRB authorized an inquiry into the policies, procedures and circumstances of police/citizen encounters during the G-20 period. Accordingly I am requesting copies of the following reports and ask that they be forwarded at your earliest convenience but no later than Wednesday, 11/25/09

If you have any questions, please call me, 412-765-8023.

Thank you.

Elizabeth C. Pittinger 11/05/09

The CPRB Requests copies of the following
 Incident, Arrest, Investigative Reports and Subject Resistance Reports related to G-20:

Incident #	Incident #	
09-227084	09-228115	
09-227109	09-228126	Arrest report rec'd – need 3.0
09-227134	09-228127	
09-227149	09-228164	
09-227209	09-228204	
09-227219	09-228260	
09-227280	09-228296	
09-227315	09-228297	
09-227353	09-228299	
09-227420	09-228300	
09-227424	09-228344	
09-227465	09-228347	
09-227483	09-228379	
09-227511	09-228380	
09-227649		Arrest report rec'd – need 3.0

EXHIBIT B**G-20 Related Document and Information Request of the Pittsburgh Bureau of Police**

The CITIZEN POLICE REVIEW BOARD has authorized a formal inquiry into the policies and procedures guiding law enforcement and security measures before, during, and after the September 2009 meeting of the G-20 in Pittsburgh.

Accordingly, as executive director of the CITIZEN POLICE REVIEW BOARD, I am requesting that the following documents and information be provided to me by the Pittsburgh Bureau of Police no later than Wednesday, December 2, 2009.

1. A master roster of all police officers serving under Pittsburgh command during the G-20 period of 9/19/09 through 9/26/09 with the following details (electronic form preferred to allow convenience of grouping to assignments):

- a. Full Name of the officer
- b. G-20 ID number
- c. Original jurisdiction of employment and ID number within original jurisdiction
- d. Assigned G-20 shift/detail/unit
- e. Period of official service in Pittsburgh

2. Roster of all officers authorized to carry less lethal weapons during the G-20 operation:

- a. Please include the pre-requisite criteria necessary to receive authorization
- b. Full Name of each officer
- c. G-20 ID number
- d. Original jurisdiction of employment and ID number within jurisdiction
- e. Assigned G-20 shift/detail/unit

3. The chain of command by operational duty assignment, detail, and sector (if distinguished from assigned detail).

- a. Please identify and include each operational division.
- b. Please identify by name, rank, and G-20 ID number, the individual supervisors of each division, unit, and detail.
- c. Please identify by name, rank, and G-20 ID numbers, the designated chain of command with the authority:
 - i. To declare an unlawful assembly
 - ii. To authorize an emergency police response
 - iii. To order mass arrests and use of force.

4. G-20 related police training records:

- a. Subject matter of each session
- b. Identify each instructor by name, agency affiliation, and instructional topic.
- c. Length of each topical session (please distinguish classroom and field training sessions)
- d. Objectives of the training session
- e. Roster of attending officers
 - i. Full Name
 - ii. G-20 ID number
 - iii. Original jurisdiction of employment and ID number within original jurisdiction

5. Summary of injuries reported by officers describing (no personally identifiable information is sought by this request):

- a. The nature of each reported injury
- b. The severity of each reported injury
- c. The stated cause of each reported injury
- d. Whether emergency treatment was rendered in a hospital emergency department
- e. Please identify mode of transportation provided for each injury requiring emergency treatment (EMS, personal vehicle or police transport)

6. A copy of the orders, authorization, and procedures related to:

- a. Accountability measures (ID armbands, arrest photos, articulated supervisory measures ordered to assure adherence to accountability measures).
- b. The use of chemical agents for crowd/riot control
- c. The use of LRAD for crowd/riot control
- d. The use of canine for crowd/riot control
- e. The use of all instruments of force and criteria for their deployment
- f. The log of authorization for incremental elevations of force deployed

