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DATE: March 27, 2026

TO: Angela Jacobs, City Attorney, City of Whitefish
Dana Meeker City Manager, City of Whitefish,

FROM: Senator Ellie Boldman, Montana Senate District 46, licensed attorney

RE: Compliance of Proposed Whitefish Growth Policy and Zoning Amendments with Senate Bill 243 (2025) and § 76-2-304(4), MCA

I. PURPOSE AND INTRODUCTION

I write in my capacity as the primary sponsor of Senate Bill 243 (2023), codified in relevant part at § 76-2-304(4), Montana Code Annotated (MCA), to express serious legal concerns regarding the proposed land use recommendations currently under consideration by the City of Whitefish as part of its Growth Policy update and related zoning amendments.

It is my considered legal opinion, informed by direct participation in the drafting and legislative history of SB 243, that certain provisions of the Whitefish Growth Policy as currently drafted are not in compliance with the requirements of § 76-2-304(4), MCA, and would, if adopted, constitute an unlawful attempt to circumvent the clear statutory mandates of that law.

The purpose of this memorandum is to: (1) summarize the statutory requirements imposed by SB 243; (2) identify the specific provisions of the proposed Whitefish Growth Policy that conflict with those requirements; (3) explain the legal basis for those conflicts; and (4) call upon the City of Whitefish to revise its proposed Growth Policy and zoning amendments to bring them into full compliance with state law.

I make no challenge to the City's legitimate authority to regulate land use within the bounds established by state law. However, where municipal action is explicitly designed to evade or undermine state statute, that action is without legal foundation and exposes the City to legal liability.

II. STATUTORY BACKGROUND: § 76-2-304(4), MCA AND SENATE BILL 243

Senate Bill 243, enacted by the 68th Montana Legislature and signed into law in 2023, was designed to address Montana's acute housing shortage by reducing exclusionary zoning practices in municipalities that have demonstrated sufficient urban infrastructure to support higher-density development. The bill reflects a considered legislative judgment that local land use regulations, while important, must yield to the statewide interest in housing availability and affordability where those regulations operate as de facto barriers to needed housing production.

A. The Statutory Text

Section 76-2-304(4), MCA, provides in relevant part:

> *In a municipality that is designated as an urban area by the United States Census Bureau with a population over 5,000 as of the most recent census, the city council or other legislative body of the municipality shall allow as a permitted use multiple-unit dwellings and mixed-use developments that include multiple-unit dwellings on a parcel or lot that: (i) has a will-serve letter from both a municipal water system and a municipal sewer system; and (ii) is located in a commercial zone.*
>
> *Zoning regulations in municipalities meeting the requirements of subsection (4)(a) may not include a requirement to provide more than: . . . (iii) a height restriction of less than 60 feet on buildings that are located in downtown commercial, heavy commercial, or industrial zones.*

Whitefish, having been designated as an urban area by the United States Census Bureau with a population exceeding 5,000 as of the most recent census, is subject to the full requirements of § 76-2-304(4), MCA.

B. Legislative Intent

The Legislature's use of the phrase "shall allow as a permitted use" reflects a mandatory obligation, not a discretionary grant of authority. Similarly, the prohibition on height restrictions "of less than 60 feet" in the enumerated commercial zones is an express limitation on the conditions a municipality may impose. Conditioning 60-foot development approvals on use type, massing, stepbacks, floorplate size, or lot coverage ratios effectively imposes height restrictions below 60 feet through regulatory means, precisely what the statute prohibits.

III. SPECIFIC LEGAL DEFICIENCIES IN THE PROPOSED GROWTH POLICY

Having reviewed the proposed Growth Policy language presented to the Whitefish Planning Commission and City Council, I have identified the following provisions that are, in my legal opinion, in direct conflict with § 76-2-304(4), MCA.

A. Conditioned Use and Massing Requirements That Function as Sub-60-Foot Height Restrictions

The proposed Growth Policy recommends allowing a maximum of 60 feet "by right" while simultaneously imposing the following conditions on achieving that height:

- Upper-story stepback requirements after 2–3 stories
- Maximum floorplate size per story
- Incentives for sloped roofs or articulated massing requirements
- Reduced lot coverage allowances for buildings exceeding 45 feet
- A 60-foot allowance for vacant lots only, with a 45-foot allowance remaining in effect for existing buildings, including those demolished after the date of Growth Policy adoption

These conditions do not "allow" 60-foot buildings by right. They make the achievement of 60 feet contingent on compliance with a series of form-based standards that collectively function as an effective height cap below 60 feet. A building limited in floorplate size above a certain elevation, required to step back upper floors, and potentially penalized with reduced lot coverage is not, as a practical matter, permitted to build to 60 feet on the same terms as a building reaching 45 feet. This is precisely the type of regulatory end-run that § 76-2-304(4)(b)(iii) prohibits.

