

IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 24-0039

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC,

Plaintiff and Appellee,

v.

STATE OF MONTANA,

Defendant and Appellant.

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

BRIEF OF *AMICUS CURIAE* BETTER BOZEMAN COALITION

APPEARANCES

Brian F. Close
taxatty123@gmail.com

Attorney for *Amicus Curiae*
Better Bozeman Coalition

Additional Counsel Information:

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

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

Attorneys for Plaintiff and Appellee

Austin Knudsen
Montana Attorney General
Michael Russell
Thane Johnson
Alwyn Lansing
Michael Noonan
Assistant Attorneys General
MONT. DEPARTMENT OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
Ph: 406-444-2026
Email: michael.russell@mt.gov
thane.johnson@mt.gov
alwyn.lansing@mt.gov
michael.noonan@mt.gov

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Ph: 406-384-7990
Email: emily@joneslawmt.com

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae, Better Bozeman Coalition (“BBC”), is a group of concerned citizens and residents of Bozeman who have organized to address the impact of growth on existing and future neighborhoods. BBC’s mission is to preserve the unique character of Bozeman’s neighborhoods while working with the city on historic preservation, housing affordability, availability, and natural resource sustainability.

STATEMENT OF THE CASE

Nobody denies that Montana is facing an affordable housing crisis. “The median price for a single-family home in the greater Bozeman area is currently \$979,500. Seattle’s median is \$52,000 less.” Cassidy Powers, *Bozeman home prices reaching an all-time high, raising the cost across Gallatin County and the region*, KBZK Bozeman (Mar. 6, 2024), <https://www.kbzk.com/news/local-news/bozeman-home-prices-reaching-an-all-time-high-raising-the-cost-across-gallatin-county-and-the-region>.

Densification through upzoning, however, is not a viable solution. “A recent article posted by Bozeman Real Estate Group says one of the main reasons Bozeman houses are so expensive is out-of-state money. People moving to Bozeman from places where real estate is more expensive can easily compete in our market, outbidding local buyers and paying all cash for homes. According to

Montana Title and Escrow, approximately 45% of Montana Title closings in 2021 were cash deals—a threat to locals who wish to stay but simply cannot afford to.”

Id.

BBC believes that the challenges of growth can be met without destroying the things that make Bozeman unique. To do so, however, requires local participation by local residents to affect policies adopted by local government that can affect existing neighborhoods and allow for rational development of future areas of the city. The current legislation adopted by the legislature that is at issue in this case affects the rights of BBC and its members to participate meaningfully in planning the future of their city and affects their lives and quality of life.

STANDARD OF REVIEW

The Montana Supreme Court reviews summary judgment rulings de novo. *Davis v. Westphal*, 2017 MT 276, ¶ 9, 389 Mont. 251, 405 P.3d 73.

SUMMARY OF THE ARGUMENT

The statutes at issue were allegedly enacted under the premise that a denser and more abundant supply of housing in Montana would lead to more affordable housing for Montanans—foisting this responsibility on Montana’s largest cities, counties, and their historic, core neighborhoods previously zoned “single-family” and not subject to restrictive covenants. This “free market” approach to affordable housing is mistaken and the legislation does not allow Montana’s cities and

counties to decide how to grow rationally—i.e., by taking into account local issues such as historic preservation and the availability of natural resources. For Bozeman, it means funneling high-price development into Bozeman’s historic, core neighborhoods without the promised payoff of affordable housing for Bozemanites.

ARGUMENT

To avoid a violation of equal protection, the State must—at the very least—“show that the objective of” the law at issue “is legitimate and rationally related to the classification used by the Legislature.” *Jaksha v. Butte-Silver Bow Cty.*, 2009 MT 263, ¶ 21, 352 Mont. 46, 53, 214 P.3d 1248, 1254. “When analyzing equal protection claims under the rational basis test, this Court has struck down laws creating arbitrary classifications without a legitimate state interest as unconstitutional.” *Davis v. Union Pac. R.R.*, 282 Mont. 233, 243, 937 P.2d 27, 32 (1997) (collecting cases).

