

DATE ISSUED: July 6, 2006

ATTENTION: Chair and Members of the Planning Commission  
Docket of July 13, 2006

SUBJECT: APPEAL OF HEARING OFFICER DECISION TO REVOKE  
CONDITIONAL USE PERMIT 40-0109 (PROCESS 3) FOR THE  
ROUGE RESTAURANT & NIGHTCLUB AT 624 E STREET IN THE  
EAST VILLAGE DISTRICT OF THE DOWNTOWN COMMUNITY  
PLAN AREA

REFERENCE: Conditional Use Permit No. 40-0109  
Hearing Officer Resolution No. 2006-01  
Appeal application filed March 13, 2006  
Public correspondence  
Acoustical analysis dated June 3, 2004  
Noise Confirmation Testing Report dated January 28, 2005

Staff Recommendation - Staff recommends that the Planning Commission deny the appeal and uphold the Hearing Officer's decision to revoke Conditional Use Permit No. 40-0109 based on non compliance with the conditions of approval.

Centre City Advisory Committee (CCAC) Recommendation - On June 14, 2006, the CCAC voted unanimously to recommend to the Planning Commission to deny the appeal and uphold the Hearing Officer's decision to revoke Conditional Use Permit No. 40-0109.

Other Recommendations – None.

Fiscal Impact – None.

## DISCUSSION

Conditional Use Permit (CUP) No. 40-0109 was approved on April 13, 2000 for Kenny B's Bar & Grill located within the ground floor of the historic Beaumanor Loft building at 624 E Street in the East Village neighborhood of the Downtown Community Plan Area. The 3-story building also contains 52 SRO units on the two upper floors. The approval allowed alcohol in conjunction with live entertainment within a 3,491 square foot restaurant space.

In June 2003, Hustler Bar & Grill took over the business and expanded the restaurant by an additional 2,403 square feet. At that time, Hustler Bar & Grill submitted a request to amend the

CUP to allow alcohol in conjunction with live entertainment throughout the newly expanded premises.

Due to potential noise impacts to residents living directly above the establishment, the amendment application was put on hold. Over the course of a year, an acoustical analysis was conducted and a number of mitigation measures were implemented, including replacing the existing speakers with cluster speakers hanging from the ceiling, attaching a layer of acoustical lagging material throughout the establishment walls and ceilings, installation of ceiling grid system and acoustical panels and installation of fiberglass insulation atop the ceiling acoustical panels. A Noise Confirmation Testing report was conducted to certify that the measures met the recommendations in the report.

Prior to moving forward with the amendment, the applicant notified CCDC staff of a change in business name from Hustler Bar & Grill to Rouge. The stated purpose for Rouge was to provide entertainment consisting of live music, dinner dance shows and recorded music. Dance routines were to be done to "show tunes" from the 40's and 50's with some contemporary soft pop/rock music. Hours of operation were proposed to be from 11:00 a.m. to 2:00 a.m. seven days a week with entertainment available from 9:00 p.m. to 1:00 a.m. nightly.

The amendment to CUP No. 40-0109 was approved and issued on April 21, 2005. The approval allowed alcohol in conjunction with live music, entertainment and dinner dance shows within the expanded 5,894 square foot restaurant and lounge.

The CUP included specific conditions of approval to ensure compatibility, including items 1, 2, 6,& 7, which state the following:

- "1. The sale of alcoholic beverages shall be an accessory or secondary use to the primary use of the property as a restaurant in conformance with the permitted uses as outlined in the Centre City Planned District Ordinance.
2. The business shall maintain a valid State Department of Alcohol and Beverage Control (ABC) "On-Sale Bona Fide Public Eating Place" alcoholic beverage license and be a bona-fide eating establishment, maintain an operational kitchen facility and make reasonable efforts to sell food products to the general public. The business shall be in compliance with all conditions of said license at all times.
6. Bass-heavy music shall not be permitted.
7. Sound and amplification equipment shall be monitored during business hours to ensure that audible noise remains below 88dB so as not to disturb residents above. In the event that any noise and/or vibration complaints are received, CCDC shall evaluate the complaints and if it is determined that the business is potentially creating a nuisance for

the neighbors living in the upper floors, a duly noticed public hearing shall be scheduled. After receiving public testimony, the Hearing Officer may revoke or modify the Permit."

Pursuant to the conditions of the Permit, a six month administrative review was conducted on October 25, 2005. Notice was sent out to all interested parties. CCDC received complaints regarding the operation of Rouge including: 1) Loud bass-heavy music and vibrations emanating into residential units above the establishment; 2) management failing to respond to the requests from upstairs management and residents to lower the volume of bass music; and 3) claims from the public that the use was an on-going nightclub operation, not a bona-fide public eating establishment. Based on the number and nature of complaints filed (see attached), staff found it appropriate to schedule a public hearing to review the status of CUP No. 40-0109.

CCDC staff met with the business owner on several occasions to discuss the residents' concerns prior to the public hearing. The business owner acknowledged the residents' concerns and indicated that he was seeking to sell the business to a prospective buyer. The prospective buyer was proposing to modify the establishment's concept; however, no specifics were presented to staff. In order for the transaction to occur between the two parties, the business owner needed to obtain consent of the building owner, which did not occur prior to the date of the hearing. At the time, the business owner and the landlord were involved in mediation to resolve this and a number of other outstanding tenant/landlord issues.

