OFFICE OF THE CITY ATTORNEY

6015 Glenwood Street ▪ Garden City, Idaho 83714
Phone 208/472-2900 ▪ Fax 208/472-2996

TO: Mayor and Council
FROM: Charles I. Wadams, City Attorney
DATE: 11/14/2022
SUBJECT: Reconsideration Request on DSRFY2022-14

BACKGROUND: At the October 24, 2022 Council Meeting, the City Council approved DSRFY2022-14. On November 4, 2022, a neighbor to the project, Belinda Isely, submitted a timely Request for Reconsideration with the City. I am now providing a legal analysis to the City Council to assist in the review of the Reconsideration Request.

ANALYSIS: In the Request for Reconsideration, Ms. Isley is requesting that the project be redesigned. In the reconsideration request, Ms. Isley states that the Council errored in making the following findings:

1. The proposed design adheres to standards for the protection of health, safety and general welfare.
2. The proposed design creates a sense of place and contributes to the uniqueness of the different districts and neighborhoods within the city

The Request for Reconsideration raises the following claims:

1. The project, "will create unsafe conditions, be detrimental to the neighborhood, and negatively affect its residents – along with the many people who visit and recreate on a daily basis."
2. The building, "is not well integrated in regards to lot coverage, mass volume and height, to adjacent buildings withing the neighborhood and contradicts the designation's goal to limit lot size, building footprint, square footage."

The current design review may be subject to judicial review under the Local Land Use Planning Act (LLUPA). LLUPA governs how local governments can act on certain land-use matters and compels local governments to act on such matters by stating that they "shall exercise the powers conferred by [LLUPA]." I.C. § 67-6503. The following are subject to LLUPA review: (1) initial zoning following annexation; (2) rezoning of specific parcels or sites pursuant to Idaho Code § 67-6511; (3) conditional rezoning pursuant to Idaho Code § 67-6511A; (4) application for subdivision; (5) application for variance; (6) application for conditional use permit; and (7) "other similar applications" which presumably includes planned unit developments.

To start, it should be noted that LLUPA "may implicitly authorize [design review] requirements, but [LLUPA] does not expressly 'require or authorize' design review.'" GARY G. ALLEN ET AL., IDAHO LAND USE HANDBOOK: THE LAW OF PLANNING, ZONING, AND PROPERTY RIGHTS IN IDAHO 219, n. 225 (Givens Pursley, LLP, Nov. 2019). Therefore, with no directly applicable case law to clarify, there is an open question as to whether design review matters are subject to judicial review under LLUPA. *Id.* However, discussing and applying LLUPA to design review matters is nevertheless worthwhile for the reasons discussed herein.

Several of LLUPA's provisions touch on design review matters. First, one of LLUPA's stated purposes is "[t]o ensure that the development on land is commensurate with the physical characteristics of the land." I.C. § 67-6502(h). When a local government creates and empowers a planning and zoning commission (PZC), the PZC must "prepare, implement, and review and update a comprehensive plan" and such plan should include considerations about community design. I.C. § 67-6508. Specifically, the comprehensive plan should, among other things, include "[a]n analysis of needs for governing landscaping, building design, tree planting, signs, and suggested patterns and standards for community design, development, and beautification." I.C. § 67-6508(m).

Thereafter, local governments shall adopt ordinances that establish zoning districts that are in accordance with the comprehensive plan. I.C. § 67-6511(1). Such ordinances "*shall* where appropriate establish standards to regulate and restrict, the height, number of stories, size, construction, reconstruction, alteration, repair[,] or use of buildings and structures; percentage of lot occupancy, size of courts, yards, and open spaces; density of populations; and the location and use of buildings and structures." I.C. § 67-6511(1)(a) (emphasis added). Further, LLUPA also states that a local government "*may* adopt stands for such things as: building design; . . . signs; parking spaces; roadways, streets, lanes, bicycleways, pedestrian walkways, rights-of-way, grades, alignments, and intersections; lighting; . . . access to streams, lakes, and viewpoints; . . . [and] schools, hospitals, and other public and private development." I.C. § 67-6518 (emphasis added). Such standards "may be provided as part of zoning." *Id.*

LLUPA requires local governments to establish procedures for timely processing of "applications for zoning changes, subdivisions, variances, special use permits[,] and such other applications required or authorized pursuant to [LLUPA] for which a reasonable fee may be charged." I.C. § 67-6519(1). Furthermore, LLUPA requires decisions on "any application required or authorized" under LLUPA to be based on express standards and criteria set forth in local government ordinances, to be made in writing, and to identify and explain the decision in light of the applicable standards and criteria. I.C. § 67-6535. Failure to do so "shall be grounds for invalidation of an approved permit or site-specific authorization, or denial of the same, on appeal." I.C. § 67-6535(2)(a).

