Billings City Administrator Weekly Report

January 27, 2024

1. **Park and Recreation News –** The skating rink at Veterans Park has started to melt. As the daytime temperatures stay above 40 degrees the ice condition deteriorates. Park staff will no longer be opening the restrooms during the days. (Please see the attached chart showing the status of all the Park projects across the city.)

2. **Lutheran Family Services Meeting** – More to come - we anticipate receiving our first refugee family in early March.

3. **Public Safety Panel** – Tuesday evening, several neighborhood task forces held a joint meeting in the library community room to hear from six (6) panelists talk about community safety. Pastor and Chaplain Dave Thompson, councilmember Jennifer Owen, commissioner Don Jones, tribal government leader Darrin Old Coyote, Retired DEA Stacy Zinn and Dept. of Corrections, Katie Weston all discussed and answered questions focused on safety and crime prevention.

4. **Senator McGillvray** – Senator McGillvray has been appointed to the Governor's Property Tax Task Force. We met to discuss how the current property tax system effects Billings and local governments. We also shared ideas on how to shift the tax burden away from property owners to strengthen our economy and reward investment. Finance Director Zoeller and I am available to help Senator McGillvray anytime.

5. **School District 2 Safety Levy** – Chief St John organized a meeting between the city and SD2 leadership to discuss their May 2024 Safety Levy. Several areas work directly between SD2 and the city including radio communication systems, training, and additional school resource officers. SD2 is an excellent partner. Safety within our schools has a direct impact on the safety of our community. I suggest the city council pass a resolution supporting the levy after they provide a summary to the council.

6. **Built Environment Presentation** – Councilmember Gulick presented the impacts of quality design and walkability to a subcommittee of the chamber. The cost of services study, upcoming neighborhood plan updates and the new growth plan are all opportunities to strengthen the economic vibrancy of Billings.

7. **Council Orientation** – Yesterday's meeting and tour was focused on the airport and MET transit.

8. **Gravel Streets Program Summary -** Gravel streets are historic unpaved streets and remnants from older developments enveloped by City boundaries over time. Some of these streets were created when regulations didn't require the current day level of improvements or were created in the County. Gravel streets generally require substantial maintenance and typically do not have formal storm water collection systems. The current development standard for City streets through subdivision and development regulations require curb and pavement, sidewalks, and appropriate treatment for storm water runoff (quality and quantity). Paved streets require less maintenance and provide easier access to water valves and sewer manholes that aren't buried in gravel. Typically, paved streets thaw much more quickly than gravel streets and are more pedestrian and bicycle friendly. Paved streets with curb and gutter provide improved control of

stormwater that minimizes property flooding. The city is responsible for the DEQ MS4 permit (storm water discharge) and sediment coming from gravel streets impedes compliance with the permit. In certain situations, paving streets and bringing them up to current City standards may raise property values and provide a catalyst for redevelopment of the area. For example, we have observed new homes being constructed along newly paved streets in South Billings.

Public Works maintains a list of about 80 gravel streets within City limits. Remaining streets on the list are either difficult to construct, require substantial off-site storm drain extension to serve the street, or have had poor response to resident interest in an SID. About 28 of these streets have declined an SID through interest surveys. Some City funds are budgeted (SMD2 and Water funds), as many of these streets require water replacement due to the age of the water mains or have missing or undersized water mains unable to provide fire flow. SMD2 funds typically fund improvements related to non-addressed properties. Some recently improved gravel streets include Charles Street (commercial), Radford and W. Radford Square, Holiday Avenue (commercial), Park Lane, Stephens Lane, Ryan Avenue, Morgan Avenue, Ryan Avenue, Hillview Lane, and Vaughn Lane. Most of these streets had tangential improvements made to storm water facilities, and water mains that had frequent break history or substantial leaks. In other words, several deficient infrastructure elements were improved while paving the street.

Gravel street improvements are prioritized and recommended to Council based on the criteria found in City Resolution 18-10719 and 23-11171 that include one or more of the following:

- Citizen request
- Staff recommendations
- Coordination with other projects
- Along school walking routes
- Other public interest

In addition to citizen requests, we send out periodic surveys to residents with estimated costs to gauge interest in an SID. We try and group streets to obtain favorable bid prices and ensure focus isn't on one area of the city from year to year. Aside from citizen requested projects, the historic positive resident response rate to interest surveys is about 20% to create a project. Many surveys are sent before a project comes to fruition.

