MINUTES OF REGULAR MEETING
SUGAR CITY COUNCIL
THURSDAY, APRIL 28, 2016

Presiding: Mayor David D. Ogden
Meeting Convened at 6:30 p.m.
Prayer: Matt Garner
Pledge of Allegiance – BSA Troop #109 posted the colors and led in the pledge of allegiance

Present: Mayor David D. Ogden; Clerk-Treasurer Wendy McLaughlin; Councilmen Bruce Arnell, Joe Cherrington, Matt Garner, and Bruce King; Chairman Brent Barrus of the Planning and Zoning Commission; Scout leader Spencer Cook; Scouts – Braxton Clinger, Logan Cutler, Braden Guyman, Wesley Johnson, and Garrison Madsen; Forsgren Associates Project Manager Randy Johnson, River Bend Ranch Representative Terry Mortensen, River Bend Ranch Attorney Jim Smith; Sugar City Building Inspector Cliff Morris; Rexburg Standard Journal Reporter Lisa Smith; St. Anthony Police Chief Terry Harris; Citizens Mary Louise Barney, Jesse and Virginia Brown, Nantalie Cleverley, Megan Davis, Rachel Distelhorst, Beau and Hannah Fuquay, Paul and Becky Jeppson, Elaine King, Todd Lines, Barbara Lusk, Ashley and Cody Morin, Greg and Elaine Presler, Jeffrey Parkinson, J... Smith, Dela Th..., and Travis Williams.

Mayor Ogden asked if there were any corrections to the minutes of the regular meeting held on April 14, 2016. Each councilman had a copy of the minutes prior to the meeting. It was moved by Councilman King and seconded by Councilman Cherrington to accept the minutes; motion carried.

PLANNING & ZONING COMMISSION REPORT: Commissioner Brent Barrus reported on items of business:

River Bend Ranch: Commissioners continued their review of the preliminary plat and design review applications.

Title 9 Revisions: The commission worked on defining the newest zone codes of MU1 and MU2.

City Impact Area Increase: Madison County Planning and Zoning Chairman Brent McFadden picked up copies of Madison County Ordinance No. 365 which establishes a joint commission for areas of city impact governance and Madison County Ordinance No. 338 which amends and defines the area of city impact for Sugar City. These two documents help govern procedures and clarify ownership of the 80 acres of Harris property claimed by the City of Rexburg or which are shown on maps distributed by Rexburg as their impact area.

Councilman King will forward to Commission Chairman Brent Barrus the cost difference of building in Rexburg's impact area versus Sugar City's impact area.

DESIGN REVIEW BOARD APPOINTMENT AND REVISION: The council authorized the proposed changes to allow appointments to the design review board to include the city's public works director, engineer, building inspector and a councilman along with three members of the commission. (See Attachment #1). This is hoped to make the board more independent of the

commission.

MOTION: It was moved by Councilman Arnell and seconded by Councilman Garner to accept the changes to the city code. A draft ordinance will be written up and a public hearing date set at the next council meeting.

MOTION TO AMEND AGENDA: It was moved by Councilman Cherrington and seconded by Councilman King to amend the agenda to include the presentation on the water study by Forsgren and Associates; motion carried.

WATER STUDY: Randy Johnson of Forsgren Associates presented Sugar City's water study to the council. He identified deficiencies and possible responses:

- **Production** - legal and physical ability to get the water out of the ground. Currently the city has enough water to take care of its needs. But with future growth in Old Farm Estates and River Bend Ranch the city will need at least 3 times as much water to meet future demands. Currently the city has sufficient rights to meet the demands. However, Mr. Johnson reminded the council that water rights may not translate directly to water credit.
- **Distribution** – The city currently has two wells but will need four within ten years. Some demands are needed whether the city grows or not such as enough water for fire suppression, wells, pumps, storage capacity, and system replacement.
- **Treatment** – The city currently does not have to treat the water
- **Costs** – The city needs to strategize on a system replacement (since glue joints are beginning to deteriorate at their 40 year life expectancy), storage tanks are aging, and pumps need repair/replacement..
- **Storage** – The city can use wells and pumps to deliver water, storage tanks, or a combination of both. Another alternative is to have two systems – one system for drinking water and the other for irrigation. A secondary water system could be more cost effective than using a recharge system.

The council will review the water study and make a recommendation as soon as possible. The council was reminded to take advantage of what has already been done.

PROPOSED WATER RIGHTS LEASE AGREEMENT: The council agreed to sign the water rights lease agreement with Pocatello to mitigate the call on water from the Idaho Department of Water Resources. Sugar City needs to provide 21 acre feet of water this year and will lease the water from Pocatello at $22/acre foot. (The city will not be able to meet fire suppression demands if it provided the 21 acre feet of water from our own wells.)

RESOLUTION NO. 2016-12 (Water Rights Lease Agreement with the City of Pocatello): Councilman King read Resolution No. 2016-12 by title only. It was moved by Councilman King and seconded by Councilman Cherrington to approve Resolution No. 2016-12. Thereupon, the clerk called roll upon said motion.

Those voting aye: Councilman Arnell, Garner, Cherrington, and King
Those voting nay: None

Thereupon, the mayor declared the motion passed. A copy of said resolution is attached hereto marked "Attachment 2".

PROPOSED PHONE AGREEMENT WITH SCHOOL DISTRICT #322: The council discussed the city's current phone system which is antiquated and insufficient. A VOIP phone system provided by the school district will provide the city with voice messaging and the ability to service disabled individuals as well as offer a Hispanic line at a lower cost than the current system.

RESOLUTION NO. 2016-13 (Phone and Fax Agreement between Sugar Salem School District #322 and the City of Sugar City): Councilman Cherrington read Resolution No. 2016-13 by title only. It was moved by Councilman Cherrington and seconded by Councilman King to approve Resolution No. 2016-13. Thereupon, the clerk called roll upon said motion.

