

MINUTES OF A CONTINUED MEETING OF THE  
COEUR D'ALENE CITY COUNCIL  
HELD IN THE LIBRARY COMMUNITY ROOM  
ON JANUARY 14, 2013 AT 12:00 NOON

The City Council of the City of Coeur d'Alene met in continued session in the Library Community Room held at 12:00 noon on January 14, 2013, there being present upon roll call a quorum.

Sandi Bloem, Mayor

Woody McEvers       ) Members of Council Present  
Steve Adams         )  
Dan Gookin           )  
Deanna Goodlander   )  
Mike Kennedy         )

Loren Ron Edinger   ) Members of Council Absent

**STAFF PRESENT:** Wendy Gabriel, City Administrator; Warren Wilson, Deputy City Attorney; Troy Tymesen, Finance Director; David Yadon, Planning Director; Renata McLeod, City Clerk; Mike Gridley, City Attorney; Jon Ingalls, Deputy City Administrator; Kenny Gabriel, Fire Chief and Tami Stroud, Planner.

**CALL TO ORDER:** The meeting was called to order by Mayor Bloem. Mayor Bloem stated that she would recuse herself from the proceedings and asked Councilman Kennedy to take over the proceedings.

Deputy City Attorney Warren Wilson stated the purpose of the meeting is to hear a quasi-judicial appeal of the One Lakeside, L.L.C., project Design Review Commission (Design Commission) determination. This is a unique hearing as no new evidence can be introduced into the record and no new testimony can be taken. The only argument to be heard should be in reference to the decision of the Design Commission. He clarified that there will be no public comments taken. The one issue to determine at this hearing is if the Design Commission incorrectly applied the design standards. Objections to parking, height, density, and parking impacts are not reasons for appeal. He asked the City Council to disclose any ex parte contact including any site visits. Additionally, councilmembers should disclose when the contact occurred and what was discussed.

Councilman Goodlander stated that she has spent time with Mr. Don Sausser at his apartment in the Hagadone apartment complex and discussed the views and vistas and the potential interference thereof. Councilman Gookin stated that his ex parte contact consisted of his reading of articles in the Coeur d'Alene Press and he has discussed the tower and regulations with Planning Department staff. On October 5, 2012, Councilman Gookin received and replied to an e-mail from James Crowe, a resident of Coeur d'Alene North, and on November 1, 2012, he attended a portion of a Design Review Commission meeting and spoke to constituents who live

in Coeur d'Alene North and the Lake Tower buildings after the meeting. He also spent time with Mr. Saucer at his apartment, studied the views from his apartment, and met with another resident of the apartment complex. On November 3, 2012, he received an E-mail from Curt Olson and visited his apartment in the Coeur d'Alene North apartment complex. At the November 6, 2012 Council meeting, he made a comment about the building that is reflected in the Council meeting minutes. On January 6, 2013, he received a text message from Robert Cliff who expressed his opinion regarding the project and its impacts on the surrounding properties. Councilman Adams stated that he met with Mr. and Mrs. Curtis Olson at their condominium in early November and discussed their view. Councilman McEvers stated that he received a couple e-mails but did not respond. Councilman Kennedy stated that he received an e-mail containing a meeting request, but declined. He also received a text from Robert Cliff and responded he could not comment on this issue.

Mr. Wilson stated that the next step is for each Councilmember to consider if what they heard or saw would prevent each from being impartial and to question if they were able to make a decision based on what is heard today without bias. The Councilmembers confirmed they would be able to be impartial.

Mr. Howard Damiano spoke as the appellant. Mr. Damiano disagreed with Mr. Wilson regarding the purpose of today's meeting and stated that he had provided copies of code sections to the Council and a PowerPoint presentation. According to Municipal Code 17.09.335 (b), the rights to appeal, states that the City Council's review of the decision shall be based on the record developed by the Commission. The appellant must establish that an error was made in the decision or that design standards were not applied correctly. He presented a summary of transcripts from the Design Review Commission meeting held on November 1, 2012, and outlined Mr. Wilson's remarks that he believed to be inaccurate. Specifically, he believes that the Commission is charged with protecting property rights and values and complying with all state and city statutes, rules, and regulations.