“Equal protection of the laws means subjection to equal laws applying alike to all in the same situation. While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which such classification is imposed; such classification cannot be arbitrarily made without any substantial

basis. Arbitrary selection cannot be justified by calling it classification.” *Mont. Land Title Ass’n v. First Am. Title*, 167 Mont. 471, 475-76, 539 P.2d 711, 713 (1975) (collecting cases).

Here, the laws at issue violate equal protection because limiting densification measures to Montana’s largest cities and their historic, core neighborhoods—as opposed to requiring densification everywhere—is not even rationally related to the legitimate goal of attaining more affordable housing for Montanans. Densification does not create affordable housing and, accordingly, the classifications are completely arbitrary.

I. Densification, in general, does not lead to affordable housing.

“Formed in 2022, the [Governor’s Housing] Task Force was charged with developing short- and long-term recommendations and strategies to increase the supply of affordable, attainable workforce housing.” *Shelter WF Br.*, p. 14.

In the district court, *Shelter WF* argued that there is an “overwhelming body of research” that “shows that increasing the supply of housing reduces housing costs, and that exclusionary zoning and regulatory barriers limit new housing construction.” Dkt. 120, p. 7. *Shelter WF* claimed that more market-rate housing leads to more affordable housing through the “filtering” process, where “people move into the new development” and “free up other housing units, usually in the same region.” *Id.*, p. 8. According to *Shelter WF*, “the people moving into the new

housing are freeing up less desirable, less expensive housing” and the “construction of market-rate buildings [is] associated with a 5% to 7% decrease in rents located with[in] 250 meters of new developments.” *Id.*

Respectfully, Shelter WF is incorrect—especially in a city like Bozeman where there is little to no affordable housing on the market. As has been shown in California and elsewhere, this “trickle-down” housing policy fails to deliver the affordable housing communities like Bozeman desperately need:

For years, politicians, the real estate industry, and controversial YIMBY groups (Yes In My Back Yard, a clever twist on NIMBY or Not In My Back Yard) have aggressively pushed the idea that the housing affordability crisis is merely a supply-and-demand issue. That we just need to flood the rental housing market with more market-rate, luxury apartments and eventually rents will drop. In the end, they say, it’s a winner for everyone — from the working class to the middle class to the affluent.

The real estate industry, politicians, and YIMBYs make that case so they can push through their ultimate agenda: to deregulate land-use zoning ordinances so they can build whatever they [want], wherever they want, and as much market-rate housing as they want.

In fact, Zillow, the real estate site, found that developers build almost exclusively market-rate, luxury housing. But to truly address the housing affordability crisis, Zillow Chief Economist Dr. Svenja Gudell warned that “apartment construction at the low end needs to start ramping up, and soon, in order to see real improvements.”

The real estate industry, politicians, and YIMBYs

also use their trickle-down policy as a political weapon: any renter protections, they say, that prevent developers from building more market-rate apartments must be stopped in its tracks.

But just like trickle-down economics, trickle-down housing is seriously flawed and self-serving: similar to how tax cuts made the rich richer, corporate landlords and major developers will generate billions in revenue by charging sky-high rents for market-rate apartments, making massive profits off the backs of the middle and working class.

Trickle-down housing policy also benefits politicians: developers and landlords shell out millions in campaign cash, so politicians want to keep them happy and rake in major money to stay in or attain power. As for YIMBYs, trickle-down housing is a core principle of their controversial belief system — and they're determined to prove themselves right, no matter who gets hurt.

Patrick Range McDonald, *Trickle-Down Housing is a Failure. Here's What you Need to Know*, HOUSING IS A HUMAN RIGHT (May 25, 2021),

<https://www.housingisahumanright.org/trickle-down-housing-is-a-failure-heres-what-you-need-to-know/>.

The idea behind upzoning/trickle-down housing may, in a vacuum, seem sound. But, “[t]he notion that increasing housing supply will magically fix our problems is one of those things that is simply too good to be true. Zoning liberalization is at best one part of the answer.” Richard Florida, *Does Upzoning Boost the Housing Supply and Lower Prices? Maybe Not*, BLOOMBERG (January

31, 2019), <https://www.bloomberg.com/news/articles/2019-01-31/zoning-reform-isn-t-a-silver-bullet-for-u-s-housing>.

