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TO: Mayor and Council

FROM: Charles I. Wadams, City Attorney

DATE: 06/05/2019

SUBJECT: Garden City's Boise River Greenbelt Overlay District Update – Status Report

ACTION REQUIRED: Within the City Council's discretion.
RECOMMENDATION: None.
FISCAL IMPACT/BUDGET IMPLICATIONS: Unknown.

BACKGROUND: Garden City's Boise River Greenbelt (BRG) Overlay District was adopted in 2018. A work session is scheduled on June 10, 2019 to discuss potential areas of revision to the BRG Overlay District. Staff has previously provided recommendations on potential updates to the BRG Overlay District, and I am providing a legal analysis below to assist in the discussion.

RULES: The use of zoning to promote physical, aesthetic, and monetary goals has become normal practice. One effective and widely used method for regulating such goals, without having to rezone an entire city, is through the use of overlay districts. Overlay districts provide a means to integrate different development regulations across a specified area. Overlay districts are special zones that lay on top of existing zones to supplement or supersede existing regulations.

Overlay districts usually provide a higher level of regulation than that required by the existing zoning classification, and imposes additional burdens on a developer of land within the zone. However, they can also permit exceptions or require a less-restrictive guideline. If conflicting standards are given by an overlay district and the underlying zoning category, those of the overlay district generally take priority.

The boundaries of an overlay district may or may not coincide with the boundaries of the underlying zone, and an overlay district may contain parts of more than one existing zone. Overlay districts are used to accomplish a mixture of transportation, development, and land use goals. General examples include access management, protection of historic or natural resources, safety, standardization of a historic district, implementation of development guidelines, and protection of the quality of surface water. Overlay districts often complement a jurisdiction's comprehensive plan.

A specific example is an overlay district that seeks to preserve and promote the arts by providing incentives for high-density retail, commercial, and housing with arts-related benefits. Another example is the Boise Conservation Overlay District, which maintains adjacent neighborhoods by nurturing neighborhood associations, with a focus on positive improvements.

Overlay districts can be beneficial to municipalities because they allow existing zoning requirements to be superseded when appropriate. Overlay districts can be implemented by passing an ordinance that appends existing land use regulations, without having to go through the process of rewriting the underlying zoning regulations. If the overlay is on top of two or more underlying zoning districts, then creation of one overlay district may be less work than amending two or more underlying districts, which makes for a more streamlined zoning ordinance. Moreover, a municipality can modify an overlay district with less difficulty if it decides to change the requirements or coverage area.

A zoning ordinance will always include a zoning map that shows the municipality divided up into zoning districts. The overlay district, in the zoning ordinance, might have additional, or different, regulations that apply within the district overlaid on top of the typical zoning map. For example, it may be an overlay district along a river that flows through several different zoning districts. The desire may be to have a vegetation buffer and larger setback from the riverbank for the entire length of the river.

The overlay district tool can be used for several different things. It can be an overlay around: public water to prohibit certain polluting activities; or both sides of a river or lake to provide vegetation buffer areas; or greater setbacks along/around a lake shoreline for beach protection; or along a scenic road or highway with aesthetic regulations and greater setbacks. Common standards in an overlay zone may include building setbacks, density standards, lot sizes, impervious surface reduction, vegetation requirements, building floor height minimums, and flood-proofing to high water levels. However, modification of permitted uses is generally not a part of an overlay zone.

Overlay districts can accomplish the following goals: (1) provide design guidelines that create a particular look of an area; (2) protect valuable resources; (3) help meet goals and objectives of the community; and (4) maintain the base zones while addressing a special need of a particular area within a zone(s). It is important that such zoning has a defined need and purpose, and the restrictions and allowances in the zone must help satisfy the defined purpose.

