Senate Local Govt. Comm.
Exhibit No. 9
Date 2.15.07
Bill No. SB51

LEGAL MEMO

TO: GLENN OPPEL, GOVERNMENT AFFAIRS DIRECTOR, MONTANA ASSOCIATION OF REALTORS
FROM: MICHAEL S. KAKUK, ATTORNEY
RE: SB0051 AMENDMENT MEMO
DATE: FEBRUARY 14, 2007

PURPOSE AND DISCLAIMER

You have asked me to prepare a brief memo regarding my understanding of the intent and impact of the below amendments to SB0051. This is provided below.

Note: Additional impacts may become apparent through further research or during testimony on this important legislation.

AMENDMENTS: SB005101.alh

Amendments to Senate Bill No. 51
1st Reading Copy

Requested by Senator Bob Hawks

For the Senate Local Government Committee

Prepared by Leanne Heisel
February 15, 2007 (9:48AM)

1. Title, line 6.
Strike: "CONSIDER"
Insert: "EVALUATE THE POTENTIAL FOR"

MSK Comment: Clean up to the title in light of Amendment 4, Section 1, page 3 of this memo.

2. Title, line 12.
Following: "REGULATIONS;"
Insert: "GIVING RULEMAKING AUTHORITY TO THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION TO ADDRESS DEVELOPMENT IN THE WILDLAND-URBAN INTERFACE; GIVING RULEMAKING AUTHORITY TO THE DEPARTMENT OF LABOR AND INDUSTRY TO IDENTIFY CONSTRUCTION TECHNIQUES TO MITIGATE FIRE HAZARDS;"
Following: "76-3-501,"
Strike: "AND"

MSK Comment: Clean up to the title in light of Amendment 4, Sections 4 through 7, beginning on page 7 of this memo.

3. Title, line 13.
Following: "76-3-504,"
Insert: "AND 76-13-109,"

MSK Comment: Clean up to the title in light of Amendment 4, Section 4, page 7 of this memo.

4. Page 1, line 17 through page 7, line 25.
Strike: everything after the enacting clause
Insert: "Section 1. Section 76-1-601
, MCA, is amended to read:

"76-1-601. Growth policy -- contents. (1) A growth policy may cover all or part of the jurisdictional area.

(2) ~~A growth policy must include the elements listed in subsection (3) by October 1, 2006.~~ The extent to which a growth policy addresses the elements of a growth policy that are listed in subsection (3) is at the full discretion of the governing body.

MSK Comments: The stricken language is no longer relevant or necessary.

(3) A growth policy must include:

(a) community goals and objectives;

(b) maps and text describing an inventory of the existing characteristics and features of the jurisdictional area, including:

(i) land uses;

(ii) population;

(iii) housing needs;

(iv) economic conditions;

(v) local services;

(vi) public facilities;

(vii) natural resources; and

(viii) other characteristics and features proposed by the planning board and adopted by the governing bodies;

(c) projected trends for the life of the growth policy for each of the following elements:

(i) land use;

(ii) population;

(iii) housing needs;

(iv) economic conditions;

(v) local services;

(vi) natural resources; and

(vii) other elements proposed by the planning board and adopted by the governing bodies;

(d) a description of policies, regulations, and other measures to be implemented in order to achieve the goals and objectives established pursuant to subsection (3)(a);

(e) a strategy for development, maintenance, and replacement of public infrastructure, including drinking water systems, wastewater treatment facilities, sewer systems, solid waste facilities, fire protection facilities, roads, and bridges;

(f) an implementation strategy that includes:

(i) a timetable for implementing the growth policy;

(ii) a list of conditions that will lead to a revision of the growth policy; and

(iii) a timetable for reviewing the growth policy at least once every 5 years and revising the policy if necessary;

(g) a statement of how the governing bodies will coordinate and cooperate with other jurisdictions that explains:

(i) if a governing body is a city or town, how the governing body will coordinate and cooperate with the county in which the city or town is located on matters related to the growth policy;

