

IN RE:)
) **KETCHUM CITY COUNCIL**
) **DECISION ON REQUEST FOR**
 Bluebird Village Community Housing) **RECONSIDERATION**
 Project, Design Review P21-063)
)
)
)

This matter was approved by the Ketchum City Council (Council) on October 18, 2021 via adoption of Findings of Fact, Conclusions of Law, and Decision (October 18, 2021 Council Decision). A Request for Reconsideration was submitted on November 1, 2021 by Kenneth Howell of the law firm of Hawley Troxell, representing Susan and Gary Martin, residents at 480 N. Walnut Avenue, Ketchum, Idaho (Requester). The Council’s Decision on the Request for Reconsideration is as follows:

1. This matter and the Request for Reconsideration primarily concerns an application for design review, P21-063.
2. Design review does not constitute a permit or application under the Idaho Local Land Use Planning Act, Chapter 65 of Title 67 Idaho Code (LLUPA). A LLUPA request for reconsideration under Idaho Code §67-6535 is therefore not applicable on a design review decision.
3. Ketchum Municipal Code does not provide for reconsideration of a design review decision.
4. The October 18, 2021 Council Decision is an appropriate and reasoned written statement of the decision of the Ketchum City Council.
5. In addition, the October 18, 2021 Council Decision affirms and at page 5 references and is intended to incorporate the design review approval and written reasoning by the

Planning and Zoning Commission in the *Ketchum Planning and Zoning Commission Findings of Fact, Conclusions of Law, and Decision* of August 24, 2021 (August 24, 2021 P&Z Decision).

6. To the extent necessary, if any, the October 18, 2021 Council Decision constitutes a satisfactory written decision identifying compliance with relevant approval standards and criteria.

THEREFORE, the October 18, 2021 Council Decision is affirmed and the Request for Reconsideration is denied.

A majority of the Council hereby adopts this Decision and authorizes the Mayor to execute the same.

Neil Bradshaw, Mayor
Effective Date: November 18, 2021

A copy of this Decision has been provided to the Requester, Applicant, and the City Attorney, and the original has been retained in the records of this City on this ____ day of November, 2021.

By: _____
Tara Fenwick, City Clerk

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November 1, 2021

VIA E-MAIL: tfenwick@ketchumidaho.org
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Tara Fenwick
Ketchum City Clerk
480 East Avenue
Ketchum, Idaho 83340

Re: *Request for Reconsideration of Bluebird Village Community Housing Approval of Findings of Fact, Conclusions of Law and Decision dated October 18, 2021 and related actions*

Dear Mayor Bradshaw and City Council Members:

I write as counsel to Susan and Gary Martin, residents at 480 N. Walnut Avenue, Ketchum, Idaho. On behalf of the Martins, we respectfully request reconsideration of the City Council's October 18, 2021, approval of the Bluebird Village Community Housing Findings of Fact and Conclusions of Law and Decision of that date (the "City Findings"). This approval also included the affirmation of the Planning & Zoning Commission's approval of the Bluebird Village Community Housing Project design and related approval of the development's building height and forth floor consistent with the Commission's Pre-Application Design Review P21-027 and Design Review P21-063 (the "Commission Findings").

This request for reconsideration is made pursuant to Idaho Code § 67-6535, the Idaho Local Land Use Planning Act (LLUPA", codified as Idaho Code Title 67, Chapter 65). Pursuant to Idaho Code § 67-6535, this request is made in writing, is filed with the City Clerk, identifies specific deficiencies in the decision for which reconsideration is sought, and is made within fourteen (14) days of the "final approval" of the above-referenced approval.

The specific deficiencies for which reconsideration is sought are: (1) the City Council's final approved decision failed to explain or document the rationale for the City Council's approval of the Commission's approval of Bluebird based upon the Comprehensive Plan and relevant provisions of the Ketchum Municipal Code ("KMC"). While the City Council "unanimously affirmed" the Commission's approval, it did not adopt any of the Commission's

analysis and provided no analysis of the findings and conclusions by the Commission beyond the statement that it “expressed appreciation for the Planning & Zoning Commission’s review of the project.....” see Findings and Conclusions page 5; (2) The Findings necessary to approve the Commission’s decisions, or the city’s criteria for approval of the 4th floor of the Bluebird project, and their completely failure to address any conflicting information and testimony in opposition to such approval; (3) the public hearing process was not impartial and therefore failed to provide for due process; and (4) the members of the Commission and the City Council all had irrevocable conflicts of interest while participating and voting on matters related to property owned by the City of Ketchum.