Those voting aye: Councilman King, Garner, Cherrington, and Arnell
Those voting nay: None

Thereupon, the mayor declared the motion passed. A copy of said resolution is attached hereto marked "Attachment 3".

PROPOSED ADA SIDEWALK RAMP CONTRACT: No report.

ANIMALS OTHER THAN CANINES REVISION SUMMARY: Councilman King gave a brief history of Ordinance No. 304 "Animals Other Than Canines". The revisions to the ordinance are an attempt to strike a balance to citizen input. The revised ordinance will be available online as well as in print from the city office. Two public hearings are set for May 26 and June 9. The council invites public comments.

PROPOSED DESIGNATED LARGE VEHICLE PARKING AREA: The council reviewed Ordinance No. 305 and discussed the possibility of providing a designated area to park large vehicles within the city limits. A draft resolution will be prepared for the council's review and possible adoption at the next council meeting.

ORDINANCE NO. 312: Mayor Dave Ogden gave a brief history on Ordinance No. 312, the review process, proposed litigation, and Findings of Fact adopted on April 14, 2016. Barbara Lusk submitted a signed petition on March 14, 2016 to repeal Ordinance No. 312. The petition alleged that the city violated city and state laws on three counts:

- Zone to retain predominance of single-family housing
- Promote housing consistent with Sugar City's small-town, family-focused character
- Maintain and perpetuate quiet neighborhoods

City Attorney Bill Forsberg reviewed in depth the city's position and why the adoption of Ordinance No. 312 was legal and did not violate the city's Comprehensive Plan or state law (See Attachment #4). Some of the main points the attorney brought forth:

- The City's Comprehensive Plan is not law but rather a guide which reflects goals

- Governing bodies must use standards and fact based issues to make recommendations and decisions
- Cannot use a vote of the people or referendum to change property rights

Afterwards Councilman King reiterated his position against Ordinance No. 312 expressing his belief in the voice and governing power of the people, being duty bound to represent his constituents, and his belief in growth by single family homes.

DEPARTMENT REPORTS:

COUNCILMAN KING: No report

COUNCILMAN CHERRINGTON: No report

COUNCILMAN ARNELL:

AIC Spring Training Report: The meeting was well attended by most of the council. Information on budgeting, Planning and Zoning procedures was excellent.

COUNCILMAN GARNER: No report.

MAYOR'S BUSINESS:

Old Farm Estates Street Numbers & Lighting: Rocky Mountain Power has begun the process to install the lighting in Old Farm Estates Subdivision.

Letter to Planning and Zoning on Dalling Zone change: Mayor Odgen will prepare a letter to the Planning and Zoning Commission explaining the zone change for the Dalling property annexation.

Meetings with County Sheriff's Office: Regular monthly meetings are planned with the sheriff's office to discuss issues and needs. A possible ordinance officer was suggested.

City Office Renovation: The city offices will go through some minor renovations mainly to accommodate disabled persons. New paint and front office door are planned.

Meeting adjourned at 9:45 p.m.

Signed:_____ Attested:_____

David D. Ogden, Mayor Wendy McLaughlin, Clerk-Treasurer

David D. Ogden, Mayor
Wendy McLaughlin, Clerk-Treasurer
Shelley Jones, Deputy Clerk-Treasurer
Phone: (208) 356 7561
Fax: (208) 359 2654
Office Hours: 9 a.m. to 4 p.m.

ATTACHMENT #1

City of Sugar City
P.O. Box 56 - 10 East Center
Sugar City, Idaho 83448

Support our local businesses

TO: Sugar City Council

DATE: May 6, 2016

RE: Design Review Board Changes

Dear Councilmen,

I am recommending that we discuss potential changes to the Design Review Board, as contained on Title 8-4-4 (A), as follows:

The planning and zoning commissioners shall ~~be~~ **have three (3) voting members** ~~of~~ **on** the design review board. The ~~city council~~ **mayor** may appoint up to five (5) additional voting members to the board, **to be ratified by the city council.** The term of service for an additional member thus appointed shall be ~~until action is complete on the application(s) he or she is appointed to consider~~ **three (3) years, with one additional three (3) year period, as deemed necessary.** The city clerk shall be the design review administrator.

Please review these changes and make any comments or recommend changes as necessary. Once you have decided on the appropriate verbiage, I will have Bill Forsberg prepare an ordinance for your consideration.

Sincerely,

David D. Ogden

David D. Ogden
Mayor

The City of Sugar City, Idaho

Resolution No.: 2016 - 12

"A Resolution to Approve a Water Rights Lease Agreement with the City of Pocatello, to Lease Storage Water in the Amount of Twenty-One (21) Acre Feet of Water, in Mitigation of the Call on Water from the Idaho Department of Water Resources, and Authorization for the Mayor of the City of Sugar City to Execute Said Lease."

WHEREAS, the Council of the City of Sugar City, Idaho desires to mitigate the Call on Water issued by the Idaho Department of Water Resources, on all water rights junior to 1989; and

WHEREAS, the City of Sugar City has two wells affected by this Call, and based on the model accepted by the Idaho Department of Water Resources, we would need to provide 21 acre feet of water to mitigate this call; and

WHEREAS, the City of Sugar City does not have surplus water of its own to provide this mitigation, and therefore needs to find this water elsewhere; and

WHEREAS, the City of Pocatello has sufficient storage water in the Palisades Reservoir, and is willing to lease 21 acre feet of water to the City of Sugar City to meet this Call, at the cost of $20 dollars per acre feet;

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF SUGAR CITY, AS FOLLOWS:

The City Council of the City of Sugar City, Idaho hereby approves the Water Rights Lease Agreement between the City of Pocatello, and the City of Sugar City, and authorizes the Mayor to execute the aforementioned Lease.

PASSED by the Council of the City of Sugar City on this 28th day of April, 2016

APPROVED by the Mayor of the City of Sugar City, Idaho, on this 28th day of April, 2016.