(ii) if a governing body is a county, how the governing body will coordinate and cooperate with cities and towns located within the county's boundaries on matters related to the growth policy;

(h) a statement explaining how the governing bodies will:

(i) define the criteria in 76-3-608(3)(a); and

(ii) evaluate and make decisions regarding proposed subdivisions with respect to the criteria in 76-3-608(3)(a); ~~and~~

(i) a statement explaining how public hearings regarding proposed subdivisions will be conducted; and

(j) an evaluation of the potential for fire and wildland fire in the jurisdictional area, including whether or not there is a need to:

(i) delineate the wildland-urban interface; and

(ii) adopt regulations requiring:

(A) defensible space around structures;

(B) adequate ingress and egress to and from structures and developments to facilitate fire suppression activities; and

(C) adequate water supply for fire protection.

MSK Comments: This language requires that if a local government (LG) adopts a growth policy (GP's), it must evaluate the potential for fire and the need to adopt regulations addressing the above criteria. The extent to which an LG decides to evaluate or regulate remains entirely up to the LG and nothing in this section makes GP's required or regulatory.

Note: While I believe LG's already have this authority in current law – this change raises the importance fire issues with the LG's.

(4) A growth policy may:

(a) include one or more neighborhood plans. A neighborhood plan must be consistent with the growth policy.

(b) establish minimum criteria defining the jurisdictional area for a neighborhood plan;

(c) address the criteria in 76-3-608(3)(a);

(d) evaluate the effect of subdivision on the criteria in 76-3-608(3)(a);

(e) describe zoning regulations that will be implemented to address the criteria in 76-3-608(3)(a); and

(f) identify geographic areas where the governing body intends to authorize an exemption from review of the criteria in 76-3-608(3)(a) for proposed subdivisions pursuant to 76-3-608.

(5) The planning board may propose and the governing bodies may adopt additional elements of a growth policy in order to fulfill the purpose of this chapter."

Insert: "Section 2. Section 76-3-501
, MCA, is amended to read:

"76-3-501. Local subdivision regulations. The governing body of every county, city, and town shall adopt and provide for the enforcement and administration of subdivision regulations reasonably providing for:

(1) the orderly development of their jurisdictional areas;

(2) the coordination of roads within subdivided land with other roads, both existing and planned;

(3) the dedication of land for roadways and for public utility easements;

(4) the improvement of roads;

(5) the provision of adequate open spaces for travel, light, air, and recreation;

(6) the provision of adequate transportation, water, and drainage;

(7) subject to the provisions of 76-3-511, the regulation of sanitary facilities;

(8) the avoidance or minimization of congestion; and

(9) the avoidance of subdivisions that would involve unnecessary environmental degradation and danger of injury to health, safety, or welfare by reason of natural hazard<u>, including but not limited to fire and wildland fire,</u> or the lack of water, drainage, access, transportation, or other public services or that would necessitate an excessive expenditure of public funds for the supply of the services."

MSK Comments: This language clarifies that LG's have the authority to regulate hazards in subdivisions – including fire hazards.

Note: As with GP's, while I believe LG's already have this authority in current law – this change raises the importance fire issues with the LG's.

Insert: "Section 3. Section 76-3-504
, MCA, is amended to read:

"76-3-504. Subdivision regulations -- contents. (1) The subdivision regulations adopted under this chapter must, at a minimum:

(a) list the materials that must be included in a subdivision application in order for the application to be determined to contain the required elements for the purposes of the review required in 76-3-604(1);

(b) except as provided in 76-3-210, 76-3-509, or 76-3-609, require the subdivider to submit to the governing body an environmental assessment as prescribed in 76-3-603;

(c) establish procedures consistent with this chapter for the submission and review of subdivision applications and amended applications;

(d) prescribe the form and contents of preliminary plats and the documents to accompany final plats;

(e) provide for the identification of areas that, because of natural or human-caused hazards, are unsuitable for subdivision development<u>.</u> ~~and~~ <u>The regulations must</u> prohibit subdivisions in these areas unless the hazards can be eliminated or overcome by approved construction techniques~~;~~ <u>or other</u>

mitigation measures. 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 as provided in [section 5].

