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IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No.: DA 25-0200

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC,

Plaintiff and Appellee/Cross-Appellant,

v.

STATE OF MONTANA,

Defendant and Cross-Appellee,

SHELTER WF, INC.,

MONTANA LEAGUE OF CITIES AND TOWNS,

Defendant-Intervenors and Appellant/Cross-Appellee,

DAVID KUHNLE,

CLARENCE KENCK,

Defendant-Intervenors/Cross-Appellees.

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

AMERICAN PLANNING ASSOCIATION'S *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND CROSS-APPELLEE STATE OF MONTANA

[Appearances on next page.]

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I. INTEREST OF AMICUS CURIAE

The American Planning Association ("APA") is a non-profit, public-interest research organization founded in 1978 to advance the art and science of land-use, economic, and social planning and development at the local, regional, state, and national level. Based in Chicago and Washington, D.C., APA and its professional institute, the American Institute of Certified Planners ("AICP"), represent nearly 39,000 practicing planners, elected officials, and citizens in state and regional chapters across the United States. APA members work in the public and private sectors to formulate and implement communities' future growth plans, land-use and zoning regulations, and similar planning tools. APA and its chapters educate planners on the planning and legal principles underlying land-use regulation through publications and training programs, as well as by filing numerous amicus curiae briefs on important land-use law questions in state and federal courts across the country.

APA's Montana Chapter has 185 members working across more than 20 counties, 18 cities, four state agencies, several federal agencies, and as private consultants, serving the state's largest cities and counties to some of its smallest places, and everywhere in between.

II. SUMMARY OF ARGUMENT

Everywhere, every day, every Montanan—whether or not they know it—engages with planning, zoning, and real property. The built environment including—homes, businesses, schools, roads, sewers—is familiar to everyone. But the myriad public and private choices that shape it are required, guided, and constrained by a complex—and, at times, obscure—system of law and planning. Planners, the public- and private-sector professionals who oversee and implement this system, work at the center of it.

This case concerns the Montana Constitution's guarantee of a Right to Participate in the land-use context, and when in the complex development regulation and approval process that right should arise. The Court's decision will carry important implications for private property rights as well as for the fairness and efficiency of the land-use regulatory system. Land-use planning, regulation, and administration require balance. Robust Planners must balance property rights and the public interest. They must also balance public participation—incorporating community goals and concerns into plans, regulations, and actions—with technical expertise. Given public participation's centrality to professional planning practice, planners are keenly interested in ensuring that the Court's decision accords with the planning profession's past century of best practices in public engagement.

APA files this brief in support of the Appellants and Cross-Appellees because the Montana Land Use Planning Act, § 76-25-101 MCA *et seq.* ("MLUPA"), strikes the right balance. MLUPA ensures robust, continuous public participation where it is most effective: where community members' knowledge of their neighborhoods and goals and visions for their respective futures can inform planning and policymaking. It also ensures an appropriate place for technical planning expertise during the implementation of plans and policies, that is, during site-specific application review—where community input is less effective and more likely to undermine property rights, and the broader community's preferences. Even then, MLUPA allows the public to review records, comment on actions that depart from prior public input's direction, and present evidence and make arguments at a *de novo* hearing. For these reasons and those presented below, MLUPA reflects best practices in planning public engagement, and amply protects and reaffirms Montanans' Right to Participate. APA thus respectfully requests that the Court affirm MLUPA's constitutionality.

III. LEGAL ARGUMENT

A. Planning is Critical to Well-Functioning Systems of Property Rights and Land-Use Regulation

While this case concerns MLUPA's public participation provisions, the

context concerning planning, zoning, and subdivision is important, as discussed below.

