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TO: Mayor and Council
FROM: Charles I. Wadams, City Attorney
DATE: 1/7/2021
SUBJECT: Request for Reconsideration of DSRFY2020-25

BACKGROUND: At the November 9, 2020 Council Meeting, the City Council vacated the Design Review Committee's (DRC) Decision approving application DSRFY2020-25 and denied the application, finding the application was premature and not ripe for review. The Appeal Opinion is dated November 23, 2020. On December 7, 2020, the applicant, Jason Jones, submitted, in part, a Request for Reconsideration with the City.

In the Request for Reconsideration, the applicant raises the following issues:

1. Violations of Idaho open meeting law and noticing requirements.
2. Violations of Idaho's Local Land Use Planning Act
3. Violations of the applicant's constitutional rights to Due Process
4. The City Council acting in direct contradiction to their own ordinances and code in conspiring to deprive the property owner of the use of this property
5. The City Attorney has covered up potential conflict of interest and bias on the part of City Council Members through his denials/refusals to fill public information requests that might reveal these conflicts.

I am now providing a legal analysis to the City Council to assist in the review of the Request for Reconsideration.

ANALYSIS: Preliminarily, I am unaware of any violations of the Idaho open meetings law or noticing requirements. Additionally, I have not "covered up" any potential conflicts of interest or bias on the part of City Council Members through denials/refusals to fill public information requests. Therefore, the below analysis addresses the claims that: (1) there were violations of Idaho's Local Land Use Planning Act; (2) there were violations of the applicant's constitutional rights to Due Process; and (3) the City Council acted in direct contradiction to their own ordinances and code in conspiring to deprive the property owner of the use of this property.

The current design review may be subject to judicial review under the Local Land Use Planning Act (LLUPA) *if it was a final decision*.

1. Design Review Process in Garden City

In Garden City, the DRC is the final decision-making body for: (1) design review of non-residential structures and sites, as well as three or more attached or adjacent dwelling units; (2) nonconforming setback extensions; (3) master plans or design review for signs; and (4) site layout templates, also known as minor PUDs. GCC § 8-6A-2.E; Table 8-6A-1. All decisions on these matters are appealable to the City Council. *Id.* Additionally, aside from the decisions on master plans or design review for signs, all other processes in which the DRC is the final decision-making body are considered to be administrative processes with public notice. *Id.* Notably, the DRC is deemed to be the decision-making body on *all* "design applications unless otherwise herein defined." GCC § 8-6A-2.D

Both an applicant subject to a final decision by the DRC and any party who testified orally or in writing before the DRC have standing to appeal the DRC's decision to the City Council. Additionally, the Development Services Director, Public Works Director, and/or the Chief of Police may appeal a final decision, only if he or she believes the decision will have a significant adverse impact on the City. GCC § 8-6A-9.A(1). Proceedings on such appeals are based on the record before the DRC and are not reviewed *de novo*. GCC §§ 8-6A-9.A(1); 8-6A-9.D.

2. Procedural Due Process and Design Review

When a local government's action "entails the application of a general rule or policy to specific individuals, interests, or situations" then the action is quasi-judicial. *Cooper v. Ada Cty. Bd. of Comm'rs*, 101 Idaho 407, 410 (1980). In other words, when a local government makes a decision concerning specific private property, it is making a quasi-judicial decision. *Cowan v. Fremont Cty. Bd. of Comm'rs*, 143 Idaho 501, 510 (2006). Such quasi-judicial actions must comport with the requirements of procedural due process. *Id.* Some courts have said that design review matters are purely administrative in nature and should not "include the legislative or quasi-judicial power to prohibit a permitted use." *PRB Enterprises, Inc. v. South Brunswick Planning Bd.*, 518 A.2d 1099, 1102 (N.J. 1987) (quoting *Lionel's Appliance Center, Inc. v. Citta*, 383 A.2d 773, 777 (N.J. Super. Ct. Law Div. 1978)). From a practical standpoint, however, design review is often an administrative function in theory only and can be more properly characterized as quasi-judicial in nature and therefore should incorporate procedural due process protections. A PRACTICAL GUIDE TO WINNING LAND USE APPROVALS AND PERMITS § 6.11 (2019).