-
-
- g. The operative definition of “unlawful assembly” as applied to G-20.
 7. Please provide deployment reports and/or logs related to the Long Range Acoustic Device (LRAD) which include:
 - a. Locations of each LRAD deployment
 - b. Duration of active LRAD warning tone in each deployment
 - c. Decibel setting for the LRAD hailing function
 - d. Decibel setting warning tone for each deployment
 8. Inventory of equipment purchased and used:
 - a. Inventory of all new equipment and munitions purchased under the G-20 umbrella (include personal protective equipment, LRADs, vehicles, chemical agents, less lethal munitions, etc.)
 - b. Beginning inventory of all less lethal munitions by type and designated for the operation.
 - c. Ending inventory of all less lethal munitions by type and designated for the operation.
 9. A copy of the operational dispersal plan for Oakland that includes:
 - a. Distinctions (if any) for the 9/24/09 and 9/25/09 incidents
 - b. Unit assignments: staging and deployment posts
 - c. Identity of supervisors for each unit
 - d. Designated (or intended) routes of egress for dispersing people
 - e. Tactical protocol for the operations
 10. A copy of the operational plan for Lawrenceville on 9/24/09 that includes:
 - a. Unit assignments: staging and deployment posts
 - b. Identity of supervisors for each unit
 - c. Designated (or intended) routes of egress for dispersing people
 - d. Tactical protocol for the operations
 11. A copy of the Emergency Declaration by the Mayor.
 12. A copy of all mutual aid agreements and/or contracts executed with any and all visiting agencies providing police officers and/or police support.
 13. A copy of the insurance policy covering the City’s risks related to G-20 security and law enforcement activities.
 14. Complete list of demonstration, assembly, protest and march permit applications with following status per application:
 - a. Name applicant
 - b. Date received by the City and name of person who received the application
 - c. Disposition of Application
 - d. Date of disposition
 - e. Person effecting the disposition of the application
 - f. Litigation outcome of the disposition, if applicable
 15. A copy of the officer’s handbook that was distributed to visiting officers.
 16. Copies of intelligence reports and/or briefings and/or logs related to G-20 security risks or threats conveyed to commanders, supervisors and police officers:
 - a. In the four weeks prior to the 9 day G-20 period
 - b. Immediately prior to the declarations of unlawful assemblies on 9/24 and 9/25.
 17. Copies of all arrest and related investigative reports related to G-20 operations filed during the 9 day G-20 period.
 18. Copies of all Subject Resistance/Use of Force reports filed by venue and/or individual arrests of record:
 - a. Please include projectile discharge reports for all projectiles fired
 - b. Please include deployment reports for OC vapor and smoke grenades
 - c. If the Subject Resistance report does not include documentation of medical clearance for those affected by gas or smoke or hit by baton rounds please include the investigative report documenting same.
 19. Please provide a copy of any internal review reports on G-20 operations, including the report presented to the National Policing Improvement Agency in the UK.

Submitted by:
Elizabeth C. Pittinger
Executive Director CPRB

**Arrow Financial Services, LLC v.
Virginia Hairston**

Pa. R.C.P. 237.5—Petition to Strike Default Judgment—Requirements of Praecepto to Enter Default Judgment

Default judgment was stricken for Plaintiff’s failure to comply with language prescribed in Pa. R.C.P. 237.5 by adding additional language, despite Rule’s requirement that notice of intention to file the praecipe only be “substantially in the following form.”

(Lynn E. MacBeth)

David Apothaker for Plaintiff.
Gregory T. Artim for Defendant.

No. AR 09-013989. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Wettick, Jr., J., March 29, 2009—Defendant’s petition requesting that I set aside the default judgment entered against defendant is the subject of this Opinion and Order of Court.¹

Defendant seeks to strike the default judgment on the ground that the Important Notice that plaintiff sent to defendant did not comply with the requirements of Pa.R.C.P. No. 237.5 because it contained additional language not set forth in Rule 237.5.²

Under Pa.R.C.P. No. 237.1(a)(2), no default judgment for failure to plead shall be entered by the Prothonotary unless the praecipe for entry of a default judgment includes a certification that a written notice of intention to file the praecipe was mailed or delivered to the defendant. Rule 237.5 provides that the notice shall be substantially in the following form:

IMPORTANT NOTICE

YOU ARE IN DEFAULT BECAUSE YOU HAVE FAILED TO ENTER A WRITTEN APPEARANCE PERSONALLY OR BY ATTORNEY AND FILE IN WRITING WITH THE COURT YOUR DEFENSES OR OBJECTIONS TO THE CLAIMS SET FORTH AGAINST YOU. UNLESS YOU ACT WITHIN TEN DAYS FROM THE DATE OF THIS NOTICE, A JUDGMENT MAY BE ENTERED AGAINST YOU WITHOUT A HEARING AND YOU MAY LOSE YOUR PROPERTY OR OTHER IMPORTANT RIGHTS.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

(Name of Office) _____
(Address of Office) _____
(Telephone Number) _____
(Signature of Plaintiff or Attorney) _____
(Address) _____

The notice which plaintiff furnished included an additional initial paragraph:

NOTICE, RULE 237.5

NOTICE OF PRAECIPE TO ENTER JUDGMENT BY DEFAULT

Date of Notice: January 13, 2010

IMPORTANT NOTICE

YOU ARE IN DEFAULT BECAUSE YOU HAVE FAILED TO ENTER A WRITTEN APPEARANCE PERSONALLY OR BY ATTORNEY AND FILE IN WRITING WITH THE COURT YOUR DEFENSES OR OBJECTIONS TO THE CLAIMS SET FORTH AGAINST YOU. UNLESS YOU ACT WITHIN TEN DAYS FROM THE DATE OF THIS NOTICE, A JUDGMENT MAY BE ENTERED AGAINST YOU WITHOUT A HEARING AND YOU MAY LOSE YOUR PROPERTY OR OTHER IMPORTANT RIGHTS.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE, IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELLIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

