BEFORE THE CITY COUNCIL
OF THE CITY OF KETCHUM

In the Matter of the Administrative Appeal of:	)	**RESPONSE BRIEF**
Scott and Julie Lynch, Yahn Bernier And Elizabeth McCaw, and the Distrustful Ernest Revocable Trust For the Sawtooth Serenade (Applicant/Appellant)	)	
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
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,

Morgan Landers, AICP
Director of Planning and Building