IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 23-0619

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.

CITY OF BOZEMAN,

Defendants and Appellants.

On Appeal from Montana Eighteenth Judicial District Court,
Gallatin County Cause No. DV-22-1006C,
Hon. Andrew Breuner, District Court Judge

APPELLEES' ANSWER BRIEF

[Appearances on next page.]

APPEARANCES

James H. Goetz
Henry J.K. Tesar
GOETZ, GEDDES & GARDNER, P.C.
35 North Grand Ave.
P.O. Box 6580
Bozeman, MT 59771-6580
Ph: 406-587-0618
Fax: 406-587-5144
Email: jim@goetzlawfirm.com
htesar@goetzlawfirm.com

Brian K. Gallik
GALLIK & BREMER, P.C.
777 E. Main St., Ste 203
PO Box 70
Bozeman, MT 59771-0070
Ph: 406-404-1728
Email: brian@galliklawfirm.com

Attorneys for Plaintiffs and Appellees

Elizabeth W. Lund
BERG LILLY, P.C.
1 West Main Street
Bozeman, MT 59715
Ph: 406-587-31181
Fax: 406-587-3240
Email: lund@berglawfirm.com

Attorney for Defendant and Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SECONDARY SOURCES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court properly granted summary judgment in favor of Plaintiffs in finding:

(a) The City's deletion of fraternities and sororities from its zoning code was void *ab initio* because the public was not properly notified of the proposed change;

(b) The City's deletion of fraternities and sororities from its zoning regulations was void as arbitrary and capricious; and

(c) The City neglected to apply the "*Lowe* Criteria" to the proposed deletion.

2. Whether the District Court properly rejected City's statute of limitations arguments.

3. Whether the Plaintiffs should be awarded their attorneys' fees for defending this appeal.

STATEMENT OF THE CASE

The Complaint alleged nuisance (Count I) against the Montana State University-Affiliated Alpha Sigma Phi men's fraternity, and John Pine, owner of the property leased to the Fraternity. The remaining Counts, directed against the City, raised claims of violation of Montanan's Constitutional open meeting requirements, arbitrary and capricious acts violative of Due Process, and failure to apply the criteria of § 76-2-304, MCA (the "*Lowe* Criteria").

Defendant Pine moved to dismiss on the theory that a landlord is not liable for the tortious acts of its tenants. Plaintiffs did not contest that motion and he was

dismissed. Dkt. 36.

The Fraternity Defendant was unable to procure litigation assistance from its national organization and attempted to represent itself, through its Chapter President. This proved unsatisfactory to both the District Court and Plaintiffs. Plaintiffs moved to stay their claim against the Fraternity (Nuisance), which the District Court granted. Dkt 34.

Plaintiffs moved for summary judgment on the remaining Counts against the City, and the District Court granted summary judgment for Plaintiffs by Order of September 6, 2023. Dkt. 73.

The District Court, at Plaintiffs' request, then vacated the stay against the fraternity and dismissed Count I and the fraternity.

Plaintiffs and the City then stipulated that the City would pay Plaintiffs' attorneys' fees at a certain amount, contingent upon Plaintiffs prevailing on appeal. Dkt. 79.

Judgment was entered on September 26, 2023. Dkt. 80. The City timely appealed.

STATEMENT OF FACTS

Bozeman is a beautiful city and a fine place to live. Its vibrant main street is second to none. Among Bozeman's most attractive features are its older

neighborhoods, including the funky northside, Wilson Ave., with its stately homes, and the University Neighborhood. These older neighborhoods possess interesting architectural diversity. The yards are tree-lined, spacious, and well-maintained. That makes Bozeman what it is. The main tangible asset of each of the Plaintiffs is their home.

The University Neighborhood at issue in this case has several university-affiliated "Greek" houses; mostly well-behaved sororities which are grandfathered under Bozeman's zoning codes. Plaintiffs have coexisted in harmony with these **existing** houses for many years.

The Plaintiffs/Appellees ("Homeowners") are long-time homeowners in a neighborhood directly east of Montana State University. In the winter/spring of 2022, a group of young men, who were a fraternity, moved into a single-family dwelling at 411 W. Garfield St., and began behaving badly.

In addition to the unacceptable behavior of the fraternity which had already corroded the neighborhood, the Plaintiffs' central concern is what is known as "college creep". As student rentals and Greek houses fill the neighborhood—with unsightly tendencies to park vehicles on sidewalks and lawns, overcrowd small residences, and generally ignore routine maintenance—there comes a tipping point. At some point, those single-family residents who can afford to sell and move

elsewhere, will.

This neighborhood had long been zoned for low-density, family housing, designated as R-1 or R-2. Each of the Homeowners had the impression that new Greek houses were not permitted in their neighborhood. They were right. Until 2018, the City regulations were clear that, since 1991, new Greek Houses were not permitted in R-1 and R-2 zones. Dkt. 40, Ex. 3, *Purdy Aff.*, ¶ 6. Homeowners justifiably relied upon the historic stability of those regulations.

On investigation, Homeowners learned that the City in 2018 had quietly adopted a specific zone change as part of its massive revision of its Uniform Development Code ("UDC"). That specific zone change deleted the category of "fraternities and sororities" from **Table 38.08.020**, which, until then, prohibited fraternities and sororities in various residential zoning districts, including R-1 and R-2 zones. The effect of that change was that fraternities and sororities were no longer prohibited in R-1 and R-2 zones. For convenience, the discrete amendment is referred to as "contested zone change".

The District Court found that, absent adequate public notice, the contested zone change did "not become effective" under §76-2-303, MCA and was therefore void *ab initio*. Dkt. 73, pp. 18–19. The Court also voided the zone change as arbitrary and capricious. *Id.* at p. 9. No issue was raised concerning any other aspect

of the general modifications to the City's UDC made in 2018.

The judgment in Homeowners' favor, in essence, restored the pre-2018 Table 38.08.020 to its previous form, thereby reinstating its prohibition on Greek houses in R-1 and R-2 neighborhoods. *Id.* at p. 19.

STANDARD OF REVIEW

This Court reviews summary judgments *de novo*. *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶ 8, 380 Mont. 204, 354 P.3d 604.

SUMMARY OF ARGUMENT

The City, as part of its 2017/2018 overhaul of its UDC, deleted a provision which, for many years prior to that deletion, prohibited additional fraternities and sororities in residential neighborhoods. Although the City gave very generalized notices of its macro-overhaul of the UDC, there was no notice of the contested zone change regarding Greek houses.

A survey of the residents in the University Neighborhood reflects that out of 147 respondents, **none** were aware of the contested zone change. The general notices relied on by the City were inadequate to inform the public of the particular zone change. Such specific notice is required in Montana law (§ 2-3-103, MCA).