1. Zoning and Subdivision Laws

Zoning and subdivision rules are not the only forms of land-use regulation, but for more than a century, they have been the primary forms of it.[1] Zoning, which geographically separates land uses by district, responded to a need for an *ex ante*, predictable approach to ameliorating nuisances and protecting sensitive uses, like homes, amid rapid technological change and urban growth. *See Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–89 (1926). The federal government's 1924 Standard State Zoning Enabling Act (the "SZEA") still serves as the model for most states' zoning enabling laws. U.S. DEP'T OF COM., ADVISORY COMM. ON ZONING, *A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations* (rev. ed. 1926) *available at* https://planning-org-

[1] MAID's contention that MLUPA will destroy "core architecturally-diverse traditional areas of Montana cities" conspicuously mistakes history. (MAID Br. at 20.) Most of Montana's historic neighborhoods predate zoning altogether. *See* SZEA, Foreword (noting that, as of September 1921, just 48 cities and towns nationally had adopted zoning). Much of Missoula's cherished downtown, for instance, developed before the city's first, 1932 zoning ordinance. *See* Office of the Missoula City Attorney, Legal Opinion 2013-11 *available at* https://www.ci.missoula.mt.us/Archive/ViewFile/Item/6801. Ironically, MAID idealizes neighborhoods that developed free from land-use limitations and neighbor-objection opportunities MAID now characterizes as essential.

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SZEnablingAct1926.pdf.

Within each zoning district, codes regulate building heights, lot coverages, lot sizes, dwelling-unit densities, and setbacks, among other things. *See* SZEA § 1. An "R-1" district usually allows only single-family detached homes on large lots, with deep setbacks to provide broad lawns, an "I-3" district might allow for heavy industrial activities with few limitations. While regulations differ *across* districts, they are uniform within them to prevent "improper discriminations." *Id.* § 2 n.19. Modern codes often expand on these authorizations, but these basic principles appear almost everywhere.

Zoning also establishes development approval procedures. These fall into two primary classes. Administrative or ministerial procedures are employed for permitted—also called "by right" or "as of right"—uses. Assuming such uses meet the objective rules of the applicable district, they are approved by local planners without further exercise of discretion.[2] MAID argues that these types of

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[2] Implicitly this means the local government made it an earlier, discretionary decision to permit the use by right when it first adopted the zoning regulation. *E.g.*, *W. Paving Const. Co. v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, 506 P.2d 1230, 1232 (Colo. 1973) (explaining, "[W]hen the matter is permitted by right in the zone created and … through … a change of circumstances the use is incompatible with prior usage, the proper procedure is to amend the zoning resolution. . . . If the use is permitted within the zone, then it is impossible to not be in harmony.")

applications involve “judgment,” yet the degree of judgment involved differs little from—and may in some cases be less than—that employed by a city engineer reviewing sewer main plans, a recreation official licensing a community event in a local park, or a school district hiring a maintenance staff member.

In contrast, discretionary procedures are used, for example, in the adoption and revision of zoning laws, or for “special review” or “conditional” uses that are “presumptively compatible or desirable in a [given] district” but require additional factfinding. 3 *Rathkopf’s The Law of Zoning and Planning* § 61:1 (4th ed.). Other discretionary procedures include variances, which allow development subject to some regulatory relief, and rezonings, where a landowner petitions to allow an otherwise prohibited use or project. Discretionary processes often require a local body to perform adjudicative functions, such as applying a given case’s facts to pre-established review criteria, and taking evidence on applications at noticed public hearings. Discretionary procedures, especially zoning adoption, may require local bodies to consider and articulate community preferences, which are subsequently carried out in site-specific discretionary and administrative processes. *See, e.g.*, § 76-25-304, MCA.

In Montana and nationwide, just as local civil engineers review road and bridge designs, professional planners execute and administer zoning laws. Consider Helena’s residential zone districts’ standards:

	OSR (Open Space/ Residential)	R-U (Residential-Urban)	R-1/R-2 (Residential)	R-3 (Residential)	R-4/R-O (Residential-Office)
Lot area	1 - 3 acres; no more than 1 DU per acre for cluster development. See section 11-2-5 of this title	No minimum	No minimum	No minimum	No minimum
Lot coverage	No maximum	60% maximum Additional 5% for porch attached to front or side	40% maximum	40% maximum	60% maximum
Front lot line setback	25' from right-of-way	No minimum	10' minimum	10' minimum	10' minimum
Rear lot line setback	No minimum unless abutting right-of- way, then 25' from right-of-way	No minimum	10' minimum	10' minimum	10' minimum
Side lot line setback	No minimum unless abutting right-of- way 25' from right- of-way	No minimum	8' minimum	6' minimum for each side yard	6' minimum
Height	24' maximum	42' maximum	30' maximum	36' maximum	42' maximum

