

## CITY ZONING OFFICER OPINION # 19-01

**DATE:** April 18, 2019

**RE:** Townhome Exemption Developments (TEDs)

### QUESTION:

Does Title 20 adequately address the processing of applications for Townhome Exemption Development (TED) projects and regulations under which they may be developed?

### CONCLUSION:

Townhome Exemption Development has been permitted and even encouraged (as a tool to help address rising housing prices) in the City of Missoula since state law was revised in 2011 to provide certain local governments a mechanism to allow TEDs to be developed in lieu of traditional residential subdivisions.

Development Services staff has maintained a consistent process for handling TED projects over time based on Missoula Municipal Codes and the provisions in state law. As projects grew in unit numbers and complexity, the regulations and review process, necessarily evolved to include greater considerations.

Given the increasing scale and potential impacts of TED projects currently being proposed, coupled with arguments of some developer's legal counsels as to the legal foundation for some aspects of the City's processes and regulation around larger TED projects, it would be prudent for the City to revise municipal codes to restate very explicitly how TEDs are processed and regulated. This would also provide opportunity to reexamine the role of subdivision as a legitimate alternative for future affordable residential development.

There should be a review of current codes as they relate to TEDs and a package of proposed amendments prepared for City Council consideration that more explicitly address TED process and regulation along with any associated changes that would serve to accommodate development while protecting the public health, safety and welfare.

An Interim Ordinance is needed to address urgent concerns related to potential hazards to public health, safety, and welfare and to clarify the current process for conditional use review, while staff develops recommendations for solutions. The Interim Ordinance also eliminates the minimum lot size requirement for new subdivisions in order to equalize the density of development that can be achieved in TED and subdivision projects. This will provide developers seeking to maximize development potential with alternatives for realizing residential development in the short as well as the longer term.

### ORDINANCE EXCERPT:

Existing Townhome Exemption Development regulations (Chapter 20.05.040.D)

## D. Townhome Exemption Development

### 1. Intent

- a. The Townhome Exemption Development Option is intended to encourage affordable fee simple detached house, two-unit townhouse, and 3+-unit townhouse development without subdivision review in accordance with City zoning regulations.
- b. Public notice and City Council approval of a conditional use is required if the development contains more than five dwelling units in R and RT districts, or more than nine dwelling units in RM, B, C, and M1R districts.

### 2. General Description

- a. The only permitted residential building types that may be included in a TED project are detached houses, two-unit townhouses, and 3+-unit townhouses as described in Section 20.05.030 and as allowed within the applicable zoning district.
- b. Two-unit townhouse and 3+-unit townhouse building types as part of TED projects must also comply with Section 20.40.140, Townhouse standards.
- c. Townhome Exemption Developments must meet all City zoning regulations (see Figure 20.05-7).

	R Districts	RT Districts	RM Districts	All B, C Districts M1R
One (1) to five (5) total dwelling units	Administrative Approval Comply with Zoning 15 day neighborhood notice (20.05.040 D 4)		Administrative Approval Comply with Zoning	
Six (6) to Nine (9) Total dwelling Units	Conditional Use Approval (20.85.070) + Building Specific Standards (20.40.180)		Administrative Approval Comply with Zoning	
Ten (10) or More Total dwelling Units	Conditional Use Approval (20.85.070) + Building Specific Standards (20.40.180)			

**Figure 20.05-7 Townhome Exemption Development Requirements**

- d. All surface infrastructure shall meet the standards in Title 12 and be approved by Development Services Engineering Division.
3. **Condominium Conversion to Townhome**  
Conversion of condominium projects constructed prior to May 18, 2016, to Townhome Exemption Development (TED) are not subject to the provisions of TED regulations unless dwelling units are added.
4. **Notice to Neighboring Property Owners**  
Notice of the application for a zoning compliance permit for Townhome Exemption Developments of one to five dwelling units in the R and RT zoning districts must be mailed to all owners of property within 150 feet of the subject parcel at least 15 days before a permit is issued. (Mailed notice for projects of six or more dwelling units in those districts and ten or more dwelling units in RM, M1R, B, and C districts is required within the Conditional Use process.)

## **BACKGROUND:**

In 2011, out of an initiative intended to make the financing of condominiums easier, the Montana Legislature passed HB460 that provided an exemption from subdivision for "townhomes" on lots legally created and zoned, and where a townhome was defined as "property that is owned subject to an arrangement under which persons own their units and hold separate title to the land beneath their units, but under which they may jointly own the common areas and facilities."

According to Title 20.100.10, Townhome Exemption Development is defined as "a residential development containing one or more dwelling units that are owned subject to an arrangement under which persons own their own dwelling units and hold separate title to the land beneath their dwelling units but under which they may jointly own the common area and facilities in accordance with MCA §§ 70-23-102 and 76-3-203."

