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TO: Mayor and Council
FROM: Charles I. Wadams, City Attorney
DATE: February 13, 2023
SUBJECT: Consideration of Proposed Ordinance No. 1030-22 (Surety Code) and Proposed Resolution 1142-23 (Surety Policy and Procedure)

ACTION REQUIRED: Within the City Council's discretion.

RECOMMENDATION: None.

FISCAL IMPACT/BUDGET IMPLICATIONS: There is no significant financial impact to the City.

BACKGROUND: Development Services Department and Public Works Department would like to allow for sureties to address logical needs as they arise.

The first consideration is surety percentages which need to address fluctuating costs and supply chain issues. The proposed code changes include a minimum surety percentage which will give staff flexibility to respond to application-dependent conditions. Stating the minimum percentage puts applicants on notice of minimum requirements but enables staff to increase the percentage if the situation calls for it. This flexibility gives the city more financial assurance that the project will be completed notwithstanding supply chain issues and rising material costs. Idaho Code does not have a cap for surety percentages, but such percentages must be reasonable in relation to the project. If the surety percentage increase does not correspond with an increase in fees or taxes, a public hearing is not required under Idaho law.

The second consideration is what projects are eligible for sureties. The staff would also like to allow more flexibility for applicability of sureties, so as long as life and safety components are not compromised. This can be achieved by generalizing surety examples and moving references to sureties from 8-5B-7 to a new section, 8-6A-15. Moving sureties to "Administration" allows a broader application of sureties and department director discretion. Such discretion is guided by department policy and reflects the context-specific features of the application.

The third consideration is if identified department heads can enter into routine surety agreements on behalf of the city. Delegating this power to identified department heads allows the departments to make decisions based on the unique facts of an application and operate more efficiently. The requested changes to this code are within legal limitations placed on sureties and a department head's ability to enter into an agreement on behalf of the city. Idaho Code addresses public works performance bonds minimums

MEMORANDUM ON SURETY CODE, CPAFY2023-0001, PROPOSED ORDINANCE NO. 1030-22, AND PROPOSED RESOLUTION 1142-23 P.1

but does not reference caps or non-public works development bonds. City councils have broad powers to delegate duties to designees to assist in managing the city. Proposed changes to the code are reflected in the attached ordinance.

AUTHORITY:

Idaho Code 54-1926: PERFORMANCE AND PAYMENT BONDS REQUIRED OF CONTRACTORS FOR PUBLIC BUILDINGS AND PUBLIC WORKS OF THE STATE, POLITICAL SUBDIVISIONS AND OTHER PUBLIC INSTRUMENTALITIES— REQUIREMENTS FOR BONDS — GOVERNMENTAL OBLIGATIONS

- (1) **A performance bond in any amount to be fixed by the contracting body, but in no event less than eighty-five percent (85%) of the contract amount** conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions thereof. Said bond shall be solely for the protection of the public body executing the contract.
- (2) **A payment bond in an amount to be fixed by the contracting body but in no event less than eighty-five percent (85%) of the contract amount,** solely for the protection of persons supplying labor or materials, or renting, leasing, or otherwise supplying equipment to the contractor or his subcontractors in the prosecution of the work provided for in such contract.
- (3) Public bodies requiring a performance bond or payment bond **in excess of fifty percent (50%) of the total contract amount shall not be authorized to withhold from the contractor or subcontractor any amount exceeding five percent (5%) of the total amount payable as retainage.** Further, the public body shall release to the contractor any retainage for those portions of the project accepted by the contracting public body and the contractors as complete within thirty (30) days after such acceptance. Contractors, contracting with subcontractors pursuant to contract work with a public body, shall not be authorized to withhold from the subcontractor any amount exceeding five percent (5%) of the total amount payable to the subcontractor as retainage. The contractor shall remit the retainage to the subcontractor within thirty (30) days after completion of the subcontract.

ANALYSIS: A neighborhood meeting was held on Thursday, November 17, 2022. The public hearings were on Wednesday, December 21, 2022, in front of the Planning and Zoning Commission, and Monday, January 9, 2023, in front of City Council. Also on the agenda are ordinances related to permit extensions and accessory dwelling units. The third reading of proposed Ordinance No. 1030-22 is scheduled for February 13, 2023.

1. Percentage caps on sureties

Garden City's code requires sureties for subdivision projects at 125% of the total contract amount, but there is no legal cap addressed in state or federal law.

The city requires subdivision sureties from developers to ensure necessary components of the project are completed prior to inhabitation. Once the developer satisfies the requirements set in code “the city shall release the sureties deposited with the city...” G.C. 8-5B-7(C), (D). Idaho law has a minimum surety bond amount of 85% of the total contract amount for performance bonds. For public bodies that contract in excess of 50% of the total amount, they are prohibited from withholding more than 5% of the total amount payable for retainage. Federal law is limited in scope to federal acquisitions and contracts but may be a helpful comparison. The Federal Acquisitions Regulations System sets the amount for performance contracts at a minimum of 100%, with any increases in the contract to be added at 100% and places the burden on the performing party to show a lesser amount would be adequate. Other parts of the code reference allowable dollar threshold inflation adjustments for government acquisitions. 41 U.S.C. §1908, 48 C.F.R. §102.2.