A planner reviewing a development proposal in the OSR district must evaluate, *inter alia*, whether the lot meets the minimum size, whether any "cluster" development satisfies the density standard, and whether structures are at least twenty-five feet from the front right-of-way.[3] Helena, Mont. Code of Ords., § 11-4-2, Table 2. This review is technical and involved, to be sure, but it requires staff to carry out policy, not set it.

[3] On an unusual lot, the official may further need to identify which lot line is the "front" lot line.

Subdivision controls parallel zoning. Like zoning, state laws enable localities to regulate real property divisions. *See* § 76-3-501 *et seq.*, MCA (applicable to counties), § 76-25-401 *et seq.*, MCA (applicable to cities subject to MLUPA). For smaller parcels and in urbanized areas, these regulations require subdividers to ensure the availability of public infrastructure and services, like roads, water, and sewer, to newly created parcels. *See* § 76-3-504(1), MCA (applicable to counties), § 76-25-404(1), MCA (applicable to cities subject to MLUPA). They also ensure that subdividers dedicate certain property, such as street rights-of-way, utility easements, parks, and school properties, to the government as needed to serve new parcels. *See Id.*

When adopting subdivision regulations, localities set policies for, *inter alia*, lot-size, open-space, and engineering design requirements. Thereafter, subdivision application review is technical. Professional planning and engineering staff document whether, among other things, a plat meets minimum size and access requirements and utility location standards, whether it avoids areas of geological hazards or flood zones, and whether roads, sidewalks, curbs, and gutters are correctly designed. Thus, whereas zoning regulates land use and development, subdivision regulates property division and the provision of infrastructure and services to it.