“[S]imply liberalizing zoning for taller buildings and denser development will not address the critical need to provide affordable housing for less advantaged people.” *Id.* To have a chance at accomplishing the goal, there is a “need for other programs, like more affordable units and rent control, which should potentially come with upzoning. Upzoning isn’t a sufficient affordability program in itself.” *Id.* (quoting Yona Freemark, a then-doctoral student in urban planning at MIT who analyzed the effects of upzoning in Chicago neighborhoods in a study published by the journal *Urban Affairs Review*). Easing restrictive zoning and building codes does “little to address housing affordability and might actually serve to increase housing prices in the neighborhoods in question, for the simple reason that developers would use the land not for affordable units but for luxury construction.” *Id.*

Kelly Lynch, the author of MLUPA and League President, recently testified at the House Local Government Committee hearing on SB 243—a bill to amend zoning regulations to allow for taller buildings, proposed by Senator Ellie Boldman who was a member of the Governor’s Housing Task Force. According to Senator Boldman, the bill was needed to create more affordable housing and rentals. Montana House Local Government Committee Hearing (March 20, 2025) at

16:01:25–16:02:00, <https://sg001->

[harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20250320/-1/54816#agenda_](https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20250320/-1/54816#agenda_).

When questioned about whether SB 243 would increase affordability, Ms. Lynch—who opposed that bill—tellingly testified to what research actually shows: that “unless you tie **these types of reforms** to some affordability requirement, they are not ending up with affordable housing. The rents are getting a little bit better in these areas with more units but those are in areas like Minneapolis. That’s not a good analogy to what’s happening in Montana, and particularly in Bozeman. One of the things that I will say is that the San Francisco study showed that if you just relied on trickle-down housing, you would start to see affordability increase in about fifty years.” *Id.* at 16:26:15–16:27:03 (emphasis added).

The 2021 Montana legislature, however, enacted legislation to abrogate direct affordable housing measures: “City zoning laws that require builders to include some affordable homes in developments are now banned in Montana, under a bill signed . . . by Gov. Greg Gianforte.” Mike Dennison, *Gov signs law killing affordable-housing program in Bozeman, Whitefish*, KTHV (last updated Apr. 20, 2021), <https://www.ktvh.com/news/montana-politics/gianforte-signs-bill-offing-affordable-housing-program-in-bozeman-whitefish>.

City managers from both Whitefish and Bozeman touted their cities’

inclusionary zoning as one of the best ways to create affordable housing. *Id.*

Apparently, the legislature crumbled to developers who blamed market forces—like the skyrocketing price of lumber—for the housing crisis and stated they **could not** offer affordable homes and apartments. *See id.*

After stripping away the only tool that **guaranteed** affordable—as opposed to market-rate—housing, the 2023 Montana legislature purportedly relied on the premise that “these types of reforms”—removing zoning protections and land use rules—would allow developers to essentially build anything, anywhere in cities like Bozeman in **hopes** that these additional units would make housing affordable by simply increasing supply. This “free-market” ideal may seem simple enough but is directly contradicted by evidence that increased housing density and up-zoning alone do not often produce more affordable housing, as Ms. Lynch recently testified. Upzoning and higher-density housing can actually increase land costs and values, thus decreasing affordability.

For instance, the efforts to upzone land for more density in Vancouver, Canada actually drove up land values and costs, thus making housing more expensive. The expectation in Vancouver “was that adding new rental supply would lead to increased competition between landlords and thus lower rents.” Patrick Condon, *When Will Rents Come Down?*, THE TYEE (Feb. 2, 2023), <https://thetyee.ca/Analysis/2023/02/02/When-Will-Rents-Come-Down/>.

