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**To:** Mayor and City Council, City of Ketchum, Idaho  
**From:** Abigail R. Germaine, Special Project City Attorney, Elam & Burke P.A.  
**Subject:** Findings of Fact, Conclusions of Law, and Decision  
**File #:** Sawtooth Serenade – P22-056B  
**Date:** March 12, 2024

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The attached written Findings of Fact, Conclusions of Law, and Decision (“Decision”) is drafted based on the deliberation, discussion, and decision by the City Council on March 4, 2024, after hearing from both the Appellant and Respondent regarding the Sawtooth Serenade Appeal (“Appeal”).

Pursuant to Ketchum Municipal Code 17.144.020(D), the City Council must enter a written decision within thirty (30) days after the hearing on appeal. The City Council’s decision must include a “reasoned statement” that “explains the rationale for the decision” made by the City Council. Idaho Code § 67-6535.

The attached draft Decision remains open to modification as deemed appropriate by the City Council to reflect its determination on the Appeal, and its rational basis for such determination.

Based on the City Council’s review of the draft Decision, two alternative motions are provided below:

*Recommended Motion: I move to approve the written Findings of Facts, Conclusions of Law, and Decision, as presented, and authorize the Mayor to sign the Decision.*

*Alternative Recommended Motion: I move to approve the written Findings of Facts, Conclusions of Law, and Decision, as presented, with the following changes and modifications: [state revisions] and authorize the Mayor to sign the Decision.*

**BEFORE THE CITY COUNCIL  
OF THE CITY OF KETCHUM**

In the Matter of the Administrative Appeal of:	)	
	)	
	)	FINDINGS OF FACT, CONCLUSIONS
Scott and Julie Lynch, Yahn Bernier and Elizabeth McCaw, and the Distrustful Ernest Revocable Trust for the Sawtooth Serenade Project (Applicant/Appellant)	)	OF LAW, AND DECISION
	)	
	)	
Of the Decision of the Planning and Zoning Commission on Administrative Appeal of a Planning Director Administrative Determination	)	
_____	)	

This matter came before the City Council of the City of Ketchum, Idaho (“City Council”), pursuant to Ketchum Municipal Code 17.144.020, Appeals of Planning and Zoning Commission Decisions, as an appeal of the Planning and Zoning Commission’s (“Commission”) decision to affirm the Planning Director’s Administrative Determination. An appeal hearing on this matter was originally held before the Commission on November 14, 2023. The matter was then appealed from the Commission and heard by the City Council on March 4, 2024. The City Council having evaluated the evidence and information before it, and that evidence and information contained in the record, does hereby make and set forth the following findings of facts, conclusions of law, and decision (“Decision”):

**I. PRIOR PROCEEDINGS AND RECORD ON APPEAL**

The appellants in this matter are Scott and Julie Lynch, Yahn Bernier and Elizabeth McCaw, and Distrustful Ernest Revocable Trust (“Appellant”). The Appellant, an affected party, is the applicant (“Applicant”) of the Sawtooth Serenade Project (“Project”) located at 260 1<sup>st</sup> Street, Ketchum, Idaho. The terms “Appellant” and “Applicant” are used interchangeably within this

Decision.

The respondent here is the Commission, the Ketchum City Planning and Building Department (“Department”) and the Department’s Director and Administrator (“Director”) (collectively referred to herein as the “Respondent”).

A record of the proceedings from the Commission’s decision was prepared and accepted by the City Council. Ketchum Municipal Code (“KMC”) §17-144.020(A). Transcripts of the proceedings of the Commission hearings on this matter were prepared at the Appellant’s expense, transmitted to the City Council, and included in the record. KMC § 17.144.020(A). The record on appeal (the “Record”) is hereby referenced and incorporated in full into this Decision. The Record before the City Council includes the following:

- a. Pre-Application Design Review Application Materials and Plan Set – August 11, 2022
- b. Pre-Application Design Review Completeness Review – October 17, 2022
- c. City Interim Ordinance 1234 – October 17, 2022
- d. Planning Administrator Determination – August 24, 2023
- e. Notice of Appeal, Memorandum in Support of Appeal by Appellant, and Accompanying Exhibits – September 7, 2023
- f. Administrator Response Memorandum – November 3, 2023
- g. Appellant Reply Memorandum and Accompanying Exhibits – November 9, 2023
- h. Legal Cover Report – November 9, 2023
- i. Planning and Zoning Commission Findings of Fact, Conclusions of Law and Decision – November 30, 2023
- j. Notice of Appeal of Commission’s Decision – December 11, 2023.

- k. Scheduling Order and Notice of Administrative Appeal – February 5, 2024
- l. Amendment to Scheduling Order and Notice of Administrative Appeal – February 15, 2024.
- m. Commission Meeting Transcript of November 14, 2023
- n. Commission Meeting Transcript of November 28, 2023
- o. Appellant Appeal Brief and Accompanying Exhibits – February 20, 2024
- p. Respondent Brief and Accompanying Exhibit – February 26, 2024
- q. Appellant Reply Brief – February 29, 2024

The Commission originally heard this Appeal on November 14, 2023. On November 30, 2023, the Commission issued its Findings of Facts, Conclusions of Law, and Decision affirming the Administrative Determination. This Appeal to City Council followed.

The Director certified and reported that all procedural requirements of the Appeal before City Council had been met pursuant to KMC § 17.144.020(A). Notice of the date, time and place of the Appeal hearing was provided by the Department as required by KMC §17.144.020(B). Other than the Appellant and Respondent, there are no other affected persons related to this Appeal. *Id.*

The Appeal hearing on this matter was held on March 4, 2024. The Appellant was represented by James R. Laski, of Lawson Laski Clark, PLLC. The Respondent was represented by Matthew A. Johnson of White Peterson, P.A. The City Council was represented by Special City Counsel, Abigail R. Germaine of Elam & Burke, P.A. The City Council heard oral arguments by both the Appellant and Respondent, asked questions of Appellant and Respondent, and sought clarification from Department staff. Following the close of the Appeal hearing, the City Council deliberated and voted to reverse the decision of the Commission.

## **II. STANDARD OF REVIEW**

The City Council hereby takes judicial notice of the Ketchum Municipal Code.

Ketchum Municipal Code § 17.144.020(C) states:

*Authority of council.* Upon hearing the appeal, the council shall consider only matters which were previously considered by the Commission as evidenced by the record, the order, requirement, decision or determination of the Commission and the notice of appeal, together with oral presentation and written legal arguments by the appellant, the applicant, if different than the appellant, and the Commission and/or staff representing the Commission. The council shall not consider any new facts or evidence at this point. The council may affirm, reverse or modify, in whole or in part, the order, requirement, decision or determination of the Commission. Furthermore, the council may remand the application to the Commission for further consideration with regard to specific criteria stated by the council.

Pursuant to KMC § 17.144.010(C), the City Council made its determination considering the Administrative Determination below, the Findings of Facts and Conclusions of Law and Decision of the Commission, along with the written and oral arguments by Appellant and Respondent. No other facts or evidence were considered in this Appeal.

## **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The crux of this Appeal to City Council centers around whether or not the Applicant was required to submit its Design Review Application related to this Project within 180-days of the Commission's approval of its Pre-Application Design Review Application ("Pre-App"). The Administrative Determination by the Director of the Department found that Applicant's Design Review Application needed to be filed within 180-days of its Pre-App approval, and that the Applicant's Design Review Application was filed 195-days after the Commission's approval of its Pre-App, therefore its Pre-App was null and void pursuant to Interim Ordinance 1234. The Administrative Determination was affirmed by the Commission and this Appeal followed.

