



## OFFICE OF THE CITY ATTORNEY

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**TO:** Mayor and Council  
**FROM:** Charles I. Wadams, City Attorney  
**DATE:** September 12, 2022  
**SUBJECT:** Consideration of Proposed Ordinance No. 1026-22 (Design Review Consultant)

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**ACTION REQUIRED:** Within the City Council's discretion.

**RECOMMENDATION:** None.

**FISCAL IMPACT/BUDGET IMPLICATIONS:** There is no significant financial impact to the City if the additional expense is passed on to applicants.

**BACKGROUND:** 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 Design Review Committee served that function. However, the noticing and hearing requirements associated with a Design Review Committee recommendation can be improved in a manner that eliminates the public hearing process and makes staff the decision maker on design review applications. Thus, the current ordinance proposes to replace the Design Review Committee with individual Design Review Consultant(s) to increase the flexibility, efficiency, and effectiveness of the Design Review process. This proposal is in front of the City Council at the same time as CPAFY2022-0005 and Ordinance 1024-22.

**ANALYSIS:** Ordinances are local laws that are used to regulate people or property, and for specific situations outlined in state law. The fundamental power of cities to enact laws (ordinances) for the promotion and protection of the public health, safety, and welfare is granted by Article XII, Section 2 of the Idaho Constitution. Ordinances must be used for regulatory measures, especially when there is a penalty for violation. Procedures for adopting ordinances are prescribed by Idaho Code § 50-901 through § 50-906 and must be strictly followed. Failure to follow these requirements can result in an ordinance being struck down by a reviewing court.

I have previously presented to the city council a review of ordinances from other jurisdictions to assist in considering options for a policy regarding city council review of final actions. A summary of the previous presentations is below.

(1) The Boise City Code and Meridian City Code:

Boise City Code § 11-03-03.9 states, “appeals to the city council can only be made by a party of record,” and parties of record are defined as, “the applicant, property owner, Planning Director, and those who testified orally or in writing at the lower hearing.” B.C.C. § 11-012-05. Under Meridian City Code § 11-5A-7, a “[r]equest for City Council review of a decision of the director or the Planning and Zoning Commission concerning the administration of this title may be made by an applicant, the director, or a party of record.” Under current Garden City, Boise, and Meridian ordinances, the city council does not have the power to appeal from a final decision.

(2) The Twin Falls City Code:

As the city council is aware, the City of Twin Falls has reserved a review power to their city council. Under Twin Falls Code (T.F.C.) § 10-17-2, “any action taken by the Commission which would be final unless appealed may be reviewed and heard by the Council when an appeal is not made but the Council determines, within fifteen (15) days of Commission action, that there may be significant adverse impact as a result of the Commission action.” As has been previously discussed, the Idaho Supreme Court has upheld T.F.C. § 10-17-2, relying on LLUPA. See *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 159 P.3d 840 (2007).

**PROCEDURES FOR AMENDING DEVELOPMENT CODE:**

Under GCC § 8-6B-5, if the city (any member of the council, design review committee, or the commission) proposes to amend the development title, proper notice and public hearing procedures must be followed as set forth in article A, “General Provisions” of Chapter 8 in Garden City Code. Accordingly, a neighborhood meeting must first be held. GCC § 8-6A-7.B.1. Thereafter, development code amendments are heard by the DRC as a recommending body when design is affected by the application, and the PZC as recommending body. The city council is the final decision maker on development code amendments. GCC § Table 8-6A-1.

In order to grant a text amendment to the development code, the council shall make the following findings:

1. The text amendment complies with the applicable provisions of the comprehensive plan.
2. The text amendment shall not be materially detrimental to the public health, safety, and welfare; and
3. The text amendment shall not result in an adverse impact upon the delivery of services by any political subdivision providing public services within the city.

GCC § 8-6B-5.D.

**COMMON STRUCTURING PRACTICES OF DRC:**

There are three types of DRCs. The first, which Garden City currently abides by, is an appointed or volunteer board that has the authority to review applications and approve,

deny, or approve them with conditions either as a recommendation to another PZC board, or as a binding decision, appealable by an interested party. Planning staff provides support for the work, by preparing staff reports and assisting applicants.