Lawyer Referral
The Allegheny County Bar Association
3rd Floor Koppers Bldg., 436 Seventh Avenue, Pittsburgh, PA 15219 — 412-261-5555

DAVID J. APOTHAKE, ESQUIRE
APOTHAKE & ASSOCIATES, PC
A Law Firm Engaged in Debt Collection
520 Fellowship Road C306, Mount Laurel, NJ 08054 — (800) 672-0215
Attorney for Plaintiff
Attorney ID #38423

Defendant contends that the default judgment should be stricken because of noncompliance with Rule 237.5. Plaintiff contends that the judgment should not be stricken because Rule 237.5 only requires that the notice be substantially in the form set forth on pages 1-2 of this Opinion. According to plaintiff, its notice was *substantially* in the form set forth in Rule 237.5. In fact, the additional language compliments the language within the Rule's Important Notice.

At oral argument, defendant's counsel advised me his client, a seventy-eight year old unsophisticated litigant, told him that she thought this notice meant that a judgment had been entered against her. Obviously, the fact that the defendant made that statement to her counsel does not mean that this is what the defendant believed. However, I cannot rule out the possibility that the additional language creates confusion for some defendants. Because it is in bold type and is the first portion of the notice, it may cause a defendant to believe that a judgment has already been entered. Thus, the additional language referring to a judgment that will be entered does not apply.

To the layperson, a "notice of praecipe" to enter judgment by default has little meaning. It does not necessarily mean that this is a notice of an intention to enter a default judgment at a later date. It may be even more likely to mean to the layperson that this is what has already occurred.

The first line's reference in bold print to a notice of praecipe to enter judgment by default is confusing. This confusion may alter the intended impact of the Important Notice which emphasizes that the defendant has ten additional days in which to act before any judgment will be entered against the defendant.

The words of the Important Notice were chosen with care. According to Explanatory Comment—1994, the "form of notice is universal, applying to all...defendants...whether represented or not and without distinction as to their degree of education or sophistication." The purpose of the Important Notice is to inform "the defendant of the need for action, the consequences of default and where he can obtain a lawyer."

The requirement that the defendant use the language of the Important Notice within Rule 237.5 is a requirement that can be easily met. There is no reason for a plaintiff to add to or otherwise alter the Important Notice and there is no reason for courts to be put in a position of trying to decide whether additional or modified language is harmless.

The requirement of the use of a universal form means that the language "substantially in the following form" comes into play only where there are misspellings or omissions of a word if the omission does not change the impact of the Important Notice. For example, the Important Notice may state that judgment may be entered "without hearing" where it should have stated "without a hearing."

For these reasons, I enter the following Order of Court:

ORDER OF COURT

On this 29th day of March, 2010, it is hereby ORDERED that the default judgment entered in these proceedings is stricken. Defendant's proposed Answer and New Matter attached to Motion to Open Judgment is deemed filed. Arbitration hearing is scheduled for May 19, 2010 at 9:00 A.M., 523 Courthouse.

BY THE COURT:
/s/Wettick, J.

¹ At oral argument, defendant's counsel correctly referred to the petition as a petition to strike default judgment.

² I am deciding defendant's petition through an opinion because it involves a recurring issue, and at oral argument counsel for plaintiff asked me to reconsider my rulings, made without opinions, in other cases striking default judgments.

Gary A. Sippel v. Franklin Park Borough v. P/6 Investments, L.P.

Land Development Application—Ambiguity in Language of Zoning Ordinance—Zoning Law—Municipalities Planning Code

Pursuant to Section 10603.1 of the Pennsylvania Municipalities Planning Code, an ambiguity in the meaning of a zoning ordinance must be resolved in favor of the applicant. *Desousa v. Zoning Hearing Board of Whitehall Township*, 339 A.2d 650 (Pa.Cmwlth, 1975).

(Lynn E. MacBeth)

Andrew F. Szefi for the Appellant.

R. Max Junker for Appellee.

Stacey M. Noble for Intervenor.

No. SA09-000469. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

James, J., November 4, 2009—This appeal arises from the decision of the Borough Council of the Borough of Franklin Park to grant approval for Intervenor, P/6 Investments, L.P.'s, Land Development Application dealing with their property at 2404 Nicholson Road, located in the municipality. That decision approved Intervenor's application to build and operate a self-storage/mini-warehouse facility on 5.640 acres of vacant land. Appellant contends that the Borough Council's decision constituted an abuse of discretion and an error of law under the Borough of Franklin Park Zoning Ordinance Sections 212-30J(2)–(3).

