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

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MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC,

Plaintiff and Appellee/Cross-Appellant,

v.

STATE OF MONTANA,

Defendant,

MONTANA LEAGUE OF CITIES AND TOWNS,

Defendant-Intervenor and Appellant/Cross-Appellee,

SHELTER WF, INC.,

Defendant-Intervenor and Appellant/Cross-Appellee,

DAVID KUHNLE, CLARENCE KENCK MONTANA LEAGUE OF CITIES AND TOWNS,

Defendant-Intervenors.

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

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# APPELLEE/CROSS-APPELLANT'S COMBINED ANSWER AND OPENING CROSS-APPEAL BRIEF

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## STATEMENT OF ISSUES PRESENTED

1. Is MLUPA's severe curtailment of public participation, even as tempered by the 2025 amendments, facially unconstitutional?

2. Do the 2025 amendments to MLUPA make Appellants' appeal moot?

3. Do the 2023/2025 land use amendments deny equal protection of the laws because:

> a) they apply a different standard of public participation to those cities falling under the ambit of MLUPA and those which do not; and
>
> b) they place an irrationally inordinate affordable housing burden onto city neighborhoods that are not protected by private restrictive covenants?

## STATEMENT OF THE CASE

Montanans Against Irresponsible Densification, LLC ("MAID") filed this underlying action, seeking declaratory and injunctive relief, primarily regarding the newly enacted Montana Land Use Planning Act ("MLUPA"), otherwise known as SB 382 (§ 76-25-101, *et. seq.*, MCA).[1]

The Montana League of Cities and Towns ("League") was allowed to

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[1] Several other land-use/zoning measures were also challenged in the complaint, § 76-2-304, MCA, and § 76-2-345(2)(a), MCA, requiring the allowance of duplexes and accessory dwelling units (ADUs) in areas previously zoned for single-family use.

intervene as a defendant party, solely to defend the constitutionality of MLUPA. Dkt. 77. Two other parties, Shelter WF and Kuhnle/Kenck, both of whom claimed an interest in housing affordability, were allowed to intervene as defendant parties. Dkt. 60. Several of the Intervenors filed various motions to dismiss on justiciability issues.

MAID filed its second motion for summary judgment. Dkt. 83.[2] After a hearing, the district court issued its ultimate Summary Judgment, Declaratory Judgment, and Permanent Injunction granting, in part, MAID's summary judgment motion. Dkt. 152, Appellants' Joint Appendix ("AJA") 7–61 (hereinafter "Summary Judgment"). The court first ruled that the 2023 land use amendments do not supersede private restrictive covenants. On Count II (public participation), the court ruled in MAID's favor, holding MLUPA's prohibition of public comment at the site-specific level violates the Montana Constitution. The court denied MAID's motion on the other issues (equal protection, substantive due process and usurpation of local powers)—and granted the cross-motions on those counts. Various motions to dismiss on justiciability grounds were denied by the court.

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[2] MAID's first motion for partial summary judgment was filed in January of 2024. It requested a declaratory ruling that the 2023 land use amendments could not preempt private restrictive covenants. Dkt. 18. Because of the appeal and the stay, resolution of that early motion was deferred, and later resolved along with the balance of the case. Dkt. 152, AJA 7–61.

A timely Notice of Appeal was filed by Shelter WF, subsequently joined by the League. A timely Notice of Cross-Appeal was filed by MAID. Significantly, the main Defendant, State of Montana, did not appeal, possibly recognizing that the decision of the district court on public participation is correct.

MLUPA was amended by the 69th Montana Legislature in 2025.[3] Pertinent to this appeal are changes aimed at the public participation ruling of the district court.

## STATEMENT OF THE FACTS

### I. The challenged 2023 land use laws.

MAID's Complaint challenges various land-use revision laws enacted in 2023 by the Montana Legislature. In general, these measures purport to address housing affordability by doing away with single-family zoning. The main thrust of the case concerns the "Montana Land Use Planning Act" (SB 382) ("MLUPA"), (Title 76, Chapter 25, MCA), which requires certain municipalities (those of populations of 5,000 in counties of 70,000, § 76-25-105(1), MCA) to engage in sweeping overhauls of their subdivision and zoning regulations. § 76-25-105(2)(b), MCA. This law largely tracks recommendations made by a Housing Task Force

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[3] SB 121, AJA, pp. 62–89.

appointed by the Montana Governor in 2022.[4]

The fifty-year-old Subdivision and Platting Act, § 76-3-101, MCA, with its requirement of a public hearing on site-specific proposals remains in effect, as do the various zoning laws, but only for those cities not within the ambit of MLUPA.

MLUPA eliminates single-family zoning, but only for those cities of 5,000 in counties of 70,000 population.

Although all Montana cities are ringed with private protective covenants, limiting use to single-family, MLUPA's zoning amendments cannot preempt private protective covenants. Accordingly, under MLUPA, the burden of addressing housing affordability falls on traditional neighborhoods which lack protective covenants.

Although these 2023 attempts to impose top-down "densification" in the name of addressing Montana's affordable housing problem, none of the measures explicitly address the issue of "affordability".[5]

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[4] In 2022, the Governor appointed the "Governor's Task Force on Affordable Housing". Its first Report is labeled *Recommendations and Strategies to Increase the Supply of Affordable, Attainable Workforce Housing*, October 2022, p. 17.
https://deq.mt.gov/files/About/Housing/HTF_PhaseI_Final_10142022.pdf

[5] MAID's Complaint challenges a fourth measure, SB 245, as unconstitutional because it suffers the same constitutional faults as the others. However, SB 245 will not be addressed here because that measure does not implicate single-family uses.

## II. The interests of MAID's members.

The undeniable existence of a housing affordability problem in Montana and elsewhere presents a moral conundrum. On the one hand, people in single-family neighborhoods want to protect them, understandably. On the other hand, people of low, and even moderate, incomes are suffering from housing unavailability. Perhaps, if the zoning revisions enacted in Montana truly promised to accomplish affordable housing, many proponents of single-family zoning would swallow such zoning reforms as the price of living in a diverse and equal society. But the 2023 Montana Legislative reforms do nothing to ensure that they will result in enhanced affordability. Dkt. 87, *Sweeney Decl.* Nor is there any likelihood that new housing, if any, will be "affordable".

Instead of addressing the problem of housing affordability, the 2023 legislation embraced the attitude of the libertarian-oriented Governor's Task Force, which, as expressed by one of its members, is a "build more" solution, relying on the assumption that, with more houses built, prices will go down.[6] Because none of Montana's land-use modifications require controlling the initial or subsequent housing price or rent, the price of any units produced will be

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[6] *See* fn. 2.

determined by the local market.

Actually, the Montana Legislature made the problem worse through enactment of preemption legislation. In 2021, the Montana Legislature passed SB 259, which prohibited local governments from either requiring dedication of real property for affordable housing, or exacting a fee in lieu. § 76-2-302(6), (7), MCA. In other words, the Legislature, in 2021, took away from local government one of the most direct and effective avenues to address the affordable housing problem.[7]

The 2021 Montana Legislature, at least, tried to address the problem by passing HB 397, an Act "providing for workforce housing tax credits…." HB 397, 67th Legislature, 2021. This act was, however, vetoed by the Montana Governor, who stated in his veto message,

> I believe the most effective way to address housing affordability challenges in our growing state is to reduce the panoply of regulations faced by housing development. …I am committed to working with my agencies … to identify additional ways to reduce regulatory burdens that drive up the cost of new housing development.

Montana, Office of the Governor, Veto Message, May 14, 2021. Dkt. 84, Exhibit E. That message makes it clear—"regulatory reform" is the (only) answer.

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[7] This approach to addressing housing affordability, now forbidden in Montana, has met with some success in other states. *See e.g. California Bldg. Ind. Assoc. v. City of San Jose*, 851 P.3d 974 (Cal. 2015).

MAID's concern is that the new land-use laws will result in the "tear-down" of present affordable housing and the replacement of that with multi-unit buildings which will be unaffordable for a good part of the population—i.e., gentrification. The new laws threaten to demolish existing affordable housing, while promising to enrich developers. It is the desire of MAID members to preserve Montana's historic neighborhoods. Dkt. 87.

In contrast, virtually all of the newer housing construction outside core areas of cities tends to be uniform and lacking in architectural diversity. Once the core architecturally-diverse traditional areas of Montana cities are lost, they are lost forever. That is why the members of MAID, even though sympathetic with the need for housing affordability, are passionate about protecting neighborhoods.

It cannot be gainsaid that the stakes are extremely high. The 2023 amendments to Montana's land-use laws are draconian—they **abolish single-family zoning**. Single-family zoning has been a staple of all of the neighborhoods in this country since the late 1920's. The dream of most Americans is to live in a house in a single-family neighborhood. Some urban planners, and other "experts", think the problem of affordability in housing will be solved by eliminating single-family zoning. It won't. And, the cure is worse than the disease.

To be clear, MAID is not requesting this Court to be an arbiter of

architectural taste or good design. This background is simply set forth to explain the interests and moral position of MAID's members. The dubiety of whether a sole "build-more" solution will work, coupled with the threat to the quality of existing city neighborhoods, continue to motivate the members of MAID to oppose densification efforts.

## STANDARD OF REVIEW

The district court's grant or denial of summary judgment and related conclusions of law are reviewed *de novo* for correctness. *Park County Environmental Council v. Montana Dep't of Env. Quality*, 2020 MT 303, ¶ 18, 402 Mont. 168, 477 P.3d 288.

## SUMMARY OF ARGUMENT

The district court correctly held MLUPA's attempt to "front-load" public comment and severely curtail such comment at the site-specific level of land-use decisions is unconstitutional as violative of Article II, Sections 8 and 9, Mont. Const. and the implementing statutes. Montana's old Subdivision and Platting Act, which still applies to all counties and most cities and towns, requires appearing before a public body prior to approval or disapproval of a subdivision. But MLUPA now dispenses with that for cities of a certain size in large counties.

The same is true for important zoning decisions. MLUPA now places a

blanket limitation on public involvement in zoning decisions at the site-specific level.

SB 121, passed in 2025, improves the situation somewhat. It now provides for public notice of land-use applications and a fifteen day period for public input. However, it is still constitutionally defective because there is no public hearing and a single person, the planning administrator, makes all of the important decisions, no matter that such decisions are largely discretionary.

