

**IN THE SUPREME COURT OF THE STATE OF  
MONTANA**

Supreme Court No. DA 23-0619

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SUSAN JOHNSON, DAVE  
JOHNSON, KATHY RICH, SUSAN  
HINKINS, RICHARD GILLETTE,  
LINDA FULLER, LARRY JENT,  
JULIE JENT, RICHARD J.  
CHARRON, KRISTIN CHARRON,

Plaintiffs and Appellees,

v.

ALPHA SIGMA PHI (MONTANA  
STATE UNIVERSITY CHAPTER),  
and CITY OF BOZEMAN,

Defendants and Appellants.

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On Appeal from the Eighteenth Judicial District Court,  
Gallatin County District Court  
Cause No. DV 17-36  
Honorable Andrew Bruener, Presiding

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**APPELLANT CITY OF BOZEMAN'S  
OPENING BRIEF**

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## STATEMENT OF THE ISSUES

1. Did the District Court err in granting Plaintiffs' motion for partial summary judgment when it determined the City of Bozeman's ("City") Unified Development Code ("UDC") Ordinance 1978 was void *ab initio* as it pertains to the reclassification of fraternities and sororities into Group Living because notices of the repeal and replacement of the City's UDC ("UDC Replacement") were insufficient under Mont. Code Ann. § 76-2-303(2)?

2. Did the District Court err in its consideration of the *Lowe*<sup>1</sup> criteria and arbitrary and capricious standard in the context of the UDC Replacement?

3. Did the District Court err when it denied the City's motion for summary judgment determining Plaintiffs' challenge to the City's adoption of Ordinance 1978 as it pertains to the reclassification of fraternities and sororities as Group Living was not time-barred?

## STATEMENT OF THE CASE

Plaintiffs Susan Johnson, Dave Johnson, Kathy Rich, Tony Rich, Susan Hinkins, Richard Gillette, Aimee Stewart, Phil Stewart, Linda Fuller, Larry Jent, Julie Jent, Richard Charron, and Kristin Charron (collectively "Plaintiffs") filed this action to challenge one item among hundreds of changes to the City's UDC

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<sup>1</sup> *Lowe v. Missoula*, 165 Mont. 38, 525 P.2d 551 (1974) *rev'd on other grounds by The Greens at Fort Missoula LLC v. City of Missoula*, 271 Mont. 398, 897 P.2d 1078 (1995).

(Chapter 38 of the Bozeman Municipal Code) adopted on January 4, 2018 and effective on March 31, 2018. Specifically, Plaintiffs challenge the City’s decision to remove the residential use category of “Fraternity and sorority houses” (previously listed in Table 38.08.020 and defined by §38.42.1275, BMC) under the pre-2018 UDC and merge fraternities/sororities into the broader “Group living” category of use in the UDC Replacement (listed in Table 38.310.020.A and defined by §38.700.080, BMC) as arbitrary and capricious.

Plaintiffs reside in a neighborhood immediately east of Montana State University (the “University Neighborhood”) that includes several sororities and rental units, many of which are rented by college students. They initially also sued the fraternity that had moved into their neighborhood years after the UDC Replacement, Alpha Sigma Phi (Montana State University Chapter) (the “Fraternity”), and the owner of the house the Fraternity was renting (“House”). The Fraternity reportedly moved while this case was pending, and Plaintiffs have since dismissed their claims against the Fraternity and owner of the House.

Relevant to this appeal, Plaintiffs moved for partial summary judgment before the district court arguing that (1) the notice of the UDC Replacement was legally insufficient and in violation of constitutional and statutory requirements; (2) the change violated Plaintiffs’ due process rights because it was made

arbitrarily and capriciously, and (3) the City failed to consider the *Lowe*<sup>2</sup> factors in removing the prohibition against new fraternities/sororities. The City cross-moved for summary judgment with respect to all of Plaintiffs' claims because the statutes of limitations for Plaintiffs to challenge the UDC Replacement had expired.

The lower court found that while Plaintiffs' claims to set aside the UDC Replacement as to fraternities/sororities were time-barred, the change was void *ab initio* because of the claimed lack of notice. The district court reasoned that although the City "undertook the adoption of Ordinance 1978 in a purposeful, coordinated and professionally-informed manner," the City's notices were insufficient because the City did not specifically identify the change with respect to fraternities/sororities. *Opinion & Order Re Cross Motions for Summary Judgment* ("*Order*"), CR 73, at p. 17. The district court further found that while the rationale for the UDC Replacement as a whole was extensively discussed, because the specific fraternities/sororities reclassification was not expressly discussed, it could not ascertain whether that particular part of the decision met the *Lowe* criteria and therefore the City's decision was arbitrary and capricious. The City appeals these decisions.

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<sup>2</sup> *Lowe v. Missoula*, 165 Mont. 38, 525 P.2d 551 (1974) *rev'd on other grounds by The Greens at Fort Missoula LLC v. City of Missoula*, 271 Mont. 398, 897 P.2d 1078 (1995).

Prior to turning to the relevant facts, note the issues on appeal before this Court are truncated from those issues the district court considered because the Fraternity has moved out of Plaintiffs' neighborhood. Specifically, Plaintiffs' claims for nuisance (Count I) and failure to enforce zoning regulations (Count III) each addressed the Fraternity's alleged conduct and the City's response to that conduct. As the Fraternity has since vacated Plaintiffs' neighborhood, those claims, and issues associated with the district court's summary judgment decision, are moot. *See e.g. Shamrock Motors, Inc. v. Ford Motor Co.*, 1999 MT 21, ¶¶ 18-19, 293 Mont. 188, 974 P.2d 1150 (explaining a matter is moot when the issue has ceased to exist due to an event or happening). Thus, the only ripe issues are Counts II and IV of Plaintiffs' Complaint, addressing the claimed lack of public notice and Plaintiffs' assertion that merging fraternities/sororities within Group Living was arbitrary and capricious, respectively.

### **STATEMENT OF THE FACTS**

#### **A. Undisputed Facts Related To The Notice And Adoption Of The UDC Replacement.**

As set forth below, there is no dispute that the City published the time and place of public hearings to consider and take action on the UDC Replacement on seven different occasions. The district court recognized the City engaged in "a year long process of workshops, planning and commission meetings, and detailed agendas and staff reports related to updated UDC drafts." *Order*, CR 73, at p. 3.