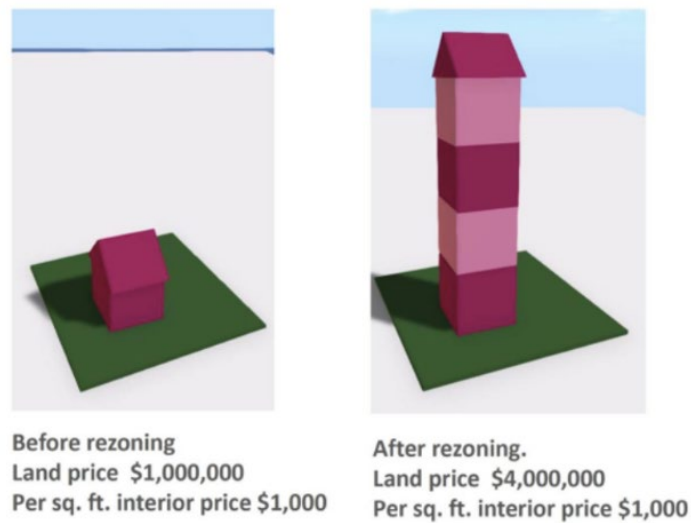
A report from the Canada Mortgage and Housing Corporation found that this “free market” approach did not work. *Id.* Specifically, the report found that “average rents for new two-bedroom units (\$2,823) were nearly identical to the asking rent (\$2,865) for vacant two-bedroom units of all ages.” *Id.* And, “new two-bedroom units, newly abundant in relative terms, are unaffordable to average renters—median household income of renter households is around \$50,000, meaning rents above \$1,300 per month are unaffordable.” *Id.*

For Patrick Condon—with over thirty years of experience in sustainable urban design as a city planner, teacher, and researcher—the problem lies not in zoning restrictions or land use regulations but rather in escalating the cost of land further driven higher by upzoning and infill density pursuits.

“If you simply increase allowable density **without requiring affordability**, here is what happens: Imagine a 4,000 square foot parcel with an allowable floor/surface ratio of 1 (FSR 1) selling for \$2 million prior to rezoning. After allowable density is doubled (FSR 2), the potential redevelopment value increases in kind, forcing a near doubling in the value of land. . . . [T]he evidence shows that increases in allowable density (particularly in job-rich coastal cities where rent levels are inflating rapidly) merely increase land price, i.e., increase the level of Rent, with the only benefit going to land speculators.” Patrick M. Condon, *SICK CITY DISEASE, RACE, INEQUALITY AND URBAN LAND* pp. 117–118 (2021)

(emphasis added).¹

The following illustration is based on the same concept:



Vancouver's Smartest Planner, Prof. Patrick Condon, Says Upzoning is a Costly Mistake, LIVABLE CALIFORNIA (Feb. 6, 2021),

<https://www.livablecalifornia.org/vancouver-smartest-planner-prof-patrick-condon-calls-california-upzoning-a-costly-mistake-2-6-21/#:~:text=Vancouver%E2%80%99s%20high-profile%20professor%2C%20planner%20and%20author%2C%20Patrick%20Condon%2C,up%20housing%20costs%20and%20cannot%20create%20affordable%20housing.>

¹ Available at https://uploads-ssl.webflow.com/5efd1c1c4e2740c1bb1bfb69/60001a4f82797d502d088dcf_Sick%20City%202021.pdf.

“The commonly accepted theory of supply and demand has been undercut by the observed reality; i.e., that no matter how much a metropolitan area adds new housing units, housing prices continue to rise. This begs the question: If the high price of housing is not caused by constrained supply, what is the problem? The problem seems to be the cost of land.” SICK CITY, *supra*, p. 38.

The solution is even worse for a city like Bozeman. Studies show that housing is less affordable in high tourist, recreation-dependent, counties, where folks are moving to as fast as they can to take advantage of the existing recreational and small-town qualities, and pricing locals out of housing options. See Megan Lawson, Ph.D., *Housing in recreation-dependent counties is less affordable*, HEADWATERS ECONOMICS (May 18, 2020), <https://headwaterseconomics.org/equity/housing-affordability-recreation-counties/>.

