

Written Testimony in Opposition

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Purpose of HB 548: The assumed purpose of HB 548 is to put into statute a court decision, *Braach v. Missoula County*, that applies to only Missoula County. The Montana Supreme Court Decision in *Braach* is a non-cite opinion; meaning that the opinion is not precedence for the entire state but only for Missoula County.

What did *Braach* hold? *Braach* held that based upon the specific facts of the case and Missoula County's specific unwritten policy of allowing mortgage exemption tracts or the remaining portion of the tract to transfer to third parties without a foreclosure of the mortgage prior to October 1, 2003, Missoula County was estopped from denying the recording of the deed transferring the remaining portion of the tract; *in other words*, Missoula County had to record the deed transferring the remaining portion of the tract without subdivision review even though the mortgage exemption tract was created before October 1, 2003 and the deed for the remaining portion of the tract was presented to be recorded after October 1, 2003. October 1, 2003 is significant as discussed below as that was the effective date of SB 406.

Problems with HB 548:

1. The *Braach* holding is specific to the facts of the case and is based on a Missoula County unwritten policy. Not every county had the same unwritten policy as Missoula County. Different facts or a different policy may result in a different analysis and holding. **Therefore, the *Braach* holding cannot be applied state-wide.**

Why did counties have different unwritten policies? A 1988 Attorney General Opinion addressing whether the mortgage exemption created tract or the remaining tract of land could transfer to third parties was interpreted differently by the counties. Some counties allowed the mortgage exemption created tract or the remaining tract of land to transfer to third parties without a foreclosure (Missoula County, Park County, Yellowstone County as examples). Other counties did not allow the mortgage exemption created tract or the remaining tract of land to transfer to third parties unless there was a foreclosure (Ravalli County, Lewis and Clark County and Gallatin County as examples).

The legislative fix to these different interpretations was SB 406 in 2003 that added 76-3-201(3). SB 406 clarified that mortgage exemption tracts or the remaining tracts of land from October 1, 2003 forward could only be transferred if they were foreclosed upon. SB 406 was not retroactive so it left the counties unwritten policies in place prior to October 1, 2003. Those unwritten policies were not illegal at the time.

2. HB 548 as written would reverse some counties unwritten policies prior to October 1, 2003, regarding transfers of mortgage exemption created tracts or the remaining tracts of land. **HB 548 may result in litigation and liability for some counties.**

3. HB 548 does not protect private property rights. As written, the language of the bill is unclear. (4)(a) is vague; "formal written consent" is not defined. Is this "formal written consent" allowing the mortgage exemption tract to be created or is this "formal written consent" to convey the mortgage exemption tract or remaining tract of land. It is unknown to MACo if formal written consents were issued by counties before 2003. **Private property rights are not protected when the language of a bill is unclear.**