Procedural due process is a flexible concept and whether the protections afforded are adequate depends on the specific circumstances, but at the most basic level it requires notice and the opportunity to be heard. *Neighbors for a Healthy Gold Fork v. Valley Cty.*, 145 Idaho 121, 127 (2007). More specifically, the opportunity to be heard must occur at a meaningful time and in a meaningful manner. *Id.* Generally, whether the opportunity to be heard is meaningful boils down to the opportunity to present and rebut evidence. *Cowan*, 143 Idaho at 510. Additionally, the U.S. Supreme Court has

identified three factors that should be considered when determining whether adequate procedural due process protections have been afforded: (1) the private interest that will be affected by the government action; (2) the risk of erroneous deprivation of that private interest through the procedures used and the probable value of additional or substitute procedures; and (3) the government's interest, such as the function involved or the fiscal and administrative burdens, that the additional or substitute procedures would affect. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

Applying these general principles to design review matters, the issues become what exactly due process protections look like and who, if anyone besides the applicant, should be afforded those protections. These questions should be considered in the context of the Local Land Use Planning Act ("LLUPA") because it may be applicable to the design review process and it may impact the procedures a local government must follow, as discussed in the next section. However, it appears as if procedural due process was afforded to Mr. Jones in this matter.

3. Application of LLUPA To Design Review

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.

4. Available Recourse for Parties Aggrieved by Decisions on Design Review Applications

The Idaho Administrative Procedures Act ("IAPA") generally only applies to certain state-level agencies, not local governments and therefore, separate statutory provisions must incorporate IAPA by reference in order to subject a local government action to IAPA. I.C. § 67-5201(2). LLUPA accomplishes this by providing affected persons with the ability to seek judicial review of a local government's action on certain land-use matters under IAPA. I.C. § 67-6519(5); I.C. § 67-6521(1)(a).

If decisions on design review matters are considered decisions on "other similar applications required or authorized" pursuant to LLUPA, as previously discussed, then affected persons can seek recourse in the form of filing a petition for judicial review as provided by IAPA.

Applicants that are "denied an application or *aggrieved by a final decision*," concerning, among other things, "a subdivision, variance, special use permit[,] and such *other similar applications required or authorized* pursuant to [LLUPA]," must exhaust all remedies provided by applicable ordinances and then they are permitted to file a petition for judicial review within twenty-eight days of exhaustion under the procedures set forth by IAPA. I.C. § 67-6519(5); I.C. § 67-6521(1)(a); I.C. § 67-6535(2)(b), (3) (emphasis added). Other "affected persons," those with "a bona fide interest in real property which may be adversely affected by . . . [t]he approval, denial[,] or failure to act upon an application for a subdivision, variance, special use permit[,] and such *other similar applications required or authorized* pursuant to [LLUPA]" may also file a petition for judicial review within twenty-eight days of exhaustion under the procedures set forth by IAPA. I.C. § 67-6521(1)(a)(i), (d); I.C. § 67-6535(2)(b), (3) (emphasis added).

The Idaho Supreme Court has noted that it is hesitant to apply IAPA "in judicial review situations where the legislature expressed no such intent" to apply IAPA to a local government decision. *Idaho Historic Pres. Council v. Boise City Council*, 134 Idaho 651, 653-64 (2000). However, this apparent hesitancy does not always come through in the Idaho Supreme Court's decisions. For example, *Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87 (2007) seems to suggest that, despite saying that it hesitates to apply IAPA unless explicitly provided for in statute, Idaho courts will default to applying LLUPA when there is an issue with most development-related applications, even if it does not explicitly fit within LLUPA.

In *Lane Ranch Partnership*, the application to construct the private road was not of the kind explicitly identified in LLUPA, such as a conditional use permit or variance, but it was nevertheless considered in the context of LLUPA. It is almost as if the court just assumed that LLUPA applied. Perhaps, design review matters are so intertwined with other matters that fall explicitly under LLUPA that Idaho courts would be inclined to not only hear petitions for judicial review on design review matters, but order such cases to take the form of petitions for judicial review, regardless of how they were originally filed. The cases taken together seem to imply that Idaho courts will apply LLUPA and IAPA without hesitation to any quasi-judicial action that seems to fit within the context of land use.

5. <u>The Current Request for Reconsideration</u>

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 **<u>final decision</u>** 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 <u>or the request is deemed denied</u>. A **<u>decision</u>** <u>shall not be deemed</u> **<u>final</u>** 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 applicant 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.