MSK Comments: This approach accomplishes the following objectives:

1. ***This section clearly allows LG's to require any and all mitigation, including "approved construction techniques" to mitigate hazards;***
2. ***This section also clarifies the existing statutory prohibition that this mitigation authority does not allow LG's 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 DOL 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 DOL has included such measure in its rules.***

(f) prohibit subdivisions for building purposes in areas located within the floodway of a flood of 100-year frequency, as defined by Title 76, chapter 5, or determined to be subject to flooding by the governing body;

(g) prescribe standards for:

(i) the design and arrangement of lots, streets, and roads;

(ii) grading and drainage;

(iii) subject to the provisions of 76-3-511, water supply and sewage and solid waste disposal that meet the:

(A) regulations adopted by the department of environmental quality under 76-4-104 for subdivisions that will create one or more parcels containing less than 20 acres; and

(B) standards provided in 76-3-604 and 76-3-622 for subdivisions that will create one or more parcels containing 20 acres or more and less than 160 acres; and

(iv) the location and installation of public utilities;

(h) provide procedures for the administration of the park and open-space requirements of this chapter;

(i) provide for the review of subdivision applications by affected public utilities and those agencies of local, state, and federal government identified during the preapplication consultation conducted pursuant to subsection (1)(q) or those having a substantial interest in a proposed subdivision. A public utility or agency review may not delay the governing body's action on the application beyond the time limits specified in this chapter, and the failure of any agency to complete a review of an application may not be a basis for rejection of the application by the governing body.

(j) when a subdivision creates parcels with lot sizes averaging less than 5 acres, require the subdivider to:

(i) reserve all or a portion of the appropriation water rights owned by the owner of the land to be subdivided and transfer the water rights to a single entity for use by

landowners within the subdivision who have a legal right to the water and reserve and sever any remaining surface water rights from the land;

(ii) if the land to be subdivided is subject to a contract or interest in a public or private entity formed to provide the use of a water right on the subdivision lots, establish a landowner's water use agreement administered through a single entity that specifies administration and the rights and responsibilities of landowners within the subdivision who have a legal right and access to the water; or

(iii) reserve and sever all surface water rights from the land;

(k) (i) except as provided in subsection (1)(k)(ii), require the subdivider to establish ditch easements in the subdivision that:

(A) are in locations of appropriate topographic characteristics and sufficient width to allow the physical placement and unobstructed maintenance of open ditches or belowground pipelines for the delivery of water for irrigation to persons and lands legally entitled to the water under an appropriated water right or permit of an irrigation district or other private or public entity formed to provide for the use of the water right on the subdivision lots;

(B) are a sufficient distance from the centerline of the ditch to allow for construction, repair, maintenance, and inspection of the ditch; and

(C) prohibit the placement of structures or the planting of vegetation other than grass within the ditch easement without the written permission of the ditch owner.

(ii) Establishment of easements pursuant to this subsection (1)(k) is not required if:

(A) the average lot size is 1 acre or less and the subdivider provides for disclosure, in a manner acceptable to the governing body, that adequately notifies potential buyers of lots that are classified as irrigated land and may continue to be assessed for irrigation water delivery even though the water may not be deliverable; or

(B) the water rights are removed or the process has been initiated to remove the water rights from the subdivided land through an appropriate legal or administrative process and if the removal or intended removal is denoted on the preliminary plat. If removal of water rights is not complete upon filing of the final plat, the subdivider shall provide written notification to prospective buyers of the intent to remove the water right and shall document that intent, when applicable, in agreements and legal documents for related sales transactions.

(l) require the subdivider, unless otherwise provided for under separate written agreement or filed easement, to file and record ditch easements for unobstructed use and maintenance of existing water delivery ditches, pipelines, and facilities in the subdivision that are necessary to convey water through the subdivision to lands adjacent to or beyond the subdivision boundaries in quantities and in a manner that are consistent with historic and legal rights;

(m) require the subdivider to describe, dimension, and show

public utility easements in the subdivision on the final plat in their true and correct location. The public utility easements must be of sufficient width to allow the physical placement and unobstructed maintenance of public utility facilities for the provision of public utility services within the subdivision.