Section 76-2-303(2), MCA, provides that a zone change "may not become effective" unless there is a public hearing at which both "parties in interest" and

"citizens" have the opportunity to be heard. "Parties in interest" here are residents of the University Neighborhood. They were not notified. The zone change was a complete surprise to them.

Article II, Secs. 8 and 9 of Mont. Const. and their implementing legislation provide for robust participation by the public in government decisions. Zoning cases from other states and zoning legal authorities also call for robust and specific public notice.

The City's claim that specific notice is infeasible is belied by the fact that the City did attempt to give specific notice on a wide variety of specific changes contained within the overall UDC revision but failed to do so with respect to the deletion of Greek houses.

Montana law requires governing bodies to **encourage** public participation. Given that, the City fails in its argument that general notice suffices because it is incumbent upon citizens, once generally notified, to comb through many pages of documents to figure out what affects them.

Section 76-2-303, MCA, provides that a zone change does not become effective unless there is public notice. The District Court was therefore correct in finding the zone change is void *ab initio*.

Separately, the contested zone change is violative of Due Process because it

was arbitrary and capricious. It came about seemingly at random or by chance, with no report or written analysis, no public input, no notice, and no constituency supporting the change. The City gave no reason for the change. The single post-hoc comment by a City planner, claiming the City was folding the category of Greek houses into "group living" is not supported by any actual regulation that the City adopted in 2018, nor by anything other than an off-the-cuff email opinion. The classification of Greek houses, which for many years was separately classified from "group living", is arbitrary, in itself, because Greek houses are much different from the standard definition of "group houses".

The City also failed to apply the required "*Lowe* criteria" set forth in § 76-2-304, MCA, to the contested zone change. The City's argument that specific application is infeasible is refuted by the City's actual act of assessing the "*Lowe* criteria" when the planning staff prepared a report regarding the citizens' proposal for an interim zone change to reinstate this very prohibition on Greek houses.

The District Court correctly rejected the City's statute of limitations argument based on the thirty-day limitation of § 2-3-114(1) MCA. No limitation started to run because the zone change, for lack of public notice, is void *ab initio*.

As there is no specific statute of limitations applicable, Montana's five-year default statute, § 27-2-231, MCA, applies and this lawsuit was timely filed.

This case should be remanded for a determination of Homeowners' attorneys' fees incurred in defending this appeal. Homeowners' fees should be awarded under the supplemental relief clause of the Declaratory Judgment Act, § 27-8-313, MCA.

ARGUMENT

I. The City Failed to Provide the Required Notice to the Public When It Eliminated Fraternities and Sororities from Its Zoning Code

In the spring of 2022, members of the University Neighborhood, after learning of the secret zone change regarding fraternities, prepared an emergency interim zoning ordinance to present to the City. Based on their own experience of having been kept in the dark, they surmised that no member of the public had been so informed. Accordingly, they included in the petition circulated to the neighbors the following questions posed to each signing party:

> Also, the University Neighborhood Association believes that the public was not adequately made aware of the revisions to the UDC, which deleted the category of "Fraternity and sorority houses." Please indicate with a 'yes' or 'no', your answer to the following question:
>
> **Prior to 2018, the Bozeman Municipal Code prohibited the establishment of "fraternity and sorority" houses in residential neighborhoods. In 2018 the Code was amended so that new fraternity and sorority houses now appear to be allowed in any Bozeman neighborhood. <u>Were you aware in 2018 or prior to 2018 of any proposal to make this change?</u>**

(Underlining added.)

One-hundred-forty neighbors signed the petition for an interim zone change[1]. **Every single signing party indicated "no"**[2].

The issue is a common sense one. Notice to the public must be suitably crafted to advise the public of a proposed change. Here, whatever the City did in terms of **general notice**, the message did not get through to anyone in the University Neighborhood.

On the notice issue, the City makes four arguments: (1) the statute requires only fifteen days' notice—nothing more is required; (2) the City's very generalized notice is sufficient—it is incumbent upon the citizens to comb through general notices to figure out what affects them; (3) in any event, the City provided adequate specific notice; and (4) it was infeasible for the City to give specific notice.

These arguments are addressed below.

A. The City's very general notices on the overhaul of the UDC were legally insufficient.

The City asserts the fifteen-day notice requirement in § 76-2-303(2), MCA,

---

[1] As the Complaint alleges, the City Commission in 2022 declined to consider the emergency interim zone text amendment. Dkt. 1, ¶58.

[2] *See* Dkt. 40, Ex. 10.

is both the beginning and end of any notice required. Thus, the City argues the District Court erred in finding the City's bare compliance with the statute insufficient. City Br., p. 21.

This is flatly contrary to the language of § 76-2-303(2), MCA. That statute provides: "**At least** 15 days' notice of the time and the place of the hearing must be published in an official paper…" (emphasis added). The statute sets **a floor** regarding public notice. It does not purport to prescribe the exclusive means of notifying the public.

Moreover, the Montana Constitution's provisions for public notice and participation, Art. II, Secs. 8 and 9, both in spirit and in text, require more—as do numerous cases and zoning authorities, as demonstrated below.

The City discusses various general notices of the overhaul of Bozeman's UDC, arguing they are sufficient to comply with the law. City Br., pp. 6–15. Plaintiffs never argued that these general notices and meetings did not happen. Those notices, however, were completely ineffective in informing the University Neighborhood that the City had plans to revise its long-standing zoning regulations regarding Greek houses—i.e., there was no notice of the contested zone change. This is a vital issue to the University Neighborhood.

Montana law is clear that general notice is insufficient. § 2-3-103, MCA

provides:

> 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.

Id. (emphasis added); *see also*, *Rathkopf's The Law of Zoning and Planning*, § 39.17 at 30-31 ("Requirements of notice tend to be strictly construed."). To this end, *Rathkopf's* observes: "[t]he modern trend, whether in statutes or ordinances, in judicial interpretation, or in application of precepts of constitutional due process – is to require that notice serve its intended function of **realistically** apprising interested residents and property owners, in language understandable by a lay person, of the nature of the proposed amendment as [it] affects their interests." *Id.* at § 39.17, n.9 (emphasis added).

Posit a situation where the City, instead of undertaking a massive general overhaul of its UDC, proceeded only with the specific zone change here in question. Would this specific zone change require public meeting and prior notice? The answer is obviously, yes. Section 76-2-303(2), MCA, states that a zoning regulation is not effective "until after a public hearing in relation to the regulation…." Given this, it makes no sense that such requirements are excused merely because there is a giant overhaul of the whole UDC.

Section 76-2-303(2), MCA, provides:

> A regulation, restriction, or boundary may not become effective until after a public hearing in relation to the regulation…at which **parties in interest and citizens have an opportunity to be heard**…

Id. (emphasis added). This statute makes a distinction between "parties in interest" and "citizens". This is critical because the City's entire argument on "notice" is that the "citizens" (i.e., the general public) were given general notice of the overhaul of the Bozeman UDC. And, according to the City, that is enough. Montana's "parties in interest" language fits nicely into the analysis in *Rathkopf's*, § 12.7 at 12-24 (2022 Ed.), which states that notice, to be adequate, must "fairly and sufficiently" inform "**interested parties**" of "the nature and character of the proposed action and their right to be heard on the matter."