Intervenor proposes to construct and operate a 7 building, 540 unit, self-storage/mini-warehouse facility on property located at 2404 Nicholson Road in the Borough of Franklin Park. The property is located in an M-1 residential/commercial district. Self-storage/mini-warehouse facilities are permitted as-of-right in M-1 zoning districts in the Borough of Franklin Park.

The Borough's Planning Commission reviewed a final site plan of Intervenor's proposed development on February 17, 2009. Appellant, Gary A. Sippel, raised objections before the Planning Commission. The Planning Commission voted 4-2 against recom-

mending approval of the proposed development.

The Borough Council of the Borough of Franklin Park held a hearing on the proposed development on March 18, 2009. Council was asked to review and interpret Sections 212-30J(2)–(3) of the Zoning Ordinance to determine if the proposed development complied with those provisions.

Sections 212-30J(2) and (3) state:

(2) The site shall have direct vehicular access to an arterial or collector road, as defined by this chapter and access shall not be through a street on which the current use of the majority of the lots fronting on the street is single-family.

(3) Vehicular access to the site shall be limited to one two-way or two one-way driveways from each arterial or collector street on which the site has frontage and which meets the requirements of Subsection J(2) above.

(Borough of Franklin Park Zoning Ordinance, §§212-30J(2)-(3)).

Nicholson Road, upon which the property fronts, is specifically classified as an arterial road. Borough of Franklin Park Subdivision and Land Development Ordinance §184-23(b)(1). Appellant argued that sites for self-storage/mini-warehouse facilities must be located off an arterial or collector road, and that a majority of all the lots fronting Nicholson Road in the M-1 zone were being used for single-family purposes, and thus the proposed development cannot be allowed. Intervenor contended that the Ordinance provides that sites must have direct access to an arterial or collector road, and that the access cannot be through a street in which the majority of the lots are classified as single-family. Following the arguments, Council approved the preliminary and final land development plan by a vote of three (3) to two (2). On March 20, 2009, the Borough issued its written decision to the Applicant and Appellant. No findings of fact or conclusions of law were required. 53 P.S. §10508(2).

Where the trial court takes no additional evidence, the scope of its review is limited to determining whether or not Council abused its discretion or committed an error of law. *Vogel v. Hopewell Twp. Bd. of Supervisors*, 365 A.2d 706, 708 (Pa.Cmwlt. 1976). The Municipalities Planning Code provides the following direction when interpreting zoning ordinance provisions:

In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against the implied extension of the restriction.

53 P.S. §10603.1. In *Desousa v. Zoning Hearing Board of Whitehall Township*, 339 A.2d 650, 652 (Pa.Cmwlt. 1975), the Court recognized “that in construing a zoning ordinance any doubt concerning the scope of a permitted use or an ambiguity respecting its definition must be resolved in favor of the applicant.” The rationale behind Section 10603.1 of the Pennsylvania Municipalities Code and subsequent holdings is the zoning law rule that requires land use restrictions to be strictly construed because such restrictions are generally inapposite to the common law of a property owner’s right to unfettered use of land. *Fidler v. Zoning Hearing Board of Adjustment*, 182 A.2d 692, 695 (Pa. 1962).

In the case at hand, both the Appellant and the Appellee offered different definitions as to what the term “through” meant in the Ordinance language. A member of council noted at the hearing that there was an ambiguity in the Ordinance because there was an issue about what the definition of “through” was. This Court agrees that there is a definite ambiguity as to what the meaning of “through” is in the Ordinance.

Both parties also differed on the proper interpretation of the Ordinance language, which banned the proposed development if the majority of the lots fronting the street on which the development was proposed were currently being used for single-family purposes. Appellant contended that the Ordinance required all lots on Nicholson Road within the M-1 zone to be counted, and submitted exhibits at the Council hearing that supported the contention that the majority of lots on Nicholson Road were being used for single-family purposes. Appellee submitted evidence that created a 1.5 mile “block” around the subject property and argued that the majority of the lots fronting Nicholson Road in the “block” were not being used for single-family purposes and thus the proposed development was allowed under the Ordinance. Again, after reading the Ordinance in question, this court agrees with Council that an ambiguity arises in interpreting the Ordinance. It is well-settled law that an ambiguity must be construed in favor of the applicant. 53 P.S. §10603.1; *Desousa v. Zoning Hearing Board of Whitehall Township*, 339 A.2d 650 at 652 (Pa.Cmwlt. 1975).

For the foregoing reasons, the Borough Council of the Borough of Franklin Park’s approval of the proposed development is affirmed. This Court finds that Council committed no error of law, nor did they abuse their discretion.

ORDER OF COURT

AND NOW, to-wit, this 9th day of November, 2009, for the reasons set forth in the above opinion it is ORDERED, ADJUDGED and DECREED that the decision of March 20, 2009, is hereby affirmed. The appeal of Appellant is hereby dismissed for the reasons set forth in the foregoing Opinion.