SB 121 does not moot the case because the amendments did not go far enough to achieve public participation, and because its amendments are, in any event, temporary—they are set to expire in 2027.

Appellants' argument that Montana's constitutional provisions are not self-executing and the Legislature, therefore, is free to modify the statutes as it wants, is unpersuasive. Numerous cases of this Court have applied strict scrutiny to legislation designed to implement Montana's fundamental constitutional provisions, and have invalidated such legislative attempts.

Appellants argue that the district court opinion forces **all** local land-use decisions to be subject to full public participation. That is not true. Instead, the district court invalidated a **blanket prohibition** on public participation at the site-specific level.

The district court erred in failing to address, substantively, MAID's argument that equal protection is violated because the citizens of all counties and the citizens of most cities and towns continue to be afforded full public participation, including hearings, on site-specific land-use decisions, while MLUPA-qualifying cities (over 5,000 population in counties of over 70,000) have suffered a serious curtailment of their public participation rights.

There is a separate equal protection violation because a good portion of Montana's cities are subject to private restrictive covenants, most of which stipulate single-family use. Thus, MLUPA's attempt to eliminate single-family zoning is ineffective for the private-covenant areas, because zoning, as a matter of law, does not trump private covenants. The result is a creation of two separate similarly-situated classes of persons living in cities in single-family areas. The traditional single-family neighborhoods are now subject to MLUPA's zoning modifications, but persons protected by covenants are unaffected. Thus, the burden of addressing affordable housing falls, arbitrarily, on one class while the other class is sheltered from that burden.

Under strict scrutiny review and even under mid-tier or minimal review, this classification does not pass constitutional muster. The district court erred in rejecting the two classifications based on its finding that the statute did not

"create" these classifications. This is inconsistent with substantial state and federal case law.

## ARGUMENT

### APPEAL

It is all too common that government officials try to hide important, but controversial, decisions in the shadows—because they often think they are right and you (the public) don't know what you're talking about. There seems to be a never ending tension between public officials who seek to operate in secret and the people—i.e., the ones who are truly affected by government decisions.

This is evident on the national scene where Elon Musk, purporting to be some kind of government "official", has attempted to ravage the federal workforce and decimate congressionally-enacted programs, such as USAID and the Department of Education, **with no public accountability**.

Unfortunately, a similar attitude permeates the recent land-use amendments. For example, MLUPA seeks to eliminate all public hearings on all subdivision and zoning site-specific decisions—because public involvement is nettlesome. The evident hostility to sunshine in government is evinced in the briefing of Shelter WF, which refers to the present open government system as a "vetocracy", Shelter WF Br., p. 23 n.7, whatever that means, and public hearings as inviting a

"heckler's veto", Dkt. 120, p. 12, n.35 (citing Dugan Dec. at ¶ 14). The author of MLUPA, League President Kelly Lynch, is at her patronizing best when she criticizes the fact that hearings on site-specific land-use decisions (a practice in Montana for **over fifty years**), as "we do things backwards in Montana":

> "Essentially, we do things backwards in Montana. And so it's no surprise that our permitting processes take too long." Lynch said Wednesday, describing the current system as driven by project-level review instead of proactive planning. "The whole idea behind this is to flip that, so that we do the planning and the public participation up front, we front-load it, then as we get to the permitting and planning, that becomes a very administrative process."[8]

There is no doubt that this effort to "front-load" public comment and eliminate such involvement on ultimate site-specific decisions is purposeful. Some government officials and many planners are obviously hostile to public participation, particularly when it is untidy and robust, and particularly when the public input disagrees with pronouncements from on high.

Fortunately, the Framers of the Montana Constitution, in enacting Article II, Sections 8 and 9, anticipated this attitude and presciently provided a constitutional bulwark. As the Legislature has stated in implementing legislation, "the people of

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[8] The accuracy and authenticity of this quotation is established through the League's responses to MAID's written discovery requests, Interrogatory No. 5, Dkt. 131.

the State **do not wish to abdicate their sovereignty** to agencies which serve them." § 2-3-201, MCA (emphasis added).

## I. The district court correctly held MLUPA is unconstitutional.

Under the present Montana Subdivision and Platting Act, § 76-3-101, MCA), public hearings on site-specific subdivision proposals **are required,** and have been for **fifty years**. § 76-3-605, MCA.[9] *See also Citizens for Responsible Dev. v. Bd. of County Comm'rs.*, 2009 MT 182, ¶ 23–24, 351 Mont. 40, 208 P.3d 876; *State ex. Rel. Florence-Carlton Sch. Dist. v. Bd. of County Comm'rs.*, 180 Mont. 285, 590 P.2d 602 (1978).

But MLUPA has changed that with respect to certain cities—those that fall within its ambit (cities of 5,000 in counties of 70,000). Confusingly, Montana now requires local governments to regulate subdivisions under two separate regimes, the present Subdivision Act (Montana "Subdivision and Platting Act", § 76-3-101, *et. seq.*, MCA) and the new MLUPA (§ 76-25-101, *et. seq.*, MCA). Once MLUPA is implemented for those qualifying cities, **no public hearing is allowed** on site-

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[9] Public hearings and public participation have been required regarding subdivisions since the Act's inception in 1973. *See Recent Developments in Montana Land Use Law*, James H. Goetz, Montana LR Vol. 38, pp. 98–100, Winter 1977: "Upon submission of the preliminary plat and environmental assessment by the subdivider, **the governing body must hold a public hearing**, after notice by publication…." *Id.* at p. 100. (emphasis added).

specific subdivision proposals. Instead, the ultimate decision is to be a "ministerial" one made by an administrative officer. § 76-25-408(7), MCA.[10]

Section 76-25-408(7)(b), MCA, states: "The application is **not subject to any further public review or comment**, except as provided in 76-25-503." In short, public participation is **not allowed** on site-specific projects except for the minor exception that allows further public comment (but not a public hearing) in cases where a site-specific proposal involves previously-undisclosed significantly increased impacts. In short, on site-specific developments, the ones that actually affect citizens, public participation is severely curtailed.[11]

The attempt at "front-loading"—i.e., moving public involvement to the early stages of development of the City's Land-Use Plans—is a cynical effort to suppress public involvement. Traditionally, members of the public have been only

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[10] This blanket prohibition applies not only to subdivisions, but also to municipal zoning actions. Many local regulations now provide for issuance of permits, such as variances or conditional use permits, which must be heard by the planning commission and/or the governing body. *See e.g.* Appendix 1, p.2, Dkt. 114, City of Bozeman planning document "Development Review Timelines and Processes", which indicates which zoning and subdivision application are subject to public participation. However, § 76-25-106(4)(d), MCA, is now a blanket prohibition on public participation on all "site-specific" zoning applications with certain limited exceptions, and confines review to the standard of "substantial compliance" with the land use plan.

[11] Appellants suggest that the cut-back on public participation is ameliorated because of the availability of an appeal under § 76-25-503, MCA. An "appeal" remedy is no substitute for public participation at the critical level where a site-specific land-use decision is actually made.

sporadically involved in general planning issues at the stage of development of a "growth policy". Instead, the public is, understandably, much more involved when a "site-specific" proposal directly affects them. The attempt to derail public participation at the site-specific level is palpably inconsistent with Montana's Right to Participate constitutional provisions.

In sum, Montana's new subdivision and zoning laws now purport to take away a fundamental and treasured constitutional right of those citizens who happen to reside in cities subject to the MLUPA—rights that have been in existence for **fifty years**.

Section 76-3-605, MCA provides:

> **Hearing on subdivision application**. (1) …at least one **public hearing** on the subdivision application must be held by the governing body, its authorized agent or agency, or both, and the governing body, its authorized agent or agency, or both shall consider all relevant evidence relating to the public health, safety, and welfare, including the environmental assessment if required, to determine whether the subdivision application should be approved, conditionally approved, or denied **by the governing body**.

Emphasis added.

The district court held MLUPA's drastic cut-back on public participation is unconstitutional. The court first carefully reviewed Article II, Sections 8 and 9, Mont. Const., the State's open meetings laws, § 2-3-201, MCA, *et. seq.*, and the

implementing laws guaranteeing "sunshine" in government, 2-3-101, *et seq.*, and correctly held MLUPA's features to be unconstitutional.

The district court focused on the attempt by the authors of MLUPA to remove site-specific decisions from public participation by labeling them "ministerial". The court stated: "Characterizing the decisions to be made by the planning administrator in the review and approval process as ministerial, when they **are obviously discretionary**, does not validate these provisions under the Constitution." Summary Judgment, p. 28, Dkt. 152 (emphasis added).

The gravamen of the district court's ruling regarding public participation is: "The decision of the planning administrator involves more than a ministerial act." *Id.*, p. 27.

This Court has repeatedly emphasized that Article II, Section 8, "…guarantees citizens the right of participation in the operation of government agencies prior to the making of a final decision." *Jones v. County of Missoula*, 2006 MT 2, ¶14, 330 Mont. 205, ¶14, 127 P.3d 406, ¶14 (citing *Sonstelie v. Bd. of Trustees for Sch. Dist. No. 10, Flathead County* (1983), 202 Mont. 414, 418, 658 P.2d 413, 415) (emphasis added). Because the right to participate and the right to know are included within our Constitution's Declaration of Rights, both are fundamental rights. *Butte Community Union v. Lewis* (1986), 219 Mont. 426, 430, 712 P.2d 1309,

311.

*Jones*, relied on by the district court, is a case in which the county argued that the issue of healthcare coverage available to same-sex domestic partners was not of significant interest to the public, and, therefore, not subject to public participation constitutional requirements. This Court disagreed. "Significant public interest" was defined by this Court as "... any non-ministerial decision or action ... which has meaning to or affects a portion of the community ...." *Id.*, ¶ 16. The *Jones* Court confirmed a "ministerial act" is "... one performed pursuant to legal authority, and requiring no exercise of judgment." *Id.*

In short, the court was correct that such zoning decisions are **inherently** subjective. Although a master plan can give general guidance, there is still a great deal of **judgment** involved in such decisions. Accordingly, the district court was correct in finding unconstitutional MLUPA's attempt to avoid public participation through simply denominating the decision as "ministerial".