Why Hancock Drive and Arvin Lane - Currently, the Hancock Drive and Arvin Lane projects are the latest gravel streets proposed for improvement by SID. Hancock Drive is a short gravel street that drains onto Poly Drive and was a citizen requested project. The nearby Arvin Lane project was prioritized based on the proximity to Hancock Drive and a positive response to an SID interest survey. Arvin Lane has an undersized, 1966 2-inch copper water "main" serving residential homes. Current DEQ regulations require a minimum 8-inch main for water mains to provide fire flow. Staff realizes both streets are cul-de-sacs, but both projects meet one or more of the criteria to improve a gravel street. Based on the recent Council discussion on the overall benefit of improving a cul-de-sac, staff will review the criteria that is currently used to prioritize streets, which will likely result in cul-de-sacs being prioritized lower. Citizen requests may still be considered a priority, but we will also review the other public benefits of these projects. Benefit may take on many forms and will include review of maintenance costs, number of homes or businesses served by the street, cost of off-site improvements, potential improvement to pedestrian connectivity,

sediment runoff on adjacent streets, and proximity or connection to Safe Routes to School plan elements.

Recommendation - Staff recommends further discussion with Council on the Gravel Streets Program during the budget process. Staff will bring the draft budget forward based on the current approved CIP that contains the Gravel Street Program. During budget discussions, staff can review with Council the merits of continuing to invest in the gravel streets program as-is or changes that could occur to the program, and Council can decide on the direction forward.

9. **Case DV-16-2023-0001248-DK – Montanans Against Irresponsible Densification, LLC vs. State of Montana –** In early December, a complaint was filed against the State regarding the constitutionality of SB 323 (Trebas), SB 528 (Hertz), SB 245 (Zolnikov) and SB 382 (Mandeville). The League opposed the first three of these bills but helped draft and lobby for passage of the latter.

   On December 29, Judge Salvagni in the Eighteenth Judicial District (Gallatin County) issued a preliminary injunction against the implementation of SB 323 and SB 528. SB 323 required municipalities with a population of 5,000 or more to allow a duplex as a permitted right in all zones where single-family residential is a permitted use. SB 528 required every municipality in Montana to allow an accessory dwelling unit of a certain size as a permitted right on every lot with a single-family home.

   - If a municipality has not already enacted any changes to their zoning ordinance to comply with these laws, they are now held in abeyance, and the city does not need to do anything at this time.
   - If a municipality has already codified these required changes into its zoning ordinance and this reflects the desired policy of the city or town, then the city does not need to do anything at this time.
   - If a municipality has already codified these changes into its zoning ordinance but would not have otherwise made these changes absent the passage of SB 323 or SB 528, and the city does not agree with the policies required therein, the city may take steps to repeal or hold such ordinance in abeyance until the lawsuit is resolved.

   As to SB 245 and SB 382, both laws remain effective at this time and those municipalities to which they apply must take steps to come into compliance with these laws as set forth therein. (Please see attached the Housing Litigation Update, the Decision and Order, and the First Amended Complaint regarding Case DV-16-2023-0001248-DK – Montanans Against Irresponsible Densification, LLC vs. State of Montana.)

10. **City of Billings Grant Funding Update –** Please see the attached grant update on the Billings Fire Station #7.

11. **Board & Commission Annual Report –** Please see the attached annual report for the Citizen Police Advisory Committee.

12. Next Week's Meetings/Task Forces

a. Council Operations Committee, Thursday, February 1st, 4:00 PM, City Hall Conference Room.

13. 2024 Council Meeting Schedule – Please see the attached Council Meeting schedule for upcoming items on the agenda.

