DA 25-0200

In The Supreme Court of the State of Montana

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC,
Plaintiff, Appellee, and Cross-Appellant,

v.

STATE OF MONTANA,
Defendant and Cross-Appellee,

SHELTER WF, INC.,
Defendant-Intervenor, Appellant, and Cross-Appellee,

MONTANA LEAGUE OF TOWNS AND CITIES,
Defendant-Intervenor, Appellant, and Cross-Appellee, and

DAVID KUHNLE and CLARENCE KENCK,
Defendant-Intervenors and Cross-Appellees.

Appeal from the Eighteenth Judicial District Court, Gallatin County
Hon. Mike Salvagni, Cause No. DV-16-2023-0001248-DK

SHELTER WF'S OPENING BRIEF

Jesse Kodadek
PARSONS BEHLE & LATIMER
127 East Main Street, Suite 301
Missoula, MT 59802
406.317.7220
jkodadek@parsonsbehle.com

For Shelter WF, Inc.

Austin Knudsen
Montana Attorney General
Michael D. Russell
Thane Johnson
Alwyn Lansing
Michael Noonan
Assistant Attorneys General
MONTANA DOJ
PO Box 201401
Helena, MT 59620-1401
406.444.2026
michael.russell@mt.gov
thane.johnson@mt.gov
alwyn.lansing@mt.gov
michael.noonan@mt.gov
For State of Montana

Ethan W. Blevins
PACIFIC LEGAL FOUNDATION
839 W. 3600 S.
Bountiful, UT 84010-8423
916.288.1392
eblevins@pacificlegal.org
For David Kuhnle and Clarence Kenck

Murry Warhank
Scott Svee
JACKSON MURDO & GRANT
203 N. Ewing
Helena, MT 59601
406.442.1300
mwarhank@jmgattorneys.com
ssvee@jmgattorneys.com
For Montana League of Cities and Towns

James H. Goetz
Henry J.K. Tesar
GOETZ, GEDDES & GARDNER
35 North Grand Ave.
PO Box 6580
Bozeman, MT 59771-6580
406.587.0618
jim@goetzlawfirm.com
htesar@goetzlawfirm.com

Brian K. Gallik
GALLIK & BREMER
777 E. Main Street, Suite 203
PO Box 70
Bozeman, MT 59771-0070
406.404.1728
brian@galliklawfirm.com
For Montanans Against Irresponsible Densification

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INTRODUCTION

This case involves a facial constitutional challenge brought by a group called Montanans Against Irresponsible Densification (MAID) to a package of interrelated pro-housing bills that were passed with broad bipartisan support during the 2023 Legislative session—the so-called "Montana Miracle."

The district court largely rejected MAID's challenge and mostly upheld the challenged laws. But the district court struck down several provisions of the Montana Land Use and Planning Act (MLUPA) as violations of the constitutional right to participate. And it issued a curious statewide declaratory judgment that the new laws defining duplexes and accessory dwelling units as permitted uses in most cities could not "invalidate or displace" more restrictive private covenants.

Shelter WF, Inc., which intervened in defense of the challenged bills, appeals these two parts of the district court's final judgment, for two reasons.

First, since the district court issued its opinion and a final judgment, the 2025 Montana Legislature passed and the Governor signed Senate Bill (SB) 121, which substantially re-wrote the public participation provisions of MLUPA, and which has an immediate effective date. The changes and additions made by SB 121 go directly to the heart of MAID's public participation grievances and specifically modify several of the provisions struck down by the district court. They

also add multiple provisions that allow for the specific type of public participation MAID argues the Montana Constitution requires. As will be shown below, SB 121 modified MLUPA to the extent that the MAID's claims related to MLUPA's public participation claims are now moot and should therefore be vacated.

Second, the problem with the district court's declaratory judgment as it relates to restrictive covenants is that this Court has long held that whether any set of covenants applies to a particular situation requires a case-by-case inquiry. That is because covenants are subject to statutory and equitable defenses to enforcement, so just because a set of covenants purportedly limits use to a single-family residence does not necessarily mean that restriction is enforceable. Moreover, MAID lacked standing to bring an action to enforce covenants to which none of its members are a party. The district court's declaratory judgment on this issue therefore resolved a nonjusticiable claim and constituted an impermissible advisory opinion.

ISSUES FOR REVIEW

I. Did Senate Bill 121, which became law after the district court entered judgment and substantially modified the challenged provisions of MLUPA, render the district court's declaratory judgment related to MLUPA moot and this part of the case non-justiciable, thereby requiring vacatur of the portions of the district court's order addressing MLUPA?

II. Did the district court resolve a nonjusticiable claim and issue an advisory opinion when it issued a sweeping statewide declaratory judgment that the provisions of the new laws allowing accessory dwelling units cannot be used to "invalidate or displace covenants" that are more restrictive than zoning?

STATEMENT OF THE CASE

A. Background.

This is the second time this case has been to this Court. The first time, this Court vacated a preliminary injunction in favor of MAID that had enjoined portions of the challenged laws that permitted duplexes and accessory dwelling units in most Montana cities. *Montanans Against Irresponsible Densification, LLC v. State (MAID)*, 2024 MT 200, ¶ 23, 418 Mont. 78, 555 P.3d 759. Several amici filed briefs in that appeal, including Shelter WF. *Id.*, ¶ 21.