State law allows for the consideration of the TED exemption according to the following:

MCA 76-3-203: Exemption for certain condominiums. Condominiums, townhomes, or townhouses, as those terms are defined in 70-23-102, constructed on land subdivided in compliance with parts 5 and 6 of this chapter or on lots within incorporated cities and towns are exempt from the provisions of this chapter if:

- (1) the approval of the original subdivision of land expressly contemplated the construction of the condominiums, townhomes, or townhouses and any applicable park dedication requirements in 76-3-621 are complied with; or
- (2) the condominium, townhome, or townhouse proposal is in conformance with applicable local zoning regulations when local zoning regulations are in effect.

There are two key points that apply to the City within the state law:

1. TEDs are exempt from subdivision if they are expressly contemplated on lots within the city. Once a TED project is approved the units that are established are TED ownership units (according to Title 20.100.010).
2. The TED project must conform to applicable local zoning. The City has the ability to create appropriate regulations relating to TEDs. Those zoning rules can regulate the locations, conditions, review procedures, size, development standards, etc. of TED projects as the City determines necessary to fulfill the purpose and intent of zoning.

Shortly after state law took effect, developers in Missoula began to utilize the exemption to subdivision by building small residential projects (mostly in the 2-6 unit range) as TEDs on zoned parcels, with individual homebuyers owning their residential units and the land beneath and with an association created to own and maintain the common areas. Typically these were infill projects that could take advantage of existing road networks and infrastructure systems with common areas comprising little more than a driveway or short private road and landscaped common areas. Initially, TED projects were reviewed administratively as a multi-unit site development project, containing either single dwellings or two-unit buildings that would trigger some consideration of multi-dwelling standards. The City of Missoula accommodated and even encouraged TEDs as a legitimate and cost-effective alternative to minor subdivisions.

By 2015, the scale and complexity of TED projects grew. Several of the newer projects presented unique challenges, and highlighted the issue of using zoning to generally address mitigation of potentially hazardous areas and the placement of community infrastructure. By

2016, City Council approved a set of development standards and expanded review process for larger TED proposals. Additionally, TEDs must comply with all other local and state regulations (20.01.060.B) and street standards were added to Title 12 for TED projects.

Currently, for small scale projects (outlined in Figure 20.05-7), review is handled administratively. For larger scale projects (also outlined in Figure 20.05-7), review and approval follows the conditional use procedures (20.85.070) and additional building specific standards are in place (20.40.180). All projects must comply with the parcel and building standards as referenced in the Townhome Exemption Development section of Table 20.05-3. In addition to the requirements of Title 20, section 20.01.060 states that all uses and developments must comply with all other applicable city, state and federal regulations.

More recently, a next generation of TED projects are being proposed to Development Services staff. These have tended to be proposals for very large projects on greenfield sites void of a collector street network and other supporting infrastructure, some with other development constraints. The size and location of these proposed projects, combined with some developer's legal counsel opinions as to what the City can and cannot require of TED projects, based on what is in (or more often what is not specifically addressed in) state law and city regulations supports the need for this zoning officer opinion and subsequent amendments to the regulations.

Issues relating to timing and submittal material have occurred, not just for zoning requirements, but to address the expectations of other local regulations and to provide the City Council with the information that they need to be able to adequately evaluate the conditional use permit. Additional regulations are also needed to protect the public health, safety and general welfare relating to development on property with hazards such as high ground water, flooding, steep slopes, and soils with drainage constraints. The following section will address review and approval issues relating to timing and application submittal needs for conditional use TED proposals, and new hazardous lands development regulations.

#### Timing:

An approved conditional use permit is expected to be acted on within two years of City Council approval. To meet this deadline, a building permit or a zoning compliance permit (ZCP) has to be issued (Title 20.85.070.J). A ZCP is the tool used to document compliance with zoning and approval of the Townhome Exemption Declaration. Review of the ZCP application is the time to ensure that potential conditions of approval to the conditional use are being met. The ZCP is good for two years and is considered met when a building permit and a final certificate of zoning compliance is issued (Title 20.85.120.E). Typically, staff expects to review and approve infrastructure construction plans before approval of the ZCP. Installation of infrastructure improvements is required prior to approval of the first building permit or installation is delayed contingent on an improvements agreement, with an estimate of cost of improvements and a security guarantee. A townhome exemption declaration is tied to the ZCP so if the ZCP is not acted on in the required timeframe, the Townhome Exemption Declaration is revoked.

Local and state agencies periodically update their regulations. The mechanism for requiring approved conditional use TED projects to be modified to reflect the new regulations is very limited. This is mitigated during conditional use review by expecting a project to be fully developed in a relatively short time frame; requiring that every TED conditional use have all the units included in one townhome exemption declaration; and requiring an improvements agreement, cost estimate with contingency funds and security to cover the cost of infrastructure not yet installed.