14. New City Hall Update –

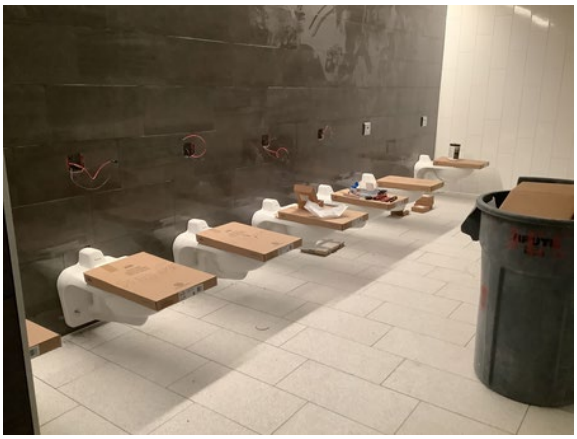
5th Floor
Install acoustic ceiling tile borders.
Sand out acoustic panels in the council chambers.
Hang sheetrock on exterior walls.
Metal stud framing at exterior walls.
Insulation and vapor barrier at exterior walls.
Install plumbing fixtures in main restroom group.
Casework installed.
Install light fixtures in restrooms.
Security and access control wiring started.
Data cable being pulled on north end.
Welding pipe for heat exchanger in fan room.
Installing of new air handler and HVAC trim out.

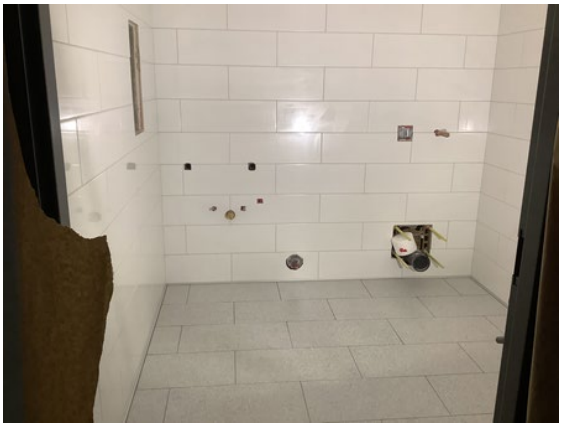
4th Floor
Pour housekeeping pad for air handler.
Insulate hard lids.
Install wall and floor tile in single use restroom.
Install light fixtures in ceiling grid.
Land wire in electrical panels.
Window replacement on south and west elevations.

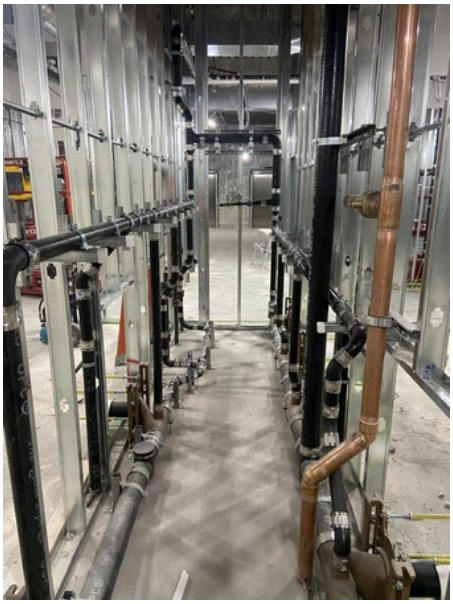
2nd Floor
Run home run conduit.
Pull home run wire to electrical panels.
Lighting control and light fixture boxes.
Taping and sanding walls on north end.
Inspection signed off for above hard lids.
Prep and paint Hollow metal frames north end.
Paint soffits around grand stairs.
Mask off Hollow metal frames for wall primer and paint.
Fur out framing at elevator lobby south wall.
Install dampers in mixing boxes under windows.

1st Floor
Hydronic piping to VAV's.
Overhead waste and vent piping.

Pick up framing north and south end.
HVAC overhead rough in.
Seal and paint mixing boxes.
Wall framing inspection signed off.
Electrical Inspection signed off.







15. City Communications –

Your City – The New City Hall
https://youtu.be/3fdCq_EN8Ao?si=9aVnYKMlVGRIoYtk
Billings Fire Department announces 2024 tour dates
https://www.billingsmt.gov/CivicAlerts.aspx?AID=2562
Billings Parks and Rec introduces new tennis program: Love Serving Autism
https://www.billingsmt.gov/CivicAlerts.aspx?AID=2568
Billings PD Weekly Brief
https://www.facebook.com/photo?fbid=769455415216239&set=a.226302889531497

