



MONTANA  
HOUSING

## MONTANA BOARD OF HOUSING - BOARD TRAINING & STRATEGIC PLANNING

Date: Monday, April 8, 2024

Time: 8:30 a.m. – 5:00 p.m.

Location: AC Hotel Bozeman Downtown by Marriott  
110 North Tracy Ave, Bozeman  
Ross Conference Room  
406.602.1072

In-person attendance is preferred.

Board members and partners unable to join in person can register to join via [Zoom](#)

Meeting ID: 848 4456 4348

Password: 308636

Dial by Telephone

+1 646 558 8656

### AGENDA

#### 8:00 to 8:30 – Grab and Go Breakfast

- ❖ Vegetarian and local meat burritos, seasonal whole fruit, and Chobani yogurt

#### 8:30 – Introductions & Icebreakers

- ❖ Board members, staff and partner introductions
- ❖ Ice Breaker: Montana Board of Housing will be turning 50 years old in 2025. Please share your favorite MBOH story or experience from your history working with the Board.

#### 9:00 – Board Governance (John Wagner, Kutak Rock | Greg Gould, JMG)

- ❖ Boardmanships Basics

#### 10:15 – Break

- ❖ Coffee Refill Break for the Attorneys

#### MISSION STATEMENT:

*Montana Housing works with community partners across the state, and together we ensure Montana Families have access to safe and affordable homes.*



MONTANA  
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### 10:30 – How to Interpret HFA Financial Statements (John Wagner, Kutak Rock)

- ❖ Review of Montana Board of Housing's FY2023 Financial Statements

### 11:00 – Policy Discussions (Greg Gould and Nathan Bilyeu, JMG)

- ❖ Ex Parte Communications
- ❖ Board Member Conflict of Interest Policy
- ❖ Board Member Attendance Policy

### 12:00 – To Go Boxed Lunch

- ❖ Turkey Club or Vegetable with roasted & fresh veggies, & hummus. Served on focaccia. (GF available upon request). Served with chips, cookies, and fruit.

### 1:00 – Multifamily Program Discussion (Jason Hanson, MF Program Manager)

- ❖ LIHTC 9% Allocations: Board Discretion / Staff Recommendations

### 2:30 – Break

- ❖ La Quercia Prosciutto, Brie cheese, Toasted Rustic Bread w/ Olive Oil, Chili & Citrus Marinated Olives, Cilantro Lime Pistachios & Pepitas

### 3:00 – Local Perspectives Housing Panel

- ❖ Housing Projects in Bozeman's Pipeline – Renata Munfrada, City of Bozeman
- ❖ Tax Increment Financing and Local Housing Impact – Brit Fontenot, City of Bozeman
- ❖ Boundary Development – Joe Walsh, Co-founded of Boundary Development
- ❖ Housing Impact Fund – Terry Cunningham, Mayor, City of Bozeman
- ❖ Housing Highlights and Q&A – Round Robin

### 5:30 – Dinner

- ❖ Montana Ale House | <https://www.montanaaleworks.com/>  
611 E Main St  
Bozeman, MT 59715

#### MISSION STATEMENT:

*Montana Housing works with community partners across the state, and together we ensure Montana Families have access to safe and affordable homes.*

# Basic Board Training

*Montana Board of Housing | April 8, 2024*

John J. Wagner, Partner



**KUTAKROCK**

[kutakrock.com](http://kutakrock.com)

# Nature of MBOH

- Unique quasi-governmental financial organization (“Board”)
  - Relationship to Department of Commerce
- Finances and administers affordable housing programs
- Self-supporting
  - No taxing power
  - Three primary operating revenue sources (program loan spread, investment revenue, fees)
  - Various federal/state exemptions/special rules
- Multiple “overseers”
  - State; Federal (IRS, HUD, SEC, CFPB)

# MBOH Challenges

- Financial Challenges
  - Rate/Capital Market changes/limited spread
  - Limited PAB Cap
  - Limited administration fees
- Technology; cyber (changes/costs; risks)
- Changing federal tax rules affecting housing
- Federal regulation (IRS, HUD, SEC, CFPB)
- Department of Commerce relationship

# Role of the Board

- Govern and monitor, macromanage not micromanage
  - Program Reports (SF, MF, LIHTC, Other)
  - Operation Reports (HR, IT, Risk Assessment)
  - Financial Reports (internal, external, GASB)
- Oversee/Develop programs
  - LIHTC QAP
  - Housing Trust Fund, RAM, etc.
- Set/review/revise policies
  - Program (mission, financial prudence, transparency, etc.)
  - Operational (management, ethics, travel, social media, continuity, investment, etc.)
- Plan
  - Short term
  - Long term

# Board Works as a Team

- Chair is leader
- No individual Board member has authority
  - Special expertise
  - Sector representative
- Committees?
- Executive Director is key part of Board team

# Board/Executive Director Relationship

## Executive Director:

- Is CEO
- Recommends/Board approves
- Has broad responsibilities
- Provides information requested by Board
- Interfaces with Department of Commerce

# Legal Duties

- Due Care
  - Ministerial (meet periodically, keep minutes, adopt budget, etc.)
  - Discretionary (set program parameters)
- Loyalty (no conflicts)
- Disclosure (SEC Anti-fraud – minimal duty)
- Liability – avoiding it

**MONTANA BOARD OF HOUSING  
BOARD MEMBER TRAINING  
APRIL 8, 2024**

Gregory G. Gould, Board Counsel  
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- I. **Nature of Montana Board of Housing** - Unique governmental financial organization created by Mont. Code Ann. § 2-15-1814:
  - a. Governor appoints members informed and experienced in housing, economics or finance.
    - i. Members not considered to have conflict of interest under state ethics law *merely* because member is stockholder, officer or employee of a lending institution that may participate in Board's programs.
  - b. Board elects presiding officer and other necessary officers.
  - c. Board is allocated to Department of Commerce (DOC) for administrative purposes:
    - i. Board exercises its quasi-judicial, quasi-legislative, licensing and policymaking functions *independent of, and without control or approval of, DOC*; submits budgetary requests through DOC; submits any required reports through DOC; DOC Director represents Board in communications with Governor.
    - ii. DOC handles clerical, administrative, financial, staffing, and publications and provides office space. Board does not hire, fire or do performance evaluations.

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- d. DOC provides all staff (state employees) and services Board determines necessary to carry out its programs and assesses Board for costs.
- e. Board is a “quasi-judicial board” under Mont. Code Ann. § 2-15-124:
  - i. At least 1 member must be attorney licensed to practice law in Montana;
  - ii. Members may be removed by Governor only for cause;
  - iii. “Quasi-judicial board” statute addresses member appointment, confirmation, vacancies and compensation;
  - iv. Majority of membership constitutes a quorum; a favorable vote of at least a *majority of the members in attendance* at a meeting at which a quorum is present is required to adopt any resolution, motion or other decision (revised HB 309, 2023 Legislature).

