EXHIBIT 5
DATE 3.31.05
SB 116

LEGAL MEMO

TO: GLENN OPPEL, GOVERNMENT AFFAIRS DIRECTOR, MONTANA ASSOCIATION OF REALTORS
FROM: MICHAEL S. KAKUK, ATTORNEY
RE: SB116 AND SB290 - CONCERNS RAISED IN THE HOUSE LOCAL GOVERNMENT COMMITTEE
DATE: MARCH 30, 2005

PURPOSE AND DISCLAIMER

You have asked me to briefly respond to concerns raised during public testimony in House Local Government regarding SB116 and SB290. This is provided below. Please keep in mind that this memo is based on my understanding of the concerns. The opinions expressed in this memo are my alone and should not be attributed to any other individual or entity.

SB116

1. REVIEW PROCESS TIME FRAME.

Concern: SB116 unreasonably extends the subdivision review process.

Response: The timeline for subdivision review is straightforward:

- Pre-App Meeting - maximum 30 days;
- Part Review - maximum 5 days;
- Information Review – maximum 15 days;
- Application Review – maximum 60 days; and
- Subsequent Hearing – (if needed) maximum 45 days.

Therefore, even if a subsequent hearing is required, the statutory subdivision review process is 155 days. (See the flow chart handed out at the House Local Government hearing, attached to this memo as Exhibit A) It's important to remember that the pre-app meeting completeness reviews are already taking place and, without the protections in SB116, these informal or un-official reviews can unreasonably lengthen the subdivision review process and the

developer has no recourse. While the subdivision review process under SB116 may look like it takes longer, by and large it codifies existing practice and puts side-boards on how long the review can take.

Recommendation: No amendments needed.

2. Section 9 – Subsequent Hearings
   a. Unreasonably Subjective

      Concern: Governing bodies should not be allowed to determine what "new" evidence is relevant and credible.

      Response: The "relevant and credible" criteria (SB116, Section 9(3)(a), page 12, lines 13 through 15) was put into SB116 to make it easier for governing bodies to disregard irrelevant or non-credible evidence, and governing bodies make these "relevancy and credibility" decisions at every public hearing.

      Recommendations: No amendments needed.

   b. Subsequent Hearings Are Unnecessary

      Concern: There is no real need to allow for a subsequent hearing and it would create a revolving door for the continued request for and study of new information.

      Response: If new evidence is presented to the governing body, and that evidence is relevant and credible, it would seem only reasonable for the governing body to allow the public to comment on this new evidence at a subsequent hearing. However, it is important to note that SB116 actually prohibits a "revolving door" in that no matter what information is presented after the subsequent hearing, the governing body must disregard such information, its relevance and credibility notwithstanding. (See SB116, Section 9(4), page 12, lines 23 through 25.)

      Recommendations: No amendments needed.

3. Section 11 – Minor Subdivision Review Process
   a. First Minors
      i. Subdivision Exemptions

         Concern: Parcels created by using exemptions to the subdivision process should not be used to turn a "first" minor into a "subsequent" minor.

         Response: SB116 reflects the Work Group's consensus understanding that development can impact the environment, the community, and local services. And, at some point, the impacts resulting from developments that have been basically un-reviewed through the valid use of exemptions to the subdivision process should properly trigger increased review when such review is required under law. SB116 simply says that if the parcel proposed to be divided was part of a tract from which more than 5 subdivision-exempt parcels have been created, any non-exempt minor subdivision will be reviewed as a subsequent minor. (See SB116, Section 11(2), page 14, lines 23 through 26.)

         It is important to note that SB116 does not limit or otherwise impact in any way a landowner's ability to use the existing subdivision exemptions.

         Recommendations: No amendments needed.

      ii. No Actual Division Of Land

         Concern: Many of the exemptions that count against first minor review under SB116, for example boundary line readjustments, mortgage exemptions, and leases, do not actually even "create" any parcels and should not be used to turn a first minor into subsequent minor.

Response: The SB116 in its current form, and the consensus Work Group amendments submitted during public testimony, address this issue by clearly stating that only those exemptions that actually "create a parcel" are considered when determining whether or not the proposed minor subdivision is a first or subsequent subdivision. (See SB116 amendments, *SB011603.alk*, amendment #3.)

Recommendations: Adopt the Work Group consensus amendments, *SB011603.alk*.

iii. Impact On Rural Montana

Concern: The "first minor/subsequent minor" determination process is too complex and will result in too many subsequent minors. This result is not justified in many areas of Montana that are not experiencing significant growth.

Response: If a governing body believes that the subsequent minor review process in SB116, the same as in current law in fact, is too complex or unnecessary in that jurisdiction, the governing body has the authority to create their own subsequent review process, as long as it meets the minimum standards for first minor review. (See SB116, Section 11(4), page 16, lines 2 through 4.) Maintaining local government flexibility and local control, within reasonable state-wide parameters, was a primary Work Group objective.

Recommendations: No amendments needed.

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SB290

1. Section 4
   a. Redundant Information

      Concern: The information required under SB290, Section 4, is already required to be submitted as part of a subdivision application.

      Response: Opponents to SB290 are apparently confusing the Subdivision and Platting Act (76-3-101) with the Sanitation in Subdivision Act (76-4-101). The AG's Opinion clearly states that 76-3 requires governing bodies to address sanitation issues in their review but, under current law, 76-3 provides no standards or criteria on how to do this. The sanitation information is required to be submitted - but only under DEQ's 76-4 review. SB290 Section 4 requires the submittal of certain sanitation information in the 76-3 process.

