Moore, Megan

From: Deb Carstensen <deb@indeeddecor.com>
Sent: Sunday, July 08, 2018 4:24 PM
To: Moore, Megan
Subject: RTIC meeting on July 10 and HJ22 agenda item
Attachments: Points re HJ 22 rev.pdf

Subject: RTIC meeting on July 10 and HJ22 agenda item at 3:30 p.m.

Dear Ms. Moore,

We hope you have welcomed the awaited arrival of summer as we have.

Our group of small orchard, vineyard and winery owners saw on the RTIC legislative website the proposed agenda and various materials, particularly papers on "Possible Bills Ideas" and "Draft Final Report" that will be discussed at the meeting. We believe that in the interest of accuracy and clarity certain changes should be made in these otherwise very helpful papers. Accordingly, in the attachment we are submitting those changes for the committees' and your review and consideration.

First, our attachment consists of a listing of 15 points which we think can or should be agreed upon by all involved, including the RTIC and the DOR, as **Proposed Agreed Facts**. These are important points that should be acknowledged and frame further discussion of HJ22. Second **Suggested Changes to HJ22 Draft** are several comments on certain statements in the otherwise excellent Final Draft Report that we believe in the interest of clarity and accuracy should be revised as we have set forth.

Because of the importance of matters on the agenda to us, many of our group of small orchard, vineyard and wineries are making the trip to Helena on Tuesday. We hope that we will be given time to testify or at least make public comment. Should we make copies of the attached document for distribution to committee members or will you do so and distribute to the committee in advance of the meeting?

We again thank you for all your hard work on HJ22 as well for your many courtesies to our group.

Kind Regards,

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Without getting into a discussion of what the DOR did or didn't do to enable the present uncertainty around the ag classification of small orchards and vineyards in Montana, it seems a few things can be agreed upon by all involved, including the RTIC and the DOR. These are:

PROPOSED AGREED FACTS Submitted by Small Orchard and Vineyard Owners

1. The RTIC essentially is back to where it was two years ago in the previous Interim Committee. According to the recent research paper "HJ 22 AGRICULTURAL PROPERTY STUDY: POSSIBLE BILL IDEAS", on the table for consideration at the July 10-11 RTIC meeting, with a couple potential tweaks, are the concepts from the same failed bills from the 2017 legislative session - – HB 27 (1 acre under farmstead at market value), HB 28 (change gross income requirement from $1500 to $3500), HB 29 (minimum 1 acre parcel requirement in addition to 1 acre under residence) and HB 75 (eliminate non-qualifying ag designation).

2. HB 75 is not an issue for the producing small orchard and vineyard people and their operations.

3. Montana has a provision in its Constitution, which states in Article XII: "**Section 1. Agriculture**. (1) The legislature shall provide for a Department of Agriculture and enact laws and provide appropriations to protect, enhance, and develop all agriculture,"

4. Other than the failure of the four House bills in the 2017 legislature, several things have happened since the 2015-2016 RTIC meetings that produced the four above draft bills:

a. In late 2016, the DOR of its own volition, without the subject rules even being at issue in a legal or administrative proceeding, repealed its long standing administrative rules that authorized a 5 year provisional ag classification before having orchards/vineyards meet the $1500 gross income requirement and required a minimum planting requirement of 100 fruit trees or 120 vines. Both of these rules, 5-year provisional agricultural classification and the requirement for a minimum number of trees/vines for agricultural classification, had long been part of DOR's administrative rules and they were always approved by the MTAB in any decisions where they were involved. Indeed, in the 2016 Goodspeed and Beyer-Ward cases, the MTAB ordered DOR to reinstate the provisional agricultural status of the parties, an order with which DOR complied.

b. DOR's repeal of its minimum tree/vine requirement has led to some public officials and members of the public making inflammatory statements to the effect

that all people need to do now to get agricultural classification of their property is put a couple fruit trees in the yard —or other similar statements.

c. To correct the actions and reactions in 4a. and 4b., a group of orchard and vineyard owners recently suggested to the RTIC proposed amendments to 15-7-202 MCA that put into statute what DOR chose to repeal from its administrative rules described above in 4a., namely, that specialty crops such as fruit trees and vineyards that are biologically incapable of producing ag revenue for approximately 5 years after planting will be classified as provisionally agricultural for 5 years after planting so long as they meet good husbandry requirements and consist of at least 100 trees/120 vines.

d. The HJ 22 Study Bill was passed in 2017 and it required a "comparison to other states with similar valuation and taxation of agricultural property."

e. Unlike the RTIC proceedings before the 2017 legislature, the public, particularly affected small orchard and vineyard operators, now has been able to participate in the current RTIC discussions.