**II. Board’s purposes and powers.**

- a. Montana Housing Act - Mont. Code Ann. Title 90, Chapter 6, part 1.
- b. *Legislative Declaration* (90-6-102): The legislature finds and declares that there is a shortage in Montana of decent, safe, and sanitary housing which is within the financial capabilities of lower income persons and families. In order to alleviate the high cost of housing for these persons, the legislature believes that it is essential that additional public moneys be made available through the issuance of revenue bonds to assist both private enterprise and governmental agencies in meeting critical housing needs.
- c. *General Board Powers* (90-6-104, 108): lengthy list of powers includes:

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- i. rulemaking;
  - ii. making agreements with other governmental agencies, private entities, housing sponsors and lenders;
  - iii. acquiring, holding and disposing of property (*e.g.*, notes and mortgage interests, title at foreclosure);
  - iv. investment of funds subject to bondholder agreements;
  - v. loan servicing;
  - vi. collecting interest, fees and charges in connection with making and servicing of loans, bonds and other obligations (limited to costs of operation, administration and loss allowances);
  - vii. procuring mortgage loan insurance;
  - viii. operation of housing financing programs.
- d. *Issuance of Bonds and Notes (90-6-111–127)*: authorizes and establishes requirements for bond programs to provide funding for Board purposes. Bonds are issued in both single-family and multifamily contexts.
- e. *Single Family Program*
- i. *Single Family Bond Program*
  - ii. *Reverse Annuity Mortgage Loan Program* (Mont. Code Ann. Title 90, Chapter 6, part 5): “Many elderly citizens in Montana own their own homes and have little or no remaining mortgage debt. Many of these homeowners are persons of lower income who would benefit from an additional income source from the use of the equity in their homes. The legislature finds that reverse annuity mortgage loans would enable elderly homeowners to provide more

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substantially for their own in-home support and specialized care.” (90-6-502)

- iii. *Veterans’ Home Loan Mortgage Program* (Mont. Code Ann. Title 90, Chapter 6, part 6): Coal tax trust funds loaned to first-time homebuyer veterans.

f. *Multi-Family Programs*

- i. *Housing Credit Program*. Board designated by Governor’s 1987 Executive Order as Montana’s Housing Finance Agency for purposes of allocating federal low-income housing tax credits (Housing Credits) in Montana.

- ii. *Multifamily and Housing Montana Fund Loan Programs*.

- iii. *Coal Tax Trust Multifamily Loan Program* (Mont. Code Ann. § 90-6-137): Provides funding to fill gaps in financing multifamily rental housing projects that provide low-income and moderate-income housing; may not be used to replace other existing or available sources of funding.

- g. *Rulemaking authority* (90-6-102, 106 and other sections): includes authority to adopt all procedural and substantive rules necessary for administration of Housing Act and other Board statutes.

- h. *See* Board Member Resources page on Board website for statutes, rules and policies.

**III. Other Authorities.**

- a. In addition to the Governor’s appointment authority and the Legislature’s authority to create the Board and govern its programs through legislation, the Board and its programs are subject to other authority and oversight:

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- i. Federal laws, regulations and guidance, *e.g.*, through IRS and HUD in single family, Housing Credit and other programs
- ii. Financial standards and guidelines, *e.g.*, through rating agencies and capital markets.

**IV. Rulemaking** – Montana Administrative Procedure Act (MAPA) – Mont. Code Ann. Title 2, Chapter 4: rulemaking and contested cases.

- a. The Legislature has authorized the Board to develop and operate certain programs as discussed above and has granted rulemaking authority to the Board to carry out those programs.

**"Rule"** means each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency. The term includes the amendment or repeal of a prior rule. (2-4-102(11)(a))

- b. Every rule must be authorized by statute and the rule must be consistent with the statute implemented and other applicable law.
  - i. MAPA contains numerous additional substantive and procedural requirements for rulemaking.
- c. A Board requirement, standard, fee, etc., that is adopted as a rule according to MAPA requirements has the effect of law.
- d. On the other hand, a Board requirement, standard, fee, etc., that is not adopted as a rule according to MAPA requirements is not enforceable as law.
- e. Thus, it is important that certain requirements be adopted as MAPA rules to ensure enforceability and validity of determinations made on the basis of such requirements.

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*Example:* Housing Credit allocation award standards, such as mandatory threshold items. If an award is made based upon standards not adopted as rules under MAPA, the resulting awards may be subject to challenge, disrupting expectations and investment.

Rulemaking considerations and concerns may impact the content and procedures for adoption of certain items, such as the content and drafting of the Housing Credit Qualified Allocation Plan (QAP).

- f. Legal Counsel and Board staff will advise the Board when they believe rulemaking is required or warranted.

#### **V. Open Meeting Requirements**

- a. Montana Constitutional provisions:

**Right to Participate** - Article II, Section 8: Citizens are granted the right to participate in the operation of government agencies prior to final decision-making.

**Right to Know** - Article II, Section 9: Citizens are granted the right to examine documents and observe the deliberations of state agencies.

- b. Notice and Open Meeting Statutes (Mont. Code Ann. Title 2, Chapter 3).

- i. Notice: Advance notice of meeting must be adequate. No specific standard in statute, but DOC and Board post notice on website with agenda at least 72 hours before meeting.
- ii. Agenda: The agenda for a meeting must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is

## **BOARD MEMBERSHIP TRAINING**

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within the jurisdiction of the agency conducting the meeting. (2-3-103)

- However, the agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on that matter. (2-3-103)

iii. All Board meetings must be open to the public. (2-3-203(1))

- "Meeting" means the convening of a quorum of the constituent membership of the agency, whether in person or by electronic means, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power. (2-3-202)

iv. Exceptions:

*Individual Privacy:* The presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy, if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure. The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting must be open. (2-3-203(3))

*Litigation Strategy:* a meeting may be closed to discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental effect on the litigating position of the public agency. (2-3-203(4))

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c. Board Practice:

- i. Provide notice of meetings on website at least 72 hours before meeting with meeting agenda.
  - ii. No Board action on any issues unless specific notice of that matter is included on the agenda and public comment has been allowed on that matter. Any new items may be discussed but any action must be carried over to next meeting.
  - iii. The public should be provided the opportunity to obtain public documents and information before meeting so that participation will be meaningful.
- d. A decision made in violation of open meeting laws may be declared void and the person who brings the action may be awarded their costs expended and reasonable attorney fees. (2-3-213)
- e. Board staff will take care of notice and agenda for scheduled meetings, so Board members need not worry about that.
- i. Concern is that Board member does not participate in an unnoticed meeting. Do not participate in unnoticed discussions of Board matters with a quorum of Board members present in person or electronically.
- f. Discussion: Does “reply all” to email with all Board members copied constitute an open public meeting in violation of the statute?

**VI. Confidential Information**

- a. Right to Know/Public Disclosure Laws

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- b. What Information is Protected from Disclosure?
  - (i) *Individual Privacy*: personal financial and other information
  - (ii) *Trade Secrets*. Information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that: (A) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Title 30, Chapter 14, part 4.
- c. If you are asked for Board-related documents or information containing information of individuals or companies, ask for guidance before disclosing.
- d. Be aware that Board member communications (e.g., emails, texts) involving or related to Board matters are public records, so they should be preserved and may be subject to disclosure.

**VII. Board Member (Non) Liability.**

- a. Personal liability: there is a very low risk of personal liability, unless the member is grossly negligent, knowingly violates the law, commits fraud, acts beyond the Board member's role or some other egregious form of conduct.
- b. Immunity, defense and indemnification. (2-9-305)

Montana law provides certain immunities from suit and liability, and provides you with a defense and indemnification of claims

## **BOARD MEMBERSHIP TRAINING**

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so long as you have acted within the course and scope of your Board role.

Exceptions: fraud, malice, oppression, acts outside course and scope, criminal acts, settlement of a claim with the State's consent, failure to cooperate in defense of a claim.

c. Common sense suggestions to avoid liability:

- Attend training and ask for guidance when needed;
- Be informed - prepare for and attend meetings;
- Exercise care and independent judgment in conducting Board activities;
- Protect confidential information;
- Disclose *ex parte* communications/conflicts and observe ethics rules;
- Follow Board policies;
- Act in the best interests of the Board;
- Act honestly and in good faith; and
- Stay in your lane – act within role and authority of Board member.