The proposed distinction between vacant lots (60 feet allowed) and existing buildings including those that are subsequently demolished (45-foot cap retained) is particularly problematic. There is no basis in § 76-2-304(4), MCA, for conditioning statutory height entitlements on the prior use history or demolition status of a parcel. Such a distinction creates an unlawful two-tiered system that denies the statutory benefit to a significant class of downtown parcels.

B. Unlawful Limitation of Uses Above 45 Feet

The proposed Growth Policy further recommends limiting the types of uses permitted above 45 feet or three stories, specifically by restricting commercial uses (including short-term rentals) to 45 feet or three stories, while allowing multi-family and mixed-use development up to 60 feet. This use-based height stratification is not authorized by § 76-2-304(4), MCA.

The statute does not permit municipalities to condition the 60-foot entitlement on the type of use proposed above a given floor. Imposing use restrictions above certain elevations is a form of conditional height regulation that effectively denies the statutory 60-foot entitlement to a subset of commercial uses. This approach violates both the letter and spirit of SB 243.

C. Strategic Rebranding of Commercial Zones to Avoid Statutory Coverage

Perhaps the most legally concerning aspect of the proposed Growth Policy is its recommendation that the City undertake a "comprehensive review" of its existing commercial zoning

districts—explicitly including a suggestion to reclassify the WB-2 commercial zone as a "Large Lot Suburban Light Commercial" designation or similar—for the stated purpose of avoiding what the Growth Policy itself acknowledges would otherwise be the application of § 76-2-304(4), MCA.

The record before the City is unambiguous on this point. At the Whitefish City Council Work Session on March 2, 2026, City Planning Director Dave Taylor publicly stated: "There's no way to argue that WB2 isn't heavy commercial based on the uses that are currently allowed." This candid acknowledgment by the City's own Planning Director confirms that zones like WB-2, under its existing regulatory character and permitted uses, meets the statutory definition of "heavy commercial" for purposes of § 76-2-304(4)(b)(iii), MCA.

A post-hoc reclassification of a zone whose character is concededly "heavy commercial," undertaken not because the zone's character has changed, but for the express purpose of removing it from the reach of a state statute, is void as a matter of law. Municipal action taken in bad faith or for an improper purpose lacks the presumption of validity that would otherwise attach to legislative land use decisions. The Growth Policy's own language makes the improper purpose explicit: the reclassification is proposed to "avoid the unintended consequence" of state law applying to the WB-2 corridor.

I note further that § 76-2-303, MCA, requires that zoning regulations be made in accordance with a comprehensive plan and designed to promote the health, safety, morals, convenience, order, prosperity, or welfare of the municipality. Reclassifying a commercial zone for the sole purpose of evading a state mandate does not serve any of these legitimate regulatory purposes. Such a reclassification would accordingly be subject to legal challenge on multiple grounds.

D. Sub-District Fragmentation of Downtown as an Evasion Mechanism

The proposed Growth Policy also recommends dividing Downtown Whitefish into sub-districts with differentiated height regimes—including a "Historic Core" sub-area with prevailing heights of 2–3 stories and a "Downtown Transition Zone" with 3–4 story potential—as a means of limiting the geographic scope of the 60-foot entitlement mandated by § 76-2-304(4)(b)(iii).

To the extent these sub-districts would impose height restrictions below 60 feet on parcels that are currently located within a downtown commercial, heavy commercial, or industrial zone subject to the statute, their creation for the purpose of narrowing the scope of statutory compliance is impermissible. § 76-2-304(4)(b)(iii) does not vest in the City the authority to determine which parcels within an otherwise qualifying zone shall receive the 60-foot entitlement. The statute applies to the downtown as a whole.

IV. LEGAL AUTHORITY AND PREEMPTION PRINCIPLES

Under Montana law, the relationship between state statute and municipal ordinance is governed by well-established principles of state preemption. Where the Legislature has spoken clearly and directly on a subject, a municipality may not act in a manner that conflicts with or frustrates the legislative purpose. § 7-1-111, MCA, provides that a municipality may not exercise a power in a manner "inconsistent with state law."