(Seal)

_____

David D. Ogden
Mayor

ATTEST:

_____

Wendy McLaughlin,
City Clerk - Treasurer

ATTACHMENT #3

The City of Sugar City, Idaho

Resolution No. 2016 - 13

"A Resolution to Approve the Phone and Fax Agreement Between Sugar Salem School District #322 and the City of Sugar City, for use of Five (5) Phone Lines through the District's Phone System, and Authorization for the Mayor of the City of Sugar City to Execute Said Contract."

WHEREAS, the Council of the City of Sugar City, Idaho desires to upgrade and improve the existing phone system; and

WHEREAS, the Sugar Salem School District #322 is willing to enter into an agreement for the City of Sugar City to use Five (5) phone lines through their existing system, and allow the City to continue using their existing phone number; and

WHEREAS, the Mayor and the District have negotiated a reasonable price, which would save the City significant cost, and provide them with a better system, improving the work flow for the City;

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF SUGAR CITY, AS FOLLOWS:

The City Council of the City of Sugar City, Idaho hereby approves the Phone and Fax Agreement between Sugar Salem School District #322, and the City of Sugar City, and authorizes the Mayor to execute the aforementioned Agreement.

PASSED by the Council of the City of Sugar City on this 28th day of April, 2016

APPROVED by the Mayor of the City of Sugar City, Idaho, on this 28th day of April, 2016.

(SEAL)

David D. Ogden
Mayor

ATTEST:

Wendy McLaughlin,
City Clerk - Treasurer

Attachment #4

ATTORNEY RESPONSE
TO ORDINANCE NO. 312 PETITIONER OBJECTIONS

On January 14, 2014, the City Council, passed Ordinance No. 312 amending the R3 zoning district to require 1.5 parking spaces per unit and to increase the maximum density from 12 dwelling units per acre to 16 dwelling units per acre, and to make all such units subject to approval by the design review committee for the City, amending the MU1 zoning district to add professional uses, to require 1.5 parking spaces per unit, and to increase the maximum density from eight to sixteen dwelling units per acre and adding a new zoning district, MU2 with a residential density of 30 units per acre. The ordinance has since been published and is now in effect. I note that these amendments were asked for by the developers of Old Farm Estates (OFE) as a part of proposing their preliminary plat for phase two of the development and directly affects the Old Farm Estates property.

At the March 10 City Council Meeting, Barbara Lusk submitted a document objecting to Ordinance 312 and asking the City Council to repeal the ordinance in her document, Ms. Lusk raised three objections. I will address these as well as offer some information about local land use planning and discuss some of the Idaho court cases that have interpreted the legal requirement when a public body makes land use decisions.

Does Ordinance 312 violate the Housing Chapter of the City's Comprehensive Plan?

Ms. Lusk asserts that "compliance" with the following quoted language from the City's Comprehensive Plan is mandatory for the City Ordinance to be "legal" and that somehow (she does not specify how) the action recommended by the Planning and Zoning Commission and taken by the City Council violated this language.

1. Zone to retain predominance of single-family housing. (The actual language states "To zone to retain predominance of single- family housing." A small detail, perhaps, but as written by Ms. Lusk, infers that each zone must have a predominance of single family housing.)

2. Promote housing consistent with [Sugar City's] small-town, family-focused character.

3. Maintain and perpetuate . . . quiet neighborhoods.

I have reviewed the Comprehensive Plan, the ordinance, the adopting proceedings and findings and recommendations of the Planning and Zoning Commission and the law and do not agree that the ordinance violates the "policies" stated in the Comprehensive Plan.

First I believe it is important to understand just what a comprehensive plan is, and its place in regulating the City.

Idaho law mandates the creation of a comprehensive plan separate from a zoning ordinance. *Dawson Enterprises, Inc. V. Blaine County*, 98 Idaho 506, 567 P.2d 1237 (1977); Idaho Code §§ 67-6508, 67-6509. A comprehensive plan is what it sounds like: a comprehensive articulation of the conditions and objectives that will guide future growth within the geographic

boundaries of the city. Idaho Code Section 67-6508 requires that "[t]he plan shall consider previous and existing conditions, trends, desirable goals and objectives or desirable future situations for each planning component." Local Land Use Planning Act (LLUPA) contemplates the plan will include "maps, charts, and reports. " Idaho Code § 67-6508.

The Idaho Supreme Court has described the role of the comprehensive plan, in contrast to zoning ordinances, this way:

> The Act [LLUPA] indicated that a comprehensive plan and a zoning ordinance are distinct concepts serving different purposes. A comprehensive plan reflects the "desirable goals and objectives, or desirable future situations" for the land within a jurisdiction. I.C. § 67-6508. This Court has held that a comprehensive plan does not operate as legally controlling zoning law, but rather serves to guide and advise the governmental agencies responsible for making zoning decisions. The Board may, therefore, refer to the comprehensive plan as a general guide in instances involving zoning decisions such as revising or adopting a zoning ordinance. A zoning ordinance, by contrast, reflects the permitted uses allowed for various parcels with the jurisdiction.
>
> *Urrutia v. Blaine County*, 134 Idaho 353, 357-58, 2 P.3d 738, 742-43 (2000_ (citations to case law omitted).

The adoption of a comprehensive plan is an essential prerequisite to other planning and zoning activity. "[A] valid comprehensive plan is a precondition to the validity of zoning ordinances." *Sprenger, Grubb & Associates v. Hailey ("Sprenger Grubb II")*, 133 Idaho 320, 322, 986 P.2d 343,345 (1999). "The enactment of a comprehensive plan is a precondition to the validity of zoning ordinances." *Love v. Bd of County Comm'rs of Bingham County*, 105 Idaho 558,559,671 P.2d 471,472 (1983). "[T]he mandate . . . is not a mere technicality . . . . Rather, the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use . . . . "

However, a comprehensive plan is more than an abstract planning document. As a discussed below, the zoning actions of the planning and zoning commission must be in accordance with (i.e., consistent with) the comprehensive plan. Idaho Code §§ 67-6511 and 67-6535(a).

