

# Flathead County Planning & Zoning

1035 1st Ave W, Kalispell, MT 59901  
Telephone 406.751.8200 Fax 406.751.8210

## PETITION FOR ZONING AMENDMENT

Submit this application, all required information, and appropriate fee (see current fee schedule) to the Planning & Zoning office at the address listed above.

FEE ATTACHED \$ \_\_\_\_\_

### APPLICANT/OWNER:

1. Name: Therese R. Jeffers Trust Phone: \_\_\_\_\_
2. Mail Address: 1245 Three Mile Drive
3. City/State/Zip: Kal. mt 59901
4. Interest in property: owner

Check which applies:  Map Amendment  Text Amendment:

### TECHNICAL/PROFESSIONAL PARTICIPANTS:

Name: Montana Mapping Associates Phone: 752-5535  
 Mailing Address: 285 1st Street N  
 City, State, Zip: Kal. mt 59901  
 Email: Olaf.Erickson@broadnet.net

### IF THE REQUEST PERTAINS TO AN AMENDMENT TO THE TEXT OF THE ZONING REGULATIONS, PLEASE COMPLETE THE FOLLOWING:

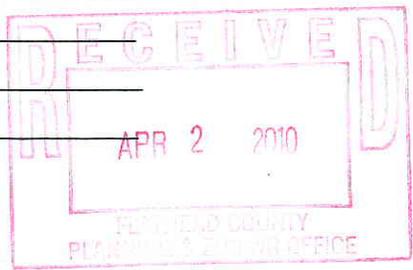
- A. What is the proposed zoning text/map amendment?  
Addition of Conditional use under West Valley District to include "Community Residential Facility"

### IF THE REQUEST PERTAINS TO AN AMENDMENT TO THE ZONING MAP PLEASE COMPLETE THE FOLLOWING:

- A. Address of the property: N/A  
 B. Legal Description: N/A  
 (Lot/Block of Subdivision or Tract #)

Section Township Range (Attach sheet for metes and bounds)

- C. Total acreage: West Valley Zoning District  
 D. Zoning District: " "  
 E. The present zoning of the above property is: ✓  
 F. The proposed zoning of the above property is: ✓



*1. Is the proposed amendment in accordance with the Growth Policy/Neighborhood Plan?*

A community residential facility is defined by Montana statute as follows:

**76-2-411. Definition of community residential facility.** "Community residential facility" means:

- (1) a community group home for developmentally, mentally, or severely disabled persons that does not provide skilled or intermediate nursing care;
- (2) a youth foster home, a kinship foster home, a youth shelter care facility, a transitional living program, or youth group home as defined in [52-2-602](#);
- (3) a halfway house operated in accordance with regulations of the department of public health and human services for the rehabilitation of alcoholics or drug dependent persons;
- (4) a licensed adult foster family care home; or
- (5) an assisted living facility licensed under [50-5-227](#).

Flathead County zoning regulations define community residential facilities slightly differently:

“A community or group home, which may provide for skilled or intermediate nursing care for developmentally, mentally, or physically disabled persons. Such uses that would be covered by this term include, but are not limited to: A youth foster home, youth group home, a halfway house or an adult foster care home, a convalescent home, a family care home, a nursing home, retirement home, or personal care facility. The term does not include boarding houses and similar uses.”

Both definitions are harmonious with the Flathead County Policy and the West Valley Neighborhood Plan. More specifically, several goals and policies within the Growth Policy document address the concept of a community residential facility. Chapter 2 of the Growth Policy includes the following goals and policies:

**Goal**

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*G.7 Consider existing community character in commercial land development.*

**Policies**

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*P.7.3 Encourage small-scale, impact-mitigated and compatible commercial developments in accessible, developing rural areas with good access and away from urban areas.*

*P.7.5 Encourage commercial development that is visually and functionally desirable.*

*P.7.6 Encourage mixed use developments that share infrastructure requirements such as parking, pedestrian facilities, etc. and reduce traffic by promoting live/work situations where appropriate in Flathead County.*

**Goal**

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*G.10 Restrict development on lands that pose an unreasonable risk to the public health, safety and general welfare of all Flathead County residents.*

**Goal**

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*G.15 Promote a diverse demographic of residents.*

## ***Policies***

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***P.15.2 Provide services and facilities to support elderly and special needs residents.***

## ***Goal***

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***G.16 Safe housing that is available, accessible, and affordable for all sectors of the population.***

The above referenced goals and policies would appear to support the concept of a community residential facility in any residentially zone area of the county. The question then becomes "Is West Valley zoning residential?". Thankfully the Montana Supreme Court has given very clear guidance on this issue. In January of 2008 the Court issued an opinion in the Tutvedt case. That opinion included the following discussion about the character of the West Valley zoning district.