The provisions of § 76-2-304(4), MCA, are unambiguous in their operative mandates: qualifying municipalities shall permit multi-unit and mixed-use development as of right in commercial zones, and may not impose height restrictions below 60 feet in the enumerated commercial zone categories. These are not aspirational guidelines—they are mandatory statutory commands. Municipal ordinances, zoning regulations, and growth policies that operate to circumvent these commands are preempted and unenforceable.

The fact that the Growth Policy employs indirect regulatory tools (massing requirements, floorplate caps, stepback standards, lot coverage reductions, zone reclassifications, and sub-district creation) rather than a direct height cap does not shield it from preemption analysis. Courts apply a functional, not merely formal, analysis to preemption questions. Where the practical effect of a regulatory scheme is to deny the benefit conferred by state statute, the scheme is preempted regardless of its formal structure.

Additionally, I would note that the Growth Policy's reliance on purported "lack of clarity" in the statutory definition of "heavy commercial" as a justification for zone reclassification is unavailing. The City Planning Director's own public statement acknowledges the clarity of that classification as applied to WB-2. The suggestion that the City may exploit definitional ambiguity—where no genuine ambiguity in fact exists as applied to specific zones—to avoid statutory obligations is not a valid basis for regulatory action.

V. THE SIGNIFICANCE OF LEGISLATIVE HISTORY AND SPONSOR INTENT

As the primary sponsor of Senate Bill 243, I am in a position to offer direct testimony regarding the intent of the legislation. While legislative history is a secondary tool of statutory interpretation, resort to sponsor intent is appropriate and indeed encouraged where, as here, a municipality attempts to argue that indirect regulatory conditions are consistent with a statute's purpose.

SB 243 was designed precisely to prevent the kind of outcome that the Whitefish Growth Policy, as currently drafted, would produce. The Legislature was fully aware that municipalities confronted with housing production mandates would be tempted to comply in form while defeating compliance in substance through the creative use of design standards, zone reclassifications, and other indirect mechanisms. The statutory text was deliberately written to foreclose that avenue.

The phrase "shall allow as a permitted use" was chosen specifically to eliminate discretionary approval processes for qualifying development. The prohibition on height restrictions "of less than 60 feet" was chosen to set a clear floor below which municipalities may not condition height approvals. Neither of these provisions, properly interpreted, leaves room for the suite of conditions proposed in the Whitefish Growth Policy.

I am prepared to provide sworn testimony or a formal affidavit regarding legislative intent in any legal proceeding arising from the adoption of the proposed Growth Policy, should that become necessary.

VI. REQUESTED ACTIONS

In light of the foregoing, I respectfully but urgently request that the City of Whitefish take the following actions prior to the adoption of the proposed Growth Policy and any related zoning amendments:

- **Withdraw the proposed massing and form-based conditions** on 60-foot height entitlements, including but not limited to stepback requirements, floorplate caps, and lot coverage reductions that apply differentially to buildings above 45 feet.
- **Eliminate the proposed use restrictions** that limit commercial uses above 45 feet or three stories, as such restrictions constitute a conditional height cap not authorized by § 76-2-304(4), MCA.
- **Abandon any proposed reclassification** of WB-2, WB-3, or WB-4 commercial zones to "light commercial" or any similar designation undertaken for the purpose of removing those zones from the scope of § 76-2-304(4)(b)(iii), MCA.
- **Review and revise the proposed Downtown sub-districting scheme** to ensure that all parcels currently within a qualifying downtown commercial, heavy commercial, or industrial zone receive the full benefit of the 60-foot height entitlement mandated by state law.

SB 243 does not prohibit design standards, community character objectives, or thoughtful planning. It prohibits municipalities from using those tools to effectively deny the housing production that the Legislature has determined is in the statewide interest. There is ample space within those parameters for the City to exercise its planning judgment.

VII. CONCLUSION

The proposed Growth Policy recommendations, as currently drafted, reflect a deliberate strategy to satisfy the formal requirements of § 76-2-304(4), MCA, while defeating its substantive

mandates through indirect regulatory means. This approach is not consistent with lawful compliance. It is, in the candid assessment of the City's own Planning Director, designed to circumvent statutory obligations that the City acknowledges it is subject to.

This memorandum constitutes notice to the City of Whitefish of the specific legal deficiencies identified herein. I urge the City Attorney and City Manager to take these concerns seriously and to ensure that the proposed Growth Policy is substantially revised before adoption. The consequences of adopting a Growth Policy that is facially non-compliant with state law are significant and avoidable.

Respectfully submitted,

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