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

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, et al.,

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, CLARNENCE KENCK, MONTANA LEAGUE OF CITIES AND TOWNS,

Defendant-Intervenors.

On Appeal from the Montana Eighteenth Judicial District Court, Gallatin County,
DA 16-2023-1248DK, the Honorable Mike Salvagni, Presiding

# BRIEF OF *AMICUS CURIAE* FLATHEAD FAMILIES FOR RESPONSIBLE GROWTH

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Flathead Families for Responsible Growth ("FFRG") submits this brief in support of Appellee Montanans Against Irresponsible Densification, LLC with respect to the Eighteenth Judicial District Court's summary judgment order.

## INTEREST OF AMICUS CURIAE

This case involves the Montana Legislature's enactment of the Montana Land Use Planning Act ("MLUPA"), otherwise known as SB 382, now codified at § 76-25-101, et. seq., MCA. Flathead Families for Responsible Growth ("FFRG") is a 501(c)(3) not-for-profit organization. Its members represent a diverse cross-section of local residents in Flathead County, Montana. Its mission is to foster responsible growth in the Flathead's varied and unique communities. FFRG has a strong interest in ensuring that Montana's land use laws protect the public's constitutional right to be informed about and meaningfully participate in development proposals in communities throughout the Flathead to ensure that public health, safety, and the general welfare of its citizens are protected.

FFRG works to educate and engage the public on various development proposals throughout the Flathead, which requires that it be informed on these matters to ensure that its participation at the local government level is meaningful. Flathead Families for Responsible Growth, *About FFRG MT* (available at https://ffrgmt.org/about/). FFRG files this amicus brief to explain how MLUPA violates the public's right to participate in development proposals that have a real

impact on public health, safety, and the general welfare of communities in Flathead County. FFRG further aims to explain why MLUPA will not increase the supply of affordable housing due to the high cost of urban infrastructure, basic supply and demand economics, and the incentivization of real estate speculation.

## STATEMENT OF THE CASE

1. In 2023, the Montana Legislature enacted MLUPA, which became effective on January 1, 2024. MLUPA mandates that cities with a population of at least 5,000 residents in counties of at least 70,000 residents overhaul their subdivision and zoning regulations. § 76-25-105(1), 2(b), MCA. The requirements of MLUPA combined with § 76-2-304(3) also eliminates single family zoning in these cities by requiring, as a permitted use, for at least duplex (and, potentially, triplex and fourplex) housing by right where a single-family residence is permitted. § 76-25-302 (1)(a), (g).

2. MLUPA guts Montana's longstanding tradition, as guaranteed by the Montana Constitution, to participate in local land use decisions by placing significant limitations on the scope, opportunity, and method for public participation, public comment, and public hearings on site-specific development proposals, including zoning proposals, planned unit developments, and subdivisions. § 76-25-106, MCA. Rather, MLUPA, as amended by Senate Bill 121 in 2025, instead provides an arduous and difficult process to participate in these decisions

3. Specifically, under MLUPA and SB 121, the public is only given 15 days to provide only *written* public comment to the planning administrator when the planning administrator determines that "all impacts resulting from the proposed development were previously analyzed and made available for public review and comment in the adoption, amendment, or update of the land use plan, zoning regulation, or zoning map." S.B. 121, 69th Leg., Reg. Sess., at 20 (Mont. 2025) (amending § 76-25-408, MCA.) Rather than have these written public comments be reviewed by a municipality's elected local government officials, the comments are then reviewed by the planning administrator or his/her designee to determine if the development proposal requires further review – by the planning administrator – and additional public comment to be reviewed – by the planning administrator. S.B. 121, at 21.

4. If the planning administrator approves a development proposal after this bureaucratic and circular process, MLUPA provides citizens only 15 days to appeal the decision to the planning commission – again, not the local government body – and to finally be heard in a public hearing. § 76-25-503(3)(a)-(b), MCA. In order to appeal the planning commission's decision to their *elected* governing body, citizens must again appeal this decision within, 15 days "stating the facts and all the grounds for appeal that the party may raise in district court." § 76-25-503(4)(a)-(b), MCA. It is only after this exhausting and likely very costly process that a challenge

in district court may be filed, but only after citizens exhaust their administrative remedies and such challenges are "limited to the issues raised by the challenger on administrative appeal." § 76-25-503(5)(c), MCA. In other words, if citizens are unable to afford an attorney to represent their interests from the very start of this convoluted process, such appeals are very unlikely to succeed given the technical and complex nature of land use law.