By way of background, the City is an incorporated municipality with a charter form of government and the City Commission is authorized to implement zoning regulations. Mont. Code Ann. § 76-2-301. The City initially established its UDC in 2004, which included zoning, subdivision, and infrastructure standards. *Rogers Dec.*, CR 58, Exhibit W, at p. 8. By 2017, many of the older elements and standards from 2004 had been carried forward and the text of the UDC did not reflect the latest zoning, planning, and infrastructure practices. *Id.* For example, areas in Bozeman's older neighborhoods were non-conforming to the then-current standards, leading to frequent variance requests and incremental amendments to the UDC. *Id.* The increased use led to conflicts between new and existing users, and ongoing incremental modifications to the UDC were causing inefficient code administration, unnecessary complexity, and challenges implementing land use and design recommendations. *Id.*

After adopting its Community Plan in 2009, the City, noting the existence of numerous adopted neighborhood and special area plans and acknowledging the community's rapid growth, recognized the need to update its land development regulations and standards. *Id.* As a result, the City Commission began considering the UDC Replacement in 2017. *Rogers Dec.*, CR 58, Exhibit W, at p. 8. The complexity of the project required a two-step process: the first focused on the North Seventh Avenue corridor and urban renewal/tax increment district and incorporated

block frontage standards, while the focus of step two was reorganizing the code, broadening block frontage standards to apply throughout the City, and incorporating a variety of other text. *Id.* Among other things, the second phase specifically focused on increasing the use of tables for presenting information rather than extensive text, consolidating multiple similar uses into fewer broader categories, reducing the number of conditional uses in zoning districts, and improving review procedures. *Id.*, pp. 8–9.

The City repeatedly provided notices of the UDC Replacement to the public well in excess of statutory requirements beginning in early 2017 by publishing notices and meeting agendas in the local newspaper. In addition, the City posted all meeting agendas and minutes on the City’s website for informational meetings and work sessions, as well as public hearings in which the Commission would take action on the UDC Replacement. *Rogers Dec.*, CR 58, Exhibit A, at ¶ 3. Each of the notices are explained below.

First, from January 22-29, 2017, the City ran a Notice of Public Work Session in the Bozeman Daily Chronicle, the local newspaper of general circulation, informing the public that the Zoning Commission and Planning Board would be conducting a public work session regarding the UDC Replacement on February 7, 2017. *Rogers Dec.*, CR 58, at Exhibit B.

Then, on May 8, 2017, the City published a Notice of Public Work Sessions in the Bozeman Daily Chronicle which, in relevant part, provided:

**NOTICE OF PUBLIC WORK SESSIONS  
FOR A TEXT AMENDMENT TO THE BOZEMAN  
MUNICIPAL CODE**

The city is reorganizing and updating its unified development code (UDC). It is proposed to generally revise Chapter 38 of the Bozeman Municipal Code (BMC). Chapter 38 governs the division, development and use of land within the city limits and lands proposed for annexation to the city. These work sessions are the result of the ongoing UDC Replacement project....

**Workshop #1 public work session on the text amendments will be held on Thursday, May 11, 2017 in the City Commission Room, City Hall, 121 N. Rouse Avenue, Bozeman MT at 6:00 pm.**

**UDC Advisory Committee work session will be held on Tuesday, May 16, 2017 in the downstairs conference room of the Alfred Stiff Professional Building, 20 East Olive Street, Bozeman, MT from 12:00 – 1:30 pm.**

**The Bozeman Zoning Commission and Planning Board will conduct a joint public work session on the text amendments Tuesday, May 16, 2017 in the City Commission Room, City Hall, 121 N. Rouse Avenue, Bozeman MT at 6:00 pm.**

The purpose of the public work sessions are to review the draft Chapter 38 UDC, accept public comment, and discuss the amendments as requested by the City of Bozeman, 121 N. Rouse Avenue, PO Box 1230, Bozeman, MT 59771. There will be no formal action taken at the public work sessions.

Amendments include but are not limited to the following areas:...

3. Zoning districts & land use (*introduces zones, permitted uses, and density & dimensional standards*)...

7. Definitions

The wording of the draft may be revised during the text amendment review process. Revisions may affect any part of the proposed ordinance.

The complete text of all the proposed changes is available through the Department Community Development, 20 E Olive Street, Bozeman MT 59715. Questions may be directed to Tom Rogers trogers@bozeman.net or 582-2260.

The City invites the public to comment in writing and to attend the public work sessions. Written comments may be directed to the City of Bozeman, Department of Community Development, P.O. Box 1230, Bozeman, MT 59771-1230.

*Rogers Dec.*, CR 58, at Exhibit C.

Based on the above notice, the City Commission held a public meeting on May 8, 2017, and the published agenda for the meeting also provided notice of the agenda item “Initiation of Public Review of the Unified Development Code and Design Manual Updates.” *Rogers Dec.*, CR 58, at Exhibit D. The publicly available agenda packet for this meeting included a Commission Memorandum and Comparison Table of Existing and Proposed UDC Organization. *Id.* The Memorandum states:

The purpose of this presentation and discussion is to summarize the draft revised Unified Development Code

(UDC) and announce the proposed adoption plan. This draft is a result of an examination and recommendations on evolving and improving the usability and function of our existing development code. The recommendations are based on extensive public outreach and involvement and best practices from similar City's [sic] to Bozeman to preserve the unique character and promoting development of the City....

Staff is suggesting a robust 60-day facilitated public comment period generally following the attached schedule. These workshops and public meetings are in addition to the meetings, open houses, workshops, advisory committee meetings, and studios previously held to develop the draft code. The majority of the proposed changes and modifications have been . . . presented at the City wide open houses over the past 18 months....

*Id.* at p. 3–4. With respect to categories of residential use, the Comparison Table provides:

Existing Organization ( <i>proposed new location in code re-org</i> )	New Code Re-Organization ( <i>current code location</i> )...
Article 3: Zoning Districts & Land Uses...	
Article 8: Residential Zoning Districts (proposed 38.310 and 38.320)	Article 3: Zoning Districts & Land Uses... 38.310 Permitted uses (related portions of existing Articles 8-14)...
Article 7: Definitions...	

Article 42: Definitions (38.700)	Article 7: Definitions 38.700 Terms & interpretation (existing Article 42 – 38.42.101) 38.710 Definitions (existing Article 42)
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*Rogers Dec.*, CR 58, Exhibit D, at pp. 11 and 13. The City simultaneously made the May 8, 2017 Draft UDC Replacement available for public review at the Planning Department, City Hall, Bozeman Public Library, Montana State University, and online. *Id.*, p. 3; and *Rogers Dec.*, CR 58, at Exhibit E. The following excerpt from the May 8, 2017 Draft UDC Replacement shows the City’s intention to remove “Fraternity and sorority houses” as a stand-alone category of use and merge it into the “Group Living” category:

Group residences											
Community residential facilities with eight or fewer residents <sup>8</sup>	P <sup>1</sup>	P <sup>1</sup> C	P <sup>1</sup> C	P <sup>1</sup>	P <sup>1</sup>	P	P	-	-	-	-
Community residential facilities serving nine or more residents <sup>8</sup>	-	C	C	-	P	P	-	-	-	-	-
Cooperative household <sup>8</sup>	-	-	-	-	-	P	C	-	-	-	-
<del>Fraternity, sorority or lodge</del>	<del>-</del>	<del>-</del>	<del>-</del>	<del>-</del>	<del>-</del>	<del>P</del>	<del>-</del>	<del>-</del>	<del>-</del>	<del>-</del>	<del>-</del>
Group living (38.360.1 <del>2</del> 40) <sup>8</sup>	-	-	-	-	-	P	P	-	-	-	-
Lodging houses <sup>8</sup>	-	C	C <sup>8</sup>	C <sup>1</sup>	P	P	-	-	-	-	-