On remand, the district court allowed several parties to intervene as defendants, including Shelter WF. (Docs. 60, 73, 77.) Soon thereafter, following a flurry of cross-motions for summary judgment and a motion to dismiss—where Shelter WF was the only party to move for defensive summary judgment on all of MAID's claims—the district court held an extended hearing on those motions and, on March 3, 2025, expeditiously issued the order and judgment now before this Court. (Docs. 151, 152.)

Shelter WF timely appealed, Intervenor Montana League of Towns and Cities joined the appeal, and MAID timely cross-appealed.

On May 1, the Legislature transmitted SB 121 to the Governor, who signed the bill on May 8, 2025.[1] SB 121 has an immediate effective

[1] The enrolled bill, which is in the Appellants' Joint Appendix, does not include the relevant dates when it was passed and signed. But https://bills.legmt.gov/#/laws/bill/2/LC0016?open_tab=status (last visited May 12, 2025) shows that it passed the House via a 99-0 vote,

date. Appellants' Joint Appendix (AJA)-87.

B. Summary of MAID's claims and the district court's judgment on those claims.

In its five-count amended complaint, MAID challenged the new laws discussed above, and the district court granted the relief, as follows:

1. Count I sought a declaratory judgment that SB 323, SB 528, and SB 382 do not purport to and cannot displace, supplant, or otherwise preempt private covenants that are more restrictive than the zoning reforms. AJA-116. The district court *granted MAID's motion* on this issue and issued the declaratory judgment. Shelter WF appeals this ruling because it constituted an advisory opinion. AJA-4.

2. Count II alleged MLUPA's revised procedures for public participation and ministerial approval of projects compliant with the community's land use plan are facially unconstitutional violations of the Montana constitutional right to participate and right to know. AJA-118. The district court *largely granted MAID's motion for summary judgment on this* issue and struck provisions of MLUPA related to ministerial approval of certain types of projects. AJA-4–5. Shelter WF appeals this ruling because it has been mooted by the passage of SB 121 in 2025.

3. Count III alleged the parts of the new laws allowing duplexes

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then passed the Senate via a 50-0 vote, and was then transmitted to the Governor on May 1. The governor signed it into law on May 8, 2025.

and ADUs on single-family lots violate the right to equal protection by treating properties subject to private covenants differently from properties not subject to private covenants.[2] AJA-129. The district court *granted the defendants' motions for summary judgment* on this claim. AJA-5.

4. Count IV alleged violations of the right to substantive due process due to purported contradictions and inconsistencies within the new laws, mainly related to the fact that they involve population-based line-drawing. AJA-132. The district court *granted the defendants' motions for summary judgment* on this claim. AJA-5.

5. Count V alleged a general constitutional claim of "arrogation" of local power by the State. AJA-138. The district court *granted the defendants' motions for summary judgment* on this claim. AJA-5–6.

Additional parts of the challenged laws and the district court's rulings will be addressed below.

STATEMENT OF FACTS

A. The parties to this case.

MAID is a group of Montana property owners which opposes increased density, including allowing duplexes and accessory dwelling units in areas zoned single-family. AJA-12.

Defendant-Intervenor Shelter WF, Inc. is a Montana nonprofit

[2] This claim is especially bizarre because the practical effect would have been to allow those with private covenants to control *all* zoning.

public benefit corporation a public benefit corporation that was formed to improve housing affordability in Whitefish, the Flathead Valley, and Montana more broadly. Shelter WF educates the public about government policies affecting housing supply, and advocates for reforms that lead to an abundance of homes in all shapes and sizes. AJA-151–154.

Defendant-Intervenor Montana League of Cities and Towns is a nonprofit association of 127 municipalities whose sole purpose is the cooperative improvement of municipal government in Montana.

Defendant-Intervenors David Kuhnle and Clarence Kenck are property owners in Missoula who planned to build an ADU and a duplex, respectively, on their own properties. Their right to do so was challenged by MAID's lawsuit and temporarily enjoined before the last appeal.

B. The widespread recognition of Montana's dire housing shortage, the Governor's Housing Task Force, and the new laws that emerged from the 2023 and 2025 Legislative sessions.

The challenged laws arose in part out of the Housing Advisory Council, also known as the Housing Task Force. *MAID*, ¶ 21. Formed in 2022, the Task Force was charged with developing "short- and long-term recommendations and strategies for the State of Montana to increase the supply of affordable, attainable workforce housing." To meet those goals, the Task Force sought input from diverse

stakeholders. The Task Force and its subcommittees met over 30 times. Every meeting allowed extensive public comment, and all were open to public participation from anywhere.

During the 2023 legislative session, several pro-housing bills arising out of and related to the Task Force's work were passed nearly unanimously and signed into law, including the three bills[3] that MAID challenged, and which are now before this Court: Senate Bill ("SB") 323, SB 382 and SB 528. *MAID*, ¶ 2. Those bills implemented the following changes, which MAID challenged.

1. SB 528 (2023)—ADUs on all single-family lots.

SB 528, codified as § 76–2–345(9)(a), MCA, defines an "accessory dwelling unit" (ADU) as "a self-contained living unit on the same parcel as a single-family dwelling of greater square footage." All Montana municipalities are now required to adopt regulations allowing an ADU on any "lot or parcel that contains a single-family dwelling." *Id.*

[3] MAID also challenged a portion of SB 245, now codified at §§ 76–2–304 and 76–2–309 MCA, which requires municipalities designated as urban areas to allow, as a permitted use, multiple-unit dwellings (i.e. apartments) and mixed-use developments that include multiple-unit dwellings on lots under certain conditions. But, as the district court found, MAID did not address this bill at all during the post-remand litigation, and the district court treated these claims as waived. AJA-10 n.4.