To be implemented, an overlay district typically follows this process: (1) a study or report is completed that details the purpose and goals of the overlay district, and ensures that it is tied to the objectives of the comprehensive plan and/or the stated goals of the community; (2) the boundary is simply and clearly defined, which is known as “spatial definition;” (3) applicant information is compiled into a formal application to demonstrate the need for the overlay district; (4) the municipality’s reviewing body (typically a review board comprised of citizens and/or planning staff, or possibly the

planning and zoning commission) evaluates for compliance with current standards; and (5) the city council decides whether to approve the application before it is voted on. If there is public opposition to the overlay district, interim development controls may be instituted for the overlay area to allow time for more deliberation.

Generally, an early step in the process is to assemble the stakeholders and designate a review board, committee, or task force. Ideally, a municipality should get input from neighborhood groups, developers, and interest groups whose constituencies might be affected by the overlay district. The best practice is to involve the public at the outset with full discussion of the problems or goals that an overlay could address. Such a review board, committee, or task force can provide more opportunity for public input, better public relations, and a broader perspective than reviews by staff. Possible members of the group include local government representatives, neighborhood organizations, property owners, realtors, developers, and bankers. However, if the substance of the overlay is overly technical or specialized, it will be necessary to require technical expertise and training for committee members. Charrettes with other entities can also be helpful.

A good overlay district ordinance should provide all of the following components:

Purpose Statement - Should tie the overlay to the goals and objectives of the comprehensive plan, cite the public necessity behind the intent, and make a direct connection to protecting the public health, safety, morals, general welfare, and aesthetics. Concerns about purposes behind overlay districts are often related to the documentation of public necessity, impacts on property values, and fairness of applicability to only a portion of the community.

Spatial Definition - The boundary or rule for the spatial definition of the overlay should be as simple and understandable as possible. Boundaries for the overlay district should be drawn based on reliable scientific factors, or other logical rationale for including properties within the boundary of the district, so that the resulting boundaries will be legally defensible. Boundary information should be provided in a way the public can understand.

Application Procedures - Additional information will be needed in the request for an overlay district to demonstrate compliance with the factors addressed in any overlay regulations. The procedures may be different from a public initiated request and a government initiated request.

Special Definitions - Specialized standards will likely require specialized terminology that must be defined.

Standards for Review and Approval - The reviewing body needs guidance concerning how to determine compliance. If there are no standards for

review and approval, an ordinance may be struck down for vagueness or decisions overturned as being arbitrary and capricious.

Appeals Process - The term “hardship” should be carefully outlined to address unique situations and to avoid variances based on convenience rather than peculiar damages. The standing to appeal needs to be limited to “aggrieved parties” having direct and substantive claims in order to avoid groundless appeals.

Resolution of Conflicting Provisions - If the overlay intends to add new provisions above those existing in the underlying zoning districts, then it will be necessary to prescribe which set of standards takes precedence in cases of a conflict.

The ways to measure the success of an overlay district differs depending on the type of district. For example, for districts whose purpose is to regulate a particular “look and feel” for corridors or communities, setting design standards, as well as oversight in the plan review process, are essential in ensuring that the objectives of the overlay district are satisfied. Quantitative elements can also be monitored for success through implementation of the overlay ordinance, including the following examples: lot size, building height and area, parking, number of access points, and types of land uses.

However, an overlay zoning district should possibly be avoided in some situations. It is possible to impose multiple overlapping overlay districts on the same area. However, the resulting complexity may make such a scheme difficult to administer. It is possible that one overlay may have some inconsistent purposes to another overlay.

Additionally, overlay districts are commonly used when a municipality does not wish to alter the preexisting uses in a given district. If a proposed overlay district contemplates changing the types of permitted uses, or possible conditional uses, then it may be more appropriate to create a new underlying zoning district for that area. Usually, when creating an area that will have changed uses, it should be within its own underlying zoning district. An example may be an area along a river that has very special and unique characteristics, such as a wide river valley, plentiful wetlands, and geologic features. The area along the river is more than just a ribbon along both sides of the river, but rather includes more area. That area may deserve its own unique parcel sizes, setbacks, and specific list of permitted uses and conditional uses. This scenario likely describes a new underlying zoning district and not an overlay district.