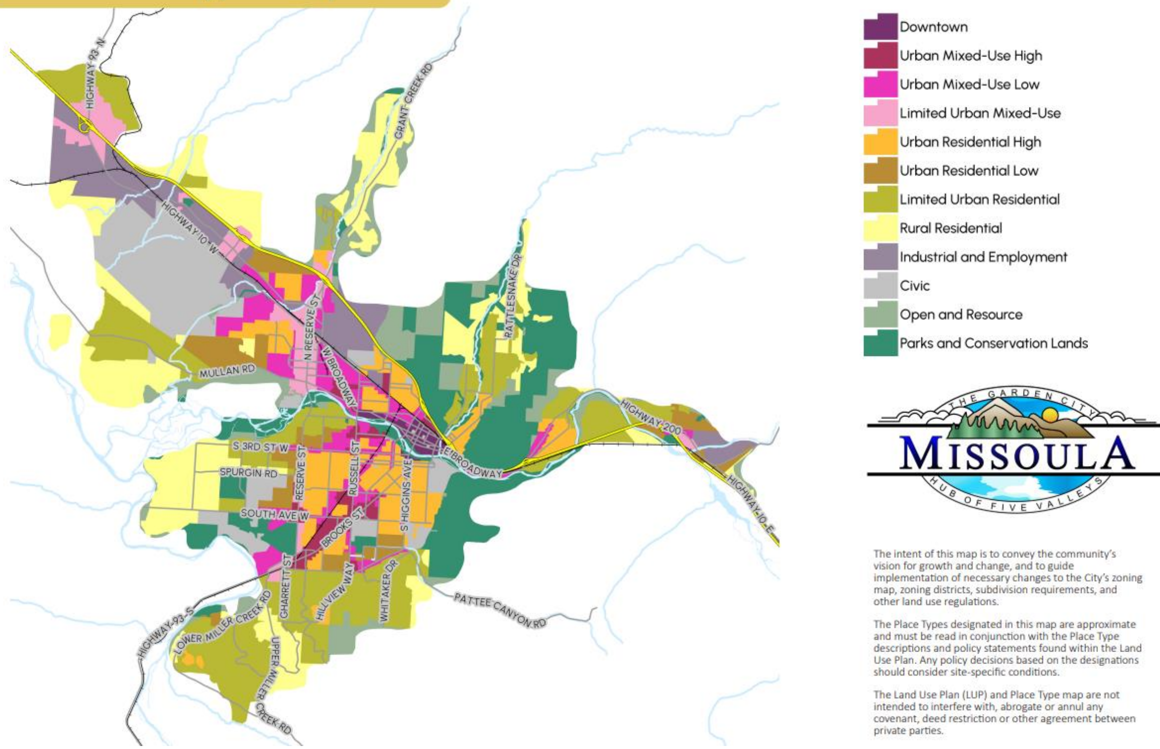
2. Planning

From the beginning, enabling laws have required zoning to be "in accordance with a comprehensive plan." SZEA § 3. Montana's requirement that zoning regulations "substantially comply" with a master plan is substantially identical. *Little v. Bd. of Cnty. Comm'rs of Flathead Cnty.*, 193 Mont. 344, 352, 631 P.2d 1282, 1293 (1981). Planning was intended to "prevent haphazard or piecemeal zoning," SZEA § 3, n.22, and ensure that zoning is formulated with community and expert input, sufficient to pass constitutional muster, *see* Alfred Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834, 844–45 (1924). Whereas zoning sets specific, enforceable regulations, a comprehensive or master plan is usually an advisory document delivering a "'long-term . . . plan' for the physical development of the community [that] embodies information, judgments, and objectives collected and formulated by experts to serve as both a guiding and predictive force." Charles M. Haar, "*In Accordance with A Comprehensive Plan"*, 68 HARV. L. REV. 1154, 1155 (1955).

An advisory "future land-use map" often accompanies the plan, identifying the community's preferences for growth and development. For instance, where community members see an opportunity to convert an aging mall to a walkable neighborhood of shops and houses, preserve existing countryside for agriculture, or protect forestry and backcountry areas for habitat and recreation, these goals will

be reflected on the map. For example, Missoula's comprehensive plan contains the following place-type map, which is representative. Each "place type" in turn corresponds to the plan's descriptions of the envisioned community character.

Figure 30. **Place Types Map**



Planning and land-use regulations protect and preserve property rights while supporting important public policy goals. Zoning elevates landowners' and communities' property values by avoiding incompatibility, ensuring public infrastructure and service availability, and maintaining aesthetic quality. *See* RICHARD F. BABCOCK, THE ZONING GAME 116–20 (1966). Planning advances fiscal responsibility and economic development, facilitating orderly growth and

encouraging development only where public infrastructure can serve it. *See* Haar, 68 HARV. L. REV. at 1154–55. Planning, zoning, and subdivision work together to forecast public improvements needed to support growth, regulate land uses according to landowners' rights and community expectations, and create salable parcels. As the next Section describes, they do so by drawing upon landowner and community input to plan and set policy, and relying upon technical experts to carry it out.

B. Public Participation is Instrumental to Sound Planning—and Most Effective Early in the Planning and Zoning Process

Setting land-use policy requires effort from professional planners and lay community members. By requiring public participation early in the planning and regulation process, MLUPA reflects planning best practices.

1. Participation in Planning and Zoning Adoption

Public participation is paramount to planning and zoning. The Standard City Planning Enabling Act—adopted concurrently with the SZEA and the model for states' planning enabling laws—requires at least one public hearing before plan adoption, to educate and engage the community. U.S. DEP'T OF COM., ADVISORY COMTE. ON CITY PLANNING AND ZONING, A STANDARD CITY PLANNING ENABLING ACT § 8 (1928), *available at* https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/CPEnabling%20Act1928.pdf. The SZEA

demands that a public hearing on zoning adoption "should be open to all 'citizens,'" emphasizing that "[t]his permits any person to be heard, . . . not merely property owners . . . ." SZEA § 4 n.38. Today's AICP Code of Ethics, which binds certified planners, states that planners aspire to

> [f]acilitate the exchange of ideas and ensure that people have the opportunity for meaningful, timely, and informed participation in the development of plans and programs that may affect them. Participation should be broad enough to include those who lack formal organization or influence . . . ."