**A. The Applicant's Pre-Application Design Review Application was deemed Complete and Vested on October 17, 2022.**

It is not disputed by the parties that the Applicant's Pre-App Design Review application was timely filed and deemed complete on October 17, 2022, prior to the City Council's adoption of Interim Ordinance 1234. Pursuant to KMC §17.96.010(D)(1), "[P]reapplication review is required for all non-residential and multi-family residential developments with four or more stories and all new developments on a lot or lots totaling 11,000 square feet or more." All parties agree that Applicant's Project was required to undergo preapplication design review. Understanding that the City Council intended to enact Interim Ordinance 1234, which would disallow Applicant's Project as designed, Applicant filed its Pre-App before Interim Ordinance 1234 was adopted.

On October 17, 2022, the Department issued its Completeness Review stating that the Applicant's Pre-App was "deemed complete and will be scheduled for the next available [Commission] hearing." Appellant Appeal Brief, February 20, 2024, Exhibit 9. On January 24, 2023, the Commission held a design review hearing on Applicant's Pre-App and the Commission voted to allow the Applicant's Project to proceed to final design review. *Id.*, at Exhibit 12. The Department's Staff Report to the Commission for the January 24, 2023 hearing, stated "[t]he application is not subject to Interim Ordinance 1234 as the application was deemed complete prior to the effective date of the ordinance." *Id.* at Exhibit 13. Staff's Report goes on to state that this "Project does not come under the purview of the interim ordinance because it was deemed substantially complete prior to the effective date." *Id.*

Pursuant to KMC 17.196.040, Applicant was required to submit a subsequent separate and distinct design review application to initiate the design review application process following its Pre-App. The Applicant submitted its Design Review Application on August 7, 2023, 195-days after the Commission's approval of Applicant's Pre-App on January 24, 2023. Following the submittal,

Applicant received the Administrative Determination from the Director stating that its Pre-App was null and void because pursuant to Interim Ordinance 1234, Section 3, which required that design review applications be submitted within 180-days of approval of a pre-application design review.

The Appellant argued on appeal that Interim Ordinance 1234's requirement that a design review application must be filed within 180-days of a preapplication approval, did not apply to its Pre-App because its Pre-App vested prior to the enactment of Interim Ordinance 1234. Respondent's position was that the Pre-App and the Design Review Applications are separate and distinct applications and therefore, the Applicant's Design Review Application was not vested and was subject to Interim Ordinance 1234, and therefore, needed to be filed within 180-days of its Pre-App approval.

Regardless of whether the Applicant's Pre-App and Design Review Applications are separate and distinct, it is clear that the Applicant's Pre-App was deemed completed on October 17, 2022, prior to the enactment of Interim Ordinance 1234. Idaho case law is clear that changes in ordinances enacted while an application is pending or complete may not be applied to the pending application. *Chisholm v. Twin Falls County*, 139 Idaho 131, 134-35, 75 P.3d 185, 1988-89 (2003) (“[i]t is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application for permit.”). The record is undisputed that Applicant's Pre-App was deemed complete on October 17, 2022, and is not subject to Ordinance 1234.

**B. Because Applicant's Preapplication Design Review Application Vested Prior to the Enactment of Interim Ordinance 1234, the 180-day Requirement Does Not Apply.**

The language of Interim Ordinance 1234 was revised and edited over several months preceding its enactment on October 17, 2022. The final language of Interim Ordinance 1234 reads in pertinent part:

**Section 1.** The following interim regulations and standards apply to any Building Permit, Pre-Application Design Review, Design Review, Subdivision, or Conditional Use Permit application deemed complete for vesting purposes after the effective date of this Ordinance filed pursuant to Title 16 – Subdivision Regulations and Title 17 – Zoning Regulations. Wherever any provision in Title 16 or Title 17 or any other ordinance, rule or regulation of any kind contained standards covering the same subject matter, the standards of this Ordinance shall apply.

...

**Section 3.** Developments subject to Design Review approval pursuant to KMC 17.96 – Design Review or 17.104 – Mountain Overview Zoning District that have conducted a preapplication design review meeting with the Commission, as required or voluntary, must file a complete Design Review Permit application and pay all required fees within 180 calendar days of the last review meeting on the preapplication with the Commission, otherwise the preapplication review will become null and void.