Like most zoning ordinances, overlay districts and the decisions of municipalities are frequently challenged by individual landowners seeking variances or permission to engage in new construction. Overlay districts are typically challenged on substantive due process and equal protection claims. When there are such challenges, the municipality should be able to show a legitimate municipal interest in protection of an area, and show the zoning is “rationally related” to this interest. If in some situations, the strict enforcement of the overlay district requirements might be close to invoking a

takings claim, the overlay district should provide for hardship variances or face possible court tests. Property owners and the real estate developers may allege that the overlay district deprives property value because it constrains the full use and enjoyment of their property.

However, as municipal governing bodies are given deference, direct challenges to such districts are not generally successful. For example, an overlay district was challenged as being void for vagueness in Blaine County in 2009. A statute is void for vagueness if somebody with ordinary intelligence must guess at its meaning. In *Terrazas v. Blaine Cty.*, 147 Idaho 193, 207 P.3d 169 (2009), the Idaho Supreme Court rejected an argument that Blaine County's mountain overlay district (MOD) ordinance was void for vagueness, as well as a separate argument that it was inconsistently applied in violation of equal protection.

In *Terrazas*, the applicant argued that if staff and the county commissioners could not agree on what the ordinance means, it must be unconstitutionally vague. However, the Court looked at the language of the ordinance, and found it to be clear and correctly interpreted by the county commissioners. Landowners may be more successful in seeking variances or permission to engage in new construction by demonstrating either that a municipality erred in its application of the zoning ordinance, or that the building at issue actually fits well with the overall character of the district.

Municipalities do have to be careful that an overlay district is not preempted by the state or federal government. For example, *Ralph Naylor Farms v. Latah Cty.*, 144 Idaho 806, 172 P.3d 1081 (2007), involved an ordinance adopted by Latah County creating the "Moscow Sub-basin Groundwater Management Overlay Zone." The overlay district prohibited certain specified land uses that were found to consume large quantities of water. When the Director of the Planning and Building Department refused to accept an application for a conditional use permit on the basis that the use was prohibited under the overlay zone, the applicant challenged the validity of the overlay ordinance.

The Court invalidated the Latah County overlay district on the basis that it was preempted by the authority granted to the Idaho Department of Water Resources to regulate water resources. While the applicant was not awarded attorney fees in the *Naylor* case, it is important to note that a city or county that unsuccessfully defends its own decision may be subject to an award of attorney fees. Furthermore, an Idaho court has also invalidated an overlay district when it improperly delegated authority to set the district's boundary to a state agency. See *Cove Springs Development, Inc. v. Blaine Cty.*, Case No. CV-2008-22 (Idaho, Fifth Judicial Dist., July 3, 2008).

ANALYSIS: In 2017, the City of Garden City, and the Garden City Urban Renewal Agency, entered into an agreement with a limited liability company to perform planning services to develop a river overlay district for Garden City and the Garden City Urban Renewal Agency. The City was interested in implementing the policy guidance provided by both the Garden City Comprehensive Plan and the Parks and Waterways Plan. Thereafter, the BRG Overlay District ordinance went through multiple different

drafts or revisions, and the final version was adopted by the City Council on February 12, 2018.

BRG Overlay District Purpose Statement:

The first part of the BRG Overlay District purpose statement is the following:

[t]he Boise River is the city’s most significant natural resource and imparts the unique identity of the City with a river running through it. The Boise River Greenbelt, with its pathways and green spaces, is also significant to the recreational enjoyment, health and conveyance of city residents.

