IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 25-0200

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC,

Plaintiff and Appellee/Cross-Appellant,

v.

STATE OF MONTANA,

Defendant and Appellant/Cross-Appellee,

and

SHELTER WF, INC.,

MONTANA LEAGUE OF CITIES AND TOWNS,

Defendant-Intervenors and Appellants/Cross-Appellee,

DAVID KUHNLE,

CLARENCE KENCK,

Defendant-Intervenors/Cross Appellees.

MONTANA LEAGUE OF CITIES AND TOWNS' OPENING BRIEF

On Appeal from the Montana Eighteenth Judicial District Court
Gallatin County Cause No. DV-16-2023-1248DK
The Honorable Michael Salvagni, Presiding Judge

Appearances:

James H. Goetz
Henry J.K. Tesar
Goetz, Geddes & Gardner, P.C.
35 North Grand Avenue
P.O. Box 6580
Bozeman, MT 59771-6580
Phone: (406) 587-0618
jim@goetzlawfirm.com
htesar@goetzlawfirm.com

Brian K. Gallik
Gallik & Bremer, P.C.
777 East Main Street, Suite 2023
P.O. Box 70
Bozeman, MT 59771
Phone: (406) 404-728
brian@galliklawfirm.com

Attorneys for Montanans Against Irresponsible Densification, LLC

Jesse Kodadek
Parsons Behle & Latimer
127 East Main Street, Suite 301
Missoula, MT 59802
Phone: (406) 317-7220
jkodadek@parsonsbehle.com

Attorneys for Shelter WF, Inc.

Austin Knudsen
Michael D. Russell
Thane Johnson
Alwyn Lansing
Michael Noonan
Montana Department of Justice
P.O. Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
Michael.russell@mt.gov
Thane.johnson@mt.gov
Alwyn.lansing@mt.gov
Michael.noonan@mt.gov

Attorneys for the State of Montana

Ethan W. Blevins
Pacific Legal Foundation
839 W 3600 S
Bountiful, UT 84010-8423
Phone: (916) 288-1392
eblevins@pacificlegal.org

Mark Miller
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Phone: (561) 691-5000
mark@pacificlegal.org

David McDonald
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
Phone: (202) 888-6881
dmcdonald@pacificlegal.org

Attorneys for David Kuhnle and Clarence Kenck

Murry Warhank
Scott Svee
Jackson, Murdo & Grant, P.C.
203 N. Ewing Street
Helena, MT 59601
Phone: (406) 422-1300
mwarhank@jmgattorneys.com
ssvee@jmgattorneys.com

Attorneys for Montana League of Cities and Towns

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STATEMENT OF THE ISSUES

1. Did legislative changes to the Montana Land Use Planning Act ("MLUPA") moot this matter and make vacatur of the District Court's order regarding the public's right to participation appropriate?

2. Did the District Court err when it found that MAID's challenge to MLUPA on public participation grounds was ripe even though MLUPA, and its unique public participation plans, will not be implemented until 2026?

3. Did the District Court err when it found that the public has a constitutional right to comment on site-specific land use decisions regardless of the legislature's decisions regarding implementing Article II, § 8 of the Montana Constitution?

STATEMENT OF THE CASE

Montanans Against Irresponsible Densification, LLC ("MAID") sued the State of Montana on December 15, 2023. (Dkt. 1.) It filed an Amended Complaint four days later. (Dkt. 3.) MAID attacks four bipartisan bills, collectively known as the "Montana Miracle,"[1] enacted by the 2023 Legislature: SB 528, 245, 323, and 382. SB 528 (codified as Mont. Code Ann. § 76-2-345) provides that municipalities must permit one "accessory dwelling unit" ("ADU") on each lot on

[1] So called because the bills enacted meaningful reform to address Montana's housing crisis. *See* Eli Kahn & Salim Furth, Mercatus Ctr., *Breaking Ground: An Examination of Effective State Housing Reforms in 2023, Mercatus Center* at 2 (August 2023), available at *https://www.mercatus.org/media/document/ policybriefkahnfurthv1pdf* [https://perma.cc/FE5D-LEYA], last accessed May 15, 2025.

which a single-family residence can be constructed. SB 245 (codified as Mont. Code Ann. §§ 76-2-304 and 309) requires urban municipalities to permit multiple-unit housing and mixed-use developments under certain circumstances. SB 323 (also codified as Mont. Code Ann. § 76-2-304 and 309) mandates that urban municipalities permit duplexes where single-family homes are permitted. The Montana League of Cities and Towns ("the League") does not challenge the District Court's decision on these bills.[2] It limits its appeal to the District Court's decision invalidating SB 382.

MAID sought a preliminary injunction against the implementation of these bills. (Dkt. 4.) The District Court set a show cause hearing. (Dkt. 7.) The State requested substitution of Judge Brown, and eventually, Retired Judge Mike Salvagni accepted jurisdiction. (Dkt. 8, 15.) The Court heard argument on MAID's motion, and after consideration, the District Court enjoined enforcement of SB 323 and SB 528. (Dkt. 17.) MAID filed its first motion for partial summary judgment, arguing that SB 323 and SB 528 could not displace restrictive covenants as a matter of law. (Dkt. 19.) It was eventually granted. (Dkt. 152.)

The State appealed the District Court's preliminary injunction of January 17, 2024. (Dkt. 24.) Shelter WF sought to intervene the same day. (Dkt. 22.) David

[2] MAID has appealed these items in its cross-appeal, so they will be before the Court for review. Because they are not part of the League's appeal, they will not be discussed herein.

Kuhnle, a property owner who planned to develop land per the new laws, sought to intervene. (Dkt. 27.) MAID opposed intervention by either of these parties, although it suggested that they should be permitted to participate as *amici*. (Dkt. 49.) On April 3, 2024, the District Court stayed the matter pending this Court's decision on appeal. *Id.* at 54.

This Court reversed the District Court decision granting a preliminary injunction on September 3, 2024. (Dkt. 55.) It found that MAID "offered only generalized fears and supposition" about the potential effects of SB 323 and SB 528. *Montanans Against Irresponsible Densification, LLC v. State*, 2024 MT 200, ¶ 19, 418 Mont. 78, 555 P.3d 759. Thus, it failed to prove the likelihood of imminent harm or that the balance of equities tipped in its favor. *Id*.

On remand, the District Court granted Shelter WF and Kuhnle's motion to intervene. (Dkt. 60.) The League also sought permission to intervene, and the District Court granted its motion over objection from MAID. (Dkt. 70, 77.) The League filed a motion to dismiss on November 26, 2024; it argued that MAID's challenge to SB 382 was unripe. (Dkt. 105.)

MAID filed its second motion for summary judgment on November 15, 2024. (Dkt. 93.) It argued the challenged laws violated equal protection, failed to protect due process, deprived MAID's members of their right to participate in government, and invaded local authority. (Dkt. 94.) Each intervenor filed a cross-

motion for summary judgment. (Dkt. 117-124.) The State opposed MAID's motion. (Dkt. 113.) The District Court heard argument on the undecided motions on January 28, 2025. (Dkt. 149.) It issued its decision on March 3, 2025. (Dkt. 151, 152.) It found that MLUPA violated the public's right of participation but found for the defendants in all other respects. *Id*. This appeal and MAID's cross-appeal followed. (Dkt. 153-156.)

STATEMENT OF THE FACTS

I. The 2023 Legislature enacted an important land use law to streamline land use decisions.

The "Montana Land Use Planning Act" ("MLUPA") was codified by the 2023 Legislature. *See* SB 382 68th Montana Legislature (2023); Mont. Code Ann. § 76-25-101 (providing title).

