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Mayor Jenson and City Councilors  
City of Whitefish  
Whitefish, Montana

## **WB-2 Zone Text Amendment Recommendations**

### **Summary**

At the City Council Meeting of October 18, the council gave staff direction to bring back the text amendments originally tabled last summer to address issues on allowed permitted and conditional uses in the WB-2 Zoning District. Attached are the proposed text amendments as forwarded with a recommendation for approval by the Whitefish City-County Planning Board, each one analyzed within the staff report below. Staff has also provided a separate new draft with some recommended modifications. Also attached is a memo sent by the Heart of Whitefish with suggestions and their draft version of the WB-2 text amendment, which staff will provide an analysis of throughout the report.

### **Discussion**

The code amendments forwarded by the Planning Board attempt to rectify unclear or archaic code language relating to existing uses in the WB-2, Secondary Business District. The draft also includes several uses that have been allowed over the years that are not specifically listed in an attempt to close up a loop hole in the permitting system. The primary motivation in attempting to do the latter is that denying future businesses the right to operate when past similar uses have been allowed may create problems which may compromise future enforcement. Since it is in no one's best interests to make those illegal businesses close down (and may not be possible, see Legal Issues below) and since some of those businesses are fairly consistent with the intent of the zone or are similar to other uses that are currently legal, making a few tweaks to the code seems the best course of action. This gives the city the ability to better enforce new uses in the future, which greater protects downtown businesses in the long run. For instance, it would be difficult to tell future sporting goods stores they are not allowed since the Army Navy store was allowed. However, the council could add a limitation on the new proposed permitted use of "sporting goods" by re-writing it to say "sporting goods stores with a floor area 8,000 square feet or greater", which would then allow Army Navy (at 8,000 sq ft), but would prohibit future smaller format sporting goods stores that don't fit with the zone's intent.

Staff will quickly summarize below why the following new permitted and conditional uses were proposed for addition and offer suggestions for improvement. All of these uses were previously reviewed by the Ad-Hoc Committee and the Planning Board.

## **Proposed WB-2 Permitted Uses:**

### Agricultural Supplies and Sales

This was inserted to replace “Seed, and Grain Sales”, an antiquated type of use. Retail agricultural supply stores seem best suited for the WB-2 zone in Whitefish and are consistent with the zone’s intent.

### Automobile, Boat and Recreation Vehicle Rentals and Parts

The WB-2 zone currently allows automobile, boat and recreational vehicle sales and service, but no mention is made of rental and parts. These uses have been allowed over the years due to the similarity to permitted uses, but the code needs to be clear that those uses are also permitted. The WB-2 zone with its automobile-related intent and need for parking is the best location for car, boat and RV rentals and parts stores. The Heart of Whitefish’s proposed draft WB-2 permitted uses removes RV sales, rentals and parts from the list. While motor home sales may not be attractive, with the visitor destination and second home market, the WB-2 seems the most suited since banning them outright could lead to a future legal challenge. RV sales and service and rentals could be moved to the allowed conditional uses.

### Electronic Appliance Stores

The WB-2 currently allows electric and household appliances. Most everything Radio Shack sells could be considered an electric or household appliance, including phones, which is why that store was allowed in the WB-2. Since most electronic appliances could also be called electric appliances, adding electronic doesn’t really change what uses are allowed. It does clarify that stores selling electronic devices such as cell phones, cameras, I-pods, etc., would be also allowed, eliminating a grey area. If the council is uncomfortable with small appliance stores not being consistent with the zone’s intent, the text could be modified to add a minimum square footage, although the result of that would probably be to encourage large “chain” electronics stores rather than smaller locally owned mom and pop stores.

### Home Furnishing Stores

Most home furnishings could be considered furniture, so again adding this clarification does not really change the allowed uses, it just clarifies a grey area. There has been some consternation that small home furnishing stores in the WB-2 would compete with downtown home furnishing stores. The Heart of Whitefish has suggested it should be changed to “furniture and rug/carpet stores” to be more specific. Some home furnishings stores need large display and floor areas, parking, truck loading zones, etc, so seem more suitable for the WB-2. However, smaller home furnishing stores are certainly not out of place downtown. Alternatively, a minimum floor area for such uses could be established, such as 7,000 feet, although that may be rather large for a new small home furnishings business.