The P&Z commission and the governing board should include in their decision documents a thorough discussion of those elements of the comprehensive plan bearing on their decision.

ACTIONS MUST BE IN "ACCORDANCE" WITH THE COMPREHENSIVE PLAN

It is a fundamental principle that zoning districts adopted in a zoning ordinance must be "in accordance" with the policies set forth in an adopted comprehensive plan. Idaho Code § 97-6511.303fw "The enactment of a comprehensive plan is a precondition to the validity of zoning ordinances. . . . It follows a fortiori that an amendment to a zoning ordinance must also be in

accordance with the adopted plan." *Love v. Bd. of County Comm'rs of Bingham County*, 105 Idaho 558, 559, 671 P.2d 471,472 (1983).

The determination of whether a city or county's zoning and other actions are in accordance with the comprehensive plan is a case-by-case factual determination:

> [C]omprehensive plans do not themselves operate as legally controlling zoning law, but rather serve to guide and advise the various governing bodies responsible for making zoning decisions. . . . [T]he determination of whether a zoning ordinance is 'in accordance with' the comprehensive plan is one of fact. As a question of fact, the determination is for the governing body charged with zoning. . .

South Fork Coalition v. Board of Comm'rs of Bonneville County, 117 Idaho 857, 863, 792 P.2d 882, 888 (1990) (quotations and citations omitted); see also, *Love v. Bd. of County Comm'rs of Bingham County*, 108 Idaho 728, 730-31, 701 P.2d 1293, 1295-96 (1985); *Bone v. City of Lewiston*, 107 Idaho 844, 850, 693 P.2d 1046, 1052 (1984). Idaho courts have tended to be highly deferential to the factual findings of land use agencies, yet fairly strict in requiring the land use agency to undertake a "factual inquiry" on the accordance issue.

The early cases interpreting the accordance requirement offer little guidance about whether the accordance requirement places any real limits on a land use agency's zoning power, so long as the agency undertakes the "factual inquiry." In *Roark v. City of Hailey*, 102 Idaho 511,633 P.2d 576 (1981), the Court upheld an action by the Hailey City Council to annex and give business zoning to a twelve acre parcel. The court analyzed the City of Hailey comprehensive plan's provisions "to keep the commercial zone as the center or core of the community" and found it to be consistent with offering business zoning to land on the outskirts of town, but still along State Highway 75. Essentially, the court deemed the outskirts of town to be "close enough" to the core of the community.

In *Love v. Bd. of County Comm'rs of Bingham County*, 105 Idaho 558, 671 P.2d 471 (1983) ("*Love I*"), the county approved a zone change from agricultural to manufacturing after concluding that the change would be consistent with the comprehensive plan. A neighbor appealed. The Idaho Supreme Court overturned the county's action, declaring that "the findings of fact are insufficient to support the conclusion that the amendment was in accordance with the comprehensive plan." *Love I*, 105 Idaho at 560, 671 P.2d at 473. The Court remanded the matter to the county. On remand, the county commission again approved the application, including lengthy findings of fact and conclusions of law. This time, the Court sided with the county, emphasizing that the rezone did not need to be "in exact conformance with the County's Comprehensive Plan." *Love v. Bd. of County Comm'rs of Bingham County*, 108 Idaho 728, 730, 701 P.2d 1293, 1295 (1985) ("Love II").[1] Without any analysis, the Court declared that is had

---

[1]Oddly, in *Love I*, the Court insisted that the "in accordance with" determination is "not a finding of fact, but rather a conclusion of law which if erroneous may be corrected on judicial review." Love I, 105 Idaho at 560, 671 P.2d at 473. Yet, in *Love II*, the court declared: "Whether a zoning ordinance is 'in accordance' with the

read the 200 pages of testimony in the record and found that the county's findings were adequately supported by substantial and competent evidence. Love II, 108 Idaho at 731, 701 P.2d at 1296. The take home message here is that the "in accordance with" requirement is a pretty squishy one and that a city's conclusion that an action is in accordance with its comprehensive plan will be upheld so long as it has taken the time to adequately explain its decision. (As explained below, a city's decision to reject an application because the proposed action is not in accordance with its comprehensive plan may be accorded more rigorous scrutiny.)

In *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (!984), the Idaho Supreme Court rejected a developer's argument that he was entitled to a rezone because it was consistent with the comprehensive plan depicted the property to be suitable for commercial use. The Idaho Supreme Court held that the comprehensive plan map designation did not mandate that the city council approve the request to approve the commercial zoning of the property. Rather, the decision of whether the requested zoning designation was in accordance with the comprehensive plan was a case-by-case factual determination. The Court remanded the matter to the city council to adopt findings of fact and conclusions of law, reserving the right to the property owner to appeal if those findings were insufficient to support the decision. In a later case, the Idaho Supreme Court explained the holding in *Bone* this way: "In *Bone*, a unanimous Court decided . . . that 'in accordance' does not mean that a zoning ordinance must be exactly as the Comprehensive Plan shows it to be." *Love v. Bd. of county Comm'rs of Bingham County*, 108 Idaho 728, 730, 701 P.2d 1293, 1295 (1985) ("Love II").

Balser v. Kootenai County Bd. Of Comm'rs, 110 Idaho 37, 39, 714 P.2d 6, 8 (1986), reinforces the conclusion that a zoning ordinance need not strictly conform to the land use designation of a comprehensive plan. In Balser, the comprehensive plan designated the property owner's property for industrial use. When the property owner sought to rezone the property as industrial, the county denied the request, stating that the comprehensive plan stated future directions for development and did not necessarily reflect appropriate current zoning for a property unless other criteria of the comprehensive plan were met. The Court agreed with the county that the decision to rezone was not "a purely ministerial duty" and that there might be good reasons for departing from the comprehensive plan. The Court did not discuss the factors in the record that supported the denial, but merely concluded that there was a substantial evidence in the whole record to support the county's decision. Balser, 110 Idaho at 39, 714 P.2d at 8.