A. Part of the "Montana Miracle," MLUPA seeks to address significant issues in Montana's larger municipalities.

The Legislature concluded that the "coordinated and planned growth" that MLUPA provides "will encourage and support," *inter alia*:

> (a) sufficient housing units for the state's growing population that are attainable for citizens of all income levels;
>
> (b) the provision of adequate public services and infrastructure in the most cost-effective manner possible, shared equitably among all residents, businesses, and industries;
>
> (c) the natural environment, including wildlife and wildlife habitat, sufficient and clean water, and healthy air quality;

(d) agricultural, forestry, and mining lands for the production of food, fiber, and minerals and their economic benefits;

(e) the state's economy and tax base through job creation, business development, and the revitalization of established communities;

(f) persons, property, infrastructure, and the economy against natural hazards, such as flooding, earthquake, wildfire, and drought; and

(g) local consideration, participation, and review of plans for projected population changes and impacts resulting from those plans.

Mont. Code Ann. § 76-25-102(2). Further, the Legislature noted that it intended MLUPA to provide "streamlined administrative review decision making for site-specific development applications." *Id*. at (3)(d).

MLUPA applies to all municipalities of more than 5,000 residents in a county of more than 70,000 residents. Thus, it focuses on areas of highest urban growth in Montana.[3] Mont. Code Ann. § 76-25-105. It consolidates the current variety of local advisory boards involved in land use into a single planning commission, allowing for the development of experienced appointed officials who understand all aspects of land use plans and regulations. *Id*. at § 76-25-104.

B. MLUPA strengthens and modernizes local planning to prioritize public participation and detailed analysis.

Under pre-MLUPA land use law, the growth policy is the "preeminent planning tool." *Citizen Advocates for a Livable Missoula, Inc. v. City Council*,

[3] The municipalities currently required to comply with MLUPA are Missoula, Kalispell, Whitefish, Columbia Falls, Great Falls, Helena, Belgrade, Bozeman, Laurel, and Billings. In February 2024, the City of Lewistown opted to comply with MLUPA.

2006 MT 47, ¶ 20, 331 Mont. 269, 130 P.3d 1259. However, the statute provides very little guidance regarding the details that must be provided in the growth policy. For instance, the local jurisdiction is not required to quantify its housing needs over the next 20 years or create a future land use map. Mont. Code Ann. § 76-1-601(3)(c). *Id.* It also does not require updating the growth policy. Mont. Code Ann. § 76-1-601(3)(f). Most importantly, under the current growth policy statute, the local government body may lawfully adopt the growth policy after only one public hearing. Mont. Code Ann. § 76-1-602.

By contrast, MLUPA requires extensive and detailed data collection, impact analysis, and mapping. First, the local government must develop and adopt a public participation plan that, at a minimum:

(a) identifies how it will disseminate draft documents for public review,

(b) provides an opportunity for written and verbal comments;

(c) holds public meetings after effective notice; and

(d) engages in electronic communication regarding the process, including online access to documents, updates, and comments; and provide an analysis of and response to public comments.

Mont. Code Ann. § 76-25-106. None of these details outlining notice and opportunity for public participation are required under current law.

After adopting a public participation plan, MLUPA requires that the local government develop a land use plan and map that provides the public with a substantive reflection of:

> the anticipated and preferred pattern and intensities[4] of development for the jurisdiction over the next 20 years, based on the information, analysis, and public input collected, considered, and relevant to the population projections for and economic development of the jurisdiction and the housing and local services needed to accommodate those projections, while acknowledging and addressing the natural resource, environment, and natural hazards of the jurisdiction.

Mont. Code Ann. § 76-25-213(2).

> This planning is detailed and comprehensive. It requires the local governing body to:
>
> (a) Establish projected population estimates,
>
> (b) Quantify the number of housing units needed to accommodate that population,
>
> (c) Identify land uses and densities throughout the jurisdiction that will allow the development of those units by right,
>
> (d) Identify any local infrastructure or service needs that present an obstacle to that population growth and the steps the local government will take to address them, and

[4] Land use intensity is a widely applied term in urban planning and land use management. It refers to the extent to which a permitted type of use is developed. For instance, if the type of land use is residential, the intensity of the use is the density allowed on a site (i.e., the actual number or the range of dwelling units per net or gross acre). For non-residential uses, the type of land use can reflect the allowed intensity of the use (i.e., neighborhood commercial allows for low-impact, small-scale services while heavy commercial typically allows for large-scale, big-box retail stores).

(e) Identify, analyze, and mitigate or avoid the impacts of that development on the environment, local natural resources, and natural hazards.

Mont. Code Ann. §§ 76-25-203, 76-25-206 through 76-25-208, 76-25-213, and 76-25-216. In short, the plan must contain detailed information and analysis about the impacts of development, which is currently left to site-specific development proposals. Mont. Code Ann. § 76-3-608. MLUPA shifts the overall analysis from developers to the local government and the community by way of the development, review, and approval of the land use plan and map.

After following the extensive public participation plan adopted pursuant to Mont. Code Ann. § 76-25-106, under MLUPA the planning commission reviews and makes recommendations to the local governing body regarding the development, review, adoption, approval, or denial of the land use plan and map. Mont. Code Ann. § 76-25-201. The elected governing body must also solicit, consider, and respond to public comment on the planning commission's recommended land use plan and map in compliance with the public participation plan. Mont. Code Ann. §§ 76-25-106; 76-25-201(a)-(b). The pattern and intensities of development mapped and described by the local jurisdiction in the final adopted land use plan and map are the result of this continuous and extensive public participation and comprise the basis for implementing land use regulations in substantial compliance with the land use plan and map. *Id.*

C. MLUPA requires regular review of land use plans to ensure they are relevant and responsive to public needs.

Under MLUPA, land use plans must be reviewed for updates every fifth calendar year. Mont. Code Ann. §§ 76-25-202(1); 76-25-106. In this process, the planning commission must (a) "make a preliminary determination regarding the existence of new or increased impacts to or from local facilities, services, natural resources, natural environment, or natural hazards from those previously described and analyzed when the land use plan and future land use map were previously adopted," (b) "provide public notice and participation in accordance with 76-25-106"; and (c) "accept, consider, and respond to public comment on the review of the land use plan and future use land map," with all public comment becoming part of the administrative record transmitted to the governing body. *Id*. at (1), (7)(a).

If the planning commission finds new or increased impacts, it must recommend an update to the land use plan, future land use map, or both. *Id*. at 76-25-202(3). If it finds no new or increased impacts, the planning commission must recommend to the governing body that no update to the land use plan is necessary. *Id.* The governing body may then direct an update of the land use plan or readopt the current land use plan. *Id*.

Unlike the growth policy statutes in Title 76, Chapter 1, the land use plan and map under MLUPA are "living" documents. They are constantly reviewed, updated, and modified to ensure the needs of the community, impacts of planned

development patterns, and intensities are addressed both through continuous and extensive public participation and review and updates to the plan and map.

After adopting the plan, the municipality must adopt zoning regulations and a zoning map that substantially comply with that land use plan. Mont. Code Ann. § 76-25-301(4). By using this language, MLUPA codifies the existing and well-established standard in land use case law for determining the level of consideration a local governing body or its designee must give to the plan in adopting implementing regulations and approving site-specific development applications.