5. The other states' comparison included North and South Dakota, Wyoming, Idaho, and Washington. The small orchard and vineyard people also looked at Oregon.

a. Each of these states allows ag classification for small (0 to 5 acres, for example) orchards and vineyards.

b. With the exception of South Dakota at $2500, each of the states are at or lower than the $1500 gross income requirement in present Montana law. Public testimony showed that the USDA also uses no more than $1500 in its regulations related to ag qualification.

c. Each of the four invited public panelists at the December 2017 RTIC meeting, when questioned by a RTIC member, supported $1500 as the appropriate number. Public testimony at the March and May RTIC meetings supported $1500 as the appropriate number. No other testimony, public or otherwise, at these meetings supported any number higher than $1500.

d. None of the other states has a comparable Constitutional provision like Montana's Article XII, Section 1 stating unequivocal instruction to its legislature to "enact laws .....to protect, enhance, and develop all agriculture".

6. The Montana Constitutional requirement is not acknowledged to exist or mentioned or discussed in any of the written submissions by state officials in any of the proceedings before this RTIC or the prior RTIC before the 2017 session or during the 2017 session when the four bills mentioned above were dealt with. It has been mentioned and discussed by the small orchard and vineyard group in public testimony and written submissions to the RTIC.

7. Under existing Montana law and MTAB case law, orchards or vineyards with a minimum of 100 live trees or 120 live vines are producing "bona fide agricultural" operations and must meet the stated gross income, watering, fencing, upkeep, and proper fruit husbandry requirements.

8. Public testimony from orchard owners and grape growers clearly support the conclusion that the nascent grape growing/winemaking business in Montana will be harmed if their proposed legislation supporting a 100 fruit tree/120 vine minimum and 5 year provisional ag classification period for crops to mature is not adopted. Such legislation would simply put back in place, this time in statute, the requirements of the administrative rules that DOR voluntarily chose to repeal, effective January 1, 2017.

9. Both Democrat and Republican Party platforms state clear support for the ag industry in Montana.

10. There is no factual evidence in the RTIC or 2017 legislative proceedings supporting a conclusion that a "flood" of small ag applications is occurring or has occurred in the state.

11. Under Montana law, the "use" of property, not what a neighbor is doing or can do with his or her property, is what determines its property tax classification. 15-7-201 MCA states in part:

"15-7-201. **Legislative intent—value of agricultural property.** (1) Because the market value of many agricultural properties is based upon speculative purchases that do not reflect the productive capability of agricultural land, it is the legislative intent that bona fide agricultural properties be classified and assessed at a value that is exclusive of values attributed to urban influences or speculative purposes. (2) Agricultural land must be classified according to its use....."

12. The six Republican members of the RTIC supported the proposed legislative changes offered by the small orchard and vineyard group and presented by Rep. Hertz at the recent May RTIC meeting. The vote on Rep.Hertz' motion was a tie vote so it did not pass.

13. The July 10-11 RTIC agenda includes potential bill draft requests relating to HJ 22 so the small orchard and vineyard operators' proposed legislation can be discussed again with a motion similar to the May 2018 Hertz motion.

14. Any effort to change the land under a farmstead from agricultural classification to market value will result in an increase in property taxes only to farmers and ranchers in Montana.

15. Former DOR Director Kadas talked with a few individuals after the last RTIC meeting in May. This occurred after a succession of testimony by certain Lake County taxpayers of unfair treatment by the DOR when, because of the subsequent repealed DOR rules discussed above, DOR revoked these landowners' provisional ag classification after first promising or granting it. To his credit, former Director Kadas told several of these affected landowners that DOR would now instate or reinstate and thus return them to the appropriate provisional agricultural classification they had or should have had in order to allow their orchards or vines to mature to productive status before they would be required to meet the gross income requirement. To date, this has only happened for Richard and Jean Schreiber who received a written assurance from the DOR Legal Department of provisional ag classification in return for dropping their detailed Montana Freedom of Information Act Request to the DOR for information about DOR records related to ag classification requests for small parcels and rulemaking activity from 2014 (when the DOR first revoked prior provisional ag classifications) to the present time. The specific landowners, in addition to the Schreibers, who should also receive written assurance of reinstated provisional ag classification include the Beyer-Wards, the Carstensens, and possibly others.