G.C.C. § 8-3E-1.A. The 2006 Garden City Comprehensive Plan’s objectives also include the Boise River and the Greenbelt. For example, the Comprehensive Plan states, “the Boise River, with its phenomenal natural features, has been rediscovered as a place to live near and recreate.” (Executive Summary, p.5.) An objective of the Comprehensive Plan is to create a downtown or town center with river access, and a goal is a focus on the river, with one objective being to create more accessibility to the Boise River and Greenbelt. (3.1 Objective, p.10; Goal 5, p.12; Objective 5.5, p.13.)

Other objectives in the 2006 Comprehensive Plan are to develop a river walk, and maintain and protect the Greenbelt. One action step is to amend the Land Use Code to allow for certain types of urban uses in limited locations along the river with setbacks and buffers that protect the Greenbelt, wetlands, and river. (Action Step 5.4.2, p.13.) Another action step is to protect the greenbelt from private development; enforce codes for private property maintenance, and control of runoff, litter and debris; and adopt minimum setback requirements for new development. (Action Step 5.7.3, p.14.) Therefore, the BRG Overlay District purpose statement does tie the overlay to the goals and objectives of the Comprehensive Plan.

The second part of the BRG Overlay District purpose statement is the following:

The Boise River and Greenbelt (BRG) Overlay District is intended to preserve, protect and enhance the river, and the public’s enjoyment and access to the Boise River and Greenbelt through carefully planned and designed development. Mixed use, commercial development, and urban density housing are encouraged that focus on, celebrate, connect and enhance the Boise River environment. Objectives of the provisions in this article:

1. To protect public access and enjoyment of the river and greenbelt through regulations on the location, orientation, density, and appearance of development.
2. To encourage the highest best use development adjacent to the urban river setting through specific use standards.

3. To protect critical wildlife habitat and wetlands along the river through limiting development in these areas.
4. To minimize disruption and alteration of existing waterways through limitations on grading and land clearing.
5. To enhance the natural environment with requirements for appropriate native landscaping, planting and landscape maintenance techniques.
6. To protect and enhance connectivity along the greenbelt and linkages with other parks, paths and green spaces through incentives that encourages dedication or easements for public use.
7. To create nodes of urban development in certain locations in the District through appropriate use and development standards.
8. To provide for emergency and maintenance services to the Boise River and Greenbelt through the requirements for public access.

G.C.C. § 8-3E-1.B.

The purpose statement is rather specific. However, some objectives are regarding mixed use, commercial development, and urban density housing, and encouraging the “highest best use development,” which may be somewhat ambiguous or inconsistent with some of the other objectives. Is mixed use, commercial development, urban density housing, and encouraging the “highest” development, consistent with protecting areas around the river and Greenbelt? Additionally, does the purpose statement reference the public necessity behind the intent? Is there a direct connection to protecting the public health, safety, morals, general welfare, and/or aesthetics?

A useful purpose statement example can be found in the City of Moscow Legacy Crossing Overlay District, which states:

1. Purpose. With the retraction of historic agricultural industrial uses from the downtown area and in special consideration of its unique and sensitive characteristics, the City finds that redevelopment within the LCO area **requires** an increased level of review to ensure the logical and orderly redevelopment and provision of public services within the LCO area.
2. Relationship to Underlying Zoning. It is the intent of the LCO that the underlying zoning district designation shall specify the permitted land uses within the LCO and the LCO review process shall be contained to the review of design of proposed development within the LCO.

3. Development Review. Prior to the issuance of any building permit for a new principal structure, or for a substantial improvement (as defined by this Code) to any existing principal structure, all development proposals within the LCO shall be reviewed for conformance with the LCO Design Guidelines, as duly adopted by Resolution of the Council, in accordance with the provisions of this Section.