Commented [TR8]: Merges with group living

BOZEMAN UDC RE-ORGANIZATION - DRAFT  
May 9, 2017 38-udc\_update\_5 8 2017 - ccs cleaned

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*Rogers Dec.*, CR 58, Exhibit E, at p. 188.<sup>3</sup>

The noticing continued when, on May 21, 2017, the City published a Notice of Public Sessions for Workshops #2 and #3 to be held on May 23, 2017. *Rogers Dec.*, CR 58, at Exhibit F. Critically, the notice advised citizens that:

The city is reorganizing and updating its unified development code (UDC). It is proposed to generally revise Chapter 38 of the Bozeman Municipal Code (BMC). Chapter 38 governs the division, development and use of land within the city limits and lands proposed for annexation to the city. These work sessions are the result of the ongoing UDC Replacement project.

*Rogers Dec.*, CR 58, at Exhibit F (emphasis added).

And then again: On June 25, 2017, the City published a Notice of Public Hearing in the Bozeman Daily Chronicle, which was substantially similar to the May 8, 2017 notice, though this time the notice specifically called for a public hearing on the UDC Replacement to be conducted by the Zoning Commission and Planning Board on July 11, 2017. *Rogers Dec.*, CR 58, at Exhibit G. Critically, this notice advised residents in relevant part that:

The City of Bozeman is replacing and amending its land use regulations, Unified Development Code, Chapter 38 BMC. The Unified Development Code establishes the standards for development and land use. These changes apply throughout the entire city. The new text applies to all applications for land development. . .

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<sup>3</sup> The district court misunderstood what “P” means in the context of this table. *Order*, CR 73, at pp. 14-15. It concluded the “P” means “prohibited;” however, “P” means “Principal Use” as identified at the top of the above table at “Table clarifications” on the preceding page. *Rogers Dec.*, CR 58, Exhibit E, at p. 187. The ”-“ denotes a prohibited use. Regardless, the district court correctly summarized the result.

Specific amendments will amend multiple sections by (section references follow the revised organization) . . .

Amend Section 38.310.020 classification of uses by refining evaluation criteria and authority . . .

Amend Tables 38.310.030, 38.310.040.B and 38.310.040C residential uses . . .

Amend Tables 38.320.030, 38.320.040, and 38.320.050 for residential, mixed use, and non-residential districts.

*Id.* (emphasis added). The agenda for the July 11, 2017, Joint Planning Board and Zoning Commission meeting listed “Public Hearing & Recommendation on Bozeman Revised Unified Development Code” as an action item and attached a Memorandum from City Senior Planner Tom Rogers (“Rogers”), Planning Board and Zoning Commission comments on the draft UDC and a compilation of public comments received to that date. *Rogers Dec.*, CR 58, at Exhibit H.

After the Planning Board and Zoning Commission hearings, the City published a Notice of Work Session and Public Hearing in the Bozeman Daily Chronicle on July 30 and August 6, 2017, informing the public of a work session before the City Commission on the UDC Replacement on August 17, 2017 and public hearing on August 24, 2017. *Rogers Dec.*, CR 58, at Exhibit J. This Notice provided in relevant part:

The City of Bozeman provides notice of a proposal to amend its land use regulations, the Unified Development Code (UDC) Chapter 38 BMC. The UDC establishes standards for land use development, zoning, subdivision,

and land use. The proposed amendments include comprehensive changes to the City's zoning, subdivision, and other land use regulations . . .

*Id.* (emphasis added). The Bozeman Municipal Code tables were referenced again, and information on how to obtain copies of the UDC Replacement and submit comments or appear at hearings was included. *Id.* The action item for the August 17, 2017, special City Commission meeting was “Work Session of the Bozeman City Commission Regarding Proposed Changes to the City’s Zoning, Subdivision, and Other Land Use Regulations (Chapter 38, Bozeman Municipal Code) . . .”

*Rogers Dec.*, CR 58, at Exhibit K. The agenda for the August 24, 2017, special City Commission meeting listed the same action item and provided a link to the July 28, 2017, UDC Draft. *Rogers Dec.*, CR 58, at Exhibit L. Similar to the prior draft, the July 28, 2017, UDC Draft showed the City’s decision to remove fraternities/sororities as their own category of use. *Rogers Dec.*, CR 58, Exhibit I, at p. 178.

The public hearing on the UDC Replacement was ultimately continued and listed as an action item on the publicly noticed agendas for City Commission meetings held throughout the rest of 2017, including on September 11, September 18, October 2, October 23, October 30, November 6, November 13, November 15, November 27, and December 4. *Rogers Dec.*, CR 58, at Exhibits M-V. In addition, the agenda for the December 18, 2017, City Commission meeting listed the following action item:

Ordinance 1978 Provisional Adoption, Repealing and Replacing Chapter 38, Bozeman Municipal Code, Amending the City's Zoning, Subdivision, and Other Land Use Regulations ...

*Rogers Dec.*, CR 58, at Exhibit W. The December 18, 2017, City Commission publicly available agenda packet included a “clean version” and a “strikeout and underline version” of the December 11, 2017 Revision of the July 28, 2017 UDC Replacement for the public to view, both of which clearly show the intention to remove the separate residential use category of “Fraternity and sorority houses” under the pre-2018 UDC and include fraternities/sororities in the “Group Living” category of use in the UDC Replacement. *Id.* at pp. 214–15, 707–08. Land uses were discussed at length during the December 18, 2017 meeting, including public comments regarding land use. *Rogers Dec.*, CR 58, Exhibit X, at pp. 5-12.

Throughout the process of the UDC Replacement, the City considered whether the UDC Replacement was in accordance with the City's growth policy and determined that it was. *Rogers Dec.*, CR 58, Exhibit W, at pp. 30–36. Further, the City determined the UDC Replacement met all *Lowe* criteria because the UDC Replacement was designed to secure safety from fires and other dangers, promote public health, public safety, and general welfare, and facilitate the provision of transportation, water, sewerage, schools, parks, and other public requirements. *Id.* pp. 36–37. The reasonable provision of adequate light and air, the effect on motorized and non-motorized transportation systems, promotion of compatible

urban growth, the character of each zoning district, peculiar suitability of each zoning district for particular uses, conserving the value of buildings, and encouraging the most appropriate use of land throughout the jurisdictional area were all factors considered and analyzed by the City in its adoption of the UDC Replacement. *Id.* at pp. 37–38. The Staff Report analyzing these factors is incorporated by reference into the Commission’s findings.