2. SB 323 (2023)—duplexes on single-family lots in cities with over 5,000 residents.

SB 323 amended the laws permitting municipal zoning to require most cities to allow duplexes on all lots where single-family homes are permitted. Now codified in §§ 76–2–304 and –309, SB 323 amended the municipal zoning provisions of § 76–2–304 by adding a subsection (3) which provides, in part:

> In a city with a population of at least 5,000 residents duplex housing must be allowed as a permitted use on a lot where a single-family residence is a permitted use[.]

Id.

3. SB 382 (2023), the Montana Land Use Planning Act—broad public participation requirements for comprehensive land use plans and zoning regulations, and then faster approval of compliant projects.

SB 382, now codified as Title 76, Ch. 25, MCA, created the Montana Land Use Planning Act. MLUPA applies to cities with a population exceeding 5,000 located within a county with a population of at least 70,000. Section 76–25–105(1), MCA.[4] For those cities, MLUPA replaces both the municipal zoning provisions at § 76–2–301, *et seq.* and the Subdivision and Platting Act at § 76–3–101 *et seq.* Section 76–25–105(4), MCA.

In enacting MLUPA, the Legislature made several findings,

[4] MLUPA is optional for cities that do not meet these population thresholds. Section 76–25–105(3), MCA.

including that "coordinated and planned growth will encourage and support…sufficient housing units for the state's growing population that are attainable for citizens of all income levels." Section 76–25–102(2), MCA. It also found the same coordinated and planned growth would support environmental goals such as wildlife habitat and clean and healthy air; agricultural, forestry, and mining lands; people and private property in relation to natural hazards; and local consideration, participation, and review of plans for projected population changes and impacts resulting from those plans. *Id.*

The Legislature's express intent in enacting MLUPA's "comprehensive planning" requirements was to provide the broadest and most comprehensive level of data collection to analyze existing conditions and future opportunities and constraints; acknowledge and address the impacts of development for each city; and provide "for broad public participation." Section 76–25–102(3), MCA. That comprehensive planning then serves as the basis for implementing specific land use regulations that are in substantial compliance with the local land use plan; provides for public participation during the development and adoption of the land use plan and implementing regulations; and allows for streamlined administrative review and decisionmaking for site-specific development applications that substantially comply with the city's land use plan and regulations. *Id.*

Depending on when cities subject to MLUPA last adopted a growth policy, cities are required to implement MLUPA's requirements within either 3 or 5 years of May 17, 2023. Section 76–25–105(2), MCA. Thus, no municipality is yet subject to MLUPA's mandatory provisions.

The parts of MLUPA challenged by MAID required these cities to "provide continuous public participation when adopting, amending, or updating a land use plan or regulations" and to "adopt public participation plans" to meet that obligation. Once the plan is in place, the 2023 version of MLUPA would have allowed cities to streamline the approval process for site-specific projects consistent with their land use plan and implementing regulations, including subdivisions. The basic premise was that different types of projects with similar impacts should be placed on more equal footing. AJA-171. Thus, for example, if a large apartment project with hundreds of units could be approved without public comment—as it currently can be in most Montana cities—then so should a subdivision across the street that has a far lesser impact. AJA-171.

The 2023 version of MLUPA—again, which never went into effect—therefore would have allowed "zoning compliance and other ministerial permits" to be issued by the planning administrator without further review or public comment,[5] with a few exceptions that are no

[5] Again, many of MLUPA's provisions are consistent with the current status quo. As explained by the former President of the Montana

longer relevant. Section 76–25–305(3)–(4), MCA (2023). More specifically, § 76–25–305(d), MCA (2023), which applied to zoning, provided that:

> (4) Throughout the adoption, amendment, or update of the land use plan or regulation processes, a local government shall emphasize that:
>
> ****
>
> (d) The scope of and opportunity for public participation and comment on site- specific development in substantial compliance with the land use plan must be limited only to those impacts or significantly increased impacts that were not previously identified and considered in the adoption, amendment, or update of the land use plan, zoning regulations, or subdivision regulations.

Likewise, the new subdivision regulations under MLUPA also provided that subdivision applications that were in substantial compliance with a community's zoning and subdivision regulations could be ministerially approved without additional public comment, with limited exceptions. Section 76–25–408(7)–(8), MCA (2023).

These provisions were challenged by MAID and ultimately struck down by the district court based on MAID's theory that the right to

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Association of Planners, AJA-169, building permits are issued administratively, and most zoning compliance reviews are too. AJA-171. That means that permitted uses are "by right" and do not require any sort of notice or governing body approval. They only require a ministerial review to ensure compliance with existing zoning regulations. AJA-171.

publicly comment on every subdivision application, however minor, is a "fundamental and treasured constitutional right[.]" (Doc. 137 at 6.) The specific provisions struck down as facially unconstitutional violations of the right to public participation were: Section 76-25-106(4)(d); Section 76-25-305 (4), (5)(a)(b)(c)(d) and (6)(a)(b); and Section 76-25-408 (7)(a)(b), (8)(a)(i)(ii)(ii) and (b), MCA (2023). AJA-4–5.

4. After the district court entered judgment, the 2025 Montana Legislature substantially amended MLUPA to allow public comment on *all* development applications, which is more than MAID asked for.

