



City of Ketchum

CITY COUNCIL MEETING AGENDA MEMO

Meeting Date: Staff Member/Dept:

Agenda Item:

Policy Analysis and Background (non-consent items only):

Background

This is an administrative appeal to the City Council of a determination by the Planning and Zoning Commission. The appeal was filed by the Applicant, Scott and Julie Lynch & Yah Bernier and Elizabeth McCaw, & Distrustful Ernest Revocable Trust, represented by Jim Laski of Lawson Laski Clark.

The matter generally concerns the design review process, in particular the interplay between the preliminary design review and the full/final design review as relate to timing and applicability of City ordinances, in particular Ordinance 1234. The details of these issues are presented in the attachments to this report as listed below.

Procedural Status

This is an administrative appeal of decisions or determinations of the Planning and Zoning Commission, as is provided for in Ketchum Municipal Code §17.144.020. This matter was scheduled by the City Attorney, along with approving deadlines for submission of memorandum, by agreement of the parties involved and approval of the Council. The three memoranda have been timely submitted and are provided for the Council's review as attachments to this report.

From a process perspective, the Council can focus its review primarily on those memoranda and their arguments. The Council is reviewing these arguments and addressing interpretation questions in a quasi-judicial role. The remainder of any accompanying documents are the Record, which may include application documents, minutes, staff reports, etc., and are available primarily as resources or for purposes of reference within arguments to evaluate the factual background. The full Record, including meeting transcripts, is available on the city's website and can be viewed by clicking the link below:
<https://www.ketchumidaho.org/planning-building/project/sawtooth-serenade-260-n-1st-ave>

This is an administrative appeal hearing. Oral arguments will be presented by the involved parties only: Mr. Laski for Appellant/Applicant and City Attorney Matt Johnson for the Planning and Zoning Commission. The presenting parties and supporting staff will be available for questions. This is not a public hearing and there is no public comment as part of the process. Comments or input to Council members outside the appeal hearing are discouraged, and if any is received should be disclosed by that Council member at the start of the hearing.

During the hearing, the Council, at its discretion, is welcome to ask questions of staff or the parties as may be helpful to deliberation. It is encouraged to handle most questions for a party during their portion of the hearing. The order of presentation will be Appellant/Applicant, Director/Respondent, and then an Appellant rebuttal if desired. Any further presentation or answers to questions will be at the discretion of the Council.

Standard of Review:

Since the Council does not hear administrative appeals frequently, a common question when they do arise is as to the applicable standard of review. Standard of review is a legal term guiding the discretion (or not) of the review and decision with respect to use of the Record and, in particular, whether or not to consider new additional information. In this situation, it is important for the Council to understand the standard of review as defined in KMC §17.144.010(C):

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.

While arguments, per the memoranda of the parties, are considered, there should not be new factual information considered or weighed that was not part of the Record.

Decision Options:

As indicated in the last sentences of KMC §17.144.020(C) – see above – upon review and deliberation, the Council may decide from the following on the underlying Planning and Zoning Commission decisions: affirm, reverse, modify in whole or in part, and/or remand the application back to the Planning and Zoning Commission with direction. Per KMC §17.144.020(D), the Council must issue a written decision within 30 days of this hearing. Typically, the Council will indicate a decision, or at least direction, for legal counsel to prepare a full draft written decision for final approval and decision at a future meeting within that 30-day time period.

Sustainability Impact:

Not applicable

Financial Impact:

None OR Adequate funds exist in account:	None
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Attachments:

- | |
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| 1. Application to Appeal Planning and Zoning Commission Determination |
| 2. Appellant Brief with exhibits – February 20, 2024 |
| 3. Response Brief with exhibits – February 26, 2024 |
| 4. Appellant Response Brief - February 29, 2024 |
| 5. Full Record - https://www.ketchumidaho.org/planning-building/project/sawtooth-serenade-260-n-1st-ave |



City of Ketchum

ATTACHMENT 1:

Application to Appeal Planning and Zoning Commission Determination



**City of Ketchum
Planning & Building**

OFFICIAL USE ONLY	
File Number:	P22-056B
Date Received:	12/11/23
By:	HLN
Fee Paid:	\$5615
Approved Date:	
Denied Date:	
By:	

Notice of Appeal

Submit completed application and documentation to planningandzoning@ketchumidaho.org Or hand deliver to Ketchum City Hall, 191 5th St. W. Ketchum, ID If you have questions, please contact the Planning and Building Department at (208) 726-7801. To view the Development Standards, visit the City website at: www.ketchumidaho.org and click on Municipal Code. You will be contacted and invoiced once your application package is complete.

Note: The Appellant shall submit an amount to cover the cost of giving notice, as applicable in the Fee Schedule, and provide a transcript within two (2) days after the Planning and Building Department provides the Appellant with an estimate for the expense of the same. In the event the fee is not paid as required, the appeal shall not be considered filed.

OFFICIAL USE ONLY	
Date Appeal Received:	Date Notice Published:
Appeal Fee:	Transcript Fee:
Date Paid:	Date Paid:
Date Appellant Notified of Estimated Transcript Costs and Notice:	Mailing Fee:
Date of Appeal Hearing:	Date Paid:
Action(s) Taken/Findings:	
APPELLANT	
Name of Appellant: Scott and Julie Lynch & Yahn Bernier and Elizabeth McCaw & Distrustful Ernest Revocable Trust	Phone Number: 425-828-0333
Address: Lynch - 409 5 th Ave W, Kirkland, WA 98033 Bernier – 321 82 nd Ave NE, Medina, WA 98039	Fax Number or Email: scott@lynchclan.com ; yahnbernier@valvesoftware.com
REPRESENTATIVE	
Name of Representative: Thielsen Architects – Dave Thielsen. Rep. for appeal James R. Laski.	Thielsen Phone Number: 425-828-0333 Laski Phone Number: 208-725-0055
Thielsen Address: 720 Market St, Suite C, Kirkland, WA 98033 Laski Address: 675 Sun Valley Rd A, Ketchum, ID 83340	Fax Number or Email: davet@thielsen.com ; jrl@lawsonlaski.com
APPLICATION	
Application Being Appealed: Appeal Denial of Applicant’s Design Review Application	
Explain How You Are an Affected Party: Owners of the Project and their Representatives	
Date of Decision or Date Findings of Fact Were Adopted: P & Z Commission Determination made on 11/30/23.	
SUBMITTAL INFORMATION	
This Appeal is Based on The Following Factors (set forth all basis for appeal including the particulars regarding any claimed error or abuse of discretion):	
The Applicant appeals the P & Z Commissioners’ Findings of Fact, Conclusions of Law, and Decision on the grounds that it:	
1. violates the law regarding vesting of applications;	
2. is contrary to the express provisions of Ordinance 1234;	
3. is contrary to the prior written and stated actions of the City and the record as a whole;	
4. is made based on unlawful procedure;	
5. is arbitrary and capricious and an abuse of discretion; and	
6. is in excess of the authority of the Planning & Zoning Commission.	

If you have attached additional pages, please indicate the number of pages attached _____

Signature of Appellant or Representative

Date

12-11-2023



City of Ketchum

ATTACHMENT 2:

Appellant Brief with Exhibits

February 20, 2024

BEFORE THE CITY COUNCIL
OF THE
CITY OF KETCHUM

In the Matter of the Administrative Appeal of:)	
)	
)	APPLICANT/APPELLANT
Scott and Julie Lynch, Yahn Bernier and Elizabeth McCaw, and the Distrustful Ernest Revocable Trust, for the Sawtooth Serenade (Applicant / Appellant))	APPEAL BRIEF
)	
)	
)	
)	
)	
)	
Of the Decision of the Planning and Zoning Commission)	

On behalf of Scott and Julie Lynch, and Yahn Bernier and Beth McCaw and Distrustful Ernest Revocable Trust (collectively, "Appellants" or "Applicants"), this Memorandum is made in Support of their Notice of Appeal of the City of Ketchum Planning & Zoning Commission's ("Planning Commission") Findings of Fact, Conclusions of Law, and Decision dated November 30, 2023 (the "Decision") regarding the Sawtooth Serenade Development (the "Project") in which the Planning Commission affirmed the Staff Determination dated August 24, 2023 ("Determination Letter") finding that Ketchum's Interim Ordinance 1234 ("Ordinance 1234") applies to Applicants' Application for Design Review under Ketchum Municipal Code ("KMC") §17.96, which was deemed complete prior to Ordinance 1234, and such application is null and void pursuant to Section 3 of Ordinance 1234.

This is a case about the legal issue of vesting – and the processing of a Project through the Design Review process that, by all accounts, vested prior to the adoption of Ordinance 1234 by the City. Vesting simply establishes the zoning and regulatory framework under which a project will be evaluated. Vested rights are established at the time an application is deemed substantially complete by the Municipality. When the zoning or regulatory frameworks change, vested rights are sometimes referred to as "grandfathered" under the framework applicable at the time the application was filed.

This is also a case about the lengths, both subtle and bold, the City's planning staff has taken to prevent a project that it does not like from proceeding, despite the fact that the Project meets all objective requirements of the law in effect at the time of application. In fact, the record shows the City repeatedly delayed implementing vesting language consistent with Idaho law in drafting the ordinance, in the hopes that Applicants' Project would not vest. As that became less feasible, City staff focused on manipulating the interpretation of prospective sunset or expiration language incorporated into the ordinance as a means to limit the "grandfathering" of vested applications and misled the Planning Commission with respect to other pending applications, all to the detriment of the Project.

Based on the arguments set forth herein, as well as those set forth in Applicants' Letter of Appeal to the Planning Commission dated September 7, 2023 and Applicants' Response Memorandum to the Planning Commission dated November 9, 2023, both of which are submitted as exhibits hereto and incorporated herein by this reference, the City Council should reverse the Decision of the Planning Commission and allow Applicants' Project to proceed through the KMC Chapter 17.96 Design Review Process.

Relevant History

In order to better put the matter in context, below is a timeline of events:

- March 2019: Applicants purchase the unimproved property located at 260 1st St.
- January 2020: Applicants engage design team to start work on the Project.
- February 2020: Applicant's design team has initial discussions with the City of Ketchum Planning Department (the "Planning Department").
- August 11, 2022: Applicants submit their first Preapplication Design Review submittal to the Planning Staff under KMC Chapter 17.96
- August 16, 2022: the Planning Commission holds its ONLY hearing on draft Ordinance 1234 and refers it to Ketchum City Council ("City Council") for review, with guidance for staff to revise Section 1 so "current Pre-Application

Design Review applications deemed complete would not be subject to the interim ordinance . . .” See Minutes of August 16, 2022 P&Z Meeting attached as Exhibit 1; Transcript of August 16, 2022 P&Z Meeting attached as Exhibit 2.

- September 16, 2022: 36 days after filing, Planning Department issues a Completeness Letter for Applicants’ first Preapplication Design Review submittal deeming it incomplete. See September 16, 2022 Completeness Letter attached as Exhibit 3.
- September 19, 2022: City Council holds its first hearing on draft Ordinance 1234 and makes first reading of the Ordinance. See Minutes of September 19, 2022 Council Meeting attached as Exhibit 4; Transcript of September 19, 2022 Council Meeting attached as Exhibit 5.
- September 30, 2022: Applicants resubmit their Preapplication Design Review application addressing 14 issues raised in the September 16 Completeness Letter.
- October 3, 2022: City Council holds its second hearing on draft Ordinance 1234 and makes second reading of the proposed Ordinance. Revisions to vesting provisions are suggested by the City Attorney and approved by the Council. See Minutes of October 3, 2022 Council Meeting attached as Exhibit 6; Transcript of October 3, 2022 Council Meeting attached as Exhibit 7.
- October 11, 2022: In email, the City Attorney assures Applicants’ attorney the revisions to draft Ordinance 1234 will provide for vesting based on Preapplication being “substantially complete.” See October 11, 2022 Email Correspondence with the City Attorney attached as Exhibit 8.
- October 17, 2022: 18 days after resubmission, the Planning Department issues a Completeness Letter for Applicants’ Preapplication Design Review resubmittal deeming it complete. See October 17, 2022 Completeness Letter attached as Exhibit 9.
- October 17, 2022: City Council approves revised Ordinance 1234 and makes final reading.

- October 18, 2022: Planning Staff sends emails to two OTHER applicants, but not the Applicants, advising of City position that preapplication design review previously vested under 17.96 required filing of design review application within 180 calendar days of last Planning Commission review meeting. See October 18, 2022 City Correspondence with the Perry Building Development attached as Exhibit 10; October 18, 2022 City Correspondence with the 4th and Main Development attached as Exhibit 11.
- January 9, 2023: Public notice published by Planning Staff for Applicants' Preapplication Design Review meeting with the Planning Commission.
- January 24, 2023: Applicants' Preapplication Design Review Meeting held with the Planning Commission. The Planning Commission votes to allow Applicants' Project to proceed to Final Design Review. See Minutes of January 24, 2023 P&Z Meeting attached as Exhibit 12; January 24, 2023 Staff Report attached as Exhibit 13.
- August 7, 2023: After diligently working to incorporate Planning Commission comments from Preapplication Design Review and meet other requirements of the Planning Staff, Applicants submit their Final Design Review application.
- August 24, 2023: Planning Department issues Determination Letter to Applicants, declaring Applicants' Preapplication Design Review to be null and void pursuant to Ordinance 1234. See Determination Letter attached as Exhibit 14.
- September 7, 2023, Applicants appeal the Determination Letter to the Planning Commission. See Letter of Appeal attached as Exhibit 15.
- November 3, 2023: Planning Department submits an Administrator Reply Brief in response to Applicants' Appeal Letter. See Administrator Reply Brief attached as Exhibit 16.
- November 9, 2023: Applicants file Response Memorandum to the Administrator's Reply Brief. See Response Memorandum attached as Exhibit 17.

- November 14, 2023: the Planning Commission holds Appeal Hearing (the “Appeal Hearing”) for the Applicants’ Project. At the conclusion of the hearing, the Planning Commission votes 4-1 to affirm the Determination Letter. See Transcript of November 14, 2023 Appeal Hearing attached as Exhibit 18.
- November 28, 2023: Planning Commission finalizes and adopts their Decision. See Transcript of November 28, 2023 P&Z Decision Hearing attached as Exhibit 19.
- November 30, 2023: Decision is signed and issued. See Decision attached as Exhibit 20.
- December 11, 2023: Applicants timely file their notice of appeal of the Commission’s Decision to the City Council.

SUMMARY OF FACTS

The Applicants purchased the unimproved property located at 260 1st St in Ketchum in March 2019. They began working on the Project in January 2020 with the ultimate goal of building a future home for their two families in downtown Ketchum. Preliminary discussions with the Ketchum Planning Department began as early as February 2020. Since beginning work, the Applicants have invested over 2500-man hours of professional time over more than three years to develop a project conforming to all the requirements of the Ketchum Municipal Code. Indeed, work on the Project began long before discussions of an interim ordinance, Ordinance 1234, started taking place in March 2022, which, among other things, would preclude the Applicants’ Project as planned.

After years of work, in a race to beat the adoption of Ordinance 1234, Applicants submitted a complete Preapplication Design Review application to the Planning Department on August 11, 2022. However, that Preapplication was deemed incomplete more than a month later, on September 16, 2022. After addressing 14 comments and required actions from the Planning Department, Applicant’s resubmitted their application on September 30, 2022. Over two weeks later, the Planning Department found that the

additional work Applicants completed met the requirements needed for the Project application to be deemed “complete” on October 17, 2022.

Because Applicants understood the new ordinance would prohibit the Project they had designed, and due to the significant time and work that Applicants had already committed to the Project, they made sure to stay involved with the public process and participated in hearings, to the extent allowed,¹ related to the proposed ordinance. In hearings on Ordinance 1234 held by both the Planning Commission and Council, Applicants specifically raised legal issues related to language included in the draft of the ordinance regarding vesting, specifically as it related to vesting of projects subject to mandatory preapplication design review under Chapter 17.96 of the Ketchum Municipal Code (“KMC”).

As a direct result of their participation, Applicants received assurances on and off the record from the Planning Commission, the City Attorney, the Planning Department, the Mayor, and the Council that any project deemed complete at the mandatory preapplication phase prior to the adoption of Ordinance 1234 would not be subject to the new ordinance. At the August 16, 2022 P&Z Meeting, the Commissioners directed staff to change Section 1 of draft Ordinance 1234 stating “Current Pre-Application Design Review applications deemed complete would not be subject to the interim ordinance” See Minutes of August 16, 2022 P&Z Meeting. However, in an effort clearly directed to preclude the Project from vesting prior to the adoption of Ordinance 1234, Staff declined to incorporate that directive into the draft of the Ordinance, instead retaining language that a Preapplication Design Review Meeting with the Planning Commission would be required for vesting.²

At the September 19 City Council Meeting, both Applicant’s counsel and Planning Commissioner Moczygomba objected to the new language regarding vesting proposed

¹ Despite being one of only two members of the public to comment on draft Ordinance 1234 at the Planning Commission’s August 16, 2022 Hearing, Chair Murrow cut off Applicants’ attorney’s comments at exactly 3 minutes.

² It was evident at this time that while Applicants might be able to get a substantially complete Pre-Application submittal into Planning Staff, they would not be able to schedule a meeting prior to the adoption of the Ordinance.

by staff as not consistent with Idaho law or the direction of the Planning Commission. Two weeks later, on October 3, 2022, after staff still refused to incorporate the vesting language directed by the Planning Commission, City Attorney Matt Johnson, after researching caselaw raised by Applicants' attorney, advised the Council to delete language requiring a preapplication meeting prior to vesting a project, so that vesting under the new ordinance would ONLY apply to those applications deemed substantially complete AFTER the adoption of the new Ordinance. In his concluding remarks, the Mayor noted that the legal clarification "does shift, you know, what is grandfathered and what is not a little bit." Transcript of October 3, 2022 Council Meeting at 1:56:30 –40.

Following that meeting, by email correspondence dated October 11, 2022, the City Attorney confirmed to the Applicants' attorney that the final revision will make clear that vesting is based on the application being "substantially complete."³ See October 11 Email Correspondence with the City Attorney. Ordinance 1234 was then passed on October 17, 2022 by City Council with new language regarding vesting and without further discussion.

On January 24, 2023, Applicants participated in the required Preapplication Design Review meeting with the Planning Commission. The Staff Report for that meeting made it abundantly clear that the Project was not subject to Ordinance 1234 "as the application was deemed complete prior to the effective date of the new ordinance." See January 24, 2023 Staff Report at pg. 2. After almost two hours of review and comment by the Planning Commission, they voted to allow the Project to proceed to Design Review.

Then, after working diligently to address comments of the Planning Commission and obtain required information from city contractors and franchise holders, Applicants submitted their Application for Design Review on August 7, 2023, only to receive the Determination Letter, concluding that the Preapplication Design Review was null and void pursuant to the Ordinance which the City repeatedly assured did not apply.

³ Despite clear direction from the Mayor, Council and City Attorney to make vesting at substantial completion, consistent with Idaho law, Ms. Landers declined to use the word "substantial" in the final version of the Ordinance.

Notably, at no point between the adoption of Ordinance 1234 on October 17, 2022 and the August 7, 2023 Design Review Application did ANYONE from the City suggest to ANY member of the Applicant team that the City's position was that their preapplication design review would only be effective for 180 days as a result of Ordinance 1234.⁴ This despite the fact that Senior Planner Abby Rivin, apparently without solicitation, advised two other applicants with projects pending between Preapplication Design Review and Design Review, of the City's view that Section 3 of Ordinance 1234 limited vesting of grandfathered preapplication submittals to 180 calendar days from the last review meeting on the preapplication with the Commission, *the day after Ordinance 1234 was adopted*. See October 18, 2022 City Correspondence with the Perry Building Development; October 18, 2022 City Correspondence with the 4th and Main Development.

LEGAL STANDARD

Pursuant to Title 17 of City of Ketchum Zoning Code, the authority of the Council in this hearing on appeal is to consider the record, the order, requirement, decision or determination of the Planning Commission and the notice of appeal, as well as the oral and written legal arguments of the Appellant and the Planning Commission and/or staff representing the Planning Commission. The Council may then affirm, reverse or modify, in whole or in part, the decision or determination of the Planning Commission. Furthermore, the Council may remand the application to the Planning Commission for further consideration with regard to specific criteria stated by the Council. See KMC § 17.144.020.

In considering this appeal, it should be noted that the enabling legislation for the Commission, and Ketchum's Zoning Ordinance itself, is the Local Land Use Planning Act,

⁴ The Applicant team first learned of the Planning Department's position by email from Planning Director Morgan Landers on August 8, 2023, within 7 minutes of downloading Applicants' Final Design Review application package. That email notice was later formalized in the August 24, 2023 Determination Letter.

I.C. § 67-6501 et seq. (“LLUPA”). The first listed purpose of the LLUPA is to “protect property rights while making accommodation for other necessary types of development. . . .” I.C. § 67-6502(a). Among the statutory duties of the Planning Commission is to insure that “land use policies, restrictions, conditions and fees do not violate private property rights, adversely impact property values, or create unnecessary technical limitations on the use of property” I.C. § 67-6508(a).

ARGUMENT

Applicants now appeal to the Council to reverse the Planning Commission’s Decision issued on November 30, 2023 because it is not based on the applicable facts or the law. The Decision ultimately affirmed the Determination Letter issued by the Planning Department based upon the following findings: 1) that Preapplication Design Review and Design Review are separate and distinct steps in the application process (Decision, pg. 3); 2) that the Administrator appropriately interpreted and applied the 180 day requirement of Ordinance 1234 (*Id.*); and 3) that the 180 day requirement of Ordinance 1234 was equitably applied and that there was no evidence of delay by staff. (*Id.*). Notably, the record is clear that the Planning Commission made these findings without the benefit of any legal analysis with respect to the concept of “vesting” nor the interpretation of the City’s Design Review Ordinance from the City Attorney, but rather only after hearing the Planning Director’s argument to justify her Determination Letter. Moreover, a review of the transcripts demonstrates that the Planning Commissioners had drastically differing impressions and understandings of how these important legal concepts should be interpreted, few of which appear to be incorporated into the Decision, nor support the ultimate Decision made. Accordingly, the Decision must be reversed.

1) The Decision is Not Founded in the Deliberation of the Planning Commissioners

a. November 14, 2023 Deliberation

At the November 14, 2023 Planning Commission Hearing on Applicants’ appeal of the Determination Letter, there was no legal analysis presented by the City Attorney

with respect to vesting or the design review application process. Rather, the Commissioners were left to weigh the arguments presented by staff and the Applicants. Not surprisingly, the Commissioners sided with staff. However, their deliberations at the November 2023 Appeal Hearing exposed a surprising lack of certainty about the issue of vesting and the design review process in general and do not support, or even address, a majority of the findings included in the Decision.

For example, during oral argument, **Commissioner Passovoy** inquired:

I guess the question I have for the City Attorney, and for Mr. Laskey [sic] is if Ordinance 1234 does not apply to an approved pre-application, predesign review application that was completed, deemed complete prior to the adoption of 1234, what is the point of the grandfather period, or whatever you choose to call it. (Transcript of November 14, 2023 Appeal Hearing at pg. 36, Ins. 7-14).

The City attorney declined to answer, stating that he was serving only as “process attorney.” *Id.*, at Ins. 21-25.

Then, during deliberation, **Commission Chair Morrow** directly contradicted the vesting language contained in Ordinance 1234⁵ and staff’s argument regarding grandfathering by proclaiming:

*“In my opinion, it’s always been its own thing. It’s always been a charette to give advice on things. It didn’t ever have any real power to it, in a way . . . [t]here was no vesting of their project at pre-app. It was a design charette for us to give them ideas . . . You know, it’s voluntary. They were like, why do we have to come in and do this, we’re going to bring our project in. So, I’ve always been under the impression that it was its own thing, that it was more of a curtesy to developers and designers . . . that’s always been in my head, that pre-app is, it’s just a charette. It doesn’t vest anything. **Vesting happens at design review.** (Id., at pg. 48, ln. 14 to pg. 50, ln. 1).*

He then went on to say: “So, just because they’re linked doesn’t mean they’ve vested, or they’re grandfathered. Again, these may be legal determinations that I’m not making.”

⁵ As well as various statements of the Mayor, City Attorney, and Planning Department on Preapplication Design and vesting as set forth in Section 3, below.

(*Id.*, at pg. 50, Ins. 11-14). Then: “I’m not, I’m a little confused. Either the 180 days doesn’t apply, or it does apply, and they missed it.” (*Id.*, at pg. 51, Ins. 16-18).

While it is straightforward to apply the language of Ordinance 1234 to applications received after Ordinance 1234 was passed, the Commissioners were clearly confused on how to address the Project as its application had been deemed completed before the adoption of Ordinance 1234. Without legal guidance, the Planning Commission incorrectly interpreted and applied the new ordinance. Later in deliberations, **Commissioner Passovoy**, states:

If I really look at the language of Section 1, it says that anything that has vested is subject to the ordinance. And the vesting, in terms of vesting, a pre-application only means that you don’t have to go through a pre-application process. But its not vested for all purposes.” (*Id.*, at pg. 54, ln. 24 to pg. 55, ln. 6).

She then equivocates: “*So I am coming down on the side of staff’s conclusion on this. But it is a very, very, as Brenda said, a very tricky situation. And it’s difficult to parse your way through these various words that have loaded meanings.* (*Id.*, at pg. 55, Ins. 18-22).

Commissioner Carter expressed his confusion:

You know there is a question of, you know . . . if you’re – if it’s deemed that were not, that the Applicant isn’t subject to the Interim Ordinance 1234, but then they are subject to a part of Interim Ordinance 34 [sic], that seems to be a conflict. . . . It seems like the, you know, the decision of whether or not the Applicant is subject to Section 3 of 1234 to our intent you know, is a – ultimately comes down to some legal principles, you know, whether or not, you know, it’s vested or its not vested, other complex, sort of legal principles that you know, I don’t – I’m not a trained attorney. I don’t want to make that – I feel like I don’t want to make that determination. I want to give the Applicant the opportunity to make this argument in front of somebody who is more, you know, a body that’s more trained . . . (*Id.*, at pg. 56, ln. 16 to pg. 57, ln. 13).

Chair Murrow summarized Commissioner Carter’s comments as follows:

. . . you’re saying, because none of us really know what vesting is. And I guarantee in the new code, we’ll have better

this vest here, this vest there, whatever it is. But because of that, you're more comfortable allowing experts on how to parse that term out do it than have us make that decision." (*Id.*, at pg. 58, ln. 23 to pg. 59, ln. 5).

Commissioner Cordovano's comments dealt primarily with his feeling that the "project doesn't meet the development standards for an exceedance in Ketchum and has no place in Ketchum" and that he felt there was discussion of intent to limit the timeframes of vested applications. (*Id.*, at pg. 59, ln. 9 to pg. 61, ln. 15).

Commissioner Moczygemba, on the other hand, stated:

*I think, in relistening to the meeting we had regarding 1234, it was clear out of fairness that we wanted to include this grandfathering provision out of fairness for preapps that came through before 1234 was put in place. . . . I think there was a concern by staff that there would be . . . this glut of applications just trying to get this pre-application deemed complete⁶ and then they'd sit for, you know, a long period of time, until they were ready to proceed. . . I have some sympathy for the Applicant team that **the way that that was captured between section 1 and section 3 just completely misses the mark of that particular conversation and how it was worded.** . . .*

*And so you know there was arguments being made by both sides about, okay, is a preapplication design review actually a vestment, I guess, of the process or not. So, again, that's just arguing what the terms versus what the intent was. **But the most important part to me is Section 1, clearly is the applicability of the entirety of this 1234.** So, I think I would agree with the applicant, that the application of 1234 and pieces and parts is not necessarily appropriate. I think it's an all or nothing thing. Either we're under 1234, or we're under the 17.96. (*Id.*, at pg. 46, ln. 5 to pg. 47, ln. 17).*

⁶ At the August 16, 2022 hearing on Ordinance 1234 before the Planning Commission, Commissioner Moczygemba acknowledged that projects in Preapplication Design Review "[W]ere started six, seven, eight months ago." Transcript of August 16, 2022 P&Z Meeting at 1:06:32-51. With that understanding, she projected that there would not be a rush of applications trying to get in before the adoption of Ordinance 1234 because, "I think it's been said before the requirements for preapplications are essentially the requirements for design review. And so, you're still needing civil landscape on and on." *Id.*, at 1:15:48-1:16:10.

She later expanded on her analysis, reasoning:

[if] it's only pre-application vested then you do design review, and you're vested – you know, the other part of this Section 1 is building permit. So, to me, if that's the take, then there's probably several projects that were approved under design review that were preparing their plans. And now, they should also be subject to 1234, because they were not vested under that.” (Id., at pg. 64, Ins. 9-18).

After discussing the process, but not the law, with the City Attorney, he advised: “So you’ll give direction tonight. I’ll prep, draft a written decision for you that will come back within those 30 days” (*Id.*, pg. 67, In. 25 to pg. 68, In. 3), the Planning Commission voted 4-1, with Commissioner Moczygamba against, to affirm the Determination Letter.

b. November 28, 2023 Deliberation

The Findings of Fact, Conclusions of Law, and Decision presently before you were adopted by the Planning Commission at their November 28, 2023 Meeting. Although approved by a 4-1 vote, the Findings incorporate little of the deliberations articulated at the Appeal Hearing, where all Commissioners with the exception Commissioner Moczygamba lacked any certainty or understanding of the legal issue at hand. However, to make matters worse, at that meeting, Commissioner Passovoy recommended revisions to the findings to add language, without any basis in reality, that the “Appellant in this situation actually urged for the 180-day grace period to be added.” Transcript of November 28, 2023 Decision Hearing, pg. 4, Ins. 1-3). The Commissioners then went on to discuss Applicants role in the inclusion of Section 3 at the City Council level, and Applicants purported support of that language. (*Id.*, at pgs. 4-8).⁷ This resulting finding, fully unsupported as discussed in more detail below, was incorporated into the Decision. The fact is, based on the applicable Idaho law and discussions focused on Section 1 of

⁷ It should be noted that (1) Susan Passovoy was not a member of the Planning Commission for the single meeting on August 16, 2022 when draft Ordinance 1234 was reviewed and advanced for City Council review; and (2) that paragraph 3 was never discussed directly by any member of the City Council, the Applicant or the public in the City Council Hearings on Ordinance 1234.

Ordinance 1234, there were no legal grounds to support a finding that Section 3 could be applied to the Project.

Commissioner Passovoy also disclosed that she had a conversation with the City Attorney regarding vesting. “*But I, as he reminded me, everyone seemed to be a little confused about it. **And I don’t think it’s essential to our decision.***” (*Id.*, at pg. 6, Ins. 8-12).

Based on the foregoing, it is clear that the findings made by the Commissioners, and drafted by the City Attorney, are not supported by the record, the law or the deliberations. Indeed, **in a matter entirely related to vesting, the Commission, on advice of legal counsel, admitted that everyone was confused about the issue, but that it isn’t essential to the decision.** They then adopted a decision contrary to the law and the record before them.

2) Preapplication Design Review and Design Review are Part and Parcel of the Same Design Review Approval Process.

The Design Review Chapter of the Zoning Code **requires** Preapplication Design Review on any lot or lots totaling 11,000 square feet or more as a condition precedent with Design Review. KMC §17.96.010.C.1. Design Review approval is then a condition precedent to make application for a building permit. KMC § 19.96.090. While each of these steps require separate applications and fees, they are both part and parcel of the same permitting process for the Project. When an application under KMC Chapter 17.96 is vested prior to Ordinance 1234, the entire process under that chapter is vested.

When Ordinance 1234 was initially proposed and presented to the Planning Commission on August 16, 2022, draft Section 1 regarding vesting stated:

Preapplication Design Review Applications deemed complete prior to the effective date of this ordinance, that do not have a subsequent Design Review application deemed complete, are subject to the provisions contained herein.

At that point in time, Applicants were struggling to get what was, compared to other preapplications deemed complete by staff, a complete Preapplication Design Review application accepted as complete by City staff. At the meeting, Applicants raised Idaho's legal standard regarding the vesting of new ordinances on land use applications and the **fact** that Ketchum's ordinance required Preapplication Design Review as a required step in the Design Review Process and a condition precedent to Design Review, that it charged a fee to have the Preapplication Design Review reviewed, and that Preapplication Design Review required submittal of the exact same information as Design Review (in fact they use the exact same application form). The Planning Commission and Planning staff discussed vesting, without any further participation from Applicants. Then Planning Director Suzanne Frick initially suggested that Preapplication Design Review was not a "formal process" and should not be treated as vesting a project, but noted that if it did vest a project, we should "build guardrails" so that a project wouldn't be vested for years. Staff then said it would work on the "mechanics" of vesting of a project with a substantially complete Preapplication Design Review submittal. Transcript of August 16, 2022 P&Z Meeting at 1:12:53 to 1:14:55.

The next version of draft Ordinance was never reviewed by the Planning Commission, but rather was reviewed directly by the City Council on September 19, 2022. This version included the following language:

Preapplication Design Review Applications that have been reviewed by the Planning and Zoning Commission at one review meeting prior with the Commission as of the effective date of this ordinance.

This version was also the first to add Section 3 which included a 180-day timeframe within which "Developments" that have completed Preapplication Design Review under Ordinance 1234 to file for Design review, presumably the so-called guardrails suggested by Ms. Frick for applications filed under the new ordinance. At that meeting, Applicants again presented the Idaho caselaw regarding vesting and argued that vesting of a development was triggered upon the determination of a substantially

complete, mandatory Preapplication Design Review Application, which is consistent with Idaho law.

The final draft of Ordinance 1234, which was adopted on October 17, 2022, included the following language regarding vesting:

*The following interim regulations and standards apply to any . . . Building Permit, **Preapplication Design Review, Design Review, Subdivision, or Conditional Use Permit application deemed complete for vesting purposes after the effective date of this Ordinance** . . .*

Just before Ordinance 1234 was signed by the Mayor, Applicants received a Completeness Review Letter from the Planning Department indicating that “. . . the application has been deemed complete and will be scheduled for the next available hearing.” October 17, 2022 Completeness Letter at pg. 1 (emphasis in original). At that point, as a matter of law, the application process for the Project was vested under the ordinance in effect PRIOR to the adoption of Ordinance 1234, that is KMC § 17.96.

Idaho law is clear that a land use applicants rights are “measured under the law in effect at the time of the application.” *Citizens Against Linscott/Interstate Asphalt Plant v. Bonner County*, 168 Idaho 705, 717(2021) quoting *S. Fork Coal. v. Bd. of Comm'rs of Bonneville Cnty.*, 117 Idaho 857, 861, 792 P.2d 882, 886 (1990) (citations omitted); see also *Taylor v. Canyon Cnty. Bd. of Comm'rs*, 147 Idaho 424, 436, 210 P.3d 532, 544 (2009).

The policy undergirding this rule is “to prevent local authorities from delaying or withholding action on an application in order to change or enact a law to defeat the application.” *Taylor*, 147 Idaho at 436, 210 P.3d at 544 (citation omitted). Thus, the rule is an outgrowth of the well-established principle that legislation does not ordinarily have retroactive effect. See *Cooper v. Bd. of Cnty. Comm'rs of Ada Cnty.*, 101 Idaho 407, 412, 614 P.2d 947, 952 (1980); see also *Ben Lomond, Inc. v. City of Idaho Falls*, 92 Idaho 595, 601, 448 P.2d 209, 215 (1968) (reasoning that the rule to apply the ordinance in effect at the time of the application is “in accord with the general rule that legislation generally acts prospectively only”). *Id.*

As previously stated, under Ketchum Ordinance Chapter 17.96 – Design Review, Preapplication design review was a **required** step in the design review process. KMC §17.96.010.C.1. It is not a separate and distinct process as suggested in the Planning Commission’s findings, but rather requires the applicant to submit all materials required under section 17.96.040, just as are required under the Design Review application.⁸ The purpose of preapplication review is to allow the Planning Commission to “exchange ideas” and give direction to the applicant on ‘design concept.’ KMC §17.96.040.C.2. In practice, an applicant cannot proceed to Design Review until the Planning Commission formally votes to allow the development application to proceed. The Planning Commission, after nearly two hours exchanging ideas and direction on the design concept, formally voted to allow the Project to “advance” to the Design Review stage of the Design Review Process on January 24, 2023. The motion carried on a 4-1 vote, with former Commissioner and current City Council member Spencer Cordovano opposing. See Minutes of January 24, 2023 P&Z Meeting.

As noted by Ms. Frick in the Planning Commission Hearing leading up to the adoption of Ordinance 1234, Chapter 17.96 (prior to the adoption of Ordinance 1234) does not include a timeframe within which an applicant must file its Design Review application after the Planning Commission advances it to that stage.⁹ However, from a legal perspective, the lack of the inclusion of a timeframe does not render the vesting of a project invalid. In fact, in a case with facts very similar to the present matter, *South Fork Coalition v. Board of Com’rs of Bonneville County*, the South Fork Coalition was created to oppose a proposed development and appealed the approval of a final development plan to the Idaho Supreme Court. The Court determined that the governing ordinance for an application for preliminary approval of a planned unit development (“PUD”) is the ordinance in effect at the time the application was filed, and the preliminary plan was approved under that standard. 117 Idaho 857, 886, 792 P.2d

⁸ Preapplication Design Review is a subsection of the Design Review Chapter of the Code, not a separate Chapter such as with Building Permits or Conditional Use Permits

⁹ Ms. Frick argued that this defect was a basis to not allow vesting of a Development Project until after Preapplication Design Review was completed and a design review application was deemed complete. On the advice of legal counsel, that was not the language ultimately adopted in the final version of Ordinance 1234.

882, 861 (1990). Similar to the present case, the applicable ordinance provided no deadline for PUD to apply for a final development plan. *Id.*, at 887. Therefore, the Board of Commissioners advised applicants to file their application for a final development plan within one year of the effective date for preliminary approval, and when applicants timely applied for their final development plan, the Court then upheld the Board of Commissioners' finding that the application was timely filed. *Id.* Likewise, in the present matter, the Preapplication Design Review Vested the Project under the Design Review Chapter of the Code, KMC § 17.96. At the time of vesting, § 17.96 had no timeframe within which an applicant needed to file for Design Review after being advanced from Preapplication Design Review. For a vested application under KMC § 17.96, this did NOT change when Ordinance 1234 was adopted.

Moreover, despite being one of only three applications pending in the Design Review Process when Ordinance 1234 was adopted, neither the Planning Staff nor the Planning Commission included a timeframe within which it expected a Design Review application to be filed with the City in order to maintain its vested status when the Planning Commission voted to recommend advancement to Design review, as is the standard practice in decisions where entitlements are subject to expiration.¹⁰

Based on the foregoing, it is clear the Project vested under KMC § 17.96 prior to the adoption of Ordinance 1234, and therefore the Project is not subject to the time limitation included in Section 3 of that Ordinance. As such, Applicants' Preapplication Design Review cannot, as a matter of law, be determined to be null and void, and the Planning Commission Decision must be reversed.

3) The 180-day Requirement of Ordinance 1234 was Not Appropriately Interpreted and Applied by the Administrator to the DR Application because the Project Vested Under the Applicable Ordinance Prior to the Adoption of Ordinance 1234

¹⁰ Interestingly, Planning staff did advise the two other pending applications of the date on which they needed to submit a complete Design Review Application to maintain their vested status under KMC § 17.96, although, improperly, and contrary to law, using the timeframe from Section 3 of Ordinance 1234.

The Planning Commission's Decision concluded that "Ordinance 1234 specifically considered and provided for situations where a preapplication design review had already been conducted and with an allowance of an additional 180-day timeframe for the next process: application for design review." Decision, pg. 3. However, the only legitimate reading of Section 3 of Ordinance 1234 states:

Developments subject to Design Review Approval pursuant to KMC 17.96 . . . that have conducted a preapplication design review meeting with the Commission, must file a complete Design Review Permit application and pay all fees within 180 calendar days of the preapplication with Commission, otherwise the preapplication review will be null and void.

There is nothing in this provision to suggest that it applies to Developments that have vested prior to the adoption of this provision (and Ordinance 1234 in general). Moreover, there was absolutely no discussion of this provision at the City Council level and it does not comport to "grandfather" language discussed at the August 16, 2022 Planning Commission meeting where Ms. Frick suggested adding proper guardrails on pre-app approvals to keep them moving and to identify specifically those projects "caught in limbo" and give them a timeframe. (See Transcript of August 16, 2022 P&Z Meeting, at 01:18:47 – 01:19:02). Rather, it is clearly "sunset" language designed to limit the time of entitlements for projects vested under the new ordinance. And, after Applicants' Preapplication Design Review was deemed complete as a "limbo" project, nobody from the City ever contacted Applicants to advise them of a deadline to file their Design Review Application.

Indeed, as stated by Mayor Bradshaw at the October 3 Council Meeting, the legal clarification and modification to the vesting language of Section 1 to Ordinance 1234 "shifts . . . what is grandfathered and what is not a little bit." (See Transcript of October 3, 2022 Council Meeting at 01:56:27 –40). Moreover, that language was adjusted in light of the City Attorney's review of Idaho law as cited in *Citizens Against Linscott/Interstate Asphalt Plant, supra*. The 180-day timeframe was written to apply to Projects that vested under Ordinance 1234, and, as a matter of law, simply cannot apply to prior projects.

The Decision goes on to state that “[T]he 180-day grace period was placed with the Applicant’s knowledge and support, and therefore Applicant should have been aware the grace period applied” Decision, pgs. 3-4. In making this claim, the Decision cites to “Applicant’s Memo.” A review of Applicants’ letters submitted to the Planning Commission on appeal plainly shows that at no time have Applicants ever endorsed or supported a “grace period” or noted such in any of their briefings. In fact, in discussing vesting on several occasions with the City Attorney, this concept, and Section 3 in general was never raised, nor discussed as a time limit that would apply to a previously vested Development Project. Moreover, there is absolutely no evidence in the record that Applicants knew the 180-day period included in Section 3 of Ordinance 1234 was intended to apply to them. As discussed below, Applicants had received confirmation from the City Attorney and Planning Director that Ordinance 1234 did not apply to their Project on several occasions.

To that end, it is enlightening that the Planning Commission asked the Planning Director at the Appeal Hearing whether any other projects had reached out to the Planning Department as to whether Ordinance 1234 would apply to them. At that time, Ms. Landers stated for the record that:

So, it was this project, of Sawtooth Serenade, it was the Perry Buildings, and it was Fourth and Main. . . . ***Both of those applications inquired to staff, following adoption of 1234, on whether that provision of Section 3 applied. And staff responded to both of those applications that it did.***
Transcript of Appeal Hearing, pg. 31, Ins. 11-21.

Emails obtained through FOIA requests disclose that the Planning Director’s representation is patently false as neither the Perry Buildings nor the Fourth and Main Projects inquired staff as to the applicability of Section 3. Rather, the day after Ordinance 1234 was approved, Senior Planner Abby Rivin emailed representatives of both of the other pending projects advising them of the City’s position with respect to timing for filing their final design review applications. See Exhibits 10 and 11.

Next, the Planning Commission's Decision goes on to affirm that "the intent of Section 3 was to provide a reasonable timeframe for an applicant that had conducted preapplication review to proceed to final design review under pre-Ordinance 1234 standards, while not allowing an applicant to delay and sit on the preapplication design review completion and pre-Ordinance 1234 standards without further timely action." Decision, pg. 4.

Notwithstanding well-established Idaho law on vesting, the record contradicts the Decision's representation of the intent of Section 3. At the August 16, 2022 Planning Commission Hearing on Ordinance 1234, then Administrator Suzanne Frick informed the Planning Commission that there is no timeframe for how long a preapplication approval is valid, unlike design review. Transcript of August P&Z Meeting at 1:10:26-58. With that in mind, Chair Morrow suggested, "Can we add a time limit to preapp?" *Id.*, at 1:11:33-39. Indeed, the Planning Commission and Planning Department didn't want projects sitting with Preapplication approval for years. *See generally* Transcript of August P&Z Meeting. Despite the Planning Commission's guidance to implement a grace period to apply to the three pending applications, Planning staff included a "sunset" clause in Ordinance 1234 so that new projects would now have 180-days to proceed to Design Review.

Therefore, the Decision improperly considered the record and the law as it concluded that, "[T]he Administrator appropriately found that the Final Design Review Application . . . was beyond the 180-day window to preserve the previously completed preapplication design review. Decision, pg. 4. The Decision further distorts the record when it claims Applicants could have reached out "just as other applicants did." *Id.* As previously shown, no other applicants reached out to the City. The Decision affirming the Determination Letter is neither consistent with the intent or language of Ordinance 1234, nor the record as a whole, and as such, must be reversed.

4) The 180-Day Requirement of Ordinance 1234 Was neither Equitably Applied, nor Was There No Evidence of Improper Delay by City Staff.