The testimony in the record makes clear the intent of the 180-day requirement of Interim Ordinance 1234 was to ensure that projects which received pre-application approval did not sit idle for years on end before seeking design review and moving the project forward. City Council Hearing Recording, March 4, 2024, at 1:18:15 – 1:18:44.

Appellant argues that the requirement of Interim Ordinance 1234 stating that all design review applications must be filed within 180-days of approval of a pre-application design review does not apply to its Pre-App because its Pre-App was deemed complete and vested prior to the enactment of Interim Ordinance 1234. *See* Appellant’s Brief, at pg. 18. It is undisputed that at the time of Applicant’s Pre-App being deemed complete and vesting, KMC § 17.96 did not include a timeframe within which an applicant needed to file for design review after its preapplication was approved. Therefore, the only requirement for Applicant to submit its Design Review Application within 180-days of its Pre-App, was included in Section 3 of Interim Ordinance 1234.

Respondent asserts that the 180-day requirement of Interim Ordinance 1234 does apply to



Applicant's Project because Applicant's Design Review Application is a separate and distinct application from its Pre-App, and its Design Review Application was not deemed completed or vested at the time Interim Ordinance 1234 was enacted. *See* Respondent Brief, at pg. 2-3.

In looking at the language of Interim Ordinance 1234, Section 1, the pertinent language reads, “[t]he following interim regulations and standards apply to any Building Permit, *Pre-Application Design Review*, Design Review, Subdivision, or Conditional Use Permit application *deemed complete for vesting purposes after the effective date of this Ordinance...*” (emphasis added). From the plain language of Interim Ordinance 1234, the regulations and standards contained in Interim Ordinance 1234 did not apply to any pre-application deemed complete prior to the effective date of Interim Ordinance 1234. Because Applicant's Pre-Application was deemed completed prior to the effective date of the Interim Ordinance 1234, Section 3, containing the 180-day requirement, could not apply to Applicant's Pre-App.

The Respondent argues that notwithstanding the Pre-App being vested and deemed complete, Applicant's Design Review Application is a separate and distinct application and was not complete or vested prior to Interim Ordinance 1234's enactment, and therefore Applicant was required to submit its Design Review Application within 180-days of its Pre-App approval. *See* Respondent Brief, at pg. 3. However, regardless of whether Applicant's Pre-App and Design Review Application are separate and distinct for purposes of vesting, it is clear that the Pre-App was vested and complete and therefore, any regulation or standard relating to the Pre-App, which was enacted by Interim Ordinance 1234 after the vesting of the Pre-App, would not apply. The language of Section 3 of Interim Ordinance 1234 relates to the Pre-App. Section 3 states in pertinent part that the design review application must be submitted within 180-days of the preapplication review “otherwise the *preapplication* review will become null and void.” (emphasis added) The regulation of Section 3,

and the timeframe contained therein, specifically relates to the validity of the Pre-App. Therefore, because the 180-day requirement relates to the preapplication and attempts to null and void such preapplications if a design review application is not filed within 180-days, Section 3 cannot apply to Applicant's Pre-App because it was complete and vested prior to the enactment of Interim Ordinance 1234. Applicant's Pre-App is not null and void despite its Design Review Application being filed 195-days after its Pre-App was approved.

**C. The Record Supports that the Applicant was Unaware the 180-day Requirement would be Applied to its Application.**

On appeal the Appellant states that it did not believe its Design Review Application had to be submitted within 180-days of its Pre-App, because its Pre-App was vested and complete before the 180-day requirement was enacted by Interim Ordinance 1234. City Council Hearing Recording, March 4, 2024, at 1:07:01-1:09:20. Respondent argues that Applicant was aware of the 180-day time period included in Interim Ordinance 1234 and that it was enacted to prevent preapplications from sitting idle for years at a time. City Council Hearing Recording, March 4, 2024, at 47:40-47:51.