BY THE COURT:
/s/James, J.

Marquise Investment, Inc. v. City of Pittsburgh and the Pittsburgh City Council

Conditional Use Application—Adult Entertainment—Deemed Denial of Application—Remand Hearing—Objections Based on Health, Safety and General Welfare

1. Planning Commission issued a report on the application for conditional use for an adult entertainment use, but did not schedule a public hearing or issue a decision. There was substantial opposition to the application from a number of community leaders.

2. Failure to conduct a hearing within forty-five days resulted in a deemed denial of the application. On appeal from the deemed denial, the court ordered a remand, to which applicant filed a motion to vacate. The court vacated the remand order and held a hearing de novo.

3. At the hearing de novo, objectors appeared but did not provide testimony sufficient to sustain their burden of proving their objections based primarily on traffic safety, health and welfare, and crime and property values. Where the local legislation expressly designates the use to be appropriate, the burden of showing the proposal to be detrimental to public health, safety and welfare falls on objectors.

4. Not every anticipated increase in traffic will justify the refusal to grant a special exception.

(Lynn MacBeth)

Clifford B. Levine for Appellant.

Lawrence H. Baumiller for the Appellees.

No. SA09-102. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

James, J., November 23—This appeal arises from the deemed denial of the Appellant's Conditional Use Application for an Adult Entertainment Use for property located at 1635 West Carson Street, City of Pittsburgh. The subject property is located in an Urban Industrial District and the Adult Entertainment Use is permitted as a conditional use.

On June 6, 2008, Appellant filed with the Pittsburgh Planning Commission a Conditional Use Application for the operation of an adult entertainment use on the subject property. On November 18, 2008 at a public hearing before the Commission the Zoning Administrator submitted a Conditional Use Report as required by the Zoning Ordinance. The report made the following findings:

1. The zoning classification of the property is Urban Industrial which permits Adult Entertainment as a conditional use;
2. All spacing and set-back requirements are met at this location;
3. Hours of operation will be 9:00 P.M. to 4:00 A.M., seven days per week;
4. The minimum parking standards were met;
5. The surrounding land use is primarily commercial and light industrial.

The Appellant submitted a narrative and exhibits in support of the Application and also testimony that supported their position that the proposed plan would meet all the objective criteria for a conditional use. There was substantial opposition to the Application from a number of community leaders. The Commission recommended denial without making specific findings of fact or reaching any conclusions of law.

The City's Zoning Code requires Council to hold a public hearing on the Conditional Use Application within forty-five days of the Commission's recommendation. Failure to conduct such a hearing within the specified time results in a deemed denial of the Application. The forty-five day deadline lapsed on January 2, 2009 without any hearing being held.

On January 29, 2009, Appellant filed a notice of appeal from Council's Deemed Denial pursuant to Section 923.01 D of the Code. After a status conference in March, this Court remanded the matter to Council to conduct a public hearing and make appropriate findings. On July 10 2009, Appellant filed a motion to vacate or enforce the order of remand of March 9, 2009. Because of Council's failure to conduct a hearing, Appellant requested that this matter be heard by the Court based on the record developed before the City of Pittsburgh Planning Commission. Because Council never conducted a hearing, made a record or findings of fact, the deemed denial because of inaction cannot be reviewed without taking testimony and creating a record. Indeed, the record now before this Court is all being presented to a fact finder for the first time. It is not "additional" testimony, but is the only testimony in this case.

On September 16, 2009, this Court vacated the March 9, 2009 Order of Remand, directed the parties to submit any additional evidence they deemed relevant and scheduled a hearing date to consider the additional evidence. Despite the lack of intervention, the City Solicitor gave notice to everyone who participated before the Planning Commission of the October 13, 2009 Hearing before this Court. Included in the Notice was a copy of this Court's Order of September 16, 2009 providing for the taking of additional testimony at the October 13, 2009 Hearing. Only Appellant offered additional evidence at the October 13, 2009 Hearing. The de novo hearing was concluded on October 13, 2009, and the record was closed. The record now before this Court is made up of the entire record before the Planning Commission, including all exhibits submitted, the supplemental testimony offered by Mr. Pat Risha, a representative of the Appellant, and the letter dated September 17, 2009 from the City Solicitor to all participants at the Planning Commission Hearing.

Because the law regarding conditional uses and special exceptions are virtually identical, the burden of proof standards are the same for both. *In re Thompson*, 896 A.2d 669, 670 (Pa.Cmwlth. 2005). The important characteristic of a special exception is that it is a conditionally permitted use, legislatively allowed if the standards are met. *City of Pittsburgh v. Herman*, 298 A.2d 624, 626 (Pa.Cmwlth. 1973). Thus, an applicant, by showing compliance with the specific requirements of the ordinance identifies the proposal as one which the local legislation expressly designates to be appropriate in the district and, therefore, presumptively consistent with the promotion of health, safety and general welfare. *Bray v. Zoning Board of Adjustment*, 410 A.2d 909, 912 (Pa.Cmwlth. 1980).