Contrary to the Decision, the record shows that Ordinance 1234 was not equitably applied to the Applicants' Project. Despite Applicants receiving direct confirmation that Ordinance 1234 was not applicable to them, the Planning Department changed its position without warning. Furthermore, as outlined above, the finding that other applicants contacted the Planning Department as to the applicability of Ordinance 1234, the record shows to be untrue. Instead, the Planning Department reached out to them. Throughout the application process, Applicants and their Project have never been treated equitably and fairly by the Planning Staff, rather Staff had continuously refused to follow Planning Commission directives on language related to vesting and continuous delay in processing Applicants' application.

Further, the record before the Planning Commission included a list of delays the Applicants team experienced between Preapplication Design review and Design Review that was wholly discounted by the Planning Commission. (See Timeline of Delays attached as Exhibit 21). Indeed, the policy behind project vesting in Idaho is designed specifically to prevent the type of action on display here in of the processing of this Design Review Application.

The policy undergirding this rule is "to prevent local authorities from delaying or withholding action on an application in order to change or enact a law to defeat the application." *Taylor, Supra*.

Without being informed that there was a deadline for filing a vested Design Review Application, Applicants were left shooting in the dark. Even so, Applicants' Design Review application was submitted only 197 days after receiving the Planning Commission's recommendation to proceed to Design Review. On such a record, it's easy to be skeptical of the unexplained delays in scheduling meetings with staff due to staff unavailability, three weeks in April and May (April 24 to May 17), and in receiving required responses from City's contractors – four weeks with Michael Decker regarding street lighting and seven weeks with Clear Creek Disposal (June 16 to August 2) regarding garbage pickup location, despite diligent efforts by the Applicants' team. See Timeline of

Delays. Moreover, without a deadline, there was no reason to request any accommodation from staff.

Based on the foregoing, the record does not support the Planning Commission's findings related to equal application of Ordinance 1234 nor lack of evidence of improper delay by City staff and contractors. As such, the decision must be reversed.

5) The Commission's Decision Directly Contradicts the Bad Faith Ruling of the Recent *BRACKEN V. CITY OF KETCHUM* Case against the City of Ketchum.

The Decision of the Planning Commission is even more surprising given the recent Idaho Supreme Court ruling against the City in *Bracken v. City of Ketchum*, 537 P.3d 44 (Idaho 2023). Citing to the same case law on vesting that has been repeatedly cited by Applicants, the Idaho Supreme Court concluded that the developer's rights vested under the ordinance in effect at the time it filed its first application, which the City refused to accept, and that Bracken's "rights could not be taken away by Ketchum's enactment of a new ordinance [thereafter]" *Id.*, at 54.. The Court then, citing *Ben Lomond, Inc. v. City of Idaho Falls*, 92 Idaho 595, 602 (1968), pointed out the City of Ketchum's "bad faith conduct" stating:

[T]o hold for the City in the present case would mean that a city, merely by withholding action on an application for a permit, could change or enact a zoning law to defeat the application. It could, in substance, give immediate effect to a future or proposed zoning ordinance before that ordinance was enacted by proper procedure. (*Id.*, at 55).

The Determination Letter and the Planning Commission Decision, both apparently rendered without the benefit of legal advice from the City Attorney as to the intricacies of vesting, lead the City into a procedural decision eerily similar to that in *Bracken*. For this reason alone, it seems abundantly clear that the Decision should be reversed so that the vested Design Review Application can proceed on its merits.

6) The City is Estopped from Changing Its Position Regarding Vesting.

The Planning Commission never addressed the issue of estoppel at the Appeal Hearing or in their Decision. A simple review of the record shows that the only time it was mentioned was when Commissioner Carter asked James Laski to explain estoppel. Transcript of November 14 Appeal Hearing, pg. 40, ln. 14 to pg. 41, ln. 7.. The Planning Commission's omission is unsurprising to Applicants, as they have repeatedly faced pushback from the City at every step of the application process.

“Quasi-estoppel prevents a party from changing its legal position and, as a result, gaining an unconscionable advantage or imposing an unconscionable disadvantage over another.” *Hollingsworth v. Thompson*, 168 Idaho 13, 22–23, 478 P.3d 312, 321–22 (2020); *Garner v. Bartschi*, 139 Idaho 430, 437, 80 P.3d 1031, 1038 (2003). “Unlike equitable estoppel, quasi-estoppel does not require an undiscoverable falsehood, and it requires neither misrepresentation by one party nor reliance by the other.” *Hollingsworth*, 168 Idaho at 23, 478 P.3d at 322. Quasi-estoppel applies when:

(1) the offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.

Id. (quoting *Trumble v. Farm Bureau Mut. Ins. Co. of Idaho*, 166 Idaho 132, 136, 456 P.3d 201, 215 (2019)).

The facts here are in line with *Hollingsworth*, where the Court found quasi-estoppel applied when a hospital changed its position by holding itself out as a private corporation in its business filings with the Idaho Secretary of State, but then later claimed it was a governmental entity when sued. The public filings led the plaintiffs to believe the hospital was a private corporation, causing them to disregard the ITCA notice deadline to the benefit of the hospital. 168 Idaho at 23, 478 P.3d at 322. Likewise, in the present

situation, the City cannot now change its position regarding vesting to preclude Applicants from proceeding under the under the prior Code provisions.

As outlined at length above, and in Applicants' prior briefing before the Planning Commission, the City confirmed, on numerous occasions, that the Project was not subject to Ordinance 1234. The issue of substantial completion and vesting was also confirmed through email correspondence between City Attorney and Applicants' attorney the days leading up to the adoption of Ordinance 1234:

Jim –

I checked in with Morgan. She said she's currently reviewing all the resubmitted items this week and will be issuing a completeness letter based on that submittal.

For the Council meeting next Monday there will be a clearer revised version of the interim ordinance that clarifies the distinction that was discussed at the last meeting in response to your comments. That revision will make clear vesting is based on an application being "substantially complete."

So I believe in combination those two items will address your request.

Matt

Matthew A. Johnson
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From: Jim Laski <jrl@lawsonlaski.com>
Sent: Tuesday, October 11, 2022 9:42 AM
To: Matthew A. Johnson <mjohnson@WHITEPETERSON.com>
Subject: RE: Ketchum Ordinance 1234

Hi Matt – would it be possible to get conformation that my client's application (at 260 N 1st Ave) is substantially complete and will be reviewed under the presently existing ordinance, rather than the proposed new ordinance 1234? I written statement to that effect would be much appreciated.

Thank you
Jim



JAMES R. LASKI

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208-725-0055 Phone
208-725-0076 Fax

(See October 11, 2022 Email Correspondence with the City Attorney.).

Even more clear and succinctly, the Staff Report for the Preapplication Design Review Meeting held January 24, 2023, issued on or about January 19, 2023, states that this application is not subject to Interim Ordinance 1234:

The application is not subject to Interim Ordinance 1234 as the application was deemed complete prior to the effective date of the ordinance.

(January 24, 2023 Staff Report at Pg. 2).

Finally, and to the point that required Preapplication Design Review vests the entire Design Review Application Process, 2 hours and 31 minutes into the Preapplication Design Review Meeting of January 24, 2023, Planning Administrator Morgan Landers states:

“ . . . Staff also provided a review of the project’s compliance with interim ordinance 1234. ***This Project does not come under the purview of the interim ordinance because it was deemed substantially complete prior to the effective date . . .***”

(Transcript of January 24, 2023 Planning Commission Meeting at 2:31:11 – 22).

Quite simply, given that the City has repeatedly advised the Applicants that Ordinance 1234 is not applicable to the Project as their application was deemed complete prior to its adoption, and because Applicants relied on the representations made by the City in proceeding through the Design Review Process, it cannot now change its stance regarding vesting to preclude Applicant from proceeding under the prior KMC § 17.96 provisions. Accordingly, on the basis of quasi-estoppel, the Decision must be reversed.

7) The Planning Commission Was Unable to Properly Consider and Follow the Law Because the City Attorney Failed to Provide Legal Insight or Analysis on the Issues Presented.

Finally, it must be noted that City Attorney Matthew Johnson, despite being involved in multiple hearings regarding the applicability of Ordinance 1234, failed to provide legal insight and analysis to the Planning Commission at the Appeal Hearing.

Additionally, the City Attorney failed to ensure the Planning Commission's Decision addressed all the issues presented. As the record demonstrates, the City Attorney was acutely familiar with Interim Ordinance 1234 as he had helped draft Ordinance 1234, he was present at every hearing before the Planning Commission and Council, and he had multiple communications with Applicants' team regarding Ordinance 1234.

In fact, the City Attorney had already agreed with Applicants position on vesting when he told the Council, "The key is based on some Idaho case law if an application has more or less submitted everything it needs to and its application fee that's what is termed substantially complete." Transcript of October 3, 2022 Council Meeting at 1:55:05-18. However, he then failed or refused to provide this same conclusion to the Planning Commission at the November Appeal Hearing.

The Planning Commission sought legal insight multiple times throughout the Appeal Hearing. For example, Commissioner Moczygamba asked, "[A]re we deciding between intent versus I guess the legality of the language of how that was written. You know, can we say, well, it was written like this. But what we meant was?" Transcript of November 14, 2023 Appeal Hearing, pgs. 32-33, Ins 25-4. Additionally, Commissioner Carter sought legal insight for definitions and explanations of "Vesting" and "Estoppel." Then, when asked to provide legal insight by Commissioner Passovoy Mr. Johnson declined by saying, "Let me just clarify something for you, Susan. So, because I'm serving as the process attorney for this, not arguing a side. So, I think you would want to go to Morgan if you want kind of the City perspective." *Id.*, at pg. 36, Ins. 21-25. Although seemingly there to advise the Planning Commission on Idaho law, the City Attorney directed the Commissioners to the Administrator for legal insight. By abstaining, the Planning Commission was denied the opportunity to have their questions as to the law answered. Because of that deficiency, the Planning Commission and Applicants both were denied valuable legal insight and analysis.

As a direct result of the lack of legal insight and analysis from the City Attorney, the Planning Commission was left to deliberate on legal issues that the Planning

Commission did not feel comfortable addressing. In fact, throughout the deliberations, the Planning Commission noted that they did not feel equipped to properly consider the issues before them. As previously discussed, Commissioner Carter simply put it, “[T]he decision of whether or not the Applicant is subject to Section 3 of 1234. . . ultimately comes down to some legal principles. . . whether or not, you know, it’s vested or it’s not vested, other complex, sort of legal principles that, you know, I don’t – I’m not a trained attorney. I don’t want to make that determination. I want to give the Applicant the opportunity to make this argument in front of somebody who is more, you know, a body that’s more trained. . . .” *Id.*, at pgs. 56-57, lns. 25-12.

The City Attorney knew the Planning Commission struggled to understand the law presented. As Commissioner Passovoy noted while finalizing the Decision, “I will say I had talked with Matt about the discussion we had regarding vesting. But I, as he reminded me, everyone seemed to be a little confused about it. And I don’t think its essential to our decision.” Decision Hearing, pg. 6, lns. 8-11. Clearly, the City Attorney allowed the Planning Commission to determine that vesting wasn’t an essential issue, a fact he knew to be untrue. Had the City Attorney simply presented his own legal insight and analysis, presumably, he would have helped inform the Planning Commission where they struggled on legal decisions and confirmed to the Planning Commission that the Ordinance 1234 did not apply to Applicants Project. Instead, Applicants have been forced to proceed further in the Appeal Process, spending additional time and money to do so.

Conclusion

As presented above, it is clear the Planning Commission’s Decision on the Administrative Determination violates Idaho law regarding the vesting of land use permits, is contrary the express provisions of Ordinance 1234 and the prior written and stated actions of the City with respect to this Project. Combined with the foregoing, the unexplained delays create an unlawful procedure in the processing of Permit Application. As such the Administrator’s action in making the determination, and the Planning Commission’s Decision to Affirm is arbitrary and capricious, contrary to the law and a

clear abuse of discretion – designed to stop the Project. As such, we respectfully urge the Council to reverse the Planning Commission’s Decision and allow the Project to proceed with Design Review.

Respectfully Submitted this 20th day of February 2024.

LAWSON LASKI CLARK, PLLC

By: 

James R. Laski
Attorney for Appellants/Applicants

EXHIBIT 1



CITY OF KETCHUM
MINUTES OF THE SPECIAL MEETING
PLANNING AND ZONING COMMISSION
Tuesday, August 16, 2022

CALL TO ORDER: (00:00:25 in video)

Chairman Neil Morrow called the meeting to order at 4:30 p.m.

Roll Call:

Tim Carter
Spencer Cordovano
Brenda Moczygemba
Neil Morrow

COMMUNICATIONS FROM COMMISSIONERS:

None

PUBLIC HEARING: (00:02:55 in video)

1. **ACTION ITEM:** Recommendation to conduct a Public Hearing, review, and take action on a proposed interim ordinance to amend Titles 16 and 17 of the Ketchum Municipal Code. Senior Planner Morgan Landers gave a recap of the Emergency Ordinance.

Public Comment:

Perry Boyle (00:45:45 in video)
Jim Laski (00:53:50 in video)

The Commission noted the following changes:

Section 1: Current Pre-Application Design Review applications deemed complete would not be subject to the interim ordinance with an expiration date to be determined.

Section 12: Clarify language from “not exempt from “ to “subject to”.

Motion to advance the proposed interim ordinance to City Council for their consideration, with changes as noted.

Motion made by Tim Carter; Seconded by Spencer Cordovano

Ayes: Tim Carter, Spencer Cordovano, Neil Morrow

Nays: Brenda Moczygemba

COMMUNICATIONS FROM STAFF

Commissioner Cordovano requested a discussion of ADU's.

ADJOURNMENT: (02:50:15 in video)

Motion to adjourn at 7:17 pm.

Motion made by Neil Morrow; seconded by **Spencer Cordovano**.

Ayes: Tim Carter, Spencer Cordovano, Brenda Moczygemba, Neil Morrow

Nays: None



Chair Neil Morrow



Lisa Enourato, Interim City Clerk
City of Ketchum

EXHIBIT 2

Below is a partial transcript of the August 16, 2022 P&Z Meeting.
Applicants have highlighted the speaker when possible and removed text in
the interest of brevity.

Jim Laski Comments

00:54:23,500 --> 00:54:27,300
thing. The real issue I have today is in
1040
00:54:26,300 --> 00:54:29,800
section one of the proposed ordinance
1041
00:54:29,800 --> 00:54:32,800
and that talks about vesting of applications.
1042
00:54:32,800 --> 00:54:36,300
And in that it says pre-application design
1043
00:54:35,300 --> 00:54:38,500
review applications deemed complete prior
1044
00:54:38,500 --> 00:54:41,400
to the effective date of the this ordinance that do
1045
00:54:41,400 --> 00:54:44,800
not have a subsequent design review application deem complete
1046
00:54:44,800 --> 00:54:47,800
our subject to the provisions contained here
1047
00:54:47,800 --> 00:54:48,100
in
1048
00:54:49,100 --> 00:54:50,300
and I would submit that that
1049
00:54:51,700 --> 00:54:54,400
sentence or that provision is probably illegal under
1050
00:54:54,400 --> 00:54:57,900
Idaho law the design
1051
00:54:57,900 --> 00:55:01,100
review criteria in your code requires
1052
00:55:00,100 --> 00:55:04,300
pre-application. It's not a optional process.
1053
00:55:03,300 --> 00:55:07,500
You have to do the pre-application in
1054
00:55:06,500 --> 00:55:09,500
order to do the design review
1055

00:55:09,500 --> 00:55:12,700
application. So this city controls how
1056

00:55:12,700 --> 00:55:15,200
that process goes forward controls the
1057

00:55:15,200 --> 00:55:18,700
timing of that process despite the fact that you
1058

00:55:18,700 --> 00:55:22,500
are request. It's the exact same submittal requirements
1059

00:55:22,500 --> 00:55:24,000
as a design review requirement.
1060

00:55:24,700 --> 00:55:27,200
And also includes a
1061

00:55:27,200 --> 00:55:31,900
fee, so I just want to read to you a couple of cases from Idaho
1062

00:55:31,900 --> 00:55:34,100
Supreme Court that talk about
1063

00:55:34,100 --> 00:55:35,900
the vesting of applications.
1064

00:55:36,700 --> 00:55:40,500
The first one will be citizens against Lynn
1065

00:55:39,500 --> 00:55:43,900
Scott Bonner to 2021
1066

00:55:42,900 --> 00:55:44,200
case.
1067

00:55:45,300 --> 00:55:46,400
from the Idaho Supreme Court
1068

00:55:47,300 --> 00:55:48,300
and it's as
1069

00:55:49,900 --> 00:55:52,400
Idaho is adopted the minority position that land use
1070

00:55:52,400 --> 00:55:55,300
ever a land use applicants rights are measured under
1071

00:55:55,300 --> 00:55:57,200
the lawn effect at the time of the application.
1072

00:55:58,300 --> 00:56:01,700
The policy undergirding this rule
1073

00:56:01,700 --> 00:56:04,500
is to prevent local authorities from delaying or
1074

00:56:04,500 --> 00:56:07,600
withholding action on an application in order to change or
1075

00:56:07,600 --> 00:56:09,400
enact a law to defeat the application.
1076

00:56:10,800 --> 00:56:13,100
Thus the rule is an outgrowth of the
1077

00:56:13,100 --> 00:56:16,500
well-established principle that legislation does not
1078

00:56:16,500 --> 00:56:18,500
ordinarily have an retroactive effect.
1079

00:56:20,200 --> 00:56:23,400
In 2009 and Taylor V Canyon County
1080

00:56:23,400 --> 00:56:26,300
similar. They're similar
1081

00:56:26,300 --> 00:56:29,700
language, Idaho laws. Well established applicants rights
1082

00:56:29,700 --> 00:56:32,300
are determined by the ordinance and existence at the
1083

00:56:32,300 --> 00:56:34,200
time of filing an application for a permit.
1084

00:56:35,300 --> 00:56:38,000
The minority rule it goes on to say the same thing.
1085

00:56:38,900 --> 00:56:41,600
But then goes on in other words the rule
1086

00:56:41,600 --> 00:56:44,300
in. It ensures that local authorities do not engage in
1087

00:56:44,300 --> 00:56:47,200
the arbitrary action before they render a decision
1088

00:56:47,200 --> 00:56:50,500
on an application policy behind this rule is
1089

00:56:50,500 --> 00:56:53,600
independent of whether or not the local authorities would ultimately
Grant
1090

00:56:53,600 --> 00:56:56,800
the underlying application. So my point

1091
00:56:56,800 --> 00:56:56,900
is
1092
00:56:57,900 --> 00:56:59,400
If you have a pre-application.
1093
00:57:00,600 --> 00:57:04,500
That's in that has not then gone
1094
00:57:03,500 --> 00:57:06,500
through the pre-application process which
1095
00:57:06,500 --> 00:57:09,900
I've had clients where that has taken actually years
1096
00:57:09,900 --> 00:57:11,300
to get through.
1097
00:57:12,300 --> 00:57:12,800
then
1098
00:57:14,300 --> 00:57:17,100
you cannot say that they then have to
1099
00:57:17,100 --> 00:57:20,000
go through in conform with the new

Commissioner Morrow Comments

1100
00:57:20,700 --> 00:57:22,600
ordinance. That's three minutes. Thank you.
1101
00:57:25,100 --> 00:57:28,600
You can submit if you have other stuff for
1102
00:57:28,600 --> 00:57:29,600
the accounts we could submit.
1103
00:57:30,700 --> 00:57:32,200
Do we have other public comment?
1104
00:57:37,300 --> 00:57:37,900
in the back
1105
00:57:39,500 --> 00:57:40,500
no more not no one else online.
1106
00:57:41,800 --> 00:57:44,300
okay, so in in can I ask that the
1107
00:57:45,500 --> 00:57:48,300
Um staff check that with

1108

00:57:48,300 --> 00:57:51,300

the city attorney and make sure that we're not putting something in

1109

00:57:51,300 --> 00:57:55,300

there. That would be a clear violation of Idaho law

Suzanne Frick Comments

1110

00:57:54,300 --> 00:57:57,400

by all means we will check that

1111

00:57:57,400 --> 00:58:00,600

as this moves forward. I would just mention also in

1112

00:58:00,600 --> 00:58:03,400

pre-application. There is no

1113

00:58:03,400 --> 00:58:06,400

decision. The commission is making in a

1114

00:58:06,400 --> 00:58:09,800

pre-application really all you're doing is deciding whether

1115

00:58:09,800 --> 00:58:12,500

or not something moves on to the design review.

1116

00:58:12,500 --> 00:58:16,400

We don't have you adopt findings or a

1117

00:58:15,400 --> 00:58:18,700

record of decision. So but

1118

00:58:18,700 --> 00:58:21,500

nevertheless he brings up a good point. We

1119

00:58:21,500 --> 00:58:24,400

will review that with the city attorney

1120

00:58:24,400 --> 00:58:27,500

to make sure there is no vulnerability in

1121

00:58:27,500 --> 00:58:31,000

what's being proposed. Yeah good and also so that we're just we're clear

1122

00:58:30,200 --> 00:58:33,200

that this is this is what you have to do and

1123

00:58:33,200 --> 00:58:36,100

it's legal to do and the other thing I

1124

00:58:36,100 --> 00:58:39,800

would make note as part of this budget

1125
00:58:39,800 --> 00:58:42,800
process in the fiscal year 23 budget,
1126
00:58:42,800 --> 00:58:44,900
which starts October 1st.

1277
01:06:07,300 --> 01:06:10,300
If anyone feels strongly about sending a recommendation today, or
1278
01:06:10,300 --> 01:06:13,300
is there more discussion is there something else you

Commissioner Moczygemba Comments

1279
01:06:13,300 --> 01:06:16,500
need to see or hear? I like to handle this
1280
01:06:16,500 --> 01:06:19,800
similarly to how we handle the emergency ordinance and
1281
01:06:19,800 --> 01:06:23,200
kind of go Section by section. So there's a
1282
01:06:23,200 --> 01:06:26,700
lot to each piece and part and starting
1283
01:06:26,700 --> 01:06:29,500
with section one. I completely agree
1284
01:06:29,500 --> 01:06:34,400
with Mr. Lasky regarding I
1285
01:06:32,400 --> 01:06:37,400
guess it's this vesting
1286
01:06:36,400 --> 01:06:40,000
of applications or what's you
1287
01:06:39,600 --> 01:06:42,900
know what this applies to things that
1288
01:06:42,900 --> 01:06:45,400
are coming through or maybe in for
1289
01:06:45,400 --> 01:06:48,200
pre-application design review, you know,
1290
01:06:48,200 --> 01:06:51,700
those projects were started six seven eight months ago.
1291

01:06:51,700 --> 01:06:54,100
And so even though
1292
01:06:54,100 --> 01:06:55,800
we're talking about a 12 month.
1293
01:06:56,600 --> 01:06:58,400
Interim ordinance. I'm
1294
01:06:59,500 --> 01:07:01,200
I would prefer trying to limit.
1295
01:07:02,500 --> 01:07:05,300
the scope of that timeline and the amount
1296
01:07:05,300 --> 01:07:08,600
of people and money and investment dollars that
1297
01:07:08,600 --> 01:07:11,200
have already gone into projects as we can, you know,
1298
01:07:11,200 --> 01:07:14,500
and maybe that's only one or
1299
01:07:14,500 --> 01:07:16,300
two projects in the pipeline, but
1300
01:07:17,300 --> 01:07:21,500
I think as much uncertainty as we can bake in
1301
01:07:21,500 --> 01:07:25,100
here the better anybody have any strong feelings,
1302
01:07:24,100 --> 01:07:27,500
you know, nobody would like to stop a lot of those projects
1303
01:07:27,500 --> 01:07:30,500
more than me, but I do feel like it's a little
1304
01:07:30,500 --> 01:07:31,600
bit unfair.
1305
01:07:32,600 --> 01:07:32,900
just
1306
01:07:33,900 --> 01:07:36,100
Morally, another thing I want to bring up is
1307
01:07:36,100 --> 01:07:39,200
today as of today. There's four baking lots for
1308
01:07:39,200 --> 01:07:42,900
sale in the city Ketchum and 17 closed
1309

01:07:42,900 --> 01:07:43,700
in 2020.
1310
01:07:45,700 --> 01:07:46,200
Tim
1311
01:07:49,100 --> 01:07:53,300
let's can we just talk about what that the details
1312
01:07:52,300 --> 01:07:55,300
of what section one are so let's see
1313
01:07:55,300 --> 01:07:58,100
the following them regulations and standards apply to building permits.
1314
01:07:59,100 --> 01:08:01,500
Preapped and reviews subdivision. He's permit
1315
01:08:03,600 --> 01:08:07,400
so the permits are these out so these regulations apply
1316
01:08:06,400 --> 01:08:07,500
to
1317
01:08:09,700 --> 01:08:12,100
These two permits design review subdivision conditional use
1318
01:08:12,100 --> 01:08:15,500
permits that are deemed complete. The applications are deemed complete.
1319
01:08:16,100 --> 01:08:19,400
So it's at the point that the applications are deemed
1320
01:08:19,400 --> 01:08:19,800
complete.
1321
01:08:22,400 --> 01:08:25,100
This ordinance would then apply to them? Is that what
1322
01:08:25,100 --> 01:08:25,400
this says?
1323
01:08:28,400 --> 01:08:31,200
so if I can I can clarify to clarify so we
1324
01:08:31,200 --> 01:08:34,700
understand exactly what the
1325
01:08:35,800 --> 01:08:38,600
metric is that we are using to apply this
1326
01:08:38,600 --> 01:08:41,100
ordinance to if that's what we're discussing here. Let's make
1327

01:08:41,100 --> 01:08:44,100
sure we all understand what what it says. Yeah, and and I think
1328

01:08:44,100 --> 01:08:47,300
we kind of chatted about this during the emergency ordinance as
1329

01:08:47,300 --> 01:08:50,100
well. And the term deemed complete is a pretty
1330

01:08:50,100 --> 01:08:53,300
significant milestone for projects. It's also
1331

01:08:53,300 --> 01:08:55,900
the least objective Milestone that we have.
1332

01:08:56,400 --> 01:08:59,600
You know when we get applications in the door, they go
1333

01:08:59,600 --> 01:09:02,400
through a couple of different steps, right? You submit an application and
1334

01:09:02,400 --> 01:09:05,500
we make sure we have the documents that we need and and
1335

01:09:05,500 --> 01:09:08,200
they pay their application fees and then the planning staff
1336

01:09:08,200 --> 01:09:11,200
will review and make sure that all of those documents include all
1337

01:09:11,200 --> 01:09:14,500
of the necessary information. And so I think
1338

01:09:14,500 --> 01:09:17,400
that the reason why we recommend using
1339

01:09:17,400 --> 01:09:20,400
that Milestone as deemed complete is because that is an actual
1340

01:09:20,400 --> 01:09:23,800
Milestone that gets communicated to an applicant where they
1341

01:09:23,800 --> 01:09:26,200
are formally in the process because we have everything that we
1342

01:09:26,200 --> 01:09:29,700
need to do our full analysis. And so one of
1343

01:09:29,700 --> 01:09:33,000
the concerns about having a less
1344

01:09:32,400 --> 01:09:35,700
objective kind of Milestone is
1345

01:09:35,700 --> 01:09:38,800
that we may get an onslaught of
1346

01:09:38,800 --> 01:09:41,200
incomplete applications because people are just trying to
1347

01:09:41,200 --> 01:09:44,100
submit an application but it may be, you know,
1348

01:09:44,100 --> 01:09:47,400
a fraction of the information that we need, right? So because I
1349

01:09:47,400 --> 01:09:51,500
think we talked about that at the emergency ordinance as well. Sorry. I
1350

01:09:51,500 --> 01:09:52,300
just want to know how many
1351

01:09:53,200 --> 01:09:56,300
Current projects. Let's say we send this to
1352

01:09:56,300 --> 01:09:58,900
City Council in the next meeting. They approve the annual mortgage.
1353

01:09:59,500 --> 01:10:02,700
How many current projects would that Encompass that
1354

01:10:02,700 --> 01:10:05,400
would not have to worry about vesting because
1355

01:10:05,400 --> 01:10:06,700
they're already in the process?
1356

01:10:08,300 --> 01:10:12,900
So really the the vulnerability is projects
1357

01:10:11,900 --> 01:10:14,900
that have submitted but
1358

01:10:14,900 --> 01:10:17,600
haven't been deemed complete which probably by
1359

01:10:17,600 --> 01:10:20,900
the time this ordinance goes into effect. They're
1360

01:10:20,900 --> 01:10:23,600
going to be deemed complete. So I don't
1361

01:10:23,600 --> 01:10:27,000
think there's a big risk to that Universe the
1362

01:10:26,500 --> 01:10:29,300
the risk is those that
1363

01:10:29,300 --> 01:10:32,600
are in pre-application and as Brenda indicated.
1364
01:10:32,600 --> 01:10:35,300
So what if that is a
1365
01:10:35,300 --> 01:10:39,100
concern if the commission will take that back because the
1366
01:10:38,100 --> 01:10:43,800
difficulty we have with pre-application applications
1367
01:10:41,800 --> 01:10:45,100
is that
1368
01:10:44,100 --> 01:10:47,600
there is no determination and
1369
01:10:47,600 --> 01:10:51,000
there's no time frame for how long that
1370
01:10:50,200 --> 01:10:53,100
decision is valid.
1371
01:10:54,100 --> 01:10:57,400
So unlike design review permits. There is
1372
01:10:57,400 --> 01:11:00,500
a expiration date for how long that approval
1373
01:11:00,500 --> 01:11:05,200
is good for there is no expiration date
1374
01:11:04,200 --> 01:11:07,300
for a pre-application. So what we don't
1375
01:11:07,300 --> 01:11:10,400
want is a project has been
1376
01:11:10,400 --> 01:11:13,400
approved through pre-application and then it
1377
01:11:13,400 --> 01:11:17,200
sits for two years or three years before that design
1378
01:11:16,200 --> 01:11:19,400
review application is actually submitted.
1379
01:11:20,300 --> 01:11:24,100
So we will need to work through this issue. If the
1380
01:11:23,100 --> 01:11:27,900
commission is looking to vest a
1381

01:11:27,900 --> 01:11:30,700
project under old standards with
1382
01:11:30,700 --> 01:11:32,300
the filing of a pre-application.

Commissioner Morrow Comments

1383
01:11:33,800 --> 01:11:36,800
Can we add a time limit
1384
01:11:36,800 --> 01:11:39,400
to preamp exactly? So so that's if
1385
01:11:39,400 --> 01:11:42,400
that is your desire then what we'll do
1386
01:11:42,400 --> 01:11:46,000
is take back that information and figure
1387
01:11:45,300 --> 01:11:48,500
out how to fix the vulnerabilities that
1388
01:11:48,500 --> 01:11:51,500
we know of in the process. I mean a reasonable
1389
01:11:51,500 --> 01:11:54,400
amount of time whatever it is, but we do get projects that
1390
01:11:54,400 --> 01:11:58,100
come back after a few years that we're pre design
1391
01:11:57,100 --> 01:12:00,400
review approved and right then I've said
1392
01:12:00,400 --> 01:12:03,500
and we haven't seen them again and if the rules change in
1393
01:12:03,500 --> 01:12:06,500
between, I'd like to if they come back I'd like
1394
01:12:06,500 --> 01:12:09,600
to make them apply the new rules exactly. It's recent
1395
01:12:09,600 --> 01:12:13,300
Hotel projects. Come to mind. Yeah a
1396
01:12:12,300 --> 01:12:14,500
wall I mean
1397
01:12:16,300 --> 01:12:19,900
Can you reiterate that one more time for me in layman's terms
1398

01:12:19,900 --> 01:12:22,600
you father so in for most
1399
01:12:22,600 --> 01:12:26,000
every permit that we Grant you
1400
01:12:25,300 --> 01:12:28,900
are making a finding or there
1401
01:12:28,900 --> 01:12:31,500
is an official action you're taking to approve
1402
01:12:31,500 --> 01:12:34,300
deny or approve with conditions of
1403
01:12:34,300 --> 01:12:37,900
approval. Right? There's a record of that determination and
1404
01:12:37,900 --> 01:12:40,800
then that approval is good for a
1405
01:12:40,800 --> 01:12:43,300
certain period of time a year. It can
1406
01:12:43,300 --> 01:12:46,800
be extended usually for another year. And so
1407
01:12:46,800 --> 01:12:49,600
there is a procedure for how long those approvals
1408
01:12:49,600 --> 01:12:52,200
are good for there's a shelf life to
1409
01:12:52,200 --> 01:12:52,300
them.

Suzanne Frick Comments

1410
01:12:53,200 --> 01:12:57,500
In the pre-application process, there
1411
01:12:56,500 --> 01:12:59,500
is no determination. The
1412
01:12:59,500 --> 01:13:02,500
Planning and Zoning commission makes there is
1413
01:13:02,500 --> 01:13:05,400
no time frame for how
1414
01:13:05,400 --> 01:13:08,600
long that decision is good for. All
1415

01:13:08,600 --> 01:13:12,100
you are doing in a pre-op is to say yep. We're
1416

01:13:11,100 --> 01:13:14,800
okay. You can now file your
1417

01:13:14,800 --> 01:13:16,500
design review application.
1418

01:13:17,500 --> 01:13:20,500
And so then that really starts the formal review
1419

01:13:20,500 --> 01:13:23,600
and approval process because remember in pre-app, there's
1420

01:13:23,600 --> 01:13:27,000
no public hearing. It is really an informal.
1421

01:13:26,700 --> 01:13:29,900
It's it's English
1422

01:13:29,900 --> 01:13:33,100
a red between us exactly. It is an informal discussion
1423

01:13:32,100 --> 01:13:35,600
between the commission and the applicant no
1424

01:13:35,600 --> 01:13:38,400
public hearing no public input. It is
1425

01:13:38,400 --> 01:13:41,400
really just for you to say projects good
1426

01:13:41,400 --> 01:13:45,400
to go move it on to the next phase of review. And
1427

01:13:44,400 --> 01:13:48,200
so if we're now investing projects
1428

01:13:47,200 --> 01:13:50,800
under that procedure, we
1429

01:13:50,800 --> 01:13:54,000
need to kind of build guardrails around
1430

01:13:53,400 --> 01:13:57,100
it so that we aren't vesting a
1431

01:13:56,100 --> 01:14:00,600
project for years and years and years. Well things
1432

01:13:59,600 --> 01:14:02,500
have changed reasonable but limited

Commissioner Morrow Comments

1433

01:14:02,500 --> 01:14:05,000
amount of time. So if you change or you

1434

01:14:05,500 --> 01:14:08,200
wait a year, you have to come back and redesign in the old one doesn't

1435

01:14:08,200 --> 01:14:11,200
work anymore. And that's I I'm a big

1436

01:14:11,200 --> 01:14:12,800
fan of putting that in so we don't get

1437

01:14:13,700 --> 01:14:16,500
This kind of none of the developers want

1438

01:14:16,500 --> 01:14:19,200
us to have any say in what they do in their time frame and but

1439

01:14:19,200 --> 01:14:22,300
they're real happy to abuse the system if they can drag it

1440

01:14:22,300 --> 01:14:25,400
out for three years and it benefits them then they'll do that. Well, I'd

1441

01:14:25,400 --> 01:14:29,100
like to eliminate that because that's bull

City Staff Comments

1442

01:14:28,100 --> 01:14:32,100
so and and maybe it is that we

1443

01:14:31,100 --> 01:14:34,500
figure out what's the universe of projects.

1444

01:14:34,500 --> 01:14:37,700
They're in pre-app when this ordinance comes

1445

01:14:37,700 --> 01:14:40,500
forward and then those specific projects are the

1446

01:14:40,500 --> 01:14:43,200
ones that get grandfather did and and then we

1447

01:14:43,200 --> 01:14:46,600
give them a period of time. So if this again

1448

01:14:46,600 --> 01:14:49,000
is a direction that commission wants us to

1449

01:14:49,100 --> 01:14:52,100
go in we'll figure out the mechanics of how to make it

Commissioner Morrow Comments

1450

01:14:52,100 --> 01:14:55,800
work. Yeah, and it gets us around saying hey, it's it's vested
1451

01:14:55,800 --> 01:14:58,300
even though it's not approved right? We're saying look
1452

01:14:58,300 --> 01:15:02,900
you can do this, but you have to come to design approval and
1453

01:15:02,900 --> 01:15:05,200
you have to do that within a certain amount of time or you have to
1454

01:15:05,200 --> 01:15:08,100
start over and if they don't like it or it's uncertain
1455

01:15:09,200 --> 01:15:10,000
Not too bad.

1456

01:15:10,900 --> 01:15:11,600
Okay, so we're

1457

01:15:12,900 --> 01:15:15,400
Oh, sorry, and I was just gonna clarify something the
1458

01:15:15,400 --> 01:15:19,000
Mr. Lasky stated not all projects require pre-application. So
1459

01:15:18,200 --> 01:15:21,100
we do have a good chunk of projects that are
1460

01:15:21,100 --> 01:15:24,300
on single Ketchum Town site Lots if you all recall
1461

01:15:24,300 --> 01:15:27,900
you did make a change to the pre application process earlier on
1462

01:15:27,900 --> 01:15:30,300
this year with the final historic preservation
1463

01:15:30,300 --> 01:15:33,000
ordinance. So there are a good chunk of
1464

01:15:33,400 --> 01:15:36,600
projects that don't that aren't going to be subject to this because pre
application
1465

01:15:36,600 --> 01:15:37,000

is not required.

Commissioner Moczygemba Comments

1466

01:15:39,800 --> 01:15:42,500

At night I would agree and thanks for the clarification

1467

01:15:42,500 --> 01:15:45,300

Susan on pre-application not

1468

01:15:45,300 --> 01:15:48,300

having a I guess expiration date so to

1469

01:15:48,300 --> 01:15:51,100

speak so I think that's a great idea. I don't

1470

01:15:51,100 --> 01:15:51,800

know that any.

1471

01:15:52,700 --> 01:15:56,000

Applications pre-applications are going to be rushed

1472

01:15:55,300 --> 01:15:58,500

in between now and then because it I

1473

01:15:58,500 --> 01:16:01,800

think well, I think it's been said before the requirements

1474

01:16:01,800 --> 01:16:04,900

for pre-application are essentially the requirements

1475

01:16:04,900 --> 01:16:07,400

for design review. And so you're

1476

01:16:07,400 --> 01:16:10,100

still needing civil landscape on and on.

1477

01:16:10,100 --> 01:16:13,500

So anyways, I guess I'm not too worried about a glut

1478

01:16:13,500 --> 01:16:15,200

of applications trying to squeeze in.

1479

01:16:17,800 --> 01:16:20,000

So that we've we're kind of

1480

01:16:20,200 --> 01:16:21,200

okay with the first one then.

1481

01:16:21,700 --> 01:16:22,200

I'm

1482

01:16:23,300 --> 01:16:26,700

Still not a hundred Brazil trying to get this out of bureaucracy

Commissioner Carter Comments

1483

01:16:26,700 --> 01:16:30,200

and the electric is that if you're

1484

01:16:30,200 --> 01:16:34,000

as soon as your application is deemed complete after if

1485

01:16:33,600 --> 01:16:36,400

you complete before the ordinance changes, then

1486

01:16:36,400 --> 01:16:40,500

you are you must meet the requirements of before

1487

01:16:39,500 --> 01:16:42,200

the ordinance. If you're deemed

1488

01:16:42,200 --> 01:16:45,400

complete after the ordinance change and you have to meet the requirements of the

1489

01:16:45,400 --> 01:16:48,400

new ordinance right of all of all applications the

1490

01:16:48,400 --> 01:16:53,200

tricky part is this pre app. So I

1491

01:16:51,200 --> 01:16:55,600

think we're saying that if you're

1492

01:16:55,600 --> 01:16:57,300

pre-app is deemed complete.

1493

01:16:58,500 --> 01:17:01,500

And correct me if I'm wrong staff, but if

1494

01:17:01,500 --> 01:17:04,800

you're if you're pre-app is deemed complete that isn't

1495

01:17:04,800 --> 01:17:07,000

that isn't the same

1496

01:17:07,500 --> 01:17:10,700

metric because pre app is different. So you actually

1497

01:17:10,700 --> 01:17:13,100

have to get through pre-app and then have your

1498

01:17:13,100 --> 01:17:16,200

design review deemed complete. That's that's how
1499
01:17:16,200 --> 01:17:17,100
I understand it and
1500
01:17:18,800 --> 01:17:21,100
I think that but it's written so
1501
01:17:21,100 --> 01:17:24,300
put it to put it straight. We have currently written. We're having
1502
01:17:24,300 --> 01:17:27,700
this option to apply this ordinance potentially to
1503
01:17:28,900 --> 01:17:31,700
For the man Perry's building.
1504
01:17:33,200 --> 01:17:36,200
So if it's Etc if it passes, I think we're saying
1505
01:17:36,200 --> 01:17:40,800
let's make it let's move the metric to pre-app deemed
1506
01:17:40,800 --> 01:17:43,300
complete that will learn those aren't through
1507
01:17:43,300 --> 01:17:43,900
the final.
1508
01:17:45,100 --> 01:17:48,400
No, I just know we're suggestions. We're just being complete but
1509
01:17:48,400 --> 01:17:51,800
make pre-app, uh limited limited
1510
01:17:51,800 --> 01:17:54,600
amount of time reason why it's written
1511
01:17:54,600 --> 01:17:55,400
that.
1512
01:17:56,300 --> 01:17:59,700
The preappdeem complete metric isn't
1513
01:17:59,700 --> 01:18:03,100
adequate is because you what
1514
01:18:02,100 --> 01:18:05,400
we're saying is creep team complete is
1515
01:18:05,400 --> 01:18:08,300
inadequate you it must be designed review deemed complete
1516
01:18:08,300 --> 01:18:11,400

right but we're saying what if
1517
01:18:11,400 --> 01:18:14,600
we move it to pre-app deemed complete but put a
1518
01:18:14,600 --> 01:18:17,700
limitation on how long that pre approval.
1519
01:18:18,900 --> 01:18:21,800
Informal approval is right. So we're
1520
01:18:21,800 --> 01:18:23,300
moving the metric from
1521
01:18:24,400 --> 01:18:27,200
design it design design review deemed complete to
1522
01:18:27,200 --> 01:18:28,700
pre-app. Does that team complete?
1523
01:18:29,400 --> 01:18:32,100
Right. That's what we're talking. That's what we're seeing. This will
only
1524
01:18:32,100 --> 01:18:35,600
last until the ordinance is approved and then there will be the rule and
there
1525
01:18:35,600 --> 01:18:38,400
will be no more. So it only is those projects that are
1526
01:18:38,400 --> 01:18:41,200
falling through the middle that that it will
1527
01:18:41,200 --> 01:18:45,300
happen and that has to find a way to put proper guard Wells on pre-app
approvals
1528
01:18:44,300 --> 01:18:47,800
and it is in an infinite. We'll vote
1529
01:18:47,800 --> 01:18:49,900
on a time frame for it in the next meeting but
1530
01:18:50,200 --> 01:18:53,200
Or we identify specifically what those projects are
1531
01:18:53,200 --> 01:18:56,200
and then you know, we give them a time
1532
01:18:56,200 --> 01:18:59,800
frame but here you go, right? So right now
1533
01:18:59,800 --> 01:19:02,500

there's yeah, there's probably one project that
1534
01:19:02,500 --> 01:19:06,400
is caught in this limbo right now. Okay, so
1535
01:19:05,400 --> 01:19:08,100
we'll we'll if this is the
1536
01:19:08,100 --> 01:19:10,300
desire we'll figure out how to make it happen.
1537
01:19:11,600 --> 01:19:14,100
I mean, like I said, I wish
1538
01:19:14,100 --> 01:19:17,500
it was applying to all those but it doesn't seem totally fair and
1539
01:19:17,500 --> 01:19:20,000
I want to make it apply because these are some of
1540
01:19:20,100 --> 01:19:23,300
our last Lots it's a super transitional time.
1541
01:19:23,300 --> 01:19:24,800
I'm just trying to cut through.
1542
01:19:25,500 --> 01:19:26,900
To the straight answers here.
1543
01:19:31,600 --> 01:19:34,600
Thanks. Yeah, you want to go to the next one? Yeah, sure
1544
01:19:34,600 --> 01:19:37,600
section two I think is just a definition. So

EXHIBIT 3



City of Ketchum
Planning & Building

September 16, 2022

Thielsen Architects
Attn: Dave Thielsen - Architect

Galena Engineering
Attn: Matt Smithman – Civil Engineer

[Sent via email]

Re: 260 N 1st Ave – Preapplication Design Review - Completeness Review

Dear Mr. Thielsen and Mr. Smithman,

The City of Ketchum Departments have completed their review of the Preapplication Design Review for the project at 260 N 1st Ave. Please see below for all comments. At this time, the application has been deemed incomplete. Additionally, it appears that some elements of the project are not compliant with applicable sections of the Ketchum Municipal Code (KMC). While you provided many of the required materials, the following items must be corrected, and revised information must be provided to certify the application as complete. Where applicable, references to the KMC have been provided for clarity. Please provide a written response to each comment upon resubmittal of your application materials.