The "parties in interest" here are the homeowners living in the University Neighborhood. Both the Bozeman City Charter and its Municipal Code, explicitly provide for "neighborhood associations", including the University Neighborhood Association[3].

Any Bozeman planner would know the removal of a prohibition on Greek

---

[3] Bozeman Charter, Chap. 2; Municipal Code, Part III, Code of Ordinances, Sec. 2 Administration, Division 7, Neighborhood Associations 2.05.110; *and* Part 1 Charter, Art. IV, Depts. Offices and Agencies, Section 4.06 A–E, Neighborhood Associations (providing and requiring numerous standards to be met for recognition).

houses would be of keen interest to the University Neighborhood Association. Obviously, these would be the persons classified as "parties in interest" (as opposed to "citizens") covered by § 76-2-303(2), MCA. Yet, the City gave no notice of its intent to delete Greek houses to anyone, much less the "interested parties" in the University Neighborhood.

Rathkopf's makes it clear that a notice that does not reasonably identify the nature of the proposed zoning action, **or that is not otherwise calculated to afford persons most affected** an opportunity to be heard, is generally held defective and inadequate. *Rathkopf's*, at § 39.17, n.9 and § 12.9 (emphasis added).

The City's unhelpful attitude on this issue is reflected in its responses to Plaintiffs' written discovery:

> **REQUEST FOR ADMISSION #3: Please admit there was no public notice of the specific act of deleting the category of fraternities and sororities from the Bozeman zoning codes.**

Despite the City's admission prior to the litigation that it had not published a specific notice (*see* pp. 26–27, below), the City backtracked:

> **ANSWER:** Deny. The public received notice of the overhaul of the relevant sections of the UDC. Upon receiving the notice of the revisions to the relevant sections to the UDC, **it was incumbent on the Plaintiffs to determine whether the amendment would affect them**.

(Emphasis added.) The same answer was given to RFA #4. Dkt. 54.

The City's brief continues with this argument that it was up to the individual citizens to comb through these general notices to ascertain whether there were particular proposals that affect them. City Br., p. 21.

Montana has very progressive constitutional provisions regarding public notice and public meetings. It's shameful to blame the Homeowners for not inquiring about the challenged amendment when, for lack of public notice, they had no knowledge of it. In *Glazebrook v. Bd. of Supervisors*, 587 S.E.2d 589, 592 (Va. 2003), the Court said: "…it is not enough to provide information that will merely direct readers to the physical location of the actual text of the proposed amendments."

Article II, Section 8 of the Montana Constitution provides:

> **Right of participation**. The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation, in the operation of the agencies prior to the final decision as may be provided by law.

This Court has held that the right to notice and the right to participate in Art. II, Secs. 8 and 9 are companion sections. *Bryan v. District*, 2002 MT 264, ¶¶ 30–31, 312 Mont. 257, 60 P.3d 381. *Bryan* quoted the Bill of Rights Committee:

> Both arise out of the increasing concern of citizens and commentators alike that government's sheer bigness threatens the effective exercise of citizenship. The committee notes the concern and believes that one step

> which can be taken to change this situation is to Constitutionally presume the openness of government documents and operations.

Id. at ¶ 31 (quoting Montana Constitutional Convention, Vol. II at 631).

The Public Participation in Governmental Operations is codified at Title 2, Chapter 3, MCA. § 2-3-103, MCA, provides:

> (1) Each agency shall develop procedures for permitting **and encouraging** the public to participate in agency decisions that are of significant interest to the public. The procedures shall assure adequate notice and assist public participation before a final agency action is taken of significant interest to the public.

Id. (emphasis added); *see also Board of Trustees v. Board of County Comm'rs*, 186 Mont. 148, 606 P.2d 1069 (1980) (invalidating a decision of the County Commissioners on a subdivision approval for lack of appropriate public notice).

Having plowed through Bozeman's UDC, the Homeowners admit that these are complex. Necessarily so because Bozeman is a large, diverse city, with all kinds of areas, uses, and standards set forth in its zoning codes. This is all the more reason why **specific** and **clear** notices to the public should be provided. Instead, the City buried its notice in a labyrinth of documents which worked to shield particular zone changes from public oversight. This obscurantism should not be tolerated.

On the issue of "adequacy" of notice, fundamental due process requires that it must be calculated to "***fairly and sufficiently***" inform interested parties "of the

nature and character of the proposed action and their right to be heard on the matter." *Rathkopf's*, §12.7 at 12-24 (citing cases).

B. Zoning cases and authorities make it clear that public notice must be calculated to effectively inform the public.

Courts from other jurisdictions have weighed in with the application of the common-sense standard summarized above. *Rathkopf's*, *supra* at §12.7. In *North Beach Medical Center, Inc., v. City of Fort Lauderdale*, 374 So. 2d 1106 (Fla. 4th DCA 1979), the notice was deemed inadequate because it merely advised the reader of proposed "revisions or amendments" to zoning ordinances:

> The notice must be clear and unambiguous and readily intelligible to the intended reader, the average citizen at large, who is presumed to lack the technical knowledge of a zoning expert. It is not enough that the notice convey to one well-versed in the law of zoning adequate information as to what changes the proposed ordinance would bring about.

Id. at 1108.

Rathkopf's quotes one court as follows: "[a] notice which does not present the true nature of the proposed amendment or revision must be treated as no notice at all (citing text)". *Civic Assn' Inc. v. Guaranty Sav. Assur Co.*, 329 So. 2d 767, 771 ((La. Ct. App). 1st Cir. 1976)), *rev'd* 339 So. 2d 323; *see also American Oil Corp. v. City of Chicago*, 331 N.E. 2d 67, 70–71 (1st Dist. 1975) (notice denied due process where the only notice was by publication buried in the back pages of newspaper,

which publication failed to identify the property).

City of Mobile v. Cardinal Woods Apt., Ltd., 727 So. 2d 48, 54 (Ala. 1999) held that a notice was not reasonably calculated to afford the persons most affected an opportunity to object. The published notice of rezoning was invalid because it did not refer to any specific uses and therefore "simply does not apprise interested persons as to how, and for what, to prepare." *Id.*; *see also Cotler v. Township of Pilesgrove*, 923 A.2d 338 (N.J. App. Div. 2007) (did not provide any information concerning specific nature or scope of proposed changes).

This Court said in *Bd. of Trustees v. Bd. of Co. Comm'rs.*, 186 Mont. 148, 606 P.2d 1069, 1073 (1980), "[w]ithout public notice, an open meeting is open in theory only, not in practice." *See also Glazebrook*, *supra*, stating that "no citizen could reasonably determine from the notice whether he or she was affected by the proposed amendments **except in the most general sense . . . ."** 587 S.E.2d at 592 (emphasis added).