The City Council failed to explain or document its review of the Commission action, and its Findings are therefore deficient, erroneous and not in compliance with LLUPA.

The Commission’s approval of the Bluebird project was entirely and expressly conditioned on the City’s approval of a planned zoning amendment as to setback requirements, and further subject and conditioned upon “final approval” by the City due to the fact that the project contained a fourth floor and otherwise exceeded height and floor area ratio limitations. See Bluebird Village Community Housing Project Design Review (Planning and Zoning Commission) Findings of Fact, Conclusions of Law, and Decision, page 37, items numbered 3 and 4. The City further acknowledged that it was required to make a “final review and approval of the project”. See Bluebird Village Community Housing Project Design Review Findings of Fact, Conclusions of Law, and Decision dated October 18, 2021, page 4.

Despite this clear recognition of its requirement that “all buildings greater than 48 feet or that contain a fourth floor receive final review and approval from the City Council”, the Council’s “Findings Regarding Planning & Zoning Commission’s Design Review Approval” contain no analysis or conclusions regarding the project’s compliance with any of the zoning code’s requirements, and whether the Commission had fully complied with those standards. In fact, the “Findings” regarding the Commission’s actions consist of three short paragraphs. The first paragraph recites the history of the development incentives for maximum floor area and height limitations. The second paragraph is a recitation of the Commission’s findings which appears to be largely taken from the Commission’s own Findings at the Planning & Zoning Commission level. The final paragraph is an expression of gratitude to the Commission for its work. Nowhere do the City’s Findings review the relevant standards and requirements for the Commission’s review, nor does the City discuss or review any of the quantum of evidence or proof relied upon by the Commission to reach its exercise of discretion. In point of fact, the City’s Findings nowhere state that the Commission’s Findings are correct or otherwise acceptable to meet articulated standards of approval. In short, the City’s Findings are simply deficient in that they fail to articulate 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” all as required by Idaho Code § 67-6535 [emphasis added].

The Public Hearing Process was not Impartial, and the members of the Commission and the City Council all had irrevocable conflicts of interest.

It has been obvious to the Martins, along with many other members of the community, that the City was highly desirous of approving an affordable housing project in the City, that the City took a convoluted series of steps to make the particular site available (to wit, building a new fire station and moving the locations of City Hall and the Police Station), and, once the current location was made available, considerable City resources, effort and determination was made to engineer approval of this project on that particular site. These incentives have taken the form of outright grants as well as assurances of essentially free conveyances of City property. The economic incentive to maintain a vibrant community fully supported by the employment of individuals in all aspects of the workforce has been repeatedly referenced in the City's and Commission's Findings, and no one realistically doubts the economic contributions to the City, its businesses and tax base as a consequence

As evidenced by items upcoming on the City's hearing agenda, these efforts have not concluded with the approval of the Bluebird project, but continue with consideration of significant economic contributions to the project by essentially gifting City-owned property under the guise of a less-than-nominal lease for many decades. While these efforts call into question an intentional attempt to skirt statutory prohibitions on disposition of municipal property unless done by competitive bidding, they also illustrate the level of the City's commitment to the approval and construction of this project towards the aim, among other things, of economic vitality.

Under these conditions, it is plain why the Commission and the City's Findings omit any discussion of "relevant contested facts" brought to the fore by public comments and submissions. Indeed, aside from a casual mention that public testimony and submissions were in the record and were thus submitted for consideration by the Commissioners and City Council, neither of the Findings provided any discussion or acknowledgement of the many opposing viewpoints – whether they be economic, or related to conditions of approval or community impact. The partiality of the decision-making processes in this case is palpable, and clear.