¶69 **Issue Four:** Did the District Court err in concluding that under § 76-2-209, MCA, the Board could issue Tutvedt a CUP which prohibited asphalt and concrete batch operations?

¶70 Tutvedt faults the Board for not giving it a broader CUP which would allow it to operate concrete and asphalt batch plants. The District Court determined the Board was within its statutory authority to issue Tutvedt a CUP which prohibited asphalt and concrete batching, and consequently denied Tutvedt's motion for summary judgment challenging the lawfulness of the Board's decision under § 76-2-209, MCA. The relevant provisions of § 209 provide as follows:

(2) The complete use, development, or recovery of a mineral by an operation that mines sand and gravel or an operation that mixes concrete or batches asphalt *may be reasonably conditioned or prohibited* on a site that is located within a geographic area zoned as residential, as defined by the board of county commissioners.

(3) Zoning regulations adopted under this chapter *may reasonably condition, but not prohibit*, the complete use, development, or recovery of a mineral by an operation that mines sand and gravel and may condition an operation that mixes concrete or batches asphalt *in all zones other than residential*.

Sections 76-2-209(2) and (3), MCA (emphasis added).

¶71 The District Court reviewed this statute and determined it "does not require that the zone in which the property is located be denominated 'Residential.'" The District Court further found the Board correctly determined Tutvedt's property was "residential. . . [and] located in a zone classification which permits, and in which there exists, substantial residential use." Accordingly, the District Court concluded Tutvedt's property was "within a geographic area zoned as residential," and that the condition in the CUP was properly imposed under the authority granted the Board by virtue of § 76-2-209(2), MCA.

¶72 The kernel of Tutvedt's argument is that the District is not zoned "residential," and should be considered zoned "other than residential" within the meaning of § 209(3). Tutvedt asserts the Board never determined that its property is residential or in a residentially zoned area but in fact concluded the District was not zoned "strictly residential." Because of this, Tutvedt argues, § 209(3) applies. Under § 209(3), "in all zones other than residential" the Board "may reasonably condition, but not prohibit, the complete use, development, or recovery of" Tutvedt's mineral resources. Section

76-2-209(3), MCA. Tutvedt maintains the prohibition on concrete and asphalt batch plants in Condition No. 28 of the CUP denies it the ability to make complete use of its gravel resources because it is too cost-prohibitive to extract the gravel and then transport it to another location for processing.

¶73 Accordingly, Tutvedt contends the District Court erred in denying its summary judgment motion. Tutvedt argues the District Court incorrectly concluded that the Board correctly determined the area was a residential area, because no evidence existed in the record to support this finding. Tutvedt maintains it showed an absence of any genuine issue of material of fact as to whether the District was zoned “other than residential,” and that Citizens and the Board failed to counter this point.

¶74 Citizens and the Board urge us to affirm the District Court’s decision. They assert the District Court correctly concluded that the Board determined the District to be zoned “residential,” and that the Board was within its statutory authority under § 76-2-209(2), MCA, in issuing a CUP which prohibited concrete and asphalt batch plants. Both Citizens and the Board point to evidence in the Report and before the Board which supports their contention that the District is zoned “residential.” Citizens assert that Tutvedt asks this Court to read the word “exclusively” into § 76-2-209(2), MCA, meaning that § 209(2) applies only to zones with solely residential use. The Board argues that in adopting § 76-2-209, MCA, the Legislature did not require the use of any special terminology by boards of county commissioners, and that the District, because it is zoned for residential use, is exactly the type of zoning district contemplated by § 209(2). Accordingly, the Board had the power to completely prohibit any gravel

development, and did not exceed its authority in prohibiting asphalt and concrete batch plants as a condition to the CUP.

