

MINUTES OF SPECIAL MEETING
SUGAR CITY COUNCIL
WEDNESDAY, DECEMBER 18, 2019

Meeting Convened at 6:30 p.m.

Prayer: Connie Fogle

Pledge of Allegiance

Present: Mayor David D. Ogden; Deputy Clerk-Treasurer Shelley Jones; Councilors Sid Purser, Connie Fogle, and Steve Davis; City Building Inspector Cliff Morris; Planning and Zoning Chair Dave Thompson; Planning and Zoning Commissioner Quinton Owens; Design Review Chair Paul Jeppson; City Engineer Dick Dyer; City Attorney Dylan Anderson; Old Farm Estates Attorney Michael W. Brown; Old Farm Estates Representatives Jeff Lerwill and Jeff Patlovich; Standard Journal Journalist Lisa Smith; St. Anthony Planning and Zoning Chairman Jim Hobbs; Citizens Mayor Elect Steve Adams, Tyler Andreasen, Councilor Elect Joy Ball, JoAnn Clark, Spencer and Miriam Cook, Kurt Hibbert, Tyler and Necia Hoopes, Gene Jeppson, Bruce and Elaine King, John Morgan, Kerry Moser, Jill Moss, Lawrence and Councilor Elect Catherine Nielsen, and Mitch Workman. City Clerk-Treasurer Wendy McLaughlin and Councilman Brent Barrus were excused.

AMEND AGENDA: The council amended the agenda before the meeting pursuant to Idaho Code 74-204 to enter executive session for legal counsel on a pending or imminently likely litigation as per Idaho Code 74-206 1(f). A letter was received from Attorneys Holden Kidwell Hahn & Crapo on behalf of Joyce Cromar today, December 18, 2019 and relates to the following public hearing.

MOTION: It was moved by Councilwoman Fogle and seconded by Councilman Davis to amend the agenda to enter into executive session. Thereupon the clerk called roll upon the motion:

Those voting aye: Councilors Purser, Fogle, and Davis

Those voting nay: None

Councilman Brent Barrus was excused.

Thereupon, the mayor declared that the motion, having been passed by not less than two-thirds of the council, had been duly carried.

EXECUTIVE SESSION:

6:37 P.M. It was moved by Councilwoman Fogle and seconded by Councilman Davis pursuant to Idaho Code 74-206 1 (f), "Legal counsel on pending or imminently likely litigation, not merely when legal counsel is present," to discuss a letter received from the attorney regarding the development agreement with Old Farm Estates. Motion carried. Thereupon, the clerk called roll upon the motion.

Those voting nay: None
Councilman Brent Barrus was excused.

6:54 P.M. The executive session ended for Idaho Code 74-206 1 (f). No decisions were made and there was no deliberation.

PUBLIC HEARING TO AMEND THE OLD FARM ESTATES DEVELOPMENT

AGREEMENT: The council canceled the public hearing and the remainder of the special meeting even though the city attorney said there were no legal restrictions to do so. The amendments to the Old Farm Estates Development Agreement are needed to update maps and incorporate the Settlement Agreement. Posting requirements on property are unique to zoning applications and would not apply to this public hearing to amend the agreement. A summary of the concerns are listed below from Holden Kidwell Hahn & Crapo (see Attachment #1):

- The city must have adequate notice provided
- The amendment must be considered by the city's Planning and Zoning Commission before going to the City Council
- Failure to follow these procedures would invalidate any decision and lead to further litigation

City Attorney Dylan Anderson of Forsberg Law Offices provided an Opinion Letter for Development Agreement Procedures (see Attachment #2) summarized below:

- The Council is the governing body and has the authority to modify a development agreement in accordance with the notice and hearing procedures set forth in the statute.
- The city code does not require a hearing before Planning and Zoning to modify a development agreement.

MOTION: It was moved by Councilman Davis and seconded by Councilman Purser to cancel the public hearing and the remainder of the meeting; motion carried.

Meeting adjourned at 7:02 p.m.

Signed: _____
Mayor Dave Ogden

Attested: _____
Wendy McLaughlin, Clerk-Treasurer



Holden Kidwell
Hahn & Crapo P.L.L.C.
LAW OFFICES

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December 17, 2019

**VIA FEDEX OVERNIGHT
AND EMAIL**

The City of Sugar City
c/o Wendy McLaughlin, City Clerk-Treasurer
10 East Center Street
P.O. Box 56
Sugar City, Idaho 83448

The City of Sugar City
c/o William R. Forsberg, City Attorney
Forsberg Law Offices
49 Professional Plaza
Rexburg, Idaho 83440
forsbergw@forsberglawoffices.com

Re: *Citizen Concerns regarding the Renegotiation and Acceptance of the Amended and Restated Development Agreement—Old Farm Estates Subdivision*

Dear Mayor and City Council Members;