BPD
Hundreds of counterfeit bills dumped in Billings
https://www.kulr8.com/news/hundreds-of-counterfeit-bills-dumped-in-billings/video_a93c6624-bb84-11ee-8246-5ba508fc460b.html
Feels fake, looks real: Thousands of dollars in counterfeit 100 bills dropped in Billings streets
https://www.ktvq.com/news/local-news/feels-fake-looks-real-thousands-of-dollars-in-counterfeit-100-bills-dropped-in-billings-streets

PRPL
Billings Parks and Recreation gears up for introducing major renovations to public parks
https://www.kulr8.com/montana/billings-parks-and-recreation-gears-up-for-introducing-major-renovations-to-public-parks/article_3b5f8562-bac3-11ee-8e57-efe3e1bda2ba.html

MET
MET Transit uses a bus simulator to train drivers prior to driving electric buses this summer
https://www.kulr8.com/montana/met-transit-uses-a-bus-simulator-to-train-drivers-prior-to-driving-electric-buses-this/article_9104cfc6-b6f0-11ee-a0f5-a7871db36718.html
Guns on public transit?
https://watch.montanapbs.org/video/208-guns-on-public-transit-new-wolf-management-uefile/

In other news…
Point in Time Count typically shows about 600 homeless in Billings
https://www.ktvq.com/news/local-news/point-in-time-count-typically-shows-about-600-homeless-in-billings
Community leaders talk stopping crime in Billings
https://www.ktvq.com/news/local-news/community-leaders-talk-stopping-crime-in-billings
Yellowstone County leaves Code Red for Everbridge for emergency alerts
https://www.ktvq.com/news/local-news/yellowstone-county-leaves-codered-for-everbridge-for-emergency-alerts
RiverStone Health conducting survey to gather thoughts on vaccinations
https://www.billingsmt.gov/CivicAlerts.aspx?AID=2569

Januray 25th, 2024 progress report

Park	Progress Started ----------> Project Completed	Status *updated information for this week
Arrowhead playground replacement		Project complete final payment invoice submitted
Castle Rock playground addition		Warrantied swing set parts received, swing set reinstalled on 1/5/23
Castle Rock parking lot & restroom		Design chosen, awaiting consultant to begin documentation
Central tennis courts replacement		Submitting LWCF paperwork for project reimbursement
Comanche playground replacement		Playground complete and open to the public
Cottonwood Park masterplan		Presented at November 8th Park Board meeting and approved for recommendation to City Council
Coulson Park South Improvements		Received approval from US Army Corps of Engineers, proceeding with design
Gorham irrigation automation		Pump station being shipped by manufacture for installation
Grandview irrigation automation		Advertised twice, no bids both times, rebid at a later date
Highland playground replacement		Playground equipment was delivered, installer under contract for Fall completion
Millice irrigation automation		Sealed bids opened, project over budget, rebid at a later date
North Park adult exercise & shelter		Building permit application was returned 12/21/23, working with consultant on corrections
North Park playground replacement		Old playground equipment removed, sight cleared in preparation for install of new playground
North Park restroom replacement		Concrete restroom placed on pad 12/8/23, Contractor continuing work to connect all services to building
*Pioneer Park tennis courts replacement		*Met with consultant to review 65% CD's 1/23/23, schedule 95% review for 1/30/23.
*Poly Vista inclusive playground and parking lot		*Bidding closed 1/16/23, Project received 5 bids.
Ponderosa irrigation automation		Final walkthrough complete, system fully operational
Rose Park pool spray equipment replacement		Spray equipment delivered, contractor being scheduled for installation
Skypoint sail replacement		Structural Engineer's report completed, proceeding with recommended repairs prior to painting
Aquatic Facility Assessment		Consultant performed on site visits and are compiling information for assessment

PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

Local Government Interim Committee

68th Montana Legislature

TO: Local Government Committee Members

FROM: Julie Johnson, Staff Attorney

RE: Housing Litigation Update – Overview

DATE: January 10, 2024

Montanans Against Irresponsible Densification, LLC v. State (DV-23-1248C):

Montanans Against Irresponsible Densification, or MAID, has filed suit against the State challenging the constitutionality of the following pieces of legislation passed in the 2023 session:

- Senate Bill 382, the Montana Land Use Planning Act, which requires a municipality with a population at or exceeding 5,000 located within a county with a population at or exceeding 70,000 to comply with the Act.
- Senate Bill 245, which requires cities of 7,000 residents or more to allow apartment-style housing in most areas set aside as commercial zones.
- Senate Bill 323, which requires cities to allow duplex housing on any home lot in cities with 5,000 residents or more.
- Senate Bill 528, which requires cities to adopt regulations allowing more construction of accessory dwelling units, or secondary housing structures that share parcels with larger homes.