¶75 Resolution of this issue turns on the intent of the Legislature in passing § 209(2) and (3), and the meaning of the term “residential” as used in the statute. As we have stated before, our primary purpose in construing statutes is to give controlling effect to the legislative intent, looking first to the plain meaning of the words used in the statute. *Merlin Myers Revocable Trust v. Yellowstone Co.*, 2002 MT 201, ¶ 19, 311 Mont. 194, ¶ 19, 53 P.3d 1268, ¶ 19. Section 76-2-209(2), MCA, states that the Board may reasonably condition or prohibit concrete and asphalt batching operations “on a site that is located within a geographic area zoned as residential, as defined by the board of county commissioners.” Under § 209(3), “in all zones other than residential” the Board “may reasonably condition, but not prohibit” such operations. In other words, if the District is considered zoned “other than residential,” under § 209(3) the Board may only reasonably condition Tutvedt’s operation. In this case that would mean that the Board must allow Tutvedt to operate concrete and asphalt batch plants. On the other hand, if the District is considered “residential” within the meaning of § 209(2), the Board has the authority to prohibit Tutvedt’s operation outright. In that case, a limited gravel extraction with a prohibition on asphalt and batch plants would be within the Board’s lawful authority.

¶76 The American Heritage Dictionary defines “residential” as “[o]f, suitable for, or limited to residences: residential zoning.” *American Heritage Dictionary of the English Language* 1483 (4th ed. Houghton Mifflin 2000). In light of the dispute before the Court, this definition is of little help. In fact, it reproduces precisely the opposing arguments

before the Court. On the one hand, Citizens and the Board argue that “residential” refers to an area that is “[o]f, [or] suitable for” residences. On the other hand, Tutvedt argues that “residential” refers to areas that are “limited

to residences.” The plain meaning of the term “residential” could reasonably support the arguments of both parties.

¶77 However, the lack of a conclusive definition of “residential” here does not necessarily compel us to go beyond the plain meaning of the statute. Here, the statute conditions whether a geographical area is zoned “residential” on the definition given that zone by the board of county commissioners. In other words, if the Commissioners have indicated that the District is “residential,” we need not go beyond the plain language of the statute.

¶78 A review of the Regulations and the Plan itself shows that the Commissioners have zoned the District as “residential” within the meaning of § 209(2). Even though the District embraces residential, agricultural, and silvicultural uses, both the Plan and the Regulations themselves show that the primary purpose in rezoning the District was to regulate residential development and to maintain the suitability of residences, alongside other uses which have been traditionally practiced in the West Valley area. We agree with the District Court that § 209 does not require a zone be denominated solely “Residential,” for § 209(2) to apply. Since Tutvedt produces no evidence beyond the plain language of the statute in support of its argument concerning its interpretation of § 209, we decline to adopt Tutvedt’s construction of that statute.

<sup>5</sup> An example of a more traditional designation for a residential zone would be “R-1 Suburban Residential.” See FCZR § 3.09.

<sup>6</sup> Consideration of a growth policy or a master plan may not be appropriate in all cases to determine whether a zoning district is “residential.” In this case it is because the Regulations specifically define the District with reference to the community vision statements provided in the Plan.

¶79 In cases such as this where non-traditional,<sup>5</sup> uniquely zoned, multi-use geographical areas like the District are under consideration, a determination of whether a geographic area is zoned “residential” for purposes of § 209 must be based on facts and circumstances. Here, the regulations and the Plan demonstrate that the District has been specifically zoned to promote and regulate residential use, and is a “residential” district for purposes of § 209.

¶80 As noted above at ¶ 5, the Regulations define the District as “[a] district to promote orderly growth and development in the West Valley area consistent with the community vision statements as expressed by the text and map exhibits of the West Valley Neighborhood Plan, County Resolution #1226-A.” We agree with Citizens that the “growth and development” in this definition refers primarily to residential development. A review of the Plan itself confirms this view.<sup>6</sup> In the first instance, it is difficult to overlook the significance of calling the Plan a “neighborhood” plan, and by referencing this “neighborhood” plan in the definition of the District itself. Further, as noted above at ¶ 3, a simple “Residential” designation was not placed on the District because such a designation would not capture the unique residential qualities of the District itself. As the Plan itself notes, “[t]he uniform application of a single zoning district to such a large area fails to recognize the variability of land features throughout

the district. Not all the land can easily be classified as either ‘timber’ or ‘agriculture’, especially when considering how the land use character of the area has changed dramatically, even with zoning in place. The liberal use of subdivision exemptions (family transfers, occasional sales) over the past 17+ years has created a suburban development pattern in many locations.”