Am. Plan. Ass'n, *AICP Code of Ethics and Professional Conduct*, https://www.planning.org/ethics/ethicscode/ (rev. Nov. 2021), at Section A(2)(b). APA further officially identifies community engagement and empowerment—specifically, broader participation in planning—as a centerpiece of sound planning practice. Am. Plan. Ass'n, *Planning for Equity Policy Guide*, https://planning-org-uploaded-media.s3.amazonaws.com/publication/download_pdf/Planning-for-Equity-Policy-Guide-rev.pdf (May 14, 2019), at 9.

Thus, comprehensive plans are significant not just for their substance, but for their adoption process. "[T]he plan directs attention to the goals selected by the community from the various alternatives propounded and clarified by planning experts, and delimits the means (within available resources) for arriving at these objectives." Haar, 68 HARV. L. REV. at 1155. Based on extensive engagement

conducted by planners, a city's plan often becomes a statement of its collective vision and values.

Similarly, when moving from planning to regulating land use, local governments must make hard choices, informed by planners and public sentiment. A plan may express competing preferences for affordability and large homes, historic preservation and downtown dynamism. Local elected officials, authorized by state law and informed by a representative cross-section of the public, must weigh these preferences and map them onto enforceable land-use and development regulations. Therefore, both planning and regulatory adoption require the exercise of policymaking discretion, in consultation with the public. In both contexts, planners guide engagement efforts, deliver technical expertise and assessment, and advise elected officials regarding best practices.

2. Participation in Site-Specific Applications

Once a jurisdiction adopts its zoning and subdivision regulations, the dynamic described above changes. The questions presented on site-specific applications do not concern policy or values, but rather whether an application satisfies objective previously adopted approval criteria. For by-right uses, this exercise is usually technical—for instance, does a new house satisfy the setback requirements?—and professional planners must carry out adopted law. *See* Sara C. Bronin, *Zoning By A Thousand Cuts*, 50 PEPP. L. REV. 719, 729 (2023).

Site-specific discretionary processes, like variances or conditional uses, often have more subjective approval criteria. In these cases, public hearings enable boards and commissions to gather evidence on the subject application's conformance to the criteria. *See, e.g.*, SZEA § 7 (discussing variance hearings); Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Public Processes*, 90 FORDHAM L. REV. 1083, 1105–06 (2021) (hereinafter "*Overparticipation*"). Such evidence comes in large part from the applicant's testimony or planning, engineering, environmental, and design experts retained by the applicant or locality.

Addressing these concerns, MLUPA demands for robust participation at the appropriate time: when policies are being made and when discretionary decisions most benefit from public input. It also leverages planners' technical expertise where it is most effective, on site-specific applications. The next subsection addresses how this approach ensures robust—and more importantly, *effective*—public participation.

3. Making Public Participation Effective

Public participation is important and effective in planning and adopting regulations. Evidence also strongly suggests it is far less effective—and may even undermine the public interest and property rights—when employed on site-specific

applications[4]. APA recommends site-specific hearings in limited cases, "when there is a genuine need to use discretion," to avoid bias and non-representative decision-making. Am. Plan. Ass'n, *Equity In Zoning Policy Guide*, https://planning-org-uploaded-media.s3.amazonaws.com/publication/download_pdf/Equity-in-Zoning-Policy-Guidev2.pdf (Dec. 20, 2022), at 40. As discussed below, early participation: (1) generates policy-making that better reflects community preferences, (2) makes better use of the public's expertise, and (3) upholds property rights by providing certainty throughout the entire land-use regulatory system.

First, adopting a community plan or zoning and subdivision regulations usually entails broad community notice, allowing incorporation of a representative set of community preferences. MLUPA reflects this practice. *See* § 76-25-106, MCA. It also employs engagement tools beyond public hearings, such as community-wide surveys, focus groups, neighborhood meetings, or online engagement. Participants in these discussions are typically focused on their

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[4] MAID asserts, without any citation, that the public is usually only "sporadically" involved in planning and regulatory adoption. MAID Br. at 27. However, this argument fails to acknowledge that, under a system in which the public's primary participation opportunity is at the site-specific application stage, there is little incentive to participate at the plan or regulatory-adoption stage, given that later-stage participation might upend earlier-stage community input.

community's future growth, rather than the prospective impact of a particular project.