MAID describes itself as a group of members from various Montana cities who live in neighborhoods “characterized by single-family homes, attractive well-maintained yards, and quiet streets.” MAID argues that the new housing laws, aim to impose “top-down ‘densification’” that will force them to live in more densely populated areas with larger buildings, more traffic and “any number of other changes that spur uninterrupted development under the guise of affordable housing.”

MAID also argues that the zoning bills represent an intrusion by the Legislature into municipal government’s traditional control over development policy and that the land

use planning act violates the Montana Constitution's right of participation, which requires government entities to provide the public with "reasonable opportunity for citizen participation" in decision making.

The Plaintiffs are seeking the following relief:

A declaratory judgment that the provisions of SBs 323, 528, 245 and 382:

- may not be used by any person or governmental entity to invalidate or displace covenants that are more restrictive than those developed by Montana's municipal governments.

- are facially unconstitutional in violation of Montana's constitutional provisions regarding rights of public participation and rights "to know";

- That any attempt by municipalities to develop an ordinance pursuant to SB 323, SB 528, SB 245 and SB 382 is unconstitutional because they deny Plaintiffs their rights to equal protection of the law;

- That any attempt by municipalities to develop an ordinance pursuant to SB 323, SB 528, SB 245 and SB 382 is unconstitutional because they deny Plaintiffs their rights to due process of law.

2. A permanent injunction, enjoining the State of Montana and its municipalities from implementing SB 323, SB 528, SB 245 and SB 382.

3. A preliminary injunction, preliminarily enjoining the State of Montana and its municipalities from implementing SB 323 and SB 528, both of which are scheduled to take effect January 1, 2024, and preliminarily enjoining SB 245 which purported to go into effect on passage, and purports to be retroactive.

4. An order awarding Plaintiffs their costs and attorneys' fees.

On December 29, 2023, following a show cause hearing the day before, the District Court issued a preliminary injunction enjoining the implementation of SB 323 (legalizing duplexes) and SB 528 (legalizing accessory dwelling units) on residential land across the state. The District Court ruled that these two laws would do "irreparable" damage to residents of single-family neighborhoods. The case in ongoing.

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

* * * * * * * * * *

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC, Plaintiff, vs. STATE OF MONTANA, Defendant.	)	Cause No. DV-23-1248C **DECISION AND ORDER RE: PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER/ PRELIMINARY INJUNCTION AND PRELIMINARY INJUNCTION**

On December 15, 2023, Plaintiff Montanans Against Irresponsible Densification filed a Complaint seeking declaratory and injunctive relief regarding four measures passed in 2023 by the Montana Legislature. On December 19, 2023, Plaintiff filed a First Amended Complaint and Motion for Temporary Restraining Order/Preliminary Injunction. The Motion is supported by the affidavit of Glenn Monahan, managing member of Plaintiff LLC.

On December 19, 2023, Plaintiff filed a Brief in Support of Motion for Temporary Restraining Order/Preliminary Injunction. On December 21, 2023, the Court issued a Show Cause Hearing on the Motion for Temporary Restraining Order/Preliminary Injunction. On December 27, 2023, the State filed Defendant's Brief in Opposition to Motion for Restraining Order and Preliminary Injunction.

On December 28, 2023, the Court held a show cause hearing. James H. Goetz and Brian K. Gallik represented Plaintiff. Alwyn Lansing and Thane Johnsons represented the State. No testimony or physical evidence was presented. The parties agreed to proceed on the basis of their

arguments to the Court. On December 29, 2023, the parties filed proposed Orders with the Court. From the Court's review of the parties' briefs and consideration of counsels' arguments at the show cause hearing and the proposed Orders submitted by the parties on December 29, 2023, the Court is fully advised.