It is worth noting that the Idaho Legislature has made attempts in the past to limit the ability of local governments to apply design review standards. Interestingly, these attempts have solely sought to amend LLUPA and no other statutory provisions, which weighs in favor of construing LLUPA to apply to design review matters. In 2014, members of the Idaho House of Representatives proposed House Bill 480 to limit

design review discretion. H.B. 480, 62d Leg., 2d Reg. Sess. (Idaho 2014). First, House Bill 480 sought to amend I.C. § 67-6508(m) to add language to make "design review powers for aesthetics and beautification a voluntary requirement for building." RS22794 Statement of Purpose. The amendment stated that a comprehensive plan should include an "analysis of needs for . . . *voluntary building* beautification." H.B. 480, 62d Leg., 2d Reg. Sess. (emphasis added).

Second, House Bill 480 sought to amend I.C. § 67-6511(1)(a) to add language to clarify "the authority for aesthetic design only extends to surface finish, and does not entail authority to require structural design modifications to otherwise conforming structures." RS22794 Statement of Purpose. The amendment followed the existing language about establishing "standards to regulate and restrict" various design review matters within a zoning district and added that "[n]o zoning regulation shall mandate, nor any construction permit condition require, adherence to specific exterior design aesthetics or beautification beyond surface finishes. . . . No aesthetic or beautification standards shall require structural design modifications to otherwise compliant structures for commercial or industrial construction uses. . . . All applicable standards shall be clear, ascertainable and not based on subjective considerations as required by [I.C. § 67-6535]." H.B. 480, 62d Leg., 2d Reg. Sess.

House Bill 480 successfully passed the House of Representatives but failed to receive a hearing in the Senate and ultimately did not become law. However, it still serves to illustrate that design review matters likely come under LLUPA. The legislative history of House Bill 480 explicitly talks about design review and local governments that create design review boards and committees and require proposed developments to go through a design review process. Sponsors of House Bill 480 justified the amendments to LLUPA by arguing that the discretion afforded to local governments *by* LLUPA to regulate design review matters unfairly limited the exercise of private property rights. Of course, unless a court found a facial ambiguity within LLUPA, it would not explore this legislative history, especially because House Bill 480 did not ultimately pass. However, it is certainly worth acknowledging that matters related to design review are addressed only in LLUPA and nowhere else in state law.

While the Idaho Supreme Court has not addressed design review, it has addressed another application process that is at least tangentially related to land use and development. In *Arnold v. City of Stanley*, the Idaho Supreme Court found that matters involving building permits do not fall under LLUPA. 162 Idaho 115, 116 (2017). The court reasoned that if building permits were governed by LLUPA, it would be clear from the plain text of the Act. *Id.* The reasoning used in *Arnold* might apply to design review matters, but the court in *Arnold* acknowledged, LLUPA only discusses building permits in the context of future acquisition maps. Design review matters, on the other hand, are mentioned frequently throughout LLUPA, although they are not explicitly labeled as "design review" matters.

If design review matters fall under LLUPA, its provisions may require specific processes above and beyond the basic constitutional due process requirements previously discussed. LLUPA dictates that a local government "shall, by ordinance or resolution, adopt procedures

for the conduct of public hearings. At a minimum such hearing procedures shall provide an opportunity for all affected persons to present and rebut evidence." I.C. § 67-6534. Garden City has such procedures in place and follows such procedures. The cases taken together seem to imply that Idaho courts will apply LLUPA and the Idaho Administrative Procedures Act (IAPA) without hesitation to any quasi-judicial action that seems to fit within the context of land use.

Reconsideration in I.C. § 67-6535(2)(b) is reserved for affected person of a final decision. The Local Land Use Planning Act states:

> [a]ny applicant or affected person seeking judicial review … must first seek reconsideration of the **final decision** within fourteen (14) days. Such written request must identify specific deficiencies in the decision for which reconsideration is sought. Upon reconsideration, the decision may be affirmed, reversed or modified after compliance with applicable procedural standards. A written decision shall be provided to the applicant or affected person within sixty (60) days of receipt of the request for reconsideration or the request is deemed denied. A **decision** shall not be deemed **final** for purposes of judicial review unless the process required in this subsection has been followed. The twenty-eight (28) day time frame for seeking judicial review is tolled until the date of the written decision regarding reconsideration or the expiration of the sixty (60) day reconsideration period, whichever occurs first.

I.C. 67-6535(2)(b) (emphasis added).

However, I.C. § 67-6535(2) applies only to an "application required or authorized pursuant to this chapter." *Id*. Currently, there is no case law interpreting 67-6535(2)(b). Therefore, the analysis is of the plain wording of the statute. The statute states an applicant or affected person seeking judicial review "must" seek reconsideration. It does not state that the City Council must grant reconsideration. If a written decision is not provided on the request for reconsideration, "the request is deemed denied."

LLUPA requires an affected person to go back to the City Council and specifically state what the alleged deficiencies are in the decision to potentially give the Council an opportunity to correct any errors. It does not require the Council to make a decision on the motion. Based on the plain wording of the statute, it is within the Council's discretion on whether to consider the merits of a motion for reconsideration on an application that is within the scope of LLUPA.

CONCLUSION: As an affected person, Ms. Isley likely has a right to submit a Request for Reconsideration in this matter. As required, Ms. Isley has specifically stated what the alleged deficiencies are in the Decision with argument and analysis. By granting the reconsideration request, it would give the Council an opportunity to correct any errors before Ms. Isley might otherwise proceed to file a Petition for Judicial Review in court.