(n) establish whether the governing body, its authorized agent or agency, or both will hold public hearings;

(o) establish procedures describing how the governing body or its agent or agency will address information presented at the hearing or hearings held pursuant to 76-3-605 and 76-3-615;

(p) establish criteria that the governing body or reviewing authority will use to determine whether a proposed method of disposition using the exemptions provided in 76-3-201 or 76-3-207 is an attempt to evade the requirements of this chapter. The regulations must provide for an appeals process to the governing body if the reviewing authority is not the governing body.

(q) establish a preapplication process that:

(i) allows a subdivider to meet with the agent or agency, other than the governing body, that is designated by the governing body to review subdivision applications prior to the subdivider submitting the application;

(ii) requires, for informational purposes only, identification of the state laws, local regulations, and growth policy provisions, if a growth policy has been adopted, that may apply to the subdivision review process;

(iii) requires a list to be made available to the subdivider of the public utilities, those agencies of local, state, and federal government, and any other entities that may be contacted for comment on the subdivision application and the timeframes that the public utilities, agencies, and other entities are given to respond. If, during the review of the application, the agent or agency designated by the governing body contacts a public utility, agency, or other entity that was not included on the list originally made available to the subdivider, the agent or agency shall notify the subdivider of the contact and the timeframe for response.

(iv) requires that a preapplication meeting take place no more than 30 days from the date that the agent or agency receives a written request for a preapplication meeting from the subdivider; and

(v) establishes a time limit after a preapplication meeting by which an application must be submitted as provided in 76-3-604.

(2) In order to accomplish the purposes described in 76-3-501, the subdivision regulations adopted under 76-3-509 and this section may include provisions that are consistent with this section that promote cluster development.

(3) The governing body may establish deadlines for submittal of subdivision applications."

Insert: "Section 4. Section 76-13-109
, MCA, is amended to read:

"76-13-109. Rules. (1) The department may adopt ~~and enforce~~ reasonable rules for the purpose of enforcing and accomplishing the provisions and purposes of this part and part

2.

(2) By October 1, 2008, the department shall adopt rules addressing development within the wildland-urban interface, including but not limited to:

(a) best practices for development within the wildland-urban interface; and

(b) criteria for providing grant and loan assistance to local government entities to encourage adoption of best practices for development within the wildland-urban interface."

MSK Comments: This language requires the DNRC to adopt rules regarding the above fie 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 LG's regulate development in the interface.

Insert: "NEW SECTION. Section 5. Purpose -- rulemaking. (1) The purpose of [sections 5 and 6] is to provide specific rulemaking authority to the department of labor and industry for the purposes of 76-3-504(1)(e).

(2) The department shall adopt rules identifying appropriate construction techniques that may be used by a local government in mitigation of identified fire hazards pursuant to 76-3-504(1)(e). Rules adopted under this section may not be construed to be part of the state building code as provided in 50-60-203. The adoption, amendment, or repeal of a rule under this section is of significant public interest for the purposes of 2-3-103.

MSK Comments: This section authorizes, and then requires, DOL to identify "construction techniques" that can be used by LG's to mitigate hazards. As explained above, if the DOL 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.

Insert: "NEW SECTION. Section 6. Enforcement. Rules promulgated under [section 5] may be enforced only as provided in Title 76, chapter 3, part 5. The powers and duties for enforcement provided in 76-3-501 apply to rules adopted under [section 5] and do not apply to or include any rules adopted under Title 50, chapter 60, parts 1 through 8.

MSK Comments: 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.

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Insert: "NEW SECTION. Section 7. {standard} Codification instruction. [Sections 5 and 6] are intended to be codified as an integral part of Title 50, chapter 60, and the provisions of Title 50, chapter 60, apply to [sections 5 and 6].

MSK Comments: This section clarifies that DOL construction technique identification process will take place outside of the DOL's building code authority.