**VIII. Ethics Rules: Code of Ethics/Standards of Conduct – Mont. Code Ann. Title 2, Chapter 2.**

***See separate materials and discussion regarding:***

1. *MBOH Ex Parte Communications Policy*
2. *MBOH Conflict of Interest Policy and Disclosure.*
3. *MBOH Board Attendance Policy.*

# Interpreting HFA/MBOH Financials

*Montana Board of Housing | April, 2024*

John J. Wagner, Partner



**KUTAKROCK**

[kutakrock.com](http://kutakrock.com)

# Basic SF Bond Structure

## Part 1 – Mortgage Supported Bonds

- Annual bond principal payments = annual mortgage scheduled payments
- Annual mortgage scheduled payments pay annual bond interest payments; excess mortgage interest pays HFA program costs (maximum permitted excess/spread is 1.125%);
- Mortgage prepayments used to redeem a like amount of bonds (can also be used to make new loans in first 10 years)

# Basic SF Bond Structure

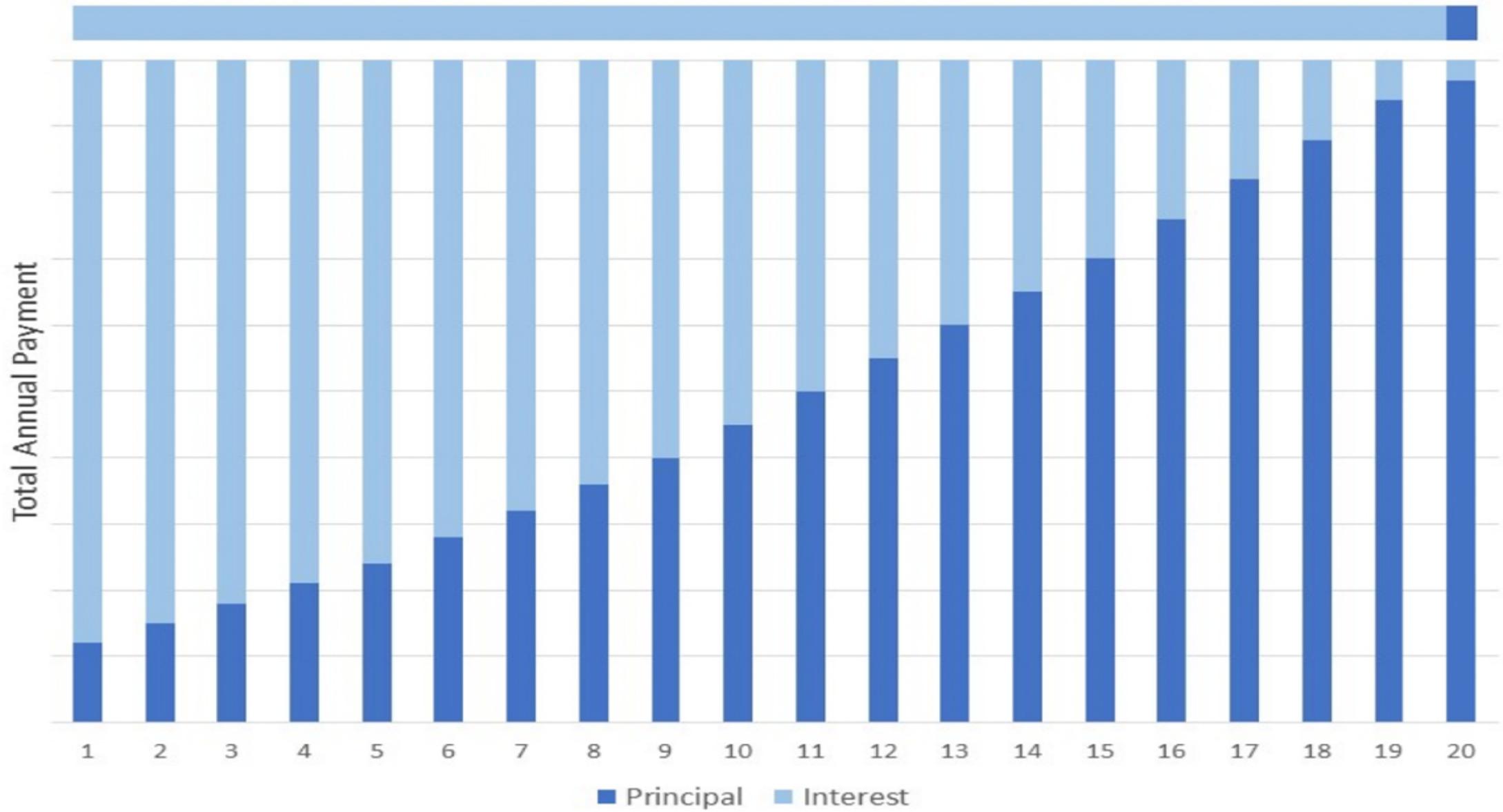
## Part 2 – Reserve Fund Bonds

- Bonds which fund reserve fund = 30-year term bonds; usually interest only until maturity
- Reserve fund moneys invested in 30-year Treasury; interest on Treasury pays bond interest and at maturity pays bond principal (Treasury interest in excess of mortgage revenue bonds yield must be paid/“rebated” to U.S. Treasury)

# Basic SF Bond Structure

## Bottom Line –

- Single Family Bonds are effectively pass-throughs of the underlying mortgage loan payments and reserve fund investment payments.
- The mortgage loans and reserve fund investments are held to maturity; not sold or traded.



# MBOH Audited Financials

- Snapshot – not a forecast
- Artificial reporting methodology (GASB dictates)
- Some terms not intuitive
- Financials include:
  - Management’s Discussion and Analysis
  - Auditor’s Report
  - Balance Sheets and Income Statements
  - Footnotes
  - Supplementary Information – Indenture specific

# Definitions – Balance Sheet/Income Statement

- “Current” – generally due/payable within the next year
- “Noncurrent” – anything not “current”; aka “non-operational”
- “Restricted” – restricted as to use by financial covenants (legal or otherwise)
- “Investments” – marketable securities (e.g., Treasuries, GNMMAs); not loans
- “Deferred Costs” – prepaid costs
- “Deferred Outflow of Resources” – assets to be “used” in future periods (e.g., prepaid items)
- “Deferred Inflow of Resources” – assets of a future period received early (e.g., advance collections or deferred revenue)

# Particular GAAP Rules

## Balance Sheet (Net Position)

- Mortgage Loans – valued at outstanding principal, regardless of interest rate or maturity
  - DPA Loans, RAM loans
- Investments – valued at “market/fair value”
  - GNMA mortgage loans treated as investments
  - Even if investments held to maturity
- Operating Revenues/Expenses
  - Investment market/fair value changes flow through “operating revenue”
- Rules that don’t affect MBOH –
  - Program grants treated as “Revenue”
  - Interest rate hedges/swaps also subject to “fair value” marked-to-market rules

# Balance Sheet/NET Position

<b>STATEMENT OF NET POSITION</b>	
<b>FOR THE YEAR ENDED JUNE 30, 2023</b>	
<b>ASSETS</b>	
Current Assets	
Cash and Cash Equivalents	\$ 90,110,845
Investments	7,437,845
Mortgage Loans Receivable, Net	16,917,914
Servicing Related Advances	976,510
Accounts Receivable	7,517
Interest Receivable	4,164,078
Prepaid Expense	230,471
Total Current Assets	<u>119,845,180</u>
Non-current Assets	
Investments	20,629,880
Mortgage Loans Receivable, Net	492,316,650
Mortgage Backed Securities	232,694
Purchase of Mortgage Servicing Rights	2,253,089
Intangible Right-To-Use Asset, Net	2,347,663
Total Non-current Assets	<u>517,779,976</u>
<b>TOTAL ASSETS</b>	<u><b>637,625,156</b></u>
<b>DEFERRED OUTFLOW OF RESOURCES</b>	
Deferred Refunding Costs	55,570
Deferred OPEB Outflows	267,185
Deferred Pension Outflow	415,293
<b>TOTAL DEFERRED OUTFLOWS</b>	<u><b>738,048</b></u>
<b>LIABILITIES</b>	
Current Liabilities	
Accounts Payable	1,648,548
Funds Held For Others	6,341,541
Accrued Interest - Bonds Payable	1,241,065
Bonds Payable, Net	16,725,000
Arbitrage Rebate Payable to U.S. Treasury Department	46,664
Accrued Compensated Absences	165,364
Lease Payable - Current	105,368
Total Current Liabilities	<u>26,273,550</u>
Non-current Liabilities	
Bonds Payable, Net	442,184,811
Arbitrage Rebate Payable to U.S. Treasury Department	942,807
Accrued Compensated Absences	205,703
Net Pension Liability	2,113,757
Other Postemployment Benefits	82,204
Leases payable - non current	2,319,090
Total Non-current Liabilities	<u>447,848,372</u>
<b>TOTAL LIABILITIES</b>	<u><b>474,121,922</b></u>
<b>DEFERRED INFLOW OF RESOURCES</b>	
Deferred OPEB Inflow	340,910
Deferred Pension Inflow	154,746
<b>TOTAL DEFERRED INFLOWS</b>	<u><b>495,656</b></u>
<b>NET POSITION</b>	
Net Investment in Capital Assets	(76,795)
Restricted for Bondholders:	
Single Family Programs	133,155,322
Various Recycled Mortgage Setaside Programs	3,323,620
Multifamily Programs	14,955,099
Reverse Annuity Program	8,741,009
Restricted For Affordable Revolving Loan Program	3,647,371
<b>TOTAL NET POSITION</b>	<u><b>\$ 163,745,626</b></u>

