

EXHIBIT 5
DATE 3-12-2009
SB SB 345

DO NOT PASS SB 345

Madame Chair and members of the committee-

My name is Michael Fasbender, I reside here in L&C County, and I am before you today representing myself on Senate Bill 345. I am a plaintiff in an appeal pending in front of the Supreme Court on this very matter. I approached the Montana Association of Realtors last year to see if they would propose a bill to clarify some of the adoption procedures for zoning. The bill before you today is a result of those efforts.

While I truly appreciate all of the work by Senator Tutvedt and MAR, unfortunately the bill in its current form does not accomplish what we set out to do, which was to clarify existing law. As amended the current bill would take away for 6 months the current check and balance afforded property owners whose land may be subject to interim zoning. I liken this to telling the governor that any law passed by the legislature cannot be vetoed until the law has been in effect for 6 months.

The current bill nullifies existing statute, it goes against the original legislative intent, and further is contradictory to two separate Supreme Court rulings and also an Attorney General's opinion from Joe Mazurek. For the sake of brevity I won't go into the details, but I do have with me today supporting documents that I submitted as written testimony, and also would be happy to answer any questions the committee may have.

Property owners deserve to be involved in the process and sitting at the table from the beginning, not six months after the fact.

I would urge you DO NOT PASS the bill as written.

Thank you.

Michael J. Fasbender

3925 Deal Lane

Helena, MT 59602

LEGISLATIVE INTENT:

The following is taken from the 1971 Legislative Council Subcommittee on Local Government Report on HB79 regarding the purpose of interim zoning. "... to allow county government to cope with the potentially major land use problems which, because of the urgency of the situation, cannot be effectively controlled through the normal process of completing the required comprehensive plan (*now growth policy*) and adopting land use regulations."

Clearly the intent of the statute was to allow counties who had not adopted growth policies to be able to implement zoning on an interim or temporary basis. As many wrongly suggest, it was not meant to deal with emergencies in the common sense of the word.

STATUTE LANGUAGE:

I now direct you to 76-2-205 MCA. ***Procedure for adoption of regulations and boundaries.*** *The board of county commissioners shall observe the following procedures in the establishment or revision of boundaries for zoning districts and in the adoption or amendment of zoning regulations:* (emphasis added)

The fundamental principle of due process requires that counties give notice and allow hearing on any proposed zoning or amendments. 76-2-205 outlines those requirements. There must be due process allowed for landowners, and unless interim zoning is not a "zoning regulation" then the "shall" language clearly applies. As originally submitted, SB345 clarified existing law in this regard, but in its current form it nullifies almost all of the adoption requirements found in 76-2-205.

ATTORNEY GENERAL'S OPINION:

For more information on the issue, I direct your attention to an Attorney General's opinion. 46 Op. Atty. Gen. Mont. #5 (1995). This opinion, which was in regards to city zoning instead of county zoning, is still a strikingly parallel analysis of the due process requirements for zoning. In his opinion, Attorney General Joe Mazurek wrote, "*I am unwilling to imply what is, in essence, the repeal of a landowner's protest rights whenever a change in an existing ordinance is made through the use of the interim zoning ordinance procedure.*"

MONTANA SUPREME COURT CASES:

The issue concerning adoption requirements has already been in front of the Montana Supreme Court on two separate occasions. The first was *Bryant Dev. Ass'n v. Dagel*, 166 Mont. 252, (Mont. 1975), and the second was *State ex rel. Christian, Spring, Sielbach & Assocs. V. Miller*, 169 Mont. 242 (Mont. 1976). The Bryant Court held that 76-2-205 and 76-2-206 were sister statutes, and should be construed together, and that notice and hearing were a requirement for the adoption of interim zoning. The following is taken from the opinion:

"In viewing Chapter 47, Title 16, R.C.M. 1947 as a whole, it is clear that section 16-4711, (now MCA 76-2-206) providing for the enactment of emergency zoning regulations, is governed by the provisions of section 16-4705 (now MCA 76-2-205) providing for notice and hearing "in the adoption or amendment of zoning regulations".

Nothing in chapter 47, nor in section 16-4711 in particular, detracts from this view.

In fact, when section 16-4711 was enacted the immediately preceding section of that bill was an amendment of section 16-4705. The close proximity of those two sections in Chapter 273, Laws of 1971, would indicate a legislative intent that the two sections should be construed together." Bryant at 258 (comment and emphasis added).

Montana Law consistently provides a freeholder protest as a check mechanism and as a balance to local government authority to impact freeholder property rights. The possibility of a freeholder protest would give incentive to local governments to engage the public, and encourage local governments and landowners to work hand in hand to guide growth in their communities. The bill before you does not allow public involvement for 6 months, and it is my belief that public involvement in government is paramount to making our system work.