Where the trial court receives factual materials and is obliged to decide the case de novo, it must enter appropriate findings in order to permit review of its decision by the appellate court. *Borough of Baden v. Boron Oil Company*, 297 A.2d 833, 834 (Pa.Cmwlth. 1972). Here, in addition to the testimony offered at the October 13, 2009 Hearing, the entire record identifies the proposal as one in which the local legislation expressly designates to be appropriate in the district and, therefore, presumptively consistent with the promotion of health, safety and general welfare; hence it is logical that...the Pennsylvania decisions have placed on the objectors the "burden" of showing the proposal to be detrimental to public health, safety and welfare. *Bray* at 911.

Since the Appellant has met its burden of establishing compliance with the specific conditions of the Ordinance, the objectors have the burden of producing evidence that refutes the presumed validity of the use and showing that the proposed use is detrimental to the public health, safety and welfare. *Atlantic Richfield Co. v. City of Franklin*, 465 A.2d 98, 99-100 (Pa.Cmwlth. 1983).

Although there were many objections in writing and in person, the subject matter of most of the objections fell into four categories. These categories are traffic safety, health and welfare of the community, crime and property values. A review of the extensive record indicates that although many personal opinions are expressed as to all four categories, there is very little specific tes-

timony. Objectors offered no expert testimony of the type and quality to sustain their burden. Allegations of mere possibilities of harm fall short of the high degree of probability standard necessary to sustain objectors' burden of proof. *Evans v. Zoning Hearing Board*, 396 A.2d 889, 892 (Pa.Cmwlt. 1979). Until such strong degree of probability is evidenced by legally sufficient testimony no court should act in such a way as to deprive a landowner of the otherwise legitimate use of land. *Archbishop O'Hara's Appeal*, 131 A.2d 587, 597 (Pa. 1957).

Although testimony indicates that West Carson Street is a heavily traveled roadway, there is no testimony that this use, with 14 parking spaces, will increase traffic to such an extent that it poses a substantial threat to the health and safety of the community. Not every anticipated increase in traffic will justify the refusal to grant a special exception. *Fantastic Plastic, Inc. v. Pittsburgh Zoning Board*, 332 A.2d 577, 580 (Pa.Cmwlt. 1975). None of the concerns expressed by the Objectors' rise to the strong degree of probability necessary to deny the landowner of the otherwise legitimate use of land. Therefore, the Conditional Use is granted.

ORDER OF COURT

AND NOW, this 23rd day of November, 2009, it is hereby ORDERED that the Conditional Use is granted.

BY THE COURT:
/s/James, J.

Arsenal Bowling Lanes, Inc. v. Planning Commission of the City of Pittsburgh v. The City of Pittsburgh

Permit Parking Area Recommendation—Motion to Quash Appeal—Legislative vs. Adjudicatory Action of Municipal Governing Body

The Planning Commission's action of making recommendations to City Council concerning a permit parking area, and Council's passing of legislation thereon, are not adjudicatory actions that would be subject to appeal, despite the Planning Commission's recommendation having followed a public hearing.

(Lynn E. MacBeth)

Lawrence H. Baumiller for the Appellant.

Stuart M. Levine for the Appellees.

No. SA09-446. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

James, J., November 23, 2009—The issue at hand arises out of the statutory appeal of Arsenal Bowling Lanes, Inc., a Pennsylvania Corporation, (hereinafter "Appellant") from the recommendation of the Planning Commission of the City of Pittsburgh (hereinafter "Planning Commission").

On March 17, 2009, a public hearing was held by the Planning Commission to consider a proposal to expand the Residential Parking Permit Program in the Lawrenceville district of the City of Pittsburgh to include the Appellant's place of business located at 212, 44th Street, Pittsburgh, PA 15201 (hereinafter "Subject Property"). Following the hearing, the Planning Commission positively recommended the incorporation of several streets into the existing Parking Permit Program. On April 14, 2009, the Appellant filed a Notice of Appeal of the Planning Commission and on April 27, 2009, the City of Pittsburgh filed a Notice of Intervention. On May 29, 2009, the Planning Commission filed a Motion to Quash the Statutory Appeal of the Appellant stating that the decision of the Commission is not adjudicatory and, therefore, non-appealable pursuant to 2 Pa.C.S. § 751(b).

