



OFFICE OF THE CITY ATTORNEY

6015 Glenwood Street ■ Garden City, Idaho 83714
Phone 208/472-2915 ■ Fax 208/472-2998

TO: Mayor and Council
FROM: Charles Wadams, City Attorney
DATE: September 12, 2022
SUBJECT: Consideration of Proposed Ordinance No. 1024-22 (Design Review and Surel Mitchell Work-Live-Create Overlay District Repeal Amendments)

ACTION REQUIRED: Passing code amendments.
RECOMMENDATION: Adoption of amendments, and there are several options to choose from. Council has decided to repeal the Surel Mitchell Work-Live-Create Overlay Zoning District rather than attempting to repair or overhaul it.

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

BACKGROUND: Title 8, Chapter 6, Article B, Section 3 and Chapter 7, Article A, Section 2 of the Garden City Code need to be amended to clarify requirements and definitions related to all Design Review findings. Additionally, Title 8, Chapter 3, Article B, Section 3 of the Garden City Code needs to be repaired or repealed to clarify requirements and definitions for the area currently known as the Surel Mitchell Work-Live-Create Overlay Zoning District. If the Surel Mitchell Work-Live-Create Overlay Zoning District is ultimately repealed, then the parking provisions in Garden City Code Section 8-4D should also be amended in the future.

RULES: The Local Land Use Planning Act (LLUPA) requires that approval or denial of any application required or authorized under the LLUPA be based on standards and criteria set forth in a comprehensive plan, zoning ordinance, or other regulation. Idaho Code § 67-6535. The approval or denial of such an application must be in writing and must be accompanied by a reasoned statement that explains the criteria and standards considered relevant, states the facts relied upon, and explains the rationale for the decision. I.C. § 67-6535(2). It is established that design review applications fall under LLUPA, and there are pragmatic reasons why the City prefers that design review falls under LLUPA.

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.

Accordingly, it is proposed that the above-mentioned sections of the Garden City Code be modified so that requirements for design review applications are more clearly defined and for City Councils consideration to enable the Design Review Committee or Consultant(s) to make appropriate findings regarding suitability of potential projects. Some of the changes are applicable to all design review applications. Additionally, the City Council has decided to repeal the Surel Mitchel Work-Live-Create Overlay Zoning District.

ANALYSIS: Garden City has a Design Review Committee that reviews design review applications, but is considering using Consultant(s) in the future in CPAFY2022-0003 and Ordinance No. 1027-22. Additionally, Garden City has had several overlay zoning districts, such as the Surel Mitchel Work-Live-Create Overlay Zoning District. To comply with LLUPA, several changes to the Garden City Development Code are needed.

Explanation of Proposed Amendments impacting all Garden City design review applications:

The ability of the owner of real property inside the limits of Garden City to use land as he chooses is not limitless and subject to some oversight and restriction. In Garden City, there are geographical areas or zones in which landowners may only use their land for certain purposes and in certain ways. Design applications currently go to the Design Committee, which is required by city code to “work in partnership with applicants on design review,” to “act as the decision maker on design applications,” and to “serve as an expert on all matters of design that come before the city.” Garden City Code 8-6A-2(D).

The City requires landowners, before they apply to the Design Committee for approval, to submit a request for a preapplication meeting. This process allows landowners to get what amounts to an advisory opinion from the Design Committee about what they are likely to do and allow the landowner to make changes to his proposed design, if he wishes, prior to applying and seeking an official recommendation from the Design Committee. Since applicants may also hold a preapplication meeting with Development Services staff, the code has been changed to call the required preapplication meeting with Design Review an “Initial Design Conference.” It is proposed that this process is simplified in the future by the use of Design Review Consultant(s).

Landowners whose applications are not approved by the Design Committee may appeal to the City Council. Any interested party may also appeal such decision to the City Council. It is treated as an “appeal” even though the word “review” is also used in the Garden City Code, and the City Council does not “review” the decision by the Design Committee so much as the City Council makes its own independent decision. However,

consideration should be made in the future to whether a “de novo” review is appropriate or if the process should be clarified.

