Education and Local Government Int... Committee

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61st Montana Legislature

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TO: Committee members
FROM: Leanne Kurtz
DATE: March 12, 2010
RE: SB 51 (2007) and SB 131 (2009)

At your December meeting and during previous meetings this interim, you have heard information about SB 51, a land use bill requested by the 2005-2006 Education and Local Government Interim Committee and sponsored by Sen. Hawks. The bill deals with wildland fire and the wildland-urban interface as they pertain to growth policies and subdivision laws. SB 51 is related to SB 131, requested by the Fire Suppression Committee and enacted by the 2009 Legislature, which requires the Department of Natural Resources and Conservation to designate WUI parcels in each county.

This document is intended to provide you with details about what SB 51 and SB 131 require; how SB 51 evolved from its introduced version to its final version and the participants in that process; the Fire Suppression Committee's intent in requesting SB 131; and how SB 51 relates to SB 131.

SB 51 - What it Does

The final version of SB 51, as signed by the Governor, is incorporated into the Montana Code Annotated as follows.

1. **Section 76-1-601, MCA,** requires growth policies adopted by local governments to include an evaluation of the potential for fire and wildland fire in the jurisdictional area, including whether or not there is a need to:
    a. delineate the wildland-urban interface; and
    b. adopt regulations requiring:
        i. defensible space around structures;
        ii. adequate ingress and egress to and from structures and developments to facilitate fire suppression activities; and
        iii. adequate water supply for fire protection.

2. **Section 76-3-501, MCA,** adds fire and wildland fire to the list of items that may constitute a natural hazard for the purposes of subdivision regulations.

3. **Section 76-3-504, MCA,** clarifies the meaning of "approved construction techniques" for the element of subdivision regulations that must prohibit subdivisions in areas identified as unsuitable for development unless hazards can be overcome by the approved techniques or other mitigation measures.

The changes provide that approved construction techniques or other mitigation measures may not include building regulations as defined in 50-60-101 other than those identified by the Department of Labor and Industry under the new rules required in the bill.

4. **Section 76-13-104, MCA**, requires DNRC to adopt rules addressing development in the wildland-urban interface, including, but not limited to best practices for development within the wildland-urban interface; and criteria for providing grant and loan assistance to local government entities to encourage adoption of best practices for development within the wildland-urban interface.

   The grant and loan assistance is not DNRC's County Co-op program in which DNRC provides equipment and training to local fire entities. The grant and loan assistance would be for helping communities with fuels mitigation and wildland fire preparedness.

   DNRC has completed its rulemaking process and has incorporated the rules in the agency's portion of the ARM.

5. Sections 5 and 6 of the bill, which became **50-60-901 and 50-60-902, MCA,** indicate that these new sections provide specific rulemaking authority to the Department of Labor and Industry for the purposes of 76-3-504(1)(e), which are the subdivision regulations' approved construction techniques (see #3, above).

   DLI's rules are to identify construction techniques that may be used by a local government in mitigating fire hazards pursuant to 76-3-504(1)(e) and may not be construed to be part of the state building code.

   Section 50-60-902, MCA, states that the rules may be enforced only by a local governing body and only if the governing body incorporates the rules into its subdivision regulations.

   This section was intended to provide local governments with guidelines on how fire hazards may be mitigated through appropriate construction.

SB 51 - How it Evolved

A bill to require local governing bodies to designate the WUI within their jurisdictional areas and to require local subdivision regulations to impose certain defensible space, ingress/egress, and water supply requirements on subdivisions proposed in these areas was considered by the 2005-2006 Education and Local Government Committee. However, SB 51, in the form that Sen. Hawks introduced it, differed significantly from the original proposal and the version discussed on Second Reading in the Senate differed significantly from the introduced version. Thus began SB 51's tortured history through the legislative process.

Discussions surrounding SB 51 after the bill's Senate hearing prompted Sen. Jeff Mangan, Senate Local Government chair, to suggest that the interested parties form a work group to attempt to reach consensus on amendments before the committee took Executive Action. The Montana Association of Realtors was an active participant in the working group, along with the Montana Smart Growth Coalition, the Montana Association of Counties, Missoula County, the Montana Association of Planners, and others to develop amendments to the introduced bill.