M.C.C. § 4-2-5.B (emphasis added). The purpose statement is also in the Design Guidelines for the City of Moscow Legacy Crossing Overlay District, which states:

In consideration of the unique characteristics of the LCO area, the redevelopment of this area **requires** an increased level of attention and consideration of site ingress and egress; building architectural style, placement and massing; public streetscape design and function; internal vehicular and pedestrian circulation; parking provision and management; preservation and enhancement of riparian areas; and the integration of public community spaces, public art and other public enhancements. These development guidelines are intended to complement the City's Zoning Code by establishing development standards and guidelines for developments within the LCO. These guidelines are to be utilized by City Staff, the Planning and Zoning Commission, and City Council in their review of all developments within the LCO area. The items included within this document are intended to be guidelines, and as such, minor deviations or variations may be allowed by the reviewing body where justified by the specific limitations or constraints of the development site, project layout and where such variations and deviations do not conflict with the intents and purposes of these Design Guidelines.

(City of Moscow Resolution No. 5015-12 (emphasis added)).

BRG Overlay District Boundary:

The boundary of the BRG Overlay District generally follows the property lines of the parcels or lots of record immediately adjacent to the Boise River and/or the Boise River Greenbelt. G.C.C. § 8-3E-2.A.1. The boundary includes any adjoining lots or parcels in the same ownership as depicted in the rolls of the Ada County Assessor. The list of specific parcels (and addresses) in the BRG Overlay District, and BRG Overlay District map, were adopted by Resolution No. 1044-18.

At first glance, this boundary or spatial definition appears to be simple and understandable. However, the ordinance deals with “parcels or lots” and the resolution does not include “lots.” Additionally, lots are not the same as parcels. Generally, and subject to specific definitions, a parcel is a quantity of land identified for taxation purposes and derived from the boundaries of a survey. It is possible for a parcel to have more than one lot. A lot is a recognized subdivision of property or area of land

with a written legal description that addresses permissions or constraints upon its development.

Furthermore, it is not possible for a lot to have more than one parcel, but large lots can be subdivided into smaller lots. A site can consist of two or more abutting lots considered as a unit having a common use. Using “site” vs. “parcel” or “lot” for some regulations may provide greater flexibility for developments that cover more than one legal parcel or lot. A tract of land is an identifiable expanse of land generally bounded by geological formations, and tracts are subdivided into lots. Therefore, it is unclear if the intent is for the boundary to cover just parcels, or parcels and/or lots.

A related issue regards amending the boundary of the BRG Overlay District. The boundary is referenced by both the ordinance and the resolution. Changing an ordinance requires a different and lengthier process than changing a resolution.

Ordinances are local laws that are used to regulate people or property, and for specific situations outlined in state law. Ordinances must be used for regulatory measures, especially when there is a penalty for violation. An ordinance must be used for: (1) regulating people (e.g. disturbing the peace); (2) regulating property (e.g. zoning); (3) granting franchises; (4) annexing property into the city; (5) adopting the land use ordinance and map for the area of city impact; (6) authorizing bond issues; (7) designating banking institutions used by the city; and (8) adopting the annual appropriation. Ordinances can also reference related resolutions, such as utility ordinances authorizing fees to be set by resolution. Amending or repealing an ordinance requires passing another ordinance, and a municipality cannot amend or repeal ordinances by resolution or motion.

However, resolutions are policy statements by the city council, are generally used for matters relating to the city’s internal operations, and are functionally equivalent to a motion. Resolutions are binding decisions of the council that are typically used for administrative matters, generally relating to the city’s internal operations. There are no specific procedures outlined in state law regarding resolutions. The following actions should be done by resolution: (1) adopting council meeting rules and procedures; (2) adopting a city personnel policy; (3) approving a contract; (4) authorizing a schedule of fees (e.g. building permit fees, water and sewer rates); (5) adopting a comprehensive plan; (6) authorizing the destruction of records; and (7) authorizing the sale of surplus equipment. Unlike ordinances, there are no reading requirements for resolutions under state law, the mayor cannot veto a resolution, and resolutions do not have to be published as a legal notice after passage. Resolutions are functionally equivalent to motions so a motion can amend, replace, or repeal a resolution. Municipalities do not amend a previous resolution but simply pass a new resolution to replace the previous resolution.