Site-specific participation processes are different. Because notice of site-specific applications tends to be given only to immediate, neighboring landowners who will be most impacted by a project, hearing participants on these applications have an easier path to *oppose* them. *See* Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget"*, 62 CASE W. RSRV. L. REV. 81, 92 (2011). Meanwhile, other community members, who may benefit from such proposals, might not even know of them and, therefore, cannot organize to support them. *See Id.* at 92–94.

Research reveals that "participants in [site-specific] public processes are predictably nonrepresentative of their larger communities." Anika Singh Lemar, *Doing Public Participation Better*, 41 ZONING PRACTICE, NO. 9 (Sept. 2024), at 1 (citing Katherine Levine Einstein et al., *Neighborhood Defenders: Participatory Politics and America's Housing Crisis* (2019)) (hereinafter "*Doing Better*"). They are demographically non-representative—often older, less racially and ethnically diverse, and likelier to own homes—compared to non-participants. Einstein et al., *supra*, at 101–03. They skew wealthier, too. *Doing Better*, at 5. Moreover, these processes are usually only open to *current* community residents, not prospective ones. *Overparticipation*, at 1130–31.

This participatory bias extends to substantive positions. Site-specific hearing participants overwhelmingly oppose new projects. EINSTEIN, *supra*, at 106. Just fifteen percent of them support new housing. *Id.* However, this opposition does not represent general community sentiment; for example, in one Massachusetts town, while eighty percent of voters supported affordable housing in a ballot referendum, at public hearings, just forty percent favored new housing. *Id.* at 108–09. Nearly two-thirds of mayors surveyed nationwide observed that, rather than being driven by public opinion, housing development is dominated by "a small group with strong views." *Id. at 111–12.* Thus, the more-representative public participation that occurs at the planning and regulation stages better reflects the Montana Constitution's goals for participatory democracy. *See* Rick Applegate, *The 1972 Montana State Constitution Declaration of Rights and the Opportunities on the Bumpy Road Ahead*, 43 PUB. LAND & RES. L. REV. 103, 116–17 (2020).

Second, lay citizens have a great deal to offer in the public engagement processes associated with planning and land-use regulations. They have deep knowledge of their community's strengths and challenges. *See Overparticipation*, at 1141. For instance, community members can tell planners if they have too few public parks, inadequate sidewalks, or need a better local business mix. The planning process translates this information into plans and regulations that build on community strengths and address challenges.

In contrast, public participation is often poorly suited for evidence-gathering on site-specific applications. *See Overparticipation,* at 1117–18. These cases present technical questions about road capacity, water and sewer sufficiency, school classroom space, and similar topics. Such questions are usually the subject of various, lengthy reports prepared by qualified experts. Because lay residents often lack expertise on these questions, it is well-documented that they instead routinely testify on matters of opinion irrelevant to the criteria. *Id.* at 1117–18.

Thus, the value of lay citizen input in planning and regulatory adoption suggests placing public participation at these stages is consistent with the Right to Participate.

Third, public participation at the planning and regulatory adoption stages more effectively protects property rights. A community-driven becomes a guide to local growth and development, and zoning and subdivision regulations codify the community's vision. Clear rules around property development increase property values. *See* Roderick M. Hills, Jr., & David N. Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 117 (2015) (citing Gary D. Libecap & Dean Lueck, *The Demarcation of Land and the Role of Coordinating Property Institutions*, 119 J. POL. ECON. 426, 446-50 (2011)). Comprehensive plans, zoning rules, and subdivision laws give landowners, prospective purchasers, developers, and citizens

certainty around what uses their land and adjacent property may be put to, and the process to build. *See Id.*

Conversely, public participation at the project-specific stage introduces uncertainty around property rights. Supplanting objective, expert review with a participatory process ensures landowners and the general public only that a prospective project's fate may be decided in a popularity contest. *See Overparticipation*, at 1118. Instead of establishing clear property rights, these processes instead have forced developers to bargain for neighboring landowners' support, lessen banks' willingness to finance projects, and offer community members little assurance of how their neighborhood will grow.