The City Commission provisionally adopted Ordinance 1978 Repeal and Replacement of Chapter 38 (Ordinance 1978) following the first reading on December 18, 2017. *Rogers Dec.*, CR 58, at Exhibit Y. On January 4, 2018, following the second reading, the City Commission passed, adopted, and approved Ordinance 1978, with an effective date of March 31, 2018. *Id.*

Considering all of the above, the City clearly offered numerous opportunities to participate in the UDC Replacement process, including public meetings, hearings, and events to educate and inform the public regarding the UDC Replacement. *City’s Notice of Filing the City’s Responses* (“City Responses”), CR 55, at p. 7; and *Rogers Dec.*, CR 58, at Exhibit A. In fact, the meeting logs for the UDC Replacement started in July 2015 and identify over 100 meetings associated with the UDC Replacement. *Rogers Dec.*, CR 58, at Exhibit A. In all, the City received hundreds of comments from the public throughout the UDC Replacement process. *Rogers Dec.*, CR 58, at ¶ 4.

The district court recognized the above when it concluded the manner in which the City undertook the UDC Replacement was “purposeful and expressly comprehensive. . .” *Order*, CR 73 at p. 10. It further concluded that throughout “the process of the UDC update, the City identified goals and considered numerous factors including the growth policy, public health and safety, public resources, and transportation among others.” *Id.* at p. 10. The district court concluded that the City’s Staff Reports did address the considerations in *Lowe* and Mont. Code Ann. § 76-2-304. *Id.* at p. 12.

**B. Undisputed Facts Related To The Timing Of Plaintiffs’ Actual Awareness Of The Integration Of Fraternities/Sororities Into Group Living Which Became Effective During The UDC Replacement.**

Fraternities and sororities have been located in areas near MSU since long before any of the Plaintiffs purchased their homes. *Rogers Dec.*, CR 58, Exhibit Z at p. 3. Indeed, there currently are three sorority houses in their immediate vicinity. *Complaint*, CR 1 at ¶ 38. Since 2012 and continuing after the UDC Replacement, Group Living was a permitted use in Plaintiffs’ neighborhood (and all zoning districts in the City). § 38.08.020 (2017), BMC (Table of Residential Uses). Because Group Living was an allowed land use in Plaintiffs’ neighborhood, several college students meeting the definition of Group Living, but without being affiliated with a fraternity or sorority, could live together in Plaintiffs’

neighborhood, but the same collection of college students with an affiliation to a new fraternity or sorority, could not.

Approximately four years after the UDC Replacement took effect, the Fraternity rented the House and allegedly produced excessive noise. *Complaint* CR 1, at ¶ 3. Plaintiffs contend they were placed on notice of the UDC Replacement through the raucous atmosphere created by the Fraternity, which they alleged began in the late winter of 2022. *Id.* Several Plaintiffs established the parties started at least by March of 2022. See e.g. *City of Bozeman’s Notice of Filing Plaintiffs’ Discovery Responses (“Plaintiffs’ Responses”)*, CR 53, Kathy Rich’s Discovery Responses, at pp. 10-11 (detailing parties).

At least one neighbor reached out to the City and had discovered what they termed as the “old version of the UDC” by March 13, 2022. *Id.* By April 3, 2022, another neighbor had reached out to Rogers, because “several in our neighborhood are asking”: “[w]hy were fraternities and sororities deleted as a permitted use?” and whether new fraternities and sororities were allowed or whether they were considered “Group Living.” *Id.* at JohnsonPlaintiffs 000003. Rogers’ April 7, 2022 response email explaining the UDC Replacement was shared with Plaintiffs Kathy Rich and Susan Hinkins on April 9, 2022.<sup>4</sup> *Id.* at JohnsonPlaintiffs 000005–06. Plaintiffs held meetings with residents of the relevant neighborhood about the

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<sup>4</sup> The body of the email supports that it was also provided to Johnson.

UDC Replacement starting in March of 2022. *Plaintiffs' Responses*, CR 53, Susan Hinkins' Answer to the City's Discovery Requests at pp. 6-7.

In opposing the City's Motion for Summary Judgment Re: Statute of Limitations, Plaintiffs did not dispute that they had learned of the existence of the Fraternity and of the relevant UDC change by May of 2022, and likely earlier.

*Plaintiffs' Brief in Opposition to Defendant City of Bozeman's Motion for Summary Judgment re: Statute of Limitations*, CR 63. Instead, Plaintiffs claimed their efforts to address the situation by proposing an interim zoning ordinance and inquiries about specific notice of the integration of fraternities/sororities into Group Living excused their failure to timely file their Complaint. *Id.* at pp. 1-2.

On October 21, 2022, six months after Plaintiffs admit they learned of the UDC Replacement, Plaintiffs filed their Complaint asserting claims against the City. *Complaint*, CR 1.

Based on this record, the district court correctly determined that Plaintiffs had actual notice of the integration of fraternities/sororities into the Group Living category that became effective during the UDC Replacement *no later than* May of 2022. *Order*, CR 73, at p. 8 (emphasis added). The district court concluded, "the Court believes [Plaintiffs'] complaint is time-barred to the extent it seeks to set aside the change because their complaint was filed, by any measure, outside the 30-day limitations period." *Id.*

## **STATEMENT OF THE STANDARD OF REVIEW**

A district court's ruling on a motion for summary judgment is reviewed de novo, applying the criteria of Rule 56, M. R. Civ. P. *Newman v. Scottsdale Ins. Co.*, 2013 MT 125, ¶ 21, 370 Mont. 133, 301 P.3d 348 (citations omitted). This Court reviews district courts' conclusions of law to determine if they are correct. *Fasbender v. Lewis & Clark Cty. Bd. of Cty. Comm'rs*, 2009 MT 323, ¶ 27, 352 Mont. 505, 218 P.3d 69 (citation omitted).

## **SUMMARY OF THE ARGUMENT**

The City fully complied with Montana law in providing notice to the public of the UDC Replacement that became effective in 2018. The district court erred in determining the City's notices regarding the fraternities/sororities reclassification, one of hundreds of changes within the UDC Replacement, were constitutionally insufficient and therefore were void *ab initio*.

Additionally, the district court's treatment of the single change to the classification of fraternities/sororities within the UDC Replacement as failing to satisfy the *Lowe* criteria, therefore ruling the change arbitrary and capricious, was improper. The district court's hyperfocus on the change to fraternities/sororities in light of the repeal and replacement nature of the overhaul of the UDC was in error, as was the determination that the City was arbitrary and capricious because it did not consider or satisfy the *Lowe* criteria.