As a general matter, "[a] municipal governing body may act in an administrative role as well as in a legislative capacity." *North Point Breeze Coalition v. City of Pittsburgh*, 431 A.2d 398, 400 (Pa.Cmwlt. 1997). The Planning Commission is not an adjudicatory body, but instead only reviews and makes recommendations. *Eastern Consol. and Distrib. Servs., v. Bd. Of Comm'rs*, 701 A.2d 621, 624 (Pa.Cmwlt. 1997). Pursuant to the Pittsburgh code, decisions of the Planning Commission regarding residential parking permit areas are merely recommendations made to the City of Pittsburgh's City Council (hereinafter "City Council"). Before the City of Pittsburgh designates a new residential parking permit area, the Planning Commission must first conduct a study for eligibility and, within thirty days of the completion of that study, hold a public hearing on the subject of availability. Pittsburgh Code §549.05(a) and (b). The Planning Commission makes a recommendation by vote at the hearing. Pittsburgh Code §549.06(a). Following the public hearing, the Planning Commission must submit a repost to City Council which includes, among other things, the Planning Commission's recommendation, the result of the eligibility study and a record of the concerns raised at the public hearing. Pittsburgh Code §549.06(a) and (b). If the criteria set forth in Section 549.04 the Pittsburgh Traffic Code are satisfied, the parking permit area is designated by a resolution of City Council.

Furthermore, the legislative acts of City Council are also not subject to appeal. Pursuant to 2 Pa. C.S. § (b), only the "adjudications" of an agency are appealable. An "adjudications" is any final decision by an agency affecting personal property rights, privileges, immunities, duties, liabilities or obligations." *Ondek v. Allegheny County Council*, 806 A.2d 644, 648 (Pa.Cmwlt. 2004). Otherwise, if an agency's action "does not affect the rights of the parties, but only affects the interest of the public in general, then that action will not be deemed an adjudication." *Id.* at 648. The creation of a new permit parking area is a legislative, rather than adjudicatory, act.

The Planning Commission's March 17, 2009 action was to recommend an action to the City Council. City Council passed the legislation on April 28, 2009, and the legislation was signed by Mayor Ravenstahl on May 7, 2009. This recommendation did not result in, nor does the Appellant claim, any infraction of a personal or property right, privilege or immunity. Indeed, implementing a permit parking area is a legislative act of City Council that cannot be appealed under Local Agency Law. As such, "[w]here no right, privilege or immunity of a person is in jeopardy, an agency's action does not constitute an 'adjudication.'" *DeSivo v. PA State Police*, 919 A.2d 361, 363 (Pa.Cmwlt. 2007). The designation of the Subject Property is an example of an agency action that affects the public in general and, therefore, a legislative action. *Ondek*, 806 A.2d at 649.

For all the above-mentioned reasons the Planning Commission's Motion to Quash the Statutory Appeal of the Appellant is hereby granted.

ORDER OF COURT

AND NOW, this 23rd day of November, 2009, it is ORDERED that his Statutory appeal is Quashed for the reasons set forth in the Opinion filed this date.

BY THE COURT:
/s/James, J.

**Najib Aboud and Nasra Aboud and Baba D's, Inc. v.
City of Pittsburgh Department of Planning and City of Pittsburgh
and James M. Quinn and JMQ-1**

Restaurants and Liquor Licenses—Local Neighborhood Commercial (LNC) Zoning District—Application for Zoning Certificates—Liquor Control Board

The zoning ordinance cannot regulate liquor control as that is the province of the Liquor Control Board. An ordinance that attempts to do so is invalid. Title Nine, Article V, §911.04 of the Pittsburgh City Code was declared invalid.

(Lynn E. MacBeth)

Lawrence H. Baumiller for Appellants.

John A. Bacharach for the City of Pittsburgh.

John E. Quinn for Intervenor.

No. SA 09-000004 and GD 08-026513. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

James, J., December 9, 2009—This case involves two separate lawsuits questioning the validity of a portion of the Pittsburgh Zoning Code (“the Code”) that deals with restaurants and liquor licenses.

The first matter is an appeal which arises from the decision of the City of Pittsburgh City Council dealing with Property located at 2126 Carson Street, in the South Side section of the City of Pittsburgh, owned by Appellants Najib Aboud, Nasra Aboud and Baba D's, Inc. (“Baba D's”). Baba D's is located in a Local Neighborhood Commercial (LNC) zoning district and is a restaurant which has a valid liquor license, which is presently in safekeeping. In October 2007, Baba D's applied for and received a zoning certificate from the City of Pittsburgh Department of Planning to operate a restaurant without a liquor license. In December 2007, they applied for a zoning certificate for a restaurant with a liquor license for the same property. The Department of Planning processed it as a conditional use because of Title Nine, Article V, § 911.04 of the Pittsburgh City Code (“the Ordinance”). The Ordinance, which was passed by City Council on July 24, 2007, limits the number of restaurants with liquor licenses in zoning districts in LNC districts in the City of Pittsburgh. In September 2008, the Planning Commission recommended approval. On December 15, 2008, City Council conducted a hearing and denied the conditional use application. It is from that decision that Baba D's Appeals.