A significant omission in any of the Findings is the obvious and overwhelming conflict in the City's Planning & Zoning Commission undertaking the approval of a project for a City-owned parcel. This same concern was present when the City Council considered and approved its own project without any mention of the curious conflict. That the Mayor and City Council members all "participated" in the decisions made cannot be denied, just as did each of the members of the Commission.

Idaho Code § 67-6506 prohibits a member of a governing board or commission under conditions giving rise to a conflict of interest. Clearly and unambiguously stated, "[a] member or employee of a governing board, commission or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business

associate or any person related to him . . . has an economic interest in the procedure or action.” Here, the members of the Commission, and the Mayor and the members of the City Council, each had undeclared conflicts of interest by reason of the City’s ownership of the parcel in question, and the City’s express and clear economic interest in seeing the project approved and constructed. Whether the individual City Council or Commission members are deemed the equivalent of the City, or are salaried City employees (for the Mayor and City Council members), it is plain that their economic interests as members of such bodies are the same as the economic interests of the body they compose. The actions of the Mayor, City Council members and Commission members ARE the actions of the City. The economic interest of the City cannot be excised from these proceedings, and the actions of the members of the Commission the Mayor and the City Council are all tainted by that economic interest to such a degree that conflicts of interest should have been declared. The City might have avoided this conflict by complying with Idaho’s public bidding and auction of surplus property requirements, but instead chose to remain as a business partner or associate of the chosen developer.

Conclusion

Owing to the complete failure of the City’s Findings to provide a reasoned statement that explain the criteria and standards considered relevant, to state the relevant contested facts relied upon, and to explain the rationale for the decisions reached based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record as required by Idaho Code § 67-6535, the Martins respectfully request that the City reconsider its Findings of Fact, Conclusions of Law and Decision. Further proceedings and amended Findings should issue to provide reasonable and clear explanations of the criteria and standards relied upon, including a discussion of the relevant contested facts.

Absent the required clarity of rationale in the Findings, it is not possible for the Martins to identify and articulate specific instances of erroneous action. Accordingly, this request for reconsideration is not a comprehensive list of objections, basis for reconsideration, or grounds for reversal on judicial review.

While the Martins believe substantial omissions and errors were made by the Commission and by the City Council, including the failure to consider or address:

- The application and impact of the Dark Sky ordinance on the project;
- The Applicant’s failure to submit complete and accurate site plans showing adjacent landscaping, structures and screening;
- Safety issues and concerns, including those related to emergency evacuation as well as amelioration of the risk of falling ice and snow;
- Adequacy of parking and impact of inadequate parking on businesses in a zone the comprehensive plan reserves for retail use;

- Mitigation and design elements necessary to minimize the mass and height of the development including landscaping and the misrepresentation of landscaping in elevations presented to the public;
- Consistency of standards applied to the Bluebird project when compared to recent decisions on smaller projects in the same zone (such as the Solstice project) which was deemed out of scale and a “domineering” presence in the Community, to the extent that decision-making appears to be entirely arbitrary and capricious;
- The misapplication of city resources where a property worth in excess of \$10 million is not sold pursuant to surplus property public bidding requirements but is instead intended to be leased for virtually free – with the consequence that up to \$20 million in taxpayer resources are being allocated to this project, and to a private, for-profit developer;
- The lack of an RFP for use of this City-owned parcel and other failures to comply with public bidding and arms-length transactions;
- The misrepresentation by the developer and City officials to the public in public meetings, newspaper editorials and advertisements that this project will provide housing for local teachers, firefighters and local workers, when, in fact, no such restriction is proposed (and may not even be possible); to the contrary, anyone meeting income limitations will be able to become a tenant;
- Safety of the project and compliance with ADA requirements and pragmatic concerns due to, among other things, the inadequate elevator capacity of the project as approved;
- Misapplication of the Comprehensive Plan to prioritize workforce housing over the Plan’s intention to preserve the city’s retail core.

Pursuant to Idaho Code § 67-6535(3), the Martins reserve the right to supplement and augment this request for reconsideration, and to include additional facts, issues and arguments in any subsequent Petition for Judicial Review, in the event the City fails to reconsider its grounds of approval.

Cordially,

HAWLEY TROXELL ENNIS & HAWLEY LLP



Kenneth C. Howell

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