Finally, the district court erred when it denied the City’s motion for summary judgment on the statute of limitations. This Court should determine the 30-day statute of limitations<sup>5</sup> started running from January 4, 2018, when the City formally adopted the UDC Replacement. The district court correctly determined that Plaintiffs’ claims challenging the notice and fraternities/sororities reclassification were time-barred, because all facts constituting Plaintiffs’ claim could have been discovered by the Plaintiffs through reasonable due diligence and the City provided the statutorily required notice of the change. Alternatively, while the district court correctly determined that Plaintiffs were aware of the UDC Replacement no later than May of 2022, and likely earlier, it erred in determining the statute of limitations did not run from the latter date when Plaintiffs had undisputed actual notice of the relevant change in the UDC Replacement.

## ARGUMENT

### **I. ISSUE 1**

#### **A. The District Court Erred By Finding The Many 2017 Notices Were Insufficient To Place Plaintiffs On Notice Of The Repeal And Replacement Of The UDC.**

The “essential elements” required to meet Montana’s constitutional and statutory guarantees of public participation are “notice and an opportunity to be

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<sup>5</sup> The City agrees with the district court that the 30 day limitations period applies to Plaintiffs’ claims related to notice and to set aside the reclassification although the City previously argued additional limitations periods applied as well.

heard.” *Carbon Cty. Res. Council v. Mont. Bd. of Oil & Gas Conservation*, 2016 MT 240, ¶ 21, 385 Mont. 51, 380 P.3d 798 (citations omitted). Public participation procedures “must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments.” *Carbon Cty. Res. Council*, ¶ 21 (quoting Mont. Code Ann. § 2-3-111(1)). The statute governing the notices required for the UDC Replacement is Mont. Code Ann. § 76-2-303(2) which provides:

A regulation, restriction, or boundary may not become effective until after a public hearing in relation to the regulation, restriction, or boundary at which parties in interest and citizens have an opportunity to be heard has been held. At least 15 days’ notice of the time and place of the hearing must be published in an official paper or a paper of general circulation in the municipality.

(emphasis added). According to the applicable statute’s plain language, only notice of the time and place of a public hearing regarding the relevant zoning regulation must be published by the City in the appropriate newspaper. Once public notice is given, “it is the obligation of potentially impacted parties to dig... further if they are unsure what action is required.” *Haas Ranch, LLC v. Pondera Colony Inc.*, 2020 WL 2095741, at \*3 (Mont. Water Ct.).

It is undisputed that the City published notices in the newspaper more than two weeks before each of the several public participation opportunities and specifically before the August 24, 2017 hearing and in published agendas for each continuation of the hearing thereafter. Indeed, the City provided *seven* notices in a

newspaper of general circulation regarding the UDC Replacement, calling out that it applied to land use regulations within the City including affecting residential uses, mixed-use, and non-residential use tables. *Rogers Dec.*, CR 58, at Exhibits B, C, F, G, and J. The City specifically highlighted the fraternity/sorority change and included an explanation of the change in the publicly available redline drafts of the UDC Replacement, made available starting May 8, 2017, more than eleven weeks before public hearings on the changes commenced at the City Commission. *Rogers Dec.*, CR 58, Exhibit E, at p. 188. The City’s May 8, 2017, notice advised that the “city is reorganizing and updating its unified development code . . . [which] governs the division, development, and use of land within the city limits . . .” *Rogers Dec.*, CR 58, Exhibit C, at p. 2. Notices further advised that the amendments would include “[z]oning districts & land use (*introduces zones, permitted uses, and density & dimensional standards*).” *Id.*, p. 1. The City’s May 21, 2017, notice provided identical language with respect to the notice the City was reorganizing and updating its UDC which governed land use. *Rogers Dec.*, CR 58, at Exhibit F. The June 25, 2017, notice also advised that the City was “reorganizing and amending its land use regulations . . . [which] establishes standards for development and land use.” *Rogers Dec.*, CR 58, at Exhibit G. The City published notice of the time and place of the August 24, 2017 public hearing on the UDC Replacement in the Bozeman Daily Chronicle on July 30 and August

6, 2017—more than 15 days prior to the hearing date, which were the only statutorily required notices. *Rogers Dec.*, CR 58, Exhibit J, at p. 2. In total, there were multiple publicly noticed opportunities for the public to participate after the first time the fraternity/sorority change was expressly identified in drafts.

These notices provided ample information about the categories of proposed changes within the broad repeal and replace nature of the UDC Replacement and afforded significant time for the public to learn more, ask questions, and submit public comment. The robust notices, starting in January of 2017, specifically advised that the UDC established standards for “land development, subdivision, and land use.” *Id.* The notices also reference the “residential uses” tables as being amended through the UDC Replacement. *Id.* The City also published agendas in advance of every meeting in which the UDC Replacement was discussed and posted minutes from those meetings on its website afterwards. *Rogers Dec.*, CR 58, at ¶ 3.

In sum, the notices identified the new UDC provisions and the public participation opportunities. The City not only met each requirement of Mont. Code Ann. § 76-2-303(2) in providing notice of the repeal and replacement, including the change to the fraternity/sorority use, but it went further by identifying the types of changes proposed and specifying that changes would affect land use and development within the City, including permitted uses in residential zones. Further, the City published agendas for meetings, and posted all meeting agendas and

minutes on its website. *Rogers Dec.*, CR 58, Exhibit A, at ¶ 3. The City clearly exceeded the requirements of Mont. Code Ann. § 76-2-303(2) and respectfully requests this Court to determine it properly noticed the UDC Replacement.

**B. The District Court Erred When It Crafted A New Requirement For Public Notice Based On The “Nature Of The Change” And Its “Impact To The Community” To Find The Change Void *Ab Initio*.**

Instead of applying the applicable statutory notice requirements, the district court impermissibly created and imposed on the City a heightened notice obligation. The court determined that the “nature of the proposed change and how it will impact the community” should also have been taken into account in order to determine whether the reclassification was void *ab initio*. *Order*, CR 73, at p. 12. No such notice requirement is set forth in Mont. Code Ann. § 76-2-303(2) or in case law. Beyond improperly finding the City’s notice insufficient in this instance, the district court imposed an amorphous and untenable standard for any local government to apply to future zoning amendments. The district court’s determination in this regard constitutes a reversible error.

This Court has repeatedly advised that courts are to interpret statutes consistently with the Legislature’s intent as set forth in the plain language of a statute. *Bates v. Neva*, 2014 MT 336, ¶ 13, 377 Mont. 350, 353, 339 P.3d 1265. Courts should not “insert what has been omitted or to omit what has been inserted” nor “to read into a statute what is not there.” *Id.* The district court impermissibly

created and imposed whole-cloth additional notice requirements on the City when it determined the City was required to consider what the district court perceived as the nature and speculative impact of the discrete change on a small part of the community.

In contrast to the specific public notice requirements found in statute and case law, the district court's directive requires guesswork on the part of the City. The district court did not identify any factors to determine whether heightened notice requirements apply due to the "nature of the change" or "impact to the community." The district court's directive requires the City to speculate about how a discrete change might affect a handful of citizens in a specific neighborhood even several years later. The decision presents a functionally impossible standard requiring local governments to divine which revisions have heightened notice requirements beyond those found in Mont. Code Ann. § 76-2-303(2) through the "nature" and "impact" of the change on the community.