C. The City's attempt to buttress by arguing that it did provide specific notice is not supported by the record.

Prior to this lawsuit, the City admitted it did not provide specific notice.

By letter of May 3rd, 2022, the Neighbors requested the City to identify each document that specifically informed the public of the proposed zone change:

> I request that you provide me with **each public document**

> **which informed the public of this particular change, i.e., deletion of the category of "fraternities and sororities"** and its "merger" into "group living."
> In this connection, please do not shower me with a bunch of extraneous documents which have some connection to the general revision of the UDC. All I want is any document where the City of Bozeman informed its public **specifically** of this proposed change.

Dkt. 40, Ex. 7 (emphasis added); *see also* Dkt. 43 (*Goetz Aff.*, ¶ 3).

By email of October 18, 2022 the City acknowledged that it had no specific responsive document:

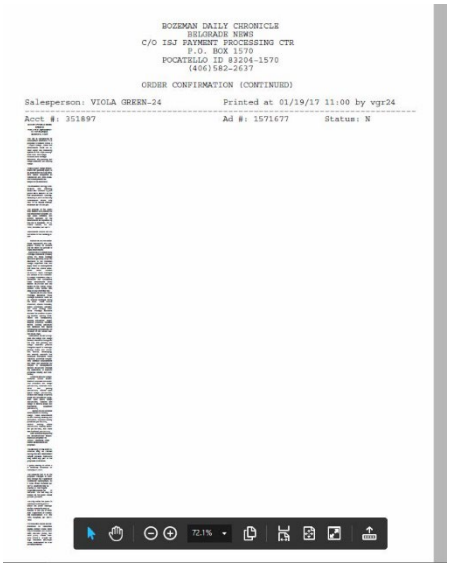
> Upon review of the potentially responsive documents **none meets your specific request**; all notifications reference more generally than the specific category of sororities and fraternities.

Dkt. 40, Ex. 8 (emphasis added); *see also* Dkt. 43, ¶ 4.

Apparently regretting this pre-litigation concession, the City now attempts to back-fill, citing several obscure references from its massive record, which, it argues, supports the proposition that citizenry was adequately notified.

Although the City **admits** it provided no **specific** notice, in Dkt. 25 it cited to four newspaper notices which are virtually unreadable to the natural eye. *See* Dkt. 40, Ex. 11; *see also* Dkt. 43, ¶ 4. The first purported notice is dated 1/19/17. Three additional notices were placed in newspapers on June 23, June 30 and July 27, 2017.

Dkt. 40, Ex. 11[4]. For example, the January 19, 2017 and the June 23, 2017 newspaper notices are as partially re-printed here:


BOZEMAN DAILY CHRONICLE
BELGRADE NEWS
C/O ISJ PAYMENT PROCESSING CTR
P.O. BOX 1570
POCATELLO ID 83204-1570
(406)582-2637

ORDER CONFIRMATION (CONTINUED)

Salesperson: VIOLA GREEN-24 Printed at 01/19/17 11:00 by vgr24

Acct #: 351897 Ad #: 1571677 Status: N


BOZEMAN DAILY CHRONICLE
BELGRADE NEWS
C/O ISJ PAYMENT PROCESSING CTR
P.O. BOX 1570
POCATELLO ID 83204-1570
(406)582-2637

ORDER CONFIRMATION (CONTINUED)

Salesperson: VIOLA GREEN-24 Printed at 06/23/17 09:21 by vgr24

Acct #: 355480 Ad #: 1636583 Status: N

Plaintiffs propounded requests for admissions (RFA #6, 7, 8, 9, 10, 11 and 12) which asked the City to admit, for each of these fine-print notices, that each "did not provide specific notice to the public regarding the deletion of 'Fraternity and Sorority houses'." The City's **ANSWER**: "Deny because this attachment is **unreadable**…" Dkt. 40, p. 10.

Precisely!

---

[4] These fine-print columns are partially reproduced here and are not in their original sizes. The originals, however, although somewhat larger are also unreadable without magnification. See full page of these notices in Dkt. 40, Ex. 11.

The City has a litigation obligation to respond to discovery requests honestly and fully. If it claims that it **can't read its own fine-print**, which purports to provide the public notice, how can it then argue that such so-called "notices" serve their function of putting the public on notice? [5]

Now, back-filling on its concession of no specific notice, the City has combed through the thousands of pages. The net result is pathetic. The City cites only four places that the City argues should have apprised Plaintiffs of the deletion of the category of fraternities and sororities.

None of these examples involve **notices** to the public. Instead, they are obscure places in the record, where after diligent and protracted search, a sophisticated reader **might** deduce that fraternities and sororities are going to be deleted.

The first example the City cites is Exhibit D, an "Agenda Packet", which contains a "Commission Memorandum and Comparison Table of existing and proposed UDC organization." City Br., p. 8. That is simply a "comparison table", which is a broad comparison of categories. It says nothing about fraternities and

---

[5] Plaintiffs admit, that when documents are repeatedly copied, fine-print may lose some of its clarity. The point here is that even the originals are in such minute print that they are unreadable to the naked eye.

nothing about the contested zone change.

The City cites a faint screen-shot of a document showing a table with a line drawn through the category "fraternities and sororities" and with a side fine-print red-lined bubble comment "merge with group living". City Br., p. 10. This obscure reference is to page 188 of a 562-page document. Moreover, this comment, in a May 8, 2017 draft of the updated UDC, was later deleted. So, if a citizen became involved after that date, there is nothing in the record that repeats the "merge" comment.

The City claims that a December 18 City Commission "Agenda Packet", included a clean version and an underlined version of revisions. City Br., p. 14. The City argues that a comparison of these two versions shows the intent to remove the separate residential use category of fraternity and sorority houses. *Id.* It cites pages 214–215 of Exhibit W. Notably, Exhibit W contains a staff report of 1075 pages. Pages 214–215 simply include a proposed new table (Table 38.310.030.A) which has no category for fraternities and sororities. Almost five-hundred pages later in the same document, page 708 merely shows a previous draft of that same table (38.310.030.A) with a cross-out through "fraternities and sorority houses". Thus, if one paws through a 1,075-page document and comes across pages 214–215 (the "clean version") and then locates at page 708, a similar table with a strikeout and

compares the two, the reader should have a "eureka moment."

In sum, these four trivial examples, which do not amount to "notice", plainly do not undercut the City's early concession that there was no specific notice.

Finally, when it was considering the overall UDC change in 2017, the City advertised for a public meeting on what it called a "Deep Dive" into the UDC changes. That so-called "Deep Dive" however, failed to mention the contested zone change. *See* Doc. 40, Ex. 12.