Although Montana's Right to Participate intended open, participatory government, its drafters surely did not intend to override fundamental rights to property. *See* Mont. Const. art. II, § 3. Interpreting the Right to Participate to ensure public participation at the planning and regulation stages, but not the site-specific application stage, of the development process appropriately harmonizes these important constitutional rights.

Fundamentally, locating participation at the policymaking level places input where it is needed most—and where it is most effective. A century of experience confirms as much. MLUPA well reflects this national experience, as discussed in the following section.

C. MLUPA Appropriately Locates "Continuous" Public Participation Requirements and Complies with Montana's Right of Public Participation

Lost amid the questions on this case's justiciability is the fact that local planners need guidance on when the Montana Constitution requires public involvement. Does a landowner's phone call, asking whether a use requires a permit, demand public notice and comment? Does submittal for a building permit require a hearing? These are not hypothetical questions in search of an advisory opinion.[5] Planning and zoning officials confront these scenarios daily. APA respectfully submits that a decision on the merits is needed in this case.

As the Court has explained, the Right to Participate requires "[t]he essential elements of . . . notice and an opportunity to be heard." *Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.*, 2008 MT 377, ¶ 21, 346 Mont. 507, 198 P.3d 219. Effectuating the Right to Participate, the legislature has provided a statutory right of participation only in decisions of "significant interest to the public," not "ministerial" functions. § 2-3-103, MCA. The procedures for

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[5] MAID correctly notes that : S.B. 121, 69th Leg., Reg. Sess., at 20 (Mont. 2025) (amending § 76-25-408, MCA) sunsets in 2027, meaning the public participation provisions of MLUPA now at issue will return then. APA respectfully submits that constitutional questions are properly before the court, and that waiting to address them will leave local government officials and the landowners who rely on their direction in the dark.

participation "must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments." § 2-3-111(1), MCA.

These provisions do not require public participation in every phase of the permitting process. Where there is "notice and opportunity to be heard" at the planning and regulation-setting stage, later approvals within the scope of the original process should not require further public participation. *Carbon Cnty. Res. Council v. Mont. Bd. of Oil & Gas Cons.*, 2016 MT 240, ¶¶ 22-24, 385 Mont. 51, 380 P.3d 798 (holding further well-permitting approvals consistent with originally contemplated impacts to be constitutional). Stated differently, a compliant process must involve the public during the initial assessment of policy impacts, and again later only if new or different impacts arise. *See Id.* That is what MLUPA does.

MLUPA, under S.B. 382, delivers the public participation the Montana Constitution demands. It appropriately locates and requires public participation before local governments can adopt the land use plan, future land-use map, zoning regulations, or subdivision regulations. §§ 76-25-106; 76-25-201(2)(a)-(b); 76-25-403, MCA. These are the processes through which local governments make land-use policy. *See* Section III.A., *supra*. There is no one right way to plan and zone a community, and MLUPA rightly requires public input before officials can make those decisions. *See Citizens for a Better Flathead v. Bd. of Cnty. Comm'rs*, 2016 MT 256, ¶¶ 44-49, 385 Mont. 156, 381 P.3d 555 (upholding planning process

similar to the one MLUPA requires).

MAID' wrongly characterizes land-use policy implementation as "largely discretionary." MAID appears to believe that a planner considering a site-specific application is tasked with making a judgment call on whether the proposal is a good idea or "right fit" at its proposed location. Yet this is not how land-use *administration* occurs. *See* Section III.A., *supra*. A planner assessing compliance with Helena's above-referenced lot size minimums, setback requirements, and height limits requires technical expertise—and such reviews can sometimes be lengthy. Helena Mont. Code of Ords., § 11-4-2, Table 2. But length and complexity are not discretion. A building either meets these objective requirements or it does not. A plat either meets the technical design standards for public streets and utilities or it does not. Under the typical code, a jurisdiction's requirements are no mystery, and planners, landowners, and neighbors alike all benefit from a shared understanding of what the code requires. MAID fears discretion that does not exist.