D. MLUPA incorporates Supreme Court case law that has been implemented by Montana's planners.

In *Little v. Board of County Commissioners*, this Court determined that the master plan (now growth policy and, under MLUPA, land use plan) statutes required that in reaching zoning decisions, the local government was required to at least "substantially comply" with the master plan. *Little v. Board of County Comm'rs*, 193 Mont. 334, 353, 631 P.2d 1282, 1253 (1981). *See also Bridger Canyon Prop. Owners' Assn. v. Plan. and Zoning Commn.*, 270 Mont. 160, 168-169, 890 P.2d 1268, 1273-1274 (1995) (county approval of a planned unit development not in substantial compliance with the adopted neighborhood plan, master plan, or zoning regulations) and *Ash Grove Cement Co. v. Jefferson County*, 283 Mont. 486, 497-498, 943 P.2d 85, 92 (1997) (neighborhood plan did not

substantially comply with master plan when failed to recognize existing mining and industrial uses identified for the same area in the master plan).

This standard was retained after the growth policy statutory language was modified in 2003. *See Heffernan v. Missoula City Council*, 2011 MT 91, ¶¶ 69, 79, 360 Mont. 207, 255 P.3d 80 (city approval of a denser subdivision than identified in the master plan was not in substantial compliance with the plan); *Citizens for a Better Flathead v. Bd. of Cnty. Comm'rs*, 2016 MT 325, ¶ 19, 385 Mont. 505, 386 P.3d 567 (zoning map amendment was not in substantial compliance with growth policy when the type of development, traffic impacts resulting therefrom, and the proposed development were inconsistent with neighboring municipal land use plans and regulations); and *Lake County First v. Polson City Council*, 2009 MT 322, ¶¶ 40-P46, 352 Mont. 489, 218 P.3d 816 (zoning amendment to allow for big-box store upon annexation was in substantial compliance with growth policies to minimize impacts to views and traffic).

"Substantial compliance" is a known, well-established standard that planning departments apply when processing amendments to legislative documents or applications for site-specific review. In fact, this Court has specifically acknowledged the standard provides clarity:

> [T]his standard is sufficiently definite so that those charged with adhering to it will know when there is an acceptable deviation, and when there is an unacceptable deviation from the master plan.

Little, 193 Mont. at 353, 631 P.2d at 1293.

E. MLUPA streamlines site-specific decisions on projects that comply with the authorities developed through extensive public participation.

MLUPA contains a detailed process by which incoming site-specific development applications are reviewed and acted upon. First, as is the case under existing law and local regulations,[5] ministerial permits may be issued by the planning administrator or the planning administrator's designee without any further review or analysis by the governing body. Mont. Code Ann. § 76-25-305(3). The lower court misinterpreted this section to refer to the discretionary review delegated to the planning administrator under subsections (4) and (5).

Instead, subsection (3) continues the current practice of reviewing and approving applications to determine whether proposed new construction or a change in use meets all applicable zoning regulations. Nothing in the existing municipal zoning statute requires a public hearing, meeting, or notice of the review or approval of such applications. These permit applications are already routinely reviewed and permitted in each municipality subject to MLUPA. The planning administrator or their designee are responsible for reviewing the application,

[5] *See* Mont. Code Ann. §§ 76-2-108, 207; Missoula County Zoning Regulations, Section 11.4 (A)-Zoning Compliance Permit; Yellowstone County Zoning Code, Section 27-1628-Zoning Compliance Permit; Gallatin County "Part 1" Zoning Administrative Regulations, Section 6-Land Use Permit; Cascade County Zoning Regulations, Section 9.2-Location/Conformance Permit; Northern Jefferson County Zoning Regulations, Section 1.5-Site Plan Permit.

determining whether it complies with all zoning requirements and development standards, and deciding whether to issue the permit to allow construction. MLUPA was not intended to abrogate this existing practice.

Mont. Code Ann. § 76-25-305(4) and (5) are at the heart of this dispute. These sections provide a new process for how to accept, review, and approve or deny the development proposals that have traditionally undergone a costly and mostly duplicative analysis and public participation process. When an application for development comes in, the community has already been provided continued and extensive opportunities to review and comment on drafts, participate in public hearings, and receive responses to their concerns from the local governing body on the land use plan and map, zoning regulations and map, and subdivision regulations.

The land use plan and map provide detailed information about the anticipated and preferred pattern and intensities of development for the jurisdiction over the next 20 years and the impacts of that development. The community can participate in the development and approval of the land use plan, which touches on policy regarding housing needs, local service capacities, and impacts of the anticipated development identified in the land use plan and map. Moreover, the municipality provides the community with continuous and extensive opportunities for reviewing and commenting on drafts, participating in public hearings, and

receiving responses to their concerns from the local governing body on the zoning regulations, zoning map, subdivision regulations, and impacts to people and the natural environment.

After a municipality adopts regulations, applicants have certainty in the development process. Moreover, community members have certainty in the process for what uses and densities of development will be allowed on every property within the municipality, as well as those areas that may be annexed over the next 20 years. The public has had "notice and an opportunity to be heard." *Citizens for a Better Flathead v. Bd. of County Comm'rs*, 2016 MT 256, ¶ 39, 385 Mont. 156, 381 P.3d 555. The public has been given a "reasonable opportunity to submit data, views, or arguments." Mont. Code Ann. § 2-3-111. The decision of "significant interest to the public"—how and where development will be allowed in the jurisdiction—has been made.

F. MLUPA provides for citizen participation when developments threaten impacts that haven't already been considered in the public process.

The only difference between MLUPA and the current process is that the discretion at the site-specific development review stage has been significantly narrowed. Once everyone knows what is and is not allowed on a property, and the regulations authorizing or prohibiting those uses and densities have been adopted,

the "issue of significant public interest" has already been finally decided by the local entity.

MLUPA also recognizes that there may be situations in which the impacts of a development were not or could not have been accurately identified and analyzed at the time the land use plan and map, zoning and subdivision regulations, and zoning map were adopted. It provides a process by which the public is given yet another opportunity for notice and participation. Mont. Code Ann. §§ 76-25-305(5) and 76-25-408(8). This includes reviewing the new information and providing written comments on the new or increased impacts.

Even after all these opportunities for participation, MLUPA provides an appeal process. Mont. Code Ann. § 76-25-503. Affected parties may seek review of the planning administrator's decision at a public hearing by the planning commission. *Id.* After that, if a member of the public is still aggrieved, they may appeal to the governing body.

II. The 2025 Legislature amended MLUPA to strengthen public participation and clarify the law.

The 2025 Legislature adopted SB 121, which revised MLUPA. *See* Appellants' Joint Appendix at 87 ("SB 121"). The Legislature passed the bill, and it was transmitted to Governor Gianforte on May 1, 2025, after this appeal was filed. The Governor signed the bill, and it became effective on May 8, 2025. *See* Appellants' Joint Appendix at 87 (providing an immediate effective date).

A. SB 121 significantly alters the right to public participation under MLUPA.

First, it amends Title 2 to provide that a municipality complies with the Legislature's implementation of the Montana Constitution's right to public participation by enacting the public participation plan already required by MLUPA. SB 121 § 2. It also removes the requirement that the public be informed in the public participation plan that their comments will be limited "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." SB 121 § 9.

SB 121 also expands the public's right to comment on site-specific applications. For both zoning and subdivision applications, the public now has a right to comment on a proposed development even if the municipality determines that the development is in substantial compliance with regulations and will have no new or increased impacts:

> If the planning administrator makes an initial determination that the proposed development, with or without variances or deviations from adopted standards, meets the requirements of subsections (3)(a) and (3)(b), the planning administrator shall provide public notice of the initial determination in accordance with 76-25-106(3)(a) and (3)(b) and a 15-business-day written public comment period during which the public must have an opportunity to comment on the initial determination.