Since this appeal began, the Montana Legislature passed and the Governor signed Senate Bill 121, which has an immediate effective date of May 8, 2025. SB 121 is "an act generally revising the Montana Land Use Planning Act," including by "clarifying public notice requirements, [and] providing additional opportunity for public comment for proposed developments." AJA-42.

It is difficult to overstate how significant the changes in SB 121 are to MLUPA, because they more than address MAID's complaint by mandating public notice and an opportunity for public comment on *all* development applications. That includes types of developments—like apartments—that are not currently subject to public comment in most instances. AJA-171.

The first changes SB 121 makes are to the public notice and public

participation statutes in Title 2. First, SB 121 revises § 2–3–102, MCA, to define "agency" as a local government or officer of the same authorized to "make a decision on development applications." AJA-62. It then defines "development application" as "a formal request submitted to a local government entity to obtain approval for a development proposal pursuant" to MLUPA. AJA-63. It amends § 2–3–104, MCA, to state that an agency is considered to have complied with the notice provisions of § 2–3–103, MCA, "if an agency adopts and implements the public participation plan required in 76–25–106 for the purposes of agency actions taken in accordance with" MLUPA. AJA-63.

SB 121 then proceeds through various housekeeping changes before reaching the meat of the bill: adding the very public participation requirements that MAID asserted—and the district court agreed—were missing from the original version of MLUPA.

Substantively, SB 121 amends § 76–25–106 by deleting (4)(d), which previously limited the scope and opportunity for public participation on site-specific developments, and which was struck down by the district court. AJA-74.

SB 121 next amends § 76–25–305, which addresses approval of development permits that are not subdivisions. First, it deletes a subsection (3), which provided that "zoning compliance permits and other ministerial permits may be issued by the planning

administrator…without any further review or analysis by the governing body, excepted as provided by 76–25–303."[6] AJA-77.

Instead, § 76–25–305, MCA (2025) now requires the planning administrator to make an "initial determination" of whether a proposed development has substantially complied with the zoning regulations and map. If it does, the planning administrator "shall provide public notice of the initial determination" and allow for "a 15-business-day written public comment period during which the public must have an opportunity to comment on the initial determination." Section 76–25–305(3)–(4), MCA (2025). If public comment is received, the planning administrator is required to "issue written findings stating the results of the public comment and a final written decision approving, approving with conditions, or denying the application, which may be appealed as provided in 76–25–303." Section 76–25–305(5)(c), MCA (2025). AJA-77–79.

Finally—and directly relevant to MAID's claims and the district court's decision—SB 121 mandates the identical process for subdivision approvals: notice of preliminary approval; a 15-day public comment period; and a written decision approving or denying the application. Section 76–25–408(7)–(8), MCA (2025). AJA-79–83.

In sum, SB 121 now requires local governments acting under

[6] Section 76–25–303 was not struck down by the district court.

MLUPA to:

- Provide public notice of any preliminary approval for all developments and subdivisions.
- Allow written public comment on those preliminary approvals.
- If public comments are received, planning administrators must consider those comments and address them in a written decision approving or denying the application.

That is precisely what MAID has argued that the Montana Constitution requires: the right to know about and publicly comment on subdivision applications. (*E.g.* Doc. 137 at 4–6.)[7]

STANDARDS OF REVIEW

Justiciability: Justiciability is a threshold requirement for Montana courts to exercise jurisdiction, and justiciability presents questions of law this Court reviews do novo. *Montanans Against Assisted Suicide v. Bd. of Med. Examiners (MAAS)*, 2015 MT 112, ¶ 7, 379 Mont. 11, 347 P.3d 1244.

Summary judgment: This Court reviews summary judgment orders de novo, applying the same standard as the district court. *Mont.*

[7] MAID argued below that the right to publicly comment on every subdivision application is a "fundamental and treasured constitutional right" that has "been in existence for fifty years." Shelter WF does not concede that the right to exercise a vetocracy is a fundamental constitutional right, but SB 121 nevertheless renders the debate academic.

Cannabis Indus. Ass'n v. State (*MCIA*), 2016 MT 44, ¶ 11, 382 Mont. 256, 368 P.3d 1131.

Facial constitutional claims: Whether a statute is constitutional is a question of law. *Montana Indep. Living Project v. Dep't of Transp.*, 2019 MT 298, ¶ 14, 398 Mont. 204, 454 P.3d 1216. The party challenging the constitutionality of the statute bears the burden of proof, and if any doubt exists, it must be resolved in favor of the statute. *Id.* It is the duty of the courts to construe statutes in a manner that avoids unconstitutional interpretation, if possible. *Id.* A statute is constitutional unless it conflicts with the Montana Constitution beyond a reasonable doubt. *Id.* Here, because MAID has brought a facial challenge to the legislation, MAID needed to show that there is no set of circumstances under which the challenged laws would be valid, and that the laws are unconstitutional in all applications. *MCIA*, ¶ 14.

SUMMARY OF THE ARGUMENT

The entire gist of MAID's public participation claim was that the public should be able to comment on all subdivision applications. Following SB 121's substantial amendments to MLUPA just a week before this brief was filed, those who live in cities subject to MLUPA will now have that right in a way that goes beyond the pre-MLUPA framework. That means the district court's order on the public participation claims—and MAID's claims themselves—are now moot.