Suggestions re clarification and modification of recent documents appearing on web site captioned "HJ22 Draft Final Report" and "HJ 22 Agricultural Property Study: Possible Bill Ideas"

The small orchard and vineyard group which proposed amendments presented to the May RTIC meeting that were then discussed by Representative Hertz believes there are several important statements and references in the July 2018 2 page paper "HJ 22 AGRICULTURAL PROPERTY STUDY: POSSIBLE BILL IDEAS" and the "HJ 22 DRAFT FINAL REPORT" which need clarification for accuracy. We offer these comments because we believe they relate directly to the reasoning supporting and the wording of our proposed amendments related to the 5-year provisional ag classification and the minimum tree/vine requirement.

I. The HJ 22 "Draft Final Report"

a. The fourth paragraph on page 1 under "BACKGROUND" should be revised to reflect the actual holdings and issue in the 2016 Montana Tax Appeal Board cases of Yeager, Goodspeed, and Beyer-Ward. A reading of those cases will show the issue and the holdings/decisions in the cases related solely to the DOR exceeding its statutory authority by adopting a new administrative rule in 2014 that imposed a one acre minimum acreage requirement for a parcel to classify for ag. classification. Based on this new administrative rule, DOR denied both previously granted ag. classifications and provisional ag classifications to many parcels and reclassified them as residential rather than agricultural because they did not meet the minimum acreage requirement of DOR's new administrative rule.

When the Yeager, Goodspeed and Beyer-Ward cases reached the MTAB in 2016, the MTAB ruled that since there is no acreage requirement in Montana law, MCA 15-7-202, it was beyond the authority of DOR to create an administrative rule requiring minimum acreage as a condition to agricultural classification.

The present language in the fourth paragraph (and another similar paragraph [third paragraph on page 1 in the HJ 22 Possible Bill Ideas paper]) suggests, implies, or states that the MTAB case holdings also invalidated the 5 year provisional ag classification and the minimum tree/vine requirement which were also in DOR's administrative rules. They did not! The 5-year provisional ag rule and the minimum tree/vine requirements were not even at issue in the cases. Nonetheless, the DOR in late 2016 repealed the rules on those two matters thus setting the stage for our group to propose the amendments putting these two subjects back in effect, this time in law, in 15-7-202 MCA , not DOR rule.

In fact, in both the Goodspeed and Beyer-Ward cases, the MTAB explicitly affirmed the propriety of DOR's administrative rule providing for provisional ag. classification and ordered DOR to reclassify both parcels as provisionally agricultural, their status before DOR changed them to residential based on its invalid administrative rule requiring minimum acreage as a condition to ag classification. In Goodspeed, the MTAB expressly affirmed that provisional agricultural classification is appropriate under MCA 15-7-202 and stated: "The record establishes that Goodspeed runs a bona fide commercial agricultural operation which will satisfy the only statutory criteria for agricultural classification: $1,500 annual agricultural revenue **when** the vines reach year five and are able to produce a viable crop of grapes." (Goodspeed, p. 20, para. 77)

Notwithstanding MTAB's affirmation of the propriety of DOR's long-standing administrative rules allowing provisional agricultural classification of immature orchards and vineyard and requiring 100 trees and 120 vines for agricultural classification, DOR thereafter repealed these administrative rules at the same time it repealed its invalid administrative rule requiring minimum acreage as a condition to agricultural classification. Accordingly, DOR's repeal of these administrative rules, provisional agricultural classification and identifying the minimum number of trees and vines required for ag classification, set the stage for our group to propose amendments to MCA-7-202 putting these rules in the governing statute.

b. The error in the present language in the Draft Report is compounded and possibly somewhat explained when you click in the same paragraph on the statement and the highlighted words DOR "alerted the committee" to some "some possible unintended consequences" . Doing that takes you to a June 10, 2016 Mike Kadas, Director of DOR memo presented to the June 2016 RTIC meeting. In his memo's first paragraph he mentions the three MTAB cases and states "The rulings invalidated the Department's criteria of requiring at least one acre of farm land and orchard standards of at least 100 trees…". If he would have put a period (“.”) after