However, no evidence exists in the Record that Applicant was told Interim Ordinance 1234 would apply to its Pre-App and Design Review Application. The Record illustrates that at the time of Applicant's Pre-App there were two other projects that also received preapplication design review approval prior to the enactment of Interim Ordinance 1234, and both those applicants submitted their design review applications within 180-days of their preapplication design reviews. *See* Respondent Brief, at pg. 5. Both these other applicants reached out to the Department and clarified whether Interim Ordinance 1234 would apply to their preapplications and design review applications. *Id.* Both were told it would. *Id.* Applicant never reached out to the Department to seek clarity on this aspect. City Council Hearing Recording, March 4, 2024, at 1:10:28 – 1:11:49. Had Applicant reached out to the Department and asked whether its Design Review Application needed to be

submitted within 180-days, this whole appeal could have potentially been avoided. However, regardless, nothing indicates that Applicant believed, or had reason to believe, the 180-day timeframe would apply to its Pre-App being that it was told the Pre-App was not subject to Interim Ordinance 1234.

Appellant has also alluded to the idea that the Department and Director acted in bad faith in processing Applicant’s Design Review Application and such action resulted in Applicant failing to submit a complete Design Review Application within 180-days of the Pre-App. *See* Appellant’s Brief, at pg. 22. City Council finds no bad faith or intentional delay on the part of the Department or the Director. City Council Hearing Recording, March 4, 2024, at 1:18:51 – 1:19:10. The Department and Director processed Applicant’s Design Review Application the same as any other application and any delay suffered by the Applicant in processing the Design Review Application was not the fault of the Department or the Director. City Council Hearing Recording, March 4, 2024, at 47:14 - 47:36. Furthermore, this issue is irrelevant to the City Council’s determination that the 180-day timeframe included in Section 3 of Interim Ordinance 1234 does not apply to Applicant’s Pre-App and therefore its Pre-App is not null and void.

#### **IV. DECISION**

Based on the record, written submissions, and oral argument presented, as well as the pertinent criteria and standards relevant to this Appeal, and based on the forgoing facts relied upon and rationale provided, the decision of the Commission is hereby **REVERSED**, thereby **REVERSING** the Administrative Decision in this matter, and authorizes the Mayor to sign this Decision on behalf of the City Council.

**APPROVED** this \_\_\_\_\_ day of \_\_\_\_\_, 2024.

**City Council of the City of Ketchum**

By: \_\_\_\_\_  
Neil Bradshaw, Mayor

ATTEST:

\_\_\_\_\_  
Trent Donat, City Clerk

PREPARED BY:

\_\_\_\_\_  
Abigail R. Germaine, Special Counsel  
to the City Council of the City of Ketchum

**\*NOTICE OF APPEAL RIGHTS\***

This Decision constitutes a written decision of the City Council pursuant to KMC §17.144.020(D). The City Clerk is directed to transmit a copy of this Decision to the Appellant and any other affected person who has requested a copy in writing. Appellant and Respondent are hereby notified of the City Council's Decision and their right to further action, including appeal of this Decision pursuant to KMC § 17.144.020(E) and Idaho Code §§ 67-6521 and 67-6535.

Pursuant to Idaho Code § 67-6521(1)(d), the Appellant is hereby notified of its right to request a regulatory taking analysis pursuant to Idaho Code 67-8003. Either Appellant or Respondent may, within twenty-eight (28) days of this written Decision seek judicial review of this Decision by the district court pursuant to Idaho Code, Title 67, Chapter 52. Should the Appellant or Respondent seek judicial review of this Decision, the appealing party must first seek reconsideration of this written Decision by the City Council. Idaho Code § 67-6535(2)(b).

A copy of this Decision has been provided to the Appellant, Respondent, and City Attorney, and the original has been retained in the records of the City of Ketchum on this \_\_\_\_ day of March, 2024.

By: \_\_\_\_\_  
Trent Donat, City Clerk