Senate Local Govt. Comm.
Exhibit No. 3
Date Feb. 8, 2005
Bill No. SB290

LEGAL MEMO

TO: GLENN OPPEL, GOVERNMENT AFFAIRS DIRECTOR, MONTANA ASSOCIATION OF REALTORS®
FROM: MICHAEL S. KAKUK, ATTORNEY
RE: SB290
DATE: FEBRUARY 7, 2005

PURPOSE AND DISCLAIMER

You have asked me to prepare a brief summary of SB290. This is provided below along with brief arguments both for and against relevant sections to allow you to better prepare for committee testimony.

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 both the MONTANA SUBDIVISION AND PLATTING ACT and the SANITATION IN SUBDIVISION ACT found in SB290 are the result of many months of work by 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 HJR37 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 SB290.

BILL

SB290 SANITATION REVIEW UNDER THE SUBDIVISION AND PLATTING ACT (LC0394 - Sen. Mangan)

GOAL

SB290 was designed to improve consistency and predictability in the subdivision review process, and to clarify the local government's role in reviewing sanitation issues during the subdivision review process.

To a large extent, the Work Group believed that a 2001 Attorney General's Opinion, AG Op. 49-7, resulted in an unworkable sanitation/subdivision review process by requiring, in effect, two separate and potentially conflicting sanitation reviews. I.e., one review by the governing body at the preliminary plat stage under the Subdivision and Platting Act (Title 76, Part 3), and one review by the sanitation reviewing agency, either DEQ or the contracted counties, under the Sanitation In Subdivisions Act (Title 76, Part 4).

SB290 effectively overturns the 2001 AG's opinion. See Section 5, page 5, below.

SECTION ANALYSIS

76-3-504: SECTION 1, PAGE 2, LINES 11 THROUGH 13:
Requires governing bodies to adopt sanitation review regulations for parcels required to undergo sanitation review under §76-4-101 et. seq., ("76-4" review) i.e., parcels less than 20 acres, and those requiring sanitation review under §76-3-101 et. seq. ("76-3" review), i.e., parcels 20 acres or greater. (See Section 5, page 5, below.)

76-3-511: SECTION 2, PAGE 4, LINES 2 THROUGH 30:
Changes all references from "rule" to "regulation". These are not intended to be substantive changes.

76-3-601: SECTION 3, PAGE 4, LINES 7 AND 8:
Requires that a subdivision application must be accompanied by preliminary water and sewer information. (See also Section 4, below.)

Arguments For:
This requirement could serve as a "fatal flaw analysis" by bringing potential sanitation problems to the developer's notice early in the subdivision application process. It also allows the public to review and comment on relevant sanitation-related information during the "76-3" review process.

Arguments Against:
Some have stated that while they do not have an objection to this requirement, the actual information required is excessive. (See Section 4, below.)

New Section: SECTION 4, PAGE 5, LINE 26 THROUGH PAGE 7, LINE 11:
Sets forth the specific sanitation information required to be submitted with the subdivision application.

Arguments For:
This list of required sanitation information represents a compromise on all sides of this important issue. Some on the Work Group believed that a developer should actually receive full DEQ "76-4" sanitation approval before even submitting the subdivision application to the governing body for the "76-3" preliminary plat review. (Note: This requirement was actually a part of Lewis and Clark County's proposed subdivision regulations until just before their adoption in December 2004.) While others, including MAR, initially argued that, since the governing body was not qualified to make the technical, science-based, "76-4" decisions, the governing body should not even be allowed to take comments on the sanitation issues.

However, all sides finally agreed that it was good public policy to require the developer to submit certain limited "preliminary" information, allow the governing body to take testimony on those issues, require the governing body to forward sanitation-related documents and testimony to the appropriate sanitation-decision making agency, and then, by and large, preclude the governing body from making sanitation decisions based on the public testimony. (See Section 5, page 5, and Section 8, page 5, below.)

Most MAR members, especially those from large, rapidly developing jurisdictions, believe that most if not all of the information required in Section 4 is already required through local regulation or policy and that the information represents basic due diligence on the part of the developer.

Note: Local governments may only require additional sanitation-related information by following the "more-stringent-than" requirements of 76-3-511.

Arguments Against:
Some argue that the sanitation-related information required under Section 4 is too costly to prepare at the preliminary plat stage, especially for small, non-professional, developers. They would prefer to wait until the subdivision application has received preliminary plat approval before spending the money and time on compiling this information. For example, they question why they should have to spend thousands of dollars on this preliminary information when the application may get denied, or substantially conditioned, on non-sanitation issues.

Rebuttal
See "Arguments For" above.

76-3-604(4) and (5): SECTION 5, PAGE 7, LINE 22, THROUGH PAGE 8, LINE 8:
Requires that sanitation-related public comment received during the subdivision "76-3" review process be forwarded to the appropriate

sanitation-review agency and authorizes the governing body to condition approval on an adequate water source and septic system compliance.

76-3-608(8): SECTION 6, PAGE 9, LINES 25 THROUGH 28:
Authorizes governing bodies to condition or deny a subdivision application on sanitation-related grounds only if such action is based on existing subdivision, zoning or other regulations enforceable by the governing body.

> Arguments For:
> This requirement effectively prevents a governing body from making sanitation-related decisions based solely on public testimony. For example, certain governing bodies are now denying or imposing conditions on subdivisions on sanitation-related grounds based solely on public comment received during the "76-3" review process. In other words, they are denying subdivisions based on sanitation reasons before the application has even undergone the "76-4" sanitation review. Considering that the governing body is not the appropriate body to be making these technical, science-based "76-4" review decisions, such action is increasingly resulting in law suits against the governing bodies.
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> However, if the governing body has adopted requirements through some enforceable mechanism, it is fully entitled under SB290 to enforce those requirements during the "76-3" review process.

76-4-101(10): SECTION 7, PAGE 12, LINES 15 AND 16:
Allows the DEQ to adopt rules providing technical details and clarification regarding the sanitation information required under Section 4.

76-4-125: SECTION 8, PAGE 12, LINES 25 AND 26:
Requires that the public comments received by the local government during the "76-3" review process be included in any application for review under "76-4". While this requirement is necessary to ensure that the "76-4" reviewing agency has all the pertinent information, it does prevent filing a "76-4" sanitation review application until after the preliminary plat has been approved under "76-3".

NEW SECTION: SECTION 9, PAGE 14, LINES 1 AND 2.
Codification instruction. No comments.

CONCLUSION

SB290 is, along with SB116, a crucial part of the Work Group's and the Committee's interim efforts to increase the consistency and predictability of Montana's subdivision review process. Additionally, SB290 is needed to overturn the unworkable 2001 AG's Opinion and should lead to more defensible local government subdivision review decisions.