D. The City's argument that specific notice is infeasible is belied by its own acts.

The City argues that because it was doing a "city-wide" update, providing specific notice was "unreasonably and functionally impossible". City Br., pp. 27–28. That argument is belied by the City's own actions. Once the 2017 fine-print notices are magnified, they show that the City actually attempted to provide advance notice on numerous proposed specific changes. For example, the fine-print newspaper notice of July 27, 2017 (Dkt. 58, Ex. J) lists:

- Amend §38.410.020 to include neighborhood centers are subject to block frontage standards;
- Amend §38.420.030 to allow and establish standards for cash donation in-lieu of land dedication;
- Amend §38.360.040 accessory dwellings units reducing unit square footage in certain districts, allowing ADU's on the ground floor when standards are met in certain districts and generally modifying

standards;

- Amend §38.360.240 townhome and rowhouse dwelling to create building standards, garage standards, internal drive isle standards, and create usable open space requirements;
- Amend §38.410.040 clarifying block standards;
- Amend §38.520 to add site planning & design elements including the relationship to adjacent properties, non-motorized circulation & design, vehicular circulation & parking, internal open space, and service areas and mechanical equipment standards;
- Amend §38.700.020 deleting convenience food restaurant.

Setting aside the fine print/readability problem, these examples show that it is feasible to provide specific notice. The City just failed to do it with respect to the deletion of the category of fraternities and sororities from Table 38.08.020.

The District Court properly concluded:

> Newspaper notices did specifically call out numerous, specific changes to Chapter 38 Sections—but none described the change at issue here.

Dkt. 73, p. 15.

The City cites *Citizens for a Better Flathead v. Bd. of Cty. Comm'rs*, 2016 MT 256, 385 Mont. 156, 1 P.3d 155, arguing this Court determined the public notice in that case was adequate with respect to sweeping changes proposed in the County's growth plan. That case is inapposite here. In that case, the Commission provided for a thirty-day comment period and "[m]embers of the public submitted 299 written comments in the form of emails, letters and postcards, and a petition containing 451 signatures." *Id.* at ¶ 47. There was no question that the protesting

citizens knew what was at issue. That is unlike the case here, where the particular aspect of the UDC overhaul that is challenged was not disclosed.

Summarizing, the District Court found:

> While numerous public notices and workshops, a "Deep Dive" public slideshow on May 23, 2017 and a summary "Unified Development Code Recommendation & Update" dated May 8, 2017, **none even remotely suggested that the City intended to end its 30-plus year prohibition on new Greek housing in residential neighborhoods**.
>
> The Court finds this remarkable for a change in zoning for Greek housing in a community inexorably tied to life at the Montana State University.

Dkt. 73, p. 15 (emphasis added).

Finally, the City cites *Generation Realty, LLC v. Catanzaro*, 21 A.3d 253 (R.I. 2011), which the City asserts rejected a plaintiff's claim that specific notice is required. If the Court is to resort to Rhode Island law, the appropriate case is *Federal Bldg. & Dev. Corp. v. Jamestown*, 312 A.2d 586 (R.I. 1970). There, the Rhode Island Supreme Court said that a zone change notice must:

> [B]e sufficient to enable the landowners in a community to ascertain therefrom whether or not the proposed change would affect zoning classifications which attached to their land.

Id. at 595. The Court rejected the City's argument that the notice was sufficient because "copies of the proposed ordinance were available at the office of the town

official where they could be examined." *Id.* at 591.

II. The City's Secretive Modification of Its Regulation Regarding Fraternities was Arbitrary and Capricious

A. The utter lack of documentation on the contested change shows that this decision was arbitrary and capricious.

It is deeply troubling that there is no explanation for the 2018 amendment deleting fraternities and sororities from Table 38.08.020. There is no evidence that there was a constituency that proposed or lobbied the City for such a change. Nor is there any **reason** given for such a change in any of the materials presented by the City to the public. There is no report or written analysis that preceded this change; nor was there any notice to the public of the proposal to make the change. In short, this naked modification is the work of a single City employee, with no reference to why, when, or how it was made.

This Court in *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 65, 360 Mont. 207, 255 P.3d 80, in invalidating a zone change as arbitrary and capricious, set forth this standard:

> The governing body's action is arbitrary and capricious if it came about seemingly at random or by chance, or as an impulsive and unreasonable act of will (citations omitted). In making this determination, the reviewing court must consider whether the governing body's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment (citations omitted).

See also Kiely Constr. L.L. v. City of Red Lodge, 2002 MT 241, 312 Mont. 52, 57 P.3d 836. This fits like a glove. There is no indication that relevant factors were considered. The alteration was made seemingly at random or by chance. It appeared to be a diktat of one member of the City Planning Department. *See also Silva v. City of Columbia Falls*, 258 Mont. 329, 335, 852 P.2d 671, 675 (1993) (citing and relying on the dictionary definitions of "arbitrary" and "capricious").

The City cites one case, *MM&I, LLC v. Bd. of Cty. Comm'rs. Of Gallatin County*, 2010 MT 274, ¶¶ 29–30, 358 Mont. 420, 245 P.3d 1029. Unlike the present case, **there was a record** in *MM&I*, which supported the decision of the governing body. *MM&I* actually addresses the record evidence supporting the decision in **eight full paragraphs**. *Id.* at ¶¶ 31–38.

In contrast, here there is simply no evidence that the City's decision regarding Greek houses was reasoned or supported by any data or rationale. It is purely arbitrary. The Virginia Supreme Court in *Glazebrook*, *supra*, held that "Virginia's zoning statutes are designed to prevent zoning changes from being made 'suddenly, arbitrarily, or capriciously.'" 587 S.E.2d at 593. It is the same in Montana. The contested zone change was properly voided by the District Court as arbitrary and capricious.

B. The City's post-hoc explanation is insufficient to salvage the change.

Any after-the-fact rationalization, particularly by a single planner, does not carry much weight. Nevertheless, the neighbors, mystified by the amendment and thinking it must have been a mistake, sought an explanation from the City in 2022. One of the neighbors emailed Tom Rogers, Bozeman Senior Planner, asking why the language pertaining to fraternities and sororities was deleted. Mr. Rogers cryptically responded:

> The City has been moving towards a hybrid approach to zoning (form based vs. Euclidian). What this means is the Commission moved to consolidate uses into fewer categories of similarity. Sororities and fraternities are group residential."

Dkt. 40, Ex. 13; *see also* Dkt. 42 (*Powell Aff.*, ¶6).

This after-the-fact and off-the-cuff assertion by a single planner that fraternities and sororities are now folded into "group residential" is unsupported by anything in the massive record regarding the overhaul of the UDC. Nor is there **any** published policy or regulation that actually explicitly states that fraternities and sororities were now considered "group residential".

