

Testimony to Senate Local Government on Senate Bill 345
February 11, 2009

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I have been a land use attorney in Montana since 1996. Because this committee hears many land use bills I am going to give you a brief overview of land use law.

There are three elements of land use law:

Planning beginning on page 1024 of the tan code booklet MACo provided to you at the beginning of the session. This chapter contains the law about Growth Policies beginning with 76-1-601.

Zoning begins on page 1038 and is found in Title 76, Chapter 2.

There are three types of zoning:

Part 1: county petitioned zoning (p. 1039)

Part 2: county zoning (p. 1041)

Part 3: municipal zoning (p. 1047)

Subdivisions which are found in Title 76, Chapter 3, beginning on page 1054 of your tan booklet. Senate Bill 305, which you heard last week, addressed the Montana Subdivision and Platting Act.

Senate Bill 345 addresses Part 2—county zoning. Creating permanent zoning is addressed in 76-2-201, -202, -203, -204 and -205. Sections 1 and 2 of the bill address permanent zoning.

Section 3 of SB 345 addresses 76-2-206 or county **interim** zoning. The top

of page 4 specifies when a county can use interim zoning. Yesterday House Local Government held a contentious hearing on House Bill 406—an attempt to simplify interim zoning, which is only in effect between its adoption and its expiration in one or at the most, two, years.

At the hearing there was such a hue and cry over taking out the word “emergency” in 76-2-206 that the sponsor agreed to leave it in. That bill provides for procedural due process—notice and an opportunity to be heard—which is lacking in the current law. SB 345 radically expands on that process so the question for this committee is how much process is due, for zoning.

I am informed the Realtors asked for SB 345. This is the same group that claims it wants zoning, for certainty, yet it wants to make permanent zoning more expensive and more time-consuming (*see* pp. 2 and 3 of the bill, and in particular subsection (5) on lines 7 and 8 on page 3), more vague and ambiguous (*see* lines 24-26 on page 2) and more susceptible to legal challenge (*see* the same part—all owners can only be determined by looking up every deed for every piece of property in the proposed district—the tax roll does not contain the names of all the owners). Then line 23 on page 3 wants to make sure the county cannot zone for another 2 years after a successful protest. As a practical matter, if a county does try to zone and it is successfully protested, the board of county commissioners will probably give up.

Section 3 (bottom of p. 3) of the bill violates the interim study results before the predecessor of 76-2-206 (in the Revised Codes) was adopted in 1971 by slowing down and making much more complicated the process of interim zoning beginning with subsection (3) on page 4 of the bill. If you compare this section to Section 1 on page 2 of the bill (the requirements for permanent zoning) you will

see more requirements for interim zoning—especially subsections (iv) and (v) on page 4, lines 22-24.

Then at the top of page 5 the planning board is referenced. Section 76-2-204 is not shown in the bill but it begins is on page 1042 of your tan booklet and makes mandatory “the board of county commissioners require the county planning board and the city-county planning board to recommend boundaries . . . and make a written report” Often planning boards meet once a month—involving them is yet another way to slow down **interim** zoning—which is supposed to address an emergency or exigent circumstance.

Finally, on page 5, beginning at line 7 the bill has incorporated the protest provisions similar to those found in permanent zoning—further complicating and slowing down the process.

A judge in Big Horn County and a judge in Lewis and Clark County have both ruled that the process in 76-2-205 for permanent zoning does not need to be followed for interim zoning because of the exigent circumstances that led to the zoning. The county might just as well do permanent zoning (unless it doesn't yet have a growth policy). Permanent zoning would only take a little longer and might be simpler.

If this bill passes, subsection (iii) beginning on line 17 of page 5 is superfluous. Section 76-2-206 is supposed to deal with exigent or emergency circumstances which probably have already occurred in a year.

When I first returned home to Montana and began practicing land use law 13 years ago, “zone” was a four-letter word. During the Growth Policy Forum meetings in about 2000 and the working group meetings during the 2003-2005 and 2005-2007 interim, in which all parties interested in land use law and its

application tried to get together to solve issues, the desire was expressed to move away from using the Montana Subdivision and Platting Act to regulate land use, and towards zoning. This possibility flickered on the horizon although zoning is a tough sell in counties because of their geographical diversity.

The citizens of Ravalli County passed an initiative and initiated interim zoning. For two years the county worked on county-wide zoning. We all watched with interest. Then certain people who want to eliminate restrictions on the use of their property put the growth policy to a vote. The growth policy was defeated and any possibility of zoning went with it. In my opinion, a rapidly growing county has seriously digressed.

In the 1920s the US Supreme Court in *The Village of Euclid v. Ambler Realty* declared zoning constitutional. If you look at the municipal zoning statutes on page 1047 in your tan book, you will see the first municipal zoning in Montana was enacted in 1929.

This session is discouraging because of the number of land use bills that have not been carefully thought out or discussed among the interested parties. I fear Montana is moving backwards, rather than forward.

Thank You