INJUNCTIVE RELIEF

In 2023, the Montana Legislature amended the preliminary injunction statute, now codified as § 27-19-201, MCA. In essence, an applicant for a preliminary injunction must establish that (a) it is likely to succeed on the merits, (b) it is likely to suffer irreparable harm in the absence of preliminary relief, (c) the balance of equities tips in the applicant's favor, and (d) the order is in the public interest. The new law provides that the applicant bears the burden of demonstrating the need for an injunction order. Section 27-19-201(3), MCA, further specifies that it is the intent of the Legislature that the Montana standard "mirror" the Federal preliminary injunction standard. *Id*., subsection (4).

Plaintiff moved this Court for a "temporary restraining order and/or a preliminary injunction." Plaintiff served notice of its intention to file that Motion upon the State on December 18, 2023, with a request for the State's position on that Motion. Ct. Doc. 4. According to Plaintiff, the State did not respond to Plaintiff's inquiry. However, on December 27, 2023, the State filed its Brief in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction. The State appeared and fully participated in the show cause hearing.

At the conclusion of the hearing, the State suggested that the Court could issue a temporary restraining order (TRO) for 10 days, and it would/may stipulate to a longer period, in anticipation of another hearing on Plaintiff's motion. The State's position confuses the statutory scheme governing issuance of a temporary restraining order, without notice, with an Order on an

application for a preliminary injunction where both parties (1) have notice; and (2) participate in that hearing. See, § 27-19-316, MCA. Section 27-19-314, MCA, provides: "Where an application for an injunction was made upon notice or an order to show cause, either before or after an answer, the court or judge may enjoin the adverse party, until the hearing and decision on the application, by an order which is called a temporary restraining order."

Here, notice of the application for preliminary injunction was served upon the State nearly 10 days before the hearing, no injunction was issued, temporary or otherwise, and the State fully participated in the hearing. The application was made, no temporary restraining was issued, a show cause Order was issued[1], a hearing was held, and the State appeared and defended. If Plaintiff has established the criteria for a preliminary injunction under § 27-19-201, MCA, a preliminary injunction may be issued by the Court. See also, §§ 27-19-316, 317, 318, MCA, (governing orders issued without notice). Having appeared and defended, the State's remedy with respect to a preliminary injunction issued by the Court is § 27-19-401, MCA ("Application to dissolve or modify injunction.")

The purpose of preliminary injunctive relief is "to so protect the rights of all parties to this suit, that, whatever may be the ultimate decision of these issues, the injury to each may be reduced to the minimum". *Porter v. K&S Partnership*, 192 Mont. 175, 182, 627 P.2d 836, 840 (1981). In *Porter* the Court made it clear that the function of a temporary restraining order is to maintain the "status quo" pending a decision on the merits of the controversy.

Accordingly, because there was a hearing, this Court deems this matter suitable for

[1] The Court's Show Cause Order states "IT IS ORDERED that all Parties shall appear before this Court on the 28 day of December, 2023, 1:30 o'clock, PM, at which time, the Defendant will have the opportunity to show cause why the preliminary injunction or temporary restraining order should not be granted." At the show cause hearing, Plaintiff acknowledged that this was in err and the burden rests with Plaintiff.

consideration of the issuance of a preliminary injunction, as opposed to a temporary restraining order.

BACKGROUND

According to Plaintiff's Complaint, Plaintiff is a limited liability corporation whose members are residents of various Montana cities, including Bozeman, Whitefish, Kalispell, Missoula and Billings. The members generally reside in areas zoned for single-family uses.

The challenged measures were purportedly enacted to address Montana's affordable housing problem, but Plaintiff argues these measures do not directly address that problem and, in fact, even if allowed to go into effect, will hardly make a dent. Plaintiff argues these measures attempt to impose top-down "densification" unto certain defined cities.

Two of the challenged Acts are scheduled to take effect on January 1, 2024. They are SB 323, now codified as § 76-2-304(3), (5), and § 76-2-309, MCA, and SB 528, now codified as § 76-2-345, MCA. SB 323 requires that affected municipalities of at least 5,000 in population allow duplexes in areas now zoned for single-family residences. SB 528 will require all cities to allow "accessory dwelling units" on lots located in all areas now zoned for single-family residences.