Conflating fraternities with group living makes no sense. For over forty-years, from 1973 through 2018, the City made a distinction between the category of fraternities/sororities and group living. Why, for many years, were these different,

and how did they suddenly become the same? And how is the public supposed to **infer** that Greek houses are now within the category of "group residential"?

Courts have recognized the difference between group living and college fraternities. For example, in *Long Beach v. California Lambda Chapter of Sigma Epsilon Fraternity*, 255 Cal. App. 2d. 796, 797 (1968), the Court held:

> The city council apparently was fully aware the college spirit contemplates frequent gatherings with attendant boisterous conduct on occasions. The "rush parties", the dances, the rallies, and other manifestations of the collegiate spirit are present in a fraternity house and frequently absent in a boarding house, a lodging house or an apartment.

"Group home" is defined at §76-2-411, MCA. It includes homes for disabled persons, assisted living facilities, half-way houses, and the like. It does not include fraternities and sororities. Unlike group homes, Greek houses serve as a magnet. Few people might actually **reside** at the fraternity house, but fraternities conduct general membership meetings, rush events, and parties, which attract numerous people who don't reside at the site.

In fact, the planning industry has historically made a sharp distinction between Greek houses and group homes. The 2018 UDC lacks a separate definition for Greek houses. However, Section 38.700.010 of the Bozeman Municipal Code provides for a default: "…[terms] if not defined herein, must be defined as an in

the latest edition of 'The Illustrated Book of Development Definitions' by Harvey S. Moskowitz, Carl G. Lindbloom…". That book, in turn, defines "fraternity house" as,

> A building containing sleeping rooms, bathrooms, common rooms, and a central kitchen and dining room **maintained exclusively for fraternity members** and guests or visitors and **affiliated with an institution of higher learning**.

See Dkt. 85-1 (Transcript) p. 9 (emphasis added).

Thus, the undisclosed effort to sweep Greek houses into the category of "group living" is counter-intuitive, inconsistent with planning practice and illegally arbitrary.

In short, Homeowners' due process claim is straightforward and uncomplicated. There are no disputed facts. There is **nothing** that explains **why** the deletion was made, whether a particular constituency pushed that change, or why such change came out of the blue. As this Court said in *Heffernan*, "the governing body's action is arbitrary and capricious if it came about seemingly at random or by chance, or as an impulsive and unreasonable act of will." 2011 MT 91, ¶ 65.

This Court said in *Citizens for Responsible Dev. v. Bd. of County Comm'rs.*, 2009 MT 182, ¶ 8, 361 Mont. 40, 208 P.3d 876, that the standard of review on

whether a decision was arbitrary, capricious, or unlawful "breaks down into two basic parts. One part concerns whether the agency action could be held unlawful, and the other concerns whether it could have been held arbitrary and capricious." *See also Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 31, 356 Mont. 41, 230 P.3d 808.

This Court said in *Heffernan*,

> The governing body's action is unlawful if it fails to comply with the requirements of applicable statutes (citations omitted).

2011 MT 91, ¶ 65.

The next section demonstrates that the City's action was unlawful.

III. The City Failed to Apply the Required "*Lowe* Criteria" When It Eliminated Fraternities from Its Zoning Code

Montana law, §76-2-304, MCA, requires the City, in considering zone changes, to consider nine criteria, including the value of buildings, the character of a district, and whether it is "in accordance with" the City's "growth policy".

The seminal case on this issue is *Lowe v. City of Missoula*, 165 Mont. 38, 41, 525 P.2d 551, 553 (1974)[6]. The statutory criteria are now commonly referred to as

---

[6] *Lowe* was reversed on other grounds, not here relevant. *The Greens at Fort Missoula LLC v. City of Missoula*, 271 Mont. 398, 897 P.2d 1078 (1995).

the "*Lowe* criteria". *Lake County First v. Polson City Council*, 2009 MT 322, ¶20, 352 Mont. 489, 218 P.3d, 16.

In *Lowe*, this Court set aside a zoning change after determining there was an insufficient factual record for the governing bodies to make findings regarding the zoning change criteria. This Court stated, "the record is so lacking in fact and information that the action on the part of the City Council and district court could be said to have been based on mistakes of fact, thereby constituting an abuse of discretion." 165 Mont. at 41, 525 P.2d at 553. Many cases have followed *Lowe*. *See Schanz v. City of Billings*, 182 Mont. 328, 335-336, 597 P.2d 67, 71 (1979); *Little v. Bd. of Co. Comm'rs*, 193 Mont. 334, 352, 631 P.2d 1282, 1292 (1981); *Heffernan*, *supra*.

As *Lowe* made clear, for purposes of Court review, there must be a clear and identifiable record—i.e., there must be documentation of how the statutory factors were applied. There is simply nothing in the *Staff Report* that refers to fraternities and sororities or attempts to apply the *Lowe* criteria to the contested zone change[7].

---

[7] In response to Request for Production #12, which asked for all documents that the City "related to the statutory factors referred to as to the 'Lowe criteria'", the City's response was, "see Bates #City of Bozeman 0001779-0001788". These pages are merely a staff memorandum dated July 18, 2017, which addresses among other things, "accessory dwelling units, cottage affordable housing, grow house and town house garage standards" and the like. There is no coherent or systematic discussion of the *Lowe* criteria in these pages. *See* Dkt. 54, p. 8.

This Court also applied the *Lowe* criteria in affirming an invalidation of a map amendment in Flathead County in *Citizens for a Better Flathead v. Bd. of Co. Comm'rs of Flathead County*, 2016 MT 325, ¶ 16–26, 385 Mont. 505, 386 P.3d 567:

> A governing body "must develop a record that fleshes out all pertinent facts upon which its decision was based in order to facilitate judicial review. For purposes of evaluating 'substantial compliance,' that includes all pertinent elements of the growth policy." *Heffernan*, ¶87 (internal citations omitted).

Id. at ¶ 20.

The City argues that it would be infeasible to apply the *Lowe* criteria to discrete zone changes such as the one contested here. Yet, the City has done exactly that. In the summer of 2022, the University neighbors proposed an interim text amendment **reinstating** the restriction on fraternities and sororities. The City's planning staff after receiving the neighbors' application, prepared a *Staff Report*, which did exactly what the City now claims is "infeasible"—it compiled a 26-page report on the question of whether the specific interim zone change requested (the one identically at issue here) met the *Lowe* criteria. *22270, Staff Report for the Fraternity & Sorority Text Amendment, Application 22270* (legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/ 1747297/ 22270_CDB_SR_Final_Draft_1-17-23.pdf).

In contrast to this 2022 Report done by the City with respect to the

Homeowners' request for an interim zone text amendment, the City considered **none** of the *Lowe* criteria in 2018 with respect to the revision of Table 38.08.020.

IV. The District Court Correctly Rejected City's Statute of Limitations Arguments

The City argues that the District Court erred in rejecting City's statutes of limitations arguments. In making that argument, the City relies solely on the thirty-day (30) statute of limitations of § 2-3-114(1), MCA, which provides that acts of governing bodies done without appropriate notice may be voided if challenged within thirty days[8].