In *Ferguson v. Bd. of County Comm'rs*, 110 Idaho 785, 718 P.2d 1223 (1986), the Supreme Court deferred to the land use agency's determination of whether the application is in

---

comprehensive plan is a *factual question*, which can only be overturned where the fact found is clearly erroneous." *Love II*, 108 Idaho at 730, 701 P.2d at 1295 (emphasis original). The Court's statement in *Love II* (that consistency with the comprehensive plan is a question of fact) is consistent with the Court's holdings in *Bone v. City of Lewiston*, 107 Idaho 844, 849-50, 693 P.2d 1046, 1051-52 (1984); *Balser v. Kootenai County Bd. Of Comm'rs*, 110 Idaho 37, 39, 714 P.2d 6, 8 (1986); *South Fork Coalition v. Bd of Comm'rs*, 117 Idaho 857,863-64, 792 P.2d 882, 888-89 (1990); and *Sprenger, Grubb & Associates v. Hailey*, 127 Idaho 576,585,903 P.2d 741, 750 (1995) ("*Sprenger Grubb I*")

accordance with the comprehensive plan, again allowing some departure from a strict reading of the comprehensive plan. The Supreme Court overturned the district court's determination that the rezone of one corner of the Overland and Five Mile intersection (at that time in Ada County's jurisdiction) was not in accordance with the Ada County comprehensive plan. The Court held it was acceptable to adopt a zoning classification in conflict with the comprehensive plan when "non-conforming uses are so pervasive that the character of the neighborhood has actually changed from the purported zoning classification."

Although it upheld the City of Hailey's action, the Court in *Sprenger, Grubb & Associates v. Hailey* ("*Sprenger Grubb I*"), 127 Idaho 576, 903 P.2d 741 (1995), demonstrated a new willingness by the Court to take a harder look at the relationship between the comprehensive plan and the zoning ordinance. Like *Roark*, *Sprenger Grubb I* involved an approximately twelve-acre parcel outside the central business district of Hailey in the Woodside development. This property had been given "business" zoning as part of the initial annexation and zoning of Woodside. The city council later downzoned the property to "limited business," thereby significantly reducing the value of the property. The developer charged that the downzone was inconsistent with the comprehensive plan. The Idaho Supreme Court upheld the downzoning, finding that it was consistent with the comprehensive plan's goal of encouraging development "around the existing core." Unlike the more conclusory decisions described above, the Court here showed a greater willingness to understand the underlying purposes of the comprehensive plan and to explore whether the action was actually consistent with those goals.[2]

In a 2000 decision, the Idaho Supreme Court laid out its most complete explanation to date of the "in accordance with" principle. In *Urrutia v. Blaine County*, 134 Idaho 353, 2 P.3d 738 (2000), the Court addressed a Blaine County subdivision ordinance which conditioned subdivision approval upon, among other things, a finding that the subdivision "conformed" to comprehensive plan.[3] The county rejected a subdivision application that would allow houses to

---

[2]The developer pointed to other zoning actions which it said were inconsistent with the county's action here. The county responded by explaining how each of them were consistent with the comprehensive plan:. The rezoning of Power Engineers was adopted by the city because it posed no threats to the city since it was an engineering rather than a retail firm and, further, it would add employment opportunities to the area. The Rinker annexation was property lying close to the downtown area, which had been zoned commercial by Blaine County. By annexing these lots, the City of Hailey was able to gain control over the property's development, through the use of deed restrictions, restricting grocery stores, hardware stores and other retailers, with variances to be allowed only after the city's consideration and approval. Finally, the Northwest annexation involved property lying adjacent to the existing Hailey downtown business core. The annexation would square up the city boundaries; and, by annexing the property, which already had businesses on it (also zoned commercial by the county), the city hoped to gain some control over how this property, so close to its downtown area, would be developed. Sprenger Grubb I, 127 Idaho at 586-87, 903 P.2d at 750-51 (quoting the district court). See also Taylor v. Bd of County Comm'rs, 124 Idaho 392, 860 P.2d 8 (app. 1993) (undertaking very detailed analysis of whether action was in accordance with the comprehensive plan, but not reaching accordance issue because the zoning decision was overturned on other grounds); Evans v. Teton County, 139 Idaho 71, 73 P.3d 84 (2003) (discussing the accordance issue in some detail).

[3]LLUPA does not itself require that subdivision actions be in conformance with the comprehensive plan. Blaine County's subdivision ordinance, however, mandated such conformance.

be constructed in a rural area on the basis that it violated its comprehensive plan's goal of preserving land in agricultural use. The Court reversed, holding that the subdivision application need not conform with every aspect of the comprehensive plan:

> *In determining whether the land "conforms to the comprehensive plan" for the purposes of a subdivision application, the Board is simply required to look at all facets of the comprehensive plan and assure that the land fits within all of the various considerations set forth in the plan. It is to be expected that the land to be subdivided may not agree with all provisions in the comprehensive plan,* but a more specific analysis, resulting in denial of a subdivision application based solely on non-compliance with the comprehensive plan elevates the plan to the level of legally controlling zoning law. Such a result affords the Board unbounded discretion in examining a subdivision application and allows the Board to effectively re-zone land based on the general language in the comprehensive plan.

Urrutia, 134 Idaho at 358-59, 2 P.3d 743-44 (emphasis supplied).

The Court explained that the real purpose of the comprehensive plan is to inform zoning decisions, not individual applications for subdivision. "The Board may, therefore, refer to the comprehensive plan as a general guide in instances involving zoning decision such as revising or adopting a zoning ordinance." *Urrutia*, 134 Idaho at 358, 2 P.3d 743 (emphasis supplied). The Court continued:

> As indicated above, the comprehensive plan is intended merely as a guideline whose primary use is in guiding zoning decisions. Those zoning decisions have already been made in this instance, and land subdivided into twenty-acre lots and used for single family residences is specifically permitted in this agricultural area. Thus, we agree with the district judge that the Board erred in relying completely on the comprehensive plan in denying these [subdivision] applications, and should instead have crafted its findings of fact and conclusions of law to demonstrate that the goals of the comprehensive plan were considered, but were simply used in conjunction with the zoning ordinances, the subdivision ordinance and any other applicable ordinances in evaluating the proposed developments.