### Convenience Stores

Currently grocery stores are allowed, but we don’t specify convenience stores as an allowed use. While they are typically accessory uses to a fuel station, they can also be stand-alone to provide needed retail convenience items such as beer/pop/candy/cigarettes to nearby residential neighborhoods. While the floor area is typically small, convenience stores are auto related with a large traffic volume and thus fit with the intent. The Heart of Whitefish has suggested allowing them only as an accessory use to a service station, and that is another option for the council to consider. The code amendment also includes a new definition for convenience stores, which sets a maximum of 5,000 square feet.

### Movie and Video Game Rentals

The chain stores providing this use may be disappearing due to technology trends, but the use is auto-related in that parking and vehicle trip needs are high with drop-off or drive-thru areas necessary. Historically, there have been several movie rental businesses in both the downtown and illegally on the strip. The downtown locations suffered from parking issues. Heart of Whitefish has recommended removing this use entirely from the WB-2. Staff is not convinced the WB-3 zone downtown is the only appropriate location for this type of use, and there may be opportunity for smaller mom and pop type video/game rental stores in the future.

### Personal Services

Personal services is one of the more controversial uses proposed, and the Heart of Whitefish has made it clear they would like to see them limited to the downtown only. One thing to consider is that personal services includes far more uses than just hair salons, and many of those other uses, such as massage therapists and personal trainers, are already present in the WB-2 at the Wave and other locations. In many cases, personal service uses and professional office or professional services type uses overlap, as they are often located together in office buildings. Professional services and professional offices are currently allowed in the WB-2 although that type of use does not on first blush fit with the intent of the zone. However, everyone recognizes the WB-2 has become a hub of medical related professional offices, and no one has suggested that the use is inappropriate – in fact it has been highly encouraged to provide economic development. From a planning use category perspective, personal services and professional services are very similar. The zoning code definition of personal services is as follows:

A use that provides a service to an individual customer designed to accommodate a specialized need, provide a convenience, or cater to a particular lifestyle. Such services shall be those types that require mechanical skill or manual dexterity, as differentiated from mental disciplines generally requiring licensing or certification such as those listed under professional services (see definition of Professional Services). Examples of personal services would include, but are not limited to: delivery and pick up, catering, event planning, recreational guiding and outfitting, personal training, and personal spa and grooming services such as manicure, facial, massage therapy, hairstylists, and makeup consulting. Personal services should not involve retail sales except on an incidental basis such as the selling of hair products at a salon.

If the Council agrees with the Heart of Whitefish that the proliferation of hair salons on the strip is detrimental to the downtown economy, it could change the recommended WB-2 text amendment to say something like:

- Personal services, with the exception of hair salons and personal spa and grooming services

While staff sympathizes with the Heart of Whitefish and its desire to maintain the WB-3 as the hub of grooming and hair salons, staff still supports including the full range of personal services in the WB-2. The Heart of Whitefish's proposed modification would not address the fact that there are currently three hair salon type businesses in the WB-2, making it difficult to prohibit future hair salons unless the existing ones are eventually made to close or relocate (which may not be possible, see Legal Issues, below).

### Residential Uses

Allowing residential uses above the ground floor in the WB-2 will provide affordable housing opportunities, which is a tenet of our adopted Growth Policy. Currently, a lengthy and expensive CUP process is required to add an accessory apartment in the WB-2. This change streamlines the process. Since most of the WB-2 is a narrow strip, the zone abuts residential uses on much of its length. There is quite a bit of existing residential approved in it already through the PUD process. Allowing it only above the ground floor assures that there is ample area for the allowed commercial uses while providing some housing opportunities upstairs. The Heart of Whitefish draft does not recommend allowing expanded residential uses in the WB-2, although their submittal did not explain why.

### Sporting Goods

Another controversial subject, sporting goods stores already exist in the WB-2 (Sportsman and Army Navy). Whitefish is an outdoor oriented community, and sporting goods stores have always been a retail staple. The Heart of Whitefish is recommending that instead of sporting goods, Military Surplus be added so that Army Navy is covered without expanding the use to all sorts of sporting goods items. While their name implies the store is primarily military surplus, a quick perusal of the goods they sell shows that military related items are only a very small percentage of their inventory, so that could be an issue.