Appellants are fond of regurgitating the term "Montana miracle". This is like calling the current chaotic tax-cut bill in Congress, "One Big, Beautiful Bill". Mere labeling does not make it so. The term, "Montana miracle", was apparently first coined by a group of planners at a planner's association conference to preen in

front of Montana's governor.[12]

### A. The 2025 temporary amendments to MLUPA do not moot the case, nor do they salvage MLUPA's unconstitutionality.

SB 121, enacted by the 2025 Legislature, temporarily amends MLUPA. It changes MLUPA by 1) providing for public notice of a planning administrator's initial determination that meets the requirements of the law, and 2) providing for a fifteen-day public comment period.[13] SB 121, Secs. 11–12. By SB 121's own terms, Sections 11–13 of SB 121 expire on June 30, 2027.[14]

Notably the 2025 amendments, although now providing for public notice of the application as well as receipt of public comments, omit any public **hearing** requirement for development applications and they continue to invest in a single person the authority to approve or disapprove a development proposal.

The real difference between the 2023 land use amendments and the previous law is demonstrated at the site-specific level. Under the previous law, citizens have had, for fifty years, the right of public participation and the right of ultimate site-specific decision. Now, under the 2023 version of the MLUPA, the public did not

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[12] In fact, there is **no evidence** that the 2023 amendments have increased affordable housing.

[13] SB 121 also repeals § 76-25-106(4)(d), MCA, which limited public involvement to those impacts not previously considered in the adoption of a land-use plan or implementing regulations. AJA 74.

[14] SB 121 (2025), Sec. 16. AJA, pp. 62–89.

even have the right **to be notified** of a pending subdivision application, much less the right to participate. 2025's SB 121 has modified this somewhat. Under SB 121, Secs. 11, 12, the planning administrator is obligated at least to notify the public of the impending decision. The public is then afforded a fifteen-day opportunity to submit written comments. However, it is then up to a single person, the planning administrator, to decide how to proceed from there—i.e., to decide whether the public comments rise to the level of the need for additional information or not. And, there is no ultimate hearing before the governing body.

In other words, the 2025 amendments continue MLUPA's "ministerial" approach with the attitude that, once a land-use plan is adopted and zoning and subdivision regulations are enacted, any further decision is formulaic—a single person will be able to crank out project approvals quickly and with no exercise of judgment.

This is in contrast to the present Montana Subdivision and Platting Act, § 25-3-301, MCA, *et seq.*, and many zoning regulations, which require the public body's ultimate approval and a public hearing. As the district court found, many land-use site-specific decisions are not formulaic. Inherently, they entail the exercise of discretion.

The operative question is whether the 2025 amendments sufficiently alter

MLUPA such that the present appeal on public participation is moot. SB 121 does not moot this case for two reasons: 1) it does not alter MLUPA significantly enough so that MAID's challenge is no longer viable; and 2) it is temporary and a temporary, voluntary cessation of activity by a defendant does not moot a case.

The lead case on mootness during appeal is *Plains Grains L.P. v. Bd. of County Comm'rs.*, 2010 MT 155, 357 Mont. 61, 238 P.3d 332. There landowners sought to re-zone their property from agriculture to "Heavy Industrial", so that the land could be used for a coal-fired power plant. The county granted the re-zoning request, and plaintiffs challenged that, arguing, *inter alia*, the re-zone amounted to impermissible spot zoning. Among their challenges, plaintiffs alleged improprieties in the procedures used to re-zone. *Id.*, ¶ 14. While the case was on appeal, the county approved various general amendments to county zoning regulations. The county then argued that the amendments "superseded the version in place at the time of the [earlier] contested re-zone," and argued the case was, therefore, moot. *Id.*, ¶ 19.

This Court rejected this mootness argument, holding that "the question of the legality of the [earlier] re-zone remains alive." *Id*, ¶ 34. "As long as a court is able to grant meaningful relief or restore the parties to 'their original position', the case is not moot." In short, a legislative amendment enacted during the appeal of a

case does not moot the case unless the amendment so substantially alters the challenged statute that the grant of meaningful relief is not possible.

Federal case law reinforces this Montana rule. In *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 US 656, 662 (1993), the Court noted that the question boils down to whether the amended law is "substantially similar" to the original. The Court added, "we assess substantial similarity by reference to the claims advanced in the litigation, asking whether the amended law burdens the plaintiff 'in the same fundamental way', as the original." *Id*. at 662 (emphasis added).

*City of Jacksonville* followed *City of Mesquite v. Alladdin's Castle*, 455 US 283 (1982). In *City of Mesquite*, a mootness motion was made during the appeal to the Court of Appeals. The city's ordinance, previously found unconstitutionally vague, had been amended during the appeal to add clarifying language. The Court rejected the mootness argument because it is "well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" and the defendant had announced its intention to reenact the offending language. *Id*. at 289 & n.11.

Even Shelter WF tacitly acknowledges an action challenging legislation that has been amended is not moot when there is a reasonable expectation that the

legislative body will reenact the challenge provision as similar to it. *See* Shelter WF Br., pp. 30–31 (quoting *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (*en banc*)).

Here, there is not only a possibility that the unconstitutional measure will be reenacted, it is a **certainty**. The relevant sections of SB 121 have an expiration date: June 30, 2027. SB 121, Sec. 16. This upends Appellants' arguments on mootness—when SB 121 expires, the originally-challenged MLUPA provisions will be reinstated.

In sum, the question boils down to whether the 2025 amendments change MLUPA so drastically that this Court is incapable of affording effective relief. *Plains Grains*, ¶ 34. As demonstrated below, the 2025 amendments are insufficient to deprive this Court of jurisdiction. As stated in *City of Jacksonville*, the question to be asked is, "whether the amended law burdens the plaintiff 'in the same fundamental way,' as the original." 508 US 662. The answer is, yes, with respect to the MLUPA amendments.

### B. The begrudging 2025 amendments, perpetuating the "ministerial" approach and dispensing with public hearings, do not vitiate the court's ruling of unconstitutionality.

SB 121 continues to shoehorn the ultimate decisions on site-specific land-use applications into a so-called "ministerial" box, even though most of such decisions

are necessarily fraught with subjective judgment calls.

This technical, grudging change in SB 121 does not comport with the clear constitutional mandate, evidenced by Montana's main statute implementing the Montana constitutional public participation provisions. § 2-3-103, MCA, provides in pertinent part:

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

(Emphasis added). The minimum, grudging changes in SB 121 do not meet the standard that agents must **encourage** public participation.

SB 121 provides that the planning administrator makes an initial determination as to whether a development proposal meets the strictures of the land-use plan and applicable regulation (subdivision or zoning regulations). If it does, in the judgment of a planning administrator, public notice is issued and public comment is allowed for fifteen days. SB 121, Secs. 11(3–9), 12(9)(7–12). If, after public comment, the planning administrator makes a determination that the proposed development fails to meet such requirements "the planning administrator shall proceed…to collect more data or perform any additional

analysis necessary." *Id.* In other words, all the critical decisions remain in the hands of the planning administrator—there is no hearing before a public body and a single person makes the penultimate decisions.

Then, it is up to the single person to make a decision as to whether the public comments have merit and need further investigation. Again, this is an extremely subjective and discretionary decision. If, in the opinion of the single person, the public comments do not raise sufficiently new issues, that single person proceeds to approve the development project. If, on the other hand, the single person decides there may be merit to the public comments, that person will either develop further information or request the applicant to do the same. Then, again, in that person's sole discretion, the project is either approved or not. SB 121, Secs. 11(3-9), 12(9)(7-12).

As noted, the district court found unconstitutional MLUPA's attempt to avoid public participation by falsely designating site-specific reviews as "ministerial". Although SB 121 slightly improves the statute regarding public participation, its niggardly changes do not meet the letter or spirit of the Montana Constitution. Instead, the changes continue to be grudging, reflecting an attitude that they are trying to do just enough to get by.

The search for "objective" standards in the area of land-use will prove to be

a chimera. Neither a municipality's growth policy nor its zoning regulations are so "objective" that implementation will prove to be a mere "ministerial" function. The district court correctly held that MLUPA gives too much discretion to local officials to qualify as a mere "ministerial" decision.[15] *See Citizens for Responsible Development* (Board's failure to exercise its discretion granted by subsection 604(2) precluded according deference to the Board's decision. *Id.*, ¶ 18.)

The 2025 amendments, although better, persist with the same flaw. The vesting of such a large, discretionary, power in one person, is, unfortunately, an open invitation for corruption.[16]

The relevant inquiry is whether the public official **exercised judgment** in his/her decision. In *State ex. rel. Div. Workers' Compensation v. District Court*, 246 Mont. 225, 805 P.2d 1272 (1990) this Court defined "ministerial act" as:

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[15] MLUPA defines "ministerial permit" as:

> a permit granted upon a determination that a proposed project complies with the zoning map and established standards set forth in the zoning regulations. The determination must be based on objective standards involving little or no personal judgment and must be issued by the planning administrator.

SB 382, Section 3(22) (§ 76-25-103(22), MCA).

[16] An example is the 1973 conviction of then-Vice President Spiro Agnew, for accepting bribes on building permits while a county commissioner in Baltimore, the governor of Maryland and while Vice President of the United States. *See* https://vault.fbi.gov/Spiro%20Agnew and https://library.cqpress.com/cqalmanac/document.php?id=cqal73-867-26366-1225812

> ... an act performed in a prescribed legal manner, in obedience to the law or the mandate of legal authority, without regard to, or the **exercise of, the judgment of the individual** upon the propriety of the act being done.

246 Mont. at 229, 805 P.2d at 1275 (emphasis added). It is clear that the ultimate site-specific decisions of municipal officers approving, conditionally approving, or disapproving subdivisions or zoning permits, involve discretion and judgment on the part of the official. It is pie-in-the-sky to think that the growth policies and subsequent zoning and subdivision regulations can be so tightly drawn, and so objective, that the ultimate site-specific decision is so cookie-cutter that it is simply ministerial. *See also Benefis Healthcare v. Great Falls Clinic*, 2006 MT 254, ¶¶ 38–42, 334 Mont. 86, 146 P.3d 714 (Morris, J., dissenting).