Although these two measures are the ones subject to the present motion for preliminary injunction, Plaintiff argued that they need to be considered along with a much more sweeping revision of Montana's subdivision and zoning laws, SB 382, called "The Montana Land Use Planning Act". SB 382 was also passed by the 2023 Montana Legislature. It requires certain local governing bodies to engage in massive overhauls of their subdivision and zoning regulations. It gives affected cities up to three years after the effective date (until May, 2026) or up to five years after the date the city's growth plan was adopted, to implement the new Act, whichever is later. Accordingly, the affected cities are required to move forthwith, undertaking these massive

alterations to regulations and procedures.

STANDING

At the outset, the State argues Plaintiff lacks standing to bring this case, arguing Plaintiff offers only generalized fears and speculation about the effects of these challenged laws. State relies mainly on *Mont. Immigrant Justice All v. Bullock*, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430, arguing that the alleged injury must be "concrete", meaning actual imminent and not abstract, conjectural or hypothetical." However, the *Immigrant Justice* case actually found standing on the part of the Association to represent its members, based on allegations in the complaint, similar to the Complaint involved in this case. *See* First Amended Complaint, ¶ 32. *See also Immigrant Justice*, 2016 MT 104, ¶ 19, citing *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 43, 360 Mont. 207, 255 P.3d 80, for the broad proposition that an association has standing to bring suit on behalf of its members even without showing an injury to the association itself, as long as at least one the members has standing to sue in his or her own right.

To establish constitutional standing, one or more plaintiffs must have a "personal stake in the outcome". *Heffernan*, ¶¶ 28-29. The "irreducible constitutional minimum" of standing requires: (1) an injury in fact, i.e., past or threatened injury; (2) causation; and (3) redressability. *Heffernan*, ¶ 32.

This is a threshold issue but it is a low threshold, particularly in the constitutional arena. Because "Montana's Constitution is to be broadly and liberally construed[,]" courts reject "hypertechnical" standing complaints and will hear claims brought by "anyone" with a "true stake" in a challenged government action. *Fleenor v. Darby Sch. Dist.*, 2006 MT 31, ¶ 8, 331 Mont. 124, 128 P.3d 1048, *overruled in part by Schoof v. Nesbit*, 2014 MT 6, 373 Mont. 226, 316 P.3d 831 (taking an even more expansive view of citizen standing); *see also*, *e.g.*, *Brown v. Gianforte*, 2021

MT 149, 404 Mont. 269, 488 P.3d 548.

In *Committee for an Effective Judiciary v. State*, 209 Mont. 105, 679 P.2d 1223 (1984), for example, a group of voters challenged the constitutionality of a judicial election law. Like this case, the State attempted to avoid judicial review by arguing the plaintiffs were not "sufficiently affected" to claim any real injury. *Id.* at 108.

The Montana Supreme Court disagreed, avowing that Montana courts will not "ignore the rights of citizens to assert the public interest in challenging the legality of legislative action that allegedly flies in the face of our state constitution." *Id*. at 111. This is "particularly so where the constitutional provision is intended to benefit the public as a whole . . . ." *Id.* The Montana Supreme Court found the Framers were concerned, not with conferring benefits on individual judges or candidates, but with safeguarding the judicial system for the public good. *Id.* at 109. Ensuring the integrity of such essential public institutions is a matter of public interest that confers, on interested private citizens, "standing to assert that public interest by contending that the constitutional provision has been the victim of legislative strangulation." *Id.* at 108.

For these reasons, this Court concludes, solely on an interim basis and for purposes of deciding the issue of an interim injunctive relief, that Plaintiff has standing to bring this action.

PROBABILITY OF IRREPARABLE INJURY

Plaintiff argues, supported by the affidavit of Glenn Monahan, that its members will suffer irreparable injury if interim injunctive relief is not granted. In essence, Plaintiff is concerned that, should these challenged measures not be enjoined, they could wake up one morning to find that, without any notice at all, a new duplex or ADU ("Accessory Dwelling Unit") is going up next door in their previously peaceful and well-maintained single-family neighborhood. *See* Monahan Affidavit, ¶¶ 4-9. This threatened injury is sufficient to establish the probability of irreparable

injury for purposes of issuing interim injunctive relief.