# Statement of Revenues, Expenses and Changes in Net Position

## STATEMENT OF REVENUES, EXPENSES, AND CHANGES IN NET POSITION FOR THE YEAR ENDED JUNE 30, 2023

<b>OPERATING REVENUES</b>	
Interest Income - Mortgage Loans	\$ 17,774,967
Interest Income - Investments	5,188,332
Net Increase (Decrease) in Fair Value of Investments	(1,419,206)
Fee Income	2,682,881
Other Income	12,894
Total Operating Revenues	<u>24,239,868</u>
<b>OPERATING EXPENSES</b>	
Interest on Bonds	13,490,152
Servicer Fees	658,484
Contracted Services	778,538
Amortization of Refunding Costs	44,281
Bond Issuance Costs	525,041
General and Administrative	4,318,154
Arbitrage Rebate Expense	501,202
Pension Expense	362,291
Other Post-Employment Benefits	23,010
Total Operating Expenses	<u>20,701,153</u>
Operating Income (Loss)	3,538,715
<b>NONOPERATING REVENUES (EXPENSES)</b>	
Pensions - Nonemployer Contribution	62,954
Nonoperating Income (Loss)	<u>62,954</u>
Income (Loss) Before Transfers	3,601,669
Increase (Decrease) in Net Position	<u>3,601,669</u>
Net Position, July 1 - as previously reported	160,132,629
Adjustments to Beginning Net Position (Note 19)	11,328
Net Position, July 1 as restated	<u>160,143,957</u>
Net Position, End of Year	<u>\$ 163,745,626</u>

The accompanying notes to the financial statements are an integral part of this statement.

Year	FV Increase/Decrease	Real Net Operating Revenue	Reported Net Operating Revenue
2022	\$ (3,104,219)	\$ 2,727,495	\$ (376,724)
2021	(1,708,027)	1,280,324	(427,703)
2020	1,593,106	804,624	2,397,738

# MBOH Single Family Program – Bottom Line

1. Cash Flow is key – especially for bond issues and ratings
2. Fair value/market value of Investments is not particularly important
3. Some mortgage loans are ignored for cash flow purposes
4. GNMA'd mortgages will further distort future MBOH balance sheets and income statements due to fair value/market value rule

Montana Board of Housing  
Ex Parte Communication Policy

In instances where the Board of Housing acts as a quasi-judicial body, its members should refrain from ex parte contact with parties who will be appearing before it or their representatives.

Additionally, any ex parte communication made where a quorum of the Board is present, outside of a hearing scheduled for the purpose of entertaining the issue before it, would violate Montana's open meeting requirements and the right of public participation under Article II, section 8 of the Montana Constitution and § 2-3-203, MCA. A quorum of the Board is defined as a majority of the membership § 2-15-124(8), MCA.

The policy when the Board is sitting as a quasi-judicial body is:

- Not to receive any evidence, individually, or collectively, except as a part of the public record at a publicly noticed hearing scheduled for that purpose;
- If a member is not able to avoid receipt of information or contact with parties outside of a public hearing the remedial action in that instance is for the Board member to disclose at the public hearing the full content of the information received.
- Avoidance of ex parte communications is preferred over relying on the public disclosure remedy because an incomplete or inaccurate conveyance of the ex parte contact, even if inadvertent, may bias the outcome and subject the Board action to challenge.

All information an applicant wants distributed to board members should be provided to staff who will disburse consistently to all members.

**MONTANA BOARD OF HOUSING  
BOARD MEMBER TRAINING**

**CONFLICT OF INTEREST RULES &  
PROPOSED MBOH POLICY**

**APRIL 8, 2024**

Gregory G. Gould, Board Counsel  
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**Board Membership – Background Principles**

A few important points that may affect conflict of interest issues:

1. Governor appoints members informed and experienced in housing, economics or finance.

Members are not considered to have conflict of interest under state ethics law *merely* because member is stockholder, officer or employee of a lending institution that may participate in Board's programs.

2. The Board is a “quasi-judicial board”:

A majority of Board membership constitutes a quorum; a favorable vote of at least a majority of *all Board members* is required to adopt any resolution, motion or other decision.

**Ethics Rules: Code of Ethics/Standards of Conduct**

# BOARD MEMBERSHIP TRAINING

## APRIL 8, 2024

1. Mont. Code Ann. Title 2, Chapter 2 – Code of Conduct for Public Officers - conflict of interest rules are one part of the ethical conduct rules for public officers.

2. The rules are intended to prohibit conflict between **public duty** and **private interest**:

**Public Duty:** The holding of public office or employment is a public trust, created by the confidence that the electorate reposes in the integrity of judicial officers, public officers, legislators, and public employees. **A public officer shall carry out the individual's duties for the benefit of the people of the state.**

**Private Interest:** an interest held by an individual include:

- (a) an ownership interest in a business;
- (b) a creditor interest in an insolvent business;
- (c) an employment or prospective employment for which negotiations have begun;
- (d) an ownership interest in real property;
- (e) a loan or other debtor interest; or
- (f) a directorship or officership in a business.

3. Potential conflicts of interest that could arise for MBOH members include:

a. *Acceptance of Gifts:* Public officer may not accept a gift of substantial value or a substantial economic benefit tantamount to a gift:

(i) that would tend improperly to influence a reasonable person in the person's position to depart from the faithful and impartial discharge of the person's public duties; or

(ii) that the person knows or that a reasonable person in that position should know under the circumstances is

## **BOARD MEMBERSHIP TRAINING APRIL 8, 2024**

primarily for the purpose of rewarding the person for official action taken.

"Gift of substantial value" means a gift with a value of \$100 or more for an individual (threshold increased to \$100 from \$50 in HB 412, 2023 Legislature).

An "economic benefit tantamount to a gift" includes without limitation a loan at a rate of interest substantially lower than the commercial rate then currently prevalent for similar loans and compensation received for private services rendered at a rate substantially exceeding the fair market value of the services. Campaign contributions reported as required by statute are not gifts or economic benefits tantamount to gifts.

*Exceptions:*

- Don't use gift - return within 30 days after receipt;
- Food and beverages consumed on occasion when participation in charitable, civic or community event bears relationship to office or member attends in an official capacity;
- Award presented publicly in recognition of public service;
- Educational material related directly to public service;
- Educational activity that (i) does not place or appear to place the recipient under obligation; (ii) clearly serves the public good; and (iii) is not lavish or extravagant.

b. *Confidential Information:* Disclosure or use of confidential information acquired in the course of official duties in order to further substantially the individual's personal economic interests.

c. *Overlapping Employment Compensation:* a public officer, legislator, or public employee may not receive salaries from two separate public employment positions that overlap for the hours being compensated, unless:

## BOARD MEMBERSHIP TRAINING APRIL 8, 2024

(i) the public officer, legislator, or public employee reimburses the public entity from which the employee is absent for the salary paid for performing the function from which the officer, legislator, or employee is absent; or

(ii) the public officer's, legislator's, or public employee's salary from one employer is reduced by the amount of salary received from the other public employer in order to avoid duplicate compensation for the overlapping hours.