Mr. Damiano stated that the decision was based on 17.09.335, but he does not believe that should be the case, because if the Commission protects property rights, one would not be able build a building over four stories. He also stated that any agency of government is required to determine if they are embarking on a potential taking, through the use of the Attorney General's checklist. According to Mr. Damiano's completion of the check list, it demonstrates two check boxes filled, which would require the City to stop what they are doing. The Comprehensive Plan (page 72) includes a policy to protect private property rights and private property values. All of these items were in the record through prior testimony. He explained that the purpose of the Zoning Ordinance, as outlined in M.C. 17.01.015, the rights of a majority are more than the applicant (sometimes referred to as a public nuisance) and also includes a clause to protect property rights and to enhance property values. He stated that the Idaho Code, Local Land Use Chapter requires the private property rights analysis is required and requires the city to complete the checklist for all administrative decisions he previously mentioned, with no exception. The Idaho Regularity Takings Act Guideline clarifies that property rights, even intangible property rights, cannot be taken without just compensation. In 1994, the Idaho legislature added to Chapter 80, Title 67, when the Attorney General's office wrote a letter stating that the 5<sup>th</sup>

Amendment of the United States Constitution and the Idaho State Constitution ensure that private property will not be arbitrarily confiscated by any agency of government.

Mr. Damiano stated that he believes there was plenty of testimony given demonstrating that it would affect private property rights and values, which no one disputed, and if the building were built, it would destroy the enjoyment of those living in Coeur d'Alene North. The Attorney General checklist he completed contained marks in boxes (4 and 5) which state that there would be a significant impact on the landowner's economic interest (as it devalues property) and that the action taken denies a fundamental attribute of ownership. He stated that the Downtown Core Development Ordinance was approved in the September 5, 2006 Council Minutes, was passed unanimously by the Council, and included the establishment of a Downtown Design Commission, including the duties and responsibilities. He reiterated that only one of the established duties was allowed to be examined by the Commission, as they were advised that there was nothing else they could do. He reviewed several excerpts from the CDA Garbage vs. City of Coeur d'Alene case, which reiterated the constitutional protection of private property rights. He stated that the ordinance contains the protection the city needs and they should apply it.

Mr. Wilson clarified that the Council could ask questions of Mr. Damiano at this time. Councilman Gookin asked what his opinion of the building design was. Mr. Damiano responded that he thought it was excellent, although it should be built where the old Elks building is located. He also stated that the ordinance precludes it from going on the Mudge property, and that the only reason it got through the process is that the advice the Commission received was that they could do nothing else. Councilman Kennedy asked whose property rights were superior - yours or the property owners. Mr. Damiano stated that he believes that it should be looked at, and the City should examine the developer's property rights, since the developer bought the property for \$660,000 and it continues to remain that value, but the Zoning Ordinance has limited development to no more than four stories, which causes the property to be limited. It could be argued that rights were taken away for full development potential.

Mr. Wilson stated that Mr. Damiano has misunderstood the laws of the State and the City ordinances and processes. The only basis for appeal is the design, Mr. Damiano has no issue with the design, and that the Council should reject the appeal. Mr. Wilson clarified that under Municipal Code 17.05.690 a building can be developed up to 200 feet, and that it can be built to 220 feet if certain conditions are met. He also commented that M.C. 17.05.650 (B) sets forth the vision for the area to have the highest intensity uses, such as mid-rise and high-rise buildings in this area of town. Additionally, Mr. Wilson explained that the Design Commission could only review the design as M.C. 17.09.310(b) states no comment shall be accepted regarding basic zoning standards such as building height, density, and use. Additionally, M.C. 17.09.325 states the applicant has the obligation to prove the project complies with the adopted design standards and guidelines, and that is the basis of review of the Commission and they may not consider anything outside of the guidelines. M.C. 17.09.330 stated that the Record of Decision is defined to include public comment germane to the design. M.C. 17.09.335, Burden of Proof on an Appeal, states that merely objecting to the development's height, intensity, parking, or traffic impact are not grounds for appeal because they are not design criteria. Mr. Damiano is not objecting to the design of the structure, he is objecting to the height of the structure. The Council

would need to determine if the Commission has misapplied the design guidelines. No arguments were presented that the guidelines were misapplied, so there is nothing other than for the City to deny the appeal, to do otherwise would violate the developer's rights.