Staff recommends allowed sporting goods as an allowed use, but setting a minimum square footage requirement of 8,000 square feet so that the Army Navy store and others of that size which fit with the zone's intent are allowed. Small sporting goods shops would be relegated to the downtown. The zoning text might read as follows:

- Sporting goods stores with a minimum floor area of 8,000 square feet

It should be noted that even if sporting goods are banned in the WB-2, sporting equipment rentals such as bikes, kayaks, motorcycles, etc., are allowed with a conditional use permit under the "recreational facilities, low impact" in the SAG-5 (south of Highway 40). Retail sales would be allowed as an accessory only to the rentals (less than 50% of the floor area), but still allowed. Commercial recreation facilities are also allowed in the WB-2 with a CUP.

### Shopping Malls

The last draft by the city council recommended deleting shopping malls from the allowed uses. Since it was previously allowed, deleting it puts the Mountain Mall into the existing non-conforming use category, where they retain their rights and allowed uses but require a CUP to expand. Since a mall is a type of building and not a use, deleting it will not prohibit future malls from being constructed, but it will prohibit future malls from being allowed to have a free reign of retail uses within.

## **Proposed WB-2 Conditional Uses**

### Accessory Apartments

This item is proposed for removal because of the addition of residential uses above the ground floor as a permitted use as noted above. Requiring a CUP to add an apartment is onerous and an impediment to affordable housing.

### Department and Discount Retail Stores

These types of stores could possibly be permitted anyway based on the zone's intent or through a PUD, but adding them to the Conditional Uses assures that the community gets a chance to

weigh in through a public process when they are proposed. The WB-2 Zone is probably the only place such stores could work due to their vast parking requirements. Having a 20,000 square foot minimum in the definition assures that the stores will be large. The council could consider removing the “20,000 square feet” from the definition so that smaller sized stores might also be approved with a CUP.

#### Manufactured Home Sales

This was moved from the permitted uses to the conditional uses for reasons that need little explanation. The Heart of Whitefish draft recommended removing this use entirely, as well as manufactured home subdivisions. Typically, legal controversial uses have to be allowed somewhere (i.e., sexually oriented businesses), but allowing them only via conditional use permits provides protection and oversight.

#### Multi-family Residential

Apartment buildings that don't have a ground floor retail component could be permitted on a case-by-case basis in the WB-2 zone with this change. This provides flexibility for developers, and hopefully will provide more opportunity for affordable housing. The Heart of Whitefish draft did not include this use.

### **Heart of Whitefish Alternative Approaches Discussion**

The Heart of Whitefish provided a memo with several recommended alternative approaches to solving the issues facing the WB-2 zone. Staff will briefly discuss some of them.

#### Zoning Compliance Permits

Staff is currently working on a proposed text amendment that the Planning Board will review this month that would make commercial zoning compliance permits mandatory so staff can review for required use, parking, dark skies, and other zoning provisions. Planning staff also currently reviews all business license applications for conformity with zoning. Not all new commercial uses require a business license, as some are located outside of city limits, but the new revised code does require a new business license when a business is relocated.

#### Determination of Non-Conformity

Missoula's requirement that the property owner of a non-conforming use be burdened with providing the proof that it has legal non-conforming status is a great idea. Whitefish's planning department does that informally when a business makes a claim of legal non-conforming status, but it is not immortalized in our code. Unfortunately, the businesses we are dealing with are illegal, rather than non-conforming, so it is more difficult to apply this to our WB-2 situation. It is the opinion of the staff that we cannot make illegal uses legal non-conforming just by the adoption of a zoning compliance permit requirement. The use must have been legal at one time to be legally non-conforming.

#### Amortization

While allowing some sort of amortization period for illegal uses sounds like a good idea, even if it could be adopted it sets a precedent wherein any illegal use that comes will want the same benefit. Missoula's amortization appears to apply only to formerly legal non-conforming uses, not purely illegal uses. An example would be requiring adult businesses to close down in areas where the zoning no longer allows it, but giving them several years to do it. Creating a process to amortize illegal uses does not make sense, even if it were possible. Once a sign permit or

building permit has been granted, it is very difficult to shut down an illegal use as you will see in the legal summary below.

## Legal Issues

Montana Zoning Law Digest (February 1989) offers the following legal summaries that are specific to cases where building permits were granted to uses that were otherwise prohibited by zoning, which is likely the case for all of our illegal uses (they were probably granted building permits, sign permits, or both). As you will see below, if an applicant received a building permit and/or sign permit relied on that as city approval to his detriment even though the use is illegal per zoning, a city typically cannot revoke the permit.