Urrutia, 134 Idaho at 358-59, 2 P.3d 743-44 (emphasis supplied).

In other words, the proper time to consider consistency with the comprehensive plan is when the city adopts zoning and subdivision ordinances, not when it applies those ordinances in the context of individual subdivision applications. To require consistency with the comprehensive plan at the latter stage would allow the local government unbridled discretion to revisit its zoning decisions on individual applicants.

The conclusion reached by the Court in Urrutia was reinforced two years later by the Court in Sanders *Orchard v. Gem County*, 137 Idaho 695, 52 P.3d 840 (2002). This case, like *Urrutia*, involved a county ordinance requiring that a subdivision application be evaluated on the basis of the "conformance of the subdivision with the Comprehensive Plan." The applicant sought approval of a preliminary plat for a subdivision near Emmett. The County denied the application because the subdivision did not provide for central water or sewer. The applicant appealed, arguing that the County had improperly relied on the comprehensive plan to turn down the application, in violation of *Urrutia.*

The Idaho Supreme Court acknowledged the holding of *Urrutia*, explaining that the conformance requirement "does not incorporate by reference all the provisions of the Comprehensive Plan into the Subdivision Ordinance." *Sanders Orchard*, 137 Idaho at 699, 52 P.2d at 844. The Court continued, "The governing board cannot, however, deny a use that is specifically permitted by the zoning ordinance on the ground that such use would conflict with the comprehensive plan. . . . If there is a conflict between the comprehensive plan and use permitted under the zoning ordinance, the zoning ordinance controls. *Sanders Orchard*, 137 Idaho at 699, 52 P.3d at 844. Thus, language in the comprehensive plan cannot be used to trump an action specifically authorized by the city's zoning ordinance.

On the other hand, if the action is not specifically authorized but is merely permitted within the discretion of the City, then the City may consider "whether the application is consistent with the overall goals of the comprehensive plan." Sanders Orchard, 137 Idaho at 699, 52 P.3d at 844. Here, the Court found the zoning ordinance authorized the County, in its discretion, to require central water and sewer. Under these circumstances (where there was no conflict between the ordinance and the comprehensive plan), the clear mandate in the comprehensive plan encouraging central water and sewer could be taken into account in evaluating the subdivision application.

Nevertheless, the Court overturned the County's action because, although it had discretion to require central water and sewer under appropriate circumstances, there was not evidence in the record to support the county's finding that "it is projected that development of central sewer system and water lines will be extended to that area in the reasonably near future." *Sanders Orchard*, 137 Idaho at 702, 52 P.3d at 847.

The take away from *Sanders Orchard* and *Urrutia* appears to be that the role of the comprehensive plan in evaluating individual subdivisions or other applications not involving rezoning is limited. The "in accordance with" requirement should be applied with vigor at the time of zoning but may not be used as a basis for denying other applications where the applicable ordinances plainly allow the development or where the comprehensive plan contains conflicting aspirational goals. In short, once the ordinances are in place, applicants and the public are entitled to rely on them.

LAND USE MAP

The fifth component listed in section 67-6508 (land use) mandates the inclusion of a land use map as part of the comprehensive plan. "A map shall be prepared to indicate suitable projected land uses for the jurisdiction." Idaho Code §§ 67-6508(e).[4] The land use map is a planning instrument providing a long term vision of the direction of future land use development. In other words, it is a guidance document displaying the municipal entity's current idea of how land uses and zoning may evolve in the future.

Being merely a guidance document, the land use map does not control current uses and should not be confused with the zoning map displaying the zones required to be established under section 67-6511.[5] The planning map reflects forward thinking (envisioning the future). The zoning map, in contrast, sets out the current, operative zoning districts that control what types of developments may be constructed in a given area. The Idaho Supreme has ruled that a local government is not bound to grant a re-zone application simply because it is consistent with the zoning shown on the land use map. Bone v. City of Lewiston, 107 Idaho 844, 850, 693 P.2d 1046, 1052 (1984).

At first glance, a planning map looks much like a zoning map; both are divided into color-coded regions. However, the regions on a zoning map are the zoning districts. The regions on a planning map often correspond to an entirely different set of definitions. For instance, the Boise City planning map contains a region labeled "planned community," despite the fact that the zoning map does not allow high-density development there today. Indeed, there is not even a zone called "planned community." This is simply an indication, on the planning map, that at some point in the future, the city anticipates zoning changes that will allow a planned community to be developed there.

In some instances, a municipal entity simply will adopt the zoning map as its land use map. While this is permissible, it defeats the purpose of having a land use map.

The land use map also should not be confused with the "future acquisitions map" contemplated under Idaho Code Section 67-6517.

DISCRETIONARY AUTHORITY TO CHANGE COMPREHENSIVE PLAN

State Law:

LLUPA includes an optional way to address a conflict with the comprehensive plan. Section 67-

---

[4]The operative provision simply refers to this as a "map." Idaho Code § 67-6508(e). It is referred to as a "land use map" in Idaho Code § 67-6509(d).

[5]LLUPA does not require creation of a zoning map in so many words, but it does require the designation of zoning districts which, as a practical matter, are most readily displayed on a zoning map.

6511(c) states: "If the request is found by the governing board to be in conflict with the adopted plan, or would result in demonstrable adverse impacts upon the delivery of services. . . the governing board may consider an amendment to the comprehensive plan . . ." In my experience, this provision is infrequently used. The practice seems to be that, if the governing board is inclined to approve the application, they find a way to make it fit in the comprehensive plan rather than requiring an amendment of the plan.