In order to determine compliance a public officer shall disclose the amounts received from the two separate public employment positions to the commissioner of political practices.

*Exception:* a public officer may receive income from the use of accrued leave or compensatory time during the period of overlapping employment.

d. *Use of Public Resources.* A public officer may not use public time, facilities, equipment, state letterhead, supplies, personnel, or funds for the officer's private business purposes.

e. *Advocacy for Compensation.* A public officer may not assist any person for a fee or other compensation in obtaining a contract, claim, license, or other economic benefit from the officer's agency.

f. *Related Parties.* A public officer may not **perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which the officer either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent.**

g. *Competing Parties.* A public officer or public employee may not perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when the

## **BOARD MEMBERSHIP TRAINING**

### **APRIL 8, 2024**

officer or employee has a substantial personal interest in a competing firm or undertaking.

h. *Acquisition of Interest.* A public officer may not acquire an interest in any business or undertaking that the officer has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by the officer's agency.

*See also* attached discussion regarding Board member ownership of MBOH bonds.

#### 4. Addressing Conflicts of Interest.

a. If the member, a family member, a member business interest or an organization in which the member has a role would realize a substantial economic benefit from a proposed Board action, the member may have a conflict of interest.

b. Consult with Executive Director and/or Board Counsel for guidance.

c. Members are not considered to have conflict of interest under state ethics law *merely* because member is stockholder, officer or employee of a lending institution that may participate in Board's programs, but there may be more facts that indicate a conflict.

d. If there is a conflict or an appearance of a conflict, the member must *at a minimum* disclose the specific conflict on the record at a public meeting. Generally, the member must also recuse themselves from participation in and voting on the specific matter.

e. Recusal may not be required if the member's participation is necessary to establish a quorum or administer a statute and if the conflict is disclosed.

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5. Annual Conflict Disclosure. MBOH is adopting and requiring an annual Conflict of Interest Disclosure. See attached.
6. Enforcement of Ethics Rules.
  - a. Complaint to COPP.
  - b. Investigation.
  - c. Informal Contested Case hearing – open to public.
  - d. COPP decision.
  - e. Judicial review.
  - f. Penalties. Administrative penalty of not less than \$50 or more than \$1,000 (but \$500 to \$10, 000 for improper use of public resources for PSA with officer's name/picture/voice).

Avoidance of Board action. A Board action taken in violation of these rules could potentially be voided in Court action.

A Board member potentially could incur personal liability for taking official action without disclosing a conflict.

**BOARD MEMBERSHIP TRAINING  
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**Standards of Conduct – Additional Guidance**

- MBOH Conflict of Interest Policy (Proposed)
- MBOH Annual Conflict of Interest Disclosure Statement
- State Boards Orientation Handbook
- Employee Guide to Standards of Conduct\*
- State Ethics Policy\*
- COPP Guidance on Gifts
- DOA Fact Sheet on Political Activity (relates to use of public resources)
- Previous Board counsel opinions

*\*Written for State employees but most provisions apply.*

**BOARD MEMBERSHIP TRAINING**  
**APRIL 8, 2024**

**PURCHASE OR OWNERSHIP OF MBOH BONDS**  
**BY BOARD MEMBER**

**Question:** Is the purchase or ownership of MBOH bonds by a Board member permitted under applicable conflict of interest rules?

**Answer:** Board members may purchase and hold MBOH bonds. However, a member should purchase MBOH bonds only if they intend to hold the bonds to maturity and should refrain from buying and selling MBOH bonds on a regular basis. Board members holding or intending to purchase MBOH bonds should not ask or otherwise communicate with staff or Board advisors regarding MBOH bonds that will be redeemed. A Board member holding MBOH bonds may be required to disclose such ownership and recuse themselves from participating in Board action where the Board action would directly and substantially benefit the member economically.

**Assumptions**

MBOH routinely and frequently issues bonds pursuant to its statutory authority to finance the purchase of single family mortgage loans.

- The Board has engaged or entered into relationships with various professional advisors and firms with respect to its bond issues and related processes, including bond legal counsel, financial advisors and bond underwriters.
- Bond issues are structured and bond resolutions and related documents are prepared and recommended by and based upon the design and advice of these professionals.

## **BOARD MEMBERSHIP TRAINING**

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- Generally, the Board authorizes each bond issue by approval of a resolution setting forth the general terms of the bonds.
- Provisions relating to redemption of existing bonds may be included on the recommendation of professional advisors, but the Board and its members generally do not discuss, deliberate or take specific action on such details except through global approval of the bond resolution.

The Board does not set bond sale prices by Board action.

- MBOH bonds are sold to bond underwriters pursuant to bond purchase contracts which set the bond purchase price after a separate underwriter pricing process.
- The Board itself does not sell the bonds to individual investors; the bonds are sold by the underwriters to individuals or other investors.

A Board member purchasing MBOH bonds in the primary market would not receive any discount or special pricing.

- A Board member would purchase and hold MBOH bonds on the same arms-length terms generally available to members of the public.
- Board members are not provided with any non-public information that would create any advantage in selecting bonds for purchase.

### **Analysis**

February 22, 2000 opinion (attached) concluded that there is no conflict of interest where a member of the Board is a stockholder, officer or employee of a financial institution that purchases bonds issued by the Board.

## **BOARD MEMBERSHIP TRAINING**

### **APRIL 8, 2024**

- Opinion relied upon the language in Mont. Code Ann. § 2-15-1814 stating that a Board member does not have a conflict of interest merely because the Board member is a stockholder, officer or employee of a lending institution that participates in the Board’s programs.
- However, that provision from 2-15-1814 would not apply to a Board member who directly purchases and holds MBOH bonds.

The standards of conduct potentially applicable include the following:

Section 2-2-105(2) provides that “... a public officer or public employee may not acquire an interest in any business or undertaking that the officer or employee has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by the officer's or employee's agency.

Section 2-2-121(2)(e) provides that a public officer or employee “may not ... perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which the officer or employee either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent...”

Section 2-2-201(1) provides that a state officer or employee “may not be interested in any contract made by them in their official capacity or by any body, agency, or board of which they are members or employees if they are directly involved with the contract.”

- An MBOH bond could be considered a contract made by the Board, but Board members do not take any actions that constitute direct involvement with the bonds as defined in the statute.

## **BOARD MEMBERSHIP TRAINING APRIL 8, 2024**

- Section 2-2-201(2)(c) provides that the phrase “directly involved” means “the person directly monitors a contract, extends or amends a contract, audits a contractor, is responsible for conducting the procurement or for evaluating proposals or vendor responsibility, or renders legal advice concerning the contract.” (The statute was amended in 2001, after the opinion referenced above, to limit the prohibition to cases where the public officer is “directly involved in the contract.” Sec. 1, Ch. 181, L. 2001.)

When a Board member purchases MBOH bonds, the ownership of the bonds is subject to the terms already established in the bond resolution and documents.

The member’s interest in the bonds generally would not be “directly and substantially affected to its economic benefit” by official action to be taken later by the Board or Board member, and the Board generally would not have occasion to take official action that directly and substantially affects to its economic benefit previously issued bonds owned by a Board member.

In my opinion, Montana’s statutory standards of conduct do not prohibit a Board member from purchasing or owning MBOH bonds or from taking official action on bond resolutions simply because they have purchased and own MBOH bonds from one or more previous MBOH bond issues.

However:

- While Board members generally are not prohibited from purchasing and owning MBOH bonds or acting upon bond resolutions because of such purchase or ownership, issues could potentially come before the Board that would present a conflict of interest precluding such a member from participating.