### C. Revocation of Improperly Issued Building Permit -- Doctrine of Equitable Estoppel

Where the applicants for a building permit relied to their detriment on the mayor's erroneous representation that the permit had been issued and the town council later denied the application, and where the conduct of the council and mayor was fundamentally unfair, the town was estopped from denying the issuance of the permit. State ex rel . Barker v. Town of Stevensville , 164 Mont. 375, 523 P. 2d 1383 (1974).

In applying the doctrine of equitable estoppel to police power situations courts should weigh the gravity of the injustice to the citizen if the doctrine is not applied against the injury to the common weal if the doctrine is applied. Where any danger to the public is slight and a citizen has made a good faith and substantial change in position in reasonable reliance upon the conduct or representations of municipal officials and agents, local governments are estopped from exercising their police power in a way which is inconsistent with their prior representations or actions. State ex rel. Barker v. Town of Stevensville, 164 Mont. 375, 523 P. 2d 1388 (1974).

When a building permit has been issued in violation of the zoning ordinance, the applicant cannot invoke the doctrine of equitable estoppel to prevent the revocation of the permit unless he has relied on it to his detriment. Even if the applicant has relied upon the representations of the governing body to his detriment, however, the court, in deciding whether to apply the doctrine, must weigh the gravity of the injustice to the citizen if the doctrine is not applied against the injury to the public welfare if the doctrine is applied. State ex rel. Russell Center v. City of Missoula, 166 Mont. 385, 533 P. 2d 1087 (1975).

When an applicant relies to his detriment on an erroneously issued building permit and when, even if he had reviewed the zoning ordinance himself, he would not have discovered that the permit was erroneously issued, the doctrine of equitable estoppel

will prevent a municipality from revoking the permit. State ex rel. May v. Hartson, 167 Mont. 441, 539 P. 2d 376 (1975).

D. Presumption that Permit Has Been Properly Issued

When the issuance of a building permit by the local government official charged with the enforcement of the zoning ordinance is reviewed by a district court, the official's decision to issue the permit is entitled to a rebuttable presumption of validity, regularity, and reasonableness. Whistler v. Burlington Northern Railroad Co. 44 St. Rptr. 1415, 741 P. 2d 422 (Mont, 1987).

**Summary**

The proposed text changes attached are a reasonable attempt to update the code and mitigate the negative effects of city oversight when it comes to allowing illegal uses to proliferate. Conditions and provisions have been added to minimize the impacts on the WB-3 zone. The majority of changes proposed are consistent with the “intent” of the WB-2 zone, and consistent with the adopted 2007 Growth Policy.

**ZONING TEXT AMENDMENT CRITERIA – Section 11-7-10(D)**

The following code considerations from Section 11-7-10(D) are intended to guide both the Planning Board and the City Council when considering an amendment to the zoning regulations or the official map.

<b>CONSIDERATIONS FROM SECTION 11-7-10D.</b>	<b>Staff Analysis/Comments</b>
Conformity to the Growth Policy	<p>The 2007 Whitefish City-County Growth Policy has a several pertinent references to this particular zoning text amendment in the Land Use section. Future Land Use goals include:</p> <ol style="list-style-type: none"> <li>1. <u>Preserve and enhance the character, qualities, and small town feel and ambience of the Whitefish Community.</u></li> </ol> <p>The proposed changes conform to that goal by limiting the size of buildings and requiring a public review process for approval of uses that compete with downtown.</p> <ol style="list-style-type: none"> <li>2. <u>Strengthen the role of Downtown Whitefish as the commercial, financial, and administrative center of the community.</u> By minimizing changes to the WB-2 zone, requiring CUP’s for egregious uses such as department stores, removing malls from allowed uses, as well as limiting uses like sporting goods to floor areas over 8,000 square feet to remain consistent with the intent, the proposed amendments do their best to continue to support downtown Whitefish.</li> <li>3. Under Recommended Actions, 7. <u>The City shall develop special regulations for “big box” commercial structures to ensure that the scale and character of the community are maintained.</u> CUP requirements for larger buildings and department and discount stores help accomplish this</li> </ol>