The second matter involves Intervenor James M. Quinn and JMQ-1 (“Quinn”). Quinn owns property at 1021-1023 East Carson Street also located in the LNC zoning district of the South Side. Quinn applied for a liquor license on the property. In November 2006, Quinn applied for occupancy and building permits to remodel the property. The Department of Planning did not permit Quinn to file full applications because of possible changes in the zoning laws. Quinn's liquor license was secured on May 23, 2007. The Ordinance was passed by City Council on July 24, 2007. Quinn again attempted to apply for permits and was again denied. Quinn filed a Complaint for Writ of Mandamus and an Action in Declaratory Judgment compelling the City to issue the permits and to declare the Ordinance unlawful and void.

Zoning ordinances enjoy a presumption of validity, and courts must give such ordinances every reasonable construction possible. *Schmalz v. Buckingham Tp. Zoning Bd. of Adjustment*, 132 A.2d 233, 234 (Pa. 1957). Courts shall not interfere with zoning classifications unless it is obvious that “the classification has no substantial relation to public health, safety, morals or general welfare.” *Whitpain Tp. v. Bodine*, 94 A.2d 737, 739 (Pa. 1953). Thus, the Code's provisions relating to restaurants with liquor licenses are valid unless they are clearly and absolutely preempted by the Liquor Code. If the Zoning Ordinance is not liquor neutral as it is applied to restaurants with liquor licenses, it is an infringement of the power of the Liquor Control Board, and cannot be enforced.

When the trial court takes no additional evidence, the scope of its review is limited to determining whether the Board committed an error of law, abused its discretion or made findings not supported by substantial evidence. *Mars Area Residents v. Zoning Hearing Board*, 529 A.2d 1198, 1199 (Pa. Cmwlth. 1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637 (Pa. 1983).

The Ordinance distinguishes between restaurants and restaurants with liquor licenses in LNC zoning districts. The Code provides a saturation limit for liquor licenses within the LNC zoning districts. Once an LNC district reaches its saturation level, any new application for a restaurant with liquor license is subject to the conditional use approval process. In 1994, the Legislature amended the Liquor Code at Section 4-493.1(a) and added the following language:

Nothing in this act shall be construed to preempt the right of any municipality to regulate zoning and enforce any other local ordinances and codes dealing with health and welfare issues.

47 P.S. Section 4-493.1(a)

In 1976 *Delaware Tavern Inc. v. Zoning Board of Adjustment*, 657 A.2d 63, 67 (Pa. Cmwlth. 1995), the Commonwealth Court concluded that even though the liquor industry is highly regulated by the Commonwealth, local municipalities have the power to prom-

ulgate and enforce appropriate liquor neutral zoning controls. However, unlike Title 9, Article V Section 911.04, the Ordinance in *Delaware Tavern* is liquor neutral. The Commonwealth Court explained that the ordinance at issue restricted all cabarets and adult entertainment stores, regardless of whether the owners possessed liquor licenses. On the contrary, Title 9, Article V Section 911.04 is not liquor neutral because it only imposes restrictions on restaurants with liquor licenses. In *Compton v. Zoning Hearing Board of Pennsbury Twp*, 708 A.2d 871, 874 (Pa. Cmwlth. 1998), the zoning board granted a restaurant a special exception permitting it to sell alcohol subject to certain conditions. Years later, the owner sought to have the conditions removed arguing that they invaded the province of the LCB and were preempted by the Liquor Code. The Commonwealth Court relied on *Delaware Tavern* and found that zoning boards may only place conditions on uses of land that are liquor neutral. *Compton* at 874. The Court noted that the conditions imposed in the *Compton* case were not liquor neutral because they involved regulation of the sale of alcohol and therefore invaded the province of the LCB.

Despite the fact that the liquor industry remains highly regulated by the Commonwealth, local municipalities even before the 1994 Amendment had the power to promulgate and enforce appropriate liquor neutral zoning control. Zoning controls that are not liquor neutral invade the province of the LCB.

The evidence shows that the Department of Planning initially approved the restaurant without a liquor license. Two months later, however, Baba D's was denied when they applied for a zoning certificate for a restaurant with a liquor license for the same property. Therefore, clearly Ordinance Title Nine, Article V, §911.04 is not liquor neutral and is an infringement on the power of the Liquor Control Board and is invalid.

ORDER OF COURT

AND NOW, this 9th day of December, 2009, based upon the foregoing Opinion, the decision of City Council is reversed and Baba D's conditional use is granted. Since the Zoning Ordinance in question is unlawful, Intervenor Quinn's request for a Writ of Mandamus is granted. The City of Pittsburgh is hereby ORDERED to issue Quinn's requested occupancy and building permits.

BY THE COURT:
/s/James, J.