



OFFICE OF THE CITY ATTORNEY

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TO: Mayor and Council
FROM: Charles I. Wadams, City Attorney
DATE: February 13, 2023
SUBJECT: Consideration of Proposed Ordinance No. 1032-22 (Permit Extensions)

ACTION REQUIRED: Within the City Council's discretion.

RECOMMENDATION: None.

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

BACKGROUND: The allotted time periods for permit extensions in the building regulations and development code vary from project to project. This ordinance sets forth a standard extension time and lengthens the amount of time granted for both permits and permit extensions in Title 7 and Title 8.

ANALYSIS: This ordinance amends criteria related permit extensions by providing uniform and reasonable time periods for extensions on permits governed by the development code. This ordinance proposes that the permit times be lengthened for subdivisions, extensions, and other permits under the development code. The goal is to reduce the number of permit extension requests and allow applicants reasonable time to complete their projects. The ultimate purpose of this ordinance is to make the permitting and permit extension processes more unified and usable to benefit staff as well as those submitting development applications.

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 sureties and accessory dwelling units. The third reading of proposed Ordinance No. 1032-22 is scheduled for February 13, 2023.

At the January 9, and January 23, 2023 meetings, a discussion was held regarding whether this code amendment should be retroactive regarding extension requests on permits that were issued pursuant to the old version of code. An ordinance or statute in Idaho applies retroactively when the legislature or governing body expressly declares the ordinance or statute to be retroactive. If the City wants the amended code on permit extensions to apply retroactively on permits already issued, the City should expressly declare the amendment to be retroactive in the code.

An ordinance or statute is considered retroactive if it applies to events that occurred before the ordinance or statute was enacted. Retroactive laws can be controversial, as they can change the legal consequences of actions that were taken before the law was in place.

“[I]n Idaho, a statute is not applied retroactively unless there is ‘clear legislative intent to that effect.’ In the absence of an express declaration of legislative intent that a statute apply retroactively, it will not be so applied.” *State ex rel. Wasden v. Daicel Chem. Indus., Ltd.*, 141 Idaho 102, 105, 106 P.3d 428, 431 (2005). In *Unity Light & Power Co. v. City of Burley*, 92 Idaho 499 (1968), the Idaho Supreme Court addressed whether the legislature had expressly declared a statute to be applied retroactively. *Id.* The enactment provided, “This act shall be in full force and effect from and after June 1, 1963.” Ch. 269, § 5, 1963 Idaho Sess. Laws 685, 689. In holding that the legislature had not expressly declared the act to be retroactive, the Court stated, “The legislature, in setting the effective date of the new statute, demonstrated an intent that it not be given retrospective effect.”

In Idaho, the constitutionality of retroactive laws can be challenged in court. The courts will determine whether the law is constitutional on a case-by-case basis. The Idaho Supreme Court has held that a law is unconstitutional if it impairs the obligations of contracts, or violates the Due Process Clause or the Ex Post Facto Clause of the United States Constitution or the Idaho Constitution. It is important to note that a retroactive law that is constitutional under the Idaho Constitution may still be deemed unconstitutional under the United States Constitution.

For the third reading of the ordinance, staff is not recommending that the extensions portion of the ordinance be retroactive. The ordinance has been clarified that the “good cause” standard applies to all extension requests, which is a term accepted and used by Idaho courts. It has also been clarified that the administrator of building safety services is the development services director, who is authorized to grant up to two (2) extensions of time unless there has been a code change that affects the application.

My final review of the ordinance questioned where the following wording came from: “if there have been code changes that affect eh application, the permit may only be reactivated upon the payment of a fee totaling fifty percent (50%) of the permit fee that was established at the time of issuance.” The answer is that “the fee totaling fifty percent (50%) of the permit fee” was the percentage in the current version of code. The fifty percent (50%) fee could be changed if appropriate.

Additionally, my final review of the ordinance questioned if staff wanted to entirely repeal G.C.C. § 8-4F-4, and staff advised that they did because it is otherwise covered in code. Lastly, my final review commented that the following terms are not defined as used in G.C.C. § 8-6A-8.B: “major change,” “actively pursuing,” and the city’s “best interest.” Staff has advised that “major change” will be interpreted to mean one that would affect the project. Staff has advised that “actively pursuing” will be interpreted on a case-by-case

basis. Staff further advised that the city's "best interest" is the current wording in code. My comment is that these terms could be argued to be subjective.

This ordinance does not present a significant fiscal impact to the City and serves to unify codified requirements for permit extensions. 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 CPAFY2023-0002 will also have to be adopted pursuant to code.