Planning Department

General Zoning Comments

1. *Comment:* Based on the slope of the lot, it is correct to apply the term “basement” to the project and remove that square footage from the building. However, staff will need to verify that the methodology used for establishing what area falls under the definition of “basement” is correct.
 - a. *Required Action:* Please provide a diagram in schematic or plan and section views showing how the invisible plane was delineated and what square footage is included in the “basement” definition and what constitutes the 954.16 SF of gross floor area remaining.
2. *Comment:* The Gross Floor Area (GFA) and Net Floor Area (NFA) calculations on Sheet A1.1 don’t appear to match the net and gross SF outlined on Sheets A1.2-A1.4. For the ground level, the gross floor area on Sheet A 1.1 and A1.2 indicate a net floor area of 5,680 SF, however it is unclear what that square footage includes. Also, for Sheets A1.3 and A1.4, the GFA outlined is consistent with Sheet A1.1 but it is unclear what constitutes the NFA for these levels and what has been removed since the stair tower and elevator have already been removed.
 - a. *Required Action:* Please provide Floor Area diagrams for each floor that outlines what is included in the GFA and what is not. The best way to show this is by using shading or coloring to color code each area. In the diagrams, please also include square footages.
3. *Comment:* Sheet A1.1 shows GFA of the building, however, specific square footage of each unit and each space on the ground floor is necessary to verify parking requirements for all uses.
 - a. *Required Action:* Please revised Sheet A1.1 to include a summary of square footages by use that outlines each residential unit, parking, storage, The Commons, and the Commons Court and Event Space

4. *Comment:* The cover letter submitted as part of the project outlines that the intent of the ground floor Commons and Commons Court and Event Center is to be a “gathering place....which would be used for fundraising and philanthropic events”. The letter does not address the use of the space when those events are not happening. Staff presumes this space would be for the benefit of the residents, family and guests but not the public, however, this is a deduction based on the cover letter and clarification is necessary. Staff is also unclear whether the fundraising and event space is only the Commons Court and Event Space, or if it includes the Commons as well. Additionally, Sheet A1.1 outlines under “Required Parking” that the space is classified as “Food Service”. Staff does not believe the proposed use meets the definition of food service, but rather an “Assembly, place of”. The floor plans do not show a location within the space where food is being prepared. This is a key element of a “Food Service” use. The definitions of referenced uses are noted below:

Food service: An establishment where food and drink are prepared, served and consumed on site with associated outdoor dining, or distributed to customers through take out, delivery or catering. Typical uses include, but are not limited to restaurants, cafes, delis, catering services and brewpubs that do not distribute beer produced for off-site consumption.

Assembly, place of: The use of land for a meeting place where persons gather together for purposes of attending civic, social, religious functions, recreational events or entertainment performances on a regular or recurring basis including, but not limited to, religious institutions, banquet facilities, funeral homes, theaters, conference centers, stadiums, or indoor or outdoor recreational facilities, but excludes a "cultural facility" as defined by this chapter. A gathering of less than 25 persons shall not be considered a place of assembly provided the gathering is accessory and incidental to the principal use.

Assembly uses require the approval of a Conditional Use Permit in the CC-2 zone district to ensure any impacts from events held in the space are mitigated through certain conditions.

- a. *Required Action:* Please provide an expanded narrative as to the function of the ground floor space and justification for its classification as Food Service. Please provide clarity on the function of the space when not being used for events. Please also provide clarity on what portion of the space will be used for events. Once additional information is provided, staff will make a determination on the use proposed.
5. *Comment:* It generally appears that the project is in conformance with setback requirements, however, the methodology used appears that there may be area where square footage is calculated toward both facades’ setback square footage, which is not the correct methodology. In general, square footage should be counted toward one side other the other using reasonable extensions of the building façade to delineate space. Please see the attached example from another project for reference. The front façade along 1st Ave had a portion of the building on the south end significantly set back from the street. In this instance, the main edge of the building façade was carried to the property line to delineated what was included in the setback square footage (area in black). As you can see, the two setback calculations do not overlap (black and red areas).
- a. *Required Action:* Please revise Sheets A1.2-1.4 delineate the square footage calculation with independent calculations for each façade. Staff has provided an attached draft of how the calculations should be delineated for the ground floor.
6. *Comment:* Sheet A7 outlines the proposed building height at the front and the rear of the building and the guardrail that extends above the 42-foot height maximum. Although the code reference in Note 10 is correct in relation to height, the city categorizes “perimeter walls that enclose roof top decks that exceed the maximum building height limit as a “fixed amenity” that must be set back 10 feet from the building façade per KMC 17.12.040. Built-in hot tubs are also considered “fixed

amenities” that must be set back. It is unclear from Sheet A6 what the setback is to the hot tub from the building façade at that location.

a. *Required Action:* Please revise the plans to reflect the required setback for all roof top decks. Please also revise Sheet A6 to provide a dimension from the building façade to the hot tub location.

7. *Comment:* The 3-foot setback along the alley shows wood fencing to screen the transformer and condensers, electric meters/CT panel, and raised landscape bed. The 3-foot setback is intended to be a clear zone to assist in snow management operations in the winter, therefore these items need to be relocated from within the 3 feet setback along the alley.

a. *Required Action:* Please revise the site plans to reflect revisions as noted above to avoid future unintended damage of property due to snow management operations. Please also provide a letter from Idaho Power approving the location of the transformer with associated clearances and proposed electric meters.

8. *Comment:* Depending on final use determination for the ground floor space, the dumpster and one recycling bin will not likely be adequate for the proposed use when special events occur. Once a use determination is made for the ground floor space, a letter of approval of the garbage service based on the use will be required from Clear Creek Disposal.

a. *Required Action:* This comment is for information only; no action is required at this time. Upon use determination, please provide a letter from Clear Creek Disposal approving the garbage configuration.

9. *Comment:* Sheet A2 shows the dimensions of the parking garage area including dimensions of the parking spaces and width of the drive aisle, however, the dimensions of the 5 spaces on the Sun Valley Rd side of the parking area are noted to not meet minimum requirements and the drive aisle width does not appear to meet the 24-foot minimum between the stair and bump out where the “Trolley” area is noted. Drive aisle between stairwell and trolley/bump out area needs to also be 24 feet. Compact spaces are only permitted with certain types of uses and only when the total number of required spaces is 10 or more. If parking is proposed, it must meet the minimum dimensional standards.

a. *Required Action:* Please revise the ground floor layout to demonstrate that all parking spaces meet the minimum dimensional standards and that the drive aisle width of 24 feet can be met for the full length of the drive aisle.

10. *Comment:* Construction Management Plans (CMP) are no longer required at the time of design review. Staff has not reviewed the submitted CMP. Comments on the CMP are provided at the time of building permit application for a project.

a. *Required Action:* No action required at this time, this comment is for information only.

11. *Comment:* Sheets EL5-8 show the foot candles at the property boundary, however, the sheets do not show foot candles outside the property line. Staff is concerned that there may be light trespass across the property boundary into the public right-of-way as there are numerous locations along the perimeter that have medium to high foot candle measures. For instance, foot candles measuring 1.0 and 2.8 adjacent to the north property boundary and alley measurements of 9.1 and 8.8. There may be no light trespass across the property boundary per KMC 17.132.030 stating “All existing and/or new exterior lighting shall not cause light trespass and shall protect adjacent properties from glare and excessive lighting.” Figure 1 in the KMC only refers to light emitting from inside buildings, not exterior lighting.

a. *Required Action:* Please revise the photometric study to include foot candle measurements just outside the property boundary for verification there is no light trespass. Please note that all exterior lighting including planter, tree, and water feature lights should be included in the calculations.

12. *Comment:* Per KMC 17.132.030.F “Uplighting. Uplighting is prohibited in all zoning districts, except as where permitted in this chapter.” Staff does not believe that the “Lip of Planter” lighting or the water feature lighting fully complies with the limitation on uplighting. As outlined in KMC 17.132.030.H.2 “All exterior lighting fixtures shall be full cutoff fixtures with the light source fully shielded, except as exempted in this chapter.” As such, light fixtures must be fully shielded as to not cast light up or sideways, always casting light down as illustrated in Figure 2. For instance, the “Under Cap Lighting” is compliant as it is fully shielded based on the image.
 - a. *Required Action:* Please revised the lighting proposed to comply with the dark sky compliant requirements and fixture guidelines.
13. *Comment:* Stair tower lighting that must remain consistently illuminated 24 hours per day due to building code requirements must be mitigated with glazing or other treatments to windows that limit the amount of light emitting from the building overnight.
 - a. *Required Action:* Please provide clarity on whether any glazing is proposed for the central stair tower and whether consistent light will emit from this feature in all hours of the evening.
14. *Comment:* The street light illumination levels and placement of lights may not be in the correct location based on current discussions with the City Engineer and Planning departments.
 - a. *Required Action:* As this is a preapplication design review. No further action on street light location is required at this time, however, final street light location will be determined at the time of final design review if the project moves forward.

Design Review Comments

The following comments are provided for consideration by the applicant. Revisions to the plans are not required, but recommended, unless otherwise noted. If revisions are not made, the following comments will be provided to the Planning and Zoning Commission for their consideration and feedback.

1. *Comment:* Per KMC 17.96.060.B.2 and 3, “2. For nonresidential portions of buildings, front building facades and facades fronting a pedestrian walkway shall be designed with ground floor storefront windows and doors with clear transparent glass. Landscaping planters shall be incorporated into facades fronting pedestrian walkways.” and “3. For nonresidential portions of buildings, front facades shall be designed to not obscure views into windows.” These two standards serve to demonstrate the importance of creating an active and interesting pedestrian environment. Landscaping is encouraged, but not if it obscures views into windows. Staff has concerns that the ground floor façade of the building along Sun Valley Rd and the portion of N 1st Ave closest to Sun Valley Rd do not meet the intent of this standard as the architectural design of the project does not engage with pedestrians and serves more to privatize the space for residents and guests that create an environment that is active and interesting for pedestrians. More specifically, the landscape planter boxes that wrap the corner where the outdoor area is are 3-feet in height and the proposed plantings in the landscape boxes are shrubs and hedge like species that can grow quite tall over time. Additionally, the façade facing Sun Valley Rd has minimal storefront characteristics with transparent glass. Staff understands that the interior program of the building is driving the façade configurations, however, the proposed façade on the Sun Valley Rd side of the project does not meet the city’s design review objectives. Sun Valley Rd is one of our more heavily traveled corridors by pedestrians. This intersection is the location of two new projects in recent years that intensely serve to engage pedestrians with the Maude’s retail and coffee shop on one corner and a new office building on another that has well-articulated store front facades on both street frontages. The Commission will be keenly focused on continuing the design success of the other projects as this is such an important intersection within the downtown.
 - a. *Required Action:* Staff recommends the applicant consider revising the landscape planter and plantings proposed around the outdoor gathering area to create a more engaging, less

privatize program for the outdoor space. Additionally, staff recommends the applicant evaluate ways to integrate additional transparency onto the Sun Valley Rd side of the project. Staff recommends an evaluation of bringing the ground floor uses around to the Sun Valley Rd side of the building.

2. *Comment:* Per KMC 17.96.060.B.1 “Facades facing a street or alley or located more than five feet from an interior side property line shall be designed with both solid surfaces and window openings to avoid the creation of blank walls and employ similar architectural elements, materials, and colors as the front facade.” The Commission has paid special attention to interior walls that are exposed due to adjacent buildings that are of smaller scale than the proposed project. This is especially important when adjacent buildings are one-story structures adjacent to a three-story structure. Although staff believes the setback nature of the project mitigates some of these concerns, staff does have concern about the lack of material variation on the east elevation shown on Sheet A8. Include the outline of the adjacent buildings on the elevations for context
 - a. *Required Action:* As part of the resubmittal materials, please revise the elevation on Sheet A8 to show the outlined of the adjacent building for reference. Staff recommends the applicant consider some material variations to break up the east elevation portions of the building that are exposed.

Interim Ordinance Conformance

As you may know, the Ketchum City Council is reviewing an interim ordinance on Monday, September 19, 2022, to revise permitted uses and development standards in portions of the downtown. The project, as proposed, does not conform to many of the requirements of the new regulations. Although the ordinance has not been adopted and is not effective at this time, the project may not be exempt from the pending regulations depending on adoption timeframes and applicability as approved by City Council. The following items are provided as a courtesy for your information.

1. The proposed project exceeds the base FAR of 1.0. For projects that exceed the base FAR and receive a density bonus, a minimum number of residential units will be required. For a lot of this size, a 100% residential project would be required to provide a minimum of 21 residential units. Depending on the amount of commercial space, this number may decrease. Final determination of number of units required will depend on final use determination of the proposed ground floor use.
2. Ground floor residential uses with street frontage will no longer be permitted on this property and the ground floor will be required to have at least 55% of the GFA of the ground floor be commercial uses
3. No individual residential unit may exceed 3,000 square feet. The proposed units would not comply with this requirement.
4. The code will no longer allow the number of parking spaces to be more than what is required by the municipal code, therefore, the additional parking proposed by the project will not be permitted.
5. Projects subject to design review must show general conformance with the goals, policies, and objectives of the comprehensive plan. The purpose of the interim ordinance is to increase the supply of housing in the downtown and ensure vibrant and active uses on the ground floor. As proposed, staff does not believe this project forwards the goals and objectives of the comprehensive plan as the proposed project is a significant underutilization of a key piece of property in the downtown along one of our busiest vehicular and pedestrian corridors.

For some of the standards outlined above, relief can be granted through the Conditional Use Permit process per the interim ordinance. A separate application form and justification of how the project meets the Conditional Use Permit criteria will be required. Staff will provide an update to the applicant following the September 19, 2022 hearing as to remain transparent about applicability of the proposed ordinance.

Fire Department

Please see the attached comments from the fire department. Additionally, our Fire Marshall is currently working remotely with limited download capabilities. He noted that a standpipe may be required for the project. These items can be addressed for final design review and building permit application, no revisions are required at this time.

Water and Sewer Departments

The comments below can be addressed at the time of building permit, no revisions are required at this time.

Comments from Water Department

1. Comments were not received as of the date of this letter. Comments will be sent under separate cover.

Comments from Sewer

1. No comments.

Streets and Engineering

Please see the attached memo with comments from the City Engineer. These comments are informational at this time and will need to be resolved for the final design review submittal if the project moves forward. No comments on the preapplication were received by the Streets department, however, additional comments from streets will be provided for final design review.

Please provide a revised plan set addressing all applicable comments as noted above. Please also provide a written response to each comment noting if and where changes on the plan set were made. Once revised application materials and a written response to questions above are received, staff will conduct another review to determine if the information provided is sufficient to deem the application complete.

Please do not hesitate to email or call should you have any questions.

Sincerely,



Morgan Landers, AICP
Senior Planner
City of Ketchum Department of Planning and Building

EXHIBIT 4



CITY OF KETCHUM
MEETING MINUTES OF THE CITY COUNCIL
Monday, September 19, 2022

CALL TO ORDER: *(00:00:09 in video)*

Mayor Bradshaw called the meeting of the Ketchum City Council to order at 4:00 p.m.

Roll Call:

Mayor Neil Bradshaw
Courtney Hamilton
Michael David (via teleconference)
Jim Slanetz
Amanda Breen

Also Present:

Jade Riley - City Administrator
Lisa Enourato – Interim City Clerk
Shellie Gallagher – Treasurer
Suzanne Frick – Director Planning and Building

COMMUNICATIONS FROM MAYOR AND COUNCILORS:

Mayor Bradshaw noted that over \$300,000 in cash and gift cards have been received for the victims of the Limelight Condo Fire. He also noted the work done by the Bald Mountain Stewardship Project to remove dead trees from the mountain, creating some new ski runs, reduce fire hazard, and creating a healthier forest.

AMENDED AGENDA *(00:02:30 in video)*

Agenda amended to add item 16 to the Consent Agenda.

Motion to approve the Amended Agenda.

Motion made by Amanda Breen; Seconded by Courtney Hamilton.

Ayes: Amanda Breen, Michael David, Courtney Hamilton, Jim Slanetz.

Nays: None

CONSENT AGENDA: *(00:03:22 in video)*

Council discussed heated driveways and energy usage.

Motion to approve the Consent Agenda items 9, 10, 16. *(00:16:33 in video)*

Motion made by Amanda Breen; Seconded by Michael David.

Ayes: Amanda Breen, Michael David, Neil Bradshaw

Nays: Courtney Hamilton, Jim Slanetz.

Motion to approve the Consent Agenda items 2 - 8 and 11 - 15. (00:35:05 in video)

Motion made by Courtney Hamilton; Seconded by Jim Slanetz.

Ayes: Amanda Breen, Michael David, Courtney Hamilton, Jim Slanetz.

Nays: None

PUBLIC HEARING

17. Second Reading of Ordinance 1242, amending Chapter 10.05.03 (Traffic Authority) of the Ketchum Municipal Code (00:35:30 in video)

Public Comment:

No Public Comments

Motion to waive Third Readings of Ordinance 1242 and read by title only.

Motion made by Jim Slanetz; Seconded by Amanda Breen.

Ayes: Amanda Breen, Michael David, Courtney Hamilton, Jim Slanetz.

Nays: None

Second Reading by Lisa Enourato. (00:38:12 in video)

Motion to approve Ordinance 1242 and read by title only.

Motion made by Courtney Hamilton; Seconded by Amanda Breen.

Ayes: Amanda Breen, Michael David, Courtney Hamilton, Jim Slanetz.

Nays: None

18. Recommendation to hold a public hearing, review, and conduct a first reading of Interim Ordinance 1234 amending certain sections of Title 16 and Title 17 of the Ketchum Municipal Code. (00:38:47 in video)

Public Comment:

Jim Laski (00:57:33 in video)

Brenda Moczygemba (01:01:20 in video)

Tom Drougas (01:04:22 in video)

Motion to approve the First Reading of Interim Ordinance 1234 as read by Title only and schedule for second reading. (01:49:40 in video)

Motion made by Courtney Hamilton; Seconded by Jim Slanetz.

Ayes: Amanda Breen, Michael David, Courtney Hamilton, Jim Slanetz.

Nays: None

First Reading by Lisa Enourato. (01:50:07 in video)

NEW BUSINESS:

EXECUTIVE SESSION (01:51:01 in video)

Motion to move to executive session pursuant to Idaho Code §74-206(1)(f) to communicate with legal counsel on pending, imminent, or threatened litigation.

Motion made by Amanda Breen; Seconded by Jim Slanetz.

Ayes: Amanda Breen, Michael David, Courtney Hamilton, Jim Slanetz.

Nays: None

ADJOURNMENT:

Motion to adjourn at 6:00 p.m.

Motion made by Courtney Hamilton; Seconded by Amanda Breen.

Ayes: Amanda Breen, Michael David, Courtney Hamilton, Jim Slanetz.

Nays: None



Mayor Neil Bradshaw



Interim City Clerk Lisa Enourato

EXHIBIT 5

Below is a partial transcript of the September 19, 2022 Council Meeting. Applicants have highlighted the speaker when possible and removed text in the interest of brevity.

760

00:38:41,300 --> 00:38:46,700

Okay. Nothing else required. Thank you. Okay, let's

761

00:38:46,700 --> 00:38:50,100

go on to public hearing item number 18

762

00:38:49,100 --> 00:38:52,800

recommendation to hold

763

00:38:52,800 --> 00:38:55,200

a public hearing review and conduct a first reading of

764

00:38:55,200 --> 00:39:00,100

interim Ordinance. One, two, three, four amending certain

765

00:38:59,100 --> 00:39:02,200

sections of title 16 and title 17.

766

00:39:02,200 --> 00:39:05,500

I'm going to turn it now over to Morgan

767

00:39:05,500 --> 00:39:07,600

take it from here. Thank you more than

Morgan Landers Comments

768

00:39:08,500 --> 00:39:11,400

Evening everyone. How are you Morgan Landers senior

769

00:39:11,400 --> 00:39:14,000

planner for the city of Ketchum. So we are back in front

770

00:39:14,100 --> 00:39:17,700

of you today with interim Ordinance. One, two, three four. I'm

771

00:39:17,700 --> 00:39:20,400

going to give kind of a high level overview of with what

772

00:39:20,400 --> 00:39:23,400

was included in the staff report, but I do have all of the background information

773

00:39:23,400 --> 00:39:26,300

if anyone has questions on what went to the Planning
774

00:39:26,300 --> 00:39:28,500

and Zoning commission or anything that we talk about here today.
775

00:39:30,100 --> 00:39:33,200

So what I will talk about is kind of a brief overview kind of
776

00:39:33,200 --> 00:39:36,300

why we're here what we've done to date kind of the timeline where
777

00:39:36,300 --> 00:39:39,300

we've come from what we've done and then I am
778

00:39:39,300 --> 00:39:42,600

going to review some staff recommendations that are reflected in the interim ordinance,
779

00:39:42,600 --> 00:39:45,300

and then we'll open it up for discussion. So I do want to be mindful
780

00:39:45,300 --> 00:39:46,900

of time, but I also want to be thorough

Morgan Landers Comments

945

00:47:57,200 --> 00:48:00,000

you today to further kind of move the needle in the right direction.

Morgan Landers Comments

946

00:48:03,200 --> 00:48:06,400

So there are two areas in the interim ordinance that's
947

00:48:06,400 --> 00:48:09,600

in front of you where staff is making a different recommendation than the
948

00:48:09,600 --> 00:48:12,300

Planning and Zoning commission made and the Planning and Zoning
949

00:48:12,300 --> 00:48:15,500

commission had a very robust and great dialogue around the interim ordinance.
950

00:48:15,500 --> 00:48:18,200

They were very thoughtful the two areas where they really
951

00:48:18,200 --> 00:48:21,600

kind of struggled a bit was the applicability of
952

00:48:21,600 --> 00:48:23,900
the ordinance as it relates to pre-applications.
953

00:48:24,700 --> 00:48:27,300
And the location of community housing units where
954

00:48:27,300 --> 00:48:28,500
those bits should be permitted.
955

00:48:29,300 --> 00:48:32,500
and so as an overview the commission has made the recommendation that
956

00:48:32,500 --> 00:48:35,400
the ordinance not be applicable to pre-applications that have
957

00:48:35,400 --> 00:48:39,100
been deemed complete as of the effective date but staff
958

00:48:38,100 --> 00:48:41,600
actually thinks that we should apply
959

00:48:41,600 --> 00:48:44,600
the interim ordinance to pre-applications if they haven't had
960

00:48:44,600 --> 00:48:47,400
one of review meeting with the commission prior to
961

00:48:47,400 --> 00:48:49,300
the effective date and I'll talk about why
962

00:48:50,900 --> 00:48:53,300
The location of community housing units the commission

Morgan Landers Comments

972
00:49:22,200 --> 00:49:25,700
So the first one under applicability for
973

00:49:25,700 --> 00:49:28,200
pre-application. So on the right hand side, I've just
974

00:49:28,200 --> 00:49:31,600
kind of done a little bit of a flow chart to show what pre-applications are
975

00:49:31,600 --> 00:49:35,000

because we don't do them all the time in the
976

00:49:34,400 --> 00:49:37,500

code. They are voluntary in certain instances
977

00:49:37,500 --> 00:49:40,100

in the mountain overlay Zone District, or if you
978

00:49:40,100 --> 00:49:43,200

have a project that's less than four stories or on a lot that's less
979

00:49:43,200 --> 00:49:47,000

than 11,000 square feet. We do require pre-applications
980

00:49:46,200 --> 00:49:49,500

for projects that are more than four stories or
981

00:49:49,500 --> 00:49:52,300

more than 11,000 square feet. And that was actually a change
982

00:49:52,300 --> 00:49:55,900

that we made a little bit earlier this year. When we adopted the
983

00:49:55,900 --> 00:49:58,100

permanent ordinance for historic preservation. We also
984

00:49:58,100 --> 00:50:00,100

made some tweaks to the pre-application requirements.
985

00:50:01,200 --> 00:50:04,900

Once a project has gone through a pre-application design review the
986

00:50:04,900 --> 00:50:06,100

Planning and Zoning Commission.
987

00:50:07,400 --> 00:50:10,500

They may they make in kind of informal recommendations. So
988

00:50:10,500 --> 00:50:13,800

pre-applications are providing guidance providing
989

00:50:13,800 --> 00:50:16,800

feedback. There's no noticing.
990

00:50:16,800 --> 00:50:19,200

It's not a public hearing. It's only a public meeting.
991

00:50:20,200 --> 00:50:23,600

And the only time we notice pre-application design review
992

00:50:23,600 --> 00:50:26,400

applications is in the

993

00:50:26,400 --> 00:50:29,500

mountain overlay Zone District. There's also no

994

00:50:29,500 --> 00:50:32,200

approval or no vesting of a project the Planning

995

00:50:32,200 --> 00:50:35,800

and Zoning commission doesn't make a decision. They provide that feedback and

996

00:50:35,800 --> 00:50:38,300

the only motion they make is to move the project through

997

00:50:38,300 --> 00:50:41,200

to a formal design review application. So there's

998

00:50:41,200 --> 00:50:43,300

no approval or denial at that point in time.

999

00:50:44,700 --> 00:50:47,700

so at the community at the commission discussion, they really

1000

00:50:47,700 --> 00:50:51,300

felt that we should be honoring developments in the process considering

1001

00:50:50,300 --> 00:50:53,300

the time and energy and investment that

1002

00:50:53,300 --> 00:50:56,500

is put into these applications and we certainly understand

1003

00:50:56,500 --> 00:50:59,700

the desire of providing that flexibility but staff

1004

00:50:59,700 --> 00:51:02,400

is making the recommendation that we should really be

1005

00:51:02,400 --> 00:51:05,400

using the pre-application design

1006

00:51:05,400 --> 00:51:09,900

review meeting with the commission as the Milestone because

1007

00:51:11,300 --> 00:51:14,600

just having an application that's deemed complete. The only feedback
1008

00:51:14,600 --> 00:51:17,200

that an applicant is getting at that point in time is from staff
1009

00:51:17,200 --> 00:51:20,800

and it's usually very preliminary in the beginning. It's really
1010

00:51:20,800 --> 00:51:23,200

the commission that provides that feedback and really
1011

00:51:23,200 --> 00:51:27,000

gives that substantive guidance to the applicant rather
1012

00:51:26,200 --> 00:51:29,400

than just staff providing initial thoughts
1013

00:51:29,400 --> 00:51:32,000

and concerns related to conformance with the zoning regulations.
1014

00:51:32,800 --> 00:51:35,500

So as of right now staff is making the recommendation that
1015

00:51:35,500 --> 00:51:38,300

we use the pre-application design
1016

00:51:38,300 --> 00:51:41,500

review meeting as the Milestone rather than decent complete.
1017

00:51:44,900 --> 00:51:47,100

So the second area where staff is making
1018

00:51:47,100 --> 00:51:50,700

a different recommendation and the Planning Commission is in where location
1019

00:51:50,700 --> 00:51:53,400

of community housing units can be had so

Jim Laski Comments

1134

00:57:32,500 --> 00:57:35,200

Okay, I'm Jim Laskey. I'm here on behalf of South
1135

00:57:35,200 --> 00:57:40,000

tooth serenade leave. We are the only application that
1136

00:57:39,200 --> 00:57:43,300

has been submitted to mandatory not
1137

00:57:42,300 --> 00:57:45,800
voluntary pre-application review
1138

00:57:45,800 --> 00:57:48,400
submitted prior to this ordinance going.
1139

00:57:49,300 --> 00:57:53,300
To the Planning and Zoning commission paid our
1140

00:57:53,300 --> 00:57:56,200
fees prior to this application going to the
1141

00:57:56,200 --> 00:57:56,800
Planning Commission.
1142

00:57:57,600 --> 00:58:00,400
The applicant the pre-app application is
1143

00:58:00,400 --> 00:58:03,600
exactly the same application as the design review applications.
1144

00:58:03,600 --> 00:58:06,400
Do this is what it is just received Friday
1145

00:58:06,400 --> 00:58:09,800
after hours notice that our application
1146

00:58:09,800 --> 00:58:12,800
was deemed the not complete. We'll
1147

00:58:12,800 --> 00:58:13,400
move forward with that.
1148

00:58:14,100 --> 00:58:17,300
So my comments on this as they were
1149

00:58:17,300 --> 00:58:20,700
at pnz deal with Section one as to
1150

00:58:20,700 --> 00:58:22,600
the application of this new ordinance.
1151

00:58:23,600 --> 00:58:26,400
It is my view and I know your
1152

00:58:26,400 --> 00:58:27,900

council is on that.

1153

00:58:29,300 --> 00:58:32,400

The language. Well, first of all, the language is nothing

1154

00:58:32,400 --> 00:58:35,100

to do with teens what p and Z recommended so, I'm curious

1155

00:58:35,100 --> 00:58:38,900

why pn's even recommends if it's not going to be incorporated into

1156

00:58:38,900 --> 00:58:42,000

the proposal that you guys see but second

1157

00:58:41,100 --> 00:58:45,000

of all it's clearly violates Idaho

1158

00:58:44,500 --> 00:58:47,700

law citizens against Linscott

1159

00:58:47,700 --> 00:58:49,000

the Bonner and

1160

00:58:50,400 --> 00:58:53,400

Taylor V. Canyon County of which say

1161

00:58:53,400 --> 00:58:56,900

that a new ordinance is set in

1162

00:58:56,900 --> 00:59:00,200

comes into place at the time of the application not

1163

00:58:59,200 --> 00:59:02,200

at the time an application is

1164

00:59:02,200 --> 00:59:05,400

deemed complete by subjective staff or not

1165

00:59:05,400 --> 00:59:08,300

when a staff decides to put it on a meeting schedule

1166

00:59:08,300 --> 00:59:09,500

so that it could be

1167

00:59:10,200 --> 00:59:12,200

so I think there's a real problem if

1168

00:59:13,100 --> 00:59:16,600

you adopt the language in here and our project

1169

00:59:16,600 --> 00:59:18,700

is not exempt from this.

1170

00:59:19,600 --> 00:59:21,300

new ordinance

1171

00:59:22,700 --> 00:59:25,500

I think there's some other problems in the ordinance

1172

00:59:25,500 --> 00:59:29,200

the comp plan stuff. I would say is problematic

1173

00:59:28,200 --> 00:59:31,200

too. Because first you're comp plan

1174

00:59:31,200 --> 00:59:34,400

is dated in second of all, it was not written to being

1175

00:59:34,400 --> 00:59:37,400

incorporated as part of a coordinate. So if

1176

00:59:37,400 --> 00:59:40,600

you just take it general comp plan that wasn't designed to

1177

00:59:40,600 --> 00:59:43,600

be an ordinance and you say oh we can say this conforms

1178

00:59:43,600 --> 00:59:46,300

or doesn't form comp plan is written in ways that

1179

00:59:46,300 --> 00:59:49,600

has Alternatives and what have you so you can typically always

1180

00:59:49,600 --> 00:59:51,900

find something that conforms with the comp plan or doesn't

1181

00:59:52,600 --> 00:59:55,700

And I think that's a dangerous approach to

1182

00:59:55,700 --> 00:59:58,200

take in an ordinance and slipping in those

1183

00:59:58,200 --> 01:00:01,300

couple of words really gives a ton of authority to the planning and

1184

01:00:01,300 --> 01:00:01,500

zoning.

1185

01:00:04,100 --> 01:00:07,400

As a final statement, I think it's it's

1186

01:00:07,400 --> 01:00:10,400

sad that there's nobody really here commenting. I

1187

01:00:10,400 --> 01:00:13,300

don't know how many comments we might have online or not. But I feel

1188

01:00:13,300 --> 01:00:17,100

like the notice Provisions while I'm sure conform with law noticing

1189

01:00:16,100 --> 01:00:19,300

this hearing on a Thursday for a Monday.

1190

01:00:19,300 --> 01:00:22,700

So it misses the newspaper when you're considering an

1191

01:00:22,700 --> 01:00:25,500

ordinance that impacts a large number of property

1192

01:00:25,500 --> 01:00:28,200

owners and is going to make I don't

1193

01:00:28,200 --> 01:00:32,300

know if staff has has calculator or not, but dozens.

1194

01:00:31,300 --> 01:00:33,100

If not,

1195

01:00:34,200 --> 01:00:37,500

It's more than dozens of properties non-conforming properties, which

1196

01:00:37,500 --> 01:00:40,300

will make it impossible for them to get loans or difficult

1197

01:00:40,300 --> 01:00:43,400

for them to get loans and do all lots of problems. I think

1198

01:00:43,400 --> 01:00:46,400

you need to make sure that people are impacted by this ordinance

1199

01:00:46,400 --> 01:00:47,500

are aware of it.

1200

01:00:48,200 --> 01:00:51,900

So that they can come out and comment so limit my
1201

01:00:51,900 --> 01:00:54,400
comments to that. I love the opportunity to talk
1202

01:00:54,400 --> 01:00:58,100
to Matt about illegality of the applicability
1203

01:00:57,100 --> 01:01:00,700
of the ordinance and I certainly hope that you
1204

01:01:00,700 --> 01:01:03,200
don't wave readings of this because I think this is a really
1205

01:01:03,200 --> 01:01:04,500
important ordinance.
1206

01:01:05,300 --> 01:01:08,100
Yeah, thank you. Jim any other
1207

01:01:08,100 --> 01:01:09,500
comments people in the room?
1208

01:01:11,800 --> 01:01:14,200
Any other comments from people online?
1209

01:01:16,100 --> 01:01:18,900
We do we have one commenter Brenda. Go ahead.

1210
01:01:19,900 --> 01:01:22,300
Hi, can you hear me? Yeah, go ahead Brenda.

Commissioner Moczygemba Comments

1211
01:01:23,200 --> 01:01:25,900
Hi Brenda mocks again, but planning commissioner.

1212
01:01:27,100 --> 01:01:30,700
I would have to second what Mr. Lasky

1213
01:01:30,700 --> 01:01:33,900
had to say. I'm glad that staff pointed out the differences

1214
01:01:33,900 --> 01:01:37,300
between what staff how they

1215

01:01:37,300 --> 01:01:40,500
are presenting this interim ordinance to city council
1216

01:01:40,500 --> 01:01:43,600
versus how the Planning and Zoning commission had
1217

01:01:43,600 --> 01:01:46,400
recommended or made the motion to recommend
1218

01:01:46,400 --> 01:01:49,600
with revisions. I think we as Morgan
1219

01:01:49,600 --> 01:01:52,400
said we beat this up pretty good. We went down one
1220

01:01:52,400 --> 01:01:55,300
by one and had very thorough conversations on
1221

01:01:55,300 --> 01:01:59,300
each of the sections and I the
1222

01:01:58,300 --> 01:02:02,500
main difference being in the applicability and
1223

01:02:03,800 --> 01:02:06,500
Again, we went round and round in this conversation, but
1224

01:02:06,500 --> 01:02:09,900
what it came down to was about
1225

01:02:09,900 --> 01:02:13,100
fairness and when
1226

01:02:12,100 --> 01:02:15,800
a project is submitted for pre-application
1227

01:02:15,800 --> 01:02:18,800
the city of Ketchum requirements for
1228

01:02:18,800 --> 01:02:20,600
pre-application designer review.
1229

01:02:21,300 --> 01:02:24,300
Are very much the exact same
1230

01:02:24,300 --> 01:02:27,800
as they are for a full-on design review. And
1231

01:02:27,800 --> 01:02:30,300
so the what was discussed is that
1232

01:02:30,300 --> 01:02:33,300
the time and money has been just has been
1233

01:02:33,300 --> 01:02:36,700
spent by the developer the property owner.
1234

01:02:36,700 --> 01:02:39,400
Whoever it may be for the
1235

01:02:39,400 --> 01:02:43,300
design team to develop architectural drawings.
1236

01:02:44,200 --> 01:02:46,400
civil drawings landscape drawings
1237

01:02:47,300 --> 01:02:51,000
lighting locations photometric studies
1238

01:02:50,200 --> 01:02:53,400
on and on it goes so while it
1239

01:02:53,400 --> 01:02:56,700
may be not a while. It
1240

01:02:56,700 --> 01:03:00,800
may be an informal recommendation and there's no vesting I
1241

01:02:59,800 --> 01:03:02,900
think out of fairness these
1242

01:03:02,900 --> 01:03:04,100
projects that have been
1243

01:03:05,700 --> 01:03:08,300
on someone's plate and time and money
1244

01:03:08,300 --> 01:03:11,500
spent for six to nine to maybe even 12 months.
1245

01:03:13,500 --> 01:03:16,800
In my mind, it was only fair to say. Hey pre-application
1246

01:03:16,800 --> 01:03:19,900
design review
1247

01:03:19,900 --> 01:03:23,000
applications that have been deemed complete should not
1248

01:03:22,200 --> 01:03:23,800
be under.
1249

01:03:25,600 --> 01:03:26,900
this interim ordinance
1250

01:03:28,700 --> 01:03:31,500
and then I was the sole
1251

01:03:31,500 --> 01:03:35,600
commissioner that was not entirely
1252

01:03:35,600 --> 01:03:38,300
convinced of the section talking about.
1253

01:03:40,200 --> 01:03:43,900
Being able to evaluate projects solely based on the comp
1254

01:03:43,900 --> 01:03:46,500
plan. I believe that's where we need to head in
1255

01:03:46,500 --> 01:03:48,800
restructuring our
1256

01:03:50,800 --> 01:03:53,300
Our entire zoning code, which is essentially where
1257

01:03:53,300 --> 01:03:56,600
where we're headed, but for the sake of this interim
1258

01:03:56,600 --> 01:04:01,500
ordinance, I just didn't think that it was appropriate to be
1259

01:04:01,500 --> 01:04:05,000
in this interim ordinance.
1260

01:04:04,100 --> 01:04:06,800
Good for one year. Thank you.

Councilwoman Hamilton Comments

1462
01:14:16,400 --> 01:14:19,500
is most important. So I like the idea of including
1463

01:14:19,500 --> 01:14:22,800

that in this in this

1464

01:14:22,800 --> 01:14:25,200

ordinance in terms of

1465

01:14:25,200 --> 01:14:26,000

applicability.

1466

01:14:28,100 --> 01:14:32,600

I don't have a strong feeling when we are the other. I mean, I understand what

1467

01:14:31,600 --> 01:14:34,400

Brenda is saying Mr. Lasky. I

1468

01:14:34,400 --> 01:14:38,400

think that a lot of work has gone into projects that

1469

01:14:37,400 --> 01:14:39,100

being said.

1470

01:14:40,400 --> 01:14:43,100

This has been and this ordinance has been in the

1471

01:14:43,100 --> 01:14:46,400

public records since at least February. It's been

1472

01:14:46,400 --> 01:14:49,200

discussed since then. So I think that there is something to

1473

01:14:49,200 --> 01:14:52,200

be said about, you know projects who have been working.

1474

01:14:53,100 --> 01:14:53,400

in

1475

01:14:54,500 --> 01:14:58,300

potential conflict with this ordinance that

1476

01:14:57,300 --> 01:15:00,400

this this is been out

1477

01:15:00,400 --> 01:15:00,900

there for a while.

1478

01:15:02,600 --> 01:15:05,500

and that if they haven't had an opportunity to

1479

01:15:06,600 --> 01:15:09,500

How to take public comment or have
1480

01:15:09,500 --> 01:15:13,100

public input via the pnz that
1481

01:15:12,100 --> 01:15:15,300

they should be subject to this so I
1482

01:15:15,300 --> 01:15:18,500

don't know I'm curious what the rest of the council has to say on the
1483

01:15:18,500 --> 01:15:20,100

applicability standard.

Councilman Slanetz Comments

1561

01:19:24,400 --> 01:19:27,700

vision of the city is fresh. I think makes that
1562

01:19:28,500 --> 01:19:32,400

a much better way to go about that as far
1563

01:19:32,400 --> 01:19:36,700

as Mr. Lasky's things. I

1564

01:19:35,700 --> 01:19:38,200

guess that was the question comes down to
1565

01:19:38,200 --> 01:19:41,400

whether you're doing it at the time of the pre-application or
1566

01:19:41,400 --> 01:19:42,500

later on.

1567

01:19:44,700 --> 01:19:47,100

I guess my thing on that is can we you know
1568

01:19:47,100 --> 01:19:51,200

set it up for future pre-application, but anyone that's been has, you
1569

01:19:50,200 --> 01:19:51,600

know at the point.

1570

01:19:52,700 --> 01:19:55,300

That they're this far into it and you know changing the

1571

01:19:55,300 --> 01:19:59,400

changing the kind of the platform when they've
1572

01:19:59,400 --> 01:20:02,300

already gone through a lot of the legwork I think is a little tricky.
1573

01:20:02,300 --> 01:20:05,300

I'm not sure if we can get to the point where we can say like
1574

01:20:05,300 --> 01:20:08,500

in the future, you know, we're gonna look at it from at
1575

01:20:08,500 --> 01:20:12,100

the pre-application level and make
1576

01:20:11,100 --> 01:20:14,500

decisions based on
1577

01:20:14,500 --> 01:20:17,800

that. But if the projects
1578

01:20:17,800 --> 01:20:20,500

already in the works, I don't know how that works. Maybe Morgan
1579

01:20:20,500 --> 01:20:20,800

has a
1580

01:20:21,600 --> 01:20:23,300

Suzanne has an idea, you know.
1581

01:20:24,300 --> 01:20:27,400

I guess it's kind of like a great. It's kind of a grandfather didn't think

Mayor Bradshaw Comments

1582

01:20:27,400 --> 01:20:30,400

if they really don't depend all it is an incredibly
1583

01:20:30,400 --> 01:20:33,700

if I'm wrong. It's or it depends whether they're in application or
1584

01:20:33,700 --> 01:20:36,200

pre-application if then pre-application that
1585

01:20:36,200 --> 01:20:39,600

is not considered a you know
1586

01:20:39,600 --> 01:20:42,900
could be and again it's a policy call. It could
1587

01:20:42,900 --> 01:20:47,000
be that they've not really applied and only
1588

01:20:45,300 --> 01:20:49,200
have they deemed applied
1589

01:20:48,200 --> 01:20:52,100
if they've gone a full application and
1590

01:20:51,100 --> 01:20:54,300
Dean complete that's kind of
1591

01:20:54,300 --> 01:20:58,500
would be our recommendation. But you
1592

01:20:58,500 --> 01:21:01,600
know others who have projects in the work are arguing
1593

01:21:01,600 --> 01:21:04,700
that the determination or policy core that makes
1594

01:21:04,700 --> 01:21:07,600
it earlier and that'll be
1595

01:21:07,600 --> 01:21:12,900
a council decision. Again, our
1596

01:21:11,900 --> 01:21:14,400
recommendation is that once
1597

01:21:14,400 --> 01:21:18,500
a project is only deemed applied
1598

01:21:17,500 --> 01:21:19,900
for once. It's actually
1599

01:21:21,400 --> 01:21:24,700
Put in full and formal application not
1600

01:21:24,700 --> 01:21:28,200
pre-application, which tends to be losing? Yeah.

Morgan Landers Comments

1601

01:21:29,600 --> 01:21:32,600

And pardon me for my Interruption council members, but
1602

01:21:32,600 --> 01:21:35,500

just to clarify mayor Bradshaw. We are
1603

01:21:35,500 --> 01:21:38,900

kind of trying to kind of split the baby a little bit with what
1604

01:21:38,900 --> 01:21:42,400

the Planning Commission recommended and what we initially proposed
1605

01:21:41,400 --> 01:21:44,300

to the Planning Commission. And so
1606

01:21:44,300 --> 01:21:47,100

the initial ordinance took a much harder line that said
1607

01:21:47,100 --> 01:21:50,300

basically if you have a pre-application that doesn't count
1608

01:21:50,300 --> 01:21:53,400

at all and it really only final design review
1609

01:21:53,400 --> 01:21:53,900

count.

1610

01:21:54,200 --> 01:21:57,100

So what we're proposing here is that if you
1611

01:21:57,100 --> 01:22:00,400

have a pre-application that's in process and that you've had your
1612

01:22:00,400 --> 01:22:03,400

pre-application review with the commission meaning that they've
1613

01:22:03,400 --> 01:22:06,200

given substantial feedback. You've gotten your guidance. You've had that
1614

01:22:06,200 --> 01:22:09,700

informal review that that would be the Milestone by
1615

01:22:09,700 --> 01:22:12,300

which you get grandfathered and the new ordinance would not apply
1616

01:22:12,300 --> 01:22:15,700

to you. Does that help clarify kind of yeah, that's better.

Councilwoman Breen Comments

1842

01:33:24,400 --> 01:33:24,400

Um

1843

01:33:25,900 --> 01:33:26,100

the

1844

01:33:28,300 --> 01:33:30,000

the issue about when it's applicable.

1845

01:33:31,100 --> 01:33:34,300

I see Brenda's point about all

1846

01:33:34,300 --> 01:33:37,800

of the work that's put in that you know, I think.

1847

01:33:39,500 --> 01:33:42,200

You have to remember that it is there's a ton of work put in just to get there

1848

01:33:42,200 --> 01:33:45,500

on pre-app design review. And so that's

1849

01:33:46,700 --> 01:33:49,600

I haven't come to a fast decision on that yet whether I

1850

01:33:49,600 --> 01:33:51,500

agree with the staff's recommendation on.