The boundary of the BRG Overlay District is listed, by specific parcels and in the district map, in Resolution No. 1044-18. If desired by the City Council, it would be relatively easy to amend, replace, or repeal the boundary listed in the resolution. However, the boundary is also specifically listed in the ordinance, which states it generally follows the

property lines of the parcels or lots of record immediately adjacent to the Boise River and/or the Boise River Greenbelt. G.C.C. § 8-3E-2.A.1. Amending the boundary in the ordinance would require passing another ordinance, as the City cannot amend or repeal ordinances by resolution or motion.

Additionally, boundaries for the overlay district should be drawn based on reliable scientific factors or other logical rationale for including properties within the district so that the resulting boundaries will be legally defensible. The City should provide the boundary necessity and information in a way the public can understand. Is there a logical rationale for including all areas immediately adjacent to the Boise River and/or the Boise River Greenbelt, or should the boundary only include the Urban Renewal District or areas to the north, south, east, and/or west of the river? Is there an identifiable need for the district at all areas adjacent to the river and greenbelt? Perhaps so or perhaps not. I would recommend the City Council consider this question.

There has been some public comment by some Councilmembers that perhaps the BRG Overlay District should not include all of the parcels immediately adjacent to the Boise River and/or the Boise River Greenbelt. There are some parcels adjacent to the Boise River and/or the Boise River Greenbelt that are larger than others, and one end of the larger parcels may be a significant distance away from the Boise River and/or the Boise River Greenbelt. The BRG Overlay District ordinance currently also includes any adjoining lots or parcels in the same ownership as depicted in the rolls of the Ada County Assessor. Perhaps rather than parcels, the overlay district should include "sites," "lots," or "areas" adjacent to the Boise River and/or the Boise River Greenbelt to provide greater flexibility of developments.

The Initial Application for the BRG Overlay District and the Current Request for Changes to the BRG Overlay District:

The BRG Overlay District was initially suggested, in part, by the Garden City Urban Renewal Agency, and the City of Garden City approved the contract with a company to perform planning services to develop the Overlay District. Additional information was gathered during that process. There has now been public opposition to the overlay district, and the City Council is considering whether anything should be done regarding the district.

If the City Council decides to amend or repeal the BRG Overlay District, I would suggest that additional information be gathered to demonstrate public necessity, impacts on property values, and fairness of its impact to only a portion of the community. Depending on what is decided, interim development controls could be instituted for the overlay area to allow ample time for deliberation. There should also be a clear and defensible purpose for implementing any changes to the Overlay District, which could be examined by a designated review board, committee, or task force.

Special Definitions in the BRG Overlay District:

The BRG Overlay District currently includes special definitions. See G.C.C. § 8-3E-4. However, there is also terminology that is not defined. For example, “highest best use” and “mixed-use environment” are not defined. G.C.C. §§ 8-3E-1.B.2; 8-3E-4.B.4.a. If the City Council decides to review the BRG Overlay District, perhaps the special definitions section should also be considered.

Standards for Review and Approval in the BRG Overlay District:

The BRG Overlay District currently includes standards of review and approval. For example:

[a]llowed uses identified in Table 8-34-1 shall demonstrate that the use is oriented to the river and greenbelt and are appropriately designed and scaled to this unique environment. Despite a use identified in Table 8-34-1, the use shall not be allowed if it fails to meet the standards of this Article.

G.C.C. § 8-3E-3.A (emphasis added). There are also dimensional standards. G.C.C. § 8-3E-4.A. However, some development approved through a master site plan may deviate from the dimensional standards if the Design Review Committee finds the deviation meets all the master site plan criteria to the fullest extent possible. G.C.C. § 8-3E-4.A.4.