5. MLUPA's intent is to subject site-specific land use decisions in municipalities "with a population at or exceeding 5,000 located within a county with a population at or exceeding 70,000" to administrative review by a planning administrator rather than legislative review by local government boards and councils, informed by meaningful public participation. Unfortunately, without the "constant vigilance of a concerned community," land use regulation corruption can occur when such important and financially significant decisions are left to a few public officials. JA Gardiner and TR Lyman, *Decisions for Sale – Corruption and Reform in Land-Use and Building Regulation* (1978) (abstract available at https://www.ojp.gov/ncjrs/virtual-library/abstracts/corruption-land-use-and-building-regulation-v-1-integrated-report).

6. While MLUPA purports to address affordable housing shortages in Montana, the Montana Legislature has in fact stymied attempts by local governments to directly address this long-standing issue. During the 2021 legislative session, the

legislature enacted HB 259, 67th Leg., Reg. Sess. (Mont. 2021), now codified at §§ 76-2-114 and 76-3-514, MCA, which prohibits local governing bodies from requiring real estate developers to pay a fee or dedicate real property for affordable housing as a condition for land use approvals such as zoning changes and subdivisions. HB 259 was passed in response to attempts by Montana municipalities with self-government powers to create mandatory affordable housing programs in their communities such as the now defunct *mandatory*[1] Legacy Homes Program, enacted by the City of Whitefish in 2019.

7. In short, MLUPA seeks to mandate housing densification in certain municipalities while restricting the public's fundamental Right Participate under Article II, Section 9 of the Montana Constitution.

8. In December 2023, Plaintiff Montanans Against Irresponsible Densification, LLC ("MAID") filed suit against Defendant challenging MLUPA. MAID's complaint raised several claims, including violations of Equal Protection and Due Process of its citizenry, violations of the Right to Know and Right to Participate, and violations of constitutional self-government powers of local governments.

9. The trial court entered its summary judgment, declaratory judgment,

[1]. The City of Whitefish now has a *voluntary* affordable housing program, still called the Legacy Homes Program. City of Whitefish, Legacy Homes Program (available at https://www.cityofwhitefish.org/200/Legacy-Homes-Program).

and permanent injunction against MLUPA, holding that the MLUPA violates the Right to Participate by prohibiting meaningful and informed public comment at the site-specific level.

## SUMMARY OF THE ARGUMENT

In granting MAID's summary judgment motion, the district court properly determined that MLUPA abolishes the Right to Participate for some Montana residents by prohibiting local legislative review of certain site-specific development proposals informed by public comment. The challenged act thus undermines the facilitation of the Right to Participation and violates Equal Protection under the Montana Constitution and serves no compelling state interest to survive strict scrutiny.

## ARGUMENT

### I. MLUPA VIOLATES THE RIGHT TO PARTICIPATE BECAUSE IT DEPRIVES THE PUBLIC OF MEANINGFUL, INFORMED REVIEW OF LOCAL ZONING DECISIONS.

Article II, Sections 8 and 9 of the Montana Constitution provide the public with the fundamental right to observe the deliberations of public bodies and participate in the government's decision-making process. These are coextensive provisions, such that the Right to Participate cannot be analyzed in a vacuum, separate and distinct from the Right to Know, because "to participate effectively and knowledgeably in the political process of a democracy[,] one must be permitted the

fullest imaginable freedom of speech and one must be fully apprised of what the government is doing, has done, and is proposing to do." *Bryan v. Yellowstone Cnty. Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 31, 312 Mont. 257, 60 P.3d 381. The Right to Participate is contained in the Bill of Rights and, during the course of Montana's 1972 Constitutional Convention, the Bill of Rights Committee described the underpinnings of this fundamental right as follows:

> The provision is in part a Constitutional sermon designed to serve notice to agencies of government that the citizens of the state will expect to participate in agency decisions prior to the time the agency makes up its mind. In part, it is also a commitment at the level of fundamental law to seek structures, rules or procedures that **maximize** the access of citizens to the decision-making institutions of state government.

Montana Constitutional Convention, Vol. II, 630-631 (emphasis added).