Current Garden City Code § 8-6B-3(D)

Currently, there are several required findings for all design review approvals. Even if the City repeals the Sural Mitchel Work-Live-Create Overlay Zoning District, the findings for design review approvals would still need to be amended, which are located in Garden City Code § 8-6B-3(D):

Required Findings: In order to approve a design review application and based on the standards set forth in chapter 4, article C of this title, the design review committee shall make the following findings:

1. The proposed design is in conformance with the purpose of the zoning district and all dimensional regulations of that district;
2. The proposed design adheres to standards for the protection of health, safety, and general welfare;
3. The proposed design creates a sense of place and contributes to the uniqueness of the different districts and neighborhoods within the city;
4. The proposed design improves the accessibility of development to nonmotorized and public modes of transportation;
5. The proposed design supports a development pattern in nodes rather than strip commercial along arterial corridors;
6. The proposed design supports a compact development pattern that enables intensification of development and changes over time; and
7. The proposed design provides outdoor spaces and landscaping compatible with the southwest Idaho climatic conditions and that encourage pedestrian activity.

In 2013, the legislature amended Idaho Code § 67-6511 to require that governing bodies establish “clear and objective standards” for the districts. At the same time, it amended Idaho Code § 67-6535 to include the word “express,” i.e., to include the command that governing bodies express those clear and objective criteria so that everyone will know what they are. See I.C. § 67-6535. Therefore, the Code should not have subjectivity in application reviews under LLUPA.

1. Specific design review issue with Garden City Code

There are two types of design review findings: design standards and design guidelines. Currently, the design review findings are more like “guidelines” because they are subjective, which means they are open to interpretation and difficult to measure or verify. The City is required to implement design standards, which are objective requirements that are measurable and verifiable. It is important to have objective design standards rather than subjective design guidelines because design guidelines, standing alone, are legally unenforceable.

Design guidelines can be useful for supplementing design standards. Design guidelines can provide overall goals or clarify and explain design standards. However, without objective design standards codified to show exactly why the design is non-compliant, grounds for denial could be vacated or reversed. Because the current design review findings are more like subjective design guidelines rather than objective design standards, relying on them to deny a project is problematic.

Similarly, design standards cannot rely on the comprehensive plan as the primary basis for a decision. This is because comprehensive plans routinely have competing policy objectives because different objectives will be weighed differently for different projects in different locations. The standards, however, must be based on codified, objective criteria. Thus, the code itself can be formulated based on the comprehensive plan, but the comprehensive plan cannot be the primary basis for denying an application. Although the goals of the comprehensive plan are codified in outline form in G.C.C. § 8-1A-2, and G.C.C. § 8-1A-3 states that zoning must be in accordance with the comprehensive plan, recent judicial case law clarifies that decisions must be based on the code that is developed *as a result* of the comprehensive plan. The comprehensive plan itself is not a sufficient basis for approval/denial of an application because it is subjective, similar to a purpose statement, rather than being clear, objective, and measurable like the codified standards should be.

Establishing objective design standards for Garden City is made easier by the fact that design criteria is already found throughout Garden City Code. See, e.g., 8-4C. The challenge is finding a way to summarize and compile these criteria into objective and usable findings or standards.

Converting subjective but required design findings into objective design standards forgoes some individual project discretion. Such objectivity is required by law, however. Presenting objective design standards may also compel more explanation in the future. Thus, current design standards may need to be longer eventually, and the City may prefer additional guidelines to be more inclusive. See, e.g. Boise's Design Guidelines Manual, which is over one hundred pages long.

Objective design standards, as opposed to design guidelines, can be thought of in several ways: (a) Quantifiable standards; (b) True/False; (c) Counts and Measurements; (d) Ratios and Calculations; (e) Lists; (f) Scorecards; and/or (g) Benchmarks and Performance Measures. Garden City could take any of these approaches. I am recommending True/False design findings or standards for the code amendment.

When drafting the language of design standards, the use of "shall" rather than "should" or "may" is preferable. On the other hand, statements such as "detrimental impact," "reasonable expectation," and "functional" may be problematic as standards.