In 1989, the Montana Eleventh Judicial District Court, Flathead County, held that the Board of Oil and Gas Conservation of the State of Montana ("Board") violated Article II, Section 8 of the Constitution when its administrator issued a permit without public participation. The court held "[t]here can be little argument that the issuance of the permit in the instant case is of significant interest to the public…this was not treated in a ministerial fashion, but involved a further

request by the engineer." *Id.*, p. 3.[17] *See also Associated Press v. Crofts*, 2004 MT 120, ¶ 22, 321 Mont. 193, 89 P.3d 971 (distinguishing between acts which are "merely ministerial or administrative" and decisions that involve "matters of policy".)

The 2025 amendment continues to open the back door—an approach MAID refers to as the "Elon Musk" approach. That is, there is a blanket grant of huge discretionary power to a single individual who remains largely unaccountable. MLUPA's public participation constitutional problem is compounded by certain strange and confusing "presumption" language. [18]

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[17] A copy of the decision of Montana Eleventh Judicial District Court, Judge Robert S. Keller, August 18, 1989, *North Folk Preservation Association v. the Board of Oil & Gas Conservation*, DV-89-412(B) is attached as Appellee/Cross-Appellant Appendix 2.

[18] Strangely (and confusingly), MLUPA now vests in subdividers a "presumption" of compliance with public participation requirements. This is now codified as § 76-25-403(6), MCA:

> (6) After the subdivision regulation or amendment to a subdivision regulation has been adopted by the governing body, there is a **presumption that:**
>
> > (a) All subdivisions in substantial compliance with the adopted regulation or amendment are in substantial compliance with the land use plan and zoning regulations; and
> >
> > (b) **The public has been provided a meaningful opportunity for participation**.

Emphasis added. This is completely circular and nonsensical and amounts to an unconstitutional irrebuttable presumption. *See Vlandis v. Kline*, 412 US 441, 446 (1973); *see also In re the Existing Rights ex. rel. All the Water*, 253 Mont. 167, 832 P.2d 1210 (1992)…("a statute creating a

The League argues that MLUPA's "substantial" compliance standard is based on the case law of this Court—implying, but not directly arguing, that under MLUPA's standards, there is no discretion in implementation. It cites various cases, including *Little v. Bd. of Co. Comm'rs.*, 193 Mont. 334, 353, 631 P.2d 1282 (1981). League Br., pp. 10–12.

These cases simply do not support the argument that there is no discretion in the "substantial" compliance standard. Indeed, these cases state the opposite. In *Little*, for example, this Court was faced with resolving competing arguments—one side baldly argued that there is no obligation to comply with the county's growth policy; the other argued that there must be strict compliance. This Court split the baby, holding:

> To require strict compliance with the master plan would result in a master plan so unworkable that it would have to be constantly changed to comply with the realities. The master plan is, after all, a plan. On the other hand, to require no compliance at all would defeat the whole idea of planning. Why have a plan if the local governmental units are free to ignore it at any time? The statutes are clear

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presumption that operates to deny a fair opportunity to rebut it violates the due process clause…"); *see also State ex. rel. Zander v. District Court*, 180 Mont. 548, 591 P.2d 656 (1979) ("a conclusive statutory presumption that a marijuana cultivator is a marijuana seller is purely arbitrary. It precludes proof to the contrary. It offends the 'due process' clause of our State Constitution and *Art. II, section 17*, 1971 Montana Constitution.") *Id.* at 180 Mont. 559, 591 P.2d at 662.

> enough to send the message that in reaching zoning decisions, the local governmental unit should at least substantially comply with the comprehensive plan (or master plan). **This standard is flexible enough so that the master plan would not have to be undergoing constant change.** Yet, this 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.

*Id*. at 353 (emphasis added). *See also Heffernan v. Missoula City Council*, 2011 MT 91, ¶¶ 76–79, 360 Mont. 207, 255 P.3d 80.

In short, the *Little* line of cases simply does not stand for the proposition that "substantial" compliance amounts to a clear black-and-white standard, rotely administered by a single person. Instead, this standard calls for the exercise of reasoned **judgment** on the part of governing bodies.

In sum, because SB 121 continues to insist on "ministerial" implementation, it perpetuates the same constitutional flaws found by the district court.

### C. Appellants' arguments are unpersuasive.

Appellants make a range of arguments, including that Article II, Section 8 is not self-executing, and that the Montana Legislature is, therefore, free to amend its implementing legislation, such as its open meetings laws, without constitutional restriction. They also argue this case is not suitable for facial constitutional challenge, and that the new MLUPA public participation procedure has actually

increased opportunities for participation.

The League further argues that not every ultimate land use decision, under previous law, required approval by public body or full public participation, but the district court's opinion now requires every land-use decision, no matter how inconsequential, to have full public participation. This argument turns this issue on its head. The district court's decision simply strikes certain features of MLUPA. The decision plainly does not require full public participation on every land-use decision. The court's decision does not alter what was happening before, it simply reinstates the full rights of public participation that existed prior to the 2023 laws.

Moreover, because MLUPA constitutes a **blanket prohibition,** precluding public involvement at the site-specific case in all circumstances, the present facial constitutional challenge is appropriate because MLUPA constitutes a systemic obstacle to full public participation—an obstacle that did not exist prior to MLUPA.

As for the argument that Article II, Section 8 is not self-executing, this argument has been made and rejected by this Court in numerous constitutional cases.

In *Brown v. Gianforte*, 2021 MT 149, ¶ 23, 404 Mont. 269, 488 P.3d 548, this Court rejected an argument by the State that, because a constitutional provision is

non-self-executing, the Legislature is completely free to legislate as it sees fit. The *Brown* opinion cited the following language from *Columbia Falls Elem. Sch. Dist. v. State*, 2005 MT 269, ¶ 17, 326 Mont. 304, 109 P.3d 257:

> However, once 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.

A recent decision of the Pennsylvania Supreme Court, *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (2013), provides guidance. There, the Pennsylvania Supreme Court determined that legislative amendments to Pennsylvania's oil and gas law, which drastically displaced local zoning laws, were unconstitutional. The Court found that citizens had developed important settled expectations in the stability and economic values of their homes because of the existing zoning, and found that there was a serious "degradation" of local environmental values encompassed in the locally-enacted zoning laws through this state-imposed law. In essence, Pennsylvania's zoning laws were enacted pursuant to a foundational constitutional environmental protection provision in Pennsylvania, similar to Montana's right to a clean and healthful environment in Article II, Section 3, Mont. Const. Pennsylvania's oil and gas amendments undermined those environmental/zoning laws and were struck down, in part, for that reason.

The parallel is clear. Here, Montana has fundamental constitutional rights of public participation and to a clean and healthful environment that are implemented by carefully-drafted statutes. Montana citizens have developed settled expectations based on existing zoning—expectations on the value of their homes and the stability of their neighborhoods. MLUPA seriously undermines these settled expectations, as well as the letter and spirit of Montana's constitutional provisions with its attempt to relegate ultimate land-use site-specific decisions to "ministerial" decisions, without the benefit of full public participation. As in Pennsylvania, such effort to degrade public participation and environmental protection does not square with the Constitution.

An important trilogy of cases provides structural guidance. They deal with Montana's constitutional provisions guaranteeing the right to a clean and healthful environment. *Held v. State of Montana*, 2024 MT 312, 419 Mont. 403, 560 P.3d 1235; *Mont. Env't. Info. Ctr. v. Dep't. of Env't. Sciences*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 ("*MEIC I*"); and *Park Co. Env't. Council v. Montana Dep't. of Env't. Quality*, *supra* ("*Park Co.*").

In *MEIC I*, this Court considered a legislative amendment to Montana's water non-degradation statutes. This Court first noted that the non-degradation statute in question, prior to the amendment, was properly implemented pursuant to

Montana's constitutional provisions protecting the environment. The amendment in question then purported to exclude broad categories of activities from non-degradation review, without regard to the nature or volume of the substances being discharged. This court found this exception violated the fundamental constitutional right to a "clean and healthful" environment. Significantly, plaintiffs there argued that the statutory exception amounted to a "blanket" exclusion and was, therefore, unconstitutional. *Id.,* ¶ 30.

Importantly, this Court held that Montana's environmental constitutional provisions establish fundamental rights which are subject to strict scrutiny by the courts. *Id.*, ¶¶ 58–63 (citing *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165 (1996)).

On the question of facial unconstitutionality, the majority opinion noted, "we have not been asked to and do not hold that this section facially implicates constitutional rights." *Id.*, ¶ 80. However, Justice Leaphart said in his concurrence, "I do not see how the Court can logically avoid declaring that the statute is unconstitutional on its face…," noting the statute "is not limited to the facts of the present case but inheres in the statute's creation of a blanket exception."

Twenty-two years later, this Court in *Park Co.* embraced Justice Leaphart's prescient concurrence stating, "the constitutional infirmities here, as in *MEIC I*,

are not limited to the present facts but stem from the statute itself. We find Justice Leaphart's reasoning persuasive and adopt it here." *Id.*, ¶ 88. Given this holding, Appellants' objections regarding facial unconstitutionality are not well taken.

In *Park Co.* this Court faced an attempt by the Legislature to water down MEPA by prohibiting injunctive relief for violations. This Court first reiterated that "laws implicating either constitutional provision are subject to strict scrutiny." *Id.*, ¶ 6. This Court then held,

> Montanan's right to a clean and healthful environment is **complemented by an affirmative duty upon their government to take active steps to realize this right**. *Article IX, Section I, Subsections 1 and 2,* of the Montana Constitution command the Legislature "shall provide for the administration and enforcement" of measures to meet the State's obligation to "maintain and improve" the environment. Critically, Subsection 3 explicitly directs the Legislature to "provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." *Mont. Const. Ar. IX, § 1(3).*

*Id.*, at ¶ 63 (emphasis added).