SB 121 § 11.

B. SB 121 strengthens municipal analysis of projects that do not comply with local regulations.

If public comment shows that the development is not in substantial compliance with the applicable regulations, the municipality must gather information regarding (a) the failure to comply with the regulations and (b) any new or increased impacts not previously considered when the municipality adopted that zoning map or those regulations. *Id*. Then, the municipality must again provide the public time during which they can comment on the planning administrator's initial or revised determination. *Id.* "After the public comment period provided . . . has ended, the planning administrator shall 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 previously provided by MLUPA. *Id*. This same process applies for subdivision applications. *Id.* and § 12.

SB 121 also strengthens the appeals process. Planning commissions must now publish notice of appeals. SB 121 § 14. They must also hold public hearings on those *de novo* appeals. *Id*. The bill is effective until June 30, 2027. *Id.*

STATEMENT OF THE STANDARDS OF REVIEW

"Mootness, as an issue of justiciability, presents a question of law. We review questions of law de novo." *Montanans Against Assisted Suicide v. Bd. of Med. Examiners*, 2015 MT 112, ¶ 7, 379 Mont. 11, 347 P.3d 1244, *citing Reichert*

v. State, 2012 MT 111, ¶ 20, 365 Mont. 92, 278 P.3d 455. The Court "reviews issues of justiciability, such as standing and ripeness, *de novo*." *350 Mont. v. State*, 2023 MT 87, ¶ 11, 412 Mont. 273, 529 P.3d 847. "This Court's standard of review in appeals from summary judgment rulings is *de novo*." *Jobe v. City of Polson*, 2004 MT 183, ¶ 10, 322 Mont. 157, 94 P.3d 743.

SUMMARY OF THE ARGUMENT

The League appeals the District Court's finding that certain portions of MLUPA violate Article II, § 8 of the Montana Constitution's right to public participation. First, although the League's preferred outcome of the case is a reversal of the District Court's public participation decision, the issue now appears moot. The 2025 Legislature substantially amended the language the District Court found unconstitutional to provide additional opportunities for public comment. The Legislature also excised language that limited municipalities' ability to consider public comment on site-specific land use applications. This bill was signed into law and became effective May 8, 2025, so there is no live controversy. This Court should find that it lacks subject matter jurisdiction, dismiss MAID's public participation claim, and vacate that portion of the District Court's order.

Second, even if the matter was not moot, the Supreme Court should reverse the District Court's decision because the matter was not ripe for review. No community is required to fully implement MLUPA until May 2026, and no one,

including any of MAID's members, has been through the process to attempt to object to housing developments in their area. Moreover, MLUPA requires municipalities to develop public participation plans, which have not yet been implemented for site-specific development applications. Therefore, MAID's claims are abstract and philosophical. There is no genuine dispute over real-world developments. The District Court should have found the public participation claims unripe.

Third, even if MAID could show that its public participation claims were not moot and ripe, they fail on the merits. The right to public participation is not self-executing. The legislature must implement it through statute. It determined that the "front-loaded" comment process in MLUPA meets constitutional muster. Even if that were not the case, MAID could not show that the statutes are unconstitutional in all situations. Its facial challenge therefore fails as a matter of law.

ARGUMENT

I. MLUPA has been revised to permit public comment on site-specific land use decisions, so this matter is moot. MAID's public participation claims should be dismissed.

The 2025 Legislature amended MLUPA's public participation scheme and that renders moot the District Court's judgment on this issue. This Court's jurisdiction is limited to justiciable controversies. *Water for Flathead's Future, Inc. v. Mont. Dep't of Envtl. Quality*, 2023 MT 86, ¶ 14, 412 Mont. 258, 530 P.3d 790;

Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd., 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567. "[M]ootness is a threshold issue, [so] it must be dealt with prior to addressing the underlying dispute." *Hilands Golf Club v. Ashmore*, 2002 MT 8, ¶ 23, 308 Mont. 111, 39 P.3d 697. "Because justiciability relates to subject matter jurisdiction, issues of justiciability can be raised at any time." *Plan Helena*, ¶ 26, *citing Stanley v. Lemire*, 2006 MT 304, ¶ 31, 334 Mont. 489, 148 P.3d 643.

Mootness doctrine mandates that "the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Plan Helena*, ¶ 10. When the "initial controversy" ceases to exist "due to an intervening event or change in circumstances" and this Court is unable "to grant effective relief or to restore the parties to their original position," then this Court must dismiss the case as moot. *Id.*, ¶¶ 10-11. "If a judgment has become moot while awaiting review, this Court may not consider its merits, but may make such disposition of the whole case as justice may require." *United States Bancorp Mortg. Co. v. Bonner Mall P'ship.*, 513 U.S. 18, 21, 115 S. Ct. 386, 390 (1994) (internal quotations omitted). "The established practice of the Court in dealing with a civil case . . . which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S. Ct. 104, 106 (1950) (citation omitted).

The District Court found several statutes in MLUPA facially unconstitutional pursuant to Article II, § 8 of the Montana Constitution: Mont. Code Ann. § 76-25-106(4)(d);[6] Mont. Code Ann. § 76-25-305 (4), (5)(a)-(d), and (6)(a)(b);[7] and Mont. Code Ann. § 76-25-408 (7)(a)-(b), (8)(a)(i)-(ii) and (b).[8] Each section relates to

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[6] "Throughout the adoption, amendment, or update of the land use plan or regulation processes, a local government shall emphasize that . . . 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."

[7] (4) If a proposed development, with or without variances or deviations from adopted standards, is in substantial compliance with the zoning regulations or map and all impacts resulting from the development were previously analyzed and made available for public review and comment prior to the adoption of the land use plan, zoning regulation, map, or amendment thereto, the application must be approved, approved with conditions, or denied by the planning administrator and is not subject to any further public review or comment, except as provided in 76-25-503.
(5) (a) If a proposed development, with or without variances or deviations from adopted standards, is in substantial compliance with the zoning regulations and map but may result in new or significantly increased potential impacts that have not been previously identified and considered in the adoption of the land use plan or zoning regulations, the planning administrator shall proceed as follows:
(b) request that the applicant collect any additional data and perform any additional analysis necessary to provide the planning administrator and the public with the opportunity to comment on and consider the impacts identified in subsection (5)(a);
(c) collect any additional data or perform additional analysis the planning administrator determines is necessary to provide the local government and the public with the opportunity to comment on and consider the impacts identified in subsection (5)(a); and
(d) provide notice of a 15-business day written comment period during which the public has the reasonable opportunity to participate in the consideration of the impacts identified in subsection (5)(a).
(6) (a) Any additional analysis or public comment on a proposed development described in subsection (5) must be limited to only any new or significantly increased impacts potentially resulting from the proposed development, to the extent the impact was not previously identified or considered in the adoption or amendment of the land use plan or zoning regulations.
(b) The planning administrator shall approve, approve with conditions, or deny the application. The planning administrator's decision is final and no further action may be taken except as provided in 76-25-503.