¶81 That residential development is at the center of the Plan and the definition of the District itself, is confirmed by considering the vision statements, goals, and policies contained within the Plan itself. All of the goals and policies are centered primarily around residential concerns. See ¶ 4. The “Implementation” section of the Plan further demonstrates that the overarching goals in devising a land use strategy in the District were primarily residential. As the Plan states, “[t]he top four reasons for choosing to live or own property in the West Valley are: rural setting; lots of open space; low crime rate; and easy commute.” Clearly, then, the central focus of the Plan is the maintenance of a livable, residential area. Indeed, although agricultural and silvicultural uses are discussed in the Plan, and their preservation is encouraged, the Plan also recognizes these uses may be subordinated to residential demands at some point in the future. For instance, under the “Agriculture/Forestry Policies” section of the Plan, it specifically encourages the development of residential uses on “ ‘poor soils’ within a larger agricultural district, farm, or forest land or when public pressures no longer make farming or forestry feasible.” In total, roughly five pages of the Plan are devoted to either agricultural or silvicultural issues, while roughly twenty pages of the Plan discuss issues related to

“residential” concerns, including residential development, limiting industrial and commercial uses, open space, transportation, utilities, emergency services, and schools.

¶82 Also instructive in this regard are the Regulations themselves. A review of the Regulations in § 3.34 shows an almost exclusive concern for the orderly development of residential uses throughout the West Valley. As Citizens point out, § 3.34 regulates a variety of aspects pertaining to residential use such as standards relating to: the construction of dwellings; future subdivision development; residential clustering; operation of a neighborhood convenience store; and the operation of home-based businesses. Although it is true that strictly residential uses are not the only ones permitted in the District, that is true even in those zoning districts designated explicitly “Residential.” We agree with Citizens that a reading of the District’s Regulations shows that they were designed primarily to effectuate a residential zone.

¶83 The case at bar is distinguishable from *Merlin Myers* on which Tutvedt relies. In that case, there was an area zoned Agricultural-Open Space in which residences, a school, and a public park were located. A property owner within that area sought to establish a gravel mining operation, similar to the one Tutvedt applied for here. A report prepared for the Yellowstone County Board of County Commissioners indicated that the county could not prohibit such operations under Montana law. Ultimately, the Yellowstone Commissioners rejected the property owner’s application stating that “permitting the application would violate the Montana Constitutional rights of students at [a neighboring school] to a clean, healthful and safe environment.” *Merlin Myers*, ¶ 8 (alteration in original).

¶84 The applicant challenged the Yellowstone Commissioners decision to the District Court, advancing an argument very similar to the one here. The applicant argued “that under §§ 76-1-113 and 76-2-209, MCA, local planning boards may not prevent the operation of a gravel facility in a nonresidential area.” *Merlin Myers*, ¶ 14. The District Court agreed with the applicant, and overturned the decision of the Yellowstone Commissioners. On appeal, we affirmed the District Court. We held that the Yellowstone Commissioners could not ignore the plain language of § 209, and refuse to comply with its requirements simply because they thought it violated the right to a clean and healthful environment under Art. II, § 3 and Art. IX, § 1 of the Montana Constitution. *Merlin Myers*, ¶ 22. In that case, the zoned character of the area was never in dispute. The issue instead was whether the Yellowstone Commissioners could ignore the plain language of the statute when they thought it violated the Montana Constitution. We held they could not.

¶85 Tutvedt’s attempts to apply *Merlin Myers* in the instant case are unavailing. Here, the dispute centers upon whether the District is residential for purposes of § 209; an issue not raised or discussed in *Merlin Myers*. Moreover, the statutes in the two cases differ considerably. In *Merlin Myers*, we considered the pre-2005 version of § 209, which simply stated that gravel mining in residential areas could be subject to county zoning regulations, while gravel mining in non-residential areas could not. *Merlin Myers*, ¶¶ 15-16. The controlling version of § 209 in the case at bar subjects all gravel operations to zoning regulations, but gives counties the authority to actually prohibit gravel operations “within a geographic area zoned as residential, as defined by the board

of county commissioners.” Section 76-2-209(2), MCA. The current version of § 209 clearly instructs boards and reviewing courts to look to the definitions given by the boards of county commissioners in making the threshold determination as to whether a geographic area is zoned residential.

¶86 Although we agree with Tutvedt that the Board never made a specific determination that the District was “residential,” we affirm the District Court’s grant of summary judgment in this case because an explicit finding on this matter by the Board was not required as a matter of law. In fact, a determination by the Board one way or the other on this issue was immaterial, because under the plain language of the statute, only the definition given to the zoning district by the Commissioners is dispositive.