## **BOARD MEMBERSHIP TRAINING**

### **APRIL 8, 2024**

- For example, a member owning certain MBOH bonds should not participate in a Board action selecting bonds to be redeemed from among various choices that include the bonds held by the member, because the action may directly and substantially benefit the member economically with respect to previously issued and purchased bonds.
- In such a case, the member would be required to disclose the conflict and would be advised to recuse themselves from voting unless their participation were required to allow the Board to act.

Federal securities laws prohibit a bondholder from taking advantage of inside information if they buy or sell a bond on the secondary market.

- Board members are presumed to have all of the knowledge of the agency itself, so if there is any question later about a Board member selling their bond because the agency has knowledge of adverse information, the Board member may be liable for damages to the secondary market purchaser.
- Board members generally have no knowledge of which bonds will be called and to minimize insider trading liability risk, Board members should not ask staff or the Board's advisors which bonds will be redeemed.
- To further minimize insider trading liability risk, Board members should only buy MBOH bonds if they intend to hold the bonds to maturity and should not buy and sell the bonds on a regular basis.

## Montana Board of Housing (MBOH) Conflict of Interest Policy

### Purpose

This policy is intended to protect against conflicts between the public duties and the private interests of Board Members by ensuring that Board Members: (1) avoid conflicts of interest and any potential harm to the integrity of the Board, its programs, interests or actions; (2) disclose any actual or apparent conflicts of interest; and (3) recuse themselves from participation in any Board actions in which a Member has an actual or apparent conflict of interest unless otherwise provided by law.

### Policy

The Board expects its members to respect their public office and duties and act in an ethical manner in accordance with the rules applicable to Montana public officers. Members must use sound judgment and awareness regarding the discharge of their public duties to the citizens of Montana, avoiding any activities that compromise the public trust.

Conflicts of interest subject to this policy and any required disclosure and recusal include both actual and apparent conflicts of interest. "Apparent" conflicts of interest are circumstances that may not constitute an actual conflict of interest but that would lead a reasonable, average person with knowledge of all relevant facts to think that a conflict of interest exists.

Board Members will acknowledge and accept the responsibility to follow all applicable state laws and policies regarding ethical conduct of public officials and Board Members, including without limitation the following:

Board Members will comply with the terms of this policy, including completion, execution and submission of annual disclosure forms, disclosure of any actual or apparent conflict of interest with respect to any matter on which the Board may take official action, and recusal from participation any Board consideration or action on any such matter, unless otherwise allowed by law and express approval of the Board.

Board members may purchase and hold MBOH bonds only if: (i) the Member intends to hold the bonds to maturity and refrains from buying and selling MBOH bonds on a regular basis; (ii) the Member does not inquire of or otherwise communicate with staff or Board advisors regarding MBOH bonds that will be redeemed; and (iii) the Member discloses such ownership and recuses themselves from participating in Board action relating to MBOH bonds where the Board action would directly and substantially benefit the Member economically.

Board Members will not:

1. Use public time, facilities, equipment, supplies, personnel, or funds for private business purposes.

2. Engage in any substantial financial transaction for the Member's private business purposes with a person the Member inspects or supervises in the course of their official duties.
3. Disclose or use confidential information acquired in the course of official duties for the Member's personal economic interests or otherwise except as allowed by law and Board policy.
4. Perform any official act that will directly and substantially affect the economic benefit of a business or other undertaking in which the Member has a substantial financial interest or is engaged as counsel, consultant, representative, or agent.
5. Acquire an interest in any business or undertaking the Member has reason to believe may be directly and substantially affected to its economic benefit by actions taken by the Board.
6. Perform any official action which directly and substantially harms a business when the Member has a substantial personal interest in a competing business.
7. Accept gifts or receive duplicate compensation from overlapping public positions in violation of applicable law or policies.
8. Take any official action related to the Board that would result in the receipt of a substantial financial benefit to the Member or the Member's family, relatives, related parties, property or business or employment interests.

### **Process**

The Board will provide and its Members must participate in at least annual training regarding ethical conduct of public officials, including conflict of interest rules.

Board Members must complete, execute and submit an annual conflict of interest disclosure in the form required by the Board.

Board Members must disclose promptly, once a potential conflict becomes known to them, any actual or apparent conflict of interest with respect to any matter on which the Board may take official action. This includes, but is not limited to, Board action involving the award of contracts, loans or tax credits. Disclosure must be made on the record in a public meeting of the Board prior to the Board's consideration of the matter.

- Members are not considered to have conflict of interest *merely* because the Member is stockholder, officer or employee of a lending institution that may participate in Board's programs, but there may be more facts that indicate a conflict.

If a Member has any doubt or question regarding the existence of any actual or apparent conflict of interest, the Member will contact the Board's Executive Director or counsel to discuss and obtain guidance regarding whether the circumstances constitute an actual or apparent conflict of interest and any disclosure or recusal obligations with respect to such matter.

Board Members must recuse themselves from participation in Board consideration, voting and other action on any such matter, unless otherwise allowed by law and express approval of the Board.



Recusal means a Board Member's voluntary removal of themselves completely from the matter, including comment or other participation in deliberations or asking or directing any other person to comment or participate on their behalf.

- Recusal may not be required by law in some circumstances if the Member's participation is necessary to establish a quorum or administer a statute and if the conflict is disclosed. However, such participation will be allowed only upon the determination of the Board in consultation with legal counsel.

The Board will provide a copy of this policy to each Board Member and each Member must sign and return the policy, acknowledging receipt of the policy and that the Member has read, understands, and will comply with the policy.

**Acknowledgement**

The undersigned Board Member hereby acknowledges receipt of a copy of this policy and that the Member has read, understands, and will comply with the policy.

DATED: \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_

Print Board Member Name: \_\_\_\_\_

## Montana Board of Housing (MBOH) Member's Annual Conflict of Interest Disclosure Statement

The Montana Board of Housing expects and trusts its members to respect their public office and to act in an ethical manner in accordance with the rules applicable to Montana public officers. Members must use sound judgment and awareness regarding the discharge of their public duties to the citizens of Montana, avoiding any activities that compromise the public trust. All members must report any conflict of interest annually or as soon as a potential conflict becomes known to them.

Members must disclose and unless determined otherwise by the Board must not participate in Board action involving a direct benefit to the member or any person with whom the member has a personal or family relationship. This includes, but is not limited to, Board action involving the award of contracts, loans or tax credits.

The undersigned Member hereby acknowledges, represents and states:

1. The Member acknowledges and accepts the responsibility to follow all state laws and applicable policies regarding ethical conduct of public officials and MBOH members.
2. As a member of the Montana Board of Housing, I may not:
  - Use public time, facilities, equipment, supplies, personnel, or funds for private business purposes.
  - Engage in a substantial financial transaction for my private business purposes with a person whom I inspect or supervise in the course of my official duties.
  - Disclose or use confidential information acquired in the course of my official duties for my personal economic interests.
  - Perform an official act that will directly and substantially affect the economic benefit of a business or other undertaking in which I have a substantial financial interest or am engaged as counsel, consultant, representative, or agent.
  - Acquire an interest in any business or undertaking I have reason to believe may be directly and substantially affected to its economic benefit by actions taken by the Board.
  - Perform an official action which directly and substantially harms a business when I have a substantial personal interest in a competing business.
  - Accept gifts, use or disclose confidential information, or receive duplicate compensation of overlapping public positions in violation of applicable law or policies.
  - Take any official action related to MBOH that would result in the receipt of a substantial financial benefit to myself or my family, relatives, related parties, property or business or employment interests.

3. I must disclose to the Board in a public meeting and, except as otherwise approved by the Board, recuse myself from participation and/or voting in any Board action involving a possible conflict of interest.

4. I have the following personal or family relationships within MBOH or the Department of Commerce:

For each person, state the person's name and job title and the nature of relationship with the person. If none, state "NONE."