The Montana Supreme Court has affirmed government agencies' clear legal duty not only to permit and afford citizens' reasonable opportunity to participate in government decision-making processes, but to *secure* and *encourage* the public's exercise of this most fundamental constitutional and statutory right by establishing procedures that assist and provide adequate notice to citizens who wish to submit data, views, or arguments before the government makes a final decision of significant public interest. §§ 2-3-103 and -111; 7-1-4142; and -4143, MCA; *Bryan*, ¶ 43. "The essential elements of public participation" required by Article II, Section 8, are "notice and an opportunity to be heard," which requires "more than simply an

'uninformed opportunity to speak.'" *Citizens for a Better Flathead v. Bd. of County Comm'rs*, 2016 MT 256, ¶ 39, 385 Mont. 156, 381 P.3d 555 (quoting *Bryan*, ¶ 44).

A reasonable opportunity to be heard requires governmental bodies to give "adequate notice of their deliberations… and [give] the public sufficient opportunities to be informed and heard" in a meaningful way. *Citizens*, ¶ 48. For example, the Montana Subdivision and Platting Act ("MSPA") was enacted in recognition of the fact that residential subdivisions can create a myriad of social, environmental, health and safety impacts on the surrounding community and, as such, to recognize the public's right to participate in the subdivision review process at the site-specific level. §§ 76-3-102 and -601 *et seq*, MCA.

The importance of public participation in land use development was likewise reflected in Montana's growth policy and zoning statutes prior to MLUPA as such matters are of significant public interest and should reflect the land use goals and objectives of an entire community, not just the pecuniary interests of developers and the short-term rental market. §§ 76-1-601 and -602, MCA; §§ 76-2-303 and -304, MCA; §§ 76-2-203 and -205, MCA. For example, in 2021, FFRG along with hundreds of other citizens raised concerns about the impacts to traffic, emergency services and fire danger that would have resulted from a 318-unit development, in large part because of the independent research and expert testimony the public was able to proffer when the local planning administrator failed to adequately address

the statutory review criteria of § 76-2-304, MCA. Flathead Beacon, *Whitefish Planning Board Votes Against Mountain Gateway Development* (Nov. 21, 2021) (available at https://flatheadbeacon.com/2021/11/21/whitefish-planning-board-votes-against-mountain-gateway-development/).

Here, MLUPA violates the Right to Participate because the Montana Legislature is attempting to take away local, legislative control of zoning decisions, and thereby abrogate the public's right to know about and be heard on these matters. MLUPA also violates equal protection because the challenged acts bar certain residents from knowing about or participating in local zoning, while other residents are still afforded these rights. *See Mont. Land Title Ass'n v. First Am. Title,* 167 Mont. 471, 475-76, 539 P.2d 711, 713 (1975) ("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.").

Under MLUPA's provisions and S.B. 121, local government legislative bodies "in cities with a population of at least 5,000 residents" will no longer be able to meaningfully review, research, and then provide informed comments on often

large and complex development proposals, including planned unit developments and major subdivisions. As a result, those who live in cities with a population of at least 5,000 residents will not be given an informed opportunity to speak and engage to the maximum extent possible – even when property values, transportation, water, sewer, schools, or public safety in a community will be impacted. *See* § 76-2-304(1)(b)(i)-(iii) (listing zoning review criteria).

The cumulative effect and intent of MLUPA's bar against public participation for site specific development proposals will be the densification of Montana's traditional neighborhoods without a corresponding meaningful local legislative review of the impacts to the public's health and safety and the general welfare of its citizenry that will result from densification. As such, MLUPA undermines the facilitation of the Right to Participation and violates Equal Protection under the Montana Constitution.

## II. MLUPA IS NOT NARROWLY TAILORED TO EFFECTUATE A COMPELLING STATE INTEREST BECAUSE THE LAW WILL NOT RESULT IN THE CREATION OF AFFORDABLE HOUSING.

Because MAID's rights under Article II are implicated in this case, and because these fundamental rights are included within the Declaration of Rights, the Legislature's infringement of these rights trigger strict scrutiny – the Court's highest level of protection – and must serve a compelling state interest and be narrowly tailored to effectuate that interest. *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165

(1996).