Further, as described in Section III.B, public participation is not well-suited to assist with site-specific determinations applying clear standards. At the policymaking level, public input and insight aids in determining the appropriate locations for commercial developments, the neighborhoods that should evolve or remain the same, and demands for parks and recreational facilities. Once localities

adopt regulations, however, public participation no longer serves the same *purpose*. No amount of testimony at a public hearing can, for instance, change whether a building is or isn't taller than the code's maximum height. If anything, inviting public participation on determinations like these disserves the public, potentially wasting community members' time and energy, by suggesting officials can exercise discretion that does not exist. It also exposes jurisdictions to legal risk: departures from adopted policy in the face of community opposition can and do lead to liability. *See, e.g.*, *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 US 252, 267 (1971); *Avenue 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 504-07 (9th Cir. 2016).

As discussed above, APA posits that MLUPA's continuous public participation requirements at the planning and regulation stages are sufficient—and public participation is unnecessary at the site-specific application stage—to satisfy either the Montana Constitution or sound planning principles. Nevertheless, S.B. 382 and Montana law generally provide safeguards to ensure *ample* opportunity for participation at later stages in the land-use process. First, any site-specific application constitutes a public record that, under the Montana Constitution and statute, may be reviewed by members of the public. Mont. Const. art. II, § 9; § 2-6-1003(1), MCA. The availability of public records ensures that, should a community member identify any matter of concern, they may seek further

participation opportunities through the appeal process identified below.[6]

Second, to the extent any site-specific application requires a variance or deviates from adopted regulations—which will have been developed with continuous public participation—additional public participation is required. § 76-25-305(4), MCA, § 76-25-408(7), MCA. Third, if a site-specific application complies with applicable regulation "but may result in new or significantly increased potential impacts that have not been previously identified and considered," the statute requires notice and an opportunity for further public participation. § 76-25-305(5)(a), MCA, § 76-25-408(8), MCA. Together, these provisions ensure that, if a site-specific application departs from the assumptions and deliberations of the participatory process in planning and zoning and subdivision adoption, an opportunity for further public participation will be available.

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[6] MAID protests that, under MLUPA, the public may not receive notification of pending projects. However, many Montana jurisdictions, as elsewhere, maintain online portals where any citizen can find information about pending projects. *See, e.g.*, City of Missoula, *Private Development Projects*, https://www.ci.missoula.mt.us/3230/Private-Development-Projects (last accessed Jul. 2, 2025); City of Billings, *Citizen Access*, https://services.billingsmt.gov/citizenaccess/ (last accessed Jul. 2, 2025). Even in places that do not maintain such services, planning departments routinely respond to citizen inquiries about pending projects.

Fourth and finally, MLUPA offers an opportunity for a party aggrieved to file an appeal, in which case the local planning commission must hold a *de novo* hearing. § 76-25-503(3)(a)-(c), MCA. A party aggrieved by the planning commission's decision can further appeal to the governing body for another *de novo* hearing. § 76-25-503(4)(a)-(c), MCA. And if the party is still aggrieved, they may seek judicial review. § 76-25-503(5)(b), MCA. Thus, MLUPA affords professional *planners* the authority, unencumbered by the continuous public participation required at the planning and regulatory adoption stages, to review and dispose of technical, site-specific applications using objective criteria. But, simply put, it also affords abundant opportunity for the public to participate and be heard if *any* aspect of an application departs from the assumptions and consensus of the planning and regulatory adoption processes—and even when an application does not so depart, yet a party is aggrieved by its approval.

IV. CONCLUSION

MLUPA appropriately locates public participation at the front, policy making and regulatory adoption, end of the land-use process, where planners and other officials can draw on best practices to solicit representative input to inform policy. That approach complies with Montana's constitutional and statutory requirements for public participation, and it further complies with best practices in

professional planning. For these reasons, APA respectfully requests that the Court find MLUPA constitutional.

DATED this 8th day of July, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Word for Microsoft 365 MSO is 4,597 words, excluding Certificate of Service and Certificate of Compliance.

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