In this case, any perceived impact occurred *years* after the UDC Replacement and for a relatively short period of time. It occurred in a neighborhood that had permitted Group Living for years prior to the UDC Replacement meaning that the very same group of college students could have lived together in Plaintiffs' neighborhood, just without the fraternity affiliation. Further, Plaintiffs' neighborhood had historically and consistently included sororities. While Plaintiffs

tried to recast the merging of fraternities/sororities into Group Living as a monumental change that the City should have provided some heightened notice for, it was not.

Further compounding the district court's error, in crafting its heightened public notice standard, the district court expressed disbelief that such an important change to the community would be received with no public comment. *Order*, CR 73 at pp. 15-17. It reasoned that therefore, the public notice must have been insufficient. Tying the determination related to sufficiency of the notice to the extent of public comment on a particular change was error. The lack of public comment on a discrete issue within hundreds of changes should not have any impact on the lawfulness of the City's diligent efforts to provide notice of the UDC Replacement. Like the district's court's improper requirement that the City consider the "nature" and "impact" of the change, there is no provision within Mont. Code Ann. § 76-2-303(2) that directs the district court to have considered the presence or absence of public comment about the sufficiency of the notice. Such consideration would set a dangerous precedent. Followed to its logical conclusion, a local government must re-notice any item until it receives at least one public comment, or otherwise be subject to reversal for failure to provide sufficient notice. This is not supported by the applicable notice statute or case law, nor does it functionally make sense in any

land use changes, let alone the sweeping changes at issue during the UDC Replacement.

The district court's *sua sponte* imposition of these inappropriate additional requirements on which the court based its conclusion that the reclassification was void *ab initio* was error. The district court should have applied Mont. Code Ann. § 76-2-303(2) and stopped when it determined the City's notices were sufficient. The City respectfully requests this Court to do so here.

**C. It Would Be Unwieldy And Functionally Impossible For The City To Have Identified And Published Notice Of Every Change In Its Massive Overhaul Of Its UDC.**

The district court's conclusion that Plaintiffs were entitled to *specific* notice of the reclassification of fraternities/sororities, one minor change in the entire UDC overhaul which included hundreds of changes to the UDC, is legally unsupported and is not functionally feasible in such a massive overhaul. Despite the City's efforts that went well beyond the statutory requirements to engage, inform, and provide thorough public participation opportunities, the district court impermissibly overreached by requiring specific notice of each discrete change within hundreds of changes which took effect through the UDC Replacement. This type of notice is not required in the context of a repeal and replacement of a uniform development code of the magnitude at issue with the UDC Replacement and is contrary to case law.

For instance, in *Citizens for a Better Flathead v. Bd. of County Comm'rs*, 2016 MT 256, 385 Mont. 156, 381 P.3d 555 (“*Citizens*”) the Montana Supreme Court held that by soliciting public comment and offering the opportunity to be heard, Flathead County complied with the public participation requirements. Critically, *Citizens* involved a sweeping change to the growth policy, similar to the UDC Replacement undertaken by the City at issue in this case. *Citizens*, ¶¶ 3–8. Notably, the City was even more descriptive with respect to notices of the UDC Replacement than Flathead County was in *Citizens*. *City’s Response in Opposition to Plaintiffs’ Application for Alternative Writ*, CR 25, Exhibit M, at p. 34 (detailing text of the Flathead County agendas). Like the City in this case, Flathead County issued a press release regarding the process. *Id.* at p. 3. Also like the City, Flathead County provided a number of opportunities for the public to be heard throughout the process of amending its growth policy. *Id.* at pp. 3–8. Further, like the City, Flathead County routinely posted “tracked-changes” versions of the changes on its website during the revision process. *Citizens for a Better Flathead*, ¶ 37. This Court held those notices were sufficient and upheld summary judgment for Flathead County. *Id.*, ¶ 62. See also *Generation Realty, LLC v. Catanzaro*, 21 A.3d 253 (R.I. 2011) (rejecting plaintiff’s claim that a general amendment required individual and specific notice).

Even though the City included the deletion of the fraternity/sorority use category in a publicly available draft that was clearly noticed, the district court erred

by requiring specific notice of the fraternities/sororities change. As discussed above, the notice provided by the City was sufficient pursuant to Mont. Code Ann. § 76-2-303(2). Further, the City provided notices similar to those held to be sufficient in *Citizens, supra*. The City was not required to provide specific notice and an explanation of every change within a repeal and replace situation that involved hundreds of changes. Rather, the City was required to identify the relevant new Bozeman Municipal Code and provide notice at least 15 days prior to the relevant hearing. It is undisputed the City did so and the district court's conclusion that the merger of fraternities/sororities into Group Living was void *ab initio* was error.

The City therefore respectfully requests this Court to overturn the district court's decision on Plaintiffs' Count II (failure to notify the public of the proposed change).

## **II. ISSUE 2**

### **A. The District Court Erred In Its Consideration Of The *Lowe* Criteria As Applied To The UDC Replacement By Requiring Analysis Solely Relevant To The Change In Fraternities/Sororities.**

The district court's discussion of the scope of the *Lowe* criteria was inappropriately narrow by focusing solely on the classification change to fraternities/sororities. As discussed below, the district court should not have reached the *Lowe* criteria because Plaintiffs' challenge was time-barred. To the extent this Court considers the challenge despite that it is time-barred, the district

court viewed the change to fraternities/sororities in a vacuum instead of considering the *Lowe* criteria as applied to the UDC Replacement as a whole. While the district court determined the staff reports were “detailed and comprehensive” and, critically, concluded the staff reports *did* address the considerations in *Lowe* and Mont. Code Ann. § 76-2-304, it determined it had insufficient evidence to assess the *Lowe* criteria regarding the change to fraternities/sororities without considering the notice of the specific zoning change at issue. *Order*, CR 73, at pp. 12-13. This was an error. There is no legal requirement that the City make a record for each of the *Lowe* criteria for every single change within the hundreds of changes in a repeal and replace situation. Rather, analyzing the UDC Replacement as a whole, which the district court concluded did meet *Lowe*, is all that is required.

In *Lowe*, this Court identified several factors for district courts to consider in the context of a zoning change. They included the following:

1. Whether the new zoning was designed in accordance with the comprehensive plan.
2. Whether the new zoning was designed to lessen congestion in the streets.
3. Whether the new zoning will secure safety from fire, panic, and other dangers.
4. Whether the new zoning will promote health and general welfare.
5. Whether the new zoning will provide adequate light and air.
6. Whether the new zoning will prevent the overcrowding of land.
7. Whether the new zoning will avoid undue concentration of population.
8. Whether the new zoning will facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.