The CUP review hearing took place on January 19, 2006. The basis for the hearing was to allow both the public and business owner to testify and, based on the evidence presented, determine if the business could be modified or measures taken so that the business was no longer creating a nuisance. The Hearing Officer decided to continue the hearing to March 2, 2006 to allow the business owner and landlord to continue trying to resolve their outstanding tenant/landlord issues. In addition, the Hearing Officer requested that an additional acoustical analysis be conducted from within Rouge to determine alternative noise levels within the establishment that might alleviate noise and vibration impacts to the residents above.

#### HEARING OFFICER DECISION

On March 2nd, the Hearing Officer conducted the review hearing to review the status of CUP No. 40-0109. Staff recommended that the Hearing Officer take public testimony and take one of the following actions:

- 1) Take no action (allowing existing conditions of the Permit to remain); or
- 2) Modify Conditional Use Permit No. 40-0109, based on specific recommendations of the public and/or those presented by staff; or,
- 3) Revoke Conditional Use Permit No. 40-0109.

Prior to the March 2nd hearing, it appeared that mediation efforts between the business owner and the property owner had failed. Staff also had not received any additional acoustical analysis as requested by the Hearing Officer. In addition, new information was presented that the establishment had been closed for several months due to a kitchen fire and the pending litigation with the landlord. At the hearing, the business owner admitted to operating the establishment not as a bona-fide eating establishment, but rather only for special entertainment events on a number of occasions, therefore making the business in direct violation of Condition No. 1 of the CUP.

After receiving input from members of the public, the business owner, and considering the staff report and written complaints, the Hearing Officer found the use to be creating a nuisance and under the conditions of the original CUP approval made a decision to revoke CUP No. 40-0109 based on the following facts:

1. Failure to comply with the stated conditions of approval of Conditional Use Permit No.40-0109 specifically included to ensure land use compatibility, in particular, Condition Nos. 1,2, 6, 7 and 13 which state:
  - "1. The sale of alcoholic beverages shall be an accessory or secondary use to the primary use of the property as a restaurant in conformance with the permitted uses as outlined in the Centre City Planned District Ordinance.
  2. The business shall maintain a valid State Department of Alcohol and Beverage Control (ABC) "On-Sale Bona Fide Public Eating Place" alcoholic beverage license and be a bona-fide eating establishment, maintain an operational kitchen facility and make reasonable efforts to sell food products to the general public. The business shall be in compliance with all conditions of said license at all times.
  6. Bass-heavy music shall not be permitted.
  7. Sound and amplification equipment shall be monitored during business hours to ensure that audible noise remains below 88dB so as not to disturb residents above. In the event that any noise and/or vibration complaints are received, CCDC shall evaluate the complaints and if it is determined that the business is potentially creating a nuisance for the neighbors living in the upper floors, a duly noticed public hearing shall be scheduled. After receiving public testimony, the Hearing Officer may revoke or modify the Permit.
  13. This permit may be revoked by CCDC if there is a material breach or default in any of the conditions of this permit. If the business creates a

nuisance to the surrounding neighborhood, based on a determination of the President of CCDC, this permit may be revoked after the holding of a public hearing."

2. Failure to provide the Hearing Officer with the requested acoustical study in a timely manner. The study was not conducted nor presented to the Hearing Officer on or before the date requested.

### APPEAL

The appellant's representative has filed an appeal of this decision, based on several criteria as listed in Attachment C. The appellant claims that numerous factual errors were presented in oral testimony by parties in support of the Hearing Officer's revocation of the CUP; that the appellant did not violate the terms of the Permit; that findings to revoke the permit were not made; and, that revocation procedures were not complied with. However, no evidence is provided with the appeal application to support any of these claims. All proper procedures were followed in the hearing and the Hearing Officer's decision was based on substantial evidence provided prior to, and during, the hearing.

There is a real potential for problems when nightclubs and residential uses are located within the same building. The Beaumanor Lofts is a three-story unreinforced masonry building dating to the mid-1880s and despite the acoustical analysis recommendations and mitigation measures completed, noise and vibrations apparently continued to be transmitted to the upstairs residences. While the noise levels within the business may not exceed the prescribed decibel levels and other ambient noise levels, the "thumping" of heavy bass sounds can be irritating; especially in the later evening hours when residents are trying to sleep and the nightclub is most active.

### CONCLUSION

Based on written record attached to this report, staff recommends that the Planning Commission deny the appeal and uphold the Hearing Officer's decision to revoke CUP No. 40-0109.

Respectfully submitted,

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Lucy Contreras, CCDC Assistant Planner

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Attachment(s):

- A - Conditional Use Permit No. 40-0109
- B - Hearing Officer Resolution No. 2006-01
- C - Appeal application filed March 13, 2006
- D - Public Correspondence
- E - Acoustical Analysis dated June 3, 2004
- F - Noise Confirmation Testing Report dated January 28, 2005