

**Public Comment**  
**Conditional Use Application Review of Hillview Crossing TED**

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**Date: December 14, 2018**

**To: City Council, City of Missoula**

**From: Rocky Sehnert, MS Rural, Town, and Regional Planning, U of MT**

**RE: Discussion of a Townhouse Development Exemption Request in the Overall Context of the Conditional Use Regulations of the Missoula Zoning Ordinance and Solution to an Adverse Impact of the Proposed Hillview Crossing Development.**

After attending and testifying at the city council Zoning and Land Use Committee meeting on the review of the conditional use application by Hillview Crossing, LLC I have the impression that the majority of the city council members in attendance, which was most of them, do not fully comprehend the concept of a conditional use permit application or the process necessary to complete a full and legal analysis of the impacts of the proposed project on “adverse effects on the surrounding neighborhood and the general welfare of the community as required by the zoning ordinance.

The purpose of any conditional use permit (CUP) application is to allow the unique facts and impacts of the proposed use at a particular site to be discovered, examined, and analyzed according to a mandated, legally required set of criteria found in the zoning ordinance and thus develop “conditions” of granting the CUP necessary to abate, remove, or mitigate the adverse effects of that particular use at that particular site.

Some of these effects are those arising from facts about the site, the proposed use and the necessary buildings and infrastructure to accommodate the use. Other effects or impacts arise out of analysis of the site and the use in the context of the neighborhood and wider community. Identification of the potentially adverse impacts is the role of the city council assisted by the professional city planning staff. The applicant cannot be expected to discover and reveal all effects of his development, especially ones that will cost him money and lower his profit. In other words, he is biased.

Two important purposes of a public hearing on the CUP application is to find out what the public thinks about the project and discover impacts and problems relating to the proposed use

that might have escaped the attention of the city planning staff in its review of the CUP application.

During the hearing on Wednesday, Dec. 12, the council committee was informed by three persons that the District XI Human Resource Council was the owner of a parcel adjacent to the HC project. This parcel shares a property line with the HC project. The HRC parcel is presently landlocked by HC property and two others. This landlocked status severely restricts the ability of the HRC to use or dispose of this parcel to HRC's best advantage. Despite several attempts, HRC has been unable to secure motorized access to a roadway so that the parcel can be developed to its highest and best use. Keep in mind that HRC is a public, non-profit mandated by the state of Montana whose programs and operation directed impact the general welfare of the Missoula community and three counties.

#### Legal purposes of conditions on land use

Conditions placed on uses requiring CUP review arise because of the relationship of the project's impacts on public health, public safety, and/or general welfare. These three areas are the general and always cited reasons that private land use can be regulated by cities and specific restrictions, specifications and requirements imposed on land limiting the owner's uses.

#### Uncompensated easement for public trail access

One such use is the requirement to grant the city an uncompensated easement to continue public non-motorized trails across a developer's property ostensibly to promote the public health and whatever other values are associated with having a system of hiking and biking trails in a city. This is clearly an imposition of an easement which is the result of the circumstance of a particular development laying the path of an established trail system and the city desiring to maintain continuity of that trail across the land in question.

#### Failure to acknowledge the "fact" of landlocked status of HRC property as adverse effect of the HC project

It is commonly agreed that having landlocked land parcels in any jurisdiction is a bad thing and that, if official action can prevent it, the authorities should do so. If it is not the case that landlocking is a bad thing, that perpetuating the landlocked status of the HRC parcel is NOT an adverse effect of the EC development, and that the city intends to NOT make resolution of the landlocked status a condition of approval of the EC project, the Missoula Zoning Ordinance requires that the city council back up its decision not to act on this "fact" concerning the EC

proposal and the impact on neighboring land and do so in writing. It is worth pointing out that we are talking about procedural and, maybe, substantive due process here and that arbitrary and capricious decisions by authorities not supported by facts and reasoning are subject to judicial review. I interject this information not to threaten the council or city any with legal action but rather to point out the gravity of the responsibility of conducting a complete and professional review of a conditional use application in light of clearly mandated criteria found in the city's own ordinances.

#### Pursuing a remedy for the landlocked HRC parcel

In the case of the HRC landlocked status, what is requested is an easement or other access arrangement from the HC developer to access the internal road system of that development, possibly with compensation for the easement

By invoking the TED procedure, the developer has chosen to expose itself to the rigors of examination of its project by conditional use criteria. This was freely chosen. The developer acquired the land in question with a subdivision almost ready for final plat filing, but chose to throw out that plan in favor of one of its own liking. On that subdivision plan a road to the HRC property line was clearly a part of the internal road system of that development. The HC developer could have acquiesced to that intention and the appeals of HRC to honor that design, but declined. The fact that the developer has resisted attempts by HRC to gain access in the past from the developer should not color the opinion of the staff or council now. In the past, CUP review of TEDs was not possible. But now under the catchall criteria of adverse impact of the neighborhood and general community welfare, new and different condition to mitigate impacts to these two important criteria are required when all the facts about an proposed development are know.

Just as the city requires an uncompensated easement for non-motorized trail access across the applicant's property, the easiest solution to the HRC landlock problem is to require that the applicant provide an easement from its road system west to the property line of the four-acre HRC parcel sufficient to match the design of the southern portion of Road A on the developer's site plan and grant future uses of the HRC parcel an easement to use the part of Road A required to access Hillview Way.

However, that is kind of heavy handed even though that is precisely what the city does in requiring trail easements. HRC has expressed a willingness to share or bear the costs building the short roadway extension to its property line and and share maintenance expenses of that

section and the part of Road A leading to Hillview Way. I suspect all of this could be negotiated forthwith.

The developer's spokesman stated in the committee hearing that no negotiation is possible without first getting approval of the project. But it would take a very naïve person indeed to believe that the developer would grant an easement at a future date without being required to do so, when it so vigorously defended itself against provision of any such access in a recent court case.

#### Negotiated settlement of access as a condition of approval of the CUP

Stipulation by the council of a negotiated arrangement with a time limit (say 90 days) for achieving agreement as a condition of approval of the project is the way to go. It must be required that the parties will negotiate in good faith and that price gouging will not be tolerated in setting the costs for construction and maintenance of any roadway or even provision of the requested easement. Failure to meet the time limit or the fairness requirement should result in suspension of the project, building permits, etc. until resolution can be obtained. In this manner, the developer can proceed with its plans, but if the time limit is not met or the fairness provision violated, the threat of suspending the

Please do the right thing and require as a condition of granting the conditional use that the developer of the Hillview Crossing project work with the HRC to develop an access solution for the HRC four acres. HRC always needs more funding and so must manage its assets accordingly for the highest value. Clearly, no organization operates more in the interest of the general welfare of the community. Failure to liberate the land value of HRC's four-acre parcel by maintaining its landlocked status is an adverse impact of the HC project on the general welfare of the community.

The details of a condition specifying an access arrangement should make any solution a written condition of approval of the HC development, put that agreement in the Homeowners' Association founding documents, and require that any easement be recorded as a deed amendment to the HC crossing. Justice and fairness as well as good land use planning require nothing less.

#### Table vote or send back to committee

I suspect that crafting this additional condition will not be possible within the time space and atmosphere of a public hearing at a city council meeting. Careful consideration and honest

negotiation will be required to achieve an outcome beneficial to all concerned. I think the immediate action to be taken is to table a vote on this application or send it back to committee, whichever is the more judicious for the council.

Thank you,

Rocky Sehnert,  
MS Rural, Town, and Regional Planning, U of MT  
Former planner Missoula and Hamilton, MT