A February 14, 2007, memo from Michael Kakuk, attorney and lobbyist for MAR, discusses the proposed amendments to which most of the working group participants agreed upon and which were presented to the committee as such. Mr. Kakuk's comments are included because it is staff's opinion that they accurately reflect the understanding and intent of most of the working group participants and accurately describe the adopted amendments. However, Mr. Kakuk's memo was submitted only on behalf of MAR, not the entire working group.

1. Changes to Section 1: **"[The new] language requires that if a local government (LG) adopts a growth policy (GP), it must evaluate the potential for fire and the need to adopt regulations addressing the above criteria. The extent to which a LG decides to evaluate or regulate remains entirely up to the LG and nothing in this section makes GPs required or regulatory." Mr. Kakuk added that he believes LGs already have this authority under current law, but that the change raises the importance of fire issues.**

   Staff Note: While the changes to growth policy law in themselves do not make growth policies regulatory, a local government may incorporate the criteria and adopt and enforce regulations to require the elements listed with respect to fire.

2. Section 2 did not change.

3. Changes to Section 3: **This approach accomplishes the following objectives:**
   [A]. This section clearly allows LGs to require any and all mitigation, including "approved construction techniques" to mitigate hazards;
   [B]. This section clearly states that this mitigation authority does not allow LGs to require any mitigation measure that is statutorily defined as a 'building regulation' unless that mitigation or technique has been approved by the Department of Labor. To restate: If the mitigation or construction technique is a "building regulation", local governments can only require such technique if the [DLI] has approved its use in the rules. If the construction technique or mitigation is not a 'building regulation', the LG may require its use, regardless of whether or not the [DLI] has included such measure in its rules."

   Staff Note: The wording did change somewhat--in the interest of clarity--before SB 51 was enacted, but the meaning with regard to DLI rules and their use did not change.

4. Changes to Section 4: **"This language requires the DNRC to adopt rules regarding the above fire issues. However, it is paramount to understand that these "rules" cannot be enforced by DNRC itself. Rather the rules must be evaluated by the LG, adopted through the standard LG regulation adoption process, and only then are these rules enforceable - and enforceable only by the LG itself. It is hoped that this DNRC rule adoption process will better ensure some state-wide consistency in how LGs regulate development in the interface."**

   Staff Note: A very similar explanation of the application of this law can be used to describe DNRC's implementation of SB 131 (see discussion below). The rules took the form of "Guidelines for Development Within the Wildland-Urban Interface" document, implemented through the Montana Administrative Procedure Act on September 24, 2009. The guidelines may be incorporated in whole or in part by local governments for regulatory purposes, but only through the processes already established in laws governing local land use regulation.

5. On DLI rulemaking: **"This section authorizes, and then requires, [DLI] to identify 'construction techniques' that can be used by LGs to mitigate hazards. As explained above, if the [DLI] identifies a particular construction technique in these rules, that technique - even if defined as a building regulation under 50-60-101 - can be required by an LG regardless of whether or not that LG has the authority to enforce building regulations."**

6. On DLI enforcement: **"This section clarifies that, as with DNRC above, it will be the LG that will actually adopt and enforce the identified construction techniques through their subdivision regulations."**

7. Codification instruction: **"This section clarifies that [DLI] construction technique identification process will take place outside of the [DLI's] building code authority."**

The Local Government Committee sent SB 51 to the Senate Floor with a vote of 10-1. It passed the Senate on a Third Reading vote of 33-17.

The House Natural Resources Committee further amended SB 51. The Senate rejected the amendments and a free conference committee worked out the differences. The final version of the bill is very similar to the Senate's Second Reading version.

SB 131-- Background and Intent

The following does not speak to how individual counties may be interpreting or implementing section 76-13-145 (SB 131). It does explain the Fire Suppression Committee's intent in requesting the bill and, technically, what the bill does.