If the governing board does require a comprehensive plan amendment, the statute mandates the following procedure: "After the plan has been amended, the zoning ordinance may then be considered for amendment pursuant to Sections 67-6511(b)." The Idaho Supreme Court has held that the comprehensive plan amendment and rezone applications may be considered in tandem, but he board is required to deliberate on the comprehensive plan amendment prior to consideration of the rezone. *Price v. Payette County Bd. Of County Comm'rs*, 131 Idaho 426, 430,958 P.2d 583,587 (1998). The takeaway here is that "amendments" to the comprehensive plan must be approved by resolution.

Sugar City's Comprehensive Plan Provisions:

But wait, (as they say in infomercials) there's more! Sugar City has, in its comprehensive plan, identified the attachments in the plan as not being integral parts of the comprehensive plan, but only "support" for the plan. As such, the plan states that attachments may be altered, added or removed without amending the plan. The plan, by its terms only requires the City Council's "concurrence" in order to alter, add or remove such material.

> This plan uses attachments as secondary tools of implementation, where details of implementation are tracked. In Attachment A to each chapter numbered 2-14, recent, current, and imminent implementing actions are recorded. In Attachment B to each chapter numbered 2-14, studies and reports are collected. The attachments support the plan, but are not integral parts of it. With the concurrence of the City Council, material in them may be altered, added, or removed without amending the plan. The value of the attachments is to document city actions.

It is my opinion that the City Council's action in approving the new land use map was sufficient to meet the requirements of the City's comprehensive plan.

Analysis of whether Ordinance 312 is in Accordance with the City's Comprehensive Plan

The language cited by Ms. Lusk is excerpted from one chapter of the comprehensive plan. It is not the only direction given by the comprehensive plan with regards to zoning/housing issues. Following are other excerpts from the Plan. In order to properly evaluate Ms. Lusk's objections, we have to apply the comprehensive plan's language as a whole to the action taken by the City Council. Following is a summary of statements that, in my opinion, bear on zoning issues.

Central Values and Supporting Values

1. Promote health, safety, and general welfare of people.

2. Promote livability and orderly growth.

3.Promotes a safe, clean, prosperous and attractive community. Upholds justice, education, wholesome recreation, the natural environment and respect for the past.

Chapter 3. Property rights:

Maximum individual liberty with regards to property rights.

Balance public interests with the interests of property owners.

To maintain a regulatory framework ensuring that land use policies, restrictions and fees do not excessively impact property values.

Provide for legitimate applications of police power, which may restrict land use without paying compensation when deemed necessary to protect the public interest.

Chapter 5. Economic development:

Encourage economic developments that are suitable to various locations and public needs.

Zone so as to provide optimal settings for each sector of use.

To encourage cohesive and complete residential neighborhoods and vibrant commercial and business districts.

Chapter 6. Land Use:

Residential. Lands used primarily for single-family or multi-family dwellings.

Land Use Map is a roadmap for development.

The multiple-use zoning district in the city ordinances, however, is *guided only indirectly by the comprehensive plan.* Lands are designated for multiple use on a case-by-case basis as directed by ordinance, consistent with values and goals in the comprehensive plan. Multiple use may involve lands in any land use classification(s) on the land use map.

Chapter 11. Housing:

Promote a range of housing types and affordability.

To ensure smooth transitions between housing types.

Zone to retain a predominance of single family housing.

To require transitional lots and/or buildings-or buffers- as appropriate at zone boundaries and between land uses.

To allow a modest range of densities and encourage appropriate clustering.

To discourage development of large, independent residential areas outside the city or its impact area.

It is clear that there are provisions in the Comprehensive Plan that support an amendment of density and parking regulations of the zoning R2 and 3 zoning districts and the MU1 and 2 zoning districts. The Planning and Zoning Commission's findings and recommendations touched on several of these factors, including:

1. A review of the Comprehensive Plan and a finding that there were not "any issues in the comprehensive plan that this application would not meet in its intent."

2. "[A]ll public infrastructures were adequate and met all required codes."

3. "The impact study done by the developer's engineer was reviewed and considered in [the] ultimate recommendation."

4. "There were no streets that would require any special approval."

5. Changes in zoning districts are necessary to "allow for future expansion and to [create] more diversity."

6. "To make sure the result [of development] is family friendly and maintains a small town feel.

7. "We added a 20% minimum requirement for open space in MU2 in order to make sure it has a small town feel and looks attractive."

8. Appendix A of the Comprehensive Plan, The current Land Use Map, reflects that this property is designated as multiple use and residential. The past land use map showed this property as residential.

Initially, I note that Ms. Lusk does not even suggest that, with the exception of the three statements she cites, that the criteria named above are "violated" by the zoning changes. Lets examine more carefully the statements she asserts have been violated by passage of Ordinance 312.

1. Zone to retain predominance of single-family housing.

The Comprehensive Plan does not specify, quantify, or give any further guidance as to what "retain predominance of single family housing" actually means. It has been defined in various dictionaries "as present as the strongest or main element." "The quality of being more noticeable than anything else." This is a difficult characteristic to judge as it, as with perhaps, beauty, is mainly in the eye of the beholder. Be that as it may there are some quantifiable measures to be considered:

a. Currently in Sugar City there are 751 lots either built as single family homes or existing and zoned for single family residences. (This does not count infill [read this as vacant] lots in the City.) There is another roughly 300 acres of undeveloped land identified in the land use map as residential which adjoins the traditional single family residence neighborhoods in the City. This acreage, if developed as single family residences could provide as many as 1200 more single family residences in the City.

b. There are substantial business and industrial areas within the City, including, potato processing, a business park, farm equipment dealership and a fertilizer plant.

c. Currently there are 16 multi family units existing, and with the latest zoning a possibility of 684 additional multifamily units that could be built. (This is my estimate given the raw acreage with multifamily zoning, the required open space and roadways).

d. The location of the developable multifamily property lies in the southern portion of the City, separate from existing.

e. There is a mobile home park in the City directly north of the zones allowing the development of multiple family housing.

f. The comprehensive plan specifically calls out multiple use districts as being only indirectly guided by the comprehensive plan.