This law firm has been retained to represent Joyce Cromar. This letter is written to address some concerns my client and perhaps other citizens of Sugar City have in relation to the City's renegotiation and acceptance of the Amended and Restated Development Agreement—Old Farm Estates Subdivision (the "Amended Agreement"), which is intended to replace the Development Agreement, recorded as Instrument No. 365687 in the records of Madison County, Idaho (the "Original Agreement"). It appears that the City Council, and in particular, the (outgoing) Mayor is dead-set to pass the Amended Agreement in the few days before new elected officials take place. We want to set the record straight in this regard and, while we are setting aside substantive issues with the Amended Agreement (and there are many, which other members of the public may raise) provide a description of procedural issues relating to the Amended Agreement so that the City can avoid future litigation and conduct this process correctly the first time, with due regard for the incoming officials elected by the majority of the citizens of Sugar City.

First, the Amended Agreement specifically references a Settlement Agreement, dated February 11, 2019 (the "Settlement Agreement"). We understand that it has been proffered that the Settlement Agreement requires the passage of this Amended Agreement. This is incorrect. Section 4.06 of the Settlement Agreement does not require this Amended Agreement. That section requires that (a) after the City has approved the Amended OFE3 Zoning Application (a defined term in the Settlement Agreement), (b) the City will "negotiate terms of a new development agreement (to replace the Development Agreement recorded as Instrument No. 365687 in the records of Madison County, Idaho) and related agreements concerning Divisions 1-4 of Old Farm Estates (hereinafter 'OFEI-4') that are more appropriate for the circumstances of OFEI-4 and consistent with the terms of this Agreement." There is a time limit for the Amended OFE3 Zoning Application to be approved, but there is no requirement that the City amend the Original

Agreement, nor is there any required time to do so. The only requirement in this regard is that the City negotiate in good faith. Frankly, where this was a divisive political issue in the recent election, these negotiations should be left for the incoming elected officials of the City of Sugar City. A last-minute effort to gain approval of the Amended Agreement in the days before newly elected officials take office is ill-advised.

Second, Idaho law and the Sugar City Code have a process for the consideration of the Amended Agreement that has been circumvented in an effort to pass the Amended Agreement as soon as possible. Idaho Code § 67-6511A requires (among other things) that the commitments of a development agreement “may be modified only by the permission of the governing board after complying with the notice and hearing provisions of section 67-6509, Idaho Code.” Additionally, The Sugar City Code specifies all of the requirements and procedures for zoning reclassification within the City. *See* Sugar City Code § 9-5-2. There, the required application “shall include reasons for reclassification, discussion of zoning classification(s), and agreements as set forth in this code.” Sugar City Code § 9-5-2(B). The primary agreement required by that very code section is a development agreement, which “becomes part of the application and is subject to public hearing and rules for administrative action.” Sugar City Code § 9-5-2(D); *see also* Sugar City Code § 9-2-2 (providing a definition for “development agreement”). Then the City’s process requires notice (Sugar City Code § 9-5-2(E)), followed by proceedings before the City’s Planning and Zoning Commission (Sugar City Code § 9-5-2(F)), and only then, consideration by the City Council (Sugar City Code § 9-5-2(G)).

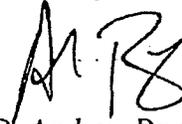
Here, the City has apparently approved the Amended OFE3 Zoning Application submitted by the developers in the time required by the Settlement Agreement. However, it also appears that the developers did not include an amendment to the prior Original Agreement with their application—which does not invalidate the approval of the application, but it likewise cannot be used to justify circumventing the procedures required by the City’s ordinances. In reality, the Amended Agreement is another application under Sugar City Code § 9-5-2, which must therefore have adequate notice provided, be considered by the City’s Planning and Zoning Commission, and then decided by the City Council. The City’s failure to follow its own procedures—even quite apart from applicable State law—will invalidate any decision as to the Amended Agreement and lead to further litigation, which the City does not need.

We suggest that the City comply with the requirements of Sugar City Code § 9-5-2 (and applicable Idaho law), by:

- Posting notice “on the property at least one week prior to each public hearing,” Sugar City Code § 9-5-2(E);
- Providing the additional notice required by the Sugar City Code’s reference to Idaho Code §§ 67-6509 and 67-6511, and its additional notice requirement to adjoining landowners, Sugar City Code § 9-5-2(F)(1);
- Allowing the City’s Planning and Zoning Commission to “conduct at least one public hearing” and consider the matter, Sugar City Code § 9-5-2(F); and then
- Considering the Amended Agreement before the City Council, Sugar City Code § 9-5-2(G).

My client, Ms. Cromar, reserves all rights she may have against the City and nothing herein is deemed to be a waiver of any such rights. We anticipate that that the City will fully comply with its own ordinances—which is really all we are asking—and hope that no legal action will be necessary. Please contact me with any questions or concerns you may have.