Neither Idaho nor federal law places a cap on performance surety amounts, which in the municipal context are often referred to as development or subdivision sureties. However, the text of the regulations suggests an underlying finding of reasonableness in determining percentages. In the state’s code, there is a cap of 5% on amount payable as retainage and additional temporal limitations on how long the public body can hold onto the retainage. The text also states the purpose of the bond as “solely for the protection of the public body executing the contract.” This language suggests a legislative intent to balance the city’s need of reassurance of completion of the project, with the economic interests of the performing party. Public interest favors sureties because they offer financial recourse for a city if projects are not completed or not in compliance with code, but such assurances must be bound in reasonableness. If a public body requires too much for sureties, it acts as a barrier for smaller companies to obtain bonds and limit the pool of applicants who can take on public works projects. Looking to federal regulations, reasonableness is also found in the subtext of the text. Market value, the ability of contractors to ask for a reduction in required surety amounts, an adjustable dollar threshold subject to periodic evaluation, all suggest that there is public interest in findings of reasonableness to support a surety percentage. It is within the interests of a municipality to seek reassurances by setting surety amounts that reflect inflation or changes in the costs of development, without discouraging development.

Whatever amount municipalities land on, it should reflect reasonableness in respect to market conditions and the public interest in encouraging development.

2. Surety increases may not require a public hearing

If an increase in surety percentage requirements does not lead to an increase in fees or taxes, a public hearing may not be required.

Municipalities are granted statutory power to charge fees and taxes. However, Idaho law requires a public hearing for fee increases of 5% or more. Idaho Const. Art. XII s. 4, VII s. 6, I.C. 63-1311A.

When it comes to sureties the law is silent on fees specific to development. So, it is prudent to consider public policy implications and delineate what is a fee, and what is a surety. A surety is a legal form of reassurance that developers will complete the project and that the project will meet code requirements. When developers make good on this promise, the bond is released by the city. Calculating the costs of the surety bond include the total cost of the project, which would include the city's administrative costs and fees. Municipalities have the power to charge developer's administrative fees so long as the correspond to actual costs in carrying out the regulations. What constitutes a fee is unclear in the statute language and "fee" is used in the context of taxation districts, implying that a fee has an ability to uniformly impact the public as taxes do and can be used by a city to generate revenue.

Idaho caselaw is equally reticent on the topic of distinguishing between fees and taxes. Looking to scholarship on the matter, some suggest the line in the sand is when a fee moves from cost recovery to revenue generation. See Hugh Spitzer, *Taxes v. Fees: A Curious Confusion*, 38 *Gonzaga L.R.* 335 (2011); See also David Owens, *How Much is too Much for that Application Fee? Coates' Canons on NC Local Gov. L. Sep. 14, 2010*, at 1. Revenue generation would be an administrative fee in excess of what the cost of carrying out the regulation. Any amount over the actual cost and retained by the city, is likely considered a fee acting as a tax and would require public hearings. Assuming the applicant is responsible for the entirety of the administrative costs, surety increases are not the same as fee increase. A larger project may come with higher administrative costs in carrying out regulatory obligations, but those costs are still proportional to the applicant's reasonable share. However, if the city splits administrative costs between taxpayers and the applicant, a surety increase may be seen as a fee increase. While an increase in sureties is not automatically an increase in what the city would charge for administrative fees, cities should be diligent in their documentation and be able to show that administrative fees correspond to cost recovery, not revenue generation.

So long as a city's administrative fees are well-documented as relating to cost recovery they are within the city's regulatory power and would not require a public hearing.

3. Generalizing language in city code allows staff to have more discretion and is allowed under the state code

The overall purpose of sureties is to ensure improvements are completed to the benefit of the public. Since sureties are not applicable to improvements needed to protect public health, safety, and life, the concept of what a benefit is to the public is subjective. City staff is best situated to make determinations of what is beneficial and would require a surety. The drainage on Creation Row is an example. In addition to discretion in determining what requires a surety, the surety minimum would remain 125%. This is allowed under state code and ensures the city can respond to inflation and supply chain issues. Without this percentage, the city runs the risk of incentivizing developers to forgo

the surety process because it would be more cost effective to leave it to the city to complete the improvements.

4. City council may delegate power to department heads to enter into agreements on behalf of city

Idaho Code does not specifically address delegating powers to bind the city when an agreement does not incur liability or involve procurement. Broadly speaking, the power to delegate signing power to designees may be gleaned from Idaho Code § 50-301 which enables municipalities to delegate authority to carry out the day-to-day activities to promote general welfare. The city may want to treat the power to enter into surety agreements the same way it does for procurement or signing authority. Council can pass a resolution which identifies surety format, requirements, who has signing authority, and may wish to set threshold limit. For example, surety agreements over one million dollars can require council approval. The resolution perhaps should identify that surety signing authority is vested in the Public Works Director and the Department of Development Services Director.

For the third reading of the ordinance, the ordinance has been clarified that the departments that determine whether there can be “safe occupancy” with a surety are the development services and/or public works departments.

This ordinance provides more flexibility regarding sureties, benefit the public and the city, and are permissible under state code. Therefore, I am recommending that this ordinance be passed if the required standards, including objectivity, are satisfied and there is a nexus to a government interest, such as public health and safety. Findings of Fact, Conclusions of Law and Decision in CPAFY2023-0001 will also have to be adopted pursuant to code.

Some of these changes, if approved by council, may require a resolution to administer and implement. Therefore, Resolution 1142-23 is also on the agenda for February 13, 2023. Resolution No. 1142-23 would be to adopt the policy and procedure for all projects requesting the use of a financial surety. The policy has been reviewed by the development services department, the public works department, and the legal department.