1851

01:33:52,500 --> 01:33:55,500

on waiting on saying it has to be that a

1852

01:33:55,500 --> 01:33:56,000

meeting is actually

1853

01:33:56,800 --> 01:33:56,900

happened

1854

01:33:59,700 --> 01:34:02,100

so I just like to think about that a little more I you know,

Councilman David Comments

1877

01:35:10,200 --> 01:35:12,000

specifically to the applicability

1878

01:35:13,400 --> 01:35:17,100

I was kind of hoping that Amanda was
1879

01:35:16,100 --> 01:35:20,200

gonna have some more legal words of wisdom or Matt.
1880

01:35:19,200 --> 01:35:22,200

Maybe can chime in a little bit more. I
1881

01:35:24,400 --> 01:35:25,200

I think that.

1882

01:35:27,800 --> 01:35:30,000

As Courtney pointed out. This has been
1883

01:35:30,100 --> 01:35:33,500

in the works for quite a while and hopefully that people
1884

01:35:33,500 --> 01:35:33,800

that were

1885

01:35:35,100 --> 01:35:38,500

Were had an application at that point
1886

01:35:38,500 --> 01:35:40,800

or talking to staff about it.

1887

01:35:43,200 --> 01:35:46,200

But maybe it's maybe there's a line that can be drawn.

1888

01:35:49,200 --> 01:35:50,500

I'm not sure.

Morgan Landers Comments

2022

01:42:43,300 --> 01:42:47,200

well. So for instance if we had an application in process and

2023

01:42:46,200 --> 01:42:49,300

we determined that the

2024

01:42:49,300 --> 01:42:52,900

milestone for pre-applications to be kind of

2025

01:42:52,900 --> 01:42:55,300

grandfathered in is that meeting with the Planning

2026

01:42:55,300 --> 01:42:58,300

Commission and pre-application hasn't made

2027

01:42:58,300 --> 01:43:01,400

that Milestone yet. They could apply for a conditional use permit

2028

01:43:01,400 --> 01:43:05,100

if they're not meeting the the ordinance Provisions. So

2029

01:43:04,100 --> 01:43:07,600

maybe they don't want to meet the minimum density

2030

01:43:07,600 --> 01:43:10,200

requirements for whatever reason or the square

2031

01:43:10,200 --> 01:43:13,400

footage of the units. So that off-ramp is available for more

2032

01:43:13,400 --> 01:43:16,200

than just those new Provisions too. So and I think sometimes that

2033

01:43:16,200 --> 01:43:16,500

gets

2034

01:43:16,700 --> 01:43:19,400

A little bit and the other piece that

2035

01:43:19,400 --> 01:43:22,700

I would mention about the comprehensive plan is that we

2036

01:43:22,700 --> 01:43:25,600

already provide a comprehensive plan analysis

2037

01:43:25,600 --> 01:43:28,300

for most projects just as a courtesy for the Planning Commission.

Commissioner Hamilton Comments

2142

01:49:03,300 --> 01:49:06,800

motion. So just to clarify just I'm kind of the topics of

2143

01:49:06,800 --> 01:49:09,400

consideration that we've discuss tonight the ordinance as it's

2144

01:49:09,400 --> 01:49:12,600

written and presented in our packet includes the

2145

01:49:12,600 --> 01:49:16,400

applicability that staff recommends prior

2146

01:49:15,400 --> 01:49:20,300

to or after pre-application

2147

01:49:18,300 --> 01:49:20,600

review.

2148

01:49:22,500 --> 01:49:24,900

But it prohibits basement.

2149

01:49:25,900 --> 01:49:29,100

Deed restricted units and it includes a

2150

01:49:28,100 --> 01:49:31,000

comprehensive plan. That's correct. Okay.

2151

01:49:31,600 --> 01:49:33,500

yeah, good summary the

2152

01:49:34,100 --> 01:49:35,400

Thanks, Courtney.

2153

01:49:37,600 --> 01:49:40,700

I moved to approve the first reading of

2154

01:49:40,700 --> 01:49:43,500

interim ordinance number one, two, three four as

EXHIBIT 6

Motion to approve the Consent Agenda items 3-11, 13-16 (00:14:33 in video)

Motion made by Amanda Breen; Seconded by Michael David.

Ayes: Amanda Breen, Michael David, Neil Bradshaw

Nays: Courtney Hamilton, Jim Slanetz.

Motion to approve the Consent Agenda items 12 (00:14:44 in video)

Motion made by Courtney Hamilton; Seconded by Amanda Breen

Ayes: Amanda Breen, Michael David, Courtney Hamilton

Nays: Jim Slanetz

Motion to approve the Consent Agenda items 17 (00:15:17 in video)

Motion made by Jim Slanetz; Seconded by Amada Breen

Ayes: Amanda Breen, Michael David, Jim Slanetz

Nays: None

Recused: Courtney Hamilton

NEW BUSINESS

18. Update on Highway 75 (Elkhorn Rd. to River Street) design and transportation improvements – City Administrator Jade Riley and Idaho Transportation Department Project Manager Nathan Jerke (00:15:40 in Video)

Mayor Neil Bradshaw expressed disappointment in direction the Deputy Director of transportation is going and will continue to push for a safe alternative and aesthetic option for our town's transportation. Council members commented and discussed the updated information. A reminder about the Public Feedback and Open house on October 11 at the Limelight was brought up. (00:23:08 in video)

19. Presentation and discussion regarding Warm Springs and Main Street transportation improvements – City Administrator Jade Riley, Brett Kohring (Cameron Waite HDR) (00:50:24 in video)

Council -Comments and discussion
(01:01:36 in video)

20. Recommendation to Approve Easement and Encroachment Agreement 22790 for the dedication of a 15-foot public access and utility easement and placement of driveway pavers with snowmelt in said easement at 203 Garnet Street. – Senior Planner Morgan Landers (2:16:29 in video)

Motion to approve made by: Amanda Breen: Seconded by: Courtney Hamilton

Ayes: Michael David, Jim Slanetz, Amanda Breen, Courtney Hamilton,

Nays: none

21. Monthly Housing Update – Housing Strategist Carissa Connelly (02:29:53 in video)

PUBLIC HEARING

22. Recommendation to hold a public hearing, and approve the Warm Springs Ranch Lot 10A Lot Line Shift Final Plat & Findings of Fact, Conclusions of Law, and Decision – Associate Planner Adam Crutcher (02:27:40 in video)

Public Comment:

None

Motion to approve made by Courtney Hamilton; Seconded by Jim Slanetz

Ayes: Michael David, Courtney Hamilton, Jim Slanetz.

Nays: None

Recused: Amanda Breen

23. Recommendation to hold a public hearing, review and conduct a second reading of Interim Ordinance 1234 amending certain Sections of Title 16 and Title 17 of the Ketchum Municipal Code -Senior Planner Morgan Landers (01:45:56 in video)

City Attorney Matt Johnson spoke on proposed amendment regarding ordinance 1234 (01:46:32 in video)

Public Comment:

Janet (1:50:16 in video)

Jim Lasky (01:54:18 in video)

Council -Comments, Questions and Discussion

(01:56:42 in video)

Motion to approve the 2nd reading of Interim Ordinance 1234 by title only, and schedule the 3rd reading for October 17th, 2022 (2:14:44 in video)

Motion made by: Courtney Hamilton; Seconded by: Michael David

Ayes: Jim Slanetz, Amanda Breen, Courtney Hamilton, Michael David

Nays: none

Second Reading by Lisa Enourato (02:15:07 in video)

ADJOURNMENT:

Motion to adjourn at 7:09:55 PM

Motion made by Courtney Hamilton; Seconded by Amanda Breen.

Ayes: Amanda Breen, Michael David, Courtney Hamilton, Jim Slanetz.

Nays: None



Mayor Neil Bradshaw



Interim City Clerk Lisa Enourato

EXHIBIT 7

Below is a partial transcript of the October 3, 2022 P&Z Meeting.
Applicants have highlighted the speaker when possible and removed text in
the interest of brevity.

1996

01:45:55,200 --> 01:45:58,500

Okay, we're gonna go to public hearing

1997

01:45:58,500 --> 01:46:01,300

item 23 recommendation to hold a public hearing

1998

01:46:01,300 --> 01:46:04,300

review and conduct second reading of interim Ordinance. One,

1999

01:46:04,300 --> 01:46:07,800

two, three, four amending certain sections of title

2000

01:46:07,800 --> 01:46:10,400

16 and 17 of the kitchen municipal code.

2001

01:46:10,400 --> 01:46:13,300

Am I going to turn it over to Morgan and then you can

Morgan Landers Comments

2002

01:46:13,300 --> 01:46:16,600

take it from there. Thanks more than thank you mayor Morgan Landers

2003

01:46:16,600 --> 01:46:19,200

city planner for the city of Ketchum. We don't

2004

01:46:19,200 --> 01:46:22,300

have new information to provide you today, but our City

2005

01:46:22,300 --> 01:46:25,200

attorney Matt Johnson does have something to speak with

2006

01:46:25,200 --> 01:46:28,500

you all about on a proposed amendment to the draft that you all reviewed

2007

01:46:28,500 --> 01:46:31,200

at the last meeting. So I will now kick it over to

2008

01:46:31,200 --> 01:46:31,500

Matt.

City Attorney Comments

2009

01:46:34,500 --> 01:46:37,300

Mayor council, thanks and thanks

2010

01:46:37,300 --> 01:46:42,200

for accommodating. Sorry for the scheduling difficulty today. So Jim
2011
01:46:41,200 --> 01:46:44,200
Laskey made some comments at the
2012
01:46:44,200 --> 01:46:48,400
last public hearing raised some legal cases. I did
2013
01:46:48,400 --> 01:46:51,200
some follow-up with him. We did some research on our
2014
01:46:51,200 --> 01:46:54,500
own based on that some of some of Jim's
2015
01:46:54,500 --> 01:46:58,300
comments were were well taken from the legal side regarding
2016
01:46:57,300 --> 01:47:00,700
Wayne essentially
2017
01:47:00,700 --> 01:47:03,700
an application's consider vested. And
2018
01:47:03,700 --> 01:47:07,100
so the change I think is pretty simple in
2019
01:47:06,100 --> 01:47:09,600
section. One of the interim ordinance titled
2020
01:47:09,600 --> 01:47:12,400
applicability. There was a second sentence that
2021
01:47:12,400 --> 01:47:15,700
it originally been added to clarify about when the
2022
01:47:15,700 --> 01:47:18,800
inner or more than this should be applicable to applications that
2023
01:47:18,800 --> 01:47:22,300
had been submitted for for pre design
2024
01:47:21,300 --> 01:47:24,200
review, but did not
2025
01:47:24,200 --> 01:47:27,700
yet had a hearing before PNC and that they would fall under
2026
01:47:27,700 --> 01:47:30,900
the intermittance not be considered as vested just
2027
01:47:30,900 --> 01:47:34,200
recommending the leading that sentence which
2028
01:47:34,500 --> 01:47:37,700

Will leave the first sentence making clear that any application that's
2029
01:47:37,700 --> 01:47:41,000
been submitted across a variety carrier areas
2030
01:47:40,700 --> 01:47:43,400
that steam substantially complete will be
2031
01:47:43,400 --> 01:47:46,200
considered under the ordinance applicable at that time
2032
01:47:46,200 --> 01:47:49,300
pretty simple change. I think it's one that
2033
01:47:49,300 --> 01:47:53,100
we can make between the second and third readings
2034
01:47:52,100 --> 01:47:55,400
and bring back to you but one to clarify for that
2035
01:47:55,400 --> 01:47:58,600
as it got directly to Jim's comments from last meeting
2036
01:47:58,600 --> 01:48:02,200
and I imagine he's there tonight to potentially comment
2037
01:48:01,200 --> 01:48:02,900
further as well.

Mayor Bradshaw Comments

2038
01:48:04,100 --> 01:48:08,200
Yes, thanks for that. Clarification Matt. Yeah, so
2039
01:48:08,200 --> 01:48:13,800
the your recommending a change in applicability which
2040
01:48:12,800 --> 01:48:16,000
means that someone's basically wants
2041
01:48:15,100 --> 01:48:18,900
a deemed complete a substantially complete even
2042
01:48:18,900 --> 01:48:23,300
though they haven't necessarily had the pnz and meeting
2043
01:48:22,300 --> 01:48:25,300
on that so Morgan, I'll
2044
01:48:25,300 --> 01:48:28,800
let you paraphrase that into English. So we're
2045
01:48:28,800 --> 01:48:31,700

clear and in terms of what the
2046
01:48:31,700 --> 01:48:34,300
council's considering. I think it's also important to
2047
01:48:34,300 --> 01:48:37,400
note that with that change or potential
2048
01:48:37,400 --> 01:48:40,400
change of adopted by the council that we should
2049
01:48:40,400 --> 01:48:44,000
then do a third. You know, we talked potentially about
2050
01:48:43,400 --> 01:48:46,600
wrapping at second and third reading together, but I
2051
01:48:46,600 --> 01:48:49,300
think we should have a third reading at a later date
2052
01:48:49,300 --> 01:48:51,600
more than over to you.

Morgan Landers Comments

2053
01:48:52,400 --> 01:48:55,400
Thank you mayor. I think that that was a good paraphrase of
2054
01:48:55,400 --> 01:48:58,300
use. So just more specific reference in section. One of the
2055
01:48:58,300 --> 01:49:01,700
ordinance the first sentence would remain which
2056
01:49:01,700 --> 01:49:04,700
is the applicability Clause basically stating that building
2057
01:49:04,700 --> 01:49:08,100
permits pre-application design review final design
2058
01:49:07,100 --> 01:49:11,100
review subdivision or cup application
2059
01:49:10,100 --> 01:49:13,200
deemed complete after the effective date
2060
01:49:13,200 --> 01:49:16,200
would be subject to the interim ordinance and then
2061
01:49:16,200 --> 01:49:19,400
the following sentence pre-application design review and
2062
01:49:19,400 --> 01:49:22,800

Mountain overlay pre-application design review applications that
2063
01:49:22,800 --> 01:49:25,100
have been reviewed by the Planning Commission Planning and
2064
01:49:25,100 --> 01:49:28,500
Zoning commission at one review meeting prior to the effective date are
not subject
2065
01:49:28,500 --> 01:49:31,200
that statement would be removed from
2066
01:49:31,200 --> 01:49:34,400
the ordinance for the third reading so as Matt
2067
01:49:34,400 --> 01:49:37,400
mentioned a pretty simple change what that provides
2068
01:49:37,400 --> 01:49:40,600
is a clear delineation, that's defensible as far
2069
01:49:40,600 --> 01:49:43,200
as who falls under the interim ordinance and who does not
2070
01:49:43,200 --> 01:49:44,600
from an application standpoint.
2071
01:49:45,300 --> 01:49:48,300
Okay. So Morgan, is there
2072
01:49:48,300 --> 01:49:51,200
anything else you want to say before? I turn it over to the public
hearing portion?
2073
01:49:52,400 --> 01:49:55,300
We don't have any additional comments at this time. Okay, great. So
2074
01:49:55,300 --> 01:49:58,500
I'm gonna open it up for public hearing. So
2075
01:49:58,500 --> 01:50:01,300
if there's anyone from the public either online or
2076
01:50:01,300 --> 01:50:04,400
in this room who wants to make a comment at this time, feel free
2077
01:50:04,400 --> 01:50:05,500
to come up and
2078
01:50:06,900 --> 01:50:08,600
state your name and make your comment.
2079
01:50:09,600 --> 01:50:09,900
Thank you.

Jim Laski Comments

01:54:17,100 --> 01:54:21,500

Hi, I'm Jim Lasky here again. Whoops. I just
2161

01:54:21,500 --> 01:54:24,800

want to point out that your attorney Matt
2162

01:54:24,800 --> 01:54:25,200

said.

2163

01:54:26,300 --> 01:54:29,900

That the second son just should say deemed

2164

01:54:29,900 --> 01:54:32,600

substantially complete as you pointed out Mr. Mayor not

2165

01:54:32,600 --> 01:54:35,400

just deemed complete which is the language in that sentence

2166

01:54:35,400 --> 01:54:38,800

and that deemed substantially complete is consistent

2167

01:54:38,800 --> 01:54:41,700

with the Idaho case law deemed complete.

2168

01:54:42,600 --> 01:54:45,200

I think but let the different

2169

01:54:45,200 --> 01:54:49,200

meeting. Let's just clarify that because is it

2170

01:54:48,200 --> 01:54:51,400

deemed substantially complete or deemed complete?

City Attorney Comments

2171

01:54:54,400 --> 01:54:57,300

Is Matt still online? Yeah me mayor. Council

2172

01:54:57,300 --> 01:55:00,300

Morgan. I can take this one mayor. So the the

2173

01:55:00,300 --> 01:55:03,200

term substantially complete would be what we

2174

01:55:03,200 --> 01:55:06,300

would use going forward. The key

2175

01:55:06,300 --> 01:55:09,800

is based on some Idaho case law if an

2176

01:55:09,800 --> 01:55:12,700
application has more or less submitted everything
2177

01:55:12,700 --> 01:55:15,700
it needs to and its application fee. That's what's
2178

01:55:15,700 --> 01:55:18,300
termed substantially complete at times.
2179

01:55:18,300 --> 01:55:21,200
It's about Matt. Just just be clear.
2180

01:55:21,200 --> 01:55:24,800
Are you saying we using the words substantially complete we
2181

01:55:24,800 --> 01:55:27,800
will use substantially complete for the
2182

01:55:27,800 --> 01:55:30,700
third reading. Yes. Yeah. So does
2183

01:55:30,700 --> 01:55:33,800
that help clarify it that does help clarify it perfect. Sorry
2184

01:55:33,800 --> 01:55:36,600
for that misunderstanding that okay. So
2185

01:55:36,600 --> 01:55:39,400
substantially complete will be in there is anything
2186

01:55:39,400 --> 01:55:42,500
else? Sorry Jim you wanted to say that was
2187

01:55:42,500 --> 01:55:46,600
just okay anything else any
2188

01:55:45,600 --> 01:55:48,900
other comments in the room? Are they
2189

01:55:48,900 --> 01:55:50,500
any comments online? No?
2190

01:55:52,100 --> 01:55:55,300
Okay. All right, then I will
2191

01:55:55,300 --> 01:55:57,200
close public hearing and then
2192

01:55:59,700 --> 01:56:03,800
turn it over to council for
2193

01:56:03,800 --> 01:56:06,300
any comments you may have again this
2194

01:56:06,300 --> 01:56:07,200
process has.
2195
01:56:07,900 --> 01:56:10,800
Been quite exhaustive. We went initially
2196
01:56:10,800 --> 01:56:13,600
with an emergency ordinance a number of
2197
01:56:13,600 --> 01:56:16,200
months back which and now
2198
01:56:16,200 --> 01:56:19,800
we're at an interim or so, it's been in the public domain for quite
2199
01:56:19,800 --> 01:56:22,500
some time it and so had
2200
01:56:22,500 --> 01:56:25,600
a chance to to review many aspects
2201
01:56:25,600 --> 01:56:26,100
of this.

Mayor Bradshaw Comments

2202
01:56:27,500 --> 01:56:30,800
So with that clarification that legal clarification
2203
01:56:30,800 --> 01:56:33,900
which does
2204
01:56:33,900 --> 01:56:37,200
shift, you know, the what is
2205
01:56:36,200 --> 01:56:39,800
grandfathered and what is not a little
2206
01:56:39,800 --> 01:56:40,000
bit.
2207
01:56:42,100 --> 01:56:46,100
I want to now turn it over to council for any other comments or thoughts
2208
01:56:45,100 --> 01:56:49,400
or questions. You may have of Morgan or Suzanne
2209
01:56:48,400 --> 01:56:51,200
or Jade or anyone else or the
2210
01:56:51,200 --> 01:56:51,300
team.

EXHIBIT 8

Mac Moriarty

From: Matthew A. Johnson <mjohnson@WHITEPETERSON.com>
Sent: Tuesday, October 11, 2022 11:07 AM
To: Jim Laski
Subject: RE: Ketchum Ordinance 1234

Jim –

I checked in with Morgan. She said she's currently reviewing all the resubmitted items this week and will be issuing a completeness letter based on that submittal.

For the Council meeting next Monday there will be a clearer revised version of the interim ordinance that clarifies the distinction that was discussed at the last meeting in response to your comments. That revision will make clear vesting is based on an application being "substantially complete."

So I believe in combination those two items will address your request.

Matt

Matthew A. Johnson
WHITE PETERSON GIGRAY & NICHOLS, P.A.
Canyon Park at the Idaho Center
5700 E. Franklin Rd., Ste. #200
Nampa, ID 83687-7901
208.466.9272 (tel)
208.466.4405 (fax)
mjohnson@whitepeterson.com

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From: Jim Laski <jrl@lawsonlaski.com>
Sent: Tuesday, October 11, 2022 9:42 AM
To: Matthew A. Johnson <mjohnson@WHITEPETERSON.com>
Subject: RE: Ketchum Ordinance 1234

Hi Matt – would it be possible to get conformation that my client's application (at 260 N 1st Ave) is substantially complete and will be reviewed under the presently existing ordinance, rather than the proposed new ordinance 1234? I written statement to that effect would be much appreciated.

Thank you
Jim

LAWSON LASKI CLARK

JAMES R. LASKI

Lawson Laski Clark, PLLC
675 Sun Valley Road, Suite A
PO Box 3310
Ketchum, ID 83340

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From: Matthew A. Johnson <mjohnson@WHITEPETERSON.com>
Sent: Monday, October 03, 2022 11:06 AM
To: Jim Laski <jrl@lawsonlaski.com>
Subject: RE: Ketchum Ordinance 1234

Jim –

We will be tweaking the applicability language; I'm still working on the specifics. With respect to your clients' project specifically, the practical effect is that your preliminary design review application (which it sounds like is substantially completed) would be vested under the current ordinance – not the interim.

Matt

Matthew A. Johnson
WHITE PETERSON GIGRAY & NICHOLS, P.A.
Canyon Park at the Idaho Center
5700 E. Franklin Rd., Ste. #200
Nampa, ID 83687-7901
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From: Jim Laski <jrl@lawsonlaski.com>
Sent: Saturday, October 1, 2022 6:42 AM
To: Matthew A. Johnson <mjohnson@WHITEPETERSON.com>
Subject: RE: Ketchum Ordinance 1234

Hi Matt –

I was hoping I might get some feedback regarding your thoughts on the proposed language relating to the applicability of the new ordinance on pending applications before Monday's meeting as we discussed. Please let me know where you stand so I can prepare my comments for city council.

Thanks
Jim

EXHIBIT 9



City of Ketchum
Planning & Building

October 17, 2022

Thielsen Architects
Attn: Dave Thielsen - Architect

Galena Engineering
Attn: Matt Smithman – Civil Engineer

[Sent via email]

Re: 260 N 1st Ave – Preapplication Design Review - Completeness Review

Dear Mr. Thielsen and Mr. Smithman,

The City of Ketchum Planning and Building Department received your resubmittal of the preapplication Design Review application on October 10, 2022. The resubmittal was in response to comments issued by city staff on September 16, 2022. At this time, the application has been deemed complete and will be scheduled for the next available hearing. Please see below for comment resolution documentation and additional comments from the city's water department.

Planning Department

General Zoning Comments

1. *Comment:* Based on the slope of the lot, it is correct to apply the term “basement” to the project and remove that square footage from the building. However, staff will need to verify that the methodology used for establishing what area falls under the definition of “basement” is correct.
 - a. *Required Action:* Please provide a diagram in schematic or plan and section views showing how the invisible plane was delineated and what square footage is included in the “basement” definition and what constitutes the 954.16 SF of gross floor area remaining.
 - b. *Staff Response: Comment resolved. Staff reviewed the overlap of the “Basement” definition with the “Underground Parking” definition and have determined that the calculation conducted by the applicant is correct.*
2. *Comment:* The Gross Floor Area (GFA) and Net Floor Area (NFA) calculations on Sheet A1.1 don't appear to match the net and gross SF outlined on Sheets A1.2-A1.4. For the ground level, the gross floor area on Sheet A 1.1 and A1.2 indicate a net floor area of 5,680 SF, however it is unclear what that square footage includes. Also, for Sheets A1.3 and A1.4, the GFA outlined is consistent with Sheet A1.1 but it is unclear what constitutes the NFA for these levels and what has been removed since the stair tower and elevator have already been removed.
 - a. *Required Action:* Please provide Floor Area diagrams for each floor that outlines what is included in the GFA and what is not. The best way to show this is by using shading or coloring to color code each area. In the diagrams, please also include square footages.
 - b. *Staff Response: Comment Resolved.*
3. *Comment:* Sheet A1.1 shows GFA of the building, however, specific square footage of each unit and each space on the ground floor is necessary to verify parking requirements for all uses.
 - a. *Required Action:* Please revised Sheet A1.1 to include a summary of square footages by use that outlines each residential unit, parking, storage, The Commons, and the Commons Court and Event Space
 - b. *Staff Response: Comment Resolved.*

4. *Comment:* The cover letter submitted as part of the project outlines that the intent of the ground floor Commons and Commons Court and Event Center is to be a “gathering place...which would be used for fundraising and philanthropic events”. The letter does not address the use of the space when those events are not happening. Staff presumes this space would be for the benefit of the residents, family and guests but not the public, however, this is a deduction based on the cover letter and clarification is necessary. Staff is also unclear whether the fundraising and event space is only the Commons Court and Event Space, or if it includes the Commons as well. Additionally, Sheet A1.1 outlines under “Required Parking” that the space is classified as “Food Service”. Staff does not believe the proposed use meets the definition of food service, but rather an “Assembly, place of”. The floor plans do not show a location within the space where food is being prepared. This is a key element of a “Food Service” use. The definitions of referenced uses are noted below:

Food service: An establishment where food and drink are prepared, served and consumed on site with associated outdoor dining, or distributed to customers through take out, delivery or catering. Typical uses include, but are not limited to restaurants, cafes, delis, catering services and brewpubs that do not distribute beer produced for off-site consumption.

Assembly, place of: The use of land for a meeting place where persons gather together for purposes of attending civic, social, religious functions, recreational events or entertainment performances on a regular or recurring basis including, but not limited to, religious institutions, banquet facilities, funeral homes, theaters, conference centers, stadiums, or indoor or outdoor recreational facilities, but excludes a "cultural facility" as defined by this chapter. A gathering of less than 25 persons shall not be considered a place of assembly provided the gathering is accessory and incidental to the principal use.

Assembly uses require the approval of a Conditional Use Permit in the CC-2 zone district to ensure any impacts from events held in the space are mitigated through certain conditions.

- a. Required Action:* Please provide an expanded narrative as to the function of the ground floor space and justification for its classification as Food Service. Please provide clarity on the function of the space when not being used for events. Please also provide clarity on what portion of the space will be used for events. Once additional information is provided, staff will make a determination on the use proposed.
- b. Staff Response: Comment Resolved.*
5. *Comment:* It generally appears that the project is in conformance with setback requirements, however, the methodology used appears that there may be area where square footage is calculated toward both facades’ setback square footage, which is not the correct methodology. In general, square footage should be counted toward one side other the other using reasonable extensions of the building façade to delineate space. Please see the attached example from another project for reference. The front façade along 1st Ave had a portion of the building on the south end significantly set back from the street. In this instance, the main edge of the building façade was carried to the property line to delineated what was included in the setback square footage (area in black). As you can see, the two setback calculations do not overlap (black and red areas).
- a. Required Action:* Please revise Sheets A1.2-1.4 delineate the square footage calculation with independent calculations for each façade. Staff has provided an attached draft of how the calculations should be delineated for the ground floor.
- b. Staff Response: Comment Resolved.*
6. *Comment:* Sheet A7 outlines the proposed building height at the front and the rear of the building and the guardrail that extends above the 42-foot height maximum. Although the code reference in Note 10 is correct in relation to height, the city categorizes “perimeter walls that enclose roof top decks that exceed the maximum building height limit as a “fixed amenity” that must be set back 10 feet from the building façade per KMC 17.12.040. Built-in hot tubs are also considered “fixed amenities” that must be set back. It is unclear from Sheet A6 what the setback is to the hot tub from the building façade at that location.

- a. Required Action:* Please revise the plans to reflect the required setback for all roof top decks. Please also revise Sheet A6 to provide a dimension from the building façade to the hot tub location.
 - b. Staff Response: Comment Resolved.*
7. *Comment:* The 3-foot setback along the alley shows wood fencing to screen the transformer and condensers, electric meters/CT panel, and raised landscape bed. The 3-foot setback is intended to be a clear zone to assist in snow management operations in the winter, therefore these items need to be relocated from within the 3 feet setback along the alley.
 - a. Required Action:* Please revise the site plans to reflect revisions as noted above to avoid future unintended damage of property due to snow management operations. Please also provide a letter from Idaho Power approving the location of the transformer with associated clearances and proposed electric meters.
 - b. Staff Response: Comment Resolved.*
8. *Comment:* Depending on final use determination for the ground floor space, the dumpster and one recycling bin will not likely be adequate for the proposed use when special events occur. Once a use determination is made for the ground floor space, a letter of approval of the garbage service based on the use will be required from Clear Creek Disposal.
 - a. Required Action:* This comment is for information only; no action is required at this time. Upon use determination, please provide a letter from Clear Creek Disposal approving the garbage configuration.
 - b. Staff Response: Comment Resolved.*
9. *Comment:* Sheet A2 shows the dimensions of the parking garage area including dimensions of the parking spaces and width of the drive aisle, however, the dimensions of the 5 spaces on the Sun Valley Rd side of the parking area are noted to not meet minimum requirements and the drive aisle width does not appear to meet the 24-foot minimum between the stair and bump out where the "Trolley" area is noted. Drive aisle between stairwell and trolley/bump out area needs to also be 24 feet. Compact spaces are only permitted with certain types of uses and only when the total number of required spaces is 10 or more. If parking is proposed, it must meet the minimum dimensional standards.
 - a. Required Action:* Please revise the ground floor layout to demonstrate that all parking spaces meet the minimum dimensional standards and that the drive aisle width of 24 feet can be met for the full length of the drive aisle.
 - b. Staff Response: Comment Resolved.*
10. *Comment:* Construction Management Plans (CMP) are no longer required at the time of design review. Staff has not reviewed the submitted CMP. Comments on the CMP are provided at the time of building permit application for a project.
 - a. Required Action: No action required at this time, this comment is for information only.*
11. *Comment:* Sheets EL5-8 show the foot candles at the property boundary, however, the sheets do not show foot candles outside the property line. Staff is concerned that there may be light trespass across the property boundary into the public right-of-way as there are numerous locations along the perimeter that have medium to high foot candle measures. For instance, foot candles measuring 1.0 and 2.8 adjacent to the north property boundary and alley measurements of 9.1 and 8.8. There may be no light trespass across the property boundary per KMC 17.132.030 stating "All existing and/or new exterior lighting shall not cause light trespass and shall protect adjacent properties from glare and excessive lighting." Figure 1 in the KMC only refers to light emitting from inside buildings, not exterior lighting.
 - a. Required Action:* Please revise the photometric study to include foot candle measurements just outside the property boundary for verification there is no light trespass. Please note that all exterior lighting including planter, tree, and water feature lights should be included in the calculations.
 - b. Staff Response: Comment Resolved.*
12. *Comment:* Per KMC 17.132.030.F "Uplighting. Uplighting is prohibited in all zoning districts, except as where permitted in this chapter." Staff does not believe that the "Lip of Planter" lighting or the water

feature lighting fully complies with the limitation on uplighting. As outlined in KMC 17.132.030.H.2 “All exterior lighting fixtures shall be full cutoff fixtures with the light source fully shielded, except as exempted in this chapter.” As such, light fixtures must be fully shielded as to not cast light up or sideways, always casting light down as illustrated in Figure 2. For instance, the “Under Cap Lighting” is compliant as it is fully shielded based on the image.

- a. *Required Action:* Please revised the lighting proposed to comply with the dark sky compliant requirements and fixture guidelines.
 - b. *Staff Response: Comment Resolved.*
13. *Comment:* Stair tower lighting that must remain consistently illuminated 24 hours per day due to building code requirements must be mitigated with glazing or other treatments to windows that limit the amount of light emitting from the building overnight.
- a. *Required Action:* Please provide clarity on whether any glazing is proposed for the central stair tower and whether consistent light will emit from this feature in all hours of the evening.
 - b. *Staff Response: Comment Resolved.*
14. *Comment:* The street light illumination levels and placement of lights may not be in the correct location based on current discussions with the City Engineer and Planning departments.
- a. *Required Action:* As this is a preapplication design review. No further action on street light location is required at this time, however, final street light location will be determined at the time of final design review if the project moves forward.
 - b. *Staff Response: Comment Resolved.*

Design Review Comments

The following comments are provided for consideration by the applicant. Revisions to the plans are not required, but recommended, unless otherwise noted. If revisions are not made, the following comments will be provided to the Planning and Zoning Commission for their consideration and feedback.

1. *Comment:* Per KMC 17.96.060.B.2 and 3, “2. For nonresidential portions of buildings, front building facades and facades fronting a pedestrian walkway shall be designed with ground floor storefront windows and doors with clear transparent glass. Landscaping planters shall be incorporated into facades fronting pedestrian walkways.” and “3. For nonresidential portions of buildings, front facades shall be designed to not obscure views into windows.” These two standards serve to demonstrate the importance of creating an active and interesting pedestrian environment. Landscaping is encouraged, but not if it obscures views into windows. Staff has concerns that the ground floor façade of the building along Sun Valley Rd and the portion of N 1st Ave closest to Sun Valley Rd do not meet the intent of this standard as the architectural design of the project does not engage with pedestrians and serves more to privatize the space for residents and guests that create an environment that is active and interesting for pedestrians. More specifically, the landscape planter boxes that wrap the corner where the outdoor area is are 3-feet in height and the proposed plantings in the landscape boxes are shrubs and hedge like species that can grow quite tall over time. Additionally, the façade facing Sun Valley Rd has minimal storefront characteristics with transparent glass. Staff understands that the interior program of the building is driving the façade configurations, however, the proposed façade on the Sun Valley Rd side of the project does not meet the city’s design review objectives. Sun Valley Rd is one of our more heavily traveled corridors by pedestrians. This intersection is the location of two new projects in recent years that intensely serve to engage pedestrians with the Maude’s retail and coffee shop on one corner and a new office building on another that has well-articulated store front facades on both street frontages. The Commission will be keenly focused on continuing the design success of the other projects as this is such an important intersection within the downtown.
- a. *Required Action:* Staff recommends the applicant consider revising the landscape planter and plantings proposed around the outdoor gathering area to create a more engaging, less privatize program for the outdoor space. Additionally, staff recommends the applicant evaluate ways to integrate additional transparency onto the Sun Valley Rd side of the project. Staff recommends an evaluation of bringing the ground floor uses around to the Sun Valley Rd side of the building.

- b. *Staff Response: No further action at this time, staff will highlight the comment to the Planning and Zoning Commission for discussion.*
2. *Comment:* Per KMC 17.96.060.B.1 “Facades facing a street or alley or located more than five feet from an interior side property line shall be designed with both solid surfaces and window openings to avoid the creation of blank walls and employ similar architectural elements, materials, and colors as the front facade.” The Commission has paid special attention to interior walls that are exposed due to adjacent buildings that are of smaller scale than the proposed project. This is especially important when adjacent buildings are one-story structures adjacent to a three-story structure. Although staff believes the setback nature of the project mitigates some of these concerns, staff does have concern about the lack of material variation on the east elevation shown on Sheet A8. Include the outline of the adjacent buildings on the elevations for context
- a. *Required Action:* As part of the resubmittal materials, please revise the elevation on Sheet A8 to show the outlined of the adjacent building for reference. Staff recommends the applicant consider some material variations to break up the east elevation portions of the building that are exposed.
- b. *Staff Response: No further action at this time, staff will highlight the comment to the Planning and Zoning Commission for discussion.*

As a follow-up to the completeness letter issued on September 16, 2022, staff received confirmation from the water department reviewed the proposed plans and provides the following comments:

- A fire line and two separate services off the fire line will be required. The services must be engineered for sizing.
- The project is also required to abandon the existing service in the alley behind the Durance training building.

No action is required at this time, these comments are for informational purposes.

Please do not hesitate to email or call should you have any questions.

Sincerely,



Morgan Landers, AICP
Senior Planner
City of Ketchum Department of Planning and Building

EXHIBIT 10

On Tue, Oct 18, 2022 at 4:08 PM Abby Rivin <ARivin@ketchumidaho.org> wrote:

Hey Carson and Broderick,

The City Council approved the third reading of Interim Ordinance 1234 during their meeting yesterday. The Perry Building project may be vested under the current zoning ordinance provided that you've filed the final Design Review application for the project and paid the required fees within 180 calendar days from the date the Planning and Zoning Commission reviewed the Pre-Application pursuant to section 3 of the interim ordinance.

Section 3. Developments subject to Design Review approval pursuant to KMC 17.96 – Design Review or 17.104 – Mountain Overlay 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 Planning and Zoning Commission reviewed the Pre-Application for the Perry Building project and moved to advance the project to final Design Review during their special meeting on August 23rd, 2022. You will need to file a complete Design Review application and pay all required fees within the 6-month window no later than February 17th, 2022 in order to be vested under the current zoning ordinance. If you file the complete Design Review application and pay the required fees within this 6-month window, then the Perry Building project would be vested under the current zoning ordinance and not subject to the interim ordinance standards.

Please don't hesitate to holler if you have any questions.

Have a wonderful rest of your week!

Best,

Abby

ABBY RIVIN, AICP | CITY OF KETCHUM

Senior Planner

P.O. Box 2315 | 191 5th Street W | Ketchum, ID 83340

office: 208-726-7801 | direct: 208-727-5082

arivin@ketchumidaho.org | www.ketchumidaho.org

EXHIBIT 11

From: [Abby Rivin](#)
To: [Chris Ensign](#)
Subject: RE: 4th & Main Mixed-Use Building Design Review, Lot Consolidation, & Condominium Subdivision Preliminary Plat
Date: Tuesday, October 18, 2022 3:53:08 PM
Attachments: [image001.png](#)

Hey Chris,

I reviewed the revised project plans that were submitted on Saturday, October 15th.

The gross floor area calculation discrepancy on Sheet CD1.1 has been corrected. Sheet CD1.0 has been revised but the dimensions for the the proposed off-street parking spaces have been removed. The project plans must provide the stall dimensions for all parking spaces provided on site to satisfy the project's parking demand. Minimum dimensions for parking stalls are specified in Ketchum Municipal Code §17.125.030.A. 90-degree-angle spaces must be a minimum of 9 by 18 feet.

One other item to address is that the site photometric plan on Sheet E101A still includes both the streetlights in the public ROW and the exterior lighting fixtures proposed for the mixed-use building. You've submitted a photometric study prepared by MH companies for the streetlights. We'll continue to work through the streetlight placement and illuminance levels prior to the public hearing. The photometric study for the mixed-use building should only show the exterior lighting fixtures proposed for the mixed-use building without the streetlights. The photometric study on Sheet E101A shows significant light trespass over the rear property line (2.3 footcandles maximum), which is out of compliance with the City's Dark Skies Ordinance. The photometric study for the exterior lighting fixtures proposed for the 4th & Main Mixed-Use Development must show zero footcandles at all property boundaries to demonstrate that the proposed lighting complies with the City's standards prohibiting light trespass.

The City Council approved the third reading of Interim Ordinance 1234 during their meeting yesterday. You are vested under the current zoning ordinance pursuant to Sections 3 of the interim ordinance.

Section 3. Developments subject to Design Review approval pursuant to KMC 17.96 – Design Review or 17.104 – Mountain Overlay 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 Planning and Zoning Commission reviewed the Pre-Application Design Review for the 4th & Main Mixed-Use Building and moved to advance the project to final Design Review during their regular meeting on May 10th, 2022. You filed a complete Design Review application and paid the required fees within the 6-month window, a little over 3 months after the Commission reviewed the Pre-Application for the project. Since you filed your complete Design Review application and paid the required fees within the 6-month window, your project is vested under the current zoning ordinance and is not subject to the interim ordinance standards.

Please don't hesitate to email or call if you have any further questions.

Best,

Abby

ABBY RIVIN, AICP | CITY OF KETCHUM

Senior Planner

P.O. Box 2315 | 191 S^{27th} Street W | Ketchum, ID 83340

office: 208-726-7801 | direct: 208-727-5082

arivin@ketchumidaho.org | www.ketchumidaho.org

From: Abby Rivin

Sent: Wednesday, October 12, 2022 4:03 PM

To: Chris Ensign <chris@solsticedev.com>

Subject: 4th & Main Mixed-Use Building Design Review, Lot Consolidation, & Condominium Subdivision Preliminary Plat

Hi Chris,

Sorry for my delay in following up with you—it has been one of those weeks where I've been in a marathon of meetings.

I reviewed your revised submittal and have just two minor clean-up items for you all address in order to certify your applications as complete.

It looks like a dimension note may have been added to Sheet CD1.0 of the project plans in response to Comment No. 3 of the completeness review letter, but it is challenging to read. Please clearly specify the dimensions of the off-street parking spaces so that it is easy to read.

The Summary Table on Sheet CD1.1 indicates that proposed FAR is 2.18 (24,003 gross square feet/11,000 square-foot-lot-area). The calculations noted above this Summary Table indicate that the proposed FAR is 2.07 (23,905 gross square feet/11,000 square-foot-lot-area). This discrepancy needs to be resolved.

Your applications will be certified as complete once you've resolved these two items, but before the public hearing for the project there are a couple of items I'd like to work with you and your design team to address—streetlights and meeting with Mountain Rides to discuss improvements for the bus stop along Main Street. I've also got some more comments and recommendations related to more subjective Design Review criteria that I'd like to review with you before the public hearing for the project. I'll give you a call to chat about all of this further.

Sorry again for my delay!

Best,

Abby

ABBY RIVIN, AICP | CITY OF KETCHUM

Senior Planner

P.O. Box 2315 | 191 5th Street W | Ketchum, ID 83340

office: 208-726-7801 | direct: 208-727-5082

arivin@ketchumidaho.org | www.ketchumidaho.org

EXHIBIT 12



CITY OF KETCHUM
MEETING MINUTES OF THE
PLANNING AND ZONING COMMISSION
Tuesday January 24, 2023

CALL TO ORDER: (00:00:45 in video)

Neil Morrow called to order at 4:30 p.m.

Roll Call:

Neil Morrow

Susan Passovoy

Brenda Moczygemba

Tim Carter

Spencer Cordovano

Also Present:

Morgan Landers – Director of Planning and Zoning

Dan Goodman – Legal Counsel or City of Ketchum

Abby Rivin – Senior Planner

Adam Crutcher – Associate Planner

Paige Nied – Associate Planner

Heather Nicolai – Planning Technician

COMMUNICATIONS FROM THE COMMISSIONERS:

None

CONSENT AGENDA: (00:01:20 in video)

1. **ACTION ITEM:** Approval of the January 10, 2023 Minutes (00:01:35 in video)

Motion: Motion made by Brenda Moczygemba to approve the January 10, 2023 Minutes;
Seconded by Spencer Cordovano. (video recording issues)

Ayes: Neil Morrow, Susan Passovoy, Brenda Moczygemba, Tim Carter, Spencer Cordovano

Nays: None

PUBLIC HEARING: (00:01:45 in video)

2. **ACTION ITEM:** Recommendation to conduct a public hearing, review, and provide feedback on the Design Review amendment and Development Agreement amendment for the Appellation Sun Valley hotel project at 300 E River Street.