<b>CONSIDERATIONS FROM SECTION 11-7-10D.</b>	<b>Staff Analysis/Comments</b>
	recommended action of the Growth Policy.
Project Designed to Lessen Congestion in the Streets	The proposed amendments recommend that a CUP criteria be established for large commercial developments that would allow city officials to require a traffic impact study.
Historical and established use patterns and recent change in use trends weighed equally, not one to the exclusion of the other.	The proposed amendments carefully weight historic and established use patterns in the WB-2 Zone with change in use trends by expanding allowed uses that were not contemplated when the original code was written in 1982 while eliminating archaic uses.
Security from Fire, Panic, and Disasters	This criterion is not applicable to this code amendment.
Promote Health and General Welfare	The proposed amendments generally promote health and welfare.
Provide Adequate Light and Air	This criterion is not applicable to this code amendment. This criterion originates with the model zoning enabling statutes and codes of the 1920s. While it remains in the Montana Code Annotated as well as the planning enabling legislation of some other states, its use as a meaningful standard ceased decades ago.
Prevent Overcrowding of Land and Avoid Undue Concentration of People	This criterion is not applicable to this code amendment, although the amendment does expand the WB-2 zone's ability to provide mixed use residential commercial without setting density limits. Modern zoning trends encourage concentration and clustering of residential properties in order to minimize travel time and energy use to jobs and amenities.
Facilitate Adequate Provisions for Transportation, Water, Sewerage, Schools, Parks and Other Public Requirements	The criteria for adequate transportation, utilities, schools and parks are imposed via impact fees on new development and will also come into play when larger facilities are proposed that require a conditional use permit or PUD, wherein the city can impose additional conditions not otherwise required.
Reasonable Consideration to the Character of the District	The proposed changes take great care to maintain the character of both the WB-3 downtown zone and the WB-2 Secondary Business District zone, and attempt to be faithful to the adopted intents of those zones.
Reasonable Consideration to the	This criterion is not applicable to this code amendment. It pertains more to site development than community wide



<b>CONSIDERATIONS FROM SECTION 11-7-10D.</b>	<b>Staff Analysis/Comments</b>
Peculiar Suitability of the Property for Particular Uses	zoning regulations.
Conserve the Value of Buildings	The proposed code amendments try to maintain building and property values in both the WB-3 and the WB-2 zone by encouraging consistent application of zoning and allowed uses.
Encourage the Most Appropriate Use of the Land throughout the Municipality	The modifications to the WB-2 zone continues to encourage auto-related uses that require access and parking, while also minimizing impacts to the downtown as the retail center of the city per the Downtown Master Plan and adopted Growth Policy

**FINDINGS:**

Approval of the amendments by the City Council should include the following findings:

1. Whereas additional uses that are compatible with the intent of WB-2 Zone such as large floor area sporting goods, home furnishings, and department stores should be permitted; and
2. Whereas personal services such as hair salons, financial advising, and massage therapy are similar to other allowed professional office uses appropriate uses and do not compete with the commercial retail center and should be permitted; and
3. Whereas these changes will make several currently non-conforming existing businesses conforming; and
4. Whereas residential uses on floors other than the ground floor will help provide affordable housing and mixed use; and
5. Whereas making larger developments that could impact downtown a conditional use provides the public an opportunity to have input and the community the opportunity to put development conditions on a project, and
6. Whereas the Whitefish Downtown Business District Master Plan and the 2007 Growth Policy support continuing to protect the WB-3 Zone as Whitefish’s commercial retail district by advocating limiting small retail in the WB-2 Zone and the proposed changes are consistent with that; and
7. We find that it is in the best interest of the City of Whitefish to allow amendments to the WB-2 zone permitted and conditional uses 11-2K-2 and 3, 11-9-2 Definitions, in order to balance the growing needs of the WB-2 Secondary Business District while protecting the economic interests of the WB-3 General Business District.

**Recommendation**

Staff respectfully asks the City Council review and approve the proposed WB-2 text amendments with modifications proposed in the staff draft enclosed, subject to the findings listed above.

David Taylor, AICP

Enc.

11-15-2010 WB-2 Text Amendment Staff Draft  
B-2 Memo from Heart of Whitefish  
Heart of Whitefish WB-2 Draft  
WB-2 Ad Hoc Committee Minority Report  
8-16-2010 WB-2 Zone Text Amendment Draft and staff report with Planning Board recommended changes