[8] (7) (a) If an application proposes a subdivision of a site that, with or without variances or deviations from adopted standards, is in substantial compliance with the zoning and subdivision regulations and all impacts resulting from the development were previously analyzed and made available for public review and comment prior to the adoption of the land use plan, zoning regulations, and subdivision regulations, or any amendment thereto, the planning administrator shall issue a written decision to approve, approve with conditions, or deny the preliminary plat.
(b) The application is not subject to any further public review or comment, except as provided in 76-25-503.
(c) The decision by the planning administrator must be made no later than 15 business days from the date the application is considered complete.
(8) (a) If an application proposes subdivision of a site that, with or without variances or deviations from adopted standards, is in substantial compliance with the zoning and subdivision regulations but may result in new or significantly increased potential impacts that have not been previously identified and considered in the adoption of the land use plan, zoning regulations, or subdivision regulations, or any amendments thereto, the planning administrator shall proceed as follows:

MLUPA's original prohibition against public comment on site-specific decisions on projects that were substantially compliant with a municipality's land use authorities and did not threaten impacts that were not already considered during the adoption of those authorities.

SB 121 changes each of these provisions to permit further public comment. That bill eliminates Mont. Code Ann. § 76-25-106(d). SB 121 § 9. Thus, when the statute takes affect—which is before the 2026 effective date of MLUPA—it will not be the case that "a local government shall emphasize that . . . the scope of and opportunity for public participation . . . 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." Mont. Code Ann. § 76-25-106(d).

Regarding zoning, SB 121 removes the passage, "the application must be approved, approved with conditions, or denied by the planning administrator and is not subject to any further public review or comment." SB 121 § 11 (amending

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(i) request the applicant to collect additional data and perform additional analysis necessary to provide the planning administrator and the public with the opportunity to comment on and consider the impacts identified in this subsection (8)(a);
(ii) collect additional data or perform additional analysis that the planning administrator determines is necessary to provide the local government and the public with the opportunity to comment on and consider the impacts identified in this subsection (8)(a); and
(iii) provide notice of a written comment period of 15 business days during which the public must have a reasonable opportunity to participate in the consideration of the impacts identified in this subsection (8)(a).
(b) Any additional analysis or public comment on the proposed development is limited to only new or significantly increased potential impacts resulting from the proposed development to the extent that the impact was not previously identified in the consideration and adoption of the land use plan, zoning regulations, subdivision regulations, or any amendments thereto.

Mont. Code Ann. § 76-25-305). Instead, the public is allowed to comment regarding whether (a) the application either does not substantially comply with local land use authorities or (b) threatens impacts that were not considered or are greater than those that were forecast during the development of the municipality's authorities. *Id*.

The public is also provided with an opportunity to comment on the decision of the planning administrator regarding whether (a) or (b) above are satisfied. Any affected member of the public also retains the right to appeal the decision of the planning administrator under Mont. Code Ann. § 76-25-503. SB 121 revised those same public participation provisions in the subdivision context. SB 121 § 12. Like with zoning, the public can comment on site-specific applications, both initially and when the planning administrator determines whether the proposed development substantially complies with subdivision regulations or threatens new impacts. Moreover, affected members of the public are permitted to appeal the planning administrator's decision. Mont. Code Ann. § 76-25-503.

Finally, SB 121 amends public participation laws on which MAID's argument relies. It amends Mont. Code Ann. § 2-3-104 to provide that a municipality that implements MLUPA's public participation plan is deemed to have complied with the Legislature's implementation of Article 8, § 8 of the Montana

Constitution. *See* Mont. Code Ann. § 2-4-103 (implementing the Constitution's right to public participation).

Thus, the Legislature amended the laws that the District Court struck down. There is no longer a live controversy regarding whether the 2023 language of MLUPA violates the public's right to participate, because that law will not be implemented.[9] As this matter was only just signed into law on May 8, 2025, this Court should find that it no longer has subject matter jurisdiction since the issue is moot. MAID's public participation claim should be dismissed, and the portion of the District Court's order on that point should be vacated.

II. The District Court incorrectly found that MAID's challenge under Art. II, § 8 of the Montana Constitution was ripe.

Even without the passage of SB 121, MAID's claims should have been dismissed because they are speculative and devoid of factual specifics. The Montana Constitution grants state courts original jurisdiction over "all civil matters and cases at law and in equity." Mont. Const. Art. VII, § 4(1). This Court concludes that the "cases at law and in equity language embodies the same limitations as are imposed on federal courts by the case or controversy language of Article III." *Advocates for Sch. Tr. Lands v. State*, 2022 MT 46, ¶ 18, 408 Mont. 39, 505 P.3d

[9] Currently, the changes in SB 121 will expire on June 30, 2027, after the next session. But prognosticating what, if any, changes will be made in that session is inherently speculative. Appellants' Joint Appendix at 87.

825, *citing Plan Helena,* 2010 MT 26 at ¶ 6 (citations and internal quotations omitted).

Thus, "[t]he judicial power of the courts of Montana is limited to justiciable controversies." *Id.*, *citing Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start, Inc*., 2009 MT 362, ¶ 22, 353 Mont. 201, 219 P.3d 881 (citations omitted); *Dennis v. Brown*, 2005 MT 85, ¶ 8, 326 Mont. 422, 110 P.3d 17 (citation omitted); *Powder River Cty. v. State*, 2002 MT 259, ¶ 101, 312 Mont. 198, 60 P.3d 357 (citation omitted). Justiciability is a threshold requirement before a Court may grant relief. *Id*., *citing Shamrock Motors, Inc. v. Ford Motor Co.*, 1999 MT 21, ¶¶ 17-19, 293 Mont. 188, 974 P.2d 1150.

Ripeness, along with standing and mootness, is a sub-doctrine of justiciability. *Id*. at ¶ 19, *citing Kulko v. Davail, Inc.*, 2015 MT 340, ¶ 19, 381 Mont. 511, 363 P.3d 430. "Ripeness and mootness . . . can be seen as the time dimensions of standing. . . . The central concern of ripeness is whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication." *Id.* (citations and internal quotations omitted). Thus, ripeness doctrine "requires an actual, present controversy" before a decision may be made. *Qwest Corp. v. Mont. Dep't of Pub. Serv. Regulation*, 2007 MT 350, ¶ 19, 340 Mont. 309, 174 P.3d 496. "The basic purpose of the ripeness requirement is to prevent the courts, through avoidance of

premature adjudication, from entangling themselves in abstract disagreements." *350 Mont. v. State*, 2023 MT 87, ¶ 22, 412 Mont. 273, 529 P.3d 847.

Ripeness comprises a constitutional component and a prudential component. *Id.* at ¶ 20, citing *Reichert*, ¶ 56. "The constitutional component asks whether there is sufficient injury, or whether the issues presented are definite and concrete, not hypothetical or abstract." *Id.* This component is linked to standing. *Id.*

The prudential component considers "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* Further, the prudential component evaluates if the record presented is "factually adequate." *Id.* If more facts will assist the Court in its inquiry, that weighs against a finding that the matter is ripe. *Id.*, *citing Havre Daily News*, *LLC v. City of Havre*, 2006 MT 215, ¶ 20, 333 Mont. 331, 142 P.3d 864 and *Abbott Labs v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681 (1967).

A. MAID's case lacks constitutional ripeness because there have been no decisions under MLUPA, and the statutorily mandated public participation plans have not been fully implemented.