“But simply adding new units is not enough: new housing units affordably priced for lower-income households are needed to serve those most burdened and avoid exacerbating housing inequality.” *Id.*

Bozeman and Vancouver are not alone: marginal reductions in supply constraints alone are unlikely to reduce rent burdens. In 2018, a group of economists ran a simulation that increased housing supply in various cities across the U.S. and found that increasing housing units by 20% would only result in a minimal decrease in rent costs of less than 2%:

Table 3: Simulation Results - Increasing Housing Stock to Single Neighborhoods

City	Rent response to adding +X% housing stock			
	+1%	+5%	+10%	+20%
Atlanta	-0.06%	-0.31%	-0.61%	-1.18%
Boston	-0.05%	-0.25%	-0.49%	-0.93%
Chicago	-0.07%	-0.34%	-0.66%	-1.27%
Dallas	-0.07%	-0.36%	-0.71%	-1.35%
Houston	-0.06%	-0.30%	-0.58%	-1.11%
Los Angeles	-0.07%	-0.36%	-0.71%	-1.36%
Miami	-0.06%	-0.30%	-0.59%	-1.13%
Philadelphia	-0.07%	-0.34%	-0.66%	-1.27%
San Francisco	-0.10%	-0.49%	-0.95%	-1.82%
Washington DC	-0.07%	-0.34%	-0.67%	-1.29%

Anenberg, Elliot, and Edward Kung (2018). “Can More Housing Supply Solve the Affordability Crisis? Evidence from a Neighborhood Choice Model,” Finance and Economics Discussion Series 2018-035. Washington: Board of Governors of the Federal Reserve System, <https://doi.org/10.17016/FEDS.2018.035>.

Taken together, this evidence shows that a “free market-based” de-zoning approach in the City of Bozeman is unlikely to deliver on the promise of affordable housing. If it is not working in Vancouver, Canada, a city with some of the highest housing density rates and land costs in the world, it will also not work in Bozeman, another location with very high land costs that make providing affordable housing prohibitive.

In Bozeman, supply is not the issue—especially of newer, likely more expensive options. “The vacancy rate for Q4 2024 currently stands at 10.49%, suggesting an oversupply. . . . For landlords of older properties, the vacancy rates are significantly lower, with properties built before 2020 showing a vacancy rate of

3.5%.” Maggie Collister, *Big Changes in Bozeman’s Housing Market*, STERLING CRE ADVISORS (Jan. 13, 2025), <https://www.sterlingcreadvisors.com/big-changes-in-bozemans-housing-market/>. “[T]he average new studio in Bozeman provides 595 square feet of space, which is 36% larger than older studios.” *Id.*

The same developers who said they could not abide by actual affordable housing requirements refuse to lower rents to a level that is affordable for Bozeman citizens and –are instead building luxury, market-rate housing. “The trailing 12-month average asking rent for all units stands at \$2,148” or \$25,776 per year. *Id.* “Comparatively, new construction units demand higher rents, averaging \$2,393, which requires a household income of \$95,479 to be affordable—this figure is above Bozeman’s median household income.” *Id.* “[T]he rise in vacancy rates is primarily due to the introduction of new supply that is priced above the market average” *Id.*