The second type is an administrative model in which professionally trained planning staff reviews the application according to standards and guidelines established in ordinances/code. While these decisions don't require a public meeting, public input is still taken into consideration in the form of written emails or letters and is still placed on record.

The third type involves both board and planning staff, each being responsible for certain aspects of design review. This division of responsibilities is established in code. The benefit of involving administrative staff, is that it lessens the need for a public meeting to help work through small, common, developer issues, and keeps the more complex development issues public to allow for input and testimony.

(Mark Hinshaw and Marya Morris, American Planning Association, *Design Review: Guiding Better Development*, PAS 591, Chapter 3).

#### **CURRENT CODE AMENDMENT:**

Here, the code amendment changes the design review process to the administrative model in which professionally trained planning staff (including consultants) review the application according to standards and guidelines established in ordinances/code. The stated purpose of the proposal to change the Design Review Committee to Design Review Consultant(s) is to modify and refine the design review application process. The intention of Design Review is to protect property rights and values, enhance important environmental features of the city, and ensure that the general appearance of buildings and site improvements are consistent with the goals of the city.

A Design Review Consultant enables decision-making bodies to render judgments based upon sound advice from an individual that understands building technologies and costs. This ordinance amends the portions of Title 8 "Development Code" pertaining to the Design Review Committee and the Design Review process. This ordinance will replace the Design Review Committee with Design Review Consultant(s). The Planning Official will select and contract with each consultant on behalf of the City. A consultant may be requested to review and recommend submitted projects as per the process outlined in code.

A Design Review Consultant functions on behalf of the Planning and Zoning Commission. A Design Review Consultant will have expertise in architecture, landscape design, and/or engineering. Their function will be to consult with developers on their projects prior to submittal, assisting them in designing a project that complies with code, conforms to the City's design guidelines, and follows the Garden City Comprehensive Plan. When a development project is submitted, a Design Review Consultant will review the project and, based on objective criteria outlined in code, recommend approval or denial of the project to the planning official.

As per the process outlined in code for the specified project, the planning official will either use the Design Review Consultant's recommendation to make a decision regarding the submittal or include the recommendation in any Staff Reports submitted to City Council. The recommendation will enable the Planning Official and City Council to make informed decisions about both the functionality and aesthetic of each proposed development project. The consultation and recommendation process will also enable developers to more easily design projects that comply with code and the City's comprehensive plan.

This process will be an administrative adjudication so there must be due process and appealability. I recommend that Design Review Consultant(s) and Development Services Director generally follow the standards for a hearing examiner under I.C. § 67-6520.

If design review is by a consultant making recommendations rather than a committee making recommendations, that process will not be governed by the Open Meetings Act under I.C. § 74-202 (formerly I.C. § 67-2341). See *Safe Air for Everyone v. Idaho State Dept. of Agriculture, et al*, 145 Idaho 164, 165, 177 P.3d 378, 379 (2008). The consultant would not be considered a "governing body" requiring open meetings under the Idaho Code definition, as "governing body" consists of "at least two members who have authority to make decisions or recommendations to [an agency]...[and is] required to make its decisions by majority vote at which a quorum is present." *Id*; I.C. § 74-202(5) (formerly § 67-2341(5)).

Even if a public meeting is required at some stage in the process, there is no requirement to allow the public to speak at a public meeting. Idaho Code § 74-203(1) states, "all meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act." In contrast, "interested persons" have an opportunity to be heard at a public hearing. In conclusion, the proposal is a major repeal and replace of portions of the Garden City Code. Both Design Review Committee and the Planning and Zoning Commission have made recommendations to approve this ordinance proposal.

On July 25, 2022, the City Council voted to commence with a first reading of the proposed ordinance. Also on the agenda for July 25, 2022 was the Surel Mitchell Overlay District repeal ordinance in CPAFY2022-0005 and Ordinance 1024-22. On August 8, 2022, the second reading of the ordinance was completed, along with a second reading of Ordinance 1024-22.

On August 22, 2022, City Council continued the matter for further review. The matter is now before City Council on September 12, 2022, for a potential third reading. The minor changes discussed have been made to the ordinance, including verifying the meaning of "standing" and replacing the term "unclear." Therefore, I am recommending that City Council adopt Findings of Fact, Conclusions of Law and Decision in CPAFY2022-0003, and pass Ordinance No. 1026-22.