The proper remedy for a claim that becomes moot while an appeal is pending is vacatur, and therefore the Court should vacate the district court's order as it relates to MAID's public participation claims and direct dismissal of those claims.

The district court's declaratory judgment as it relates to private covenants is likewise nonjusticiable. MAID lacked statutory, contractual, and common law standing to maintain those claims. Further, the declaratory judgment did not actually resolve any dispute and instead focused on hypotheticals. It is therefore an improper advisory opinion that should be vacated.

Finally, to the extent the Court reaches the merits of MAID's public participation claims, SB 121 amended MLUPA to the extent that the Court can conclude the procedural processes in the new statutory framework satisfy the constitutional right to know and to participate.

ARGUMENT

At the outset, the sweeping breadth of MAID's constitutional claims requires a brief foray into the fundamentals of zoning and land use law.

The Montana Constitution recognizes that individuals are born with inalienable rights, including the right of "acquiring, possessing and protecting property." Mont. Const. art. II, § 3. "Private real property ownership" in Montana is therefore "a fundamental right." *City of*

Bozeman v. Vaniman, 264 Mont. 76, 79, 869 P.2d 790, 792 (1994). There is not, however, any corresponding constitutional right to restrict your neighbors' fundamental property rights. MAID's case therefore lacks the basic building blocks of a constitutional claim.

Moreover, zoning itself takes away several sticks in the bundle of property rights, because zoning regulations "are in derogation of the common law right to free use of private property" and must be "strictly construed." *Whistler v. Burlington N. R. Co.*, 228 Mont. 150, 155, 741 P.2d 422, 425 (1987). Therefore, the minor and incremental relaxation of exclusionary zoning does not infringe on anyone's property rights. Instead, the minor loosening of exclusionary zoning—or "upzoning"—simply restores some of the sticks in the bundle of property rights that zoning took away.

Further, the power to zone does not arise from local government power. Instead, both the municipal- and county-level zoning enabling statutes that preexist MLUPA recognize that zoning is a delegation of state law. *E.g.,* § 76–2–301, MCA (legislative authorization of municipal zoning) *and* § 76–2–201, MCA (legislative authorization of county zoning).

Existing Montana law further mandates that "local government with self-government powers is subject to…all laws that require or regulate planning or zoning." Section 7–1–114(1)(e), MCA. So while

MAID will no doubt point out that the powers of self-governing local governments must be liberally construed, "this presumption cannot override specific legislative preemption." *City of Missoula v. Fox*, 2019 MT 250, ¶ 23, 397 Mont. 388, 450 P.3d 898.

In this context, this Court has long held that while local governments may prefer to maintain full control of their zoning authority, "there is no question that the power of the legislature over the city in this manner is supreme." *State ex rel. Thelen v. City of Missoula*, 168 Mont. 375, 380, 543 P.2d 173, 176 (1975). The Legislature can therefore "give the cities of this state the power to regulate through zoning commissions, and the legislature can take it away." *Id.*

Here, the Montana Legislature did not even take anything away when it passed the "Montana Miracle" in 2023 and then amended certain provisions in 2025. Instead, the Legislature *restored* several small sticks in the bundle of property rights guaranteed to Montanans, and directed local governments in more urban counties to revamp their planning and development approval process in ways that track best practices in the planning field. *See, e.g.*, AJA-169–71. None of these changes implicate any constitutional right—except as much as they protect and enhance the right to the free use of one's own property, which *is* a fundamental constitutional right.

Nor do these changes hinder cities' ability to plan for growth—

obviously an important function of local government. Instead, they facilitate more comprehensive planning that incorporates far more public input than the pre-MLUPA planning process, and they do it in a way that comports with accepted modern-day best practices in the planning field. AJA-169–70.

I. The affirmative relief the district court granted to MAID is not justiciable because MAID's public participation claims are now moot and the declaratory judgment related to private covenants was always an advisory opinion.

Article VII, Section 4, of the Montana Constitution limits the judicial power of the courts of Montana to justiciable controversies. *Heringer v. Barnegat Dev. Grp.*, LLC, 2021 MT 100, ¶ 18, 404 Mont. 89, 485 P.3d 731. Justiciable controversies are "definite and concrete, touching legal relations of parties having adverse legal interests and admitting of specific relief through decree of conclusive character." *City of Deer Lodge v. Fox*, 2017 MT 129, ¶ 8, 387 Mont. 478, 395 P.3d 506.

Put another way, a justiciable controversy is one upon which a court's judgment will effectively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical or academic conclusion. *Heringer*, ¶ 18. Montana courts therefore lack jurisdiction to decide moot issues or to issue advisory opinions when an actual "case or controversy" does not exist. *Heringer*, ¶ 18.

Here, neither portion of the judgment the district court entered in favor of MAID is reviewable on the merits because neither is justiciable.

First, because SB 121 so substantially alters the public participation provisions of MLUPA, the district court's judgment cannot operate effectively and this Court cannot grant effective relief, because it cannot restore any party to their pre-litigation position. MAID's public participation claims are therefore moot, and the proper remedy is to vacate the district court's decision and to direct the district court to dismiss MAID's public participation claims, which were raised as Count II of its Amended Complaint.