Some jurisdictions, such as Boise, also incorporate “deviations.” Deviations are useful because they allow for alternative method of compliance without putting the City at risk. Essentially, these deviances are a privilege and not a right.

In Garden City, under the current version of the municipal code, one of the required findings is the proposed design adheres to standards for the “protection of health, safety, and general welfare.” However, this has been found to be subjective without objective criteria. Anyone should be able to read the code along with an applicant’s plan, and easily determine if the plan will or will not be approved. Another example of a subjective standards is, “compatible with the intended character of a neighborhood.”

Therefore, the definition section in Garden City Code § 8-7A-2 was initially proposed to be modified to clarify the appropriate definitions for “health, safety, and general welfare” are “the elements identified within the purpose statement of the Local Land Use Planning Act (LLUPA), Idaho Code § 67-6502.” However, that is a purpose statement, and arguably also subjective.

After further legal review the recommendation has changed, which is to move this requirement to G.C.C. § 8-1A-4, which will indicate that all applications under Title 8 must promote safety, as defined by Merriam-Webster. Therefore, safety is now defined as providing, “security from harm, danger, risk, injury, and loss.”

Another requirement in Garden City Code § 8-6B-3(D) for design is that the application “improves the accessibility of development to non-motorized and public modes of transportation.” What does “improves accessibility of development” mean, however? Currently, it means the design must improve access to that land by users of non-motorized transportation or users of public transportation. As written, the standard simply requires the design to be an improvement in the accessibility by such users to the land being developed. But is this what the City Council intended?

Therefore, the proposed modifications also address pedestrian and bicycle accessibility requirements and clarifies the other required findings of Garden City Code § 8-6B-3(D).

2. New Proposed Required Findings in Garden City Code § 8-6B-3(D)

Previous iterations of Ordinance No. 1204-22 contained the following proposed changes to the required design review findings:

D. Required Findings: In order to approve a design review application after a recommendation by the design review consultant(s), and based on design standards adopted by the city ~~the standards set forth in chapter 4, article C of this title,~~ the decision maker shall make a determination on the following findings:

1. The proposed design ~~shall is in conformance~~ shall be in conformance with the purpose and provisions of Chapters 1-4 and 6 of this Title, including but not limited

~~to setbacks, design provisions, and overlay district provisions; of the zoning district and all dimensional regulations of that district;~~

2. The proposed design shall conform with the plans adopted by Garden City by ordinance or resolution; ~~adheres to standards for the protection of health, safety, and general welfare;~~

3. The proposed design shall provide convenient and functional bicycle and pedestrian access and movement to, from, within, and across the site; ~~creates a sense of place and contributes to the uniqueness of the different districts and neighborhoods within the city;~~

4. The proposed design shall preserve and enhance the public's use of existing and planned public spaces, including but not limited to the greenbelt and pathways, sidewalks, parks, roadways, open space, public facilities, Boise river and waterways, and canals; ~~improves the accessibility of development to nonmotorized and public modes of transportation;~~

5. The proposed design shall be consistent with the Garden City Comprehensive plan for the relevant neighborhood in scale, intensity, and character; ~~supports a development pattern in nodes rather than strip commercial along arterial corridors;~~

6. The proposed design shall be functional, in that the use of the property will not create a detrimental impact on the surrounding neighborhood. Such functionality may include but is not limited to features allowing a reasonable expectation of privacy for the neighborhood, adequate parking or loading, refuse placement and collection location, location of noise amplification devices, etc.; ~~supports a compact development pattern that enables intensification of development and changes over time; and~~

7. The proposed architecture and site improvements shall have facades, features, and other physical improvements that are consistent with Garden City's comprehensive plan for the neighborhood; ~~design provides outdoor spaces and landscaping compatible with the southwest Idaho climatic conditions and that encourage pedestrian activity.~~

8. The proposed outdoor common area(s) and landscaping shall improve the quality, value, and extent of the design and function of the site and must be consistent with southwest Idaho climatic conditions; ~~and~~

9. The proposed design shall preserve natural, scenic, and historic features, including but not limited to wetlands, the Boise River, waterways, and historic structures.