"farm land", the statement would be accurate. But gratuitously adding the language about the 100 trees makes the statement inaccurate for the same reason as discussed above in the previous paragraph. Unfortunately, this concept enlarging the holdings in the MTAB cases has been carried forward in subsequent discussions in the RTIC related to the Ag Classification study in HJ 22.

c. The inaccurate representation then is further compounded in the same 1st paragraph of the same DOR memo when it states "The ruling does however "exacerbate the equity concerns" previously mentioned by the DOR at the March 2016 RTIC meeting which was actually PRIOR to the MTAB rulings. This apparently refers to the slide attached to the memo showing neighboring properties on Flathead Lake, one of which has an orchard and the other doesn't. This slide completely ignores Montana law stating it is the "use" of the property, which determines its tax classification, not the neighbor's use. The slide would actually have the same "equity concern" if a Flathead Lake church camp was on one property and a home on the other on similar acreages. Use is important.

SUGGESTED CHANGE ON PAGE 1 OF THE DRAFT FINAL REPORT

Suggested language change for the entire paragraph 3 is as follows, bearing in mind that nowhere in the link to the DOR June 16, 2016 documents is there any use of the phrase "unintended consequences":

"During the 2015-2016 interim, the Department of Revenue in June of 2016 informed the committee of three State Tax Appeal Board rulings which invalidated its rule adopted in 2014 requiring a one acre minimum to qualify for agricultural classification. The Department then in late 2016 repealed its rule on the one-acre minimum. At the same time, DOR repealed its rules on 5 year provisional ag classification to allow trees or vines to mature before having to meet the gross income threshold and requiring a 100 tree or 120 vine minimum planting."

SUGGESTED CHANGE TO A SIMILAR PARAGRAPH ON PAGE 22 OF THE DRAFT FINAL REPORT

The first paragraph of the "ORCHARD AND VINEYARD OWNERS' PROPOSALS" on page 22 also discusses the MTAB case and the DOR rule. For clarity and accuracy we suggest that the last two sentences should be changed as follows:

In 2016, The State Tax Appeal Board, concluding there was no statutory authority for such a rule, invalidated a DOR administrative rule passed in 2014, which mandated acreage requirement for agricultural classification. In response, the DOR in late 2016 repealed that administrative rule relating to the minimum acreage requirement. At the same time, DOR also repealed rule provisions that allowed a taxpayer to provisionally qualify for agricultural classification for up to 5 years before meeting the gross income minimum and required a taxpayer to have at least 100 trees or 120 vines to qualify for agricultural classification."

d. On page 9 there is a paragraph on the "SMALL OWNER PANEL DISCUSSION" that was held at the December 2017 RTIC meeting. Our reading of the links in the paragraph does not indicate, "concerns were raised" as, described. Therefore, we suggest the last sentence be rephrased for accuracy.

SUGGESTED CHANGE

The last sentence be changed as follows:

"The panelists' comments indicated general support for current income and acreage requirements and there was a discussion about agricultural eligibility for orchard and vineyard owners whose trees and vines do not produce income immediately."

e. On page 12, we believe it would be important and helpful for the public and the legislature to know and for the document to acknowledge the 1972 Montana Constitution provision in Article XII, Section 1 instructing the legislature to "enact laws ….to protect, enhance, and develop all agriculture".

II. The HJ 22 "Possible Bill Ideas" paper:

The second paragraph on page one of this paper has a paragraph similar to the one discussed above in 1.a. relating to the MTAB cases. For the same reasons discussed above in 1.a. we suggest a change for clarity and accuracy.

SUGGESTED CHANGE

The entire third paragraph on page 1 should be changed as follows:

" Montana Tax Appeal Board decisions in 2016 concluded that a 2014 Department of Revenue rule requiring a one acre minimum for agricultural classification was invalid because the Department exceeded its statutory authority in enacting such a rule. The Department responded in late 2016 by repealing its one-acre minimum rule. At the same time, DOR also repealed rule provisions that allowed a taxpayer to provisionally qualify for agricultural classification for up to 5 years before meeting the gross income minimum and required a taxpayer to have a minimum of 100 trees or 120 vines to qualify for agricultural classification.

Thank you for the opportunity to present these comments, which are offered for the purpose of clarity and accuracy in the two documents.

Respectfully.

Small Orchard and Vineyard Owners