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5. I have the following relationships (including personal, business, ownership, governance or other) with the following persons or entities participating or potentially participating in or providing services to the Board in connection with Board programs, contracts, loans, tax credit awards or other Board programs or benefits:

For each person or entity, state the name of the person or entity, describe the nature of relationship (e.g., family relationship, ownership interest in business, parent/subsidiary of owned business, contractual relationship with entity, director or other governance role in entity, etc.) and identify the related MBOH program. If none, state "NONE."

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6. I have read and understand the Code of Ethics and Standards of Conduct found in §§ 2-2-101 through 2-2-304, MCA.

Submitted for Year: 20\_\_

DATED: \_\_\_\_\_, 20\_\_

Print Board Member Name: \_\_\_\_\_

## Montana Board of Housing (MBOH) Board Meeting Attendance Policy

The Montana Board of Housing (Board) was established by the Housing Act of 1975 to address a shortage of decent, safe, and sanitary housing for lower income persons and families by assisting private and governmental entities in financing critical housing needs in the State. The Board comprises Members informed and experienced in housing, economics or finance from diverse areas of the State.

### Purpose

This policy is intended to ensure the Board functions as effectively as possible by encouraging Member contributions of their expertise and judgment through regular attendance and participation in Board meetings.

### Policy

Board Members are expected to attend all scheduled Board meetings and training sessions, including attendance in person where a meeting is so designated. It is recognized that Members may be unable to attend some meetings due to conflicts with prior-scheduled commitments or unforeseen circumstances. Members are expected to notify the Board Chair as far in advance as possible if they will be unable to attend. Members may not have more than one (1) excused and one (1) unexcused absence from meetings or training sessions within any calendar year.

### Process

Board meetings will be scheduled and Members notified of scheduled meetings typically 6 to 12 months in advance. Special Board meetings may be called as necessary with as much advance notice as possible. Meetings may be virtual or in person, but typically 3 or more in-person meetings/training sessions will be conducted annually. In-person meetings may be held in Helena or periodically in other locations within the State.

Board staff will notify Members of scheduled meeting dates and times by meeting announcements and email. Members are expected to notify the Board Chair promptly and as far in advance as possible of scheduled meetings that conflict with prior commitments. Otherwise, Members are expected to defend scheduled meeting times in their personal calendars and to avoid scheduling other meetings or activities during that time.

Members occasionally are unable to attend due to circumstances beyond their control, such as illness, jury duty, or previously scheduled travel. Such instances will be considered "excused" absences. "Silent failure" (*i.e.*, missing a meeting without notification to the Board Chair) is unacceptable and will be unexcused absent good cause. Members are expected to provide maximum advance notice to the Board Chair if unable to attend and the reason for the absence. Virtual participation at scheduled in-person meetings is acceptable in case of illness or emergency.



A Member unable to attend regularly should consider resigning from the Board. If a Member has more than one (1) excused and one (1) unexcused absence within any calendar year, the Board Chair will contact the Member to discuss the Member's attendance and seek a commitment of the Member to regular attendance going forward. If the Member cannot or does not commit to regular attendance, the Board Chair may ask the Member to resign.

If noncompliance continues despite the Member's commitment to regular attendance, the Board Chair will discuss the issue with the Board at its next meeting. The Member will be allowed to address the attendance issue. The Board will decide what actions, if any, to take regarding the Member's attendance. The Board may authorize the Board Chair to contact the Governor's office to request removal of the Member for cause.

New Board Members will be provided with a copy of this policy and will sign to confirm they have read, understand, and will comply with the policy.

This policy is adopted this \_\_\_ day of \_\_\_\_\_, 2024.

**Acknowledgement**

The undersigned Board Member hereby acknowledges receipt of a copy of this policy and that the Member has read, understands and will comply with the policy.

DATED: \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
Print Board Member Name: \_\_\_\_\_

**MEMORANDUM TO BOARD  
REGARDING BOARD MEMBER IMMUNITY AND INDEMNIFICATION**

By Greg Gould, Board Counsel 

**October 19, 2018**

Board Chairman Pat Melby has asked that I provide Board members with this memorandum addressing Board member immunity from liability and indemnification of Board members by the State regarding any claim brought against a Board member. This memorandum is intended solely to provide information regarding the legal protections available under current law, rather than to provide advice regarding any particular claim.

Although rare, lawsuits challenging actions by the Board can and have been brought in the past. I am aware of one case in which a Board member was sued in his individual and official capacities, although that lawsuit sought only declarative and injunctive relief regarding Board actions rather than any damages or other financial relief against the Board member personally. The suit was ultimately dismissed without any Board member liability.

Fortunately, Montana law provides robust protection for Board members from any potential individual liability for actions taken in the course of service as a Board member. Montana law provides a combination of immunity, defense and/or indemnification for such claims. The key protections are provided under Mont. Code Ann. § 2-9-305, the stated purpose of this which is to provide for the immunization, defense, and indemnification of public officers and employees civilly sued for their actions taken within the course and scope of their employment. Note that the State may not provide a defense or indemnification for a Board member if any of the exclusions of Mont. Code Ann. § 2-9-305(6) apply.

**Who is Covered?**

The protections of Mont. Code Ann. § 2-9-305 apply to Board members the same as to other State employees. For purposes of this section, a State “employee” includes an officer, employee, or servant of a state governmental entity, including elected or appointed officials, acting on behalf of the governmental entity in any official capacity whether with or without compensation. Mont. Code Ann. § 2-9-101(2)(a), (3) and (7). As appointed officials of the Montana Board of Housing, a state governmental entity, Board members are covered by this section. Mont. Code Ann. § 2-9-305(1).

### **What Claims Are Covered?**

Mont. Code Ann. § 2-9-305 applies broadly to noncriminal actions brought against a Board member for a negligent act, error, or omission, including alleged violations of civil rights pursuant to 42 U.S.C. 1983, or other actionable conduct of the employee committed while acting within the course and scope of the employee's office or employment. Mont. Code Ann. § 2-9-305(2).

### **What Steps Must a Board Member Take to Obtain Coverage?**

If a Board member is served with a summons and complaint in such an action, the Board member must give written notice requesting that a defense to the action be provided by the State.<sup>1</sup> The Board member must provide such notice to the legal officer or agency of the governmental entity defending the entity in legal actions of that type. Any Board member served with a lawsuit may contact the Board's Executive Director or legal counsel for assistance in providing such notice.

Note that the Board member could jeopardize the availability of defense and indemnification if the Board member fails or refuses to cooperate reasonably in the defense of the case or compromises or settles the claim without the consent of the State. *See also* discussion below regarding refusal by the State to provide a defense and regarding exclusions to the "coverage" described herein.

### **What Protections Apply?**

The protections provided under Mont. Code Ann. § 2-9-305 may include immunity from suit and from liability for damages, provision of a defense at the State's expense, and indemnification for any money judgments or legal expenses, including any attorney fees awarded to the claimant.

*Immunity.* A Board member may have immunity from suit or liability under Mont. Code Ann. § 2-9-305 or other law.<sup>2</sup> If the action is brought against the Board in addition to a Board member, the action and any damage award against the Board member will be barred if: (a) the State acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of the

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<sup>1</sup>Mont. Code Ann. § 2-9-305 assigns "coverage" decisions under the statute to the "governmental entity" that employees the State employee or official subject to a claim. Since the Board is allocated to the Department of Commerce for administrative purposes, such decisions regarding Board members likely would be made by the Department of Commerce and/or the State's Risk Management and Tort Defense Division, rather than by the Board itself. Therefore, I refer to the "State" rather than the Board in discussing these decisions.

<sup>2</sup>This memorandum discusses only the immunity provided under Mont. Code Ann. § 2-9-305. The existence and applicability of other potential immunity defenses are beyond the scope of this discussion.