For the third reading of Ordinance No. 1204-22, the proposed changes to the required design review findings were slightly modified and now are:

D. Required Findings: In order to approve a design review application after a recommendation by the design review consultant(s), the decision maker shall make a determination with written reasoned statements on the following findings:

1. The proposed design shall comply with all design standards in this Title;
2. The proposed design shall provide effective bicycle and pedestrian access and movement to, from, within, and across the site;
3. The proposed design shall be compatible with or improve the public's use of existing and planned public spaces, including but not limited to the greenbelt and pathways, sidewalks, parks, roadways, open space, public facilities, Boise river and waterways, canals, and other surface irrigation;
4. The proposed design shall be compatible with the neighborhood in scale and intensity;
5. The proposed design shall not create an adverse impact on the surrounding neighborhood;
6. The proposed architecture and site improvements shall have facades, features, materials and building form, and other physical improvements that are compatible with or enhance the neighborhood;
7. The proposed design and landscape shall improve the design and function of the site and be consistent with southwest Idaho climatic conditions;
8. The proposed design shall be compatible with applicable natural, scenic, and historic features, including but not limited to wetlands, the Boise River, waterways, and historic structures.

E. Limitations Of Design Review Authority: Except for development on substandard lots of record, the design review consultant(s) is prohibited from requiring reductions in height, density or floor area ratio, or other general bulk regulations.

In Garden City, rather than requesting a “deviation,” if an applicant cannot comply with the required findings, he/she can request a variance pursuant to GCC § 8-6B-9. Variance requests will continue to be decided by the Planning and Zoning Commission:

8-6B-9 VARIANCE:

A. Purpose: The purpose of this section is to establish procedures for modification from the bulk and placement requirements of this title.

B. Applicability:

1. The provisions of this section shall apply to requests to vary from the requirements of this title with respect to lot size, coverage, width, and depth; front, side, and rear setbacks; parking spaces; building height; and all other provisions of this title affecting the size and shape of a structure or the placement upon properties.

2. A variance does not relieve an applicant from any of the procedural provisions of this title, nor does it allow establishment of a use that is not otherwise permitted in the applicable zoning district.

C. Process: A variance shall be allowed only upon the approval of an application by the commission, subject to the requirements of this chapter, a showing of undue hardship because of unique physical characteristics of the site, and that the variance is not in conflict with the public interest.

D. General Provisions:

1. Conditions Of Approval: Upon the granting of a variance, the commission may impose any conditions it considers necessary to assure:

a. That the variance will not constitute a grant of special privilege inconsistent with the limitations on other properties in the vicinity and the applicable zoning district in which the subject property is located; and

b. Secure substantially the purpose of city regulations and give effect to the comprehensive plan.

2. Conforming Variance: Any structure, building, fence, sign or use built, erected, reconstructed, used, maintained, established, existing or occupied under an approved variance as herein provided shall be

deemed in conformity with the provisions of this title to the extent it complies with the provisions of said variance.

3. Precedent Not Created: Approval of a variance shall not be considered as establishing a binding precedent to grant other variance requests.

E. Required Findings: A variance shall be granted by the commission only if the applicant demonstrates all of the following:

1. The subject property is deprived, by provision of this title, of rights and privileges enjoyed legally by other properties in the vicinity and under the applicable zoning district because of the unique size, shape, topography or location of the subject property (a finding of undue hardship);

2. The need for the variance is not the result of actions of the applicant or property owner;

3. The variance will not unreasonably diminish either the health, safety or welfare of the community neighborhood;

4. The variance is the only reasonable alternative to overcome the undue hardship; and

5. The variance is the minimum relief necessary to allow reasonable use of the subject property.

3. Proposed Changes to Garden City Code § 8-7A-2

As stated, definitions were included and/or updated for the terms “Boise River,” “Mixed Use,” “Safety,” “Waterways,” and “Wetlands” to give project proposers a better understanding of the City’s expectations regarding those terms.