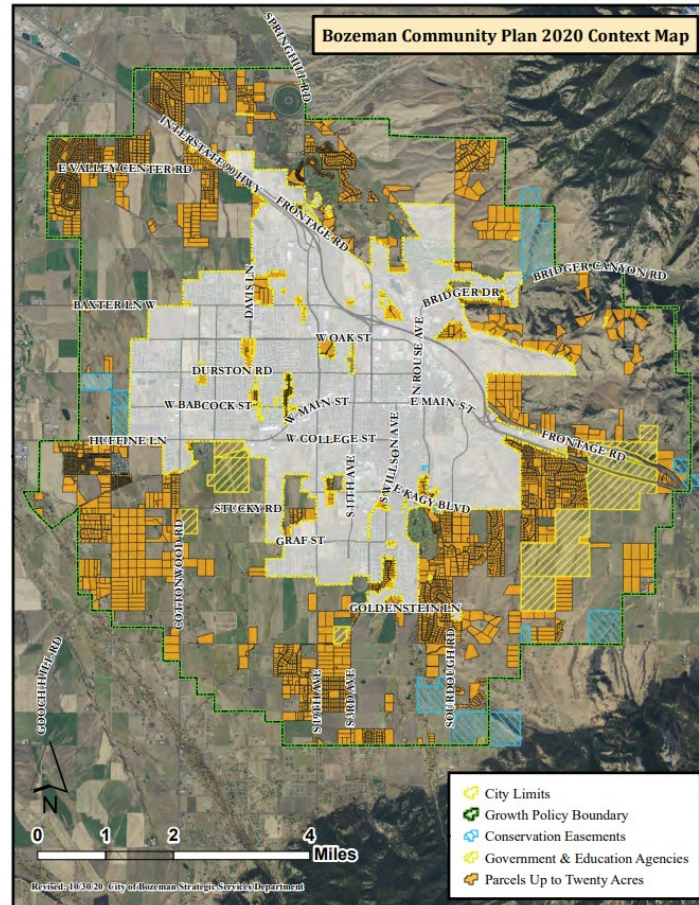
During this time of consistently unaffordable rental properties and homes, Bozeman had already expanded the housing potential:

The Planning Area for the BCP is approximately 70 square miles. Most of that area lies outside of the existing municipal limits. However, it is not free from development pressure or change. As shown on the map . . . much of the land within the Planning Area and outside the City has already been subdivided and developed to some degree, mostly as suburban and rural housing.

Bozeman MT 2020 Community Plan, p. 10

<https://www.bozeman.net/home/showpublisheddocument/1074/638212934420400>

000.



Bozeman exemplifies the legislature’s folly. Increased development in Montana’s largest cities, without requiring affordability, does not lead to affordable housing.

Without being even rationally related to affordable housing, the laws at issue violate Montanans’ constitutional rights.

II. Densification—especially in the more affordable, core neighborhoods—may actually destroy the best source of current affordable housing.

Increased density does not lead to homeownership for those Montanans

looking to buy or rent who are currently priced out of the market. Condon, *supra*. Increased density is actually likely to reduce their chances of finding affordable housing by converting existing homes into high-priced developments.

“In many communities, smaller, older single-family homes are the largest source of naturally occurring affordable housing (NOAH)—unsubsidized privately owned residences that are affordable to low- or moderate-income households.”

Donald L. Elliot, *Zoning Practice, Preserving Naturally Occurring Affordable Housing*, APA (Dec. 2023), p. 2.² “The key fact is that Americans’ earning power continues to rise much more slowly than the costs of land, materials, labor, transportation and energy necessary to build new rental or for-sale housing units.” *Id.*, p. 3. “Given the slow rate at which the U.S. housing stock grows, it is not likely that we will be able to build ourselves out of the affordability crisis.” *Id.*

“The more fundamental challenge is to retain a housing stock that is affordable to many more lower and middle income American households.” *Id.* “[Many] . . . NOAH units are vulnerable to loss through redevelopment. Over the past decades, individuals and custom homebuilders have often purchased older single-family homes simply for the value of their lots and their desirable locations.

² Available at https://planning-org-uploaded-media.s3.amazonaws.com/publication/download_pdf/Zoning-Practice-2023-12.pdf.

The NOAH structure is then demolished and replaced with a much larger and more expensive home that is not affordable to existing residents of the neighborhood. In addition to individual home replacements, some larger housing builders have acquired multiple adjacent NOAH properties, demolished those homes, merged the lots, and constructed a larger number of attached townhomes, apartments, or condominiums on the combined properties.” *Id.*, pp. 3–4.

“Since building new houses requires the purchase of new construction materials and the hiring of labor and equipment that would not be required if the old dwelling units had been preserved in their current state, the sales prices and rental rates of the resulting housing are often much higher than those of the existing NOAH units. This is part of the business model; there is money to be made in replacing older, smaller units with newer, larger units, and even more money to be made if one unit can be replaced with more than one unit on the same property.” *Id.*, p. 4.