A. Because the zone change was void *ab initio*, no statute of limitations began running.

The contested zone change is void *ab initio* for failure to provide adequate public notice. For that reason, whatever statute of limitations might be applicable, it did not begin to run because the zone change was void from the beginning.

§ 76-2-303(2) 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

---

[8] In the District Court, this was a fallback argument. The City's main argument was that § 27-2-209(5), MCA, which applies a six-month statute of limitations to "projects" of local governments, applies. The District Court squarely rejected that argument. *See* Dkt. 73 (Order), pp. 5–6. This argument is now abandoned by the City.

been held….

(Emphasis added.)

Here there was no public hearing "**in relation to the regulation**"—i.e., in relation to the deletion of fraternities and sororities from the Bozeman UDC, nor was there notice, as required by §76-2-303(2), MCA. Thus, the District Court correctly found the change in 2018 is *void ab initio*. Dkt. 73, p. 19.

The fact that the zone change was void from the outset means that any putatively applicable statute of limitations does not even begin to run. In *Schadler v. Zoning Hearing Bd.*, 850 A.2d 619, 626 (Pa. 2004), the Court cited, "procedural defects", saying,

> It is difficult to see how the public could have possibly been on notice regarding the changes in the zoning laws [in question] . . . . Therefore, under this Court's prior decisions *Lower Gwynedd* and *Cranberry Park* . . . the Ordinance is void *ab initio* and had no effective date, **and the thirty-day limitations . . . never began to run**.

Id. (emphasis added.)

The Court in *Cranberry Park Assocs. ex. Rel Viola v. Township Zoning Hearing Bd.*, 751 A.2d 165 (Pa. 2000), referred to by the *Schadler* Court, also held that the statute of limitations never began to run because the zone change was declared void *ab initio*.

Schadler, was followed by *Glen-Gery Cor. v. Zoning Bd. Of Dover*, 907 A.2d

1033 (Pa. 2006), where the plaintiff alleged (like Plaintiffs in this case) violation of due process in the enactment of an ordinance. The court held that the pending action was not barred by a statute of limitations because the alleged procedural infirmities, if proven, would render the ordinance void *ab initio*. *Id.* at 1035.

In *Edwards v. Allen*, 216 S.W.3d 278, 289 (Tenn. 2007), Plaintiffs filed their action in 2003—eleven years after the county approved the rezoning (1992). *Id*. at 280, 282. The trial court ruled the action was barred on statute of limitation grounds. *Id.* The court of appeals reversed, holding in relevant part the county's rezoning amendment was void. *Id.* The Tennessee Supreme Court affirmed, finding the rezoning ordinance was void *ab initio* and, for that reason, the statute of limitations had not begun to run. *Id.* at 285–290.

In *Yost v. Fulton County*, 348 S.Ed.2d 638 (Ga. 1986) the Georgia Supreme Court found that the challenged amendment of a zoning ordinance accomplished pursuant to a defective notice was without any legal force or effect. In a separate case, the same court found that the plaintiff could challenge a rezoning action taken thirteen (13) years prior where the evidence showed the ordinance was enacted without proper notice and hearing. *Golden v. White*, 316 S.E.2d 460, 461 (Ga. 1984).

In *Pennington County v. Moore*, 525 N.W.2d 257, 258–59 (S.D. 1994) the South Dakota Supreme Court concluded that failing to follow statutorily imposed

procedures in enacting the challenged ordinance made it invalid and unenforceable 23 years after its enactment.

In *Carter v. City of Salina*, 773 F.2d 251 (10th Cir. 1985) the court held that affected landowners were not provided the required notice and awarded injunctive relief from the subject ordinance eight (8) years after its enactment, stating:

> Ordinances which fail to comply with the state enabling statutes requiring notice and hearing are void. …Such procedural infirmities cannot be overlooked and the fact that such an ordinance has been "on the books" and in effect for a long period of time does not instill life into an ordinance which was void at its inception. Such an ordinance is of no effect.

Id. at 254–255; *see also* **numerous** cases cited at 255; *Specht v. Page*, 627 P.2d 1091, 1096–97 (Az. Ct. App. Dept. A. (1981)).

It is appropriate to look at the law of these Sister States, because many of their laws are similar to Montana's. The origins of Montana's zoning statute can be traced to the model act developed by the US Department of Commerce, almost a hundred years ago[9]. It is titled *A Standard State Zoning Enabling Act* (1926). Section 4 of that model act authorizes the adoption and amendment of zoning regulations. It provides that no zoning regulation may become effective unless preceded by a

---

[9] Attached to Dkt. 61.

"public hearing in relation thereto".

Many states, including Montana, have followed this federal model. These are summarized in *Rathkopf's The Law of Zoning and Planning*, §12:5:

> Enabling acts generally provide that **no zoning regulation shall become effective until after** notice and public hearing thereon. Notice and public hearing requirements are held to be conditions precedent to the validity of any zoning regulation…(including zoning amendments).

(Emphasis added.)

Given the ancient federal model act, which was copied by many states, it is not surprising there are numerous persuasive cases, including those cited above, holding that the failure to follow statutory procedures, including those prescribing notice to the public, result in the zoning amendments being declared void *ab initio*.

B. Numerous cases support the determination that the zone change is void *ab initio*.

Homeowners have located no opinion of this Court which refused to apply a statute of limitations because a zone change is void *ab initio*. One district court has come close. Judge Sherlock held:

> Such procedural infirmities cannot be overlooked and **the fact that such an ordinance has been "on the books" and in effect for a long period of time does not instill life into an ordinance which was void at its inception**. Such an ordinance is of no effect.

2007 Mont. Dist. LEXIS 509, ¶ 17, affirmed in *Fasbender v. Lewis & Clark County,*

2009 MT 323, 352 Mont. 505, 2018 P.3d 60 (emphasis added). Although not reaching statutes of limitations issues, there are many decisions of this Court that have found ordinances or other acts of local government void *ab initio* for failing to provide notice or comply with required procedures. In *State ex. Rel. Christian, Spring, Sielbach & Assocs. v. Miller*, 169 Mont. 242, 245–246, 545 P.2d 660 (1975), this Court nullified an interim zoning ordinance stating: "this particular temporary interim zoning regulation is **null and void** for the failure to observe the proper procedures upon its enactment." *Id.* (emphasis added).

In *Nilson Enters. v. Great Falls*, 190 Mont. 341, 621 P.2d 466, this Court held that an attempted annexation was void *ab initio* because the City was without jurisdiction to proceed with the annexation for its failure to comply with consent requirements:

> Without the property owner's consent the City was without the jurisdiction to proceed with the annexation. The annexation was void *ab initio* (citation omitted).