Second, the district court's statewide declaratory judgment stating that the new zoning laws allowing duplexes and ADU's cannot "invalidate or displace" private restrictive covenants is an impermissible advisory opinion. Nor did MAID have standing to bring a statewide claim affecting private restrictive covenants. So even though no party argued that the new zoning laws *could* invalidate restrictive covenants, the district court's opinion is both hypothetical and it could be used improperly—such as by exhuming long-abandoned covenants that Montana law deems unenforceable. Finally, MAID insists that it is not trying to "enforce" any private covenants, which further illustrates the advisory nature of that decision, which should likewise be vacated.

A. SB 121 amended MLUPA to the extent that MAID's public participation claims are now moot and the district court's order addressing those claims should be vacated.

Whether an appeal is moot is a threshold issue the Court

considers before reaching the merits. *Country Highlands Homeowners Ass'n, Inc. v. Flathead Cnty.*, 2008 MT 286, ¶ 16, 345 Mont. 379, 191 P.3d 424. A "matter is moot when, due to an event or happening, the issue has ceased to exist and no longer presents an actual controversy." *Id.* An appeal can become moot when the court cannot grant effective relief or the parties cannot be restored to their original position. *Id.*

One of the ways an appeal can become moot is if the legislative body whose actions were challenged repeals or modifies the earlier legislation. *E.g., Plains Grains Ltd. P'ship v. Bd. of Cnty. Comm'rs of Cascade Cnty.*, 2010 MT 155, ¶ 28, 357 Mont. 61, 238 P.3d 332. Montana statutes, of course, enjoy a presumption of constitutionality. *MAID*, ¶ 13. That means that MLUPA's comprehensive new public participation procedure as set forth by SB 121 must be "presumed" constitutional.

This Court does not appear to have established the rule that there is a corresponding presumption of mootness that the substantial amendment of a challenged statute should render an appeal moot. But the Ninth Circuit—along with a majority of other federal circuits—holds that in determining whether a case is moot, there is a "presumption" that "the repeal, amendment, or expiration of legislation will render an action challenging the legislation moot, unless there is a reasonable expectation that the legislative body will reenact the

challenged provision or one similar to it." *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc) (collecting cases).

To overcome that presumption, the party challenging the now-irrelevant legislation must present evidence suggesting the legislature is likely to enact substantially similar legislation again. *Id.* That is especially true where, as here, the legislature has "in good faith, responded appropriately" to a challenge to the legislation. *Id.* As it often does, this Court should adopt the Ninth Circuit's approach, so Montana litigants will be served by the clarity of a consistent standard across venues. *E.g., Stensvad v. Newman Ayers Ranch, Inc.*, 2024 MT 246, ¶ 25, 418 Mont. 378, 557 P.3d 1240. This is especially apt where constitutional challenges to Montana laws are often raised in federal courts.

Here, both houses of the Legislature unanimously passed SB 121, which amended MLUPA to allow more opportunity for public participation—including notice of preliminary decisions on all development and zoning applications, an opportunity for public comment, and then a requirement that local governments consider those public comments in written findings that grant or deny the application. In sum, the version of MLUPA that MAID challenged is no longer at issue, and therefore upholding or reversing district court's

decision cannot grant effective relief to any party.

The Court should therefore find that MAID's public participation claims are moot and nonjusticiable. It should then vacate the district court's order on this issue and dismiss MAID's public participation claims or direct the district court to do so.

B. The declaratory judgment that the new ADU and duplex laws cannot "displace" private covenants is an impermissible advisory opinion based on a hypothetical set of facts that MAID did not have standing to bring.

Restrictive covenants are contracts, and they create contractual rights between the parties bound by them. *McKay v. Wilderness Dev.*, 2009 MT 410, ¶ 57, 353 Mont. 471, 221 P.3d 118. As a general rule, litigants lack standing to enforce obligations of a contract if they are not a party to, or third-party beneficiary of, that contract. *HSBC v. Anderson*, 2017 MT 257, ¶ 33, 389 Mont. 106, 406 P.3d 416.

The district court nevertheless issued a statewide declaratory judgment that states:

> The provisions of SB 323, SB 528, SB 245 and SB 382 may not be used by any person or governmental entity to invalidate or displace covenants that are more restrictive than zoning regulations.

AJA-4.

This is an advisory opinion that does not terminate any uncertainty or resolve any live controversy. And MAID's arguments

made clear that it knew it was asking for an advisory opinion, because it repeatedly insisted it was not trying to "enforce" any set of restrictive covenants. AJA-20.[8] Indeed, there is precisely one set of restrictive covenants in the record, but no evidence as to whom those covenants apply. (Doc. 89 at 6–11.)

Compounding the problem, the single MAID member whose covenants *are* in the record—Noah Poritz—did not join any of his neighbors as parties. AJA-17–18. That means the district court issued a declaratory judgment that: (a) purports to apply statewide, regardless of the context of any particular provision in a set of covenants; and (b) purports to also apply to one individual homeowner but not his neighbors subject to the same covenants; and (c) is specifically designed to not be "enforceable." AJA-20–21.

The problems with this are self-evident. First, MAID lacks standing to maintain this claim for several reasons. Second, the declaratory judgment assumes a set of hypothetical facts and constitutes an impermissible advisory opinion. Finally, the declaratory judgment does not actually bind anyone.

1. MAID lacks standing to maintain its covenant-related claims for at least three reasons.

Standing is a threshold requirement of justiciability applicable to

[8] See also Doc. 138 at 6, ("The present action is not one to **enforce** any set of restrictive covenants.") and 8, ("There is no effort here on the part of MAID to **enforce** any set of covenants.") (emphases in originals).

all claims for relief as a matter of constitutional law and related prudential policy considerations. *Kageco Orchards v. MDOT*, 2023 MT 71, ¶ 14, 412 Mont. 45, 528 P.3d 1097. Though substantively cognizable, a claim for declaratory judgment is still not justiciable if the plaintiff lacks personal standing to assert the claim. *Id.* Here, MAID lacks standing for at least three reasons.