- Staff Report: Morgan Landers – Senior Planner (00:02:03 in video)
- Applicant Team

- Architect: John C. Davis, AIA – Hornberger + Worstell, Inc. (00:23:45 in video)
- Landscape Architect: Rob King – Landwork Studio (00:32:05 in video)
- Architect: John C. Davis, AIA – Hornberger + Worstell, Inc. (00:37:18 in video)
- Louis Kaufman – Architect, de Reus Architects (00:47:10 in video)
- Architect: John C. Davis, AIA – Hornberger + Worstell, Inc. (00:55:40 in video)
- Commission Questions/Comments for Applicant: (00:56:20 in video)
- Public Comment (01:05:29 in video)
 - No public comment
- Commission Deliberations, feedback & direction for applicant: (01:06:00 in video)
- Applicant requested recess to determine next steps (01:50:15 in video)
- Meeting Resumed (01:50:23 in video)
- Morgan Landers – Senior Planner (01:50:30 in video)
- Applicant/Managing Member: Jack E. Bariteau, Jr. (01:50:55 in video)
- Commission Responses to Applicant (02:02:05 in video)
- Legal Council for Applicant: Ed Lawson (02:05:03 in video)
- Applicant/Investor: Andy Blank (02:11:58 in video)

Commission recommended to continue the Appellation Sun Valley hotel project, located at 300 E River Street, design review and development agreement to a special hearing to Tuesday, 1/31/23. (02:20:40 in video)

Motion: Motion made by Susan Passovoy, requesting to continue this to a special hearing to Tuesday, 1/31/23. Second by Tim Carter (02:20:50 in video)

Ayes: Neil Morrow, Tim Carter, Spencer Cordovano, Brenda Moczygemba, Susan Passovoy

Nays: None

3. **RECESS:** 15 Minute Break (02:21:18 in video)

4. **ACTION ITEM:** Recommendation to review and provide feedback on the Pre-Application Design Review application for the Sawtooth Serenade project at 260 N 1st Ave. (02:21:35 in video)

- Staff Report: Morgan Landers – Senior Planner (02:21:58 in video)
- Applicant Team
 - Legal Council for Applicant: Jim Laski (02:21:58 in video)
 - Architect: David Thielsen, AIA – Thielsen Architects (02:44:35 in video)
- Commission Deliberations, feedback & direction for applicant: (03:31:20 in video)
- Architect: David Thielsen, AIA – Thielsen Architects (03:56:45 in video)
- Morgan Landers – Senior Planner (04:01:00 in video)
- Commission Comments (04:02:30 in video)

Commission recommended to advance the Sawtooth Serenade project at 260 N 1st Ave to Design Review. (04:05:15 in video)

Motion: Motion made by Susan Passovoy, to advance the Sawtooth Serenade project at 260 N 1st Ave to Design Review. Second by Tim Carter (04:05:47 in video)

Ayes: Neil Morrow, Tim Carter, Brenda Moczygemba, Susan Passovoy

Nays: Spencer Cordovano

NEW BUSINESS: (04:06:07 in video)

None

ADJOURNMENT:

Motion to adjourn at 9 pm (04:06:15 in video)

Motion made by Neil Morrow to adjourn the meeting; Seconded by Spencer Cordovano.

Ayes: Neil Morrow, Susan Passovoy, Tim Carter, Spencer Cordovano, Brenda Moczygemba

Nays: None



Commissioner Neil Morrow



Morgan Landers – Director of Planning & Building

EXHIBIT 13



City of Ketchum
Planning & Building

STAFF REPORT
KETCHUM PLANNING AND ZONING COMMISSION
REGULAR MEETING OF JANUARY 24, 2023

PROJECT: Sawtooth Serenade

FILE NUMBER: P22-056

APPLICATION: Pre-Application Design Review

PROPERTY OWNER: McCaw Nell Elizabeth Trustee, Distrustful Ernest Revocable Trust U/A/D 02/03/16

REPRESENTATIVE: Dave Thielsen, Thielsen Architects (Architect)

LOCATION: 260 N 1st Ave (KETCHUM TOWNSITE LOT 5A BLK 38)

ZONING: Community Core – Subdistrict 2 Mixed Use (CC-2)

OVERLAY: None

REVIEWER: Morgan Landers, AICP – Director of Planning and Building

NOTICE: As a courtesy, a public meeting notice for the project was mailed to all owners of property within 300 feet of the project site and all political subdivisions on January 4, 2023. The notice was published in the Idaho Mountain Express on January 4, 2023. A notice was posted on the project site and the city’s website on January 17, 2023. Story poles were verified on the subject property on January 17, 2023.

INTRODUCTION AND BACKGROUND

The applicant is proposing a 23,942 gross square foot multi-family development located at 260 N 1st Ave (the “subject property”) in the Community Core Subdistrict 2 – Mixed Use (CC-2) zone district. The project includes two residential dwelling units, ground floor private recreation space, garage parking for five vehicles, and storage for the two units. The subject property is three vacant Ketchum Townsite

lots totaling 16,507 SF on the east corner of N 1st Ave and Sun Valley Rd (Figure 1) south of the new 1st and Sun Valley office building, diagonal from the mixed-use building where Maude's is located.

The project proposes to take advantage of the Floor Area Ratio (FAR) bonus in exchange for community housing, mitigating the additional floor area by making a community housing in-lieu payment of \$568,804. The total FAR for the project is 1.45, where 1.0 is permitted by right. The application is not subject to Interim Ordinance 1234 as the application was deemed complete prior to the effective date of the ordinance. Staff has provided an analysis (Attachment D) of how the project would conform to the interim ordinance for your reference and information only.

Figure 1: Subject Property 260 N 1st Ave



The subject property is 16,507 square feet, three Ketchum Townsite lots. Per Ketchum Municipal Code (KMC) 17.96.010.C.1, new developments on lots totaling 11,000 square feet require a pre-application design review with the Planning and Zoning Commission. The Preapplication review is an opportunity for the Commission to give the applicant feedback on the proposed project. This preliminary review allows the Commission to ask questions, identify code compliance issues or design concerns, and provide recommendations to the applicant.

ANALYSIS

Per KMC 17.96.050.A. *Criteria*. The Commission shall determine the following before approval is given for design review:

1. The project does not jeopardize the health, safety or welfare of the public.
2. The project conforms to all applicable standards and criteria as set forth in this chapter, this title, and any other standards as adopted or amended by the City of Ketchum from time to time.

Criteria 1 evaluates the project's impact on the community through its alignment with the goals and policies of the city's currently adopted plans as related to public health, safety, and welfare. Criteria 2 above relates to the project's conformance with the city's zoning ordinance such as permitted uses, dimensional limitations, parking, dark skies, and the design review improvements and standards listed in 17.96.060 and 17.96.070. During department review, city staff reviewed the project against the city's adopted plans (criteria 1) and for all applicable zoning requirements including conformance with all applicable design review standards outlined in KMC §17.96.060 – *Improvements and Standards* and KMC §17.96.070 – *Community Core (CC) Projects*.

In the staff report below, staff has provided an overview of items the Commission may want to provide feedback on regarding the project and its conformance with the criteria. Through the preapplication and final design review process, the Commission will need to answer the questions of 1) does the

project jeopardize the health, safety, or welfare of the public and does the project meet all of the applicable standards and criteria of the municipal code.

Criteria 1: Health, Safety, and Welfare of the Public

The 2014 Comprehensive Plan outlines 10 core values that drive our vision for the future including a strong and diverse economy, vibrant downtown, community character, and a variety of housing options. The built environment within the downtown plays a key role in materializing these values to achieve the city's vision. The 2014 Comprehensive Plan designates the future land use for the subject property as "mixed-use commercial" where, according to the plan, "New structures in existing mixed-use areas should be oriented to streets and sidewalks and contain a mix of activities. Mixed-use development should contain common public space features that provide relief to the density and contribute to the quality of the street." Primary uses include offices, medical facilities, health/wellness-related services, recreation, government, residential, and services.

These desired qualities of mixed-use commercial stated in the plan directly relate to how new developments interface with the street and enhance the health, safety, and welfare of the public by supporting a vibrant downtown and a strong economy. The comprehensive plan acknowledges that Ketchum has high-quality public spaces including streets and plazas that contribute to our current success and, as noted above, new mixed-use developments should contain public spaces that provide relief from the bulk and mass of structures that contain higher densities. Although this is a low-density development, the bulk and mass of the project is that of a higher density development and should seek to achieve the same design objectives. As outlined further below in this report, the design of the outdoor space seems to be closed off and privatized. Staff acknowledges the space provides value to the quality of the street due to the increased landscaping and setback of the building, however, the applicant should consider designing the space to be more open to the street or making the space available to the public as there is extensive private space on decks and patios throughout the project.

Policy CD-1.3 of Chapter 4 of the comprehensive plan states that "Infill and redevelopment projects should be contextually appropriate to the neighborhood and development in which they occur. Context refers to the natural and manmade features adjoining a development site; it does not imply a certain style." As noted below, staff has concerns about the project's southeast facing façade as the adjacent property has only one-story structures with a single material blank wall. The transition between buildings is a key design element and has the potential to impact the perceived cohesiveness of the downtown and can impact the way residents and visitors experience a place.

The 2022 Housing Action Plan (HAP) emphasizes the importance of increased housing supply for long-term residents in Ketchum. The comprehensive plan identifies the downtown as being an appropriate place for that density due to proximity of jobs and transportation options as a direct correlation to vibrancy of the downtown and support of a strong economy. Goal #1 of the HAP is to produce and preserve housing. Ketchum needs to build, preserve, or convert approximately 100 residential housing units a year to keep up with demand. That demand is for households in all income categories. The subject property is three Ketchum Townsite lots that are already consolidated. The siting of two residential dwelling units on the subject property is an underutilization of a key piece of property in Ketchum's downtown and has the potential to impact downtown vibrancy in this area as the subject property is located on a block that is currently redeveloping with many active spaces and uses. As noted below, the building is somewhat closed off to the public at the ground floor on the corner which

is out of context with the rest of the intersection. There are design opportunities that can be considered to encourage better interface between the building and the public realm and provide additional activation on a key corner.

Finally, if the community is not able to produce the amount of housing needed, the community's health, safety, and welfare is challenged. Not only is the vibrancy of our downtown and our economy in jeopardy, but we also face increased severity of substandard living conditions from overcrowding and we will continue to see the number of community members who are unhoused increase. Research shows the negative impacts of housing instability for families and individuals. Housing instability means that the family or individual is at risk of displacement or has experienced eviction, frequently moves in one year, and homelessness. One study by Boston Medical Center on 22,324 families confirms that housing instability has physical and mental health impacts on affected individuals.¹ It increases the likelihood of depression and suicide in adults and disrupts development and immune system responses in children, increasing their likelihood of hospitalization. Overcrowding increases the risk of spreading infectious diseases.² At a community level, those with long commutes are less able to actively participate in the community or be productive at work, and see physical health declines.³

Criteria 2: Applicable Standards and Criteria

Zoning and Dimensional Standards

In general, the property appears to be in conformance with the zoning and dimensional standards. Final confirmation of all zoning and dimensional standards will be conducted at the time of final design review. Below are specific items of note that are uniquely applicable to this project.

Front Lot Line - Per KMC 17.08.020, the front lot line of corner lots is the shorter street frontage unless otherwise determined by the administrator based on the orientation and layout of the lot and surrounding neighborhoods. Based on staff review of the orientation of the lot and the surrounding neighborhood, staff determined that it be more appropriate for the front lot line to be along N 1st Ave rather than Sun Valley Rd. This is because most of the developed lots in the immediate vicinity are single or double Ketchum Townsite lots that orient to the Avenues rather than the Streets in the downtown.

Building Height - Building height in the Community Core is calculated differently than in the other zone districts within the city. Per KMC 17.08.020, building height in the CC is calculated based on the average grade of the front and rear lot lines. Side facades are permitted to step up or down to transition from the front to back provided that the transition happens more than 40 feet from the front and more than 35 feet from the back. As shown on the West Elevation on Sheet A7 of Attachment B, the average grade of the front lot line is approximately 5 feet lower than the average grade of the rear property line, therefore the side facades are required to step back as shown on the elevation.

¹ Megan Sandel, Richard Sheward, Stephanie Ettinger de Cuba, Sharon M. Coleman, Deborah A. Frank, Mariana Chilton, Maureen Black, Timothy Heeren, Justin Pasquariello, Patrick Casey, Eduardo Ochoa, Diana Cutts; Unstable Housing and Caregiver and Child Health in Renter Families. *Pediatrics* February 2018; 141 (2): e20172199. <https://doi.org/10.1542/peds.2017-2199>

² Nkosi, V., Haman, T., Naicker, N. et al. Overcrowding and health in two impoverished suburbs of Johannesburg, South Africa. *BMC Public Health* 19, 1358 (2019). <https://doi.org/10.1186/s12889-019-7665-5>

³ Philips, S. (2014, February 14). *Drive till you disqualify: Will businesses continue hiring super-commuters?* Planetizen Blogs. Retrieved January 18, 2023, from <https://www.planetizen.com/node/67379?fbclid=IwAR3vtggmRVHfeaLWY7J4OqJqWvqz010gN6wKTTCUofD52st99PFlald14>; Robert Wood Johnson Foundation. County Health Rankings 2012. www.countyhealthrankings.org.

Gross Floor Area Calculation - As noted above, the subject property has a unique configuration as the lot slopes diagonally downward as you move north from the back corner of the property at the alley. Per KMC 17.08.020, the gross floor area of a project includes the horizontal area of a building “not including basements, underground parking areas or open unenclosed decks”. The proposed project is unique as the ground floor includes habitable space that falls under the definition of basement and underground parking that counts toward gross floor area because of the ceiling height. Per KMC 17.04.040 – *Interpretation* in the instance of overlapping regulations covering the same subject matter, “the more restrictive or higher standards or requirements shall govern”. As such, there is 954 SF of habitable square feet not exempt as a basement and 4,698 SF of underground parking that is not exempt. Sheet A1.2 of Attachment B shows the lower-level gross floor area calculation in plan view for explanation.

Design Review Standards

In general, the proposed project meets many of the design review standards as outlined in the two subsections. Staff has concerns related to a few of the standards, as outlined below.

Activation of Ground Floor - Per KMC 17.96.060.B.2 and 3, “2. For nonresidential portions of buildings, front building facades and facades fronting a pedestrian walkway shall be designed with ground floor storefront windows and doors with clear transparent glass. Landscaping planters shall be incorporated into facades fronting pedestrian walkways.” and “3. For nonresidential portions of buildings, front facades shall be designed to not obscure views into windows.” These two standards serve to demonstrate the importance of creating an active and interesting pedestrian environment. Staff has concerns that the ground floor façade of the building along Sun Valley Rd and the portion of N 1st Ave closest to Sun Valley Rd do not meet the intent of this standard as the architectural design of the project does not engage with pedestrians and serves more to privatize the space for residents and guests than create an environment that is active and interesting for pedestrians.

Staff understands that the interior program of the building is driving the façade configurations, however, the proposed façade on the Sun Valley Rd side of the project does not meet the city’s design review objectives. The proposed façade does not include any significant fenestration, only small windows at the top of the ground floor which do not resemble storefront like windows. Sun Valley Rd is one of our more heavily traveled corridors by pedestrians. This intersection is the location of three new projects that intensely serve to engage pedestrians with the Maude’s retail and coffee shop on one corner, a new office building on another that has well-articulated store front facades on both street frontages, and the relocation of GLOW café to a new building on Sun Valley Rd across from Maude’s.

On the corner of the proposed development, the private patio has a solid stone veneer seat wall that is approximately 36 inches high at the tallest point and doubles as a planter. The proposed vegetation per Sheet L3.0 indicates flowering crab trees with a variety of shrub species in between. Staff has concerns related to the type of shrub species as some can grow to be very tall if unattended, specifically the Peking Cotoneaster and the Snowberry which can grow between 3-6 feet. The Flowering Crab trees, although very beautiful, are not very tall. These trees, combined with the height of the wall and recommended planting scheme could result in a tall hedge like row along the ground floor in this area which would obscure views in the windows of the ground floor. KMC 17.124.130 outlines that in the CC zone district “fences, hedges and walls shall not exceed four feet in height when located less than 30 feet from the front lot line and shall not exceed six feet in height when located more than 30 feet from the front lot line.”

Staff believes additional consideration should be given to how the building and exterior spaces interfaces with the street. Staff believes the outdoor space on the corner is a huge asset, but would encourage the applicant consider a public plaza rather than private outdoor space. This would engage pedestrians and provide patrons of the surrounding businesses additional seating opportunities on a key intersection of the downtown.

Bulk and Flatness of the Building (N 1st Ave) - As the subject property is three Ketchum Townsite lots, and the building is maximizing the allowable north/south footprint, the resulting building is 165 feet long on the N 1st Ave side. KMC Criteria 17.96.050.F.5 states "Building walls shall provide undulation/relief, thus reducing the appearance of bulk and flatness". Staff acknowledges that the building steps back from N 1st Ave to the alley at each level in a wedding cake fashion, however, the N 1st Ave façade appears very large and flat due to the length of the building and the repetitive nature of the architectural design on the 2nd and 3rd levels. Additionally, the sides of the building do not step in which accentuates the bulk of the building. At the 3rd level specifically, the pattern of windows are identical and run from one end of the façade to the other with little separation or break except for the center staircase. Even with the center staircase and its architectural emphasis, the building still carries a significant amount of bulk because of the identical form of each side. Fenestration is generally encouraged in buildings, particularly on ground floors. However, the amount of fenestration in this building is significant which diminishes opportunities for undulation or relief.

The flat roof form is also identical on both sides with the only variation in the center where the roof drops slightly and there is a transparent railing along the rooftop deck. The roof design, coupled with the repetitive consistent windows, makes the building still feel large even with the step back of the façade. A standard Ketchum Townsite lot is about 55 feet wide, which when developed individually, creates a unique built environment as each building is a little different with changes in materials, architectural elements, style, and building height. The proposed building lacks some of this differentiation that is key to reducing the bulk and flatness of the upper floors. Staff believes further consideration of the undulation and relief of the building is important to reduce the bulk and flatness of the building.

Bulk and Flatness of the Building (East Elevation - Interior Lot Line) - The Commission has paid special attention to interior walls that are exposed due to adjacent buildings that are of smaller scale than the proposed project. This is especially important when adjacent buildings are one-story structures adjacent to a three-story structure. Although staff believes the step back nature of the project mitigates some of these concerns, staff does have concern about the lack of material variation on the east elevation shown on Sheet A8. The grey metal paneling proposed is an extension of the material on the front face of the 2nd floor deck and used as an accent on the some of the window projections on the Sun Valley Rd side of the building. Staff recommends more variation in materials or a step back of the third floor of the building on the east side to reduce the flatness of the façade at that location.

Materials Palette - KMC standard 17.96.060.E.1 states "The project's materials, colors and signing shall be complementary with the townscape, surrounding neighborhoods and adjoining structures". Staff acknowledges that many of the proposed materials such as stone veneer, wood siding, and metal paneling are represented in projects in adjoining structures that existing or are under construction. However, many of the surrounding buildings have a warmer color palette and/or accents of warm wood elements that soften the appearance of the building. As mentioned above, the N 1st Ave façade seems to have little variation due to the amount of fenestration and the building feels long and bulky. The project does propose a cedar wood siding on the underside of the 2nd floor balcony, however, this

element is understated and could be highlighted on other portions of the façades to lighten the size of the building. For instance, some of the more recent buildings have beam accents on balcony railings, under awnings, or vertical elements at corners. Staff recommends consideration of additional wood elements on the facades.

Staff Recommendation

After considering the application materials provided as attachments, the applicant’s presentation, and any public comment received, staff recommends the Commission provide feedback to the applicant on the proposed Sawtooth Serenade project.

Attachments:

- A. Application Materials and Applicant Narrative
- B. Design Review Plan Set
- C. Story Pole and Staking Diagram
- D. Interim Ordinance 1234 Analysis
- E. Public Comment

EXHIBIT 14



CITY OF KETCHUM | PLANNING & BUILDING

Morgan Landers, AICP | Director
direct: 208.727.5085 | office: 208.726.7801
mlanders@ketchumidaho.org
P.O. Box 2315, 191 5th Street West, Ketchum, ID 83340
ketchumidaho.org

Thielsen Architects
Attn: Robert Connor
720 Market Street, Suite C
Kirkland, WA 98033
[via email]

August 24, 2023

Planning Administrator Determination: Applicability of Section 3 of Interim Ordinance 1234 to the Sawtooth Serenade development located at 260 N 1st Ave.

Dear Mr. Connor-

The City of Ketchum received a Final Design Review application for the Sawtooth Serenade development located at 260 N 1st Ave, Ketchum, ID 83340, on August 7, 2023. Upon receipt, I notified the applicant via email that the application had not been received within the required 180 calendar day requirement for Final Design Review applications outlined in Section 3 of Interim Ordinance 1234. That email also outlined that the application could be processed as a new pre-application, if that was the desire of the applicant. Following that email, I received a response requesting further consideration of the determination. Per your request, I have further reviewed Interim Ordinance 1234, other applicable code provisions in the Ketchum Municipal Code, and consulted with the city attorney.

Based on my further review, I find that Section 3 of the interim ordinance does apply to the Sawtooth Serenade development as justified by the following:

1. Preapplication Design Review and Final Design Review applications are separate and distinct applications, each with their own application form, submittal requirements, fees, and processes. Section 1 of the interim ordinance states that the ordinance applies to "to any Building Permit, Pre-Application Design Review, Design Review, Subdivision, or Condition 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". The ordinance clearly delineates between Pre-Application Design Review and Design Review as two separate applications. Although the preapplication was deemed complete prior to the effective date, the Final Design Review application has not been deemed complete as of the date of this letter which is after the effective date of the interim ordinance.

MAYOR Neil Bradshaw | **COUNCIL** Amanda Breen Michael David Courtney Hamilton Jim Slanetz

SMALL TOWN. BIG LIFE.

2. Initial drafts of the interim ordinance did not provide any grace period to preapplications as Preapplication Design Review does not provide for any vesting of development rights. Pursuant to KMC section 17.96.010.C.2, the purpose of the preapplication is to exchange ideas and give direction to the applicant on the "design concept". The preapplication design review step is not designed to vest any specific rights or design. There is no vote of approval, approval with conditions, or denial and no Findings of Fact and Conclusions of Law are issued. Based on feedback from the development community at the time of review and adoption of the interim ordinance, the City Council acknowledged that there are investments made during the preapplication process and in the interim those developments should be provided a grace period provided they continue to timely move through the process. This led to the addition of a 180-day grace period as described below.

3. Section 3 of the interim ordinance states "Design Review or 17.104 – Mountain Overlay 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 purpose of Section 3 of the interim ordinance was to provide a reasonable grace period for developments that began the multiple steps of the development approval process prior to adoption of the interim ordinance and to avoid a barrage of applications being submitted to the city prior to the effective date. This grace period was set by the interim ordinance and, upon expiration of the grace period, subject applications became "null and void." The Planning Department was not delegated any authority to extend or waive the grace period. The 180-calendar deadline has been applied to all applications with preapplications deemed complete prior to the effective date of the interim ordinance, including two others in addition to the Sawtooth Serenade development. Had the Final Design Review application been submitted within that grace period timeframe, staff would accept and process the application accordingly with Section 3 of the interim ordinance. It was not.

Thank you for your time and attention to this matter. As noted in my email dated August 8, 2023, the city can process this as a new application, starting with a new pre-application. This letter constitutes a final Administrator Determination with respect to this submission. This Determination may be administratively appealed under Ketchum Municipal Code 17.144. Please be advised, if desired, an appeal of this Determination must be filed within 15 days pursuant to KMC 17.144.030.

Please advise as to how you would like to proceed. You can reach me at mlanders@ketchumidaho.org or at 208-727-5085.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Morgan Landers', with a long horizontal line extending to the right.

Morgan Landers, AICP
Director of Planning and Building

CC: Matthew Johnson, City Attorney
Jim Laski, Lawson Laski Clark, PLLC

EXHIBIT 15

JAMES R. LASKI
MEMBER

JRL@LAWSONLASKI.COM



City of Ketchum
Planning & Zoning Commission
c/o Morgan Landers, Planning Director
191 5th Street West,
Ketchum, ID 83340

By Hand Delivery and Email: *MLanders@ketchumidaho.org*

September 7, 2023

Re: Appeal of Administrative Determination
Sawtooth Serenade Project
Our File No.: 12690-001

Ladies and Gentlemen:

We represent Scott and Julie Lynch, Yahn Bernier and Beth McCaw, and Distrustful Ernest Revocable Trust ("Applicants") with respect to the Design Review Application for the Sawtooth Serenade development located at 260 N First Avenue, in Ketchum, Idaho. This letter will serve as to supplement the Notice of Appeal filed on behalf of the Applicants with respect to the Planning Administrator Determination made August 24, 2023 ("Determination Letter") regarding the applicability of Interim Ordinance 1234 (in particular Section 3) to the Sawtooth Serenade Development ("Project").

As you are aware, the Project vested prior to the adoption of Ordinance 1234 and thus, Ordinance does not apply to the Project. However, the Planning Administrator determined that Ordinance 1234 does apply to the Project and that the Applicants' Design Review Application, submitted on behalf of the Applicants on August 7, 2023, was not timely filed. This determination came after Applicant's Preapplication Design Review was "deemed complete" and not within the purview of the interim ordinance on October 17, 2022. The determination concludes that the required step of preapplication design review does not vest any specific rights and that requires preapplication design review is a wholly separate and unrelated application for design review in Ketchum's permitting scheme. As such, she concluded that Applicants' Design Review application would not be considered by the City as it was not submitted to the City with 180

September 7, 2023

calendar days of the last Preapplication Design Review meeting of the Commission, which she calculated to be Friday July 21, 2023.¹

Applicant appeals the Administrative Determination on the grounds that it:

- violates the law regarding vesting of applications;
- is contrary to the express provisions of Ordinance 1234;
- is contrary to the prior written and stated actions of the City;
- is made based on unlawful procedure
- is arbitrary and capricious and an abuse of discretion; and
- is in excess of the authority of the Administrator.

The basis for the foregoing are set forth below.

A. Legal Standards

Pursuant to Title 17 of City of Ketchum Zoning Code (hereinafter referred to as the "Ordinance"), the authority of the Commission in this hearing on appeal is to consider the determination of the Administrator and the notice of appeal as well as the oral and written legal arguments of the Appellant and the Administrator. The Commission may then affirm, reverse or modify, in whole or in part, the decision of the Administrator. See Ketchum Code § 17.144.010.

In considering this appeal, it should be noted that the enabling legislation for the Commission, and Ketchum's Zoning Ordinance itself, is the Local Land Use Planning Act, I.C. § 67-6501 et seq. ("LLUPA"). The first listed purpose of the LLUPA is to "protect property rights while making accommodation for other necessary types of development" I.C. § 67-6502(a) (emphasis added). Among the statutory duties of the Commission is to insure that "land use policies, restrictions, conditions and fees do not violate private property rights, adversely impact property values, or create unnecessary technical limitations on the use of property" I.C. § 67-6508(a).

B. Applicant's Project Vested Prior to the Adoption of Ordinance 1234; therefore Ordinance 1234 Does Not Apply

In its Determination Letter, the City contends that Ordinance 1234 applies to the current Application because "Preapplication Design Review and Final Design Review applications are separate and distinct applications, each with their own application form, submittal requirements, fees and processes." However, the Design Review Chapter of the Zoning Code **requires** Preapplication Design Review on any lot or lots totaling 11,000 square feet or more. Code §17.96.10.C.1. Accordingly, for the Sawtooth Serenade Project, Preapplication Design Review was the first required step to achieving Design Review Approval and a subsequent Building Permit. While each of these steps

¹ The Administrator's determination was first emailed to the Development team on August 8, 2023. Following communication with the City Attorney, Matthew Johnson, it was agreed a more formal determination would be prepared, ultimately resulting in the August 24, 2023 determination letter which is the subject of this Appeal.

require separate applications² and fees, they are all a continuation of the same permitting process for the Project. As such, if Ordinance 1234 does not apply to one stage, it does not apply to any stage of the permitting process.

Idaho law is clear that a land use applicants rights are “measured under the law in effect at the time of the application.” *Citizens Against Linscott/Interstate Asphalt Plant v. Bonner County*, 168 Idaho 705, 717(2021) quoting *S. Fork Coal. v. Bd. of Comm'rs of Bonneville Cnty.*, 117 Idaho 857, 861, 792 P.2d 882, 886 (1990) (citations omitted); see also *Taylor v. Canyon Cnty. Bd. of Comm'rs*, 147 Idaho 424, 436, 210 P.3d 532, 544 (2009).

The policy undergirding this rule is “to prevent local authorities from delaying or withholding action on an application in order to change or enact a law to defeat the application.” *Taylor*, 147 Idaho at 436, 210 P.3d at 544 (citation omitted). Thus, the rule is an outgrowth of the well-established principle that legislation does not ordinarily have retroactive effect. See *Cooper v. Bd. of Cnty. Comm'rs of Ada Cnty.*, 101 Idaho 407, 412, 614 P.2d 947, 952 (1980); see also *Ben Lomond, Inc. v. City of Idaho Falls*, 92 Idaho 595, 601, 448 P.2d 209, 215 (1968) (reasoning that the rule to apply the ordinance in effect at the time of the application is “in accord with the general rule that legislation generally acts prospectively only”). *Id.*

Despite the fact of a separate application form, for a project like Sawtooth Serenade, Preapplication Design Review is a required, necessary part of the Design Review Approval Process, and as such, vests the Application. Indeed, the submittal requirements for Preapplication Design Review are identical to those of Design Review. Code §17.96.10.C.3. Acknowledging that the permitting process consists of a continuum of applications, the Administrator, in her presentation to the Commission on January 24, 2023, advised your Commission that “***this project does not come under the purview of the interim ordinance because it was deemed substantially complete prior to the effective date.***” (Transcript of January 24, 2023 Commission Meeting at 2:31:11 – 22). Because Ordinance 1234 did not apply Applicant’s Preapplication Design Review Application, it does not apply to the entire Design Review process, as they are both required steps in the same permit application process.

Notwithstanding the foregoing, and despite acknowledging on the record that the Project does not come under the purview of Ordinance 1234, in point 2 of the Determination Letter, the Administrator argues that “the preapplication design review step is not designed to vest any specific right or design.” (Determination Letter at ¶2). This is purportedly because there is no vote for approval made by the Commission. While this may make some sense for an applicant who chooses to proceed with voluntary preapplication design review, it is not only illogical, but contrary to the law where

² It should be noted that the Preapplication Design Review application form and the Design Review application form are identical. For this Project, the City staff hand wrote “pre-app” on the printed Design Review application to make the distinction.

Preapplication Design Review is a required and necessary step in the Design Review Approval Process. Further, as the minutes for the January 24, 2023 Commission meeting show, the Commission did take action on the Application by voting to recommend that the Application proceed to Design Review.

In the Determination Letter, the Administrator characterizes the newly adopted 180 period to file a Design Review Application set forth in Section 3 of Ordinance 1234 as a “grace period”, apparently applicable to previously recommended (but apparently not vested) Preapplication Design Review Applications (§3 of the Determination Letter).

But, to the extent the 180 day “grace period” described in Section 3 of Ordinance 1234 applied to a Preapplication Design Review Application, it follows that the Preapplication Design Review Application did actually “vest” specific rights, at least for 180 days under the Interim Ordinance. Thus, the Administrator’s argument supporting the application of Ordinance 1234 actually supports the conclusion, consistent with the City’s prior statements, that the Project was vested under the law in effect prior to the Interim Ordinance.

Further, there is absolutely nothing in Section 3 of Ordinance 1234 that specifies or even implies that the 180-day period was meant to be a “grace period” applicable to “developments”³ deemed complete prior to the adoption of the Ordinance. Rather, the only logical (and legal) interpretation of Section 3 of the Interim Ordinance is that a development that (i) is deemed complete for vesting purposes after the effective date of Ordinance 123, and (ii) is required to (or chooses to) go through the preapplication design review process must then submit their design review application within 180 days of the last Commission review meeting.

With respect to the present Project, the Project’s (or development’s) application was deemed complete prior to the effective date of Ordinance 1234. Accordingly, as a matter of law, the 180-day time limit for filing a Design Review Application following Preapplication Design Review does not apply.

C. The City has Confirmed Several Times on the Record that Ordinance 1234 Did Not Apply to the Project

As this Commission is well aware, Applicants tracked the adoption of Interim Ordinance 1234 as well as the Planning Department’s confirmation of the “completeness” of their Preapplication Design Review application in advance of the City’s adoption of the Interim Ordinance. It is fair to say that the vesting provisions of the new ordinance were drafted with this Project in mind.

Section 1 of Ordinance 1234 expressly states: “The following interim regulations and standards apply to any Pre-Application Design Review . . . deemed complete for vesting purposes **after** the effective date of this Ordinance . . .”. Ordinance 1234 § 1.

³ “Developments” is the term used in Section 3 of Ordinance 1234.

September 7, 2023

Applicant's Preapplication Design Review was "deemed complete" on October 17, 2022, prior to the effective date of Ordinance 1234.

At this time, the application has been deemed complete and will be scheduled for the next available hearing.

(See Completeness Review Letter attached as Exhibit 1).

The issue of substantial completion and vesting was also confirmed through email correspondence between City Attorney Matt Johnson and me in the days leading up to the adoption of Ordinance 1234:

Jim –

I checked in with Morgan. She said she's currently reviewing all the resubmitted items this week and will be issuing a completeness letter based on that submittal.

For the Council meeting next Monday there will be a clearer revised version of the interim ordinance that clarifies the distinction that was discussed at the last meeting in response to your comments. That revision will make clear vesting is based on an application being "substantially complete."

So I believe in combination those two items will address your request.

Matt

Matthew A. Johnson
WHITE PETERSON GIGRAY & NICHOLS, P.A.
Canyon Park at the Idaho Center
5700 E. Franklin Rd., Ste. #200
Nampa, ID 83687-7901
208.466.9272 (tel)
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mjohnson@whitepeterson.com

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From: Jim Laski <jrl@lawsonlaski.com>
Sent: Tuesday, October 11, 2022 9:42 AM
To: Matthew A. Johnson <mjohnson@WHITEPETERSON.com>
Subject: RE: Ketchum Ordinance 1234

Hi Matt – would it be possible to get conformation that my client's application (at 260 N 1st Ave) is substantially complete and will be reviewed under the presently existing ordinance, rather than the proposed new ordinance 1234? I written statement to that effect would be much appreciated.

Thank you
Jim

LAWSON LASKI CLARK

JAMES R. LASKI

Lawson Laski Clark, PLLC
675 Sun Valley Road, Suite A
PO Box 3310
Ketchum, ID 83340
208-725-0055 Phone
208-725-0076 Fax

(See email correspondence attached as Exhibit 2).

September 7, 2023

Even more clear and succinctly, the Staff Report for the Preapplication Design Review Meeting held January 24, 2023, issued on or about January 19, 2023, states that this application is not subject to Interim Ordinance 1234:

The application is not subject to Interim Ordinance 1234 as the application was deemed complete prior to the effective date of the ordinance.

(Staff Report for January 24, 2023 Meeting at Pg. 2, attached as Exhibit 3).

Finally, and to the point that required Preapplication Design Review vests the entire Design Review Application Process, 2 hours and 31 minutes into the Preapplication Design Review Meeting of January 24, 2023, Planning Administrator Morgan Landers states:

“ . . . Staff also provided a review of the project's compliance with interim ordinance 1234. ***This Project does not come under the purview of the interim ordinance because it was deemed substantially complete prior to the effective date . . .***”

(Transcript of January 24, 2023 Commission Meeting at 2:31:11 – 22).

Quite simply, if Ordinance 1234 does not apply to this Project, then the 180-day provision in Section 3 of the Ordinance also does not apply.

Based on the forgoing, it is abundantly clear that the Project (or Development) was vested under the Zoning Code in effect on October 17, 2022 (prior to the adoption of Ordinance 1234). Under the Design Review provisions in effect at the time Applicant's Preapplication Design Review was deemed complete, there was no time limitation for the filing of a Design Review Application following the Commission's recommendation to advance the Project to Design Review.

D. City is Estopped From Changing Its Position re Vesting

As outlined above, the Determination Letter is clearly at odds with the position taken by the City earlier in the Design Review Application Process with respect to the vesting of the Project to the detriment of the Applicants, which is contrary to law on the grounds of promissory estoppel.

“Quasi-estoppel prevents a party from changing its legal position and, as a result, gaining an unconscionable advantage or imposing an unconscionable disadvantage over another.” *Hollingsworth v. Thompson*, 168 Idaho 13, 22–23, 478 P.3d 312, 321–22 (2020); *Garner v. Bartschi*, 139 Idaho 430, 437, 80 P.3d 1031, 1038 (2003). “Unlike equitable estoppel, quasi-estoppel does not require an undiscoverable falsehood, and it requires neither misrepresentation by one party nor reliance by the other.” *Hollingsworth*, 168 Idaho at 23, 478 P.3d at 322. Quasi-estoppel applies when:

- (1) the offending party took a different position than his or her original position and
- (2) either (a) the offending party gained an advantage or caused a

September 7, 2023

disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.

Id. (quoting *Trumble v. Farm Bureau Mut. Ins. Co. of Idaho*, 166 Idaho 132, 136, 456 P.3d 201, 215 (2019)).

The facts here are in line with *Hollingsworth*, where the Court found quasi-estoppel applied when a hospital changed its position by holding itself out as a private corporation in its business filings with the Idaho Secretary of State, but then later claimed it was a governmental entity when sued. The public filings led the plaintiffs to believe the hospital was a private corporation, causing them to disregard the ITCA notice deadline to the benefit of the hospital. 168 Idaho at 23, 478 P.3d at 322. Likewise, in the present situation, the City cannot now change its position regarding vesting to preclude Applicant from proceeding under the under the prior Code provisions.

E. Even if Ordinance 1234 Did Apply, the 17-Day Delay in Meeting the Deadline Should Be Excused as It Was Caused in Part by Delays in Receiving Responses From the City and Its Agents

It should be noted that policy behind project vesting in Idaho is designed specifically to prevent the types of action on display from staff in the processing of this application.

The policy undergirding this rule is “to prevent local authorities from delaying or withholding action on an application in order to change or enact a law to defeat the application.” *Taylor, Supra*.

With respect to the present Project, in which Design Review was submitted 197 days following the Commission’s recommendation to proceed to Design Review. It doesn’t take a conspiracy theorist to be skeptical as to the unexplained delays in scheduling meetings with staff due to staff unavailability, three weeks in April and May (April 24 to May 17) and in receiving required responses from City’s contractors – four weeks with Michael Decker re street lighting and seven weeks with Clear Creek Disposal (June 16 to August 2) re garbage pickup location, despite diligent efforts by the Applicant team.

Given that Applicant’s submittal was less than three weeks after the alleged “180-day grace period,” the fourteen weeks of delays experienced by Applicant’s development team raise legitimate concerns of abuse of process should the City not reconsider its position on the applicability of Ordinance 1234.

Conclusion

Based on the foregoing, it is clear the Administrative Determination violates Idaho law regarding the vesting of land use permits, is contrary the express provisions

September 7, 2023

of Ordinance 1234 and the prior written and stated actions of the City with respect to this Project. Combined with the foregoing, the unexplained delays create an unlawful procedure in the processing of Permit Application. As such the Administrator's action in making the determination is arbitrary and capricious and a clear abuse of discretion – designed to stop the Project. As such, we respectfully urge the Commission to reverse the Administrative Determination and proceed with Design Review.

Thank you for your consideration.

Sincerely,

LAWSON LASKI CLARK, PLLC

A handwritten signature in blue ink, appearing to read 'JRL', is positioned below the firm name.

James R. Laski

Cc: clients

Matthew A. Johnson, Esq. (by email: mjohnson@whitepeterson.com)

EXHIBIT 16



CITY OF KETCHUM

Planning & Building
office: 208.726.7801
planningandbuilding@ketchumidaho.org
P.O. Box 2315, 191 5th Street West, Ketchum, ID 83340
ketchumidaho.org

MEMORANDUM

To: City of Ketchum Planning and Zoning Commission
From: Morgan Landers, AICP – Director of Planning and Building
Date: November 3, 2023
Re: Administrator Reply Brief for the Sawtooth Serenade Appeal of Administrative Determination

This memorandum serves as the reply brief to the Appeal of Administrative Determination letter received by Mr. Jim Laski, of Lawson, Laski, Clark, on September 7, 2023. As noted in Mr. Laski's letter, an Administrative Determination was made as to whether a Final Design Review application could be filed and processed with the city based on the ordinance in effect at the time of the application. Below is a response to Mr. Laski's letter for consideration by the Planning and Zoning Commission during your review of the appeal.

Vesting and Application Types

As noted in the determination letter to the Applicant, dated August 24, 2023, staff outlined that pre-applications are separate applications with separate fees and separate processes as outlined in the Ketchum Municipal Code. As such, staff reviews each application separately upon submittal of all required application materials. Applicant's Letter of Appeal from their counsel Jim Laski, dated September 7, 2023, outlines that the determination violates the project's vesting under the various legal cases referenced in the letter and notes that applications should be reviewed under the ordinances "in effect at the time of the application". City staff have done just that. At the time of the review of the pre-application, the application was reviewed under the ordinances and regulations in effect at the time the pre-application was deemed complete. City staff reviewed the pre-application for conformance with the regulations in effect at the time, and as Mr. Laski notes, reiterated multiple times to the fact that the interim ordinance was not applicable to the pre-application.

The action in question, and what is being appealed, is the determination of the Final Design Review, not the pre-application. As stated above, the pre-application was accepted and processed according to the ordinance in effect at the time. The preapplication process concluded with the January 24, 2023, meeting of the Commission. Upon receipt of the final design review application in September 2023, staff reviewed the application according to the processes and ordinances in effect at the time of the final design review application (not pre-application), which was Interim Ordinance 1234.

Section 3 of Interim Ordinance 1234 states that developments that have conducted a voluntary or required pre-application "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". Because the application was not submitted within the 180 calendar days, the preapplication became null and void and any allegation of vesting provided with the preapplication under Section 1 of the Interim Ordinance was dissolved.

Mr. Laski represents that the preapplication and final design review applications are a linked application process for one development and therefore both applications should be vested. Section 1 of Interim Ordinance 1234 specifically references each permit and application type separately, not "developments", therefore vesting of a pre-application is only upheld when the processes and timeframes outlined in the ordinance is followed. As noted above, the application was not filed within the required timeframe and therefore the pre-application is null and void and a new pre-application is required. Staff provided the option to the applicant to move forward with a new pre-application, which they declined.

Consistent Treatment of Applicants

If the applicant had submitted the final design review application in the required timeframe, the two applications would have been treated as timely in succession under the previous ordinance. Mr. Laski states that the actions of staff were arbitrary and capricious. Staff treated the Sawtooth Serenade project the same way as two other development projects moving through the process at similar timeframes. The Perry Building development and 4th and Main development both had pre-applications, that were required and deemed complete prior to the effective date of the interim ordinance. Applicant representatives from both developments reached out to city staff for clarification of Section 3 of the interim ordinance. Staff communicated to the applicants that Section 3 did apply to their developments and that they would need to submit within the 180 calendar days to avoid being subject to the development standards of the interim ordinance. Both projects submitted within the required timeframes to retain their vesting under the 180-day grace period.

Delays Caused by City


Finally, Mr. Laski's letter makes the accusation that explicit actions of the city delayed the applicant's ability to submit the application within 180 calendar days. The letter outlines delays from staff, Michael Decker, and Clear Creek Disposal. It should be noted that of the three-week delay from city staff, staff were on vacation for one full week of the stated timeframe. The applicants requested a meeting with the Director of Planning and Building, of which a two-week response time for requests is common due to workload and capacity. Michael Decker and Clear Creek Disposal staff are not employees or contractors of the City of Ketchum and city staff have no control or management over these entities and their response times. Also, city staff does not control the point at which applicants decide to provide information to and request feedback from those entities, which could have been done sooner than it was based on Mr. Laski's letter and the level of design of the project at pre-application.

Conclusion

Based on the information provided above, staff believes that we upheld the vesting of applications provided by the ordinances in effect at the time of applications, processed the pre-application thoroughly and fairly according to the law, and based the determination of the Final Design Review application within the bounds of the procedures as written in law. Staff prides themselves on treating all applicants and applications fairly and consistently to avoid accusations of arbitrary and capricious actions and have demonstrated how we have done that in this case. As the Director of Planning and Building, I serve as the Administrator of Title 17 of the Ketchum Municipal Code and have acted well within the authority of the role by providing options to the applicant for consideration to move the application through the required process.

Thank you for your time and consideration of this matter.

Regards,

A handwritten signature in black ink, appearing to read 'Morgan Landers', followed by a long horizontal line extending to the right.

Morgan Landers, AICP
Director of Planning and Building

EXHIBIT 17

November 9, 2023

City of Ketchum
Planning & Zoning Commission
c/o Morgan Landers, Planning Director
191 5th Street West,
Ketchum, ID 83340

By Email: MLanders@ketchumidaho.org

Re: Appeal of Administrative Determination
Sawtooth Serenade Project
Applicants Response Memorandum
Our File No.: 12690-001

Ladies and Gentlemen:

On behalf of Scott and Julie Lynch, and Yahn Bernier and Beth McCaw and Distrustful Ernest Revocable Trust (“Applicants”), this letter will serve as a Response to the Planning Director’s Reply Brief in accordance with the Scheduling Notice issued by the City Attorney on November 3, 2023.

In her brief, the Planning Director does not contest that the Applicant’s Pre-Application Design Review Application vested under the City Code in effect prior to Ordinance 1234. She does contend, however, that the language of Ordinance 1234, which did not apply to the Mandatory Pre-Application Design Review, does apply to the next step in the Design Review process, under Ketchum City Code 17.96.010, the Design Review Application, but includes a 180-day “grace period” which would maintain the Pre-Application Design Review vesting status for 180 days under Section 3 of Ordinance 1234.

However, Section 3 is not written as a “grace period” for preapplications submitted prior to the ordinance, but rather as a provision to keep the Design Review Application Process under 17.96.010 moving forward for Preapplication Design Review Applications processed AFTER Ordinance 1234 was adopted. As stated clearly in our September 7, 2023 appeal letter, Ordinance 1234 cannot both apply in part and not apply in part to the same Project or Development. In other words, either ordinance 1234 applies in whole, or it does not apply at all, and under Idaho law and as the City has stated on numerous occasions, it does not apply.