Moreover, a master site plan is required for all development on properties one (1) acre or larger in size and is optional at the discretion of an applicant for any other property. G.C.C. § 8-3E-4.B.1. The ordinance currently states:

2. The master site plan shall include additional property that is reasonably associated by ownership, access, or other physical characteristics with the property subject to the master site plan.
3. A master site plan shall comply with the requirements set forth in section 8 7B.1.I of this Code.
4. The master site plan shall demonstrate that the proposal satisfies the following approval criteria:
 - a. Creation of an attractive mixed-use environment focused on the river and greenbelt through the use and inter-relationship of open spaces, building locations, building scale and design, and pedestrian-bicycle connections.

- b. Provision of access and free movement of non-motorized mobility to and through the site in a manner that maximizes exposure to the Boise River and greenbelt.
 - c. Reducing to a minimum any negative impacts of the proposed development on the natural environment.
5. Upon approval of master site plan, all subsequent building and site development must comply with the approved plan and the standards and conditions in this Article.

G.C.C. § 8-3E-4.B (emphasis added).

There are also standards for site layout, building design, landscaping, natural resources protection, Greenbelt improvements, screening, fencing, and walls, exterior lighting, parking, and prohibitions. G.C.C. §§ 8-3E-4.B through 8-3E-4.K. One of the standards requires that, [l]andscaping shall include a minimum of 50% tree canopy coverage achieved within a period of ten years over the entire site.”

As generally recommended for all ordinances, this ordinance includes a severability clause, which states, “[i]f any one or more sections or subsections of these Chapters are for any reason held to be invalid or unconstitutional, such shall not affect the validity of the remaining portions of these Chapters and the same are and shall remain in full force and effect.” (Ordinance No. 996-18, Section 7, p.16). The City has been informed by multiple developers that essentially no developments can comply with the 50% tree canopy coverage standard. If no developments can comply with the 50% tree canopy coverage standard, then it is likely invalid. If the City Council decides to review the BRG Overlay District, perhaps consideration should be given to ensure that there is no vagueness, and all standards are workable for the community.

Appeals Process in the BRG Overlay District:

Generally, the standing to appeal needs to be limited to “aggrieved parties” having direct and substantive claims in order to avoid groundless appeals. The term “hardship” should be carefully outlined to address unique situations and to avoid variances based on convenience rather than peculiar damages.

Currently, regarding master site plans, the City Council is the final decision maker, and there is no administrative appeal process for final decisions. (See Ordinance 1004-19, p. 5, amending G.C.C. Table 8-6A-1). Concerning master site plans, the design review committee is the recommending authority, and even though overlay districts are a form of zoning, the planning and zoning commission is not involved. If the planning and zoning commission continues to have no involvement in master site plan reviews, that may be inconsistent with another section of the code, which states, “[t]he commission shall be responsible for final action on site specific permits.” G.C.C. § 8-6A-2.B.

Resolution of Conflicting Provisions in the BRG Overlay District:

If the Overlay adds new provisions above those existing in the underlying zoning districts, then it should prescribe which set of standards takes precedence in case of a conflict. Generally, if conflicting standards are given by an overlay district and the underlying zoning category, those of the overlay district take priority. However, the BRG Overlay District is silent on this issue. If conflicting standards are given by an overlay district and planned unit development, and those of the planned unit development take priority, perhaps the Overlay District ordinance should state this as well.

The BRG Overlay District does state that “[f]or uses that may fall into more than one category, the planning official shall determine the most appropriate category based on the more restrictive standards.” G.C.C. § 8-3A-3.C. It also states that:

[s]ome properties within the BRG are affected by more than one overlay zone. Where this is the case, applicable requirements for each overlay zone shall apply within that zone's boundaries. Where there are conflicts between requirements, the determination of which requirements apply shall be made by the Planning and Zoning Commission in regards to land uses and by the Design Review Committee in regards to site and building design.

G.C.C. § 8-3E-2.B (emphasis added).