- The 60th Legislature formed the Fire Suppression Committee during a special session to

appropriate money to fund the state's share of costs incurred (around $40 million) during the extreme 2007 fire season. FSC met monthly and held hearings around the state to collect public opinion on federal, state, and local fire suppression; opportunities to mitigate fire hazards; and control costs to taxpayers. A WUI Subcommittee explored the issues in depth and aspects of the WUI were central to nearly all of FSC's discussions.

- Through the hearings and during FSC's deliberations on its recommendations and bill draft requests, it became evident that before any incentives or other treatment in the WUI could work--and possibly bring fire costs down--a statewide map detailing the parcels considered to be in the WUI must be developed.

- The committee considered it imperative that citizens, governmental entities, and fire officials know precisely what land is in the WUI and what is not for the purposes of grant and loan applications; fuels mitigation funding; analyzing hazards; and addressing defensible space, ingress and egress, and water supply concerns.

- The Department of Natural Resources and Conservation was tasked with developing that map in consultation with local government and local fire officials.

- SB 131 provided that if a community had already developed a Community Wildfire Protection Plan (CWPP)--and the vast majority of counties have--the WUI designations in those plans could be used for the statewide map. FSC intended this provision to result in avoiding duplication of work done by communities and to honor communities' initiative in establishing their own WUI designations.

- A CWPP is a citizen-driven plan to prepare communities for wildland fire emergencies. A CWPP is defined in the federal Healthy Forest Restoration Act of 2003 as:

  a plan for an at-risk community that—

  (A) is developed within the context of the collaborative agreements and the guidance established by the Wildland Fire Leadership Council and agreed to by the applicable local government, local fire department, and State agency responsible for forest management, in consultation with interested parties and the Federal land management agencies managing land in the vicinity of the at-risk community;

  (B) identifies and prioritizes areas for hazardous fuel reduction treatments and recommends the types and methods of treatment on Federal and non-Federal land that will protect 1 or more at-risk communities and essential infrastructure; and

  (C) recommends measures to reduce structural ignitability throughout the at-risk community.

- Through a CWPP, a community can receive federal and state assistance for fuels

treatment in areas prioritized through the plan's development process. Creation of a CWPP is not required by federal, state, or local governments and creation of a CWPP does not constitute zoning or authorize subdivision restrictions.

- Designation of the WUI parcels as required in 76-13-145 also does not, in itself, constitute zoning or impose subdivision regulations. A local government may use the designation to propose zoning or to identify areas where wildfire hazards exist for the purposes of subdivision regulations, but the local government must still comply with all of the requirements and limitations located in Title 76, chapters 2 and 3 to create or amend zoning regulations or create or amend subdivision regulations.

- Similar to item #4 on page 3, this section does not give DNRC authority to regulate or enforce land use laws through this section.

Relationship of DNRC rulemaking (SB 51) to DNRC WUI designation (SB 131)

- DNRC rules--required in SB 51--and WUI designation--required in SB 131--are related in that the rulemaking requirements in section 76-13-104 (8)(b) direct DNRC's rules to address "criteria for providing grant and loan assistance to local government entities to encourage adoption of best practices for development within the wildland-urban interface." DNRC's criteria is that in order to qualify for this grant and loan assistance, a local government must adopt a CWPP or its equivalent by October 1, 2010.

- As of February 24, 2010, 49 of Montana's 56 counties had adopted a CWPP and WUI data has been collected for 36 counties.

Summary

1. SB 51 was amended numerous times during its progress through the 2007 session and compromises were reached through extensive discussions among legislators and individuals representing Realtors, planners, smart growth advocates, and some counties. The final version of the bill had the support of all but two of those attending the March 16, 2007, hearing in the House Natural Resources Committee.

2. SB 131 was intended by the Fire Suppression Committee to identify where the WUI is across the state and to identify areas where fuels mitigation may be prioritized, where grants and loans may be directed, and where local governments may consider defensible space, ingress/egress, and water supply issues.

3. Although local governments may incorporate wildland fire guidelines and rules and WUI designation into their regulatory documents, neither bill allows local, state, or federal governments to bypass established public processes that must be followed when the entity intends to create or amend regulatory documents in this way.

4. CWPPs are not regulatory and are not required by the state or federal governments, except in cases where a community wishes to apply for state or federal fuels treatment funding.