In *Held*, this Court noted that MEPA exists to inform the legislature and the public about the environmental impacts of government actions. *Id.*, ¶ 66–67. This Court noted "yet [the State] argues that it and the public need not be informed of the potentially catastrophic cumulative effects from its actions." *Id.* This Court then observed:

> Obviously, a clean and healthful environment cannot occur unless the State and its agencies can make adequately informed decisions (citations omitted). Nor can Plaintiffs be informed of anticipated impacts to the environment when **the Legislature forecloses an entire area of review** that could be harmful to Montanans' right to a clean and healthful environment….nor will the Legislature be informed of whether laws are adequate to address climate change when MEPA precludes an environmental review addressing the impacts from potential state actions….

*Id.*, ¶ 67 (emphasis added).

The same is true here. MLUPA, placing site-specific review off limits to participation, forecloses an entire area of review by the public, as well as by the courts.

The League argues that the extent and stage of public participation is entirely up to the Legislature and the Legislature, with its enactment of MLUPA, has spoken in its "front-loading" approach. In *Bryan v. District*, 2002 MT 264, ¶ 23, 312 Mont. 257, ¶ 23, 60 P.3d 381, ¶ 23, this Court held that "[T]he Montana Constitution is to be given a broad and liberal interpretation. While the Legislature is free to pass laws implementing constitutional provisions, its interpretations and restrictions will not be elevated over the protections found within the Constitution." (citations omitted). Simply put, the legislature is not the arbiter of whether a statutory provision complies with the Constitution.

Appellants cite the need to expedite the processing of building applications, arguing that MLUPA streamlines the process. Clearly the creation of a separate, duplicative subdivision and zoning law does not "streamline" the process. Moreover, while efficiency is important, it cannot trump the fundamental right of participation by the public. In any event, the Legislature has plenty of tools to speed up review of development permits—indeed, MLUPA has some such features, specifying dates by which government decisions must be made on development application. *See e.g.*, § 76-25-408(7)(c).

Finally, Appellants argue that the new amendments, by emphasizing public participation at the early stages of development of Land-Use Plans, actually strengthens public participation. This is demonstrably untrue.

The difference between the new MLUPA subdivision law and the previous subdivision law is illustrated in a demonstrative exhibit attached as Appellee/Cross-Appellant Appendix 3. As the exhibit makes clear, under the previous (and still existing) subdivision law, citizens have always had the right to participate in decisions regarding development of the growth policy and subdivision regulations. Thus, the argument that MLUPA **enhances** public participation on those levels is not true—the public has always had such rights at those levels of review.

In sum, Appellants' attempts to counter the district court's determination on these issues is unpersuasive.

### D. The district court correctly rejected the League's "ripeness" argument and found the case ripe for review.

The League argues MAID's claim regarding public participation is premature because the MLUPA has a deferred implementation date and the local governments are in the process of developing their "public participation" plans.

An identical argument was made and rejected in *Mont. Democratic Party v. Jacobsen*, 2024 MT 66, 416 Mont. 44, 545 P.3d 1074. The State argued "until the rulemaking is finished, Appellees will not know whether their groups' activities are prohibited by law or will be harmed by it." *Id.* at ¶ 90. This Court rejected this argument, finding that the statute itself was unconstitutional, and any possible rulemaking would not vary the "plain language of the statue", and that, therefore, this "is not a hypothetical dispute and is ripe for review."[19] *Id.*

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[19] The League relies primarily on *State v. Whalen*, 2013 MT 26, ¶ 7, 368 Mont. 354, 295 P.3d 1055. League Br., pp. 20, 27. *Whalen* is factually inapposite. It involved a constitutional challenge to the Sentence Review Division when the convicted person had not even applied for a sentence review. *Whalen*, ¶¶ 39–42. Therefore, there was no result of an application, and the Court was unwilling to speculate on what that result would be if the convicted person did apply for, and go through, sentence review. *Id.* Here, no speculation is required. The statutes at issue already determine MAID members' right to participate—i.e., the result is determined by the statutes, themselves. Whether they are violative of the constitutional right to participate is not speculative and is ripe for judicial review.

The same logic applies here. Whatever rules local governments may come up with under MLUPA, such rules still must comply with the language of the statute. This language eliminates public hearings on site-specific review of development proposals and it continues the improper "ministerial" approach.

MAID's Amended Complaint presents a facial constitutional challenge and requests a declaratory judgment. Amended Complaint, AJA 90–150, Dkt. 3, p. 2, ¶ 2. This Court has held that a party raising a "bona fide constitutional issue" can seek relief from the courts through a declaratory judgment action. *Stuart v. Dept. of Social & Rehab. Serv.*, 247 Mont. 433, 438–439, 807 P.2d 710, 713 (1991) (quoting *Mitchell v. Town of West Yellowstone*, 235 Mont. 104, 109–110, 765 P.2d 745, 748 (1988)).

The leading ripeness case in the constitutional arena is *Reichert v. State, ex. Rel. McCulloch*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455, which held:

> Such deference and restraint do not apply, however where a challenged measure is **facially defective**. In that event, the courts **have a duty** to exercise jurisdiction and declare the measure invalid.

*Reichert*, ¶ 59 (emphasis added).

*Reichert* was followed by *MEA-MFT v. McCulluch*, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075, which held the pre-election challenge justiciable because it was facially unconstitutional. *Id*, ¶ 18. *See also McDonald v. Jacobsen*, 2022 MT 160, 409

Mont. 405, 415 P.3d 777, which rejected the ripeness challenge, stating a "threatened injury" is sufficient. *Id.* at ¶ 10. *See also Brown v. Gianforte*, 2021 MT 149, ¶¶ 15–19, 404 Mont. 269, 488 P.3d 548.

In *Weems v. State*, 2019 MT 98, 395 Mont. 350, 440 P.3d 4, a facial challenge was ripe because "the very enactment of the statute threatened to deprive plaintiffs of a constitutional right." *Advocates for Sch. Tr. Lands v. State*, 2022 MT 46, ¶ 23, 408 Mont. 39, 505 P.3d 825 (discussing *Weems*).

The district court relied on *Schoof v. Nesbitt*, 2014 MT 6, 373 Mont. 226, 316 P.3d 1021, finding that although *Nesbitt* is a "standing case", it provides a "useful guide with its focus on the importance of the citizens' right to participate in decisions of the government. Summary Judgment, Dkt. 152, pp. 50–52. In *Nesbitt*, this Court held:

> Under the plain language of Article II, Sections 8 and 9, and the implementing statutes, the personal stake that Schoof has here is the reasonable "opportunity" to observe and participate in the Commissioners' decision-making process, including submission of information or opinions. To vindicate these rights Schoof should not be required to demonstrate a personal stake in the "cash in lieu" policy or an "injury" beyond being deprived of adequate notice of the Commissioners' proposed action and the corresponding opportunity to observe and participate as a citizen in the process. Otherwise, the constitutional rights to know and participate could well be rendered superfluous because members of the public would be unable to satisfy traditional standing

requirements to properly enforce them.

*Schoof*, ¶ 19.

Finally, even as amended by SB 121, the challenge to MLUPA continues to be ripe. As noted above, the legislation continues in its obstinate efforts to avoid public participation by labeling the ultimate site-specific revisions "ministerial". No amount of rulemaking will change this. It continues to be facially unconstitutional.

Constitutional justiciability simply requires that the issues be presented in an adversarial context. The controversy must be one in which a court's judgment will effectively and conclusively operate, as distinguished from a dispute involving a purely political, philosophical or academic conclusion. MAID alleges a concrete set of injuries which are subject to remediation through the present lawsuit. Based on the above authorities, this case is ripe for review.

## CROSS-APPEAL

### I. The district court erred in its application of the equal protection clause of the Montana Constitution.

#### A. The district court erred in failing to resolve MAID's equal protection claim that curtailment of public participation, arbitrarily applicable only to certain segments of the population, is unconstitutionally discriminatory.

MLUPA applies only to cities with 5,000 residents in counties of 70,000 residents, while the **existing** Subdivision and Platting Act (§ 76-3-101, *et. seq.*,

MCA) and the **existing** zoning law (§ 76-2-101*, et. seq.*, MCA) continue to apply to all non-MLUPA cities, and to counties. The implications affecting the rights of public participation are profound.

### 1. MLUPA attempts to deprive one segment of the population of a public participation right that Montanans have long held.

As noted above, under the **present** subdivision review law (§ 76-3-605, MCA), the governing body (city or county) must ultimately decide whether to approve or deny the application. Article II, section 8, Mont. Const., of course, guarantees all citizens the right to participate at that level of review. *See Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 57, 356 Mont. 41, 230 P.3d 808 (invalidating, as arbitrary and capricious, a decision of a county commission approving a preliminary subdivision plat)

Subdivision review[20], under the MLUPA, however, purports to be "ministerial"—at least, it is labeled as such. As author Lynch describes it: "[it] becomes a very administrative process," not subject to public participation. Dkt. 137, pp. 6–7. In contrast, public participation is legally required for all subdivision

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[20] The subdivision review process, as opposed to zoning review, is discussed here for the sake of simplicity. The constitutional problems, however, pervade both MLUPA's prohibition of public participation for site-specific in both zoning decisions and subdivision decisions. *See* n.10, *supra*.

proposals in **all counties** and for **certain** cities while public participation is severely curtailed on site-specific review.

Although the 2025 amendments soften the impacts to some extent, the discriminatory result is still the same. Citizens not subject to MLUPA have much greater rights to public participation than do persons subject to MLUPA.

The rights of citizens of certain cities, such as Whitefish, located in Flathead County (which is larger than 70,000), are now drastically curtailed in their opportunities for public participation on site-specific land use reviews. However, just outside the Whitefish city limits, Flathead County residents are given full rights of participation regarding county subdivision proposals. Also, citizens of cities, such as Polson, Hamilton, and Livingston, because they happen to be located in counties of fewer than 70,000, are provided full rights of participation on site-specific projects, while those of similarly-sized cities, such as Whitefish and Laurel, are not.

The discrimination is obvious. Some citizens are granted **full** rights of public participation, while others, arbitrarily, are cut way back on that right. This double standard is violative of equal protection. There is no public policy that justifies this arbitrary discrimination.

Appellants argue, without evidence, that MLUPA's focus on urban areas is

reasonable because that is largely where the main housing affordability problem arises. This argument, even if supported by evidence, trivializes **each** citizen's right to know and participate in governmental affairs. It must not be forgotten that the right of **each** Montanan in participating in the decisions of government is **fundamental** and constitutionally protected. The gross geographical disparities evident in the 2023 Montana zoning amendments cannot be justified by these arguments.

