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December 14, 2022

Via E-mail: jthorn@gardencityidaho.org

City of Garden City
Jenah Thornborrow
6015 N. Glenwood St.
Garden City, Idaho 83714
Boise, ID 83702

RE: Applicant's Memo In Opposition to Reconsideration in DSRFY2022-0014

Dear Mayor Evans and City Council:

Givens Pursley LLP represents Community Square LLC (the "**Applicant**") in connection with the design review approval of Applicant's mixed-use development project known as The Sonder located at 210 East 35th Street on 0.28 acres (the "**Property**").

FACTUAL AND PROCEDURAL BACKGROUND

The Sonder includes 15 dwelling units, 7 live/work studios, and 1 commercial space (the "**Project**"). The Project consists of a single 6-story structure that is 72' in height. The Project is an allowed use in the C-2 zone and the structure meets all of the C-2 zone's dimensional standards and design requirements.

On July 21, 2022, Applicant filed a design review application for the Project. On September 8, 2022, the Design Review Committee considered the application at a public hearing but continued the matter. On September 19, 2022, the Design Review Committee considered the application again, but the two-member Committee was unable to make a motion due to lack of a majority. The City forwarded the design review application to the City Council to render a decision. On October 24, 2022, the City Council held a public hearing on the Project's design review application and voted to approve it.

On October 24, 2022, the City issued its Findings of Fact, Conclusions of Law and Decision approving the Project (the "**Decision**"). The Decision lists each of the applicable design

review approval criteria and provides a detailed rationale for how the Project satisfies each of the applicable criteria.¹

On November 4, 2022, Belinda Isley filed a request for reconsideration (the “**Reconsideration Request**”). Applicant was not permitted to comment on the Reconsideration Request. On November 14, 2022, the City Council approved the Reconsideration Request and set a reconsideration hearing for January 23, 2022.

ARGUMENT

1. There is no right to reconsider a final decision on a design review application.

The Reconsideration Request does not state any legal basis for reconsideration.² Garden City’s zoning and development code (Title 8) does not provide a right to reconsider the City’s final decision approving a design review application.³ The City relies on the Idaho Local Land Use Planning Act⁴ (“**LLUPA**”) for its authority to grant the Reconsideration Request,⁵ but this constitutes error because LLUPA does not provide a right to reconsider a final decision approving a design review application.

LLUPA only allows reconsideration of the sufficiency of a decision approving or denying an application required or authorized by LLUPA. Design review applications are not required or authorized by LLUPA.

Section 67-6535 of LLUPA states:

The 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.

....

(b) Any applicant or affected person seeking judicial review of compliance with the provisions of *this section* must first seek reconsideration of the *final decision* within fourteen (14) days.⁶

Based on the plain language of LLUPA, reconsideration of a written decision is only proper for applications “required or authorized” by LLUPA. LLUPA does not require or authorize a

¹ Decision at pp. 8-11.

² See generally Reconsideration Request.

³ See generally Garden City Code.

⁴ I.C. §§ 67-6501-6539.

⁵ See generally Memorandum on Reconsideration Request on DSRFY2022-17 from Charles I. Wadams, City Attorney to Mayor and Council.

⁶ I.C. § 67-6535(2) (emphasis added).

design review application or design review process. The text of LLUPA does not mention design review permits or use the phrase “design review”.

An example of a land use application “required” by LLUPA is a rezone application. Under LLUPA, cities are required to adopt a zoning map and requests to change or rezone property must follow a specific application procedure which is laid out in Idaho Code Section 67-6511(2)(b), which states, in part: “Requests for an amendment to the zoning ordinance *shall* be submitted to the zoning or planning and zoning commission...” (emphasis added). An example of a land use application “authorized” by LLUPA is a conditional use permit. LLUPA states: “As part of a zoning ordinance each governing board *may* provide by ordinance ... the processing of applications for special or conditional use permits.” (emphasis added).⁷ Unlike rezones, LLUPA does not “require” design review, and unlike conditional use permits, LLUPA does not “authorize” design review.

Further, Idaho Code Section 67-6521 in LLUPA, lists the types of land use decisions that are judicially reviewable, and design review is not listed. Because reconsideration is an administrative step required to seek judicial review and design review decisions are not reviewable, it follows that reconsideration is inapplicable to design review. The types of decisions that are judicially reviewable under LLUPA include subdivision, variance, conditional use permits, and zoning, which impact how land is divided and *used*, not the design of a structure. Likewise, LLUPA does not govern building permits for structures, which permits are analogous to design review.⁸

Because LLUPA does not require or authorize a design review application, there is no right to reconsideration under LLUPA of a final decision approving design review. The City’s approval of the Reconsideration Request should be reversed and the reconsideration hearing vacated. In the alternative, the Decision must be affirmed on reconsideration to avoid harm to the Applicant who has a vested right in an approved design review application.