Explanation of Amendments repealing Surel Mitchel Work-Live-Create Overlay Zoning District

On July 25, 2022, the City Council decided to repeal the Surel Mitchell Work-Live-Create overlay zoning district. Therefore, the general base regulations will control for parking and off street loading in Garden City Code § 8-4D. However, referring to 8-4D for parking requirements is also problematic. For example, the number of requisite parking spaces for non-residential and mixed use proposals are to be “determined by the planning official” based on several non-specific criteria. Therefore, G.C.C. § 8-4D should also be amended at some point in time, and a parking survey has recently been sent to residents.

CONCLUSION: Approvals and denials of any application under LLUPA must be based on standards and criteria set forth in a zoning ordinance or other regulation. Additionally, the approval or denial of such an application must be in writing and must be accompanied by a reasoned statement that explains the criteria and standards considered relevant, states the facts relied upon, and explains the rationale for the decision. The proposed amendments impacting all design review applications are intended to provide clear criteria and standards for review.

The following options could have been employed to address the identified deficiencies in the Garden City Code regarding the Surel Mitchel Work-Live-Create Overlay Zoning District: (1) amend the existing Overlay District ordinance to address the concerns identified; (2) repeal the Overlay District and adopt a new Overlay District or a new base zoning district; or (4) repeal the Overlay District and amend the general design standards. Therefore, Council was presented with two alternative versions to Proposed Ordinance No. 1024-22 (one to repair and one to repeal the overlay district). Many more amendments to the Development Code will be forthcoming in the weeks and months to come. However, the above identified issues should be rectified as soon as possible.

On April 25, 2022, the neighborhood meeting and work session were conducted in front of City Council. On May 2, 2022, the matter was before the Design Review Committee for consideration. The Design Review Committee continued the matter to June 6, 2022. On May 18, 2022, the Planning and Zoning Commission recommended repairing the sections of code at issue rather than repealing the Surel Mitchel overlay in its entirety. The matter was then put before City Council on May 23, 2022. City Council continued the issue to June 13, 2022, for further discussion.

Design Review took up the matter again on June 6, 2022, and again continued to a date certain of June 20, 2022. City Council took up the matter again on June 13, 2022, whereupon it was continued to a date certain of July 25, 2022. On June 20, 2022, the matter again went before the Design Review Committee. The Committee was prevented from making a final recommendation because the item was not properly included on the agenda. The issue was once again continued to a date certain of July 18, 2022. When the Design Review Committee took up the issue on July 18, 2022, it recommended denying the repeal option and tabling the revise option until a work group has met and presented a revised option.

On July 25, 2022, the matter was again put before City Council. Also on the agenda for July 25, 2022 was a recommendation to change the Design Review Committee to Consultant(s) in CPAFY2022-0003 and Ordinance 1026-22. A member of the public, Hannah Ball, testified that the C-2 base zone would work well, and applicants could apply for a Minor Planned Unit Development in the area without the overlay district. City Council voted unanimously to repeal the Surel Mitchell Work-Live-Create overlay district (Option A), and the first reading of the ordinance was completed.

On August 8, 2022, the second reading of the ordinance was completed, along with a second reading of Ordinance 1026-22. On August 22, 2022, the third reading of the

ordinance was completed, along with consideration of Ordinance 1026-22. On August 22, 2022, Councilmember Jorgensen made the following amended motion, which passed unanimously: a motion to instruct the clerk to read ordinance 1024-22 for a third reading, incorporating the changes in the design review required findings as discussed, by title only. The Findings of Fact, Conclusions of Law and Decision in CPAFY2022-0005 was also adopted by City Council on August 22, 2022. Thereafter, it was decided to continue the matter to September 12, 2022 to adopt and publish Ordinance No. 1024-22, to coincide with CPAFY2022-0003 and Ordinance 1026-22

The matter is now before City Council on September 12, 2022, for a motion to adopt and publish. Therefore, I am recommending that City Council adopt and publish Ordinance No. 1024-22.