Board member's office as a Board member; or (b) the claimant recovers against the Board for the same subject matter. Mont. Code Ann. § 2-9-305(5). Although a Board member may ultimately be found to have immunity from suit or liability for damages, such immunity may not prevent an action from proceeding against the Board member until a judicial determination has been made regarding the scope and course of employment, or until a recovery against the Board.

*Defense.* In any such action described above in which the Board member is a party defendant, the State must defend or pay for the defense of the action on behalf of the Board member, subject to the exclusions in subsection (6). Mont. Code Ann. § 2-9-305(2), (3). The State must offer a defense to the action on behalf of the Board member, which may consist of a defense provided directly by the State. The State must notify the employee, within 15 days after receipt of notice, whether a direct defense will be provided. If the State refuses or is unable to provide a direct defense, the Board member may retain other counsel and the State must pay all expenses relating to the retained defense and pay any judgment for damages entered in the action that may be otherwise payable under Mont. Code Ann. § 2-9-305.

*Indemnification.* The Board member must also be indemnified by the State for any money judgments or legal expenses, including attorney fees either incurred by the Board member or awarded to the claimant, or both, to which the Board member may be subject as a result of the suit. Mont. Code Ann. § 2-9-305(4).

### **What is Not Covered?**

The State may not defend or indemnify a Board member for any money judgments or legal expenses, including attorney fees, to which the Board member is subject as a result of a suit *if a judicial determination is made that:*

- (a) the conduct upon which the claim is based constitutes oppression, fraud, or malice or for any other reason does not arise out of the course and scope of the Board member's office;
- (b) the conduct of the Board member constitutes a criminal offense;
- (c) the Board member compromised or settled the claim without the consent of the State; or
- (d) the Board member failed or refused to cooperate reasonably in the defense of the case.

Mont. Code Ann. § 2-9-305(6) (emphasis added).

While the Board, Board staff and Board counsel seek to minimize legal exposure and claims, ultimately we cannot prevent potential claimants from bringing suit against the Board or Board members. In my opinion, however, it is unlikely a Board member would be denied a defense or subjected to personal liability so long as the Board member uses common sense, and acts in good faith in furtherance of the Board's interests, rather than the Board member's personal interests.

Areas of potential concern for liability or refusal of a defense might include: (i) refusing to consider or follow advice of Board counsel or staff that a proposed act is outside the scope or course of Board service or beyond the authority of the Board member; (ii) actions taken as a Board member solely to further the Board member's personal interests; (iii) taking actions as a Board member against parties for purposes of the Board member's or another person's competitive advantage or to harm or damage such party; (iv) taking an action as a Board member without any reasonable or legitimate basis; (v) knowingly taking action as a Board member based upon false or fraudulent grounds; or (vi) purporting to take official action as a Board member outside the normal course of Board meetings or staff advice and direction. This list is intended only to illustrate the concept and not as an exhaustive list of actions potentially leading to refusal of a defense or liability.

### **What if the State Refuses to Defend?**

Generally, the State must offer a defense on behalf of the Board member, either directly or by paying for counsel retained by the Board member. The State must notify the Board member, within 15 days after receipt of the Board member's notice of the suit, whether a direct defense will be provided. If the State refuses or is unable to provide a direct defense, the defendant Board member may retain other counsel and, except as provided in the foregoing section, the State must pay all expenses relating to the retained defense and pay any judgment for damages.

If a judicial determination has not been made regarding application of the exclusions provided in Mont. Code Ann. § 2-9-305(6), the State may determine whether those exclusions apply. However, if there is a dispute as to whether the exclusions apply, the State may clarify its obligation to the Board member by bringing a declaratory judgment or other legal action for a determination. The State would *not* have an obligation to provide the Board member with a defense in such an action to determine whether the exclusions apply. But the State would be obligated to provide a defense or assume the cost of the defense of the Board member (on the underlying claim) until and unless a final judgment is rendered in the State's declaratory or other action that the State did not have an obligation to defend the Board member.

## Conclusion

Montana law provides significant protections for Board members from any defense costs and potential individual liability for actions taken in the scope and course of service as a Board member. As discussed herein, a Board member that acts in good faith in furtherance of the Board's interests is unlikely to face personal liability or unreimbursed legal defense costs relating to such service. In the event a Board member is served with any lawsuit, the Board member should promptly notify the State as discussed above to assure the availability of such protections.

If you have any questions or wish to discuss these matters further, please let me know.

Additional Materials Available On Request

- 1 MBOH Board Members Summary of Legal Duties
- 2 2018 State Boards Orientation Handbook
- 3 2011 Employee Guide to Standards of Conduct in Montana State Government
- 4 2019 Montana Operations Manual Policy: State Ethics Policy
- 5 COPP Gift Ban Memo
- 6 2010 DOA Manager Fact Sheet: Political Activity
- 7 2-22-2000 Board Counsel Opinion: Standards of Conduct
- 8 7-6-2001 Board Counsel Opinion: Standards of Conduct
- 9 3-18-2008 Board Counsel Opinion: Conflict of Interest in Tax Credit Proceedings

**Timber Meadows Polson**

**Immanuel Lutheran Communities, CR Builders and MPEG- New Construction-24 Senior Units**

Substantial Changes from LOI to Full application: none

<b>Board Considerations</b>	<b>Staff Comments</b>
QCT, DDA or Discretionary Boost	Discretionary
Rural, Urban, Tribal	Rural
Income Levels Targeted	4 units at 30%; 14 units at 50%; 2 units at 60%; 4 units at mkt
Sustainable energy savings initiatives	Received max points for green building and energy conservation standards
Developer History/Past Performance:	Immanuel Lutheran / CR Builders - See 10 yr History sheet, no known compliance or development issues
Credits Per Unit/Credits Per Sq Ft	\$259,650 / \$313.06
Cost Per Unit/ Cost Per Sq Ft	
Frequency of award in that area	Last Award: Big Sky Apartments 1997- 36 units
Rental Subsidies	How many units have rental assistance
Outlying features from other projects	Income Averaging Set aside, Rents from 30% AMI to 80% AMI

**Staff Notes from Underwriting process:**

- Market value of land, \$340,000, is being donated to the development.
- Cost Per Unit exceeds Max, applied for Waiver
- Amenities include community room, storage areas
- 400 renter households that are employed in Big Sky have been displaced due to owner selling rental or converting to vacation rental
- 90 workforce apartments being planned in area, unsure if will be market rate or unrestricted
- Big Sky apartments other LIHTC has 95 names on wait list; Gallatin county has 1900 names on waitlist
- Bus stop into Bozeman .1 miles from units
- Utilities: tenant pays electric, internet, owner pays, water, sewer, trash
- Over past ten years Gallatin was the states fastest growing county by overall increase and percentage increase



Comertown Apartments  
Dooley MT  
Sheridan Developers

**Housing Credits  
Staff Notes and Comparative Ratings**

(High, Medium, Low)

QCT, DDA or Discretionary Boost

**Medium**

rating rationale: High-QCT/DDA; Med-Discretionary; Low-none  
project comments: Discretionary

Income Levels Targeted

**High**

rating rationale:  
4 units at 30%; 14 units at 50%; 2 units at 60%; 4 units  
project comments: at market. Nice distribution of targeting.

Project Efficiency

**High**

rating rationale:  
Credits Per Unit \$ 259,650  
Cost Per Unit \$ 301,000  
% of Soft Costs 35.9%  
project comments: none

Location Considerations

**High**

rating rationale:  
High growth area with expected need for additional  
project comments: units.

Geographic Distribution

**High**

rating rationale:  
project comments: No project in community for 10 years

Community Contributions

**Low**

rating rationale:  
project comments: Land leased at no cost on L-T lease.

Livability:

rating rationale:  
project comments: No lead base paint or other hazards.

**High**

Other Project Notes

Rental Subsidies: No project based rental units.  
Developer Performance: No past issues  
Substantial Changes: No substantial changes from LOI  
Project could be done at all 4% but would not be able  
Other: to target lower income units.