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Via E-mail Only: jthorn@gardencityidaho.org

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

RE: Applicant's Memo In Opposition to Reconsideration in DSRFY2023-0010

Dear Mayor Evans and City Council:

The following is being submitted on behalf of JD Planning and Associates, LLC (the "**Applicant**") in connection with the design review approval of Applicant's multifamily development project located at 5855 N. Glenwood Street and 7979 W. Marigold Street on 3.51 acres (the "**Property**").

FACTUAL AND PROCEDURAL BACKGROUND

The project includes 229 dwelling units (the "**Project**") and 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 September 14, 2023, Applicant filed a design review application for the Project. On November 2, 2023, the Design Review Committee considered the application at a public hearing but continued the matter. On January 16, 2024 and May 20, 2024, the Design Review Committee considered the application again. The City forwarded the design review application to the City Council to render a decision. On August 12, 2024, the City Council held a public hearing on the Project's design review application and voted to approve it. Additionally, each design review approval criteria was individually approved by the Council at the public hearing.

On August 12, 2024, 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.

On August 23, 2024, Attorney Kenley Grover filed a request for reconsideration on behalf of certain unnamed interested parties. On August 24, 2024, Terry Loofbourrow filed a request for reconsideration on behalf of Assistance League Boise. Collectively, these reconsiderations request are referred to herein as the "**Reconsideration Requests**" or individually referred to herein as the "**Grover Reconsideration Request**" or the "**ALB Reconsideration Request**" respectively. Applicant is providing this opposition to the

ARGUMENT

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

The Reconsideration Requests do not state any legal basis for reconsideration. 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. The City relies on the Idaho Local Land Use Planning Act ("LLUPA") for its authority to grant the Reconsideration Requests, 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.

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 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).¹ Unlike rezones, LLUPA does not "require" design review, and unlike conditional use permits, LLUPA does not "authorize" design review.

¹ 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).

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.²

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 Reconsideration Requests should be denied. 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 Requests.

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 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.

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, a detailed explanation of the rationale as to why each of the applicable standards was met, and an extensive record supporting the decisions and rationale. The Reconsideration Requests do not raise any issue with the sufficiency of the Decision. Instead, the Reconsideration Requests merely asks the Council to rehear the application because the outcome was not the one they desired. Such a request is not proper

² *Arnold v. City of Stanley*, 162 Idaho 115, 117, 394 P.3d 1160, 1162 (2017).

because LLUPA's reconsideration procedure is strictly limited to the sufficiency of the final written decision. The findings, conclusions and decisions at issue are sufficiently detailed to demonstrate that the Council considered applicable standards and reached a reasoned decision.

3. The Reconsideration Requests fail 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 Requests, either collectively or individually, asserts: (i) the City committed error in finding the Project complied with all of the design Standards in Garden City Code Title 8; (ii) the City committed error in finding the Project adheres to standards that it shall be compatible with the neighborhood in scale and intensity; (iii) the City committed error in finding the Project does not create an adverse impact on the surrounding neighborhood; and (iv) the City should consider additional evidence and that the public interest should be further considered in determining the reconsideration. Each argument is addressed in turn below.

a. The Decision correctly concludes the Project complies with all design standards in Garden City Code, Title 8.

One of the applicable design review criteria for the Project is whether "the proposed design shall comply with all design standards in Garden City Code, Title 8." This approval criteria is set forth in Garden City Code § 8-6B-3(E)(1). The Decision expressly concludes that this provision is met by the Project and provides the following rationale for compliance: "As conditioned, the application meets this finding because the application is in conformance with the reviewed sections of coded in this decisions, findings of fact number 12 with the exception of 8-4I-5 Perimeter Landscaping Provisions which is in conflict with the fire code. For the review of this application deference was given to the fire code."

The Decision's expressly stated rationale related to compliance with Garden City Code, Title 8 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 standards for the C-2 zone. On reconsideration, the Project will still be code compliant and no new evidence will change that.

b. The Decision correctly concludes the Project adheres to the standards that it shall be compatible with the neighborhood in scale and intensity.

One of the applicable design review criteria for the Project is whether "the proposed design shall be compatible with the neighborhood in scale and intensity." This approval criteria is set forth in Garden City Code § 8-6B-3(E)(4). The Decision expressly concludes that this provision is met by the Project and provides the following rationale for compliance: "The application meets the finding. The application is in conformance with the vision set forth in the Comprehensive Plan's Green Boulevard Corridor and Neighborhood Destination Activity Node. They of high density residential multi-family development, and its proposed structure design, is cohesive with the adjacent uses. Moreover, the application meets the

applicable zoning code provisions set forth for the C-2 Zoning District.”

The Decision’s expressly stated rationale related to compatibility with the neighborhood in scale and intensity 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 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 compatibility in scale and intensity 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 a design review application that meets the clear and objective standards in the zoning code cannot be denied based on other subjective standards or opinion.³ This is rooted in due process and fundamental fairness.

Further the Grover Reconsideration Requests also proffered that the Council misapplied the Garden City Code. In short, the Grover Reconsideration Requests argues that the Comprehensive Plan is flawed and debates whether the Comprehensive Plan adequately addresses the project. However, the record before the Council identifies all of the ways the current project complies with the current adopted Comprehensive Plan. The City has conducted a thorough planning process. The Grover Reconsideration Requests complaint is not with the Decision or the Application, but rather in the City’s planning process, which is not dispositive on the issue of the sufficiency of the written Decision.

c. The Decision correctly concludes the Project does not create an adverse impact on the surrounding neighborhood.

One of the applicable design review criteria for the Project is whether the “proposed design shall not create an adverse impact on the surrounding neighborhood.” This approval criteria is set forth in Garden City Code § 8-6B- 3(E)(5). The Decision expressly concludes that this provision is met by the Project and provides the following rationale for compliance: “The application meets this finding as conditioned. As conditioned, the vehicular ingress/egress on Glenwood Street is a right-in/right-out access and the access onto Marigold street is eliminated. Therefore, the design of the application will create the fewest traffic hazards and will therefore have the least adverse impact on the safety of the neighborhood.”

The Decision’s stated rationale and analysis that the Project shall not create an adverse impact on the surrounding 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 assessing the adverse impact on the surrounding neighborhood standard, if LLUPA applies, a Project that complies with the finite objective design criteria set forth in the zoning code cannot be denied on other subjective standards or opinions as discussed above.⁴

³ *Wee Boise, Inc. v. City of Garden City*, CV01-20-03481 * 18 (2022).

⁴ *Wee Boise, Inc. v. City of Garden City*, CV01-20-03481 * 18 (2022).

- d. The Decision was sufficient and based on evidence presented to the Council and took into account the public interest.

The Grover Reconsideration Request states that additional evidence should be obtained and considered as well as that the public interest supports reconsidering the Decision. There was sufficient evidence in the record that provided the basis for the Decision pertaining to all of the required findings. Additionally, the record included the significant opposition to the project which was also considered by the Council in rendering its Decision. The findings, conclusions, the supporting record and Decision are sufficiently detailed to demonstrate that the Council considered the applicable standards and reached a reasoned decision regarding all of the required findings under Garden City Code 8-6B-3.

4. Conclusion.

For the reasons set forth above, the Reconsideration Requests should be denied. 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 Requests have failed to articulate any valid reasons to reverse or modify the Decision based on the standard set forth by LLUPA and accompanying case law.

Very Truly Yours,



Wade D. Thomas

cc: Charles Wadams, City Attorney
Attorney Kenley Grover, Attorney for certain interested parties