2. Even if LLUPA did provide a legal basis to reconsider a final design review decision, reconsideration pursuant to LLUPA is strictly limited to the sufficiency of the decision, which is not challenged by the Reconsideration Request.

To protect due process rights and to ensure land use decisions are made fairly and consistently, LLUPA requires the approval or denial of any application that is required or authorized under LLUPA to be in writing and based on express criteria. Section 67-6535 of LLUPA is devoted to providing instructions on how land use decisions must be issued. Section 67-6535 is the same provision that creates the obligation to seek reconsideration of a land use decision prior to seeking judicial review. Section 67-6535 states in part:

(2) The 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

⁷ See *Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995) (“the word ‘may’ is permissive rather than the imperative or mandatory meaning of ‘must’ or ‘shall.’”) (citations omitted).

⁸ *Arnold v. City of Stanley*, 162 Idaho 115, 117, 394 P.3d 1160, 1162 (2017).

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.

...

(b) Any applicant or affected person seeking judicial review *of compliance with the provisions of this section* must first seek reconsideration of the final decision within fourteen (14) days.⁹

“[T]his section” refers only to Section 6535. If the Legislature wished to apply the reconsideration requirement in Section 67-6535(b)(2) to a general challenge of a LLUPA approval or denial, it would have replaced “this section” with “this chapter”. The text of Idaho Code Section 67-6535 indicates as much, demonstrating that the Legislature knows when to refer to a section rather than a chapter: Section 67-6535(2)(b) refers to “this section”, while 67-6535(3) refers to “this chapter.” The plain text in I.C. § 67-6535(2)(b) provides that the reconsideration procedure created

Idaho Courts have held that a written decision meets the requirements of I.C. § 67-6535(2)(b) “so long as the findings, conclusions and decision are sufficiently detailed to demonstrate that it considered applicable standards and reached a reasoned decision.” *Rouwenhorst v. Gem Cnty.*, 168 Idaho 657, 662, 485 P.3d 153, 158 (2021).

In this case, the Decision includes detailed findings of fact, the Project’s procedural background, a list of the applicable standards, and a detailed explanation of the rationale as to why each of the applicable standards was met.¹⁰ The Reconsideration Request does not raise any issue with the sufficiency of the Decision. Instead, the Reconsideration Request merely asks the Council to rehear the application and again consider the Project’s substantive compliance with the applicable standards. Such a request is not proper because LLUPA’s reconsideration procedure is strictly limited to the sufficiency of the final written decision. Because the Reconsideration Request did not articulate any specific deficiency in the Decision, granting the Reconsideration Request was improper and the Decision should be affirmed.

3. The Reconsideration Request fails to articulate any valid reason the Project should be denied on reconsideration because the Project comports with the objective standards of the C-2 zone.

The Reconsideration Request asserts the City committed three errors in approving the Project: (i) the City failed to clearly identify the applicable standards to the design review application; (ii) the City committed error in finding the Project adheres to standards for protection of health, safety and general welfare; and (iii) the City committed error in finding the Project creates a sense of place and contributes to the uniqueness of the different districts and neighborhoods within the City. Each argument will be addressed in turn.

⁹ I.C. § 67-6535(2)(b) (emphasis added).

¹⁰ See generally Decision.

- a. The applicable standards were clearly identified throughout the processing of the application.

While the design review application was pending, the City amended its design review approval criteria. On September 12, 2022, the City approved a motion to adopt and publish Ordinance 1024-22 amending the City's approval criteria for design review applications. This amendment took effect several months after the application was filed in July 2022. Code amendments do not apply to previously submitted applications, which are entitled to be analyzed under the code in effect at the time the application was filed.¹¹

In this case, from the time the application was filed through the Council's approval of the Project and issuance of the Decision, the applicable standards have been clear. First, at the time the design review application was filed, Applicant's architect submitted a detailed narrative letter describing the Project and all of the ways it complied with the City's applicable design review criteria.¹² Second, in advance of the hearing before the Design Review Committee and City Council, City planning and development staff prepared project staff reports expressly listing the applicable criteria and evaluating the Project's compliance with the same.¹³ Accordingly, although the City amended its design review standards while the application was pending, there has been no confusion or error in connection with which standards apply to the application. The applicant, planning staff, and decision makers all consistently identified the correct design review standards—those in effect at the time the application was submitted, consistent with Idaho law.