**2. The district court erred in punting on this issue.**

The district court, although acknowledging MAID had raised this issue, did not resolve it. Instead, it faulted MAID for not engaging in a necessary (but illusory) "analysis", stating:

> However, on this issue MAID does not engage in the analysis of the test to determine if an equal protection violation has occurred based upon differences in procedures applicable to city residents and county residents nor city residents subject to different procedures based upon population...

Summary Judgment, Dkt. 152, p. 28. The court then punted on this issue, stating: "The test to determine an equal protection violation is discussed below." Unfortunately, the court did not re-visit this issue.

MAID is puzzled as to what "analysis" it failed (in the mind of the court) to undertake. MAID's argument on this point remains straightforward and clear. The

point is simply: 1) the newly developed land-use laws preclude residents of certain defined cities from participating in site-specific land-use decisions, while the residents of all counties and other similarly-sized cities have full rights of public participation; 2) given the constitutional status of public participation, strict scrutiny is warranted under equal protection; and 3) there is no public policy, much less a compelling one, that justifies such discrimination.

Although the district court Order promised to address this issue "below", it did not. And, if the district court meant that MAID had the burden under a strict scrutiny analysis, it improperly applied the burden to MAID:

> Strict scrutiny applies to an equal protection challenge "when a law affects a suspect class or threatens a fundamental right. Under this standard, the State has the burden of showing the law is narrowly tailored to serve a compelling government interest."

*Planned Parenthood of Mont. v. State*, 2024 MT 228, ¶ 23, 418 Mont. 253, 557 P.3d 440 (quoting *Reesor v. Mont. State Fund*, 2004 MT 370, ¶ 13, 325 Mont. 1, 103 P.3d 1019).

In this connection, it should be made clear that MAID made two **separate** equal protection arguments involving two separate classifications. The first classification, discussed here, is a classification of citizens subject to the MLUPA (in cities of 5,000 located in counties of 70,000), as opposed to citizens of all

counties, and as opposed to the citizens of all Montana cities located in counties of fewer than 70,000 population.

MAID's **separate** equal protection argument is addressed below.

Regardless of what this Court does with respect to the separate argument, this Court should reverse with respect to the geographic discrimination inherent in the 2023 land-use laws.

### B. On MAID's separate equal protection claim, based on private restrictive covenants, the district court erred in determining that there were not two classes similarly situated for purposes of equal protection analysis.

#### 1. Background on MAID's equal protection claim regarding private restrictive covenants.

The cities in Montana, historically, have grown from small settlements in the 1800's, to towns, to, now, densely populated cities. The landmark case, *Euclid v. Ambler Realty,* 272 US 365 (1926), established the constitutionality of municipal zoning. Since then, all Montana cities have adopted "Euclidian" zoning in one form or another. Most important, for present purposes, single-family zoning became pervasive. Residents have come to rely on it, developing settled expectations of the value of their homes and the stability of their neighborhoods.

Over the years, through the process of approval of subdivisions and/or annexation of land subject to homeowners' associations ("HOAs"), certain areas

of cities have become subject to contractual agreements known as "restrictive covenants". Most restrictive covenants set aside all or most of their geographic areas for single-family use. Dkt. 21 (Stratton Dec.), ¶¶ 10–11. Among typical covenants, there are restrictions on lot size, building size, landscape design, sidewalks, fences, driveways, lighting, colors, building materials, and the like.[21]

Thus, substantial areas of Montana's cities are covered by private restrictive covenants, most of which originated with the interstitial approval of subdivisions with homeowners' associations (HOAs). Most single-family restrictive covenants in Montana cities call for single-family use—a use more restrictive than the presently-challenged measures that came out of the 2023 Montana Legislature. Dkt. 21, ¶ 12.[22] In light of the omnipresence of private restrictive covenants, the

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[21] For example, in Bozeman, the "Alder Creek Subdivision" adopted its "first amended declaration of protective covenants for Alder Creek Subdivision" on May 8, 2008. Alder Creek Homeowners Ass'n, *First Amended Declaration of Protective Covenants and Restrictions for Alder Creek Subdivision*, May 8, 2008, https://irp-cdn.multiscreensite.com/5a1d9440/files/uploaded/Alder-Creek-Covents-Current-Version-dated-05-08-081.pdf. This provides for the designation of certain areas in the subdivision as "single-family". Sec. 3, pp. 34-35. Section 13 of those restrictive covenants addresses "Zoning" and provides: "in the event there is a conflict between the Covenants and the applicable zoning, the most restrictive provision of either the Covenants or the zoning shall control." pp. 29–30.

[22] Regarding the historical development of restrictive covenants, the Court in *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 474 (S. Ct. Tenn. 2012) noted that the practice of residential developments, subject to restrictive covenants, has "accelerated" in the United States in recent years. The decision states: "According to the Community Association Institute, more than 63,000,000 Americans live in an estimated 323,600 association-governed communities…." *Id.*

failure of the 2023 Legislature to address restrictive covenants is puzzling. As one academic article puts it, unless restrictive covenants are addressed "…the elimination of exclusionary zoning may have little impact." "*Exclusionary Zoning and Equal Protection"*, 84 Harv. L.R. Rev. 1645, 1971.

The district court correctly held that Montana's 2023 land use laws may not, as a matter of law, alter or displace private restrictive covenants that may be more restrictive than the new zoning laws. Summary Judgment, Dkt. 152, p. 15. As MAID alleges:

> The net result of this geographic happenstance is that the Legislature's "top-down" imposition of zoning requirements forces the core historic areas of Montana cities to absorb an inordinate share of the burden of so-called "densification" in the name of "affordable housing"—an arbitrary imposition that denies the historic core homeowners of their Due Process and Equal Protection rights.

Amended Complaint, AJA 90–150, Dkt. 3, ¶ 31.

Shelter WF spends considerable space with a red herring argument regarding protective covenants. Ignoring MAID's simple request for a declaratory judgment that zoning modifications do not preempt or supersede private restrictive covenants, Shelter WF launches into an extended discussion as to why it is improper in this case to **enforce** a private restrictive covenant. Shelter WF Br., pp. 32–39. This is sheer pettifoggery. MAID is not attempting to enforce restrictive

covenants, it simply requested a declaratory judgment, which the court granted.[23]

Even if the district court had not resolved this issue, the matter is clear as a matter of law.

In *Western Land Co. v. Truskolaski*, 495 P.2d 624 (Nv. 1972) the Court stated:

> A zoning ordinance cannot override privately-placed restrictions, and a trial court cannot be compelled to invalidate restrictive covenants merely because of a zoning change.

*Id.* at 627. In *Seaton v. Clifford*, 24 Cal. App. 3d. 46 (1972), the Court said:

> In an unbroken line of cases, California courts have held that a change in the zoning restrictions in an area does not impair the enforceability of existing deed restrictions. *See Wilkman v. Banks*, 124 Cal. App. 2d. 451, 1269 P.2d; *Mullally v. Ojai Hotel Co.*, 266 Cal. App. 2d. 9 [Cal. Rptr. 882 (1968)]).

*Id*. at 52; *see also Rice v. Heggy*, 158 Cal. App. 2d 89, 322 P.2d 53 (1958); *Kalenka v. Taylor*, 896 P.2d 222, 227 (Ak. 1995) ("zoning ordinances cannot relieve private

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[23] Shelter WF suggests that MAID member Poritz is the only MAID member living in an area protected by restrictive covenants. Even if it were true (it is not, both MAID members Barrett and James also do). Summary Judgment, Dkt. 152, pp. 11–12. It makes no difference because this Court has repeatedly held that an organization has standing to represent its members, even if only one member incurs harm. *See Heffernan*, 2011 MT 91, ¶ 43, "it is well established that an association has standing to bring suit on behalf of its members, even without a showing of injury to the association itself, when [a]t least one of its members would have standing to sue in his or her own right…."

property from valid restrictive covenants even though the ordinances are less stringent"); *McDonald v. Emporia-Lyon County Joint Bd. of Zoning Appeals*, 697 P.2d 69, Kan. Ct. App. 1985 ("it is well established that zoning ordinances cannot relieve private property from valid restrictive covenants if the ordinances are less stringent"); *Ridge Park Homeowners v. Pena*, 88 N.M. 563, 571, 544 P.2d 278 (1975); *Murphey v. Gray*, 327 P.2d 751, 754 (Az. 1958) ("…it has repeatedly been held that zoning cannot constitutionally relieve land of restrictive covenants affecting its use [citations omitted]"); *Haskell v. Gunson*, 137 A.2d 223, 225, Pa. 1950 ("zoning regulations and private restrictions do not affect each other…").

As stated in *Rathkopf*, the Law of Zoning and Planning, at Sec. 82:3, "…courts hold that private covenants have nothing to do with the administration of zoning ordinances, and that a municipality has no authority through zoning to abrogate or affect private covenants."

**2. The application of the challenged laws to traditional neighborhoods, to the exclusion of those protected by private restrictive covenants, results in a denial of equal protection of the laws.**

The first step in equal protection analysis is to decide whether there are, in fact, two separate classes which are treated differently. *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, 104 P.3d 445 ("When analyzing an equal protection challenge, we must first identify the classes involved and determine

whether they are similarly situated.").

The challenged measures result in the creation of two classes of municipal residents who, although otherwise are similarly situated, face markedly different consequences. Those who are fortunate enough to live in areas protected by restrictive covenants are insulated from the state's densification laws. Others who do not live in these restrictive covenant areas, but who in many cases reside just across the street from those so protected, will suffer inordinately the full burden of these legislative measures.

In *Snetsinger*, this Court found that the University System's denial of health benefits to unmarried same-sex couples, while granting the benefits to unmarried opposite-sex couples resulted in a denial of equal protection. *Id.* at ¶ 27.

Despite the *Snetsinger* holding, and the holdings in numerous other Montana cases, the district court rejected MAID's equal protection argument based on the differentiated treatment of those protected by private covenants and those not. AJA 7–61, Dkt. 152. The court found MAID did not meet the first step of equal protection review—the establishment of two classes similarly situated. The court held:

> In this case, the classes are not similarly situated. They are not alike in all respects. One group is governed by restrictive covenants concerning single-family residences. The other group is governed by zoning ordinances.