MAID has not presented the Court with real-world facts to which the law could be applied. Its public participation claims are abstract and therefore unripe. *State v. Whalen*, 2013 MT 26, ¶ 7, 368 Mont. 354, 295 P.3d 1055 is instructive. Whalen was convicted and sentenced for crimes. He alleged that the "Sentence Review Division (SRD) is unconstitutional as enacted and as applied to criminal

defendants seeking appellate review of their sentences." *Id*. at ¶ 39 (internal quotations omitted). He claimed that he was threatened with an additional sentence if he participated in the SRD process and that he was further harmed by having to wait up to two years to engage in the process. *Id.*

The Supreme Court found Whalen's facial SRD claims unripe. The Court recognized that, despite his objections to SRD's functioning, Whalen had not proceeded through that process or even made a claim. *Id*. at ¶ 42. Thus, it reasoned that his complaints about the system were "pure speculation" at the time of the appeal. *Id*. The Court also noted that Whalen would have a remedy to challenge any decision from SRD in the future. *Id*. at ¶ 41. Thus, it found that the appeal on that point was unripe. *Id*. at ¶ 42.

Whalen applies here. Like *Whalen*, MAID and its members have not applied for or sought to object to any proceedings taking place under MLUPA. First, none of the municipalities to which MLUPA applies has fully implemented its requirements. Second, no evidence exists that MAID or its members are threatened with imminent injury due to any land use decision by any MLUPA-required process. MAID describes its members as:

> homeowner[s] who resides in their homes in single-family neighborhoods in Whitefish, Bozeman, Billings, Missoula, Great Falls, Columbia Falls, and Kalispell. Some of Plaintiff's members' properties are not subject to restrictive covenants, but others are. Collectively, they live in areas that have long been zoned for residential purposes. The areas in which they live are

> predominately characterized by single-family residences, attractive well-maintained yards, and quiet streets.

(Dkt. 3 at ¶ 32.) However, it fails to identify any proposed changes to its members' neighborhoods through development or due to adopting zoning or land use plans under MLUPA. Amending the zoning in their residential areas is not a unique or new authority under MLUPA. An appellee's residential zoning can be changed today under current zoning law with less public process than the one required under MLUPA. Mont. Code Ann. § 76-2-303.

MAID's public participation claims are even more speculative and hypothetical than Whalen's. MAID does not know what public participation will be permitted in various municipalities. MLUPA requires jurisdictions to which it applies to enact locally tailored public participation plans. Mont. Code Ann. § 76-25-106(5) ("The local governing body shall adopt a public participation plan detailing how the local government will meet the requirements of this section").

In particular, the jurisdiction must "provide continuous public participation when adopting, amending, or updating a land use plan or regulations pursuant to [MLUPA]." *Id.* at (1)(a). It must also provide for

> (i) dissemination of draft documents;
>
> (ii) an opportunity for written and verbal comments;
>
> (iii) public meetings after effective notice;

(iv) electronic communication regarding the process, including online access to documents, updates, and comments; and

(v) an analysis of and response to public comments.

Id. at (1)(b). The jurisdiction may also choose the method for providing:

(i) "general public notice and participation in the adoption, amendment, or update of a land use plan or regulation…"; and

(ii) "notice of written comment on applications for land use permits pursuant to this chapter."

Id. at (3)(a). All notices "must clearly specify the nature of the land use plan or regulation under consideration, what type of comments the local government is seeking from the public, and how the public may participate." *Id.* at (3)(b). Moreover, the jurisdiction must "document what methods it used to provide continuous participation in the development, adoption, or update of a land use plan or regulation and shall document all comments received." *Id*. at (3)(c).

These public participation plans have not been developed or implemented in all MLUPA communities. The nature of the alleged harm threatened to MAID and its members is therefore unknown. Any attempt to analyze any harm threatened to MAID members is necessarily speculative and poses only abstract questions for the Court to consider.

This Court previously overturned the District Court's preliminary injunction against two of the bills at issue in this case in part because of MAID's inability to establish irreparable harm. *Montanans Against Irresponsible Densification, LLC v.*

State, 418 Mont. 78, 88, 2024 MT 200, ¶ 19, 555 P.3d 759, 766 (noting MAID had offered only generalized fears and supposition about the potential effects of SB 323 and SB 528, i.e., "'the possibility' of finding 'a multi-unit building or a duplex, or an accessory dwelling unit' going up next door"). "A court must . . . evaluate standing at every stage of the litigation." See *Barrett v. State*, 2024 MT 86, ¶ 18, 416 Mont. 226, 547 P.3d 630 (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137 (1992)).

MAID has still not provided any documentation of sufficient injury concerning SB 382, which, unlike the other bills at issue in this appeal, has not even gone into effect yet. *Reichert*, at ¶ 20. Until a municipality has adopted a public participation plan, followed that plan with respect to adoption of a land use plan, land use map, zoning regulations, zoning map, or subdivision regulations, and implemented the process for site-specific development review set forth in the statute, this Court, respectfully, cannot make a determination of whether the public's constitutional right to know and participate has been violated.

B. The District Court's ripeness analysis incorrectly found that the public was not permitted to be involved with any site-specific plan that was substantially compliant with local regulations.

The District Court based its conclusion on ripeness on a misunderstanding of how MLUPA works. MAID argued that, while the nature of the public process that will be offered in various municipalities was unclear, MLUPA foreclosed the

ability of individuals to be involved in site-specific land use decisions. That argument is incorrect. As discussed above, MLUPA permits interested parties to comment on adopting and revising land use plans and maps, zoning regulations and maps, and subdivision regulations. *See*, *e.g*, Mont. Code Ann. § 76-25-205 (providing for public participation in adoption of land use plans and maps), § 76-25-304(2) (providing for notices and opportunity to comment on zoning regulation or maps), and § 76-25-403 (providing for public participation in adoption of subdivision regulations).

However, the District Court assumed this was the only public participation allowed regarding site-specific land use decisions. Not so. Mont. Code Ann. § 76-25-503(3) provides an appeal process for site-specific decisions.

> Any final administrative land use decision, including but not limited to approval or denial of a zoning permit, preliminary plat or final plat, imposition of a condition on a zoning permit or plat, approval or denial of a variance from a zoning or subdivision regulation, or interpretation of land use regulations or map may be appealed by the applicant or any aggrieved person to the planning commission.

"Aggrieved party" is defined as "a person who can demonstrate a specific personal and legal interest, as distinguished from a general interest, who has been or is likely to be specially and injuriously affected by the decision." Mont. Code Ann. § 76-25-103(1). This is the same standard contained in current subdivision law. Mont. Code Ann. § 76-3-625.

MAID does not argue that its members would not be "aggrieved parties" if or when a neighbor sought to subdivide or develop a property in a way that allegedly violated a land use plan or implementing regulations. This process provides citizens who do not believe that a decision under MLUPA was substantially compliant with a land use plan or implementing regulations an opportunity to be heard. Instead of presenting every non-controversial development proposal to the governing body, it defaults initial decision-making to the planning administrator. Concerned citizens then can appeal to two separate entities *de novo* if they want to argue that the administrator erred. Thus, the District Court's assumption—"the statutes contain a prohibition for notice and opportunity to be heard"—is incorrect as a matter of law. (Dkt. 152 at 52.)

C. The fact that MAID facially challenges MLUPA does not render its public participation arguments ripe.

MAID argues that no facts needed to be developed for the Court to decide on its public participation claim, which it categorizes as a facial challenge. The argument is incorrect for multiple reasons. First, this Court has held that facial challenges still are unripe. *State v. Whalen*, discussed above, involved a facial challenge to the Sentence Review Division. 2013 MT 26, ¶ 39, 368 Mont. 354, 295 P.3d 1055 (the case was unripe because Whalen had not proceeded through challenged process).