First, MAID lacks statutory standing. Section 70–17–210(1), MCA—also passed during the 2023 session—provides that "[o]nly the governing body of a development or a parcel owner within a development can initiate a legal action to enforce covenants, conditions, or restrictions." Under this statute, MAID cannot seek declaratory relief on behalf of non-member property owners. And despite its claim that it is not trying to "enforce" covenants, there is no other reason to bring such a claim other than to weaponize the ensuing judgment.

Second, MAID lacks common law standing. Covenants are contracts, and any person having an interest under a writing constituting a contract may seek declaratory relief about the interpretation of such a contract. *Creveling v. Ingold*, 2006 MT 57, ¶ 8, 331 Mont. 322, 132 P.3d 531. But MAID's members do not have any interest under most covenants in Montana, and therefore MAID lacks standing to enforce covenants that do not apply to its members, or to ask a court to determine what those covenants might mean. *See, e.g.,*

Williamson v. Montana PSC, 2012 MT 32, ¶ 40, 364 Mont. 128, 272 P.3d 71.

Third, MAID has a wide-ranging contractual standing problem because most private covenants say they can be enforced only by the governing body like a homeowners association, the declarant, or another property owner. Indeed, the single set of covenants that are in the record specify that only "persons owning real property situated" in that subdivision may enforce them. (Doc. 89 at 11.) For all these reasons, MAID lacked standing to seek a statewide declaratory judgment interpreting contracts to which they are not a party, and the declaratory judgment should be vacated.

2. The district court's declaratory judgment is an advisory opinion based on a hypothetical set of facts.

Like any other contract, covenants must be read as a whole. *Micklon v. Dudley*, 2007 MT 265, ¶ 10, 339 Mont. 373, 170 P.3d 960. By issuing a statewide declaratory judgment based on a single set of covenants, the declaratory judgment is merely speculating on what other sets of covenants might say about single-family residences, or anything else. That is the very definition of an advisory opinion.

Even if MAID could get every set of covenants in Montana in the record, it would still not be enough, because covenants can be rendered unenforceable by multiple principles, including waiver and laches.

Bennett v. Hill, 2015 MT 30, ¶ 25, 378 Mont. 141, 342 P.3d 691; *McKay*, ¶ 33. Both waiver and laches are equitable doctrines, under which courts must review "independently all questions of fact as well as questions of law." *McKay*, ¶ 35. Under this standard, applying fact-specific equitable principles to thousands of different contracts, with different language and different on-the-ground circumstances is an impossible and non-justiciable task.

These equitable principles are now codified in § 70–17–210(2), MCA, providing that any "covenant, condition, or restriction is deemed abandoned for purposes of enforcement if no enforcement action has been undertaken" for eight years. The same statute also limits the potential enforceability of older covenants, because "when the governing body formed within covenants, conditions, or restrictions has not met for a period of 15 years, it constitutes substantial noncompliance, and the governing body is prohibited from taking any enforcement action regarding the covenants" except to comply with other laws. Section 70–17–210(3), MCA.

The district court's declaratory judgment thus has the practical effect of exhuming covenants that, as a matter of law, have been "deemed abandoned" and therefore unenforceable. For these reasons, a statewide declaratory judgment that assumes the ongoing enforceability of every set of covenants with a single-family limitation cannot be

appropriate because it required a holding premised on a hypothetical set of facts—that all covenants are still enforceable. For the same reason, it cannot be assumed that thousands of sets of disparate covenants are automatically enforceable just because MAID wants them to be. That is an improper advisory opinion based on an abstract proposition and is therefore improper. *Plan Helena v. Helena Reg'l Airport*, 2010 MT 26, ¶ 9, 355 Mont. 142, 226 P.3d 567.

Finally, restrictive covenants are strictly construed, and any ambiguity must be resolved in favor of free use of the property. *Craig Tracts HOA v. Brown Drake*, 2020 MT 305, ¶ 9, 402 Mont. 223, 477 P.3d 283. Under this principle, the district court's decision did not actually resolve any actual or live controversy, because whether any individual set of covenants truly prohibits ADUs/duplexes requires consideration of the specific language of any set of covenants that might prohibit ADUs/duplexes and then, if the first step is satisfied, a case-specific determination of whether those specific covenants remain enforceable.

The problem with the judgment is illustrated by a recent case involving covenants purporting to limit homeowners from building anything other than one "single-family residence." *Myers v. Kleinhans*, 2024 MT 208, 418 Mont. 113, 556 P.3d 529. There, the issue was whether the Kleinhans violated restrictive covenants when they built an ADU in their detached garage and then started renting it out on

Airbnb. The neighbors sued, because the covenants limited each lot to just one "single-family dwelling," which was defined as "a building under one roof designed and intended for use and occupancy as a residence by a single family," and because the covenants prohibited commercial use. *Myers*, ¶¶ 10–12.