Funneling development into communities like Bozeman to the historic, core neighborhoods by removing single-family zones is not rationally related to achieving more affordable housing. In fact, it is more likely that doing so will increase housing prices through developers buying up property and replacing the more affordable options with market-rate, luxury homes and apartments. Therefore, the laws at issue violate Montanans’ constitutional rights.

III. Senate Bill 121 does not moot MAID’s claims regarding public participation.

Shelter WF and the Montana League of Cities and Towns claim that legislative changes to MLUPA—namely those in SB 121—moot MAID’s claims regarding public participation. To make this claim, Shelter WF ignores the very framework it set forth in its brief for this Court to use:

. . . in determining whether a case is moot, there is a “presumption” that “the repeal, amendment, or expiration of legislation will render an action challenging the legislation moot, unless there is a reasonable expectation that the legislative body will reenact the challenged provision or one similar to it.”

Shelter WF Br., pp. 30–31 (emphasis added) (quoting *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019)).

Glaringly, Shelter WF failed to address the fact that SB 121’s main provisions responding to the district court’s summary judgment ruling will expire on June 30, 2027. Appellants’ Joint Appendix at 87.

While legislatures are presumed to act in good faith when amending statutes in response to legal challenges, courts cannot ignore a reasonable expectation that the challenged provisions will rear their heads again. “The party challenging the presumption of mootness need not show that the enactment of the same or similar legislation is a ‘virtual certainty,’ only that there is a reasonable expectation of reenactment.” *Chambers*, 941 F.3d at 1199. Thus, “[t]he presumption can be

overcome by showing, for example, that the legislative body has announced its intention to reenact the law at issue.” *Teter v. Lopez*, 125 F.4th 1301, 1307 (9th Cir. 2025) (citation omitted).

In *City of Mesquite v. Aladdin’s Castle*, 455 U.S. 283, 289 (1982), the U.S. Supreme Court recognized that the city’s repeal of objectionable language in an ordinance did not moot the case where the repeal would not preclude the city from “reenacting precisely the same provision if the District Court’s judgment were vacated” **and** the city announced its intention to do just that. *Id.* at 289 & n.11 (1982). The Montana legislature has done more than simply announce its intention to reenact the challenged provisions; it has already set a date for when the provisions will become operative again. Allowing the legislature to hit “pause” on a faulty statute for a period of time to avoid a ruling by this Court is not consistent with the mootness doctrine. *See Chambers, supra*. MAID’s public participation claims are clearly not moot.

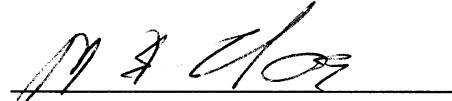
CONCLUSION

The legislation at issue violates the equal protection rights of many Montana citizens. The Court should reverse the district court’s grant of summary judgment on the issue of equal protection.

The enactment of SB 121 does not moot MAID’s public participation claims. The Court should address the merits of Shelter WF and the League’s

appeals and affirm the district court's grant of summary judgment.

DATED this 16th day of June, 2025.

A handwritten signature in black ink, appearing to read "B. F. Close", is written over a horizontal line.

Brian F. Close

Attorneys for Better Bozeman Coalition

CERTIFICATE OF COMPLIANCE

Pursuant to M. R. App. P. 11, the undersigned certifies that this brief is set in a proportionally spaced font and contains fewer than 5,000 words (3,803).

A handwritten signature in black ink, appearing to read "B. F. Close", is written over a horizontal line.

Brian F. Close

CERTIFICATE OF SERVICE

I, Brian F Close, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 06-10-2025:

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

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

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

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

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

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

Jesse C. Kodadek (Attorney)
Parsons Behle & Latimer
127 East Main Street
Suite 301
Missoula MT 59802
Representing: Shelter WF, Inc.
Service Method: eService

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

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

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

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

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

Michelle Tafoya Weinberg (Attorney)
PO Box 1417
Missoua MT 59801
Representing: Flathead Families for Responsible Growth
Service Method: eService

Electronically Signed By: Brian F Close
Dated: 06-10-2025