> MLUPA did not create that difference. It existed before the enactment of MLUPA.

*Id.*, Summary Judgment, Dkt. 152, p. 35.

In short, the court refused to find an equal protection violation based on the argument that the classes were not "created" by the legislation but existed before that. *Id.* This is intellectually unsatisfying. This could be said about any number of equal protection cases in which the courts routinely find a classification suitable for equal protection review. Under this questionable logic, a statute which arbitrarily distinguishes between genders can never be considered a violation of equal protection because the statute did not "create the distinction between male and female—that distinction "existed" before the enactment of [such statute]."

Rotunda, Nowak and Young, in their *Treatise on Constitutional Law*: Substance and Procedure, West Publishing Co. 1986, set forth a helpful example:

> For example, it is undeniably true that men and women are biologically different. However, that difference does not mean that gender-based classifications will be generally upheld, for most often there is no difference between men and women when it comes to the promotion of a legitimate governmental end. Thus, sex cannot be the basis for determining whether an individual is able to be executor of an estate or mature enough to drink alcoholic beverages.

*Id.* at Section 18.2 at pp. 318–319.

The Rotunda *Treatise* cites two seminal cases, *Reed v. Reed*, 404 US 71 (1971), and *Craig v. Boren*, 429 US 190 (1977). *Reed* dealt with a mandatory

provision of the Idaho probate code that gave preference to men over women (otherwise of the same entitlement class). The Court, applying the rational basis review standard, found the classification unconstitutional stating, "by providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause." *Id.* at 77. The Court held:

> In applying [the Equal Protection] Clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways…(citations omitted.) **The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute in to different classes on the basis of criteria wholly unrelated to the objective of that statute.** A classification, "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Citing *Reed v. Reed,* 404 US 71, 76 (1971) (emphasis added) (quoting *Royster Guano Co. v. Virginia*, 53 US 412, 415 (1920)).[24]

This case shows the fallacy in the district court's rejection of MAID's claim based on two classes similarly situated (those residents in cities in single-family

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[24] The *Reed* court rejected the state's defense of the statute based on reduction of workload on the probate court, finding, on rational basis review, "to give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause…." *Id.* at 76.

areas protected by restrictive covenants and those without protective covenants). Even though the statute did not "create" the difference between men and women, the court found a violation of equal protection in the *Reed* case, holding that the state lacks the power "…to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Id.*, 76–77.

The same is true of *Craig v. Boren*, which followed *Reed* in invalidating an Oklahoma statute that allowed sale of 3.2% beer to females over the age of eighteen, but prohibited the sale to males under the age of twenty-one.[25]

The Rotunda *Treatise* stresses that the classification must be assessed in relation to a legitimate governmental purpose. As the *Treatise* states:

> Usually one must look to the end or purpose of the legislation in order to determine whether persons are similarly situated in terms of that governmental system. The judiciary…must decide what is the end of the legislation to be tested. Once a court has found an end of government which does not in itself violate the Constitution, it can analyze the way in which the government has classified persons in terms of that end.

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[25] *See also Frontiero v. Richardson*, 411 US 677 (1973) (plurality opinion invalidating statutes that provide, solely for administrative convenience, the spouses of male members of the uniformed services are dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, but the spouses of female members are not dependents, unless they are, in fact, dependent for over one-half of their support).

*Id*. at 319.

The (legitimate) governmental end of the challenged land use laws challenged by MAID is addressing the affordability of housing. However, whether a person resides in a home protected by restrictive covenants, or not, is wholly unrelated to that end.

The equal protection cases of this Court are consistent with this paradigm discussed in *Rotunda.* This Court has held, to assess whether two classes are similarly situated, it is necessary to isolate the factor that plaintiff alleges is subject to impermissible discrimination:

> To identify similarly situated classes, we "isolate the factor allegedly subject to impermissible discrimination. Thus two groups are similarly situated if they are equivalent in all relevant respects **other than the factor constituting the alleged discrimination."** *Goble*, ¶ 29…

*Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 16, 392 Mont. 1, 420 P.3d 528 (emphasis added); *see also Snetsinger*, *supra*, ¶ 16; *Planned Parenthood*, *supra* (finding similarly situated classes between pregnant minors who choose an abortion and those who don't).

Here, the distinguishing factor is that those covered by private restrictive covenants will not be impacted by the 2023 Montana zoning changes, while others similarly situated in historic residential areas will absorb the entire burden. Neither

class, however, is different with respect to the goal of more affordable housing in Montana.

In this connection, two Montana cases are helpful, *Oberson v. USDA*, 2007 MT 293, 339 Mont. 519, 171 P.3d 715, and *Brewer v. Ski-Lift, Inc.*, 234 Mont. 109, 762 P.2d 226 (1988). In *Brewer*, this Court held that all inherently dangerous sports, including skiing were similarly situated with respect to the skier responsibility statute's purpose of immunizing area operators from liability for the inherent risk of the sport. 234 Mont. at 112, 762 P.2d at 230. This Court concluded that "the skier responsibility statute classif[ied] skiers and treat[ed] them differently than those who engage in other sports activities which are inherently dangerous." 234 Mont. at 112, 762 P.2d at 228. In *Oberson*, this Court dealt with statutes that shielded the snowmobile industry from liability except for acts of gross negligence. This Court found the statute violated the Montana Equal Protection clause, observing: "the snowmobile liability statute does classify snowmobile area operators and snowmobilers and treats them differently from other similarly situated groups…":

> These other similarly situated groups, including "ski area operators"…"persons responsible for equines"…"outfitters, guides, and professional guides"…operate pursuant to a general negligence standard. We fail to see how either the unique economics of the snowmobile industry or the addition of a motor

> distinguishes the snowmobilers from other inherently dangerous sports with respect to the snowmobile liability statute's purpose.

*Id.*, ¶ 20.

It is only when one looks at the ultimate purpose of the legislation, to generate more affordable housing, that a discriminatory classification emerges. Those in traditional neighborhoods now are forced to assume the burden of affordability, while those in covenant protected areas are not.

Several of the Appellants argued below that residents are free to leave HOAs covered by protective covenants and that residents in traditional neighborhoods could simply "band together" and develop restrictive covenants. This view is unrealistic and unhelpful to the present analysis. It ignores the practical difficulty of creating a set of private covenants which would be universally applied to all residents of a diverse neighborhood. This argument ignores the well-documented history of how private covenants came to be on the outskirts of cities, but not in the traditional historic neighborhoods. If the covenants are not put in place in the beginning by the developer, it becomes impossible later to corral all neighbors.

LeeAnne Fennell, in her article "*Contracting Communities*", 2004 U. Ill. L. Rev. 820, 838, describes the "typical process through which homeowners in a private community become bound by servitudes on the land":

> In the usual case, **a developer** drafts and records a master deed, also known as a declaration, which contains a set of CC&Rs. These vary in content from development to development, but often include deed restrictions that limit the uses to which the property may be put…**because the content of the declaration is determined before any lots in the development have been sold, homeowners purchase their homes with the community-wide deed restrictions already attached.** These are servitudes that run with the land, and thus they are binding not only on the original set of homebuyers, but also on their successors.

*Id*. at 838 (emphasis added). The *Hughes* opinion, *see* n.22 *supra*, notes that "many such communities are created by a single developer who, before selling any individual units in the community, drafts and records a master deed or declaration of covenants and restrictions intended to bind each purchaser in the community." *Hughes*, 387 S.W.3d at 475 (citing Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. Rev. 273, 277 (1997)). On the other hand, the "traditional" neighborhoods, as the author describes them, were extant prior to the popular development of restrictive covenants.

In sum, the pattern that has emerged—private restrictive covenants in the suburbs, none in the traditional areas—is largely now an entrenched phenomenon resulting from historical development. The glib statement that single-family residents are completely free to choose whether to live in a covenant-protected area or not, is much like arguing in the *Snetsinger* case that University employees with

gay partners who did not qualify as beneficiaries under the University Systems' medical insurance policies could simply choose not to be gay, or could choose to leave their employment and seek employment elsewhere with better insurance coverage. Equal protection of the laws does not require that Hobson's choice.

The discrimination inherent in the application of Montana's new zoning laws is not an isolated problem. It is **systemic**. There is a broad bright-line classification of persons that results from Montana's 2023 amendments. Those living in traditional neighborhoods suffer all of the burdens of receiving added densification in the name of affordability in housing, while those otherwise similarly situated suffer none of them.

In sum, the new laws result in different treatment of classes which are otherwise similarly situated.

### a. Heightened scrutiny applies.

The strict scrutiny standard of review must be applied because fundamental property rights are involved.[26]

With respect to the present challenges to Montana's 2023 zoning laws, strict scrutiny is required because fundamental rights, including the rights of public

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[26] *See* James H. Goetz, *Interpretations of the Montana Constitution, Sometimes Socratic, Sometimes Erratic,* 51 MONT. L. REV. 355 (1990).

participation and the rights to own and protect property are fundamental. The US Supreme Court said in its seminal constitutional case regarding private restrictive covenants (*Shelley v. Kraemer,* 334 US 1 (1948)):

> It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are **the rights to acquire, enjoy, own and dispose of property**. **Equality in the enjoyment of property rights** was regarded by the Framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.

*Id.* (emphasis added). Montana's Constitution in Article II, Section 3, under the category of "inalienable rights" provides that all persons have the rights "to a **clean and healthful environment" and of acquiring, possessing and protecting property**, and seeking their **safety, health and happiness**…. (emphasis added). *See also Montana Envt'l. Info. Ctr. v. Department of Envt'l. Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236 (noting the claim at issue "is a fundamental right because it is guaranteed by the Declaration of Rights...").

The US Supreme Court has also, on several occasions, held that "the right to 'establish a home' is an essential part of the liberty guaranteed by the Fourteenth Amendment." *Belle Terre v. Boraas,* 416 US 1, 15 (1974) (citing *Meyer v. Nebraska*, 262 US 390, 399 (1923)).