Cordially,



D. Andrew Rawlings

HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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Dylan K. Anderson, Attorney
Philip A. Packer, Attorney

December 17, 2019

Mayor Ogden and Sugar City Council
City of Sugar City
10 East Center St.,
Sugar City, Idaho 83448

Re: Opinion Letter for Development Agreement Procedures

Dear Mayor and Council

The Mayor asked that I write an opinion letter regarding the procedures of amending a development agreement. The procedures, and the authority to make such an agreement, are expressed in Idaho Code 67-6511A as follows:

Each governing board may, by ordinance adopted or amended in accordance with the notice and hearing provisions provided under section 67-6509, Idaho Code, require or permit as a condition of rezoning that an owner or developer make a written commitment concerning the use or development of the subject parcel. The governing board shall adopt ordinance provisions governing the creation, form, recording, modification, enforcement and termination of conditional commitments. Such commitments shall be recorded in the office of the county recorder and shall take effect upon the adoption of the amendment to the zoning ordinance. Unless modified or terminated by the governing board after a public hearing, a commitment is binding on the owner of the parcel, each subsequent owner, and each other person acquiring an interest in the parcel. A commitment is binding on the owner of the parcel even if it is unrecorded; however, an unrecorded commitment is binding on a subsequent owner or other person acquiring an interest in the parcel only if that subsequent owner or other person has actual notice of the commitment. A commitment may be modified only by the permission of the governing board after complying with the notice and hearing provisions of section 67-6509, Idaho Code. A commitment may be

terminated, and the zoning designation upon which the use is based reversed, upon the failure of the requirements in the commitment after a reasonable time as determined by the governing board or upon the failure of the owner; each subsequent owner or each other person acquiring an interest in the parcel to comply with the conditions in the commitment and after complying with the notice and hearing provisions of section 67-6509, Idaho Code. By permitting or requiring commitments by ordinance the governing board does not obligate itself to recommend or adopt the proposed zoning ordinance.

There has been some concern regarding whether or not a renegotiated or modified development agreement for an existing subdivision must be presented first to the Planning and Zoning Commission.

It is expressed very clearly that the “governing board” takes action on a proposal to modify a development agreement. In fact, a development agreement “may be modified only by the permission of the governing board.” Such permission may come “after complying with the notice and hearing provisions of section 67-6509.” The “Governing Board” is defined in Idaho Code 67-6504: “A city council or board of county commissioners, hereafter referred to as a governing board, may exercise all of the powers required and authorized by this chapter in accordance with this chapter.”

Perhaps the confusion stems from the line “notice and hearing provisions of section I.C. 67-6509.” This or similar terms are used throughout the Local Land Use Planning Act. I.C. 67-6509 lists notice and hearing procedures requiring fifteen (15) days public notice to be published in the official newspaper. I.C. 67-6509 specifically refers to the comprehensive plan, which requires a public hearing before the planning and zoning commission to make recommendation to the governing board. However, Idaho Code 67-6509 also states that if the governing board conducts a public hearing, it must use the “same notice and hearing procedures as the commission.”

Any reference to the notice and hearing procedures in Idaho Code 67-6509 is obviously meant to refer to the notice and hearing procedures only, and does not incorporate the entire chapter requiring an additional public hearing by planning and zoning. This interpretation is illustrated best in Idaho Code 67- 6504. Idaho Code 67-6504 allows a governing board to establish a planning and zoning commission after following the “notice and hearing procedures provided in section 67-6509.” Because there is no commission to conduct a hearing prior to the establishment of a planning and zoning commission, the notice and hearing procedures provided in section 67-6509 must refer to the notice and hearing procedures only. A planning and zoning commission cannot be required to provide a recommendation on it’s own existence prior to existing.

It was stated that Sugar City Code requires a hearing before Planning and Zoning

Commission in order to modify a development agreement. I have not found any provision in Sugar City Code requiring a modification to an existing development agreement to be reviewed or recommended by the Planning and Zoning Commission.

Conversely, there are several occasions on which the Planning and Zoning Commission is required to review agreements accompanying an application, (see Sugar City Code 10-1-5) and that if such agreements are made, they become incorporated into any application for zone change.(see Sugar City Code 9-5-2) Idaho Code 67-6511A requires that development agreements be recorded for the purpose of enforcing the conditions in any agreement on future owners of a development.

A development agreement is a controlling document that should be considered with any plat application before the planning and zoning commission, but there is no requirement in the law that the Planning and Zoning Commission review and hold a hearing on modifying an agreement. The Council is the Governing Body and has the authority to modify a development agreement in accordance with the notice and hearing procedures set forth in the statute.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dylan Anderson', written over a horizontal line.

Dylan Anderson
City Attorney

cc Mayor