



OFFICE OF THE CITY ATTORNEY

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TO: Mayor and Council
FROM: Charles I. Wadams
DATE: November 13, 2023
SUBJECT: Appeal of Design Review Approval of DSRFY2023-0007 (Bardenay)

ACTION REQUIRED: Within the City Council's discretion.

RECOMMENDATION: Considering the appeal pursuant to Garden City Code § 8-6A-9 except as otherwise agreed.

FISCAL IMPACT/BUDGET IMPLICATIONS: There is no significant financial impact to the City if the appeal is processed properly.

BACKGROUND: DSRFY2023-0007 is a Design Review application for "Bardenay," a new structure located at 3100 W. Chinden Boulevard. The owner is Riverside Hospitality, LLC, and the property is in the C-1 zoning district. The adjacent uses are eating establishment, full service, lodging, and accessory. The application is for one structure with 20 vehicular parking spaces, and 4 bike racks/20 spaces for bicycle parking. Parking was reviewed under the new parking code.

The application says the use is "bar and distillery." On page 9, the application also states this:

SQUARE FOOTAGE:
TOTAL A-2: ASSEMBLY AREA: 4,698 SF
TOTAL F-1: INDUSTRIAL AREA: 3,030 SF

On page 11, the application states:

BUILDING SQUARE FOOTAGE:
DINING: ASSEMBLY UNCONCENTRATED 1,466 SF. (TABLE AND CHAIRS):
KITCHEN, COMMERCIAL: 1,279 SF.
OUTSIDE PATIO: 1,277 SF. F-1
DISTILLERY SPACE: 3,030 SF. TOTAL: 7,002 SF

The Staff Report (and Staff Decision) identifies 4,698 square feet dedicated to the Eating Establishment, Full-Service use, and 3,030 square feet dedicated to the Food Products Processing, Small Scale use.

The process followed by Staff was “design review, administrative with notice.” Noticing for the application was completed on August 16, 2023. The neighborhood meeting was held on August 28, 2023. Among others, Jeff Hatch, Fred Oliver, and Francie Oliver were present for the neighborhood meeting, and indicated they were interested in receiving more information as the application progresses.

Staff received public comment and testimony from Jeff Hatch via email on September 12, 2023. The application was approved by Staff based on the recommendations of the design review consultant(s) on September 18, 2023. After the approval, the City received emails from River City Annex, LLC (General Counsel Scott Leap) on September 19, 2023 and September 20, 2023.

Also after the approval, the City received public comment and testimony from River City Annex, LLC (General Counsel Scott Leap) via email on September 20, 2023 and September 21, 2023. At the September 25, 2023 Council Meeting, the Staff Approval was on the Consent Agenda for approval. The City Council moved the item to Special Business, and then affirmed the Staff Decision.

On October 2, 2023, River City Annex, LLC (Fred and Frances Oliver) submitted a timely notice of appeal from the Staff Decision. River City Annex, LLC is the owner of the Stagecoach Inn property. The appeal was divided into a bifurcated process to address some procedural issues. On October 23, 2023, the City Council decided to consider the appeal *de novo*, as was agreed by the appellant, and set the appeal hearing for November 13, 2023.

At the October 23, 2023 Council Meeting, with agreement of the appellant, the City Council voted to hear the appeal *de novo* as a public hearing to preserve the record. The appeal is based on how Staff interpreted or applied the Garden City Code. Therefore, the City Council should examine the issue from the beginning without deferring to the Staff Decision. Otherwise, the hearing should be held pursuant to Section 8-6A-9 of Garden City Code. Public notice has been satisfied for November 13, 2023.

The appellant is now represented by attorney Abigail R. Germaine with the law firm Elam & Burke. On October 6, 2023, Ms. Germaine submitted a timely Memorandum in Support of Appeal Requesting Denial and/or Amended Conditions of Approval for DSRFY2023-0007, and a PowerPoint presentation for the November 13, 2023 hearing.

The appellant’s memorandum is broken into the following sections:

- I. Background;
- II. Applicable Standards and Requirements;
 - A. Design Review Standards and Criteria.
 - B. Appeal Criteria and Standards.
- III. Analysis of the Applicable Standards Requires Denial or Revised Conditions of Approval;

- A. The Application Should be Denied or Revised Conditions Should be Imposed to Ensure the Project does not have Negative Impacts on the Surrounding Neighborhood.
 - B. The Project as Approved Negatively Impacts River City Economically and Jeopardies Citizen and Patron Safety and Welfare.
 - 1. The number and location of the planned parking associated with this Application creates severe negative economic impacts and logistical problems for the Stagecoach Inn.
 - 2. Safety concerns related to direct access to Chinden Blvd. have not been addressed.
 - C. The Evidence Presented Shows the Application, as Conditioned, Does not Meet the Standards of the Applicable Code and/or the Code was Misinterpreted or Misapplied Based on the Evidence Presented.
- IV. Conclusion.

On appeal, Ms. Germaine essentially argues that: (1) there is inadequate parking; and (2) there is not safe ingress and egress. Specifically, she contends the conditions G.C.C. §§ 8-6B-3(E)(4) and (5) are not satisfied. The allegation is that the design is not compatible with the neighborhood in scale and intensity, and creates an adverse impact on the surrounding neighborhood.

Additionally, the appellant argues that more conditions of approval are needed pursuant to G.C.C. § 8-6A-5(F) to protect public health, safety, and welfare, and prevent undue adverse impacts on surrounding properties. Finally, Ms. Germaine argues that the tables in G.C.C. § 8-4D-6 establish a minimum for required parking spots, and City must also balance the requirements of no adverse impacts. I am providing the below analysis to assist the City Council in making its determination.