First, I am not aware there is any evidence that this zoning is not in accord with the plan. After considering all the above facts, I am unable to say that the zoning in 312 violates the "retain predominance of single family housing. There would appear to be more single family residences allowed/planned for than any other use permitted or planned in the City. A large majority of the land in the City is used/dedicated/or planned for use as single family residences. This is a judgement call. Reasonable minds can differ. Given the deference the courts have given to zoning decisions by local governing boards, it is my opinion, that if these criteria were properly discussed and articulated in a decision document on this subject, a court would uphold the City's action against a challenge on this ground.

2. Promote housing consistent with [Sugar City's] small-town, family-focused character.

Again, I am not aware of any evidence that establishes that the zoning in Ordinance 312 is not in accord with the plan. It is hard for me to understand the challenge to a zone that

provides for housing being inconsistent with being a small-town, with a family focused character. Add all the possible occupants of the projected multifamily housing to the residents of Sugar City and those that might come from the development of additional single family housing, and you still have a really small town. Family focused is not something you can zone for when you are talking about different forms of residential housing. I could understand this if half the town were rezoned industrial but residences equate with families. Maybe this is supposed to be code for "our idea of what a family should be." I don't know that is the case, but if it is - I wish the people bringing a challenge to this ordinance on that ground good luck with that in court. They will lose.

3. Maintain and perpetuate . . . quiet neighborhoods.

Another tough one to understand. There is no evidence in the record that development allowed by the new zoning would result in noisy neighborhoods, whatever that means. And what does that mean? I visualize rodeo grounds, noise parks, athletic facilities that attracts crowds of spectators, industy, busy commercial areas and freeways when I think of noisy neighborhoods. The zoning in Ordinance 312 contains none of those things.

Written Decision Identifying the Parts of the Comprehensive Plan Considered and an Explanation of the Facts and Law Considered in Making the Decision:

Ms. Lusk questions the existence of a written decision which identifies whether the ordinance complies with the comprehensive plan and what facts were considered in coming to the conclusions you made and action taken. She has an excellent point.

As discussed above, LLUPA does require that the City Council document its decision citing the relevant factors from the comprehensive plan and the facts on record that were considered in coming to the decision. The Supreme Court has held that a City Council can simply adopt the recommendations of the Planning and Zoning Commission as its decision document. The City Council has gone a step further and adopted its own decision document which is on file at the City Offices and available for your review.

Request that the City Council repeal Ordinance No. 312:

Ms. Lusk has asked that the City Council repeal Ordinance 312. She states in the document she presented to the City Council that "If prompt action is not taken by the city council, our lawyers have advised us to take legal action against the city." The City Council could repeal Ordinance 312 if it chose to. It would have to refer the matter to the Planning and Zoning Commission for consideration, a public hearing and a recommendation. After receiving the recommendation from the Planning and Zoning Commission, the City Council could take action on the matter.

If the City Council does repeal Ordinance 312, it will have to replace its zoning provisions with new zoning for the property affected. The Idaho state law has a provision which

protects property owners from changes in zoning that occur after a zoning definition has been amended or a new zone added in response to a request from a property owner. Idaho Code, Section 67-6511 (2) (d) provides"

> If a governing board adopts a zoning classification pursuant to a request by a property owner based upon a valid, existing comprehensive plan and zoning ordinance, *the governing board shall not subsequently reverse its action . . . without the consent in writing of the current property owner for a period of four (4) years from the date the governing board adopted said individual property owner's request for a zoning classification change. If the governing body does reverse its action or otherwise change the zoning classification of said property during the above four (4) year period without the current property owner's consent in writing, the current property owner shall have standing in a court of competent jurisdiction to enforce the provisions of this section.* (Emphasis added)

The effect of this statute is to give the owner of a property who has sought a zoning change a four year period in which that zoning classification is fixed and cannot be changed without the landowner's consent, and allows him to go to court to enforce his rights in the zoning. It is my opinion that any attempt to repeal the new zoning and effectively down-zone the property for four years could end badly for the City.

An associated concern is the constitutional doctrine that forbids government from taking private property without due process and proper compensation. In the land use context, regulatory takings usually involve (1) restrictions placed on property or (2) exactions (payments) demanded in exchange for regulatory approvals. Of course, the government usually would not institute eminent domain proceedings in a regulatory action, believing, rightly or wrongly, that its actions fall within the police power. If the landowner believes a government regulatory action rises to the level of a taking, it may be appropriate to bring an inverse condemnation or regulatory taking action.

The U.S. Supreme Court recently summarized the difference between physical and regulatory takings this way:

Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of per se rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by essentially ad hoc, factual inquiries designed to allow careful examination and weighing of all the relevant circumstances.

The essence of regulatory takings law can be stated in two points: First, the mere diminution in value, standing alone, does not establish a taking. Covington v. Jefferson Cnty., 137 Idaho 777, 782, 53 P.3d 828, 833 (2002). However, if government regulation of private property goes too far, it may amount to a compensable taking. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

Ms. Lusk submitted a petition purporting to call for an referendum election on a proposal to pass an ordinance repealing Ordinance 312. A concern about this proposal is that the referendum petition is to enact a repeal of a zoning ordinance. The Idaho Supreme court has held that comprehensive plans and zoning ordinances cannot be adopted or amended by initiative or referendum. *Gumprecht v. City of Coeur D'Alene*, 104 Idaho 615, 661 P.2d 1214 (1983). An referendum to repeal Ordinance 312 would have the effect of changing the zoning classifications adopted by Ordinance 312 at the request of the landowner. To do so violates the requirements of LLUPA and such attempted end runs around the LLUPA statute have been rejected by the Idaho Supreme Court. I expect that should this petition ever be brought before the citizens of Sugar City and approved, any resulting repeal would likely be invalidated by a court for the reasons enumerated in the Gumprecht case.

I hope this helps you to understand the action by the City in this matter.