9. Whether the new zoning gives reasonable consideration to the character of the district.
10. Whether the new zoning gives consideration to peculiar suitability of the property for particular uses.
11. Whether the new zoning was adopted with a view to conserving the value of buildings.
12. Whether the new zoning will encourage the most appropriate use of land throughout such municipality.

*Lowe*, 165 Mont. at 41.

As noted, the district court summarily concluded the City met the *Lowe* criteria as applied to the UDC Replacement as a whole, but instead focused on the notice for the fraternities/sororities change determining it had insufficient evidence to evaluate that specific change due to the notice. This was incorrect. The district court's decision regarding the City's appropriate consideration of the *Lowe* factors as to the entire adoption of the UDC Replacement should stand without specially analyzing every component part of the replacement.

In *North 93 Neighbors, Inc. v. Bd. of County Comm'rs*, 2006 MT 132, 332 Mont. 327, 137 P.3d 557, this Court considered the argument the Flathead County Commissioners failed to issue findings of fact under the zoning statutes and local regulations, which required the commissioners "be guided by and adopt findings of fact," and that the commissioners had failed to properly consider the *Lowe* criteria. This Court considered the same information that was before the commissioners, including the application for the zoning amendment and the planning office's report, as well as the planning board's discussion and adoption of

findings of fact. *North 93 Neighbors*, ¶ 43. It noted that the commissioners had reviewed the planning office’s report, reviewed the planning board’s recommendation, and considered public comment, including plaintiffs’ report asserting that the *Lowe* criteria had not been met. *North 93 Neighbors*, ¶ 44. Although the commission had not adopted its own findings of fact, this Court concluded that nothing required the commissioners to enter independent findings, and that the commissioners had “followed the proper statutory and regulatory procedure for adopting zoning amendments and had sufficient evidence before it to make an informed decision.” *North 93 Neighbors*, ¶ 44. See also *Lake County First v. Polson City Council*, 2009 MT 322, ¶ 34, 352 Mont. 489, 218 P.3d 816 (explaining there is no “requirement that a governing body explain in detail why it has determined each criterion is or is not met, and precisely what facts it found most convincing”).

There is no requirement that the City analyze each of the hundreds of changes in a repeal and replace zoning overhaul like the UDC Replacement in the context of each of the *Lowe* criteria in order to withstand a challenge to a particular part of such a sweeping change. Similar to the ramifications of the district court’s decision requiring particular notice of any amendment to affected individuals, requiring the City, and every local government that adopts zoning regulations, to particularly analyze each discrete subpart of an amendment within an entire

replacement would be unwieldy and impractical. It would require hundreds of additional hours of work and countless pages of analysis. The district court essentially imposes a requirement for a municipality to engage in a complete analysis of each of the twelve *Lowe* criteria to each proposed amendment to avoid being struck down as arbitrary and capricious. The result of such a requirement would be a process so inefficient it would exponentially increase the time to effect necessary land use changes and perhaps discourage municipalities from amending zoning regulations altogether. This Court should therefore conclude that the district court overreached in imposing the requirement to expressly apply *Lowe* criteria to every discrete amendment within an entire overhaul of code.

The district court should have stopped its analysis after it considered whether the overhaul amendment satisfied the *Lowe* criteria and determined that it had. This analysis is contained in the Staff Report adopted by the City Commission and which the district court concluded *did* address the applicable criteria. *Order*, CR 73, p. 12. The district court erred by requiring analysis of one particular amendment -- the fraternities/sororities modification -- in the context of the *Lowe* criteria as a standalone change. It should have analyzed the changes as a whole, which the district court noted would satisfy *Lowe*. The City therefore respectfully requests this Court reverse the district court's decision with respect to the arbitrary and capricious claim (Count IV).

**B. The District Court Failed To Consider The Arbitrary And Capricious Standard Required To Set Aside The City’s Decision Regarding The UDC Replacement.**

Generally, courts give great deference to a City’s decision to amend its municipal code in the context of the *Lowe* factors.<sup>6</sup> This Court has explained:

[A] reversal of the appealed ruling is not permitted merely because the record contains inconsistent evidence or evidence which might support a different result. Rather, the decision being challenged must appear to be random, unreasonable, or seemingly unmotivated, based on the existing record.

Furthermore, while the record may contain conflicting evidence, as long as a substantial amount of the evidence supports the governing body's decision and the governing body explains why it weighed certain evidence as more credible than other evidence, the governing body's decision should be upheld.

*MM&I, LLC v. Bd. of County Comm’rs of Gallatin County*, 2010 MT 274, ¶¶ 29-30, 358 Mont. 420, 427-428, 246 P.3d 1029 (citations omitted). To reverse the City Commission’s decision, the district court was required to find the decision to have been “random, unreasonable, or seemingly unmotivated, based on the existing record.” *Kiely Constr. L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶ 69, 312 Mont. 52, 76, 57 P.3d 836 citing *Silva v. City of Columbia Falls*, 258 Mont. 329, 335, 852 P.2d 671, 675 (1993).

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<sup>6</sup> This Court need not consider whether the UDC Replacement was arbitrary and capricious because Plaintiffs’ challenge is time-barred. To the extent this Court determines the statute of limitations does not apply, the City’s decision still was not arbitrary and capricious.

The district court did not apply the facts of this case to the above standards. Instead, it improperly focused on its inappropriate notice analysis and disregarded this established law in determining the fraternities/sororities reclassification was arbitrary and capricious. This compounded the district court's error. As with the *Lowe* analysis, the UDC Replacement should have been considered in the context of the arbitrary and capricious analysis. Under the correct analysis, the City's decision was neither arbitrary nor capricious.

### **III. ISSUE 3**

#### **A. The District Court Erred When It Denied The City's Motion For Summary Judgment Determining Plaintiffs' Challenge To The City's Adoption Of Ordinance 1978 As It Pertains To The Merger Of Fraternities/Sororities Into Group Living Was Not Time-Barred.**

Plaintiffs brought a claim for the failure to notify the public of a proposed zone change and mandamus relief. *Complaint*, CR 1, Count II, at ¶¶ 41-65. The City moved to dismiss this Count based on the 30-day statute of limitations in Mont. Code Ann. § 2-3-114(1). The City also moved for summary judgment on Plaintiffs' other claims because they were similarly time-barred. However, because the Fraternity moved out of Plaintiffs' neighborhood, those claims are moot, except for Count IV, which is also subject to the 30-day statute of limitations set forth in Mont. Code Ann. § 2-3-114(1). While the district court determined the 30-day statute of limitations applied to both Counts II and IV, over the City's request to apply a six-month statute

of limitations to Count IV, given the current posture, the City agrees with the district court that the 30-day limitations period applies to both of the remaining counts.