¶87 We decline Tutvedt’s invitation to read § 209(2) in a manner requiring an area be zoned “Residential” with a capital “R” in order for § 209(2) to apply, as to do so would ignore the statute’s directive to look primarily towards the definition given to a geographic area by the board of county commissioners. While there may be cases in which the definition given by the board of county commissioners is hard to discern, this is not one of them. The Regulations and the Plan speak for themselves in this case, and demonstrate convincingly that the District was defined as “residential” by the Commissioners, even though the District permits other uses. Accordingly, the authority of the Board falls within the § 209(2), and it may completely prohibit concrete and asphalt batching operations in the District.

¶88 Because we find that the Board had the authority to prohibit asphalt and concrete batch plant operations, we do not reach Citizens’ argument that § 76-2-209, MCA, is unconstitutional as applied in this case.

#### CONCLUSION

¶89 For the foregoing reasons, we affirm the District Court’s conclusion that the Board had the power to prohibit asphalt and concrete batch plant operations under § 76-2-209, MCA. We reverse the District Court’s conclusion that the Board did not abuse its discretion in issuing the CUP, and remand this case to the District Court for further proceedings consistent with this opinion.

Accordance with the West Valley Neighborhood Plan is more complicated. The Plan makes reference to the desirability of single-family residential uses. Certain manifestations of the community residential facility would be entirely harmonious with this stated goal. However, in other instances a community residential facility could constitute a multi-family use that is discouraged by the Plan. That being said it is felt that the Conditional Use Permitting process would require individual review of each proposed use and would therefore give an added level of oversight to ensure substantial compliance with both the Policy and the Plan.

2. *Is the proposed amendment designed to:*
  - a. *Secure safety from fire and other dangers?*

- b. Promote public health, public safety and the general welfare?*
- c. Facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements?*

Community Residential Facilities have been determined by the legislature to be appropriate in all residentially zoned areas. Consistent with the Montana Code Flathead County has included Community Residential Facilities as either a permitted or conditional use in all residentially zoned districts. It is therefore proposed that a Community Residential Facility poses no greater impact to the items listed above than any other residential use.

*3. Does the proposed amendment consider:*

- a. The reasonable provision of adequate light and air?*
- b. The effect on motorized and non-motorized transportation systems?*
- c. Compatible urban growth in the vicinity of cities and towns that at a minimum must include the areas around municipalities?*
- d. The character of the district and its peculiar suitability for particular uses?*
- e. Conserving the value of buildings and encouraging the most appropriate use of land throughout the jurisdictional area?*

As has been stated above, Community Residential Facilities have been determined by the legislature to be appropriate in all residentially zoned areas and are similar in their impact to the residential uses currently allowed within the West Valley district. The Tutvedt decision unmistakably classifies West Valley Zoning as residential.

*4. Is the proposed amendment, as nearly as possible, compatible with the zoning ordinances of nearby municipalities?*

The proposed amendment is entirely consistent with the zoning ordinances of the cities of Kalispell and Whitefish. Kalispell uses the MCA definition of Community Residential Facility and differentiates between facilities serve 8 or fewer residents and facilities serving more than 8 residents. Whitefish defines Community Residential Facility as follows:

**COMMUNITY RESIDENTIAL FACILITY:** One of the following facilities that may or may not be licensed by a governmental agency and providing care on a twenty four (24) hour a day basis and as defined by state law:

- A. A community group home for developmentally, mentally, or severely disabled persons or the elderly that does not provide skilled or intermediate nursing care.
- B. A youth care facility in which substitute care is provided to youth, including youth foster homes, kinship foster homes, youth group homes, youth shelter care facilities, and transitional living programs, but excluding youth assessment centers.
- C. An adult foster family care home.

D. A halfway house operated in accordance with regulations of the Montana department of public health and human services for the rehabilitation of alcoholics or drug dependent persons and/or supervised living centers for probationers.

E. A personal care facility.

F. A maternity home, including administrative offices, services for childcare, counseling, classroom training, independent living training, and support groups.

COMMUNITY RESIDENTIAL FACILITY, TYPE I: A community residential facility serving eight (8) or fewer individuals, exclusive of caretakers and administration.

COMMUNITY RESIDENTIAL FACILITY, TYPE II: A community residential facility serving nine (9) or more individuals, exclusive of caretakers and administration.

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