With the BRG Overlay District, there are multiple overlapping overlay districts in some areas. This results in a complexity that may make such a scheme difficult to administer, and it is possible that one overlay may have some inconsistent purposes to another. Additionally, the above provision indicates that the Planning and Zoning Commission makes determinations when there are areas with more than one overlay zone, but the commission is currently not involved in master site plans.

CONCLUSION: It is unclear whether the BRG Overlay District has been a success so far. There are 24 properties adjacent to the river or Greenbelt that are over an acre. Two of the 24 properties are located west of Glenwood. There is a lot on Strawberry Glenn that is 5 acres. There is also a lot behind the homes on River Beach that is 2.97 acres in size. Only one lot north of the Boise River is larger than one acre, at 100 acres in size. The BRG Overlay District does cover several different base zoning districts, such as C-1, C-2, R-2, R-3, and M.

Overlay districts are commonly used when a municipality does not wish to alter the preexisting uses in a given district. In reviewing G.C.C. Table 8-3A-1, it appears that the BRG Overlay District does alter uses in the underlying zoning districts that would be permitted, conditionally permitted, or prohibited. Because the BRG Overlay District changes the types of permitted or conditional uses, then the City Council may want to consider creating a new underlying zoning district for that area. Usually, when creating

an area that will have changed uses, such as a river that has very special and unique characteristics, it may be preferred that it be within its own underlying zoning district. This scenario may describe a new underlying zoning district and not an overlay district if it deserves its own unique parcel sizes, setbacks, and a specific list of permitted uses and conditional uses.

Like most zoning ordinances, overlay districts and the decisions of municipalities are frequently challenged by individual landowners seeking variances or permission to engage in new construction. Overlay districts are typically challenged on substantive due process and equal protection claims. If Garden City is ever challenged on the BRG Overlay District, it should be able to show a legitimate municipal interest in protection of an area, and show the zoning is “rationally related” to this interest. Garden City may be best served if there is not strict enforcement of the BRG Overlay District, and provide for hardship variances, to avoid any takings claims.

The following options could be employed to achieve the identified intent as stated in the current BRG Overlay District: (1) amend the existing BRG Overlay District ordinance to address the concerns identified; (2) repeal the BRG Overlay and adopt a new BRG Overlay District or a new base zoning district; (3) amend two overlays that would function as design overlays; and (4) repeal the BRG Overlay District and amend the design standards.

It is estimated that amending the existing BRG ordinance to address the concerns identified would take 5-7 months to complete (drafting, committee review and drafting: 2-4 months; hearing process: 3 months). Repealing the BRG Overlay and adopting a new BRG Overlay District or a base zoning district is estimated to take 1 to 1.5 years to complete (drafting/committee review: 3-6 months; hearing process for adoption of code: 3 months; outreach to properties to be rezoned: 3-6 months; land surveying: 2-4 months; rezone process: 2 months).

It is approximated that amending two overlays that would function as design overlays would take 6-9 months to complete (drafting/committee review: 3-6 months; hearing process: 3 months). This option would make it so that an overlay district would serve as a general Greenbelt and river design standard for all properties adjacent to the Boise River or Greenbelt. A secondary overlay could be adopted, or the existing Neighborhood Commercial Node ordinance could be amended, to identify appropriate relief from the BRG Overlay District when specifically designated as qualifying as a node under the second overlay.

Repealing the BRG Overlay District and amending design standards is estimated to take 5-7 months to complete (drafting/committee review: 2-4 months; hearing process: 3 months). Whatever the City Council decides, the BRG Overlay District should be clearly understood and not vague so it can be correctly interpreted by developers and the final decision maker. It should be consistently applied to comply with equal protection. Garden City should also be mindful of issues involving preemption and improper

delegation of authority. Additionally, it is likely that portions of the current BRG Overlay District are invalid if it is infeasible for developers to comply.