      Recommendations: No amendments needed.

   b. Inappropriate Information

      Concern: The information required under Section 4 is too detailed and too costly to provide at the application stage.

      Response: The Work Group, after much discussion, was able to agree that the information required under Section 4 accomplishes the following:
      - Provides a consistent standard across Montana for reviewing sanitation issues under 76-3;
      - Provides a consistent sanitation review for parcels larger than 20 acres;
      - Provides enough evidence to allow the governing body, and the developer, to determine whether or not there is likely to be at least one developable site on each parcel; and

- Provides sufficient information to allow the public to make informed comment during public hearings.

The Work Group believes that the information required under Section 4 results in a better public hearing process, better developments, and better governing body decisions.

Recommendations: No amendments needed.

c. Inappropriate Review

Concern: The information required under Section 4 is too complex to be adequately reviewed by a Planning Board or a governing body.

Response: Apparently, SB290 opponents have misunderstood a crucial aspect of the bill - under SB290, neither the governing body, nor its designated agent, reviews the information submitted under Section 4. Local governments merely accept the information, accept and collect public comment on such information, and pass the information along to the Developer to then pass along to the entity doing the sanitation review. (See SB290, Section 5(4), page 8, lines 4 through 9.) Governing bodies are actually prohibited from denying or conditioning a subdivision on sanitation related grounds unless such action is pursuant to enforceable regulations. (See SB290, Section 6(8), page 10, lines 7 through 10.)

The fact is that it is without SB290, and under the AG's Opinion, that governing bodies are required to review sanitation information and make these sanitation decisions. If people do not want governing bodies to make sanitation decisions they should support SB290.

Recommendations: No amendments needed.

d. Inappropriate Public Involvement

Concern: The public is not sophisticated enough to comment on the information required under Section 4.

Response: As stated above, one of the benefits of requiring the information in Section 4 is to provide the public with enough information so that they may make informed comments regarding sanitation issues instead of simply opposing the development because of some vague concerns regarding adverse impacts to the water resource. The information in Section 4 at least allows the public a chance to review, and respond to, basic facts regarding the resource and sanitation related issues.

Recommendations: No amendments needed.

e. AG's Opinion

Concern: The AG's Opinion needs to be overturned but it would better to simply add a sentence to 76-3 that says that "requiring eventual approval under 76-4 complies with all state laws".

Response: I do not believe that adding that simple statement would effectively overturn the AG Opinion. Additionally, since parcels larger than 20 acres do not undergo 76-4 review, that statement would not overturn the AG Opinion for those parcels.

Recommendations: No amendments needed.

2. MEPA

Concern: SB290 requires that local governments comply with MEPA.

Response: MEPA is only applicable to state actions and, therefore, local governments are not required to comply. SB290 does nothing to change this. Both SB116 and SB290 reference a requirement for an environmental

assessment for certain subdivisions - but this requirement has been in law for almost 20 years and is not tied to MEPA.

Recommendations: No amendments needed.

CONCLUSION

SB116 and SB290 are a crucial part of the Work Group's and the Interim Education and Local Government Committee's interim efforts to increase the consistency and predictability of Montana's subdivision review process. Additionally, SB116 is needed to clarify the public hearing process after the Brandborg lines of cases, and SB290 is needed to overturn the unworkable 2001 AG's Opinion. Both bills should lead to more defensible local government subdivision review decisions and therefore fewer law suits.

I recommend that MAR continue to support the Work Group consensus amendments for SB116, SB011603.alk, and for SB290, SB029001.alk, and support the bills being passed by House Local Government as amended.

MAJOR SUBDIVISION REVIEW PROCESS SCHEMATIC - - SB116 *(NOTE: SB290 REQUIREMENTS ARE ALSO INCLUDED IN ITALICS.)*

PRE-APP MEETING
Pre-Application meeting required within 30 days of written request by developer.

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APPLICATION SUBMITTAL
Preliminary Plat, Fee, and EA, if needed, are presented to the Governing Body or its Designated Agent. (GB/DA) *The application must include specific information regarding sanitation issues.*

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"ELEMENT" REVIEW
A review to ensure that all the necessary "elements" are included in the application must be conducted within 5 working days of receipt of the application.

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"INFORMATION" REVIEW
A review to ensure that the application contains "sifficient information" must be conducted within 15 working days. Note: The 60-day review "clock" starts after this review. Any deficiencies in these 5 and 15-day review period will start those clocks over.

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PUBLIC HEARINGS
At least one hearing by GB/DA must be held on the application. *The GB/DA must take public comment on sanitation issues and forward all relevant comments to the agency charged with reviewing the application for sanitation issues. (Usually the DEQ or local health officials.)* If two hearings are held and "new" information is received, the GB may disregard the new information and make a decision on the application - or – if the new information is relevant and credible, the GB may refer the new information back to another public hearing. An additional 45 days is added to the 60-day review period if an additional hearing is held. After the additional hearing on the new information is held, the GB may not consider any new information regarding the application.

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DECISION
GB decision must be made within 60 days after presentation of Preliminary Plat. *GB may not impose conditions or deny an application based on sanitation issues except through regulation enforceable by the GB.*

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WRITTEN FINDINGS
GB decision must be accompanied by written findings regarding "608" criteria and justification for the imposition of any conditions or plat denial under "625". GB can only deny or impose conditions as set forth in the denial criteria in statute and must reference where in the record the evidence for such denial or conditions is located.