This Court also found that a facial challenge to a statute was, in part, unripe for review in *Advocates for Sch. Tr. Lands* ("Advocates") *v. State*, 2022 MT 46, ¶ 26, 408 Mont. 39, 505 P.3d 825. There, the Court recognized that a matter is not ripe if it is unclear how a governmental agency will implement a statute. Advocates facially challenged a law regarding water rights and school trust land. The Department of Natural Resources and Conservation ("DRNC") and its Trust Lands Management Division ("TLMD") learned that land lessees had developed approximately 141 groundwater rights that did not name the State as a co-owner. *Id*. at ¶ 2. TLMD filed Water Right Ownership Form 608 documents for each of these water rights. *Id.* These forms transferred to the State and DNRC co-ownership of these water rights. *Id*.

Lessees could not challenge the filing of these Form 608 documents. *Id.* The 2019 Legislature enacted HB 286 (codified as Mont. Code Ann. § 85-2-441) to fix the due process concerns over the "involuntary" transfer of these rights. *Id*. at ¶ 3. Specifically, the law codified a process under which DNRC could perfect water rights on trust lands. *Id*. In addition, it rescinded all rights that perfected without using this new process, including the 141 previously found by DNRC. *Id*.

Advocates contended that cancelling the state's co-ownership of the 141 water rights discovered by the DNRC devalued trust lands in violation of the State's obligations. *Id*. at ¶ 26. This Court found that the claim was not ripe. Even

though HB 286 cancelled the State's ownership interests, the Court reasoned that it was unclear whether the State would utilize the bill's process for perfecting the rights at issue. *Id*. "Advocates' argument that HB 286 reduces the value of the school trust lands is not, therefore, a definite and concrete injury but an anticipated one that depends on the occurrence of future events," namely, how the State would implement the statute. *Id.*

This case is again analogous. Like HB 286 cancelled state ownership of some water rights, MLUPA limits further consideration of public comment at certain phases of review (though, as mentioned above, not others). Specifically, planning administrators may not consider comments when implementing regulations already deemed compliant with a land use plan and map through a continuous and extensive public participation process. These regulations, and the land use plan and map on which they rely, are detailed and extensive in identifying how and where types and densities of land uses would be allowed and the analysis and mitigation of the impacts of that development. Development proposed in substantial compliance with those regulations has been subject to comment and review already.

Nevertheless, until municipalities implement MLUPA's public participation plans, it is unclear and speculative whether and how a particular municipality will consider comments on site-specific land use decisions, especially when those

comments are duplicative of those the municipality already considered when it adopted a land use plan and implementing regulations. It also remains unclear whether any particular site-specific decision is a ministerial act pursuant to Mont. Code Ann. § 2-3-112. Like in *Advocates*, the Court must see how the affected municipalities implement MLUPA before it can decide. Unless and until these facts can be fleshed out, any decision would be abstract and fail to resolve any specific dispute. The matter is therefore unripe.

III. The District Court erred when it found the Montana Constitution guarantees a right to comment on every site-specific land use decision, regardless of whether the municipality has already considered and rejected its basis.

The League believes strongly that MLUPA is constitutional as originally enacted because it provides an opportunity to participate in (a) the development of land use plans, zoning regulations and map, and subdivision regulations; and (b) site-specific applications if they are not substantially compliant with those regulations. Though it argued the threshold issues first, its preferred outcome in this case would be for the Court to find that the District Court wrongly decided that issue so that its members could implement needed reforms and proposed housing development is no longer subject to lengthy, duplicative, and unnecessary review timelines and costs that have stymied our land use and planning process for decades.

This Court presumes laws are constitutional. *Powder River Cnty. v. State,* 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. This presumption is important: "[t]he constitutionality of a legislative enactment is prima facie presumed," and "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act." *Id.* at ¶¶ 73-74. A reviewing court does not seek to invalidate the law. Instead, it works to determine if the statute can be upheld. *Satterlee v. Lumberman's Mut. Cas. Co.,* 2009 MT 368, ¶ 10, 353 Mont. 265, 222 P.3d 566. Parties challenging statutes must prove unconstitutionality beyond a reasonable doubt, and any doubt must be resolved in favor of the statute. *Id.*; *MCIA,* ¶ 12.

The Montana Constitution 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." Mont. Const. art. II, § 8. To meet this standard, laws must ensure the public has "notice and an opportunity to be heard." *Carbon Cnty. Res. Council v. Mont. Bd. of Oil & Gas Conservation,* 2016 MT 240, ¶ 21, 385 Mont. 51, 380 P.3d 798 (internal citations omitted). "[T]he right of participation was intended to afford citizens a reasonable opportunity to know about and participate in any government decision." *Shockley v. Cascade County,* 2014 MT 281, ¶ 17, 376 Mont. 493, 336 P.3d 375. MLUPA requires local governments to

provide notice, offer opportunities for public comments, respond to comments, have public meetings, and keep all records of documents, updates, and comments.

These provisions are not self-executing. *Jones v. Cnty. of Missoula*, 2006 MT 2, ¶ 53 n. 3, 330 Mont. 205, 127 P.3d 406, citing Fritz Snyder, *The Right to Participate and the Right to Know in Montana,* 66 Mont. L. Rev. 297, 303 (Summer 2005) ("[Article II,] Section 8 is not self-executing"). *See also Brown v. Gianforte*, 2021 MT 149, ¶ 23, 404 Mont. 269, 488 P.3d 548 ("To determine whether a provision is self-executing, we ask whether the Constitution addresses the language to the courts or to the Legislature.").

When a constitutional right is not self-executing, the legislature must define it. *Brown*, 2021 MT 149 at ¶ 24. "[O]nce the Legislature has acted, or 'executed,' a provision that implicates individual constitutional rights, courts can determine whether that enactment fulfills the Legislature's constitutional responsibility. *Id*. at ¶ 23; *citing Columbia Falls Elem. Sch. Dist.*, ¶ 17; *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d.

A. The Legislature, exercising the powers delegated to it by Article II, § 8 of the Montana Constitution, determined that providing the right to comment on land use plans and implementing regulations satisfies citizens' participation rights.

As discussed above, the Legislature is responsible for implementing Montana's right to public participation. The Legislature has limited the public's right to participate in government operations. For instance, the public has no right

to participate in every ministerial decision a government makes. Mont. Code Ann. § 2-3-112. Mont. Code Ann § 2-3-103 also provides a statutory right of participation only in decisions of "significant interest to the public." *See also* Mont. Code Ann. § 2-3-111 (procedures for assisting public participation 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).

MLUPA represents the Legislature's determination that not all decisions related to land use are of "significant interest to the public." Specifically, the drafters created a framework where a municipality must develop and adopt a land use plan and map and implement zoning regulations, zoning map, and subdivision regulations, during which the public is afforded the ability to continuously and extensively participate in and comment on the drafting and consideration of these documents. However, when those documents, already subject to public participation, are applied routinely to zoning applications or subdivisions, that process does not need to invite further public participation unless the proposal does not substantially comply with those regulations or there is new information to be reviewed and commented on by the public.

This is the legislature's prerogative. It has the authority to place reasonable limitations on the right of participation in cases in which the issue is not of

significant interest to the public or is ministerial, and it can also determine that the right of public participation does not reasonably extend to situations in which the municipality has already confronted and resolved land use issues when implementing a land use plan and map. Consistent with this, MLUPA represents a unique approach to land use planning and regulation in more densely populated municipalities of Montana. The Legislature is authorized to do so.