In the current Appeal Opinion, the City Council stated:

> WHEREFORE, based upon the foregoing opinion, the City Council vacates the Design Review Committee's Decision and denies the application. The application can be resubmitted to the Design Review Committee after December 10, 2020 pursuant to Garden City Code § 8-6A-3.E.
>
> Because this application is being denied, as it is premature and not ripe for review, the City Council has not finally decided the other issues raised on appeal. Final decisions may be subject to judicial review pursuant to The Idaho Administrative Procedures Act, Title 67, Chapter 65 of Idaho Code. Any applicant or affected person seeking judicial review of a final decision pursuant to the Local Land Use Planning Act must first seek reconsideration of the final decision within fourteen (14) days. A takings analysis pursuant to Idaho Code may be requested on final decisions.

(Appeal Opinion, p.12.) While the application was "denied," it was not done so in a final decision. The application was only denied because it was premature and not ripe for review, and the City Council did not finally decide the other issues.

Alpine Vill. Co. v. City of McCall, 154 Idaho 930, 303 P.3d 617 (2013) delves into the "final decision" prong quoting the Supreme Court from the famous Penn Central Trans Case claiming, "a decision is not final because it was not clear whether the Commission

would deny approval for all uses that would enable the plaintiffs to derive economic benefit from the property." *Alpine Vill. Co*., at 938. It is noted within this opinion, that there is another option of legal action under Article 1. Section 14 of the Idaho Constitution, but that this action also requires "a **final action** restricting private property development." *Id*.

In *Cowan v. Bd. Of Comm'rs,* the Court reviewed a similar issue for a subdivision application, and held that since PZC was not a governing board in subdivision applications, LLUPA "by its very terms applies the requirements of I.C. § 67-6535(b) only to governing boards." Since PZC lacks the authority to finally approve or deny an application for a subdivision under I.C. § 67-6504, they are not a governing board under the reconsideration statute. *Cowan v. Bd. of Comm'rs*, 143 Idaho 501, 148 P.3d 1247 (2006).

Similarly, design review is not the final decisionmaker on whether or not an application is ripe for review if a decision is appealed to City Council. City Council is granted the authority to review appeals of PZC or DRC decisions, and thus, is able to consider whether or not the applicant has complied with Garden City Code requirements. Because City Council found that Mr. Jones's application is not ripe under GCC, it was within its authority to vacate the DRC Decision. This vacation, however, is not a final decision, which is an explicit requirement under LLUPA. Because Mr. Jones will have opportunity to be heard now his application is ripe, he likely should not be granted a reconsideration under LLUPA. However, the City Council is still free to grant or deny the reconsideration.

Due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner." *Cowan*, at 513, 1259. City Council's decision to wait for the application to be ripe under GCC statute likely does not violate Mr. Jones's due process rights. His application can be resubmitted when the municipal code allows.

Here, it is unclear from the Appeal Opinion if the City Council will approve or deny Mr. Jones's application if he submits it in a timely and appropriate manner. The application was denied because it was premature and not ripe for review. The City Council did not finally decide the other issues raised on appeal. Because the Appeal Opinion is likely not a final decision, a request for reconsideration is likely not required, as it is likely not subject to judicial review pursuant to LLUPA. However, now that a year has passed, the application can be resubmitted to the DRC pursuant to Garden City Code § 8-6A-3.E. Thus, there has been no final decision on his application, and the applicant would need a final decision to be obligated to submit a Request for Reconsideration.

Additionally, there is nothing in the Garden City Code that provides for requests for reconsideration. Accordingly, there is nothing that requires the City Council to consider the instant reconsideration requests. However, if subject to judicial review, a reviewing court could set aside the Council's decision if, based on the record, the applicant could establish that the decision was in violation of constitutional or statutory provisions, in excess of the Council's authority, made upon unlawful procedure, not supported by

substantial evidence in the record, or arbitrary, capricious, or an abuse of discretion. Additionally, before the Council's decision could be set aside, the applicant would also have to show that the error prejudiced a substantial right. It is not clear how Mr. Jones has been prejudiced by the Appeal Opinion.

CONCLUSION: The applicant likely has a right to submit a Request for Reconsideration on final decisions. However, the Appeal Opinion is likely not a final decision. However, by granting the reconsideration request, it would give the Council an opportunity to correct any errors before Mr. Jones might try to proceed in court.