November 9, 2023

A review of the revisions to Section 1 of proposed draft Ordinance 1234 regarding vesting, all of which came after public comment, is illustrative. The first draft of the Ordinance, reviewed by P&Z on August 16, 2022, stated the following:

Pre-application Design Review Applications deemed complete prior to the effective date of this ordinance, *that do not have a subsequent Design Review application deemed complete*, are subject to the provisions contain [sic] herein.

Following public comment and citation to legal authority, the P&Z Commission recommended changing Section 1 to have vesting upon receipt of the completed Pre-application Design Review application as it would likely only impact a single project.

Despite P&Z's recommendation, staff revised sentences highlighted above in Section 1 to the following:

Pre-application Design Review and Mountain Overlay Preapplication Design Review applications *that have been reviewed by the Planning and Zoning Commission at one review meeting* prior to the effective date of this ordinance are not subject to the provisions contained herein.

In discussing this revision with the City Council at its initial hearing on draft Ordinance 1234 on September 19, 2022, Ms. Landers interrupted the Mayor to state the following:

And pardon me for interruption council members, but just to clarify Mayor Bradshaw, we are kind of trying to split the baby a little bit with what the Planning Commission recommended and what we initially proposed to the Planning Commission. And so the initial ordinance took a much harder line that said basically if you have a pre-application, that doesn't count at all and it [sic] really only final design review count. So what we're proposing here is that if you have a pre-application that's in process and you've had your preapplication review with the commission meaning that they've given substantial feedback. You've gotten your guidance. You've had that informal review that would be the Milestone by which you get grandfathered and the new ordinance would not apply to you. (City Council meeting Transcript, September 19, 2022 at 1:21:24 – 1:22:09)

Following public objection the requirement of a P&Z meeting prior to vesting and citation to Idaho law confirming a project is vested when an application is substantially complete, at the next City Council meeting, held on October 3, 2022, City Attorney

November 9, 2023

Matthew Johnson recommended removing the clause “that have been reviewed by the Planning and Zoning Commission at one review meeting “ and replacing that with “*deemed complete for vesting purposes*.” (City Council Meeting Transcript, October 3, 2022 at 1:46:31 - 1:48:12; 1:54:54 – 1:55:30). This is the language ultimately incorporated into Ordinance 1234.

None of the discussion at City Council regarding the vesting of a project prior to Ordinance 1234 related at all to nor even referenced the 180-day provision in Section 3. There was never any discussion or suggestion that, somehow, Section 3 of Ordinance 1234 was meant to apply only to applications for Pre-application Design Review that had been deemed complete prior to the adoption of Ordinance 1234. If the 180-day period in Section 3 was meant to limit vesting on applications for Projects that vested prior to the adoption of the Ordinance, one would think it would have been discussed at the Council level as the language regarding vesting was addressed at length.

This makes sense because under chapter 17.96 of the Ketchum Ordinance related to Design Review, Subsection C, Preapplication Design Review, is a necessary, required step in the Design Review Process for specific types of Developments or Projects. As a necessary step, it triggers the vesting for the Project, as city staff has repeatedly stated on the record in both the process of adopting Ordinance 1234 and in the Pre-application Design Review process as noted in our letter of September 7, 2023.

Quite simply, either Ordinance 1234 applies or it doesn't apply to the Sawtooth Serenade Project. The City previously stated that it did NOT apply and proceeded with Pre-application Design Review, the initial stage of the Design Review Process, under the prior ordinances. It cannot now argue that Pre-application Design Review was not part of the Design Review process required for this Project. This position is even more surprising given the recent decision in *Bracken v. City of Ketchum*, Docket No. 48721 September 15, 2023, wherein the Idaho Supreme Court, citing the same law cited in our September 7 letter, concluded that the developer's rights vested under the ordinance in effect at the time it first filed an application, which the City refused to accept, and that Bracken's “rights could not be taken away by Ketchum's enactment of a new ordinance [thereafter] ...” Bracken at 12. The Court then, citing *Ben Lomond, Inc. v. City of Idaho Falls*, 92 Idaho 595, 602 (1968), pointed out the City of Ketchum's “bad faith conduct” stating:

[T]o hold for the City in the present case would mean that a city, merely by withholding action on an application for a permit, could change or enact a zoning law to defeat the application. It could, in substance, give immediate effect to a future or proposed zoning ordinance before that ordinance was enacted by proper procedure.

The City planning staff's actions with respect to the present Project seem eerily similar.

As a final matter, the Director questions the delays pointed out in our September 17, 2023 letter in receiving responses from city contractors, including Clear Creek

November 9, 2023

Disposal (the city's garbage franchisee) and The MH Companies (the city's sole street lighting consultant) which impacted the timing of submitting a completed application. To make sure the record is complete, attached as Exhibit A to this letter is a Timeline of Delays experienced by Thielsen Architects in working through the necessary steps to bring this Project from Pre-application Design Review to Design Review. Each of these communications can be confirmed by email.

Based on the foregoing, and the facts and arguments set forth in our letter of September 7, 2023, we respectfully urge the Commission to honor the City's word, stand by the written record before you regarding the vesting of the Sawtooth Serenade Project, reverse the Administrative Determination and proceed with Design Review.

Thank you for your consideration.

Sincerely,

LAWSON LASKI CLARK, PLLC



James R. Laski

Cc: Matthew A. Johnson, Esq. (by email: mjohnson@whitepeterson.com)
clients

EXHIBIT A

Timeline of Delays - Sawtooth Serenade

1st Collaborative design Meeting with Morgan Landers, Director of Planning and Building

2/11/23 Dave Thielsen (DT) of Thielsen Architects emails Morgan Landers (ML) asking for collaborative design meeting.

2/14/23 DT emails ML again asking for collaborative design meeting.

2/14/23 ML responds that she is booked for the rest of the week.

2/22/23 First collaborative design meeting between ML and TA.

Total of eleven (11) days from meeting request to the 1st meeting.

2nd Collaborative design Meeting with Morgan Landers, Director of Planning and Building

4/26/23 Robert Connor (RC) of Thielsen Architects emails ML requesting a second collaborative design meeting and receives an autoreply from ML that she is out of the office until 5/1/23.

5/1/23 RC emails ML for second collaborative design meeting.

5/1/23 DT emails ML asking for collaborative design meeting to be the week of the 8th.

5/8/23 RC emails ML asking again to schedule a collaborative design meeting.

5/8/23 ML responds that this week is full for her. Proposes the following week.

5/9/23 DT emails ML proposing meeting times.

5/9/23 ML responds that proposed times do not work for her.

5/9/23 DT emails ML proposing other times.

5/10/23 DT emails ML again attempting to secure meeting time.

5/11/23 ML responds that 5/17/23 will work.

5/17/23 Second collaborative design meeting between ML and TA.

Total of seventeen (17) days from meeting request after ML's return from vacation to the 2nd meeting.

The MH Companies

5/25/23 RC emails architectural drawings and the previous street lighting plan to the previous contact at The MH Companies. RC receives notice that the previous contact has left the company and that the message has been forwarded to a new contact who will respond shortly.

Sawtooth Serenade
Timeline of Delays
Page 2 of 3

5/31/23 RC calls The MH Companies and learns that the new contact is Mike Decker (MD). RC brings MD up to speed on the project.

5/31/23 RC emails drawings and the previous street lighting plan to MD.

6/9/23 RC emails MD to check status. MD can't access any of their previous work on the project and does not have good information on what Ketchum's requirements are for the project. MD tells RC he will contact the City of Ketchum to get more information.

6/14/23 MD emails RC an update. MD is still working on the project but promises something very soon.

6/20/23 MD emails RC an update. MD is still working on the project and hopes to have something soon.

6/21/23 MD emails RC a drawing, but MD has moved the streetlight from in front of the exit door into a required street tree.

6/22/23 RC and MD exchange emails and MD revises the drawing. MD moves the streetlight back in front of the exit door. RC responds asking it to be moved away from the door. MD moves the streetlight back into the street tree. RC responds that it is back in the street tree and needs to move further west to be out of the street tree and not in front of the door. MD provides a drawing with the streetlighting in a workable location.

24 total emails, plus phone calls, required to get small adjustments to the location of two streetlights. *Total of twenty-eight (28) days to receive requested minor adjustment from City required vendor.*

Trash Collection/Clear Creek Disposal

6/16/23 Jeff Loomis (JL) of Galena-Benchmark emails Mike Goitiandia (MG) to review trash collection access.

6/21/23 Email from JL to Thielsen Architects (TA) stating JL is still waiting to hear back from MG on a question he asked him regarding trash collection in alley.

6/23/23 JL calls MG.

6/23/23 RC emails MG asking that he return JL's call.

6/27/23 RC calls and leaves a voicemail for MG.

6/28/23 RC calls and leaves a voicemail for MG.

6/29/23 RC emails MG drawings for his review.

6/30/23 JL and MG speak on the phone.

Sawtooth Serenade
Timeline of Delays
Page 3 of 3

7/3/23 DT emails MG.

7/6/23 DT calls MG.

7/11/23-7/17/23 TA revises drawings based on civil design work which JL reviewed with MG.

7/17/23 RC emails MG asking for memo.

7/18/23 MG emails response to RC, JL, and DT.

7/18/23 RC replies to MG with revised drawings based MG's email

7/25/23 RC calls and leaves a voicemail for MG asking for a response.

7/25/23 RC emails MG asking for a response.

7/26/23 RC and MG speak on the phone.

7/26/23 RC emails MG revised drawings based on phone conversation.

7/31/23 RC emails MG asking for a response.

8/1/23 RC emails MG asking for a response.

8/1/23 RC asks Jim Laski to contact MG to get things moving.

8/2/23 MG sends approval memo to City of Ketchum and project team.

8/7/23 Final design Review Application is transmitted to City of Ketchum.

Total of forty-seven (47) days to receive feedback and approval from City required vendor.

EXHIBIT 18

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City of Ketchum
Planning and Zoning Commission Meeting
November 14, 2023

1 CHAIRMAN NEIL MORROW: Our new business
2 is review and make a determination of
3 administrative appeal for the processing of final
4 design review application for the Sawtooth
5 Serenade Development, located at 260 North 1st
6 Avenue.
7 CITY ATTORNEY MATTHEW JOHNSON:
8 Commissioner, it's Matt Johnson, City Attorney.
9 I'm going to go into a little detail because
10 we've got a couple of these administrative
11 appeals coming up. And I know it's not something
12 that we've had come before you a lot. The code
13 provides for certain decisions to be at the
14 council level, certain decisions to be at the P&Z
15 commission level, and certain decisions to be at
16 the department Director level. And included
17 within that is an administrative appeal process,
18 which allows those decisions that may be
19 delegated to a "lower body" to be appealed up to,
20 with the Council being the ultimate arbiter of
21 anything.
22 What we have today is a decision or
23 determination that was made at the Director
24 level, that in this case the Applicant is
25 disputing that interpretation, that

1 determination, and has administratively appealed
2 that determination to you. So, you are in the
3 position or being in a quasi-judicial role, in
4 fact a particularly quasi-judicial role. You can
5 put on your robes and your fancy white wigs for
6 this one. You're essentially acting as judges in
7 looking at the issues raised by the Applicant,
8 who is the Appellant, versus the response from
9 the Planning Director, and applying your
10 determination, and judging that, how to
11 interpret, how code applies in this situation.
12 So, that's kind of the basics of
13 process. Your decision is in turn appealable up
14 to City Council, by either the Applicant or the
15 Planning Director, if they were to so choose,
16 after you make your decision today.
17 So, you've received briefs from the
18 party. Typically, what we do in these
19 administrative appeals is I work with the counsel
20 for the parties who are involved, and work on a
21 schedule. Thankfully, in this case, Mr. Laskey
22 and his client were kind enough to help keep us
23 on schedule by coordinating. That's why you
24 didn't see the scheduling notice for this in
25 advance. But that was approved. They were aware

1 of the date and are fully prepared to argue
2 today.
3 We have the briefing schedule, where
4 both sides submitted briefs or memos to you to
5 kind of outline. And that always follows a
6 pattern of the Appellant files a brief, a
7 response from the other party or the Planning
8 Department, as that may be, and then a final
9 rebuttal brief from the Appellant.
10 And then we hold the hearing, which is
11 oral arguments from those same individuals, with
12 the same order. So, it'll be Mr. Laskey on
13 behalf of the Appellant, will have his chance to
14 make argument, raise issues for you, then the
15 response from the Planning Director, and then
16 ultimately a rebuttal from the Appellant, Mr.
17 Laskey. You've got a fair amount of discussion
18 to ask questions, as you see fit during that
19 process or at the end, as you go into your
20 deliberations and apply how you feel.
21 I did provide you kind of a process
22 memo that provides more detail on this. The
23 biggest thing I want to really focus your
24 attention on, because it often becomes an
25 important question in these administrative

1 appeals is from the legal side what we call the
2 standard of review. And that's essentially, are
3 you reviewing is just based on the information
4 that's already occurred, or are you allowed to
5 bring in new information? And so, on that
6 process memo from me, you'll see that
7 highlighted. And I pulled the section directly
8 from City Code on that. So, you're considering
9 the determination in this case to the
10 administrator. And you're not to consider any
11 new facts or evidence at this point. So, you're
12 just looking at what was in place at the time. I
13 don't think this will be much of an issue in this
14 particular case.
15 After you've considered that, after
16 you've done your deliberation, you can either
17 affirm the determination of the Director, you can
18 reverse it, or you can modify reverse it, or
19 remand it back to the Director with direction to
20 apply in a certain way.
21 That decision is formalized in writing.
22 We do have to issue that written decision within
23 30 days of whatever your direction is at the
24 meeting tonight.
25 So, any questions on process?

1 COMMISSIONER TIM CARTER: Can you just
2 review, Matt, our options on the decisions there?
3 It sounds like there are four options.
4 CITY ATTORNEY MATTHEW JOHNSON: Yeah,
5 so, you've got affirm. So, essentially, if you
6 agree with the determination. Reverse, find an
7 issue, you could reverse it, say the opposite.
8 You could modify, in part, if there's some issue.
9 Or you can remand. That is to say, Director, we
10 want you to re-evaluate this determination based
11 upon certain inputs, direction, if you didn't
12 want to do it yourself. So, that would be a
13 remand.
14 COMMISSIONER TIM CARTER: Thank you.
15 VICE-CHAIRPERSON BRENDA MOCZYGEMBA:
16 Matt, real quick. Is there a good time -- if we
17 have questions, when is the best time to ask
18 those or not?
19 CITY ATTORNEY MATTHEW JOHNSON: Yeah,
20 I'd say definitely, I would encourage you to let
21 them kind of get through the argument first. And
22 then maybe depending on your question, either --
23 but then the one thing I would be careful of with
24 questions from your side is we do want to be
25 careful that the Appellant, who is also the

1 Laskey. I'm here on behalf of Scott and Julie
2 Lynch, Jah Bernier and Beth McCaw, and the
3 Distrustful Ernest Revocable Trust, who are the
4 Applicants for the Sawtooth Serenade Development
5 Project, located at 260 1st Avenue. Also, Dave
6 Thielsen and Robert Conner from Thielsen
7 Architects are here, who have designed the
8 development project.
9 I think the written materials are
10 actually pretty good at setting forth the two
11 perspectives in this issue. So, I'll try to keep
12 my statements relatively brief.
13 We contend that our development, vested
14 under the prior ordinance because we have a
15 completeness letter from staff, saying that it
16 did, because we were told by staff repeatedly,
17 just as you were told during your design review
18 meeting -- that it was, and because it's
19 consistent with the law that we raised in all the
20 meetings leading up to the adoption of Ordinance
21 1234 and the vesting of it.
22 The Director contends the development
23 is not vested because pre-app does not vest
24 anything. But now that the Ordinance 1234 is in,
25 has been adopted, it somehow gave us a 180-day

1 Applicant in this case, get a final chance to
2 kind of give the final rebuttal. So, if you were
3 to ask a question, for instance to the Planning
4 Director, after all of the parts of the argument
5 are already done, that would encourage, at least
6 give Mr. Laskey a chance to perhaps respond to
7 that answer if there's some issues.
8 COMMISSIONER SPENCER CORDOVANO: This
9 might be for Morgan. But what's the difference
10 in price for the Applicant, for an appeal to P&Z,
11 and an appeal to Council? Is there any
12 difference in there?
13 PLANNING DIRECTOR MORGAN LANDERS: Our
14 fee schedule does not differentiate. So, it's
15 the same flat fee, just an appeal fee. And right
16 now, with our current fee schedule, it's 5,000.
17 COMMISSIONER SPENCER CORDOVANO: Thank
18 you.
19 PLANNING DIRECTOR MORGAN LANDERS: Yep.
20 CITY ATTORNEY MATTHEW JOHNSON: So, if
21 there's no other questions, then at this time,
22 you'd go --
23 CHAIRMAN NEIL MORROW: No. We can go
24 with the Applicant. Thank you.
25 JIM LASKEY: Thank you. This is Jim

1 grace period within which to submit our design
2 review application. In which case, we must have
3 been vested, which is sort of the rub here.
4 The Director's contention on its face
5 would require the retroactive application of the
6 new ordinance to our development, which violates
7 Idaho law. Cunningham v. Twin Falls, 125 Idaho
8 776, expands on the South Fork Coalition case
9 that was referenced in our paper, in our letter,
10 and as well as the cases that I referenced before
11 P&Z and City Council, when we were talking about
12 vesting. And it basically says that post filing
13 changes to and -- of an ordinance do not affect
14 the filing, regardless of whether they benefit or
15 adversely impact an Appellant's rights.
16 So, you can't say that an ordinance did
17 not impact an Appellant's rights and now it does
18 impact them by applying the 180-day grace period
19 included in that ordinance that never applied to
20 it in the first place.
21 It's as simple as that. But it seems
22 like to try to explain it is hard. So, I'm going
23 to try a couple of different ways. And
24 hopefully, something makes sense. It's Section 3
25 of the ordinance, which the Director relies on to

1 support her position is not written as a grace
2 period that would be applicable to the few
3 existing applications in the pipeline at the time
4 the ordinance was adopted. It's rather written
5 as a timeframe, within which the continuum of the
6 application process must take place under the new
7 ordinance. It says, for developments subject to
8 design review approval after the last pre-app
9 design review meeting, you have 180 days to
10 submit for design review, or your pre-app design
11 review expires. If the pre-app didn't invest
12 something, what would expire? This actually
13 ratifies the tie between the pre-app design
14 review in the development permitting process.
15 The pre-app is an integral part of the process,
16 particularly when it's a required part of the
17 process, as it is with our development project.
18 Stated another way, on one hand, the pre-app
19 doesn't invest any right. And on the other hand,
20 staff acknowledges that under the new ordinance,
21 the pre-app design review process does vest the
22 development right for 180 days.
23 Under the original ordinance, there was
24 no time limit on the pre-app design review
25 vesting. That didn't mean that we didn't vest.

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1 It just means that the vesting didn't expire
2 prior to the design review application, which we
3 submitted 197 days after the P&Z vote to move the
4 development to design review. We're not talking
5 a huge timeframe here. We're talking a
6 technicality.
7 So, what is a pre-app design review
8 application? Chapter 17.96 sets out design
9 review requirements for certain development
10 projects. For our development project,
11 17.96.10.1, pre-app design review is the required
12 step, first required step in the design review
13 process that requires completion of the exact
14 same form as design review. An Applicant can't
15 process with design review until the P&Z vote to
16 allow them to move forward with the process. As
17 such, pre-app design review and design review are
18 part and parcel of the same permit application
19 process.
20 In fact, we discussed this issue at
21 length before you while you were reviewing the
22 ordinance. Although, I have to say I was cut off
23 at three minutes. But you guys discussed it
24 in your August 2022 meeting when you reviewed and
25 recommended the interim ordinance to the City

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1 Council, including changes to vesting language.
2 There was a focus on vesting at that meeting
3 because the original ordinance that was brought
4 before you said that pre-application design
5 review applications deemed complete after the
6 effective date of the ordinance that did not have
7 a subsequent design review application deemed
8 complete, were subject to the provisions
9 contained herein. Under that language, vesting
10 would happen at design review, not pre-app design
11 review. That would have excluded our project
12 from having any chance of being under the old
13 ordinance.
14 Despite that fact -- so, you guys
15 recommended -- I cited case law at that meeting.
16 And same, similar case law to what I cited in my
17 appeal letter. And you guys deliberated about
18 vesting. And you all recommended that, as this
19 would only impact a few number of applications,
20 and probably only ours, that vesting, in -- the
21 vesting language in the ordinance should be
22 revised to say that pre-app design review
23 applications, it would be -- that vesting would
24 occur when pre-app design review applications
25 were deemed complete, that you then recommended

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1 that I go to City Council with that language.
2 Despite your recommendation, that's not
3 the language that staff proposed to City Council
4 in the next draft of the ordinance. The
5 ordinance went to City Council on your
6 recommendation. But the proposed language then
7 said that design review applications that had
8 been reviewed by the Planning and Zoning
9 Commission at least one meeting would be subject
10 under -- to the new ordinance.
11 So, they didn't move it back to deemed
12 complete on the application. But they said you
13 had to have at least one meeting before P&Z.
14 That language survived for two meetings at the
15 City Council level. And there was back and forth
16 between Matt and me. And we came to every single
17 meeting on this issue. And ultimately, at the
18 second meeting before City Council approved it,
19 they listened to -- Matt called in from his car -
20 - because I watched it last week. And after
21 reviewing the case law I provided to him, he
22 recommended changing the language to vesting to
23 saying that the ordinance would apply to a pre-
24 application, design review application deemed
25 complete for vesting purposes. And I think I

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1 said that backwards.
2 So, the ordinance would apply only to
3 applications deemed complete for vesting purposes
4 after the new ordinance came into place. So, if
5 it was deemed for vesting purposes before the new
6 ordinance came into place, the new ordinance
7 wouldn't apply. He, at that point, they removed
8 the phrase, and review by P&Z at one review
9 meeting, from the draft. And that was the
10 language that ultimately was adopted.
11 So, that's the language we're working
12 with. It says if we were deemed complete for
13 vesting purposes after the new ordinance, the new
14 ordinance would apply. If we were deemed for
15 vesting purposes before the new ordinance, the
16 new ordinance wouldn't apply. And we were deemed
17 complete before the new ordinance.
18 Thus, once our required pre-application
19 design review application was deemed complete, we
20 were good, and Ordinance 1234 didn't apply to our
21 development project at all. We were not just
22 grandfathered for 180 days.
23 That's the crux of the legal argument.
24 And that's the argument that I think if you don't
25 agree with, we'll ultimately prevail on, as we

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1 move, if we have to move up the chain on this.
2 At the end of the day, all my clients are looking
3 for here is to be treated by the City with
4 honesty, integrity and fairly under the law.
5 The Director says that the pre-app
6 design review and the design review aren't
7 linked. Under 17.96 of the City Code, they
8 clearly are. And under the language that was
9 adopted in Section 3 of 1234, ratifies the fact
10 that they were linked. The Director says we
11 should have asked about the meaning of Section 3.
12 But why would need to? Because under the law, we
13 proceeded under the prior ordinance, where
14 therefore, the new ordinance didn't apply to our
15 development project.
16 On top of that, I would say also, we
17 were in a lot of communication with staff and
18 with legal counsel. And nobody suggested that
19 that's how this ordinance would ever be attempted
20 to be applied. The Director reiterated the
21 position that this project was vested in her
22 staff report and pre-application design review,
23 and on the record in her description of this
24 project to your commission during the pre-
25 application meeting. The Director didn't say it

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1 was good for 180 days. The Director said we were
2 vested.
3 The Director says that delays in
4 getting responses from City vendors aren't her
5 fault. They're not her fault. But -- and I
6 don't want to get into a back and forth on this,
7 but I think I need to make a record because I
8 don't know how you guys are going to make a
9 determination today.
10 So, we provided a timeline of delays
11 prepared by Thielsen Architects, which I think
12 rebuts any contention that the Applicant team
13 wasn't diligent in pursuing the City's designated
14 vendors, Clear Creek Disposal and MH Companies,
15 both of whom have contractual relationships with
16 the City. Clear Creek is the City's franchisee
17 for waste disposal, and you need to work with
18 them. MH Companies, lighting design people, you
19 need to work with them.
20 Based on the foregoing and the written
21 materials submitted and on the record of this
22 development, we hope that it will head down the
23 rabbit hole of the Bracken decision, and rather
24 respectfully request that you exercise your
25 authority to reverse the administrative

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1 determination and proceed with design review. We
2 think this is the fair approach to this project.
3 I'm happy to answer any questions you have.
4 David and Robert can answer any questions you
5 have if you have any technical questions as well.
6 Thank you.
7 CHAIRMAN NEIL MORROW: Thank you.
8 Questions? Or would you guys like to move to --
9 no questions. No questions, Susan?
10 COMMISSIONER SUSAN PASSOVOY: I would
11 like to wait until all the presentations have
12 been made.
13 CHAIRMAN NEIL MORROW: Okay. We'll do
14 that, and then we'll give Applicant a chance to
15 rebut. Thank you. Okay.
16 PLANNING DIRECTOR MORGAN LANDERS:
17 Great. Thank you, everyone. So, in keeping with
18 Mr. Laskey's approach, I will be fairly brief.
19 Because I don't think that there's a lot more to
20 add from a color perspective on what's in your
21 packet and what's been already noted.
22 A couple of things I would like to
23 disclose today. I did have a brief conversation
24 with Commissioner Moczygemba and also Commission
25 Carter. They had both called me ahead of this

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1 meeting just to ask a couple of questions.
 2 Brenda's conversation, a question to me
 3 was getting some recollection on what kind of
 4 occurred between the P&Z meeting and the City
 5 Council meeting. And so basically, what I kind
 6 of recalled to her was that you all, in your
 7 discussions at the P&Z meeting, made that
 8 recommendation, as Mr. Laskey notes. The piece
 9 that Mr. Laskey does not note to you all is that
 10 you made that recommendation that you should
 11 grandfather projects in provided they had a
 12 timeframe.
 13 So, there was a pretty extensive
 14 discussion during that P&Z meeting, that said,
 15 hey, yes, we want to grandfather, but we don't
 16 have to grandfather in pre-apps and have them sit
 17 for two to three years, and still be able to come
 18 in with those future projects. So, I think
 19 that's a little bit of the piece of discussion
 20 that is left out on that. So, I just wanted to
 21 make that note. So, I kind of reiterated that to
 22 Commissioner Moczygemba.
 23 And then Tim had called me asking for
 24 clarification on the process. So, he said, you
 25 know, depending on what we decide tonight, what

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1 is the next step for them. And I clarified for
 2 him that if you uphold the Director
 3 determination, they could appeal that to City
 4 Council. If you remand it, then they can move
 5 forward with design review. So, I wanted to put
 6 those two items on the record.
 7 I appreciate Mr. Laskey's request that
 8 he be treated with honesty, fairness, and
 9 integrity. I think that that is what our
 10 department does on a daily basis with everyone.
 11 And when we approach determinations
 12 from an administrator standpoint, we do so with
 13 two things in mind. One is what is the intent of
 14 what we're trying to achieve, and are we being
 15 consistent in that determination? We all know
 16 our Zoning Code. It's part of the reason why
 17 we're launching into an update of the entire
 18 thing because it's not always straightforward.
 19 Right?
 20 Myself, as the director, has the
 21 ability to make determinations when things maybe
 22 aren't as clear as they were intended, or how to
 23 apply those ordinances and codes moving forward.
 24 So, we do try and do that. And that's what I
 25 kind of put in my response memo to you all.

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1 You know, the intent of this really was
 2 to make sure that we gave those pre-applications
 3 that were in process time to move through under
 4 our previous ordinances. There was a lot of
 5 discussion about fairness, and that you all
 6 wanted to make sure that those projects who had
 7 vested a lot of time and money, that they can
 8 move through the process and still get to kind of
 9 the final design review stage without having to
 10 redesign their projects.
 11 In that discussion between P&Z and
 12 going to City Council, that was when we
 13 introduced the 180-day clause. So, when we were
 14 then revising Section 1 of the language, you
 15 know, we said fine, pre-app for vesting purposes,
 16 because we had Section 3 as well. And I think we
 17 mentioned in kind of the response letter that
 18 pre-application and final design review are all
 19 separate applications, separate processes, with
 20 separate fees.
 21 I think, to the last piece of this, you
 22 know, I agree that we don't need to get into the
 23 back and forth of, you know, delays and things
 24 like that. A couple of things to note on that
 25 front, as Mr. Laskey mentioned, yes, MH Companies

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1 and Clear Creek are franchisee companies and
 2 designated entities. But those franchisee
 3 agreements do not actually include turnaround
 4 time targets or requirements. So, we as staff
 5 have no control over that. And we also have no
 6 control over when the Applicant actually submits
 7 that information and those requests to those
 8 entities.
 9 So, with that, I will leave it up to
 10 questions. Happy to answer any questions you may
 11 have.
 12 CHAIRMAN NEIL MORROW: Questions for
 13 staff? Spencer? Brenda? Susan?
 14 COMMISSIONER SUSAN PASSOVOY: As
 15 before, I'd like to wait until all the
 16 presentations have been made.
 17 CHAIRMAN NEIL MORROW: I think that's
 18 it. We will get a -- as Matt said, if we ask
 19 questions after the rebuttal, then we have to go
 20 through the process again essentially. So,
 21 everyone has presented once now. Correct? So,
 22 this would be the time if you had something.
 23 COMMISSIONER SUSAN PASSOVOY: Okay.
 24 CHAIRMAN NEIL MORROW: And I'm not
 25 sure. While you're figuring this out, Susan, I'm

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1 not sure how much -- maybe this is more for
2 discussion after this. But we will have a
3 deliberation period after this. So, maybe that's
4 more for that.
5 COMMISSIONER SUSAN PASSOVOY: I do have
6 some questions.
7 CHAIRMAN NEIL MORROW: We're ready for
8 you.
9 COMMISSIONER SUSAN PASSOVOY: Okay.
10 Okay.
11 Okay. Honey, could you --
12 MAN 1: (Indiscernible) keep going.
13 COMMISSIONER SUSAN PASSOVOY: I told
14 you I could while -- unless I'm talking. I'm
15 sorry. We have a little background noise I need
16 to eliminate.
17 With respect -- this is for the
18 Planning Department, for Morgan. With respect to
19 the delays caused by the utilities or the
20 franchisees, could an Applicant submit -- in
21 order -- let's say they're saying, look, we're up
22 against this deadline, we don't want to be
23 delayed beyond the deadline. Can we submit our
24 final review application, so that we are within
25 the parameters of the deadline, subject to things

1 project vested, or their application, or -- I
2 mean, these terms have been, as you point out in
3 your materials, a little interchangeable. And
4 that's unfortunate but it's human. You know, not
5 everyone in this process has the same training
6 that you do, or that I do.
7 Would -- are you asserting a vesting of
8 a right to build as your clients have designed
9 it? Or does the vesting only refer to the
10 ability to file a final design review
11 application? Am I being clear, or do I need to
12 rephrase it?
13 JIM LASKEY: No, I think I understand
14 your question. What we're asking for is to
15 proceed with the process. We believe we're
16 vested to proceed through the design review
17 process based on our pre-application design
18 review application being deemed complete prior to
19 the ordinance.
20 The design review process is one
21 section of the code. And that's the section of
22 code where are looking to get our title and
23 permit.
24 COMMISSIONER SUSAN PASSOVOY: Okay.
25 And you've used the terminology that the -- that

1 that are beyond either one of our controls, which
2 is responses from the waste management company
3 and the lighting company. Where would we be if
4 that would have been done?
5 PLANNING DIRECTOR MORGAN LANDERS: So,
6 there are instances where we do provide for
7 deferred submittals of some of those items. As
8 Mr. Laskey I'm sure knows, the will-serve letters
9 from the utility companies are not an itemized
10 submittal item in our design review checklist.
11 And we do sometimes get requests to say, hey,
12 we're ready to submit but we're waiting on this
13 thing. Can we do that? You know, can we submit
14 this in a future point and time? We evaluate
15 those on a case-by-case basis. Ultimately, the
16 Director has the discretion to make a decision on
17 whether we can accept deferred application
18 submittals or not. In this instance, that
19 request for submittal without those items was
20 never made to staff.
21 COMMISSIONER SUSAN PASSOVOY: Right.
22 Okay. Second question is for Jim Laskey. I just
23 want some clarification on your interpretation of
24 the term vesting. Generally, the term -- are you
25 asserting, is your client asserting that their

1 it's, 17 days late is not material. Do you have
2 an opinion as to what could be material? I mean
3 --
4 JIM LASKEY: Well, our position
5 primarily is that the 180 days didn't apply. So,
6 I'm just saying if you're going to apply 180
7 days, and you look at the delays particularly
8 caused by Clear Creek, where we were working for,
9 if I look -- wait a sec. I want to get the right
10 number.
11 COMMISSIONER SUSAN PASSOVOY: Well,
12 it's okay. It doesn't have to be exact. It's --
13 I'm just --
14 JIM LASKEY: Yeah, it took us 47 days
15 to get a response from Clear Creek. And that was
16 in response to a specific request from the
17 Planning Director, that we have that addressed in
18 our planning -- or our design review application.
19 COMMISSIONER SUSAN PASSOVOY: Okay.
20 JIM LASKEY: So, I mean, what is a good
21 -- what would be reasonable and what wouldn't be
22 reasonable? Obviously, people can --
23 COMMISSIONER SUSAN PASSOVOY: Can
24 differ, yeah.
25 JIM LASKEY: -- differ as to what that

1 would be, I guess. 17 days in my perspective on
2 this, given the fact that I would say the
3 application of this provision is questionable at
4 best, seems, if you then just weigh the
5 imbalance, the equities on this thing, you could
6 -- 17 days shouldn't be balance it in favor of
7 not reviewing the application.
8 COMMISSIONER SUSAN PASSOVOY: Okay.
9 JIM LASKEY: You still have the
10 opportunity to review the application under the
11 design review guidelines.
12 COMMISSIONER SUSAN PASSOVOY: Do you
13 agree or disagree with Morgan Lander's statement
14 that you're -- neither you nor your Applicant
15 requested the ability to submit the application
16 pending response from the -- from Clear Creek,
17 just as a factual matter?
18 JIM LASKEY: As a factual matter, we
19 didn't ask.
20 COMMISSIONER SUSAN PASSOVOY: Okay.
21 Yeah, I don't mean to put you in a difficult or
22 awkward position. I'm not trying to position
23 you. I'm just trying to get some clarification.
24 Also, you, there are a couple of
25 assertions in your materials that I wonder if

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1 you're -- if you really mean them, and if so,
2 what is the basis for the assertions?
3 One is that the ordinance, the 1234 was
4 adopted with your client's application in mind.
5 And the second one is that the 180 days was
6 solely for your client's benefit. I'm just --
7 I'm not sure where those statements come from.
8 But I'm curious as to why you think they are
9 appropriate assertions in your materials.
10 JIM LASKEY: So, I think -- and without
11 going back to my letters -- I'm not exactly sure
12 I stated it. But certainly, as this, as
13 Ordinance 1234 was being adopted, was going
14 through the Planning and Zoning and City Council
15 review process, our project was at the forefront
16 because we were racing to get our pre-app design
17 review in and accepted. We had gotten it in and
18 not accepted once. We were at every single
19 meeting. There was not a lot of public comment
20 at those meetings, as you might recall. But I
21 was at the one P&Z meeting you guys had, and then
22 the two City Council meetings.
23 So, we were certainly in the
24 background. I'm not saying necessarily that this
25 ordinance was adopted solely to stop what we were

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1 planning to do. But we were certainly aware of
2 it. And you were aware of the project that was
3 in the wings.
4 The second question was -- what was
5 your second question again?
6 COMMISSIONER SUSAN PASSOVOY: Well,
7 there -- my second question was -- in other words
8 that you stick by your characterization of the
9 adoption, of a downtown core ordinance was aimed
10 solely -- and I think the words you used, with
11 the, to prevent this project.
12 And my next question was that you are
13 asserting that the staff deliberately delayed the
14 work on the application. I'm wondering do you
15 stick by that assertion?
16 JIM LASKEY: Well, I think what I said
17 is it doesn't take a conspiracy theorist to put
18 two and two together. I don't know if there was
19 a delay or not. I don't know why it took that
20 long for Clear Creek to respond, for us to get a
21 letter that -- I just don't know why. So, I
22 think it is interesting that it took that long.
23 And again, I think if you balance the
24 equities, I think the appropriate thing is to
25 move this project forward through your process,

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1 so you can apply the criteria you have rather
2 than come up with some technicality that may or
3 may not be legal to knock it off the tracks.
4 COMMISSIONER SUSAN PASSOVOY: Okay.
5 Thank you. Those were my questions.
6 COMMISSIONER SPENCER CORDOVANO: Jim,
7 Mr. Laskey, if I can get clear on a couple of
8 things. You're talking about the adoption of
9 1234 at the beginning of the interim ordinance,
10 or the codification of 1249?
11 JIM LASKEY: The adoption of 1234.
12 COMMISSIONER SPENCER CORDOVANO: Okay.
13 JIM LASKEY: Well, I think to be clear,
14 we're talking about our project, our development
15 project vested prior to 1234, and prior to
16 anything after that. Because it gets confusing.
17 I understand.
18 COMMISSIONER SPENCER CORDOVANO: So,
19 your application was complete prior to the
20 adoption of 1234, which would negate the 180-day
21 clause?
22 JIM LASKEY: Exactly. If -- the 180-
23 day clause wouldn't apply to our application
24 because our application vested before that
25 ordinance was adopted.

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1 COMMISSIONER SPENCER CORDOVANO: And
2 the definition of vesting, in the City's opinion,
3 prior to 1234, in regards to pre-app versus the
4 design review, was updated with 1234, or the
5 same?
6 PLANNING DIRECTOR MORGAN LANDERS: The
7 question of vesting from -- as a defined term,
8 does not change. So, vesting, the way that the
9 City looks at it, is always when an application
10 is deemed complete.
11 COMMISSIONER SPENCER CORDOVANO: And
12 your application, or the City's application,
13 Clear Creek being contacted, was after the
14 adoption of 1234?
15 JIM LASKEY: Yeah. So, our pre-
16 application design review application was deemed
17 complete. The City adopted Ordinance 1234. We
18 came after the City adopted Ordinance 1234. We
19 came and had a meeting before you guys. You guys
20 voted at that meeting to recommend that we can
21 proceed with design review. That is when we then
22 put together a design review application, which
23 ultimately was submitted 197 days after that
24 meeting.
25 COMMISSIONER SPENCER CORDOVANO:

1 Including contacting Clear Creek, which we feel
2 like was delayed?
3 JIM LASKEY: They're in the middle of
4 that, yeah.
5 COMMISSIONER SPENCER CORDOVANO:
6 Question for staff. Have other projects inquired
7 about this 180-day timeline?
8 PLANNING DIRECTOR MORGAN LANDERS: Yes,
9 at the time of the adoption of Interim Ordinance
10 1234, we had three projects that were all in the
11 pre-application stage. So, it was this project,
12 of Sawtooth Serenade, it was the Perry Buildings
13 Project, and it was Fourth and Main.
14 And so, both of those projects were
15 also referenced during the Planning and Zoning
16 Commission's discussion around how to treat
17 vesting of projects and pre-apps. Both of those
18 applications inquired to staff, following
19 adoption of 1234, on whether that provision of
20 Section 3 applied. And staff responded to both
21 of those applications that it did. And they
22 proceeded to submit those applications within
23 that 180 days.
24 COMMISSIONER SPENCER CORDOVANO: And
25 those projects were also not subject to the 1234?

1 PLANNING DIRECTOR MORGAN LANDERS:
2 That's correct. They were both deemed complete
3 prior to the adoption of Ordinance 1234. And
4 those applications, both of those were also
5 required to have pre-applications. Those pre-
6 applications were not voluntary, similar to
7 Sawtooth Serenade. So, all three projects were
8 being treated the same.
9 VICE-CHAIRPERSON BRENDA MOCZYGEMBA:
10 Question for staff, without trying to get into
11 deliberation here. So, when I listened back to
12 the August 11th meeting or whatever, whenever it
13 was, of P&Z reviewing and hearing the proposed
14 Interim Ordinance 1234, there was significant
15 discussion about the inclusion of, well,
16 grandfathering in pre-app or not. And there was
17 direct mention made of applying a timeline.
18 So, there was obviously the
19 conversation and the intent. But then what we
20 have at the other end is the adopted language of
21 1234. And so, at what point -- and it doesn't
22 seem like some of the verbiage of 1234 quite
23 captured in the way that the discussion was
24 headed.
25 So, at what point are we really arguing

1 over, or are we deciding between intent versus I
2 guess the legality of the language of how that
3 was written. You know, can we say, well, it was
4 written like this. But what we meant was?
5 PLANNING DIRECTOR MORGAN LANDERS: That
6 would probably be a better question directed at
7 Matt. What I can say is just from a factual
8 matter, there was the P&Z discussion. And then
9 Mr. Laskey does account the subsequent events
10 accurately.
11 So, there was a revision made by staff
12 ahead of the City Council meeting. That first
13 version of the ordinance included kind of two
14 backstops, Section 3, and that additional
15 language in Section 1. That language in Section
16 1 then was kind of reverted back to what was
17 eventually adopted through that discussion
18 process. But on the -- kind of how you make your
19 determination, I'll look to Matt to kind of guide
20 you all on how to do that.
21 CITY ATTORNEY MATTHEW JOHNSON: So,
22 Commissioners, I mean, initially, you start with
23 a look at the plain language. And then secondly,
24 because this is coming up on appeal for you,
25 you're being asked this question about the intent

1 So, you have a fair amount of discussion here to
 2 apply how you intend it and how you understand it
 3 to the situation, while trying to stay, you know,
 4 within the letter of what's on the inlay.
 5 JIM LASKEY: May I address this issue?
 6 Thank you. So, I think we were all at this
 7 meeting. And we all were a part of the
 8 discussion. And I think Susan Frick was the one
 9 who brought up the -- I listened to this just
 10 this week to -- the guardrails that we needed to,
 11 so that applications didn't stay active forever.
 12 I would submit that's not what's
 13 written into the ordinance. What's written into
 14 the ordinance is that pre-application vests a
 15 project at pre-application, and that project
 16 vests for 180 days through that pre-application
 17 design review from the last meeting at P&Z. And
 18 if you don't thereafter file a design review
 19 application, you have to start over.
 20 I think the way it's written actually
 21 supports our position, that we were vested at
 22 design review, at pre-app design review. I'm
 23 sorry.
 24 And the new ordinance limited the
 25 timeframe by which pre-application design review,

1 the term for which pre-application design review
 2 vested a project, kept a project alive.
 3 And the discussion about -- there was
 4 discussion about whether we would grandfather our
 5 projects. Our projects were different that those
 6 other two -- our project was different from the
 7 other two projects, because at your meeting, we
 8 had not yet been deemed complete for pre-app
 9 design review, whereas the other ones had.
 10 So, we were in a different boat. And
 11 that's why I said we were sort of the one that
 12 was hanging out there, and the one where -- I
 13 think it was even suggested like maybe you say,
 14 okay, our application fits. And we're not going
 15 to let anybody else. But what was recommended to
 16 City Council was not what you guys suggested to
 17 P&Z. And I listened to the City Council tapes as
 18 well. And I did a search of those transcripts.
 19 And they never once discussed Section 3.
 20 So, it's going to be hard to say the
 21 City Council -- what the City Council's intent
 22 was with that.
 23 COMMISSIONER SUSAN PASSOVOY: I have
 24 another question if I'm -- if it's my turn again.
 25 Or shall I -- is there someone else that wants to

1 jump in?
 2 CHAIRMAN NEIL MORROW: No, go ahead.
 3 Tim will go after you.
 4 COMMISSIONER SUSAN PASSOVOY: Okay.
 5 I'll appear in person here. I -- this becomes
 6 very circular if anybody's noticed, which of
 7 course makes us all dizzy. But I guess the
 8 question that I have for the City Attorney, and
 9 for Mr. Laskey is if Ordinance 1234 does not
 10 apply to an approved pre-application, pre-design
 11 review application that was completed, deemed
 12 complete prior to the adoption of 1234, what is
 13 the point of a grandfather or a grace period, or
 14 whatever you choose to call it?
 15 It either is vesting for some infinite
 16 future application, or it's subject to the
 17 ordinance. And so, I would like to hear from
 18 those two gentlemen how -- whether I'm chasing my
 19 tail or how they would answer that argument.
 20 CITY ATTORNEY MATTHEW JOHNSON: Can I
 21 go first? Let me just clarify something for you,
 22 Susan. So, because I'm serving as the process
 23 attorney for this, not arguing a side. So, I
 24 think you would want to go to Morgan if you want
 25 kind of the City perspective on that. But I

1 think probably Jim can address the question as
 2 well as anything else. So --
 3 COMMISSIONER SUSAN PASSOVOY: Okay.
 4 Thank you, Matt.
 5 JIM LASKEY: So, Jim Laskey again for
 6 the record. So, the reason for what language was
 7 because it was stated that you had design review
 8 applications that were dangling for years, and
 9 you didn't want them to do that. So, going
 10 forward, right now, an Applicant puts -- does
 11 their pre-app design review after their last
 12 meeting, when they get recommended to go forward.
 13 They have 180 days, or they have to start over.
 14 So, that's a prospective ordinance.
 15 It's not a retroactive ordinance. And it was
 16 addressed to address a problem that people had
 17 where people were dangling in pre-app for a long
 18 time.
 19 COMMISSIONER SUSAN PASSOVOY: Thank
 20 you.
 21 CHAIRMAN NEIL MORROW: Susan, do you
 22 have other questions?
 23 COMMISSIONER SUSAN PASSOVOY: Nope.
 24 That was the question generated by the prior
 25 discussion.