- b. The Decision correctly concludes the Project adheres to the standards for the protection of health, safety, and general welfare.

One of the applicable design review criteria for the Project is whether “the proposed design adheres to the standards for the protection of health, safety, and general welfare.” This approval criteria is set forth in Garden City Code § 8-6B-3(D)(2).¹⁴ The Decision expressly concludes that this provision is met by the Project and provides the following rationale for compliance: “This proposal will not unreasonably diminish the health, safety, or welfare of the community as conditioned. The application proposes a code compliant sidewalk and landscape buffer along E. 35th Street which will provide for a better pedestrian connection than what currently exists on site. The project's proximity, and its consideration for pedestrians and bicyclists, encourages activity and connection to the adjacent greenbelt pathway systems.”¹⁵

The Decision's expressly stated rationale related to health, safety, and general welfare is a valid basis to find the approval criteria satisfied. Further, the record before the Council demonstrates the Project is code compliant and conforms to the applicable design and dimensional

¹¹ *Ready-To-Pour, Inc. v. McCoy*, 95 Idaho 510, 513, 511 P.2d 792, 795 (1973) (“[A]pplicant's rights are measured under the law in effect at the time of the application.”).

¹² See July 21, 2022 Platform Architecture Design Letter RE Design Review Application DSRFY2022-0014 at pp. 5-6 (listing all of the applicable criteria in Garden City Code Section 8-6B-3C and demonstrating the Project's compliance).

¹³ See e.g. Staff Report for File DSRFY2022-0014 prepared for the September 19, 2022 hearing date at p. 10.

¹⁴ Prior to adoption and publication of Ordinance 1024-22 amending the City's approval criteria for design review applications.

¹⁵ Decision at pp. 8-9.

standards for the C-2 zone. On reconsideration, the Project will still be code compliant and no new evidence will change that. Further, due to the inherent subjectivity in the health, safety, and general welfare approval standard—assuming LLUPA applies to permit reconsideration—LLUPA prohibits the denial of the Project based on subjective standards as opposed to finite objective design criteria. This was the Court’s conclusion in *Wee Boise, Inc. v. City of Garden City*, CV01-20-03481 (2022), holding that denial of a design review application that comports with the clear and objective standards in the zoning code based on subjective standards or opinion is improper.¹⁶ This is rooted in due process and fundamental fairness.

c. The Decision correctly concludes the Project creates a sense of place.

One of the applicable design review criteria for the Project is whether the “proposed design creates a sense of place and contributes to the uniqueness of the different districts and neighborhoods within the city.” This approval criteria is set forth in Garden City Code § 8-6B-3(D)(3).¹⁷ The Decision expressly concludes that this provision is met by the Project and provides the following rationale for compliance: “The application meets this finding. The application is in conformance with the vision set forth in the Comprehensive Plan’s live-Work-Create Future Land Use Designation, and the adopted 34th Streetscape Plan Resolution No. 1062-19. Additionally, the use of the proposed structural design is cohesive with the adjacent uses surrounding it.”¹⁸

The Decision’s stated rationale and analysis that the Project creates a sense of place and contributes to the uniqueness of the neighborhood is a valid basis to find the approval criteria satisfied and is supported by the record. On reconsideration, the Project will still be code compliant and no new evidence will change that. Further, due to the inherent subjectivity in sense of place standard, if LLUPA applies, the denial of the Project based on subjective standards as opposed to finite objective design criteria is prohibited as discussed above.¹⁹

4. Conclusion.

For the reasons set forth above, approval of the Reconsideration Request was improper and the January 23rd reconsideration hearing should be vacated. Alternatively, if the reconsideration hearing is held, the Decision must be affirmed because reconsideration under LLUPA is limited solely to whether the decision being reconsidered is sufficient under the requirements of I.C. 67-6535, which the Decision in this case clearly is. Lastly, the Reconsideration Request has failed to articulate any reasons to reverse or modify the Decision.

¹⁶ *Wee Boise, Inc. v. City of Garden City*, CV01-20-03481 * 18 (2022).

¹⁷ Prior to adoption and publication of Ordinance 1024-22 amending the City’s approval criteria for design review applications.

¹⁸ Decision at pp. 9-10.

¹⁹ See *Wee Boise, Inc. v. City of Garden City*, CV01-20-03481 * 18 (2022).

Very Truly Yours,

A handwritten signature in blue ink, appearing to read 'Jeffrey W. Bower', with a long horizontal flourish extending to the right.

Jeffrey W. Bower

cc: Charles Wadams, City Attorney