While this Court concluded that renting out the ADU violated the commercial use restriction, it nonetheless agreed with the Kleinhans that the conversion of their garage to an ADU did not violate the "single-family dwelling" restriction because the ADU "could accommodate family and over-night visitors." *Myers*, ¶¶ 10–11. Thus, even where a surface-level review of the covenants could have suggested that they barred all ADUs all the time, the specific language of the covenants had to be considered together with the specific facts of that case, and that surface-level conclusion would have been wrong.

In this legal landscape, which requires a case-by-case analysis of the precise language of any set of covenants, the district court's declaratory judgment is an advisory opinion that does not resolve anything—except as to one member of MAID, who declined to join his neighbors as parties.

3. To the extent the declaratory judgment purports to bind a single property owner, the judgment is without effect as to him and is therefore an advisory opinion.

The district court's order recognizes that at the summary

judgment hearing, MAID argued that this part of its claim was based on Noah "Poritz being a member of MAID and the rights he has with restrictive covenants." AJA-20–21. This, the court concluded, means "that there is a justiciable controversy satisfying the test for a declaratory judgment." *Id.*

The problem is that it is a "fundamental principle" that someone who is not a party to an action cannot be bound by a judgment. *Pearson v. Virginia City Ranches Ass'n*, 2000 MT 12, ¶ 41, 298 Mont. 52, 993 P.2d 688. Poritz, as a member of MAID, now has a declaratory judgment that his covenants mean that nobody else subject to them can build a duplex or ADU on their properties. But those property owners—the same ones Poritz has a private contract with—were not parties and therefore cannot be bound by that declaratory judgment. That means the judgment cannot even grant any effective relief as to Poritz, and it therefore does not have the effect of a final adjudication because it did not resolve any live dispute. It is therefore the very definition of an improper advisory opinion. *E.g., Murray v. Motl*, 2015 MT 216, ¶ 16, 380 Mont. 162, 354 P.3d 197.

II. If this Court reaches the merits of MAID's public participation claim, the procedural processes enacted in SB 121 satisfy the constitutional right to know and to participate.

Article II, § 8 of the Montana Constitution, titled "Right of participation," provides that "[t]he 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." Article II, § 9 of the Montana Constitution, titled "Right to know," provides that "[n]o person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

These provisions are related, but the right to know is broader in application than the right to participate. *Bryan v. Yellowstone Cnty. Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶ 25, 312 Mont. 257, 60 P.3d 381. The Legislature implemented these constitutional rights by enacting §§ 2–3–101 through –221 (addressing right to participate), and §§ 2–3–201 through –221 (addressing right to know), MCA.

These statutes require the government to develop procedures for permitting and encouraging public participation, and to provide adequate notice of planned actions. Section 2–3–103(1)(a). Under SB 121, the government "shall be considered to have complied" with those provisions if "it adopts and implements the public participation plan required in 76–25–106 for the purposes of agency actions taken in accordance with Title 76, chapter 25[.]" Section 2–3–104(3), MCA (2025). AJA-63.

Public participation procedures "must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public." Section 2–3–111(1), MCA. The essential elements of public participation as required by this section are notice and an opportunity to be heard. *Montana Indep. Living Project*, ¶ 38.

Here, the newly revised public notice and participation requirements of MLUPA under SB 121 satisfy the statutory and prudential factors required by the right to know and to participate. They require municipalities subject to MLUPA to provide notice of preliminary approval for any major project or subdivision, allow for public comment, and then require planning departments to consider that public comment in ultimately granting or denying an application. MLUPA, as amended by SB 121, is therefore easily sufficient to withstand a facial constitutional challenge on these grounds.

CONCLUSION

The district court's conclusion that MLUPA violates the constitutional right to know and participate should be vacated as moot, and the district court's declaratory judgment as to restrictive covenants should be vacated because MAID lacked standing to bring it and because it constitutes an advisory opinion.

May 15, 2025.

PARSONS BEHLE & LATIMER
Attorneys for Shelter WF, Inc.

/s/ Jesse Kodadek
Jesse Kodadek

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains 7371 words, as calculated by Microsoft Word, excluding the caption, tables of contents and authorities, and certificate of compliance. The brief is double-spaced in size 14 Century Schoolbook typeface.

/s/ Jesse Kodadek

CERTIFICATE OF SERVICE

I, Jesse C. Kodadek, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-15-2025:

Ethan Winfred Blevins (Attorney)
839 W 3600 S
Bountiful UT 84010
Representing: Clarence Kenck, David Kuhnle
Service Method: eService

Scott Michael Svee (Attorney)
203 N Ewing
Helena MT 59601
Representing: Montana League of Cities and Towns
Service Method: eService

Murry Warhank (Attorney)
203 North Ewing Street
Helena MT 59601
Representing: Montana League of Cities and Towns
Service Method: eService

James H. Goetz (Attorney)
PO Box 6580
Bozeman MT 59771-6580
Representing: Montanans Against Irresponsible Densification, LLC
Service Method: eService

Henry Tesar (Attorney)
35 North Grand
Bozeman MT 59715
Representing: Montanans Against Irresponsible Densification, LLC
Service Method: eService

Brian K. Gallik (Attorney)
777 E. Main St., Ste. 203
PO Box 70
Bozeman MT 59771
Representing: Montanans Against Irresponsible Densification, LLC
Service Method: eService

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620
Representing: State of Montana
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: State of Montana
Service Method: eService

Michael Noonan (Govt Attorney)
215 N SANDERS ST
HELENA MT 59601-4522
Representing: State of Montana
Service Method: eService

Electronically Signed By: Jesse C. Kodadek
Dated: 05-15-2025