1 CHAIRMAN NEIL MORROW: Okay. Thank
2 you. Tim?
3 COMMISSIONER TIM CARTER: I just have a
4 question for Mr. Laskey. And I'm waiting -- I'm
5 sorry. Mr. Laskey -- or Jim, can you define --
6 it seems, this -- it seems to hinge a little bit
7 on whether the project was vested or not vested.
8 Can you define your understanding of vested? I
9 know Susan asked you that. But can you -- what's
10 your definition? How do you understand vesting?
11 What does it mean to you?
12 JIM LASKEY: Vesting means that once
13 you submit an application that is complete, it
14 will be reviewed under an ordinance that's in
15 effect at the time, was complete. So, if you
16 listened to the Director's perspective, you're
17 going to say this is a series of applications.
18 So, the pre-application and the design review
19 application are separate. We only were vested
20 for pre-app, not for design review.
21 What I'm saying is that's all part of
22 the same section, that pre-app is a required
23 condition precedent to design review, and that
24 those legally are the same application, the same
25 application process, they're the same section of

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1 the code. It's just you go from one to two to
2 three.
3 COMMISSIONER TIM CARTER: Thank you.
4 CHAIRMAN NEIL MORROW: Anything else?
5 All right. Since there's no public comment here,
6 after we're done with this we can move to
7 deliberation -- or not -- go ahead, Matt.
8 CITY ATTORNEY MATTHEW JOHNSON: So,
9 you'll want to allow Mr. Laskey to do a final
10 rebuttal of anything else he may want
11 (indiscernible).
12 CHAIRMAN NEIL MORROW: Okay. Before we
13 discuss this. And then --
14 CITY ATTORNEY MATTHEW JOHNSON: Before
15 deliberation.
16 CHAIRMAN NEIL MORROW: -- once we go
17 into deliberation, what happens after that if
18 there are things that Morgan or --
19 CITY ATTORNEY MATTHEW JOHNSON: If you
20 have a particular question that's helpful for you
21 --
22 CHAIRMAN NEIL MORROW: More like if we
23 say something --
24 CITY ATTORNEY MATTHEW JOHNSON: Yeah,
25 you can direct questions to staff or Mr. Laskey

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1 in your deliberation. I would just note that if
2 you ask a question to staff --
3 CHAIRMAN NEIL MORROW: Then it reopens,
4 right.
5 CITY ATTORNEY MATTHEW JOHNSON: -- and
6 Mr. Laskey would like a chance to respond, that
7 you give him that opportunity. So, I'm sure
8 he'll raise his hand.
9 CHAIRMAN NEIL MORROW: Okay.
10 COMMISSIONER TIM CARTER: I got another
11 question for Mr. Laskey.
12 CHAIRMAN NEIL MORROW: Sure.
13 COMMISSIONER TIM CARTER: Let's see,
14 Jim, in your, appeal Section D, you bring up a
15 concept called estoppel. Can you explain what
16 that is?
17 JIM LASKEY: Yeah. It's estoppel, is a
18 -- it's a legal principle that basically says if
19 you say something and then somebody relies on it,
20 you can't then change your position to their
21 detriment. And that's an argument of what
22 happened here.
23 We went through the design review, the
24 pre-app design review process. During that
25 process, I've cited in my letter several areas

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1 where we were told, where you were told, we were
2 told that our project -- and project was the word
3 that was used -- was vested under the prior
4 ordinance. 1234 did not apply. So, what our
5 argument is is that you can't say that and then
6 change your position to then adversely impact our
7 position.
8 COMMISSIONER TIM CARTER: Thanks.
9 PLANNING DIRECTOR MORGAN LANDERS: I
10 (indiscernible) comment to that.
11 CHAIRMAN NEIL MORROW: Please.
12 PLANNING DIRECTOR MORGAN LANDERS: So,
13 just, and because Mr. Laskey will have a chance
14 to kind of rebut anything else, one of the things
15 that I didn't address in the determination letter
16 because I didn't feel like it was necessary to go
17 kind of line by line. All of the references that
18 Mr. Laskey put in his appeal letter were all
19 references from completeness letters or staff
20 reports or things like that, things that were
21 discussed in that pre-application meeting. They
22 were all related directly to the development
23 standards in Ordinance 1234, not process.
24 And that was when, you know, when we
25 went through and we said, hey, you know, yes,

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<p>1 we're not evaluating this based on the 2 requirements of 1234. That was in relation to 3 the development standards. I think he also put 4 in his appeal letter an attachment that was kind 5 of staff's review of interim ordinance 6 compliance. 7 As you all recall, we were doing that 8 for every project through the process. That's 9 kind of just an informational piece. And all of 10 the items listed in that review were also all 11 just development standards. There was never a 12 question about process because the application 13 was already in the process. So, just a point of 14 clarification there. 15 CHAIRMAN NEIL MORROW: Thank you. 16 Anything else for staff or the Applicant? 17 COMMISSIONER SPENCER CORDOVANO: Matt, 18 is an executive session an option for this 19 meeting at this time, or any further point in 20 this meeting? 21 CITY ATTORNEY MATTHEW JOHNSON: So, 22 although you all get to serve as judges for this 23 one, one of the drawbacks is you really don't 24 have that like going back to chambers discussion 25 part. So, particularly with anything with</p> <p style="text-align: right;">Page 42</p>	<p>1 180-day clause after vesting? 2 PLANNING DIRECTOR MORGAN LANDERS: 3 That's correct. 4 COMMISSIONER SPENCER CORDOVANO: Thank 5 you. 6 CHAIRMAN NEIL MORROW: All right. 7 Thank you so much. 8 COMMISSIONER SUSAN PASSOVOY: Wait. I 9 have one more question. 10 CHAIRMAN NEIL MORROW: Okay. 11 COMMISSIONER SUSAN PASSOVOY: Okay. I 12 forgot. This was puzzling me. In terms of 13 Section 3 of Ordinance 1234, why does it refer to 14 the mountain overlay district? 15 PLANNING DIRECTOR MORGAN LANDERS: So, 16 the reason that staff included that as a separate 17 callout is because the mountain overlay standards 18 are in a different mountain overlay section of 19 the Municipal Code. So, if we just referenced 20 17.96, it wouldn't cover the mountain overlay 21 provisions as well. 22 COMMISSIONER SUSAN PASSOVOY: Okay. 23 So, the 180 calendar days does not apply just to 24 pre-application material or in the mountain 25 overlay district? It applies to all pre-</p> <p style="text-align: right;">Page 44</p>
<p>1 respect to the merits. If there's a question 2 about sort of legal liability we need to get 3 into, that could be appropriate. But note, that 4 would be a very constrained part of the 5 discussion. 6 So, particularly anything on the merits 7 or the bigger pat, I encourage do that in 8 deliberation. 9 COMMISSIONER SPENCER CORDOVANO: 10 Thanks. 11 CHAIRMAN NEIL MORROW: Thank you. All 12 right, if there's nothing else, we can go to 13 deliberation. 14 JIM LASKEY: Can I respond to Morgan's 15 last comment? 16 CHAIRMAN NEIL MORROW: Oh, sure. 17 JIM LASKEY: So, I just want to point 18 out that -- say we were vested under the prior 19 ordinance for the purposes of going through the 20 design criteria, we were vested under the prior 21 ordinance, not just for design criteria, but the 22 prior ordinance is what applied. 23 CHAIRMAN NEIL MORROW: Thank you. 24 COMMISSIONER SPENCER CORDOVANO: And 25 Morgan, prior to adoption of 1234, there was no</p> <p style="text-align: right;">Page 43</p>	<p>1 application decisions? 2 PLANNING DIRECTOR MORGAN LANDERS: 3 That's correct. 4 COMMISSIONER SUSAN PASSOVOY: Okay. 5 Thank you. 6 COMMISSIONER SPENCER CORDOVANO: You 7 were going to say? 8 JIM LASKEY: Sure, just as a follow up 9 rebuttal to that, that further proves my point, 10 that the addition of three was not just to 11 grandfather a dangling application. The addition 12 of Section 3 was to move the process forward for 13 prospective applications. 14 CHAIRMAN NEIL MORROW: Thank you. 15 Good? Okay. We can move into deliberation. 16 CITY ATTORNEY MATTHEW JOHNSON: I just 17 want to make sure. Jim, did you get a chance to 18 complete your rebuttal? 19 JIM LASKEY: I think you can move on. 20 I think everybody's point is clearly stated. 21 CHAIRMAN NEIL MORROW: Okay. Anyone 22 chomping at the bit to start the first time, now 23 that you're an elected official, you can, changes 24 the -- 25 VICE-CHAIRPERSON BRENDA MOCZYGEMBA:</p> <p style="text-align: right;">Page 45</p>

1 I'll go ahead and start. This is definitely a
2 tricky one. And for good reason that it's being
3 questioned. So, I appreciate the Applicant and
4 staff for going through the process here.

5 And as I stated before in my question,
6 I think in relistening to the meeting we had
7 regarding 1234, it was clear out of fairness that
8 we wanted to include this grandfathering
9 provision for pre-apps that came through before
10 1234 was put in place.

11 And then it was also discussed. I
12 think Susan had brought it up. But I think we
13 were all in agreement that -- I think there was a
14 concern by staff and by us that there would be
15 this glut of applications, which I did not
16 believe to be true because of the requirements
17 necessary to get in place, but that there would
18 be this glut of applications just trying to get
19 this pre-application deemed complete, and then
20 they'd sit for, you know, a long period of time,
21 until they were ready to proceed.

22 You know, they -- so, I think it was
23 clear in the discussion how we wanted Ordinance
24 1234 to be written. But I think I have some
25 sympathy towards the Applicant team that the way

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1 have been here through a bunch of these pre-apps
2 that were, it wasn't mandatory, it was mandatory.
3 It's a hotel, so you have to do it. You know,
4 there was a lot. But we never really looked at
5 it. It was more of a charette. Pre-app was
6 always kind of its own, come in, let's give you
7 our ideas. We don't want you to spend a crap
8 load of money and bring this to design review,
9 and have us tell you, you know, it's horrible or
10 it doesn't work.

11 So, I -- for years, we've always looked
12 at it. We've looked at materials in pre-app that
13 never happened. We looked at things that never
14 happened. In my opinion, it's always been its
15 own thing. It's always been a charette to give
16 advice on things. It didn't ever have any real
17 power to it, in a way. You know what I mean? It
18 was, we saw it with -- I can name 50 projects
19 that we saw it with, where they came in, and we
20 said, okay, this doesn't fit, or this doesn't --
21 and then they came back with almost a completely
22 different project. There was no vesting of their
23 project in pre-app. It was a design charette for
24 us to give them ideas, so they didn't show up
25 with an elephant, and have us go we don't want

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1 that that was captured between Section 1 and
2 Section 3 just completely misses the mark of that
3 particular conversation and how it was worded.

4 And so, you know, there was arguments
5 being made by both sides about, okay, is a pre-
6 application design review actually a vestment, I
7 guess, of this process, or not? So, again,
8 that's just arguing terms versus what the intent
9 was.

10 But then the most important part to me
11 is Section 1, clearly is the applicability of the
12 entirety of this 1234. So, I think I would agree
13 with the Applicant, that the application of 1234
14 and pieces and parts is not necessarily
15 appropriate. I think it's an all or nothing
16 thing. Either we're under 1234, or we're under
17 the 17.96. So, those are my thoughts.

18 CHAIRMAN NEIL MORROW: Spencer, Tim,
19 Susan? All right, with nothing --

20 COMMISSIONER SUSAN PASSOVOY: I'm still
21 cogitating here.

22 CHAIRMAN NEIL MORROW: Okay. I've got
23 a couple. So, and I don't know -- Matt, some of
24 this is based on me being here for a long time.
25 And you know, we've always -- a couple of guys

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1 the elephant.

2 So, I don't know how that fits. But
3 I've always looked at it as something different,
4 and as a chance for us to talk with developers
5 and designers and architects about what fits and
6 what we like, and not as a part of a vested --
7 once you were into pre-app -- I mean, I can't
8 tell you how many came in and we never saw again,
9 or how many we saw that were completely
10 different, or how many we -- you know, it never
11 was -- for a long time there were people who said
12 we don't need pre-app. You know, it's voluntary.
13 You don't have to come in. They were like, why
14 do we have to come in to do this, we're going to
15 bring our project in.

16 So, I've always been under the
17 impression that it was its own thing, and that it
18 was more of a courtesy to developers and
19 designers, so they didn't bring in something that
20 wasn't, that was completely off the mark. And
21 we've seen that before. And we've had things
22 that weren't pre-app that that happened.

23 So, I'm not sure how that -- that's
24 always been in my head, that pre-app is, it's
25 just a charette. It doesn't vest anything.

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13 (Pages 46 - 49)

1 Vesting happens at design review. And our saying
 2 take it from here to design review, it's a --
 3 design review is a totally different thing than
 4 pre-app design review. It's a much different
 5 animal. And you can see that through any number
 6 of projects that have gone to one or two pre-apps
 7 but have gone to three or four design reviews,
 8 because we don't, it's too intense. And it goes
 9 a much longer period of time.

10 So, that's just, in my opinion, the way
 11 I've always looked at it. So, just because
 12 they're linked doesn't mean they're vested, or
 13 they're grandfathered. Again, these may be legal
 14 determinations that I'm not making. But that,
 15 for six and a half, seven years, we've looked at
 16 pre-app as a chance to talk to designers, so they
 17 didn't bring in something terrible.

18 Yeah, I don't, I mean, I have a bunch
 19 of stuff. But in a sense, I could also say, you
 20 know, as much as they can say the City changed
 21 the rules on them, it looks to me like there's
 22 three or four chances here for them to have made
 23 attempts to get a deferred application. You
 24 know, say we want to do this, but we want to do
 25 it without these two because these guys aren't

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1 cooperating. That's a process. That happens.
 2 It's not the City's responsibility. And if you
 3 drop the ball and don't ask for it, that's -- I'm
 4 not sure that can be put back on, hey, the City
 5 didn't do it. You know, the City didn't answer
 6 our phone calls, so we did whatever we wanted.
 7 You know, it's not a -- I just, that one doesn't
 8 work for me.

9 It's just as easy to argue that they
 10 dropped the ball. They didn't apply for it when
 11 they knew. They didn't come and look to see if
 12 Section 3 applied like the other people did.
 13 They just assumed. And that's, in my opinion,
 14 that's as much them dropping the ball on their
 15 job as it being inappropriate.

16 I'm not, I'm a little confused. Either
 17 the 180 days doesn't apply, or it does apply, and
 18 they missed it.

19 So, once again, you know, we have
 20 projects that make it. There is a rule. So, if
 21 it doesn't apply, then it doesn't apply. And if
 22 it does apply, then they missed it. And it's
 23 over. You can call it a technicality. But
 24 that's what it said. That's what it's there for.
 25 So, you know, you want to make that argument. It

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1 doesn't apply to us. But if it does, it's only a
 2 technicality. These guys get paid a lot of money
 3 to be lawyers, to know what's going on. You drop
 4 the ball, it's not always someone else's fault.
 5 You know, walk over to -- drive over to Clear
 6 Creek and say, it's taken 47 days to get a
 7 response, and our multi-million-dollar project is
 8 hanging on the balance. But you know, that's
 9 obviously too much.

10 I'm with Susan. I think that even the
 11 assertion that staff did anything hanky, as far
 12 as this project goes, it was the last project
 13 through. They were busting their ass to get it
 14 in so it would get in under the -- under the
 15 wire. I'm not sure we were even sure it did get
 16 in under the wire initially. I don't think any
 17 of this was done specifically because it was
 18 their project. I just think they were the last
 19 ones. And they were the ones rushing to try and
 20 get it done. The other two projects had been in
 21 the process, and had gone through that, and had
 22 followed the rules.

23 So, I'm not, I don't believe anything
 24 vests in pre-app. And I don't believe that it's
 25 the City's fault to follow your timelines and

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1 know what the timelines and the rules are. It's
 2 why lawyers get paid, you know, hundreds and
 3 hundreds of dollars an hour.

4 You know, our recommendations to City
 5 Council, when we said we wanted some kind of 180
 6 days or something, they're recommendations.
 7 That's, City Council can change that language
 8 with staff. That's not our -- they're not
 9 required to take our wording and place it
 10 directly into the code. So, you know, again, I
 11 think we recommended -- in IPN, I think if you
 12 listen to that, the idea was we didn't want
 13 projects two years, three years, 12 years sitting
 14 around and then coming back, oh, we're good,
 15 we're vested with pre-app because we did this two
 16 years ago.

17 So, I think that was the intent, at
 18 least in my opinion, of that whole discussion.
 19 And I think how it turned out in the ordinance,
 20 you know, it wasn't up to us to say specifically
 21 this is it, City Council has to adopt it. So,
 22 how it turned out is how it turned out. And
 23 again, you're doing a project. When the rules
 24 are changing, you have to stay on the ball.
 25 So, that's my opinion. Anyone else?

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1 COMMISSIONER TIM CARTER: Susan, I can
2 go. Are you ready?
3 COMMISSIONER SUSAN PASSOVOY: Okay.
4 I'll go. Whoops, what happened to me? Oh, there
5 I am.
6 Once again, it's -- this is a very
7 difficult -- and both from a process point of
8 view and from a legal and analysis point of view
9 when we get down to very tiny items, which have
10 impact on people and on the City.
11 The question of vesting, and what that
12 means, in my experience, comes up in a number of
13 circumstances. There is nothing that vests
14 forever, even if you have met -- if you're doing
15 a development project, and a development -- a
16 developer has met the vesting requirements of
17 law, in terms of expending funds and doing
18 material, physical work on their project, that
19 developer does not get to sit around forever and
20 not do anything and then show up much later with
21 the development right to proceed. Everything has
22 an end date, a parenthesis around it. And I'm
23 looking at this in the same way.
24 If I really look at the language of
25 Section 1, it says that anything that has vested

1 is subject to this ordinance. And the vesting,
2 in terms of vesting, a pre-application only means
3 that you don't have to go through the pre-
4 application process. You have vested that pre-
5 application. But it's not vested for all
6 purposes. It's only vested for the totality of
7 the pre-application process. And since one is
8 required to go to take the next step, in terms of
9 filing a complete application, I think I am
10 sympathetic to the staff's conclusion that this
11 ordinance is clear, that you know -- we
12 acknowledge that it can be a -- what's the word?
13 It can impose a, you know, a hardship on an
14 Applicant to have gone that far and not have a
15 leg up doing the next step. And if you don't do
16 what's required to meet that next step within six
17 months, then you're subject to the new law.
18 So, I am coming down on the side of the
19 staff's conclusion in this. But it is a very,
20 very, as Brenda said, a very tricky situation.
21 And it's difficult to parse your way through
22 these various words that have loaded meanings.
23 Oh, excuse me. That's my husband's
24 phone and I'll turn it off. So, sorry about
25 that.

1 So, that's my -- that's my thinking.
2 And it is a very challenging analysis and a very
3 challenging problem to have to parse.
4 CHAIRMAN NEIL MORROW: Thank you. Tim?
5 COMMISSIONER TIM CARTER: So, my
6 recollection of the intent of the language in
7 Section 3 is consistent with what we've heard.
8 And you know, in that intent, our intent was to
9 avoid a situation where a project was given an
10 approval before the ordinance and then had an
11 indefinite amount of time to come before us in
12 the next step when a different ordinance was in
13 place.
14 So, my recollection is there as an
15 attempt to find that. But you know, I'm
16 certainly sympathetic to the Applicant here. You
17 know, there is a question of, you know, if you're
18 -- if it's deemed that we're not, that the
19 Applicant isn't subject to Interim Ordinance
20 1234, but then they are subject to a part of
21 Interim Ordinance 34, that seems to me to be a
22 conflict.
23 And so, I'm certainly sympathetic to
24 the argument -- the Applicant's argument there.
25 It seems like the, you know, the decision of

1 whether or not the Applicant is subject to
2 Section 3 of 1234 to our intent, you know, is a -
3 - ultimately comes down to some legal principles,
4 you know, whether or not, you know, it's vested
5 or it's not vested, other complex, sort of legal
6 principles that, you know, I don't -- I'm not a
7 trained attorney. I don't want to make that -- I
8 feel like I don't want to make that
9 determination. I want to give the Applicant the
10 opportunity to make this argument in front of
11 somebody who is more, you know, a body that's
12 more trained into whether or not this is a, you
13 know, that has standing.
14 So, I mean, that also creates kind of a
15 complex situation, because what that means, in
16 order to do that, we would need to sort of reject
17 the application, so that it gets a chance to move
18 up and be argued in front of someone with more
19 training, which doesn't -- I'm not sure if that's
20 helpful or not to the Applicant. But I don't
21 feel like I can say because I know -- I mean, I
22 have a recollection of what the intent was.
23 And I -- so, I do feel like we're
24 acting consistent to the intent by rejecting the
25 appeal, and simultaneously giving the Applicant

1 an opportunity, because there is -- I do see that
2 there -- it does seem like there's an argument to
3 be made. To let that argument continue, you
4 know, there's an opportunity for the Applicant to
5 make that argument in front of a body that can
6 parse the sort of legal -- you know, there are
7 some fine legal issues here that have standing or
8 precedent or whatever the right term is that --
9 this decision ought to be made under those
10 principles.
11 So, my intent is to -- my instinct is
12 to pass this along to some of those folks.
13 Because I see both sides of this. I think
14 there's good standing for the Applicant's
15 argument. But I also feel like the staff may
16 have done correct, staff made the correct
17 interpretation based on the intent of the
18 language.
19 But -- so, that's my suggestion is that
20 we -- but I would vote to deny the appeal so that
21 it can go to -- (indiscernible) which is a bit of
22 (indiscernible).
23 CHAIRMAN NEIL MORROW: Well, actually,
24 to allow it, you're saying, because none of us
25 really even know what vesting is. And I

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1 guarantee in the new code, we'll have a much
2 better this vest here, this vest there, whatever
3 it is. But because of that, you're more
4 comfortable allowing experts on how to parse that
5 term out do it than have us make that decision.
6 COMMISSIONER TIM CARTER: Yeah.
7 CHAIRMAN NEIL MORROW: Okay. That's
8 very reasonable. Spencer? Any --
9 COMMISSIONER SPENCER CORDOVANO: I feel
10 like I can -- my intent when we were working
11 through 1234 was to take projects that were in
12 the application state that did not meet the
13 minimum densities and minimum number of units,
14 and allow them to proceed with their program, not
15 under the restrictions of 1234, or the
16 restrictions of 1249.
17 However, the intent was clear for me,
18 that the process updates, which this 180-day
19 clause is part of, and the process updates to
20 less materials needing to be provided for pre-
21 application, were to affect those projects in the
22 pipeline.
23 Mr. Laskey brings up a good point, that
24 I do see the conflict that pathway at this time.
25 However, I believe staff's decision was in line

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1 with what I, or we recommended. It does seem
2 weird now to look at it under this guise.
3 And I'm trying to think through how it
4 all affects each other. And you know me, as
5 always, just telling it as I see it. I think
6 it's potentially a moot point either way. I feel
7 like -- I feel like the proposed project doesn't
8 meet the development standards to qualify for an
9 (indiscernible) exceedance in Ketchum and has no
10 place in Ketchum. And I feel like the amount of
11 public feedback that I've gotten after that
12 meeting was some of the most robust of all my
13 time on the Commission, which is the most limited
14 of anybody here. Well, actually, never mind.
15 Sorry, Susan. But obviously all of her
16 experience trumps my --
17 COMMISSIONER SUSAN PASSOVOY: You're
18 excused.
19 COMMISSIONER SPENCER CORDOVANO: -- in
20 the business at hand.
21 But I just feel like regardless of this
22 thing, I feel like it has a hard time of getting
23 through council as qualifying for an
24 (indiscernible) exceedance either way. And
25 that's not what's up for deliberation here today.

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1 But I'm just trying to provide my
2 classic perspective to the Applicant without
3 beading the bushes, is that that's how I feel
4 about the whole global perspective of this thing.
5 And I'm having a hard time today to
6 decide which way to go because if we approve or
7 deny and reverse and modify, where does this all
8 go to? And I would like to exercise some
9 fairness to the Applicant. We don't want anybody
10 to feel that way when they come through a
11 process. And I also want to be able to support
12 staff when they did what I/we recommended. So,
13 it's a tough one for me. And I just wanted to go
14 last today. (Indiscernible) nothing to do with
15 anything.
16 CHAIRMAN NEIL MORROW: It's good to end
17 on a tough one.
18 COMMISSIONER SPENCER CORDOVANO:
19 (Indiscernible).
20 COMMISSIONER SUSAN PASSOVOY: Well, you
21 don't have to be last, Spencer, because I want to
22 walk through something. Each of your comments
23 has clarified some things for me. The question
24 of -- as I asked Mr. Laskey at the beginning,
25 what he thought vested. And as I -- as I

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1 interpret this, based upon my 35 years of the
2 practice of law in this field, what's vested is
3 the pre-application design review, or the -- and
4 the world application, where does it fit in this
5 sentence? But anyway --
6 COMMISSIONER SPENCER CORDOVANO: Pre-
7 app design review.
8 COMMISSIONER SUSAN PASSOVOY: The pre-
9 app design review vested. That is all that
10 vested. And Ordinance 1234 said that if -- that
11 you don't have to go back and start all over
12 again with pre-app if you vested prior to the
13 adoption date of this ordinance. However, you
14 don't get to go forward unless you get the next
15 step accomplished within 180 days. And this
16 Applicant did not get the next step accomplished
17 within 180 days.
18 Therefore, as sympathetic as I might be
19 with someone who deals with the complexities of
20 any city department, and all of the work, you
21 know, the workload that everybody has, and the
22 delays that occur, you know, we -- I really
23 understand that, and I'm very, very sympathetic
24 to the Applicant. But 180 days means 180 days.
25 And if you -- if you have that in mind

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1 and you understand it, then you get things done
2 in time, or to the extent they can't -- that
3 delays are due to reasons without -- beyond your
4 control, you make allowance for that with your
5 final design review application.
6 I don't, I just, I think the ordinance
7 if you --
8 COMMISSIONER SPENCER CORDOVANO: Susan,
9 can I -- take your time here.
10 COMMISSIONER SUSAN PASSOVOY: Sorry.
11 That's my bodyguard. I just -- so, let me just
12 close that sentence and then turn it over.
13 And that being said, to make the
14 assumption that vesting means you're vested for
15 the next step under the old ordinance, that's an
16 assumption. And that's -- could be a costly
17 assumption. And you better get verification of
18 that before you proceed.
19 So, I do support -- I think the City
20 was generous in giving people six months. And
21 I'm not sure if I had been on the City Council I
22 would have voted for that long a period of time.
23 But I understand it. It's what was adopted. But
24 there is a definitive -- Henry, enough.
25 Sorry. I'll stop there so I can shut

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1 him up. Okay?
2 COMMISSIONER SPENCER CORDOVANO: Hold
3 on, Susan. I have a question for you. And I'll
4 wait until you get back.
5 CHAIRMAN NEIL MORROW: Anyone else,
6 while we're waiting?
7 VICE CHAIRMAN BRENDA MOCZYGEMBA: Well,
8 I guess I'll follow up to that in the interim
9 here, is that if that's -- if Susan's definition
10 or understanding of vesting is that, you know,
11 it's only pre-application vested and then you do
12 design review, and you're vested -- you know, the
13 other part of this Section 1 is building permit.
14 So, to me, if that's the take, then there's
15 probably several projects that were approved
16 under design review that were preparing their
17 plans. And now, they should also be subject to
18 1234, because they were not vested under that.
19 But then in response, Neil, to your
20 comment about why the Applicant did not ask for
21 deferred submittals, is that if you simply did
22 not know that you're up against a timeline,
23 whether -- you know, again we can argue why,
24 whether or not the question was asked. But of
25 course, they didn't ask for a deferred submittal

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1 or more time if they didn't know that they were
2 missing this timeline.
3 CHAIRMAN NEIL MORROW: Spencer, go
4 ahead.
5 COMMISSIONER SPENCER CORDOVANO: Susan,
6 are you still around?
7 COMMISSIONER SUSAN PASSOVOY: Yes, I am
8 here.
9 COMMISSIONER SPENCER CORDOVANO: By the
10 way, we could barely hear the dog. So --
11 COMMISSIONER SUSAN PASSOVOY: Oh, okay.
12 I'm sorry.
13 COMMISSIONER SPENCER CORDOVANO: -- we
14 can hear you loud and clear -- or the bodyguard,
15 as you call it.
16 COMMISSIONER SUSAN PASSOVOY: Thank
17 you.
18 COMMISSIONER SPENCER CORDOVANO: What
19 my question was for you, or to deliberate with
20 you, based on your comments there was -- let me
21 find my words again. How do I put it? You
22 basically said that even though they weren't
23 subject to the items of the -- the program items,
24 that they should have been aware of the timeline
25 updates.

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1 COMMISSIONER SUSAN PASSOVOY: I'm
2 saying that -- I'm agreeing with Neil, in that
3 it's a complicated process. But there's a lot --
4 there's obviously a lot at stake, or the
5 Applicant would not be going through this
6 process. And I just think you -- I can't, it's
7 not my job to blame anybody for anything in this
8 process.
9 It's our job, or my job to look at this
10 and see whether or not the interpretations of
11 some, of the ordinance and the process were
12 objective and fair and evenly applied. And I
13 can't -- and I have to go with the decision of
14 the Planning Director, because I don't find that
15 those standards were violated.
16 COMMISSIONER SPENCER CORDOVANO: Thank
17 you. I'm still super stuck on this one. I want
18 to be sympathetic to the Applicant. I also think
19 staff performed as directed. And there was other
20 projects that met a similar timeline of when they
21 submitted, when they went through pre-app, and
22 how adoption of 1234 affected their timeline, and
23 didn't affect their program.
24 I'm having a tough time because I do
25 feel for the Applicant team. I understand where

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1 you're coming from 100 percent. But I also think
2 staff acted as we intended, and it does sound
3 tricky right now upon further look in the mirror.
4 So, maybe we could roll through some scenarios
5 here of, you know, I would like to -- so, if we
6 affirm staff's decision, then what?
7 CHAIRMAN NEIL MORROW: Goes back to --
8 Matt, go ahead.
9 CITY ATTORNEY MATT JOHNSON: Sure. So,
10 if you affirm the decision, then at that point,
11 it would be up to the Applicant, the Appellant
12 whether they'd like to take the next
13 administrative appeal step, which would be
14 appealing that decision up to the City Council.
15 City Council would essentially conduct
16 the same process you've conducted here today,
17 come to a similar decision. Depending upon the
18 outcome there, then that would trigger a final
19 decision at the City level, which would open the
20 door if the party wanted to take it to court.
21 COMMISSIONER SPENCER CORDOVANO: And
22 they have 30 days to appeal that?
23 CITY ATTORNEY MATT JOHNSON: The
24 Planning and Zoning Commission has 30 days to do,
25 issue the written decision. So, you'll give

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1 direction tonight. I'll prep, draft a written
2 decision for you that will come back within those
3 30 days. And then the administrative the appeal
4 timeline for that to go up to Council, I believe,
5 is 10 days.
6 PLANNING DIRECTOR MORGAN LANDERS: I
7 can double check.
8 CITY ATTORNEY MATT JOHNSON: Yeah, I'm
9 pulling it up right now.
10 COMMISSIONER SPENCER CORDOVANO: Make
11 sure we got all of our timelines set with
12 everyone in the room.
13 CHAIRMAN NEIL MORROW: But it does? It
14 goes back to Council, and --
15 COMMISSIONER SPENCER CORDOVANO: It's
16 15 days. That's what I thought it was. So, they
17 have 30 days to bring that back through for
18 findings of fact. And then the Applicant will
19 have 15 days to appeal that to Council, at which
20 the same conversation will happen. And if we
21 were to reverse --
22 CITY ATTORNEY MATT JOHNSON: So, a
23 straight reversal would then either reverse the -
24 - essentially flip the decision of the Director.
25 The Director actually has the opportunity, if

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1 they would like, to also appeal up to the City
2 Council, under the same timeline (indiscernible).
3 So, if the Planning Director opted to appeal,
4 it'd go up to Council. If Planning Director
5 opted not to appeal, it'd be a reversal of that
6 decision. That'd essentially be a direction back
7 to Planning to, for whatever reason you say to
8 accept the application and process it.
9 COMMISSIONER SPENCER CORDOVANO: Move
10 forward with --
11 CITY ATTORNEY MATT JOHNSON: Under pre-
12 ordinance.
13 COMMISSIONER SPENCER CORDOVANO: And
14 move forward with design review for the
15 Applicant.
16 CITY ATTORNEY MATT JOHNSON: Correct.
17 COMMISSIONER SPENCER CORDOVANO: If the
18 Director did not appeal. And then our third
19 option is to remand.
20 CITY ATTORNEY MATT JOHNSON: So, yeah,
21 you have modify as an option, and you have remand
22 as another option. Remand -- and really, either
23 of those, I think is sort of a splitting the
24 baby, where you'd be giving some kind of
25 direction on a part of this, perhaps if you

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1 wanted to kick it back to the Director for some
 2 further evaluation.
 3 Those are a little more rare. So, I'm
 4 happy to help you sort through those if that's
 5 the direction you're wanting to take it. But
 6 affirm and reversal are obviously the simplest
 7 choices.
 8 COMMISSIONER SPENCER CORDOVANO: That
 9 gives me further direction. Thank you.
 10 CHAIRMAN NEIL MORROW: Anything else?
 11 No other deliberation? All right. I'm open to a
 12 motion. I'm open to more discussion. I'm with
 13 Susan. I'm upholding this Director's decision.
 14 COMMISSIONER SUSAN PASSOVOY: Yeah, I
 15 don't see any reason to remand it for further
 16 consideration. I think this is really a thumbs
 17 up or a thumbs down type of decision. And --
 18 CHAIRMAN NEIL MORROW: And move it up
 19 the list.
 20 COMMISSIONER SUSAN PASSOVOY: Move it
 21 up the ladder.
 22 COMMISSIONER TIM CARTER: That's my
 23 instinct as well. Yeah. So, affirm the
 24 Director's decision, yes.
 25 CHAIRMAN NEIL MORROW: Okay. That's --

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1 I think they should have that opportunity to do
 2 that.
 3 CHAIRMAN NEIL MORROW: All right.
 4 Well, I'll take a motion if someone would like to
 5 make one.
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1 VICE CHAIRMAN BRENDA MOCZYGEMBA: And
 2 my opinion would be to reverse. As Spencer was
 3 saying, you know, I completely agree with the way
 4 that Morgan upheld kind of the interpretation and
 5 our prior discussions.
 6 But I think the language is a little
 7 bit too far off for any layperson to kind of come
 8 in and understand that that would, that 1234
 9 would be applicable to their project. And I
 10 mean, that's what happens. That's the last
 11 couple years. You know, the language of our
 12 code, including this project, tests the language
 13 of things that you just don't foresee. And I get
 14 it. But we, I think the language has to be
 15 closer to be able to support that interpretation.
 16 COMMISSIONER SPENCER CORDOVANO: Which
 17 was one of the clearly stated goals of staff and
 18 the Commission and Council of going down this
 19 pathway.
 20 CHAIRMAN NEIL MORROW: Right.
 21 COMMISSIONER TIM CARTER: Yeah, I mean,
 22 I see the staff's decision, consistent with the
 23 intent of the language. But I certainly see that
 24 there's an opportunity for the Applicant to
 25 contest that on legal grounds. And you know, and

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1 CERTIFICATION

2
 3 I, Sonya Ledanski Hyde, certify that the
 4 foregoing transcript is a true and accurate
 5 record of the proceedings.
 6
 7
 8
 9 *Sonya M. Ledanski Hyde*
 10
 11 Veritext Legal Solutions
 12 330 Old Country Road
 13 Suite 300
 14 Mineola, NY 11501
 15
 16 Date: December 27, 2023
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EXHIBIT 19

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City of Ketchum
Planning and Zoning Commission Meeting
November 28, 2023

1 CHAIRMAN NEIL MORROW: This won't take
2 long though, will it, the Serenade?
3 COMMISSIONER SUSAN PASSOVOY: Did you
4 all get the -- Matt's revised finding -- decision
5 memo?
6 CHAIRMAN NEIL MORROW: Revised decision
7 memo?
8 COMMISSIONER SUSAN PASSOVOY: Yeah.
9 CHAIRMAN NEIL MORROW: Yeah.
10 COMMISSIONER SUSAN PASSOVOY: He
11 submitted a redline.
12 (Pause)
13 CHAIRMAN NEIL MORROW: Okay. We are
14 back. We have our last item, which is the
15 Sawtooth Serenade decision packet.
16 PLANNING DIRECTOR MORGAN LANDERS: All
17 right. So, let me just check. We have Matt
18 Johnson on the line, I believe, if he's still
19 there with us.
20 CITY ATTORNEY MATT JOHNSON: I'm still
21 here.
22 PLANNING DIRECTOR MORGAN LANDERS: So,
23 we've got Matt here. He can give you kind of an
24 overview of what's in your packet. And I do
25 believe we have some comments from Susan Passovoy

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1 as well on some potential revisions she'd like to
2 see.
3 So, I don't have to do much. But let
4 me know if you have questions. And Matt and you
5 all can take it from here.
6 CITY ATTORNEY MATT JOHNSON: So,
7 Commissioners, you were provided a draft decision
8 I prepared. Susan did have a couple comments,
9 suggestions she had sent me in advance. And I
10 prepared a revised version to try to incorporate
11 some of those in a redline format.
12 Morgan, has that revised version been
13 provided to the Commissioners?
14 PLANNING DIRECTOR MORGAN LANDERS: It
15 has not. So, if you wouldn't mind doing a verbal
16 overview, or sharing your screen, or I can do
17 that as well. That would be good.
18 CITY ATTORNEY MATT JOHNSON: Sure, if
19 you could, if you want to pull it up. I'm on two
20 separate devices for sharing a screen.
21 PLANNING DIRECTOR MORGAN LANDERS: Yep,
22 I can do that.
23 CITY ATTORNEY MATT JOHNSON: But
24 generally, the comments Susan had were related to
25 adding some language that the Applicant, the

Page 3

1 Appellant in this situation had actually urged
2 for the 180-day grace period to be added. So, a
3 sentence was added to reflect that. This was
4 added in Finding Conclusion Number 2. So, that
5 would be on Page 3 of the decision in the first
6 paragraph.
7 PLANNING DIRECTOR MORGAN LANDERS:
8 There we go. I've got it on the screen.
9 CITY ATTORNEY MATT JOHNSON: There we
10 go. You can see the additional sentence there in
11 red. And then a little further down, in that
12 same finding and conclusion, some language was
13 added that Susan had requested regarding that the
14 administrator's determination was not
15 discriminatory or arbitrary or capricious in this
16 situation, and also a sentence there at the end
17 reflecting the discussion that the
18 Applicant/Appellant in this case, like other
19 projects, could have, with minimal inquiry
20 action, inquired about the 180-day grace period.
21 So, you know, at this point, you've all
22 had a chance to read the draft decision. This is
23 a draft. If you, as a Commission, have changes,
24 additions, anything you want to add -- I know
25 Susan mentioned she might have some other

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1 comments -- we can definitely revise this on the
2 go.
3 At the end, we just need a motion to
4 approve, either as presented or with amendments,
5 and authorize the Chair to sign. Because the
6 written decision does have to be issued within 30
7 days of the hearing. And we won't have another
8 P&Z Commission meeting in time. So, we do need
9 to work out the final at the meeting today.
10 Happy to answer questions or provide
11 clarifications.
12 CHAIRMAN NEIL MORROW: Thank you. I'm
13 interested in Susan's other changes. But
14 otherwise, I think it's good. And I love the
15 changes you made. It's perfectly legal --
16 COMMISSIONER SUSAN PASSOVOY: I would
17 just add one more magic phrase. Matt, thank you
18 very much for making these changes. They shorten
19 the time of this section of the hearing
20 dramatically.
21 In the language that Matt added in --
22 on Page 4, about the administrator's
23 determination not being discriminatory, et
24 cetera, I would like to insert one more phrase in
25 Line 3 on the last paragraph on that page, where

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1 it says, "Administrator's determination was not,"
2 and add, "an abuse of discretion, nor was it,"
3 and then it goes on, "discriminatory, arbitrary,
4 or capricious".
5 CHAIRMAN NEIL MORROW: Lovely.
6 COMMISSIONER SUSAN PASSOVOY: And I had
7 talked -- I will say I had talked with Matt about
8 the discussion we had regarding vesting. But I,
9 as he reminded me, everyone seemed to be a little
10 confused about it. And I don't think it's
11 essential to our decision. So, I'm -- unless
12 someone else had a thought about that with these,
13 I'm very comfortable with the changes that have
14 been made to the revised draft, with that one
15 other addition I'd like to put in.
16 VICE CHAIRMAN BRENDA MOCZYGEMBA:
17 Morgan, can you go to the first suggested edit?
18 Maybe it was up a little higher there. Okay.
19 What -- Susan, can you explain, I guess that
20 first line of, "According to the Applicant's
21 memo"? Could you jog my memory about this grace
22 period being placed at the Applicant's urging?
23 COMMISSIONER SUSAN PASSOVOY: I -- it
24 wasn't solely as a result of the Applicant's
25 urging. And maybe we could rephrase this

Page 6

1 slightly. But the Applicant did make the
2 argument that they were present at the hearing
3 where the City Council inserted the 180-day grace
4 period, that they thought it was important, and
5 that they were supportive of it.
6 So, does that answer your question?
7 And then I can suggest -- I'm glad you brought
8 this up, Brenda, because I didn't want it to read
9 that it was solely at their -- I didn't want it
10 to look like it was solely at their urging. I
11 would rather say that the 180-day grace period or
12 forbearance period, or whatever -- because they
13 seem to also object to our use of the phrase
14 grace period, because it wasn't exactly what the
15 City Council said.
16 COMMISSIONER TIM CARTER: With the
17 Applicant's knowledge and support?
18 COMMISSIONER SUSAN PASSOVOY: Yeah,
19 that would be better. That's very good, Tim.
20 Thank you.
21 VICE CHAIRMAN BRENDA MOCZYGEMBA: And
22 then, Matt, do we call the Applicant's legal
23 counsel as the Applicant? Do we need to clarify
24 that at all? You know, maybe we say they, 180-
25 day grace period -- yeah, that's a tricky one,

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1 which was, you know -- I don't know -- understood
2 at the time of review, or which was discussed. I
3 don't know. Somehow trying to bring some clarity
4 into what it means in the Applicant's urging. I
5 mean, they were, it was the Applicant's legal
6 counsel that was present at the time of that
7 discussion. Right?
8 CITY ATTORNEY MATT JOHNSON: Right.
9 And so, two things. One, the Appellant's counsel
10 is part of the Appellant, for party purposes.
11 So, we can specify that if you like. But the --
12 VICE CHAIRMAN BRENDA MOCZYGEMBA: No.
13 CITY ATTORNEY MATT JOHNSON: -- term
14 Applicant and Appellant would be inclusive of
15 their legal counsel representative.
16 VICE CHAIRMAN BRENDA MOCZYGEMBA:
17 Great. Okay.
18 CITY ATTORNEY MATT JOHNSON: And then,
19 Morgan, if you can scroll down a little to the
20 bottom of Page 4, there's also a footnote that
21 was in the original draft that discusses that the
22 Applicant/Appellant was present for the hearings
23 --
24 VICE CHAIRMAN BRENDA MOCZYGEMBA: Oh,
25 great. I see that.