Councilman Goodlander clarified that the City's zoning code allows up to 200' in height, which the applicant meets, so the Council is just talking about the design during this appeal. Mr. Wilson confirmed that the zoning and code related issues would be reviewed at the time of building permit application and project review. The Council could repeal the design review code tomorrow and the applicant can still build the building tomorrow.

Councilman Gookin stated that Mr. Damiano has raised issues with various codes and questioned where he would seek relief to those points. Mr. Wilson stated that there is no impact to the design, and that Mr. Damiano's issues are the height and blocking of views.

Councilman Kennedy asked for clarification regarding the Regulatory Taking Act. Mr. Wilson stated that he does not believe the takings analysis is applicable to this case. Councilman Gookin asked if there was anything in our code that clarifies what design is and that it specifically excludes height. Mr. Wilson clarified that the Design Review Ordinance does not include height in its list; however, under the public comment section it clearly states that no public comments should be taken regarding height. Councilman Adams asked if there were examples where the developers have compensated for that restricted view. Mr. Wilson stated that the developer is not a government, so the taking regulations would not apply to nongovernment entities. Councilman Goodlander stated that she believes there will be an impact on views and vistas. She questioned what would be the impact if the City denied the developer. Mr. Wilson stated that the City would be looking at a taking, since the developer meets the code requirements. The developer could also seek an injunction requiring the City to issue a permit. Councilman Kennedy asked if Mr. Damiano were still allowed a rebuttal. Mr. Wilson stated that would not be appropriate since there has been no evidence presented regarding the design. There is no basis to meet the basic threshold for an appeal. Councilman Kennedy clarified that the Council would need to accept or reject the appeal at this time. Mr. Wilson indicated that there is no harm in allowing rebuttal, but there are no grounds for an appeal.

The Council agreed to provide Mr. Damiano time for rebuttal.

Mr. Damiano stated that there is a basic disagreement between the arbiters of the ordinance, and that this is not about design, but the Commission's obligation to meet the duties within the ordinance. He believes that the ordinance is in contradiction of a 14-story building. He requested the Council look at the words and not listen to Mr. Wilson. The attorney for the Coeur d'Alene North residents, Mr. Reed, agrees that they would have grounds for a taking and Mr. Wilson does not know what a taking is and is not giving good information.

Councilman Gookin asked Mr. Wilson what latitude the Council has in the appeal. Mr. Wilson stated that the ordinance states the appeal hearing is about the design and that parking impacts or height, etc. cannot be considered. Mr. Wilson clarified that the standard is set and the City cannot change the rules half way through the process; however, the Council can change the

Ordinance for future developments, but not for this project. The application has a right to be judged based on the regulations in affect at the time of the application.

Motion by Councilman Gookin, seconded by McEvers that based on the testimony of the appeal of the design, there is no grounds for appeal.

**DISCUSSION:** Councilman Gookin stated that Mr. Damiano made good points and is a big supporter of property rights and the information presented seems correct. The City has allowed the developer to develop the property they own. He believes one's property rights ends at their own property lines. He further clarified that the government regulations regarding a taking have to do with the City, not private development. The government is restricted by what it can do and it is not the City's decision to tell the developer to build at the Elks property. Additionally, he agrees that views will be gone, but under the City's rules, that is not a part of design. He wondered if there is something or some other way to pursue it and empathized with the neighbors. Since the appeal process has to be design-related and Mr. Damiano stated that the design is excellent, is seems it is the fair thing to do. Councilman Adams stated that he would echo Councilman Gookin and that he read the Minutes of all the Design Commission meetings and that Mr. Damiano continued to say the design is excellent.

**ROLL CALL:** Adams Aye; Goodlander Aye; Gookin Aye; McEvers Aye. Motion carried.

**ADJOURN:** Motion by Gookin, seconded by Goodlander that there being no further business, this meeting is adjourned. Motion carried.

The meeting adjourned at 1:37 p.m.

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Sandi Bloem, Mayor

ATTEST:

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Renata McLeod, City Clerk