Id. at 347, 470; *see also Chennault v. Sager*, 187 Mont. 455, 610 P.2d 173 (1980); *State ex. rel Russell Ctr. v. City of Missoula*, 166 Mont. 385, 391, 533 P.2d 1087, 1090 (1975); *Wood v. City of Kalispell*, 131 Mont. 390, 310 P.2d 1058 (1957); *Glazebrook*, *supra* (…the notice in this case was inadequate…the zoning ordinances…are void *ab initio*").

In sum, whatever the applicable limitations may be, they did not even begin to run because the amendment was void *ab initio*.

C. Because there is no statute of limitations for municipal zone amendments, Montana's five-year default statute applies.

Even if a statute of limitations were to be applied, it would not be the thirty-day statute of § 2-3-114(1), MCA. Rather, because this is a zoning change, it falls under zoning amendment statutes found in Title 76. Title 76 of the Montana Code sets out the statutes regarding "land resources and use". Within that Title, "Chapter 2" governs "Planning and Zoning". Chapter 2, in turn, is divided into Part 2, which deals with "**County** Planning", and Part 3, which governs "**Municipal** Zoning". Then Chapter 3 deals with "Local Regulations of Subdivisions".

Part 2, governing **county** planning does have a statute of limitations of thirty-days (§ 76-2-227(1)(c)). Chapter 3, dealing with **subdivisions**, also has a thirty-day deadline for an appeal (§ 76-3-625(2)). In contrast, there is no counterpart statute of limitations in Title 76, Ch. 2., Pt. 3, pertaining to "municipal zoning".

Familiar statutory construction principles apply, particularly *expressio unius est. exclusio alterius* (the express mention of one thing excludes all others). *See Omimex Can., Ltd., v. State*, 2008 MT 403, ¶21, 347 Mont. 176, 201 P.3d 3.

What limitation then does apply? The answer must be Montana's five-year

default statute. §27-2-231 provides:

> **Other actions.** Action for relief not otherwise provided for must be commenced within 5 years after the cause of action accrues.

Because the substance of Plaintiffs' claims is not squarely addressed by any other statute of limitations, the five-year limitations period in § 27-2-231 is applicable. *See San Diego Cty. Dist. Council of Carpenters etc. v. Cory*, 685 F.2d 1137, 1141 n.7 (9th Cir. 1982); *Watson v. Colusa-Parrot Mining & Smelting Co.*, 31 Mont. 513, 525, 79 P. 14, 18 (1905).

Moreover, "when there is substantial question as to which of several statutes should apply, the longest limitations period controls." *Blanton v. Dep't of Pub. HHS*, 2011 MT 110, ¶ 33, 360 Mont. 396, 255 P.3d 1229 (citing *Thiel v. Taurus Drilling Ltd.*, 218 Mont. 201, 212, 710 P.2d 33, 40 (1985)).

Homeowners' lawsuit clearly falls within the five-year period. Accordingly, the City's position on the statute of limitations must be rejected.

V. Homeowners Are Entitled to Their Attorneys' Fees Incurred in Defending This Appeal.

The District Court's Order, after ruling in Homeowners' favor, provided that "motions, if any, for costs and/or fees arising from this Order shall be filed within fourteen (14) days of this Order…". Dkt. 40. No hearing occurred because the Homeowners and City reached an agreement that the City would pay a

specified amount of Homeowners' attorneys' fees if the Homeowners prevailed on this appeal. That stipulation left open the question of attorneys' fees incurred in defending this appeal. Homeowners now submit that they are entitled to such fees and request that this Court remand for the limited purpose of determining the extent of such fees.

In *VanBuskirk v. Gehlen*, 2021 MT 87, ¶¶ 27–29, 404 Mont. 32, 484 P.3d 924, the Court remanded the case for the purpose of assessing attorneys' fees on appeal. It did so under the supplemental relief clause of the Declaratory Judgment Act, § 27-8-313, MCA, stating:

> Incident to granting declaratory judgment, courts have discretion under § 27-8-313, MCA, to grant further supplemental relief, including monetary or coercive relief, when "necessary or proper" to afford complete relief under the circumstances. *Trustees of Indiana Univ. v. Buxbaum*, 2003 MT 97, ¶¶ 41–42, 315 Mont. 210, 69 P.3d 663.

Id. at ¶ 28. This Court added:

> A successful defense of the judgment **on appeal** is the final step necessary to accomplish that end by declaratory judgment.

Id. (emphasis added). Accordingly, in the interests of complete relief, this Court should remand this case for the calculation of attorneys' fees and costs in defending the appeal.

Further support for an award of attorneys' fees is found in the Private

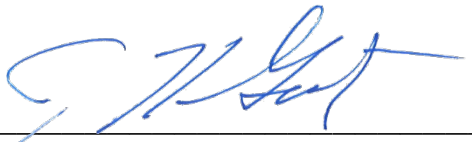
Attorneys General Doctrine. *See Forward Mont. v. State*, 2024 MT 19, ___ Mont. ___, ___ P.2d ___. Although fees for the appeal were not awarded in *Forward Mont.*, they should be here because Homeowners have had to proceed essentially as private attorneys general.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed. This case should be remanded for the limited purpose of assessing attorneys' fees on appeal against the City.

DATED this 22nd day of February, 2024.

GOETZ, GEDDES & GARDNER, P.C.



James H. Goetz
Henry J.K. Tesar

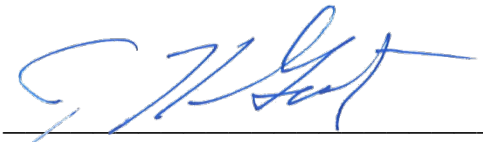
GALLIK & BREMER, P.C.

Brian K. Gallik

Attorneys for Plaintiffs and Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to M. R. App. P. 11, the undersigned certifies that this brief is set in a proportionally spaced font and contains fewer than 10,000 words (9,168).



James H. Goetz
Henry J. K. Tesar

CERTIFICATE OF SERVICE

I, James H. Goetz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-22-2024:

Henry Tesar (Attorney)
35 North Grand
Bozeman MT 59715
Representing: Kristin Charron, Richard J. Charron, Linda Fuller, Richard Gillette, Susan Hinkins, Julie Jent, G. Larry Jent, Dave Johnson, Susan Johnson, Kathy Rich
Service Method: eService

Brian K. Gallik (Attorney)
777 E. Main St., Ste. 203
PO Box 70
Bozeman MT 59771
Representing: Kristin Charron, Richard J. Charron, Linda Fuller, Richard Gillette, Susan Hinkins, Julie Jent, G. Larry Jent, Dave Johnson, Susan Johnson, Kathy Rich
Service Method: eService

Elizabeth Worth Lund (Attorney)
1 West Main Street
Bozeman MT 59715
Representing: City of Bozeman
Service Method: eService

Electronically signed by Myriam Quinto on behalf of James H. Goetz
Dated: 02-22-2024