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1 CITY ATTORNEY MATT JOHNSON: -- and
2 (indiscernible) on this. So, I think this might
3 already be capturing what you're suggesting.
4 VICE CHAIRMAN BRENDA MOCZYGEMBA: Okay.
5 Great. Yeah, no, I think it does. Thanks for
6 pointing out that footnote.
7 COMMISSIONER SPENCER CORDOVANO: If I
8 can just --
9 COMMISSIONER SUSAN PASSOVOY: Could I -
10 - if I could just finish the -- I liked Tim's
11 instead of saying, "Applicant's urging," I would
12 say, "Applicant's knowledge and support of". And
13 that is also reflected in your footnote, but it's
14 a little more consistent with your footnote.
15 VICE CHAIRMAN BRENDA MOCZYGEMBA: The
16 only thing that I'm remembering though that was
17 brought up was the 180-day window. There was
18 kind of some confusion. We have the discussion
19 amongst P&Z. But then it was presented to the
20 Council kind of in a different way. And then I
21 guess at what time, or at which draft was the
22 180-day within 1234?
23 PLANNING DIRECTOR MORGAN LANDERS:
24 Yeah. So, the 180-day grace period was included
25 with the first draft that went to Council.

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1 VICE CHAIRMAN BRENDA MOCZYGEMBA: Okay.
2 Okay.
3 PLANNING DIRECTOR MORGAN LANDERS: So,
4 it was between the Planning and Zoning Commission
5 and the City Council's first reading.
6 VICE CHAIRMAN BRENDA MOCZYGEMBA: Okay.
7 COMMISSIONER SPENCER CORDOVANO: Matt,
8 question for you. We're all good on just like
9 referring to Ordinance 1234 as -- it doesn't need
10 to be referred to as Interim Ordinance
11 everywhere. It's 1234, is what is now 1249 and
12 what was Interim Ordinance 1234?
13 CITY ATTORNEY MATT JOHNSON: Correct.
14 It's -- at the time, it would have just been
15 Ordinance 1234. The fact that it's interim is
16 included within the ordinance. So, if you don't
17 -- you don't have to always refer to it as
18 Interim Ordinance 1234. There's no other
19 Ordinance 1234, other than the interim.
20 COMMISSIONER SPENCER CORDOVANO: Cool.
21 Thanks.
22 CITY ATTORNEY MATT JOHNSON: You're
23 welcome.
24 CHAIRMAN NEIL MORROW: Anything else?
25 Take a motion.

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1 COMMISSIONER SPENCER CORDOVANO: Are we
2 taking any -- is there any room for public
3 comment or Applicant comment? Or is that part of
4 the process?
5 CHAIRMAN NEIL MORROW: No.
6 COMMISSIONER SPENCER CORDOVANO: No,
7 no, no, and no. Thank you.
8 PLANNING DIRECTOR MORGAN LANDERS: And
9 then Matt, is it clear, I guess the two edits
10 that we're discussing now, we don't need to be
11 editing that live?
12 CITY ATTORNEY MATT JOHNSON: Correct.
13 I've actually made those changes on the draft
14 I've pulled up, as you've been discussing.
15 PLANNING DIRECTOR MORGAN LANDERS:
16 Great. Okay. So, you're clear.
17 CITY ATTORNEY MATT JOHNSON: And so --
18 yeah, the Chair can verify those before he signs
19 upon approval of the Commission.
20 CHAIRMAN NEIL MORROW: I will double
21 check.
22 VICE CHAIRMAN BRENDA MOCZYGEMBA:
23 Great.
24 COMMISSIONER TIM CARTER: So, what's
25 the motion here? Approve with edits, approve

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1 with -- as discussed?
2 VICE CHAIRMAN BRENDA MOCZYGEMBA: Yes,
3 and then for the record, I did vote nay on
4 upholding, I guess the Planning Director's
5 determination on this. But I am in support of
6 the way that this is worded, as far as a
7 summation of that meeting.
8 CHAIRMAN NEIL MORROW: Thank you for
9 that clarification.
10 COMMISSIONER SUSAN PASSOVOY: Morgan,
11 what's the language of the motion?
12 PLANNING DIRECTOR MORGAN LANDERS: So,
13 I think you can just move to approve the decision
14 as drafted, with the requested revisions, and
15 direct the Chair to sign the final version.
16 COMMISSIONER SUSAN PASSOVOY: Okay. I
17 -- does anyone have any further comment, before I
18 make, before a motion is put forward?
19 CHAIRMAN NEIL MORROW: No, ma'am.
20 COMMISSIONER TIM CARTER: I do not.
21 COMMISSIONER SUSAN PASSOVOY: I move
22 that we approve the decision with the edit, with
23 the additional edits, and direct the Chair to
24 sign the decision and forward it to the City
25 Council.

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1 COMMISSIONER TIM CARTER: Second.
2 CHAIRMAN NEIL MORROW: All in favor?
3 Aye.
4 COMMISSIONER TIM CARTER: Aye.
5 VICE CHAIRMAN BRENDA MOCZYGEMBA: Aye.
6 COMMISSIONER SPENCER CORDOVANO: Aye.
7 COMMISSIONER SUSAN PASSOVOY: Aye.
8 CHAIRMAN NEIL MORROW: So, that's
9 unanimous.
10 PLANNING DIRECTOR MORGAN LANDERS:
11 Great. Thank you, everyone. Thank you, Matt.
12 Appreciate it.
13 CHAIRMAN NEIL MORROW: Thank you, Matt.
14 Anything else from staff?
15 CITY ATTORNEY MATT JOHNSON: Thank you
16 all.
17 PLANNING DIRECTOR MORGAN LANDERS: I
18 will keep it short because it's 7:00.
19 CHAIRMAN NEIL MORROW: Yeah.
20 PLANNING DIRECTOR MORGAN LANDERS: Your
21 last meeting in December has been canceled. I
22 don't have any items for you.
23 CHAIRMAN NEIL MORROW: Yay.
24 PLANNING DIRECTOR MORGAN LANDERS: So,
25 please enjoy your Christmas. And we will see you

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1 for one meeting in December.
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1 CERTIFICATION
2
3 I, Sonya Ledanski Hyde, certify that the
4 foregoing transcript is a true and accurate
5 record of the proceedings.
6
7
8
9 *Sonya M. Ledanski Hyde*
10
11 Veritext Legal Solutions
12 330 Old Country Road
13 Suite 300
14 Mineola, NY 11501
15
16 Date: December 27, 2023
17
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EXHIBIT 20

**BEFORE THE PLANNING & ZONING COMMISSION
OF THE
CITY OF KETCHUM**

In the Matter of the Administrative Appeal of:)
)
) **FINDINGS OF FACT,**
) **CONCLUSIONS OF LAW, AND**
) **DECISION**
Scott and Julie Lynch, Yah Bernier)
and Elizabeth McCaw, and Distrustful)
Ernest Revocable Trust, for the)
Sawtooth Serenade Project)
(Applicant/Appellant)

Of a Planning Director Determination
on a Design Review Application

This matter comes before the Planning and Zoning Commission of the City of Ketchum ("Commission"), pursuant to Ketchum City Code 17.144.010, as an appeal by an applicant/affected party of a Planning Director determination. An appeal hearing on the matter was held before the Commission on November 14, 2023. The matter was heard for adoption of this written Decision on November 28, 2023. The Commission does hereby make and set forth the following Record of Proceedings and the Commission's Decision as follows:

I. RECORD OF PROCEEDINGS

The Appellants in this matter are Scott and Julie Lynch, Yah Bernier and Elizabeth McCaw, and Distrustful Ernest Revocable Trust, ("Applicant" or "Appellant"), an affected party, for the Sawtooth Serenade Project ("Project"). The Planning Director served as Respondent in replying to the issues raised on administrative appeal.

A Record of Documents before the Ketchum Planning Department and upon administrative appeal ("Record") was prepared and submitted to the Commission before the

November 14, 2023 hearing. That Record is hereby referenced and incorporated in full into the Record and this Decision. The Record includes the following Attachments:

- A. Administrative Determination, August 24, 2023
- B. Notice of Appeal and Appellant Brief with exhibits, September 7, 2023
- C. Administrator Response Brief, November 3, 2023
- D. Appellant Reply Brief, November 9, 2023
- E. City Ordinance 1234
- F. Legal Cover Report, November 9, 2023

On November 14, 2023, the Commission made procedural determinations and approved the stipulated and satisfied deadlines as to submission of written argument by the Parties. All submitted Memoranda are referenced above and made a part of the Record in this matter.

An appeal hearing on this matter was held on November 14, 2023, at which hearing the Commission heard oral arguments by the Parties, deliberated, and made a verbal determination. Such hearing was recorded and that recording is made a part of the Record in this matter.

II. JUDICIAL NOTICE AND REVIEW STANDARD

The Commission takes judicial notice of the Ketchum Municipal Code (KMC).

Pursuant to KMC § 17.144.010 (C), the Commission makes its determination considering only the administrator determination below along with written and oral legal arguments by the Parties. No new facts or evidence are considered in the appeal.

III. FINDINGS, CONCLUSIONS, AND DECISION

1. The Administrator's Determination was made on Applicant's application for Design Review (DR), which is distinct from Preapplication Design Review.

Applicant's application for preapplication design review was timely filed and complete prior to the City's adoption of Interim Ordinance 1234. For purposes of consideration on preapplication design review, the Commission therefore evaluated the application and provided feedback in relation to the standards set prior to Interim Ordinance 1234. The Applicant and Commission completed the preapplication design review process on January 24, 2023.

A preapplication design review is provided for under KMC 17.196.010(C). It is required in certain circumstances, and may be requested in other circumstances, as a separate and distinct step. KMC 17.196.010(C)(1). The purpose of preapplication design review is to provide direction and exchange ideas on design concept, prior to full design review. KMC 17.196.010(C)(2). Preapplication design review was required in this matter.

Design review is a subsequent and separate application and process, as provided for under KMC 17.196.040. The Applicant was required to submit a subsequent application to initiate the design review process after the preapplication design review process concluded on January 24, 2023.

2. The 180-day requirement of Ordinance 1234 was appropriately interpreted and applied by the Administrator to the DR Application.

Interim Ordinance 1234 specifically considered and provided for situations where a preapplication design review had already been conducted and with an allowance of an additional 180-day timeframe for the next process: application for design review. See Ordinance 1234, Section 3. According to the Applicant's Memo, the 180-day grace period was placed with the Applicant's knowledge and support, and therefore Applicant should have been aware the grace

period applied to preserve the completion of their preapplication design review. The Commission hereby confirms the intent of Section 3 was to provide a reasonable timeframe for an applicant that had conducted preapplication design review to proceed to final design review under the pre-Ordinance 1234 standards, while not allowing an applicant to delay and sit on the preapplication design review completion and pre-Ordinance 1234 standards without further timely action.

The purpose of Section 3 was to provide for orderly and timely transition of development projects from the pre-Ordinance 1234 standards and criteria to the Ordinance 1234 standards and criteria. The timeframe for such transition was specifically discussed in the deliberations on Ordinance 1234, with 180 days being added to Ordinance 1234 and adopted as an appropriate time period to balance the interests.¹

Therefore, when the Administrator received the Applicant's design review application, the Administrator appropriately checked to see if this new application fell within the 180-day window provided allowing projects to remain under pre-Ordinance 1234 standards. In this situation, the Administrator appropriately found that the Final Design Review Application was submitted on August 7, 2023, which was beyond the 180-day window to preserve the previously completed preapplication design review.

The Administrator appropriately interpreted and applied the 180-day window of Section 3 of Ordinance 1234 in this context, and consistent with the ordinance language and intent. The Administrator's determination was not an abuse of discretion, nor was it discriminatory, arbitrary or capricious, and should therefore be upheld, The Applicant failed to timely file a Final Design Review application in order to preserve the previous completion of the preapplication design

¹ It is noted that Applicant/Appellant was present for those hearings and the discussion on the addition to Ordinance 1234 for the inclusion of the 180-day window to preserve a preapplication design review completion.

review. With minimal inquiry or action, Applicant could have remained in status as preserving their completed preapplication design review under the 180-day grace period; just as other applicants did.

3. The 180-day requirement of Ordinance 1234 was equitably applied, and there is no evidence of improper delay by City staff.

The Commission finds that two other projects, as presented in the hearing on this matter, similarly fell into this transition period and took steps to timely preserve their preapplication design review as provided for by Section 3 of Ordinance 1234. Appellant in this matter had the same time requirements and opportunity for transition as any other project.

The Commission also finds that no evidence was presented of any substantive delay or abuse of process by City staff. Any delays in scheduling with staff were early enough in the time period to provide ample time for follow-up, and there is no evidence that those delays were undue or unreasonable as beyond what reasonably might be expected in scheduling for a busy department. Alleged delays by third-parties, such as Michael Decker and/or Clear Creek Disposal, would be outside the control or purview of the City. Furthermore, it was admitted that no attempts were made by Applicant to address any such outside third-party delays by submitting a nearly complete or contingent application, and/or seek other accommodation due an outside party delay.

Based upon the foregoing review and analysis, and good cause appearing from the record in these proceedings, the Commission AFFIRMS the Administrator Determination as presented in this matter and authorizes the Chair to sign this Decision on behalf of the Commission.




Neil Morrow, Chair

ATTEST:

By: 
Trent Donat, City Clerk

NOTICE OF APPEAL RIGHTS:

This Decision constitutes the written decision of the Commission pursuant to KMC 17.144.010(D). The City Clerk is directed to transmit this Decision to the Appellant and any other affected person who has requested a copy in writing. All parties and affected persons are hereby notified of this decision and their option to consider further action, including further appeal, pursuant to the proceedings set forth in KMC 17.144.020 and Idaho Code § 67-6521.

A copy of this Decision has been provided to the Appellant, Planning Director, and City Attorney, and the original has been retained in the records of this City on this 30th day of NOVEMBER, 2023.

By: 
Trent Donat, City Clerk



EXHIBIT 21

Timeline of Delays - Sawtooth Serenade

1st Collaborative design Meeting with Morgan Landers, Director of Planning and Building

2/11/23 Dave Thielsen (DT) of Thielsen Architects emails Morgan Landers (ML) asking for collaborative design meeting.

2/14/23 DT emails ML again asking for collaborative design meeting.

2/14/23 ML responds that she is booked for the rest of the week.

2/22/23 First collaborative design meeting between ML and TA.

Total of eleven (11) days from meeting request to the 1st meeting.

2nd Collaborative design Meeting with Morgan Landers, Director of Planning and Building

4/26/23 Robert Connor (RC) of Thielsen Architects emails ML requesting a second collaborative design meeting and receives an autoreply from ML that she is out of the office until 5/1/23.

5/1/23 RC emails ML for second collaborative design meeting.

5/1/23 DT emails ML asking for collaborative design meeting to be the week of the 8th.

5/8/23 RC emails ML asking again to schedule a collaborative design meeting.

5/8/23 ML responds that this week is full for her. Proposes the following week.

5/9/23 DT emails ML proposing meeting times.

5/9/23 ML responds that proposed times do not work for her.

5/9/23 DT emails ML proposing other times.

5/10/23 DT emails ML again attempting to secure meeting time.

5/11/23 ML responds that 5/17/23 will work.

5/17/23 Second collaborative design meeting between ML and TA.

Total of seventeen (17) days from meeting request after ML's return from vacation to the 2nd meeting.

The MH Companies

5/25/23 RC emails architectural drawings and the previous street lighting plan to the previous contact at The MH Companies. RC receives notice that the previous contact has left the company and that the message has been forwarded to a new contact who will respond shortly.

Sawtooth Serenade
Timeline of Delays
Page 2 of 3

5/31/23 RC calls The MH Companies and learns that the new contact is Mike Decker (MD). RC brings MD up to speed on the project.

5/31/23 RC emails drawings and the previous street lighting plan to MD.

6/9/23 RC emails MD to check status. MD can't access any of their previous work on the project and does not have good information on what Ketchum's requirements are for the project. MD tells RC he will contact the City of Ketchum to get more information.

6/14/23 MD emails RC an update. MD is still working on the project but promises something very soon.

6/20/23 MD emails RC an update. MD is still working on the project and hopes to have something soon.

6/21/23 MD emails RC a drawing, but MD has moved the streetlight from in front of the exit door into a required street tree.

6/22/23 RC and MD exchange emails and MD revises the drawing. MD moves the streetlight back in front of the exit door. RC responds asking it to be moved away from the door. MD moves the streetlight back into the street tree. RC responds that it is back in the street tree and needs to move further west to be out of the street tree and not in front of the door. MD provides a drawing with the streetlighting in a workable location.

24 total emails, plus phone calls, required to get small adjustments to the location of two streetlights. *Total of twenty-eight (28) days to receive requested minor adjustment from City required vendor.*

Trash Collection/Clear Creek Disposal

6/16/23 Jeff Loomis (JL) of Galena-Benchmark emails Mike Goitiandia (MG) to review trash collection access.

6/21/23 Email from JL to Thielsen Architects (TA) stating JL is still waiting to hear back from MG on a question he asked him regarding trash collection in alley.

6/23/23 JL calls MG.

6/23/23 RC emails MG asking that he return JL's call.

6/27/23 RC calls and leaves a voicemail for MG.

6/28/23 RC calls and leaves a voicemail for MG.

6/29/23 RC emails MG drawings for his review.

6/30/23 JL and MG speak on the phone.

**Sawtooth Serenade
Timeline of Delays
Page 3 of 3**

7/3/23 DT emails MG.

7/6/23 DT calls MG.

7/11/23-7/17/23 TA revises drawings based on civil design work which JL reviewed with MG.

7/17/23 RC emails MG asking for memo.

7/18/23 MG emails response to RC, JL, and DT.

7/18/23 RC replies to MG with revised drawings based MG's email

7/25/23 RC calls and leaves a voicemail for MG asking for a response.

7/25/23 RC emails MG asking for a response.

7/26/23 RC and MG speak on the phone.

7/26/23 RC emails MG revised drawings based on phone conversation.

7/31/23 RC emails MG asking for a response.

8/1/23 RC emails MG asking for a response.

8/1/23 RC asks Jim Laski to contact MG to get things moving.

8/2/23 MG sends approval memo to City of Ketchum and project team.

8/7/23 Final design Review Application is transmitted to City of Ketchum.

Total of forty-seven (47) days to receive feedback and approval from City required vendor.



City of Ketchum

ATTACHMENT 3:

City Response Brief with Exhibits

February 26, 2024

BEFORE THE CITY COUNCIL
OF THE CITY OF KETCHUM

In the Matter of the Administrative)
Appeal of:)
Scott and Julie Lynch, Yahn Bernier)
And Elizabeth McCaw, and the)
Distrustful Ernest Revocable Trust)
For the Sawtooth Serenade)
(Applicant/Appellant))

RESPONSE BRIEF

Of the Decision of the Planning and
Zoning Commission on Administrative
Appeal of a Planning Administrator Determination

This Response Brief is made in response to the Applicant/Appellant Brief and in support of the Planning and Zoning Commission Decision and Planning Director Determination.

Attached for reference, and incorporated into this Response Brief, is the Planning Administrator's Reply Brief from the Planning and Zoning Commission appeal stage ("P&Z Reply Brief"). The Administrator's arguments and explanations from that P&Z Reply Brief remain relevant and in support of the Argument below.

BACKGROUND

This administrative appeal relates primarily to the Preapplication Design Review Application ("Preapp DR") and Design Review Application ("DR") of the Sawtooth Serenade Development ("Project").

The Preapp DR was received by the Planning Department on August 17, 2022. The Preapp DR was deemed complete on October 17, 2022. After proper notice, the Preapp DR was considered by the Planning and Zoning Commission ("Commission") on January 24, 2023.

In this same time period, the City was considering Ordinance 1234, which was ultimately approved by the City Council on October 17, 2022. It is undisputed that the Preapp DR was completed, and reviewed and commented upon under pre-Ordinance 1234 standards.

Ordinance 1234 also provided that projects that had completed a preapplication design review meeting with the Commission had the opportunity to file a design review application within 180 days or the completion of a preapplication review step would become null and void. This timing requirement applies to all new design review applications, whether their preapplication design review was done pre- or post- Ordinance 1234. This requirement is now codified at Ketchum Municipal Code §17.96.010(D)(5).

The Project submitted its DR Application on August 7, 2023. This was more than 180 days after the completion of the Preapp DR Commission meeting.

The Planning Administrator issued a Determination on August 24, 2023 ("Administrator's Determination"). Based upon the 180-day requirement in Section 3 of

Ordinance 1234, the previously completed Preapp DR was determined to be null and void. The Project was informed that it would have to go through a new preapplication design review before being able to proceed to the separate design review step.

The Administrator's Determination was timely administratively appealed to the Commission. The appeal was timely briefed and then heard by the Commission on November 14, 2023. The Commission voted to affirm the Administrator's Determination, and the Commission Decision was finalized and approved on November 28, 2023.

On December 11, 2023, the Appellant timely filed an administrative appeal of the Commission Decision to the City Council.

REVIEW STANDARD

The standard of review on administrative appeal of a Commission decision to the City Council is specified in KMC §17.144.020(C):

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.

ARGUMENT

I. Preapplication Design Review and Design Review are separate applications and processes with different purposes.

As was specified in the Administrator's Determination: "Preapplication Design Review and Final Design Review applications are separate and distinct applications, each with their own application form, submittal requirements, fees, and processes."

Preapplication design review is a less formal process of exchanging ideas and the Commission giving direction to an applicant on design concept. See KMC 17.96.010(D)(2). The preapplication review materials to be submitted are specified in KMC 17.96.010(D)(3); the design review application requirements are specified in KMC 17.96.040. No formal findings or decision is made on a preapplication design review application. A decision and approval are necessary on a design review application.

The preapplication design review is a more conversational process for input and feedback on project design. This helps provide an applicant with guidance and insight that may be helpful in determining whether and how to proceed to a full design review application. While

preapplication design review may be a preview for design review, it is still a separate and distinct process. Projects may change substantially between these applications and processes.

Preapplication design review is an optional step for many projects, and further may be waived by the Administrator in certain circumstances. KMC 17.96.010(D)(4). However, it is required for new developments totaling 11,000 square feet or more. KMC 17.96.010(D)(1). This requirement is why the Sawtooth Serenade Project had to complete a preapplication design review process before being able to proceed to a separate design review application.

The distinction between a preapplication design review and a design review are important. A completed preapplication design review does not provide any decisions or rights to an applicant. An applicant does not have anything vested at the conclusion of the preapplication design review process, other than the opportunity to proceed to filing a new design review application.

For the reasons above, the Council should find that the Determination appropriately interpreted the separateness of the applications, and the Commission appropriately affirmed such Determination in their Finding 1.

II. The 180-day requirement of Ordinance 1234, Section 3, was specifically to provide for a level of vesting on an earlier application while appropriately balancing the public interest in timely proceedings on a separate application.

Much of Appellant's Appeal Brief focuses on vesting and discussions of vesting. Appellant is correct to note that Idaho law measures land use applicant's rights as measured at the time of the application. See Appellant Brief, 16, citing numerous cases. The Appellant Brief goes on to identify the purposes of this position, particularly as to preventing local authorities from changing the law in order to defeat an application. *Id.*

Ordinance 1234, and Section 3 in particular, were specifically included to balance the policy purposes and vesting interests at play in the situation. Ordinance 1234 was pursued and adopted as the City specifically deliberated on general policy concerns with development standards, density, and regulations across a variety of zones in the City. There is no showing Ordinance 1234 was targeted at or an individualized response to the Sawtooth Serenade Project. There is no evidence of any intent to pass Ordinance 1234 to "defeat" the Project.

As with any time though, where updated standards and regulations are coming into play, the City specifically sought to address projects that may be caught in the transition period. For this reason, the language of Section 3 was specifically deliberated upon and discussed so as to provide for a reasonable period wherein projects that were vested in the preapplication design review step could preserve an opportunity to apply for design review under the pre-Ordinance 1234 standards. In essence, the Council deliberated upon and determined to provide additional time under Ordinance 1234 for a project vested in its preapplication design review to take proactive steps to create further vesting under pre-Ordinance 1234 standards for design review, despite the separate design review application not being submitted until after the applicability of Ordinance 1234.

The City's policy and legal debate on potential transitional vesting between preapplication design review and design review therefore took place at the City Council level in its deliberation on Ordinance 1234. Appellant's Brief even highlights this deliberation and discussion leading toward how the interplay between the vesting of two different applications

will be handled. This even included amendments to Ordinance 1234 specifically to address concerns that were being raised at that time by Appellant's legal counsel. The final result in Section 3 – the 180-day period to be able to proceed on applying for and further vesting a design review application – speaks for itself as to creating a period of opportunity for additional vesting that it within the applicant's control.

Applicant's Brief cites to numerous excerpts from the Commission's November deliberations, in particular as related to differing comments from Commissioners on the concept of vesting. First, these are comments in the midst of deliberation as the Commission sought to work through how and if vesting concepts may or may not apply in the context of this administrative appeal. None of those comments is definitive or a decision in itself; the findings (including interpretation) and decision are specified in writing in the Commission Decision, dated November 30, 2023.

Second, it was not a responsibility of the Commission to come to a legal determination on the concept of vesting in this situation.¹ Vesting of an application, and the interplay between a preliminary design review application and a design review application, was already considered and addressed by the Council in its adoption of Ordinance 1234, and Section 3 in particular. Upon a review of the record and the arguments, the Commission appropriately found in Finding 2 that it was the intent of the City Council to specifically strike this balance between applications at 180-days. The Commission's role, appropriately and in the same manner as the Administrator, was to interpret and apply the City's ordinances for the situation. It is now to the Council to determine whether those interpretations were accurate, since the Council is better situated than any other to know how Ordinance 1234, and Section 3, is intended and interpreted.

For the reasons above, the Council should find that the Determination appropriately interpreted and applied the 180-day requirement, and the Commission appropriately affirmed such Determination in their Finding 2.

III. Appellant failed to timely pursue the opportunity provided to vest the separate and new design review application.

This administrative appeal is unnecessary if Appellant timely files for a design review application within 180-days of the completion of their preapplication design review to avail Appellant of the opportunity. This is not an unwieldy requirement. There is no evidence that timing requirement was input to defeat the Project. Quite the opposite, the 180-day window was specifically input to provide an opportunity for how new design review applications after Ordinance 1234 could get a period to become vested under pre-Ordinance 1234 standards due to having completed a separate pre-existing preapplication design review.

Appellant puts forth a number of allegations of bad faith as having interfered with its timely submission of a design review application. These allegations are not supported by the record.

Appellant alleges delays in being able to schedule meetings with City staff. However, there is nothing to show that these were anything more than the difficulties of scheduling

¹ Appellant insinuates that the City Attorney and Planning Director did not sufficiently address or advise the Commission on the legal issues surrounding vesting. This was because an administrative appeal is about the interpretation and application of City Code. The Commission is not situated in a position to establish caselaw or strike down a duly-passed and established ordinance that has not been challenged.

meetings with a limited staff during a period of high workload. Furthermore, there is no evidence that any of these meetings did not happen or were done in a way to prevent the Appellant from timely filing a design review application. These allegations amount to little more than conspiracy theories.

Appellant alleges they were not informed of the 180-day requirement in the same manner as other projects. First, it should be noted that other projects sought out clarification on the opportunity to create pre-Ordinance 1234 vesting for their new design review applications. Abby Rivin's emails to other projects, cited to by Appellant, were done in direct response to meetings and/or inquiries from those projects on that topic. Second, Appellant's legal counsel – representing Appellant – was specifically present for the public hearings on Ordinance 1234. Appellant's comments were a key reason for the revision and refinement of Section 3 and the adoption of the 180-day opportunity period approach. The only inequitable application of the 180-day requirement would have been if City staff had ignored that language and not applied it to a new application submitted after the 180-days. That would have been inequitable to those projects who timely complied and submitted their new applications on design review so as to take advantage of the opportunity created.

Finally, Appellant makes arguments about quasi-estoppel – most notably presenting correspondence or statements alleged to be confirmation of vesting of a design review application. Context, however, matters. Each of the examples presented by Appellant are communications and reports directly related to the Preapp DR. As Appellant refers to, the Preapp DR was under certain time pressure to get completed prior to the adoption of Ordinance 1234. Staff and the City Attorney were working with the Appellant to address that completion and provide assurance to the Appellant that if completed then the Preapp DR would be considered under pre-Ordinance 1234 standards (even if a Commission meeting could not be scheduled until later). Vesting of the Preapp DR is all that was represented by staff and the City Attorney, and any interpretation of applying that to a separate DR App was an error by the Appellant. That Appellant error is further confirmed by the Appellant's presence for and clear awareness of the incorporation of the 180-day requirement for design review applications.

Appellant was treated equally and was aware of the same information and opportunities as any other similar situated project. The responsibility for Appellant's failure to timely submit a design review application in order to take advantage of the vesting opportunity on a separate application, provided by Section 3, lies solely with Appellant.

For the reasons above, the Council should find that there was no inequitable application, and the Commission appropriately found such in their Finding 3.

CONCLUSION

For the reasons stated above, the Administrator has appropriately applied and enforced the applicable ordinances and standards in line with the understood intent and interpretation. This administrative appeal is for the purpose of verifying such understanding with the Council as the governing body best positioned to definitively interpret and understand the applicable ordinances. The Commission, in conducting a similar appeal review, affirmed the Administrator. If the Council further finds that this understanding and interpretation is correct, then an affirmation of the P&Z Decision is the correct course of action.

Respectfully submitted this 26th day of February, 2024.

By: 

Matthew A. Johnson
WHITE PETERSON, P.A.
Response Attorney for Planning and Zoning Commission



CITY OF KETCHUM

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MEMORANDUM

To: City of Ketchum Planning and Zoning Commission
From: Morgan Landers, AICP – Director of Planning and Building
Date: November 3, 2023
Re: Administrator Reply Brief for the Sawtooth Serenade Appeal of Administrative Determination

This memorandum serves as the reply brief to the Appeal of Administrative Determination letter received by Mr. Jim Laski, of Lawson, Laski, Clark, on September 7, 2023. As noted in Mr. Laski's letter, an Administrative Determination was made as to whether a Final Design Review application could be filed and processed with the city based on the ordinance in effect at the time of the application. Below is a response to Mr. Laski's letter for consideration by the Planning and Zoning Commission during your review of the appeal.

Vesting and Application Types

As noted in the determination letter to the Applicant, dated August 24, 2023, staff outlined that pre-applications are separate applications with separate fees and separate processes as outlined in the Ketchum Municipal Code. As such, staff reviews each application separately upon submittal of all required application materials. Applicant's Letter of Appeal from their counsel Jim Laski, dated September 7, 2023, outlines that the determination violates the project's vesting under the various legal cases referenced in the letter and notes that applications should be reviewed under the ordinances "in effect at the time of the application". City staff have done just that. At the time of the review of the pre-application, the application was reviewed under the ordinances and regulations in effect at the time the pre-application was deemed complete. City staff reviewed the pre-application for conformance with the regulations in effect at the time, and as Mr. Laski notes, reiterated multiple times to the fact that the interim ordinance was not applicable to the pre-application.

The action in question, and what is being appealed, is the determination of the Final Design Review, not the pre-application. As stated above, the pre-application was accepted and processed according to the ordinance in effect at the time. The preapplication process concluded with the January 24, 2023, meeting of the Commission. Upon receipt of the final design review application in September 2023, staff reviewed the application according to the processes and ordinances in effect at the time of the final design review application (not pre-application), which was Interim Ordinance 1234.

Section 3 of Interim Ordinance 1234 states that developments that have conducted a voluntary or required pre-application "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". Because the application was not submitted within the 180 calendar days, the preapplication became null and void and any allegation of vesting provided with the preapplication under Section 1 of the Interim Ordinance was dissolved.

Mr. Laski represents that the preapplication and final design review applications are a linked application process for one development and therefore both applications should be vested. Section 1 of Interim Ordinance 1234 specifically references each permit and application type separately, not "developments", therefore vesting of a pre-application is only upheld when the processes and timeframes outlined in the ordinance is followed. As noted above, the application was not filed within the required timeframe and therefore the pre-application is null and void and a new pre-application is required. Staff provided the option to the applicant to move forward with a new pre-application, which they declined.

Consistent Treatment of Applicants

If the applicant had submitted the final design review application in the required timeframe, the two applications would have been treated as timely in succession under the previous ordinance. Mr. Laski states that the actions of staff were arbitrary and capricious. Staff treated the Sawtooth Serenade project the same way as two other development projects moving through the process at similar timeframes. The Perry Building development and 4th and Main development both had pre-applications, that were required and deemed complete prior to the effective date of the interim ordinance. Applicant representatives from both developments reached out to city staff for clarification of Section 3 of the interim ordinance. Staff communicated to the applicants that Section 3 did apply to their developments and that they would need to submit within the 180 calendar days to avoid being subject to the development standards of the interim ordinance. Both projects submitted within the required timeframes to retain their vesting under the 180-day grace period.

Delays Caused by City

Finally, Mr. Laski's letter makes the accusation that explicit actions of the city delayed the applicant's ability to submit the application within 180 calendar days. The letter outlines delays from staff, Michael Decker, and Clear Creek Disposal. It should be noted that of the three-week delay from city staff, staff were on vacation for one full week of the stated timeframe. The applicants requested a meeting with the Director of Planning and Building, of which a two-week response time for requests is common due to workload and capacity. Michael Decker and Clear Creek Disposal staff are not employees or contractors of the City of Ketchum and city staff have no control or management over these entities and their response times. Also, city staff does not control the point at which applicants decide to provide information to and request feedback from those entities, which could have been done sooner than it was based on Mr. Laski's letter and the level of design of the project at pre-application.

Conclusion

Based on the information provided above, staff believes that we upheld the vesting of applications provided by the ordinances in effect at the time of applications, processed the pre-application thoroughly and fairly according to the law, and based the determination of the Final Design Review application within the bounds of the procedures as written in law. Staff prides themselves on treating all applicants and applications fairly and consistently to avoid accusations of arbitrary and capricious actions and have demonstrated how we have done that in this case. As the Director of Planning and Building, I serve as the Administrator of Title 17 of the Ketchum Municipal Code and have acted well within the authority of the role by providing options to the applicant for consideration to move the application through the required process.

Thank you for your time and consideration of this matter.

Regards,

A handwritten signature in black ink, appearing to read "Morgan Landers", followed by a long horizontal line extending to the right.

Morgan Landers, AICP
Director of Planning and Building



City of Ketchum

ATTACHMENT 4:

Appellant Response Brief

February 29, 2024

BEFORE THE CITY COUNCIL
OF THE
CITY OF KETCHUM

In the Matter of the Administrative Appeal of:)	
)	
)	APPLICANT/APPELLANT
Scott and Julie Lynch, Yahn Bernier and Elizabeth McCaw, and the Distrustful Ernest Revocable Trust, for the Sawtooth Serenade (Applicant / Appellant))	REPLY BRIEF
)	
)	
)	
)	
)	
)	
Of the Decision of the Planning and Zoning Commission)	

On behalf of Scott and Julie Lynch, and Yahn Bernier and Beth McCaw and Distrustful Ernest Revocable Trust (collectively, "Appellants" or "Applicants"), this Reply Brief in Support of their Notice of Appeal of the City of Ketchum Planning & Zoning Commission's ("Planning Commission") Findings of Fact, Conclusions of Law, and Decision dated November 30, 2023 (the "Decision") and in Response to the City's Response Brief submitted February 26, 2024 ("Response Brief").

Summary Argument

KMC Chapter 17.96 sets forth the Design Review Process for the development of projects in the City of Ketchum. In the summer of 2022, when emergency Ordinance 1234, which would materially change the zoning criteria to be considered during design review, was proposed, the issue of whether and when a project "vested" under the existing 17.96 or, alternately would be subject to the new ordinance, became critical for projects in the early design phase. The City initially took the position that a development project was not "vested" under any ordinance until the Design Review Application was deemed complete. Applicants, however, presented caselaw to the Planning Commission, noting that such vesting language was not legal under Idaho law because: (1) pre-application is not optional; (2) the City controls the timing of the process; (3) pre-application submittal

requires the exact same submittal requirements as design review; and (4) a fee is required. Applicant cited *Taylor v. Canyon County*, 147 Idaho 424, 436 (2009) which states: “Idaho law is well established that an applicant’s rights are determined by the ordinance in existence at the time of filing an ***application for a permit.***” (Emphasis added.)

Despite weeks of foot dragging by planning staff in proposing language consistent with Idaho law for its new, now interim, Ordinance 1234, at City Council’s second reading of the ordinance on October 3, 2022, on the City Attorney’s advice, the City adopted language in Section 1 of Ordinance 1234 to the effect that development projects vested, or became grandfathered, when their pre-application design review application was deemed complete. This language was formally adopted on October 17, 2002. Prior to its adoption, Applicants received confirmation that their preapplication design review submittal was deemed complete.

Under KMC 17.96, the first required application for a design review permit is the Preapplication Design Review application. There is no dispute that that Applicants’ Preapplication Design Review application was deemed complete PRIOR to the adoption of Ordinance 1234. As such Ordinance 1234, as a matter of law, does not apply to Applicants’ Project. KMC 17.96, prior to the adoption of Ordinance 1234, does apply. That version of KMC 17.96 did NOT include a timeframe for submittal of Design Review Applications after the Planning Commission formally votes to move them forward to Design Review. As such, no such timeframe applied to Applicants’ Project.

I. The Administrator Obfuscates the Record to Support Separate Applications

The Administrator’s argument in support of separate applications is based on revisions to the preapplication design review process adopted AFTER Applicants’ Project vested and AFTER Ordinance 1234. The provisions cited were not in effect when Applicant went through preapplication design review. The relevant version of KMC 17.96 (the version in effect on October 17, 2022) does not contain the referenced 17.96.010(D) and it specifically says, in 17.96(C)(3), “Preapplication review materials shall be submitted according to the application requirements of section 17.96.040 of this Chapter” which is

the section stating the requirements for Design review. Ordinance 1249 which was enacted in October of 2023 (a full year after the Applicants' preapplication design review submittal was deemed complete) codified the changes to the pre-application design review requirements. (See current KMC 17.96.D.3).¹ Moreover, the inclusion of the 180-day sunset provision in Ordinance 1249 (see current KMC 17.96.D.5) further demonstrates the intent that the 180 day timeframe was designed to apply to prospective preapplication design review applications rather than to address the three grandfathered vested projects retrospectively.

Reliance on a newly revised Ordinance does not change the fact that under the prior version on KMC 17.96, the preapplication design review application was the initial application required to obtain a Design Review permit, thus vesting the Project under *Taylor*. The Administrator's contention that "nothing vested at the conclusion of the pre-application design review process" supports Applicants' position, as legally, vesting occurred when their preapplication design review application was deemed complete.²

II. Intent of Section 3 of Ordinance 1234 Not Borne Out by the Record

The Administrator contends that the policy purposes of Section 3 of Ordinance 1234 were "deliberated and discussed" by Council as they determined that vesting would only apply to preapplication design review and not design review. While this may have occurred behind closed doors, the record of the Council hearings, as well as the Planning Commission hearing for that matter, shows absolutely NO discussion related to Section 3 of the Ordinance. This simply never happened. As such, it is impossible to know the Council's intent in adopting that language. Rather, all discussion on vesting was correctly focused on Section 1 of Ordinance. The record is clear that there was never any

¹ Including a significant reduction of pre-application design review submittal requirements.

² Moreover, the limited purpose of preapplication design review as an exchange of ideas and provision of direction does not change the legal analysis. Historically, some projects have been stuck in the preapplication design review process for well over a year and multiple submittals before getting permission to proceed from the Planning Commission, i.e. the 4th & Main Mixed-Use Building Preapplication process spanned from March 2020 through May 2022.

discussion that any portion of Ordinance 1234 would somehow apply to vested applications.

The Administrator also contends that the Planning Commission's determination regarding vesting is not a legal issue. We have repeatedly requested any legal authority from the City Attorney that would support the Administrator's position regarding the vesting on an application, and the Design Review permitting process under KMC 17.96 in effect at the time Applicants' application vested, and, as can be seen from the response brief, there is none. The Council's determination is not whether the Administrator's interpretations are accurate, but also whether the Administrator's interpretations are consistent with the law.³ To the extent they are not, they cannot be upheld.

III. Applicants Relied on the City re Vesting

The Administrator finally argues that it was Applicants fault for not filing its Design Review Application within the 180-day window of Ordinance 1234. Despite being repeatedly told by the City that the Project was grandfathered and not subject to Ordinance 1234, we should have known that Section 3 applied to the Project. This, even though, Section 1 said that it didn't.

To the extent Applicants should have relied on the record to understand the City's intent, at the Planning Commission, then Administrator Frick suggested, when discussing confirming that projects vested at preapplication design review:

. . . we figure out what's the universe of projects. They're in pre-app when this ordinance comes forward and then those specific projects are the ones that get grandfather[ed] and then we give them a period of time . . . (*Exhibit 2*, 01:14:28 – 42).

³ An ordinance is void for vagueness if persons of ordinary intelligence must guess at its meaning. *Cowan v. Board of Com'rs of Fremont County*, 143 Idaho 501, 514, 148 P.3d 1247, 1260 (2006). Analysis of an ordinance begins with the literal language of the enactment. *Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 89, 175 P.3d 776, 778 (2007). Where the language is unambiguous, the clearly expressed intent must be given effect, and there is no occasion for the Court to construe the language. *Id.* Here, if interpreted as suggested by the Administrator, the plain language of Ordinance 1234 is vague to the point that a person of ordinary intelligence must guess as to its meaning. Section 1 of the Ordinance declares that the Project vested under the prior applicable law, and yet somehow Section 3 is deemed to apply. As the literal language of Ordinance 1234 expresses no clear intent, the Ordinance is rendered void for vagueness.

Applicants' Project was among the "universe of projects" that were grandfathered, which also included only two others: the 4th & Main Mixed-Use Building and the Perry Building Project. On October 18, 2022, City Planning Staff advised the development teams for both of those projects of the exact date by which their Design Review application needed to be submitted to maintain vesting under the prior ordinance.⁴ (Exhibits 10 & 11). Planning Staff did not inform Applicants of such a date for their Design Review application at any time during the process.

The Administrator contends that these emails were only provided as a "direct response to meetings and/or inquiries from those projects on the topic."⁵ Applicants' Design Team met with the Administrator twice after Preapplication Design Review received a vote to proceed, on February 22, 2023 and then again on May 17, 2023. The timing of the final submission was discussed at these meetings, indeed, specifically raised by Ms. Landers at the February 22 meeting, yet she never identified or suggested a deadline for the Applicants to file their Design Review Application.

The Administrator then contends that Applicants' Attorney was involved in the "revision and refinement of Section 3 and the adoption of the 180-day opportunity period approach." This could not be further from the truth. As stated above, Section 3 was NEVER discussed at any Planning Commission or Council Meeting, nor was it ever revised after it was initially incorporated for the Council's first reading of the ordinance on September 19, 2022. How it was revised and refined with Mr. Laski's input when it was not even discussed at any of these meetings is a significant question.

As noted above, only Section 1 was discussed on the issue of vesting. There is no dispute that the City Attorney never suggested a two-application distinction to vesting in any of his conversations with Mr. Laski. Nor did the Administrator ever suggest that to the Applicants' Development team. Rather, at the Planning Commission Hearing on

⁴ While these notices were calculated based on the language of Section 3 of Ordinance 1234, that does not make Ordinance 1234 applicable from a legal perspective. The fact that both of these projects elected to meet the deadline provided, rather than challenge the City's analysis, likewise does not impact the enforceability of a new ordinance on a previously vested project.

⁵ In both cases, a review of the email text does not support the contention that the notice was provided in response to any such inquiry.

Applicants' Preapplication Design Review application, the Administrator stated on the record that this "***Project does not come under the purview of the interim ordinance.***" (January 24, 2023 Commission Hearing at 2:31:11-22; see also exhibit 15, pg.6). Applicants relied on these representations when proceeding through the design Review process. Quite simply, there was no reason for the Applicant team to question whether Section 3 applied to their Project because Applicants were vested per Section 1.

Finally, the concept of estoppel based on the City's representations is not even addressed.

For the reasons set forth above, the Council should reverse the Planning Commission Decision.

Conclusion

Applicants were well aware that the Project they were designing, while in conformance with the existing Design Review criteria under KKMC 17.96, would not meet the requirements of Ordinance 1234. As such, they sought clarification on the vesting of their Project and received assurances that the Project vested prior to the adoption of 1234. Based on the time and effort put in to the Project design, if there had been a deadline in place within which to file the Design Review Application, Applicants certainly would have done everything in their power to meet it.⁶ Rather, the Applicant team worked in good faith with the City Staff and City Attorney only to have the goal posts moved without notice.

Now, in response to all of Applicants' arguments, the Council is being asked to adopt a two distinct application theory that was never addressed at any public meeting and which directly contradicts the Idaho Supreme Court holding in *Taylor*. To the extent an application vests, it vests all the way to the permit. As Applicants Project vested prior to the adoption of Ordinance 1234, NONE of its provisions apply.

⁶ In fact, if any one of the three major delays outlined in Exhibit 21 had not happened, Applicants' Design Review Application would have been filed within 180 days notwithstanding the fact the Project was grandfathered.

Based on the foregoing, and all the arguments set forth in Appellants' Brief dated February 20, 2024, we respectfully urge the Council to reverse the Planning Commission's Decision and allow the Project to proceed with Design Review.

Respectfully Submitted this 29th day of February 2024.

LAWSON LASKI CLARK, PLLC



James R. Laski
Attorney for Appellants/Applicants