All of the TED declarations to date have been filed with the entire TED development in one declaration. Recently, we have had applicants and attorneys suggest that they can "phase" a TED by filing multiple declarations on one parcel, leaving a remainder area each time intended to accommodate future TEDs, leaving the order and sequencing of development unknown. This approach presents several issues. Generally, a TED project results in the creation of TED Ownership Units on a TED parcel, such that the remainder areas are considered TED Ownership Units. The notion that a remainder TED Ownership Unit could be reserved for a future TED project doesn't comply with the state requirement that they occur on a lot. Not knowing when a next "phase" of TED development would come on line creates a hardship for planning orderly and beneficial development. Additionally, to consider phasing of a TED would restrict the City's ability to be responsive to potential changing conditions, and would leave the City vulnerable to potential unforeseen impacts to public health, safety and welfare over a longer period of time. Staff will continue to work toward clarifying these terms while developing recommendations for zoning solutions.

#### Application Submittal:

As project size increases, we also find that the correlation to other agency regulations need to be clarified. TED project review through zoning relies heavily on compliance with other local and state regulations since the process is void of the type of coordinated submittal (including environmental assessment) and review process typically found with subdivisions. Each local and state agency is tasked with developing/adopting the necessary general regulations and may not have given consideration to the unique nature of TED projects. Past practice was to rely on the submittal and review requirements of subdivision to thoroughly inform agencies of potential issues and hazards and collect potential conditions for mitigation for City Council consideration.

Currently, through the ability to address local regulations, the expectations of conditional use review, and the ability to generally require additional application information for a ZCP, staff seeks information relating to potential hazardous lands. But the expectation for related agency review material, such as storm water management plans is triggered in advance of a ZCP. However, similar to subdivision review, City Council benefits from knowing that generally and preliminarily, the proposed project will not adversely impact public health, safety and welfare by requiring the analysis, planning and design material earlier in the process. The zoning regulations and other local regulations need to be updated to create a clear coordinated avenue to review, accept and approve the various infrastructure plans and assessments needed to inform the projects' design.

Generally, conditional use TED projects are subject to review based on the review criteria found in Title 20.85.070.H and the factors to be considered in Title 20.85.070.I. City Council may approve, approve with conditions, or deny a conditional use project. An overall observation is that while the review criteria address public health, safety, and welfare in various ways, they don't generally express the ability for the City Council to view a project from the perspective of accommodating the orderly and beneficial development of the City. There may be times when City Council determines that the benefits of the project cannot overcome the issues related to loss of public connectivity, inability to require off-site improvements that are clearly associated with the impact of the project, or impose other conditions associated with access for local services. For those reasons, the code should be reviewed to clarify the ability for City Council to deny a project.

#### Hazardous Lands Development Regulations:

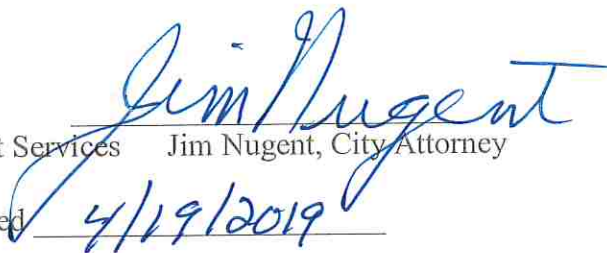
Proposed development is expected to mitigate potential impacts to public health, safety and welfare. Regulatory restrictions are placed on lands subject to hazards such as, flooding, swelling soils, subsidence, landslides, improper drainage, high ground water, and steep slopes

in order to direct development away from the hazard or to mitigate the adverse impacts. Constraints to development within flood prone areas are regulated through the City's floodplain regulations and through subdivision review. In the case of TED projects, subdivision review is not applicable, and the floodplain regulations do not adequately direct development away from flood prone areas in a way that best manages the resource. For that reason, the interim zoning should include new regulations for development within a FEMA designated floodplain area and consider solutions to address the issue.

In conclusion, Development Services staff has maintained a consistent process for handling TED projects over time based on Missoula Municipal Codes and the provisions in state law. However, given the increasing scale and potential impacts of TED projects currently being proposed coupled with arguments of some developer's legal counsels as to the legal foundation for some aspects of the City's processes and regulation around TEDs, it is necessary to clarify the review and approval procedures, the eligibility and submittal expectations and development regulations with an interim approach to regulations and a plan to consider a comprehensive review of the procedures to provide a solution.



Mike Haynes, Director of Development Services



Jim Nugent, City Attorney

Date Zoning Officer Opinion is approved

4/19/2019