

Exhibit Number:

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LEGAL MEMO

TO: GLENN OPPEL, GOVERNMENT AFFAIRS DIRECTOR, MONTANA
ASSOCIATION OF REALTORS
FROM: MICHAEL S. KAKUK, ATTORNEY
RE: SB 116
DATE: JANUARY 13, 2005

PURPOSE AND DISCLAIMER

You have asked me to prepare a brief summary of SB 116. This is provided below along with brief arguments both for and against these sections to allow you to better prepare for committee testimony. I have also attached a flow chart regarding both the hearing process and the application process itself for clarification.

Please keep in mind that this memo is based on the bill as introduced and reflects my understanding of the "intent" of the bill. Additional impacts of this legislation may become evident during public testimony. Of course, any amendments to the bill may have serious implications for the accuracy of this memo.

INTRODUCTION

The proposed changes to the Montana Subdivision and Platting Act (Act) found in SB 116 are the result of 18 months of work by the a diverse group of people working under the auspices of the 2003 Interim Education and Local Government Committee (Committee). The Committee was responsible for looking at subdivision issues under the provisions of HJR 37 passed during the 2003 Session. The Committee asked interested and affected parties to get together and attempt to agree on proposed language addressing relevant subdivision issues.

These interested parties, including representatives from the Montana Association of Realtors, Montana Building Industry Association, Montana Smart Growth Coalition, Montana Association of Counties, Montana Association of Planners, and most recently, representatives from local Boards of Health, formed a Work Group to discuss and draft proposed language for the Committee's review which is now reflected in SB 116.

BILL

SB 116 SUBDIVISION AND PLATTING ACT AMENDMENTS (LC 040 – Sen. Liable)

Note: This memo reviews the bill as amended by Sen. Liable's proposed amendments as of January 10, 2005.

GOAL

SB 116 was designed to improve consistency and predictability in the subdivision review process, and to clarify the public hearing process by ensuring a reasonable opportunity for public comment and provide a definable end-point for the process.

SECTION ANALYSIS

76-3-103: SECTION 1, PAGE 1, LINE 26 THROUGH PAGE 4, LINE 1:

Removes unused terms from the definition section and defines "minor subdivision" and "public utilities". These are not intended to be substantive changes.

76-3-504: SECTION 2, PAGE 4, LINES 2 THROUGH 21:

Rewords the section in outline form, makes editorial changes, and most importantly, removes the requirement for review under the regulations in effect at the time the application is submitted. However, this requirement is now located at Section 7, page 10, line 28, for major subdivisions, and Section 11, page 15, line 27, for minor subdivisions. These are not intended to be substantive changes.

76-3-504(a): SECTION 3, PAGE 4, LINE 26:

Requires the local government identify, in regulation, all materials that must be included in a subdivision application.

Arguments For:

This requirement improves consistency and predictability in the subdivision review process by allowing the developer to know - up front - the application requirements.

Arguments Against:

Some have suggested that the bill should go the next step and actually identify what should be required in an application.

Rebuttal:

The Work Group decided that it would be inappropriate for the legislature to try to determine the specific content of subdivision applications for every jurisdiction in Montana and that this was best left to the local governments. However, under SB 116, all parties, including the development community and the general public, now have increased due process rights if it believes that a local government has gone too far, one way or another, in its application requirements. For example, a local government's subdivision application requirements must be adopted in the local subdivision regulations. Such regulatory change requires public notice and a public hearing. This allows the developing community to comment on the proposed regulations, subjects the governing body to increased accountability, and, if nothing else, makes the regulations subject to repeal by referendum. These benefits are found in many of SB 116's proposed amendments and will be referred to elsewhere in this memo.

76-3-504(n): SECTION 3, PAGE 7, LINES 3 THROUGH 6:

Requires the governing body to adopt regulations regarding what constitutes "new" information. This issue is more fully explored in Section 9, page 7, of this memo.

76-3-504(o): SECTION 3, PAGE 7, LINES 7 THROUGH 10:

Requires the governing body to adopt "evasion criteria" in its subdivision regulations.

Arguments For:

Arguments have been raised that local governments do not currently have the authority to establish criteria by which to determine whether or not the use of an exemption under the Act is, in fact, an attempt to evade the Act. The Work Group agreed that local governments must have some criteria to determine whether or not someone was attempting to evade the Act, and that if they needed criteria, it would be best to adopt such criteria in an open and fair manner through subdivision regulations. (See again my comments regarding increased due process protections at the top of this page.)

Arguments Against and Rebuttal:

See "Arguments For", above.

76-3-504(p): SECTION 3, PAGE 7, LINES 11 THROUGH 26:

Requires that the governing body adopt regulations establishing a “pre-application process” (pre-app) and sets out specific criteria and timeline for that process.

Arguments For:

Many jurisdictions already require a pre-app meeting with the developer, but often this requirement is not found in their regulations and, even if it is, the regulations do not set out any requirements or timelines. I have heard stories of developers waiting months for a pre-app meeting. The Work Group determined that a pre-app meeting was a reasonable requirement and again thought that, if there was going to be a pre-app meeting, the requirements for such a meeting should be in the regulations with all the attendant due process protections referred to above.

Arguments Against:

This requirement extends that subdivision review process by an additional 30 days.

Rebuttal:

True, but see the “Arguments For”, above.

76-3-504(3): SECTION 3, PAGE 7, LINE 30:

Authorizes governing bodies to establish deadlines for subdivision application submittals.

Arguments For:

The Work Group heard concerns that local governments need the authority to establish deadlines for application submittals. For example, it would be unreasonable for a developer to have the pre-app meeting and then submit the application two years later.

Arguments Against:

Allowing local governments to establish submittal deadlines could allow them to say that they will only accept subdivision applications one month a year.

Rebuttal:

That is not the intent or the effect of the language and such extreme action by the local government would be hard to get through the public hearing process, not to mention the courts.