MAID argues that MLUPA violates Article II, § 8 by contradicting other state laws governing public participation. (Dkt. 84 at 20.) However, MAID relied on the laws that have now been amended. SB 121 specifically provides that the public participation plan, when implemented, satisfies Mont. Code Ann. § 2-3-103's notice provisions. Appellants' Joint Appendix at 63.

Additionally, MLUPA represented the Legislature's implementation of that constitutional provision in the specific context of land use. By implementing the public participation provisions discussed above, the Legislature determined that this new approach to land use was compatible with the public's right to participate in the process. Even if it was inconsistent with other state law, MLUPA was more specifically tailored to land use context and therefore applies over the more general provisions of Title II. *See* Mont. Code Ann. § 1-2-102 ("In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general

and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.").

MAID also argues that the public has the right to comment on site-specific plans and to attend public hearings on land use decisions because that has been the law for a long time. However, that right does not exist currently under municipal zoning laws, which do not require a public hearing on any site-specific zoning decision. Indeed, municipalities routinely do not provide such hearings. *See* Footnote 3 (collecting authorities).

This new process is analogous to how the state and local governments currently issue a wide variety of licenses, from hunting, business, dog licenses, and independent contractor's licenses to sign permits, hiring decisions, and fee schedules. The public is provided notice and the opportunity to participate *when the entity adopts the rule, regulation, policy, or guidance* that provides the criteria and conditions that govern the issuance of an approval to engage in a particular action. The specific decisions on whether each applicant meets those criteria are not subject to public notice and participation. The District Court decision, if allowed to stand, would require all entities at every level of government across the state to provide notice and public participation for almost every type of decision made, bringing businesses and economic development to a halt.

Finally, they fail to cite any case law to support the proposition that the Legislature's right to implement Article II, § 8 somehow evaporates due to the passage of time or that a constitutional right can calcify around a long-standing law. No such case law exists, and it is not warranted by the plain language of Article II, § 8. The legislature should be permitted, or even encouraged, to adjust public participation rights to new methods of communication and changes in governmental needs.

B. Even if the legislature had not defined Article II, § 8 rights, the District Court erred by determining that MLUPA is facially unconstitutional.

Regardless of the Legislature's intention in implementing MLUPA, MAID's facial challenge must fail. "Analysis of a facial challenge to a statute differs from that of an as-applied challenge." *Mont. Cannabis Indus. Assn. v. State,* 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 ("MCIA"). Parties presenting a facial challenge must show that "no set of circumstances exists under which the [challenged sections] would be valid." *Id.* (internal citations and quotations omitted). *See also Advocates for Sch. Tr. Lands v. State,* 2022 MT 46, ¶ 29, 408 Mont. 39, 505 P.3d 825 ("The crux of a facial challenge is that the statute is unconstitutional in all its applications."). Any potential constitutional application of a statute is fatal to a facial challenge. *Id.*

Below, MAID argues that MLUPA couldn't satisfy the "ministerial exception" to Article II, § 8. It contends, "[t]he search for 'objective' standards in the area of land-use will prove to be a chimera. Neither a municipality's growth policy or its zoning regulations are so 'objective' that implementation will prove to be a mere 'ministerial' function." (Dkt. 94 at 23.)

At the very least, however, MAID needs to show that MLUPA is always unconstitutional in all situations. Thus, it is not enough for it to argue that some growth plans may have insufficient detail to permit an employee of the municipality to apply for an application without the need for subjective judgments, as required by the ministerial exception in Mont. Code Ann. § 2-1-112. Rather, it must show that it is always the case. *See MCIA* at ¶ 14 (facial challenges are only successful if the statute is unconstitutional in every situation).

MAID cannot carry this burden. Its argument recognizes that members of the public are permitted to participate in site-specific land use decisions if those decisions do not "substantially comply" with the municipality's zoning and subdivision regulations.[10] MAID cannot and does not claim that, in such cases, the right of participation that will be provided is unconstitutional. It is undisputed that

[10] Here MAID again misconstrues and mischaracterizes how MLUPA works. Unlike current law, which requires each site-specific development proposal to demonstrate substantial compliance with the land use plan and its myriad goals and policies, MLUPA requires the zoning regulations and map to be developed so that the requirements that must be met to develop on a site through the expedited process are already in substantial compliance with the plan. All that must be determined by the administrator is whether proposed development substantially complies with the use, density, and development standards in the zoning and subdivision regulations and zoning map.

MLUPA provides public participation in many circumstances. This alone is reason to deny MAID's facial challenge.

Additionally, presume a municipality adopted a land use plan after considering the traffic impacts of potential subdivisions. Thereafter, the municipality adopts zoning regulations and a map that reflects densities that would mitigate the traffic impacts of those subdivisions, and subdivision regulations with development standards designed to further mitigate the impact of development at those densities.

Presume some neighbors, having heard rumors of a new development, opposed the land use plan and, as MLUPA requires, set forth their objections to the new plan. Their comments are taken into consideration, responded to, and the plan is adopted. The process is repeated thrice thereafter during reviewing and adopting the zoning regulations, zoning map, and subdivision regulations.

There is no reason the same municipality would need to consider the neighbor's same objections a week later if it received a subdivision application in substantial compliance with those densities and development standards. The neighbors have participated in a public process that led to the adoption of a land use plan reflecting a decision about how and where development will occur in their community, a plan that was implemented with regulations that were applied to this particular subdivision.

Nothing in the Montana Constitution or statutes would require the municipality to permit neighbors to have a second chance at their objections, unless, as discussed above, the impacts of the subdivision would be different than those that the municipality has already considered. In that case, MLUPA provides a process for further participation if the impacts have not already been considered. To require this second chance would write into the Montana Constitution a specific right to comment or provide public hearings on every site-specific land use proposal.

The Framers, however, specifically drew Article II, § 8 so that it would need to be defined by further acts of the legislature, instead of making the provision self-executing. *See* University of Montana Alexander Blewett III School of Law, *Montana Constitution Wiki*, II.8 Right of Participation (2025) available at *https://www.umt.edu/montana-constitution/articles/article-ii/ii-8.php*, last accessed May 15, 2025 (citing and quoting Delegate Burkart's comment that "we don't want a precise, hidebound of inescapable statement [of what participation is required] that has to be put into statutes."). This Court should not nullify their intent by writing into the Constitution that which the Framers left to the legislature.

Conclusion

Based on the foregoing, the Court should find that MAID's public participation claims are moot due to SB 121. It should dismiss those claims and

vacate the District Court's decision on them. If it does not, it should reverse the District Court. MAID's public participation claims are unripe and, in any event, cannot show MLUPA to be facially unconstitutional.

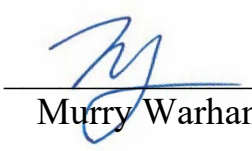
RESPECTFULLY SUBMITTED this 16th day of May 2025.

JACKSON, MURDO & GRANT, P.C.

By: _____
Murry Warhank
Counsel for Montana League of Cities and Towns

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with proportionately spaced Times New Roman text typeface of 14 points, is double-spaced except for footnotes and for quoted and indented material, and the word count calculated by Microsoft Word for Windows is 9,812 words, excluding certificates of service and compliance.

By: 
Murry Warhank

CERTIFICATE OF SERVICE

I, Murry Warhank, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-16-2025:

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

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

Jesse C. Kodadek (Attorney)
Parsons Behle & Latimer
127 East Main Street
Suite 301
Missoula MT 59802

Representing: Shelter WF, Inc.
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 Kenzie Heimbach on behalf of Murry Warhank
Dated: 05-16-2025