ANALYSIS: First, Garden City Code § 8-6A-9 controls appeals of approvals. Garden City Code § 8-6A-9.E, in part, states:

Decision:

- 1. After the hearing on the appeal or council review, the review authority shall make its decision and adopt findings of fact and conclusions.
- 2. In its decision, the review authority shall determine whether the application or petition should be granted, granted with conditions, remanded to the decision maker for additional proceedings and findings, or denied.
- 3. The city shall transmit a copy of the decision by the review authority together with a copy of its findings and conclusions to the decision maker; and shall transmit a copy of its decision, findings and conclusions of law to the appellant.

In the instant case, River City Annex, LLC appealed within 15 days of the Staff Approval, and likely has standing under the Idaho Local Land Use Planning Act (LLUPA), as the Stagecoach Inn is adjacent to the proposed address for Bardenay. Arguably, design review applications are reviewed under LLUPA.

LLUPA requires a governing authority to issue a written reasoned statement which accompanies its decision to explain why the land use application was approved or denied:

[t]he approval or denial of any application required or authorized pursuant to this chapter shall be in writing and accompanied by a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record.

I.C. § 67-6535(2). A failure to address compliance or noncompliance with express approval standards or relevant decision criteria is grounds for invalidating a governing authority's decision. I.C. § 67-6535(2)(a).

The reasoned statement required by I.C. § 67-6535(2) must:

- (1) plainly state the resolution of factual disputes;
- (2) identify the evidence supporting that factual determination; and
- (3) explain the basis for legal conclusions, including identification of the pertinent laws and/or regulations upon which the legal conclusions rest.

Recently, on September 7, 2023, the Idaho Supreme Court reviewed a stated "reasoned statement" that was approved by the Boise City Council, which consisted of only one and one-half pages of text with seven additional pages of standard conditions. *N. W. Neighborhood Ass'n v. City of Boise*, 535 P.3d 583 (Idaho 2023). After the approval of the project, the North West Neighborhood Association (NWWA) submitted a request for reconsideration, which the Council denied. NWWA then filed a timely petition for review and then an appeal with the courts.

The Idaho Supreme Court held that the Boise City Council's written reason for its decision failed to satisfy the requirements of LLUPA. The Court ruled that the Council's failure to provide a reasoned statement explaining its decision necessitated that the approvals of the applications be invalidated pursuant to I.C. § 67-6535(2)(a). The failure to provide a reasoned statement, which would have enabled the Court to engage in meaningful judicial review, deprived NWWA of its substantial right to due process. Therefore, the Court remanded the matter with instructions to invalidate the Boise City Council's actions and remand to the City Council for the adoption of a reasoned statement that complies with the requirements of I.C. § 67-6535(2).

The design review process for DSRFY2023-0007 was under the 2022 amendment, using consultants rather than a committee. Design Review was implemented to make the development application process more efficient by assisting developers in designing projects that comply with code and Garden City's comprehensive plan. The 2022 amendment replaced the Design Review Committee with individual Design Review Consultant(s) to increase the flexibility, efficiency, and effectiveness of the Design Review process.

In *Wee Boise, Inc. v. Garden City*, Ada County Case No. CR01-20-03481 (Fourth Judicial District 2022), the district judge stated that "Council may not deny a[n] ... application that meets what few clear and objective standards the City has enacted simply because, upon reviewing the application, the Council wishes it had enacted more requirements or different requirements." (*Wee Boise*, p. 18). Under the *Wee Boise* decision, if codified standards are subjective, they are unusable, which essentially means they are irrelevant to the application: "[t]o the extent that Council denied the application because the Council held the application did not meet unclear and subjective criteria in the Garden City ordinances . . . the Council erred as a matter of law." (*Wee Boise*, p. 19). Therefore, if an application meets the applicable objective standards, it should be approved.

In addition to providing a reasoned statement, based on objective standards, in its decision, the City Council should specifically consider the following issues on appeal:

- (1) Do the tables in G.C.C. § 8-4D-6 only establish a minimum number of required parking spots, and must the City also balance the requirements of no adverse impacts?
- (2) Is there adequate parking?
- (3) Should the application be denied, or revised conditions be imposed, to ensure the project does not have negative impacts on the surrounding neighborhood?
- (4) Does the project as approved negatively impact the appellant economically and jeopardize citizen and patron safety and welfare?
- (5) Does the number and location of the planned parking associated with this application create severe negative economic impacts and logistical problems for the appellant?
- (6) Is there safe ingress and egress?
- (7) Have safety concerns related to direct access to Chinden Blvd. been addressed?
- (8) Does the evidence presented show the application, as conditioned, does not meet the standards of the applicable code and/or the code was misinterpreted or misapplied based on the evidence presented?

The issues on appeal should be addressed for potential judicial review purposes.

CONCLUSION: At the October 23, 2023 Council Meeting, with agreement of the appellant, the City Council voted to hear the appeal *de novo* as a public hearing to preserve the record. The appeal is based on how Staff interpreted or applied the Garden City Code. Therefore, the City Council should examine the issue from the beginning

without deferring to the Staff Decision. Otherwise, the hearing should be held pursuant G.C.C. § 8-6A-9.

On November 13, 2023, the City Council should determine whether the application should be granted, granted with conditions, remanded to Staff for additional proceedings and findings, or denied. If the application should be granted, then the Staff decision should be affirmed. If the application should be denied, then the Staff decision should be reversed and/or remanded.