However, rather than serve a compelling a compelling state interest, MLUPA and SB 121 defeats Equal Protection and the public's Right to Participate, and the strong public interest in maintaining local control over zoning to ensure that the public health, safety and general welfare are protected. There is no compelling state interest in requiring certain local governments to restrict rather than maximize its residents' right to know about and participate in an informed and meaningful way on development proposals to further the economic interest of real estate developers and the short-term rental market. *See Bryan*, ¶¶ 43, 59.

Further, MLUPA does nothing to address the issue of affordable housing shortages in Montana because any new housing units created as a result of these bills will be *market rate housing*, not deed restricted for affordability. Indeed, the Montana Legislature has in fact prohibited such local measures requiring housing affordability. §§ 76-2-114 ("A local governing body may not adopt a resolution under this part that includes a requirement to…dedicate real property for the purpose of providing housing for specified income levels or at specified sales prices.") and 76-3-514, MCA ("A local governing body may not require, as a condition for approval of a subdivision under this part,…the dedication of real property for the purpose of providing housing for specified income levels or at specified sales prices.").

While MLUPA will result in the densification of certain municipalities – and further strain schools and road, water, sewer, and other infrastructure in these cities – densification will not increase affordability because upzoning to allow more density increases the value of land by increasing the development value, as explained by Professor Patrick M. Condon:

> 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 ration of 1 (FSR 1) selling for $2 million prior to rezoning. After the allowable density is doubled (FSR 2), the potential redevelopment value increases in kind, forcing a near doubling the value of land.

Patrick M. Condon, *Sick City*, 117 (2021) (available at https://justice landandthecityblogspot.com/p/download-sick-city-pdf.html). Likewise, Professors Eileen Taylor and Steve Allen provide the following explanation as to why eliminating single-family zoning and providing more units per acre does not lead to affordable housing:

> First, the cost of land is a relatively small percentage of the build cost. Housing costs are determined by square footage and finish, and housing prices are based not only on cost, but on market demand, which remains strong. A house needs just enough land to meet the local set back and impervious surface rules, and extra property is worth very little when it comes to housing prices. Thus, the theoretical land cost savings doesn't translate into a price savings.
>
> Second, a .25 acre lot in a single-family zoned neighborhood may be worth $220,000, but if two homes can be built on the lot (in the form of a duplex), then the lot will likely increase in value, and a builder will pay more for it. In other words, by allowing denser housing, the land itself becomes worth more per acre. This effect works to raise the cost

> of land, and thus, the cost of building a house, rather than lower it.
>
> Third, you may be thinking, yes, the cost of the whole parcel is more, but it can now be divided into two houses, making the cost per lot lower. Even if the cost per lot is lower, that savings will not be passed on to the buyer, as the builder will price the home according to market demand, as noted above. If there is additional profit due to a lower land cost per unit, that profit will go to the builder.
>
> Last, builders, like all other for-profit businesses, are likely to choose the highest rate of return on their investment. There is more profit to be made on a new home that has more bells and whistles than there is on a low cost affordable home. Given limited land on which to build, a builder will maximize their return by building the largest and fanciest house they can, as long as someone is willing and able to purchase it.

Eileen Taylor and Steve Allen, *Do "Missing Middle" Policies Increase Housing Affordability?* (May 11, 2023) (available at https://poole.ncsu.edu/thought-leadership/article/do-missing-middle-policies-increase-housing-affordability/); s*ee also* Randal O' Toole, *Density Makes Housing Less Affordable, Not More* (Apr. 26, 2021) (available at https://www.cato.org/commentary/density-makes-housing-less-affordable-not-more) ("Abolishing single family zoning won't make housing more affordable, but it will make homeownership less desirable, and the nation will lose the benefits of such homeownership.").

Certainly, as communities like Whitefish have experienced, more and more people are moving to Montana and are "willing and able to purchase" high priced homes, condos, and townhomes either as a primary home, second home, or for investment purposes. Obviously, such basic supply and demand economics cannot

and will not be addressed by MLUPA and SB 121's aim to increase density by abrogating the public's Right to Participate.

## CONCLUSION

Because there is no compelling state interest in this case, narrowly tailored to protect MAID's fundamental, constitutional rights to equal protection and to participate in site-specific development in their unique and varied communities, this Court should affirm the district court's decision that MLUPA is facially unconstitutional under the Right to Participate and reverse the district court's findings with respect to MAID's equal protection arguments.

Respectfully submitted this 16th day of June, 2025.

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## 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 (3,182).

/s/ Michelle T. Weinberg
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