



MONTANA ASSOCIATION
OF REALTORS®

EXHIBIT 21
DATE 3.23.05
HB 767

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To: Glenn Oppel, Government Affairs Director, Montana Association of REALTORS®
From: James A. Bowditch, General Counsel, Montana Association of Realtors®
Boone Karlberg P.C., Missoula, MT, jbowditch@boonekarlberg.com
Re: House Bill 767
Date: March 17, 2005

I have now reviewed House Bill 767 ("HB 767") and compared it with LC 682.

The main difference between HB 767 and LC 682 is the change from the licensing of real estate agents as encumbrance brokers in LC 682 to apparently creating a new licensee status of encumbrance brokers as set forth in HB 767. The effect of this as set forth in HB 767 is that there are significantly fewer changes to the licensing laws set forth in Montana statutory law.

Given these changes, the only effect I can see on the members of the Montana Association of Realtors® is that it would require members to have an encumbrance broker license if they desire to "solicit, facilitate, acquire or purchase" a conservation easement. Practically speaking, I am not sure there are many members who broker conservation easements as between the conservation easement holder (such as Montana Land Alliance, Five Valleys Land Trust, the Nature Conservancy, etc.) and the owners of the property upon which the conservation is proposed. I assume this is because there is typically no consideration paid from the easement purchaser to the land owner.

Nonetheless, as drafted the bill seems to generate more problems than it intends to solve. From a legal standpoint, my primary concern is that the only proposed regulation of encumbrance brokers is by rules adopted by the Board of Realty Regulation. Yet the guidance provided to the BRR in HB 767 is ambiguous, unclear and in some respects appears to have little relation to the presumed intent of HB 767 to insure encumbrance brokers are knowledgeable about conservation easements. Specifically, the rules HB 767 will require the BRR to adopt must:

1. Require that an encumbrance broker provide an accounting of all conservation easements "entered into" by the encumbrance broker. First, I do not understand why this is necessary other than perhaps to show some level of expertise (or lack thereof) by the encumbrance broker. Second, what does "entered into" mean? Must the encumbrance broker disclose only those conservation easements he or she has acquired or purchased or must it also include those the encumbrance broker has solicited, facilitated or brokered?
2. Require that an encumbrance broker provide a financial accounting of all money received and expended by the broker. In effect, this will require a full disclosure of an encumbrance broker's net income. I do not see how this requirement is in any way beneficial to licensing issues. Moreover, HB 767 does not limit the financial information to that financial information pertaining only to conservation easements. It is therefore at least arguable that a real estate licensee who is also licensed as an encumbrance broker would be required to disclose all financial information concerning all of the licensee's real estate activities.



3. Require that the encumbrance broker not enter into any confidentiality agreements with the encumbrance broker's employees or agents. This is another one that I simply do not understand and see no reason why it is included.
4. Require that the encumbrance broker pay a license fee of \$500. It is unclear whether this is a one-time fee or annually. It is also interesting to note that HB 767 requires that the BRR license both individuals and organizations that operate as encumbrance brokers. This is contrary to existing real estate licensing law which licenses only individuals. See, MCA § 37-51-301(2).

In general, I think the bill only impacts Montana Association of Realtors® and its members to the extent that some of those members currently engage in the brokering of conservation easements. However, on behalf of those members the bill as drafted is confusing and unclear concerning what is required in the way of licensing of encumbrance brokers and the inter-relationship between licensees involved in real estate and conservation easements.