Further support for a heightened level of scrutiny is found in the "settled

expectations doctrine". In the zoning context, many homeowners have long relied on the zoning codes that affect their neighborhoods. In *Robinson Twp. v. Commonwealth,* 623 Pa. 564, 83 A.3d 901 (2013), the Pennsylvania Supreme Court determined that legislative amendments to Pennsylvania's oil and gas laws, which drastically displaced local zoning laws, were unconstitutional. The Court found that there was a serious "degradation" of the local values encompassed in locally-enacted zoning laws through this state-imposed law, and said:

> [T]he General Assembly has effectively disposed of the regulatory structures **upon which citizens and communities made significant financial and quality of life decisions**, and has sanctioned a direct and harmful degradation of the environmental quality of these communities and zoning districts. In constitutional terms, the Act degrades the corpus of the trust. Cf. *HHAP,* 77 A.3d at 604 & n. 20 (passing upon due process challenge, describes effect of challenged retrospective-legislation on **appellees' settled rights**; cites US Supreme Court as "warning that settled expectations should not be lightly disrupted, and highlighting the importance of scrutinizing retrospective laws with particular caution because of the Legislature's unmatched powers to sweep away **settled expectations** suddenly and without individualized consideration").

623 Pa. at 692, 693, 83 A.2d at 980 (emphasis added).

In short, strict judicial scrutiny applies.

**b. Even under a lesser standard, Montana's zoning laws do not survive equal protection.**

If the court is not persuaded that strict scrutiny is called for, the challenged

2023 measures do not pass constitutional muster even under a less rigorous standard of scrutiny because the 2023 laws are arbitrary and capricious in relation to the professed governmental objective of facilitating affordable housing.

The key to applying equal protection law, particularly with respect to less-than-strict scrutiny is to assess whether a classification is rationally related and carefully tailored to "a legitimate governmental purpose".

In 1985, the Montana Legislature enacted provisions which eliminated general assistance payments to able-bodied individuals under the age of thirty-five who had no minor dependent children. The Butte Community Union challenged those provisions, arguing that they denied individuals affected by the statute the equal protection of the laws. *Butte Community Union v. Lewis (Butte Community Union I)*, 219 Mont. 426, 428, 712 P.2d 1309, 1310. The Union also argued that the provisions contravened article XII, section 3(3) of the Montana Constitution, the public assistance clause, which then provided: "the legislature shall provide such economic assistance and social and rehabilitative services that may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune, may have the need for the aid of society." *Id.* at 429, 712 P.2d at 1311.[27]

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[27] This constitutional provision (art. XII, sec. 3(3)) was amended in 1988 by citizen constitutional

This Court reversed the district court's determination that strict scrutiny is required because there is no fundamental right to welfare. This Court said, "in order to be fundamental, a right must be found within Montana's Declaration of Rights, or be a right 'without which other constitutionally guaranteed rights would have little meaning'. Welfare is neither." *Id.* at 430, 712 P.2d at 1311. Nevertheless, this Court, expressing dissatisfaction with the rigid two-tier equal protection standard traditionally applied by the United States Supreme Court, adopted what it called a "middle-tier" approach, determining that, although the right to public assistance is not contained in the declaration of rights, it nevertheless directs the legislature to "provide necessary assistance to the misfortunate." This Court found "a benefit lodged in our State Constitution is an interest whose abridgment requires something more than a rational relationship to a governmental objective." *Id.* at 434, 712 P.2d at 1313.

Recently, this Court in *Mont. Democratic Party v. Jacobsen,* 24 MT 66, 416 Mont. 44, 545 P.3d 1074, invalidated several legislative measures enacted during the 2021 Montana Legislative Session which appeared to be aimed at suppressing

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initiative. The measure now provides that the legislature "may" (as opposed to "shall") "provide…economic assistance…"

Native American and youth voters. This Court held that the right to vote is fundamental and that any law that interferes with the fundamental right to vote is subject to strict scrutiny analysis. *Id.* at ¶ 34. This Court's analysis, however, was more nuanced with respect to levels of review, stating: "This Court has yet to determine the level of scrutiny to apply when a law does not impermissibly interfere with the fundamental right to vote but minimally burdens it." *Id.* at ¶ 38. On that, this Court held that "middle-tier analysis is appropriate," concluding,

> Thus, when analyzing laws under the Right to Vote, we first determine whether the challenger has shown that a statute impermissibly interferes with the right to vote. If it does, we apply strict scrutiny, where the State must show that the statute is the least onerous path to a compelling state interest. If the statute minimally burdens the right to vote, we apply middle-tier analysis, where the State must show that the statute is (1) reasonable, and (2) that its asserted interest is more important than the burden on the right to vote.

*Id*. at ¶ 46.

In addition to the mid-tier scrutiny applied in *Butte Community,* Montana's most deferential review standard on equal protection issues is similar to the federal "rational basis" test. Montana's application of the rational basis test, however, is generally less deferential. Montana's equal protection laws were long ago summarized in "Goetz, *Interpretations of the Montana Constitution… ", supra.*

In addition to applying mid-tier scrutiny, this Court has used the "rational

relationship test" numerous times to invalidate arbitrary legislation. One good example is the *Jackshaw v. Butte-Silver Bow County*, 2009 MT 263, 352 Mont. 46, 214 P.3d 1248. There, a potential firefighter had applied for a position in Silverbow County but when the position became open, the firefighter was 35 years old, which was one year older than the age limit in § 7-33-4107, MCA. Considering Jacksaw's equal protection challenge, this Court expressly declined "to apply strict scrutiny or middle-tier scrutiny…". *Id.*, ¶ 19. This Court said: "we will apply rational basis review to Jacksaw's equal protection claim." *Id.*, ¶ 20. This Court noted that the State has a strong interest in protecting the safety of firefighters and the public. Nevertheless, this Court struck the age classification as "wholly arbitrary", stating:

> As we stated in *Timm v. Dept. of Pub. Health & Human Ser.*, 2008 MT 126… '[a] classification that is patently arbitrary and bears no rational relationship to a legitimate governmental interest offends equal protection of the laws….'

*Id.*, ¶ 24. Numerous cases[28] have followed this *Jackshaw* approach, finding that

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[28] *See Snetsinger,* 2004 MT 390, ¶ 27; *Reesor v. Mont. State Fund*, 2004 MT 370, ¶ 25, 325 Mont. 1, 103 P.3d 1019; *Davis v. Union Pac. R.R.*, 282 Mont. 233, 242, 937 P.2d 27, 32 (1997); *McKamey v. State*, 268 Mont. 137, 885 P.2d 515 (1994) (holding requirement that firefighters be members of the military violated equal protection); *Arneson v. State*, 262 Mont. 269, 864 P.2d 1245 (1993) (holding that statute regarding post-retirement increases in pension violated equal protection); *Brewer v. Skilift, Inc.*, 234 Mont. 109, 762 P.2d 226 (1988) (holding that portions of the "skier's responsibility" statutes violated equal protection); *Timm v. Mont. Dep't. of Pub. HS.,* 2008 MT 126, ¶ 40, 343 Mont. 11, 184 P.3d 994.

legislation must be tested in connection with an assertion of a "legitimate governmental interest." *See Cottrill v. Cottrill Sodding Serv.,* 229 Mont. 40, 744 P.2d 895 (1987).

In the federal arena, the lead case in the zoning area is *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). This is a rare federal case which invalidated a government regulation despite the court's finding that strict scrutiny is not warranted. In that case, Cleburne Living Center applied for a special use permit to establish a group home for the mentally impaired. The US Supreme Court applied the federal rational basis test and found the classification to be in violation of equal protection:

> To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related **to a** legitimate governmental purpose.
>
> ***
>
> The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.

473 U.S. at 446, 105 S.Ct. 3258, 87 L.Ed.2d at 324. *See also Willowbrook v. Olech,* 528 US 562 (2000). It is well to remind this Court that "**Montana's Constitution affords significantly broader protections than the federal Constitution.**" *Planned Parenthood*, ¶ 21 (emphasis added).

In sum, because the challenged measures are not rationally related to, or

carefully tailored to, a legitimate governmental interest, they violate the equal protection clause of the Montana Constitution.

Appellants argued below that all zoning decisions compromise individual property rights and value and that there is no fundamental right to a particular classification. MAID's complaint, however, does not present a minor dispute regarding a particular zoning decision. In this case, the result of the 2023 Montana laws is that there is a **systemic** pattern of discrimination imposed. Although an individual plaintiff may not have a right to a particular zoning designation, they certainly have come to rely overall, on the quality and stability of their neighborhoods, as protected by zoning ordinances.

The point need not be labored. Applying even a lower standard of review, Montana's 2023 zoning amendments do not pass constitutional muster. The classifications are not carefully tailored to the purported purpose of the new legislation—to foster affordability of housing.

For these reasons, Montana's new zoning laws violate Montana's equal protection clause.

## CONCLUSION

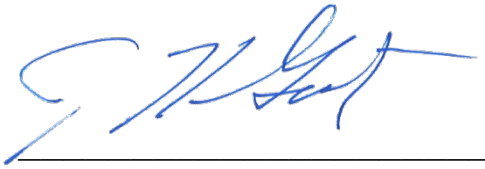
For the foregoing reasons, the Court should affirm the district court decision that MLUPA, on its face, unconstitutionally denies to MAID's members their

rights to public participation and open government; enter a judgment that, even with the 2025 amendments to MLUPA, the law remains constitutionally deficient; and, the Court should reverse the district court on both equal protection arguments.

DATED this 6th day of June, 2025.

**GOETZ, GEDDES & GARDNER, P.C.**

Attorneys for Appellee/Cross-Appellant



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Henry J.K. Tesar

## CERTIFICATE OF COMPLIANCE

Pursuant to M. R. App. P. 11, and this Court's Order granting an overlength brief, the undersigned certifies that this brief is set in a proportionally spaced font and contains fewer than 15,000 words (14,950).

James H. Goetz
Henry J.K. Tesar

# APPENDIX

| Appendix | Document Title |
|---|---|
| **1** | Development Review Timelines and Processes, City of Bozeman, Dkt. 114 |
| **2** | *North Fork Preservation Association, et. al. v. Board of Oil & Gas*, *et al.*, Decisio*n*, August 18, 1989 |
| **3** | Demonstrative Exhibit: Public Participation and Subdivision Applications |

## CERTIFICATE OF SERVICE

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