Adherence to deadlines to challenge land use regulations is important because so many parties rely on land use decisions. *Stockton Citizens for Sensible Planning v. City of Stockton* (2010), 48 Cal. 4th 481, 488, 227 P.3d 416, 418, 106 Cal. Rptr. 3d 858, 861 (explaining importance of “unusually short” limitations periods in land use decisions due to the need for “finality and certainty in land use planning decisions”). Montana recognizes this principle with its shortened statute of limitations which apply to land use decisions. Relevant to this matter, Mont. Code Ann. § 2-3-114(1) provides that:

(1) The district courts of the state have jurisdiction to set aside an agency decision under this part upon petition of any person whose rights have been prejudiced. **A petition pursuant to this section must be filed within 30 days of the date on which the person learns, or reasonably should have learned, of the agency’s decision.**

Mont. Code Ann. § 2-3-114(1). This provision was amended by Senate Bill 177 (2007) which included the following prefatory language clarifying when the limitations period begins to run:

WHEREAS, if an agency, board, or other public entity holds a meeting but does not give notice of a meeting, does not publish an agenda for the meeting, and does not publish minutes of a meeting, there is no way for the public to know whether a meeting occurred, whether a decision was made by the agency, board, or other public entity that is of public interest, or whether the 30-day “clock” has in fact started, except by word of mouth...

2007 Mont. SB 177. Accordingly, when notice of a meeting is given, and the meeting agenda and minutes are published, the statute of limitations begins to run on the date of the agency's decision, in this case on January 4, 2018.

Plaintiffs' claims for failure to provide notice of the zoning changes to the public and to set aside or void the City's change to the fraternities/sororities designation are subject to the 30-day statute of limitations set forth in Mont. Code Ann. § 2-3-114(1). See *Desmet School District v. County of Missoula*, 2001 ML 2423, 30 (Mont. Dist. Ct., 4th Jud. Dist. June 1, 2002) (dismissing the plaintiffs' action challenging a county resolution as time-barred because plaintiffs failed to file suit within 30-days of the resolution's adoption); and *Citizens for a Better Flathead v. Bd. of County Comm'rs*, 2016 MT 256, ¶ 41, 385 Mont. 156, 165, 381 P.3d 555 (explaining courts are authorized to void decisions under this statutory provision). Pursuant to Mont. Code Ann. § 2-3-114(1), the clock started to run when Plaintiffs learned, or reasonably should have learned, of the decision.

Here, the City provided adequate notice of the UDC Replacement efforts so that the statute of limitations started to run upon the adoption of Ordinance 1978 on January 4, 2018. As discussed above, the City provided appropriate notice of all public hearings on the UDC Replacement so as to place citizens on notice of the sweeping nature of the changes to the City's land use regulations. The City posted agendas and minutes for all meetings at which the UDC Replacement was discussed.

Though Plaintiffs claim they did not learn of the effect of the UDC Replacement until years later, lack of knowledge of a claim or its accrual “does not postpone the beginning of the period of limitation.” *See* Mont. Code Ann. § 27-2-102(2).

As noted, adherence to the shortened timelines applicable to land use decisions is of critical importance because of the public’s reliance on those decisions. In this case for instance, the Fraternity relied on the decision that was made on January 4, 2018, and moved into the House.

Plaintiffs should not have been granted a pass with respect to the statute of limitations. Mont. Code Ann. § 2-3-114(1) required Plaintiffs to file this action within 30-days after the City’s decision to adopt Ordinance 1978. Because the Complaint was not filed until nearly five years thereafter, Plaintiffs’ claims related to public participation and voiding the UDC Replacement are time-barred, and the district court should have dismissed those claims. Allowing Plaintiffs to challenge a change within the UDC Replacement that became effective years ago flies in the face of the short timelines permitted for challenges to zoning decisions, including the 30-day timeline reflected in Mont. Code Ann. § 2-3-114(1). Plaintiffs could have submitted public comment or participated in the many hearings on the UDC Replacement contemporaneously to the City’s consideration of it. Plaintiffs did not do this and should not now, many years later, be permitted to challenge a provision of the UDC Replacement that has been in effect since March 31, 2018.

Alternatively, even assuming the latest possible notice date is utilized, when Plaintiffs were aware of the Fraternity House and had actually learned of the UDC Replacement years after it was adopted, Plaintiffs still unquestionably waited more than the statutorily permitted 30-days to file this action. Under Mont. Code Ann. § 2-3-114(1)'s instruction to bring claims when a person reasonably should have known of the agency's decision (and indeed in this case, actually knew), Plaintiffs were required to have brought their claims within 30-days after May 31, 2022, at the absolute latest. Plaintiffs failed to bring their claims until October 21, 2022, months after the relevant statute of limitations ran. Plaintiffs' public participation claims are therefore time-barred and Plaintiffs' challenge to the UDC Replacement should have been dismissed.

In sum, Plaintiffs reasonably had notice of the UDC Replacement contemporaneously to its adoption due to the numerous notices the City posted in a newspaper of general circulation and many other broadly advertised opportunities to participate in the public feedback process. Even if the Court determines this notice was insufficient and the Plaintiffs are afforded the benefit of waiting until actual notice of the UDC Replacement years later, the undisputed facts establish that they waited more than 30-days after these events leading to their actual knowledge to file their lawsuit. Accordingly, Counts II and IV are barred by Mont. Code Ann. § 2-3-114(1) and must be dismissed. As the residents of the House

have moved out of the neighborhood, the statute of limitations disposes of all of Plaintiffs' claims. They should be dismissed with prejudice.

### CONCLUSION

The district court erred in concluding the notices of the UDC Replacement were insufficient by inserting additional requirements and considerations into the City's notices not required by Montana law and which would be functionally unwieldy and required the City to have engaged in guesswork. Additionally, the district court improperly considered the *Lowe* factors in a vacuum as applied to fraternities/sororities instead of considering the factors as applied to the UDC Replacement as a whole. Finally, the district court further erred by failing to apply the statute of limitations to Plaintiffs' claims either from the date of the adoption of the UDC Replacement or when Plaintiffs had actual notice of the change to fraternities/sororities. The City respectfully requests this Court reverse the district court on these issues and dismiss this case with prejudice.

Respectfully submitted this 12th day of February, 2024.

BERG LILLY, PC

By: /s/ ELIZABETH W. LUND  
*Attorneys for Appellants City of  
Bozeman*

**CERTIFICATE OF COMPLIANCE**

Pursuant to the Montana Rules of Appellate Procedure, we certify that Appellant’s Opening Brief is printed with proportionally spaced Times New Roman typeface of 14 points, is double-spaced, and the word count calculated by Microsoft Word is not more than 10,000 words excluding the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

BERG LILLY, PC

By: /s/ ELIZABETH W. LUND  
*Attorneys for City of Bozeman*

**CERTIFICATE OF SERVICE**

I hereby certify that I have filed a true and accurate copy of the foregoing **APPELLANT CITY OF BOZEMAN'S OPENING BRIEF** with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing **APPELLANT CITY OF BOZEMAN'S OPENING BRIEF** upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

*Kirsten Fisher*  
\_\_\_\_\_  
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I, Elizabeth Worth Lund, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-13-2024:

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