SB 528 is a law requiring all cities to allow ADUs in areas previously set aside for single-family use. Section One of that Act requires a municipality to adopt regulations "that allow a minimum of one accessory dwelling unit by lot or parcel that contains a single-family dwelling." At first glance, Section One appears to allow some breathing space because it requires a municipality to "adopt regulations", which would take some time. However, Section Five of that dispels any notion that there is any breathing space. Section (5) provides:

> (5) a municipality that has not adopted or amended regulations pursuant to this section by January 1, 2024, must review and permit accessory dwelling units in accordance with the requirements of this section until regulations are adopted or amended. Regulations in effect on or after January 1, 2024, that apply to accessory dwelling units and do not comply with this section are void.

SB 528, Section (5).

Accordingly, the consequences of this measure are imminently threatening. An examination of other features of SB 528 buttress Plaintiff's claim of irreparable injury. For example, SB 528, Section (2) says that a municipality may not require additional parking to accommodate ADUs or require fees in lieu of additional parking, assess impact fees in connection with new ADUs or require improvements to public streets as a condition for permitting ADUs, set maximum building heights, minimum set back requirements, minimum lot sizes, and other conditions which are typically imposed by cities as conditions for ADUs.

The same is true of SB 323, now codified as § 76-2-304(3), MCA, which goes into effect January 1, 2024, and simply states that "duplex housing must be allowed as a permitted use on a lot when a single-family residence is a permitted use." Thus, without further notice, hearing or other review, a duplex can go up in the neighborhood.

The State argues that this threat is insufficient to establish the likelihood of irreparable

injury, arguing that Plaintiff must adduce evidence that there is actually an imminent threat by a developer who begins construction in a single-family neighborhood. The law is not so rigid. For example, in the standing context, the court in *Heffernan* found that past or "threatened" injury is sufficient to support standing. That concept applies here to irreparable injury. *See Palmer Steel Structures v. Westech Inc.*, 178 Mont. 347 ("therefore if further proceeding or arbitration proceeding are allowed, or not enjoined, Palmer faces a real threat of **irreparable injury**. Allowing the arbitrators to make decisions might have the effect or rendering the District Court judgment ineffective...with additional cost to the parties and a multiplicity of proceedings, judicial or otherwise.) (emphasis added); *Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, LLC*, 810 MT 63, 355 Mont. 387, 228 P.3d 1134 ("the flexible nature of equitable principles allows Neighbors to attempt to establish a prima facie case for a preliminary injunction by showing 'that it is at least doubtful whether or not [they] will suffer irreparable injury', citing *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 14, 334 Mont. 86, 146 P.3d 714"); *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (irreparable injury factor satisfied if Plaintiff will experience harm that cannot be compensated after the fact by monetary damages, **even if harm is not certain to occur**) (emphasis added.).

The State also argues that the Court should be dubious about Plaintiff's claim of urgency given its delay in filing its motion for interim injunctive relief. Although the delay may be a factor to be considered, any "delay" here was, as explained by Plaintiff's counsel, largely due to the extreme complexity of the issues presented by the four challenged measures. The Court accepts that explanation given the obviously complex nature and interaction of the measures challenged. Plaintiff argued that the applicability of the challenged measures is chaotic and uncoordinated. For example, SB 382 applies to all Montana municipalities with a population of at least 5,000 residents,

located in counties with at least 70,000 residents. SB 323, requiring that duplexes be allowed in single-family zoned areas, applies to cities with a population of at least 5,000, but does not have the county population of 70,000 qualifier, that is in SB 382. SB 528, requiring the allowance of ADUs, applies to **all** Montana cities.

Any threat to the deprivation of fundamental rights, such as the right of free speech, constitutes, for purposes of a preliminary injunction, irreparable injury *per se*. *See Elrod v. Burns*, 427 US 347, 373 (1976); *Planned Parenthood Assoc. of Cincinnati v. City of Cincinnati*, 822 F.2d 1390, 1400 (1987).

PROBABILITY OF SUCCESS ON THE MERITS

The function of a preliminary injunction is to preserve the *status quo ante*. Although, at the preliminary injunction stage, a court must deal with the merits of a moving plaintiff's claim, it is not the function of a court to resolve these claims with finality. Rather, a court must look at these claims solely with a view, based on a summary examination, that a plaintiff has a likelihood of succeeding on the merits. *See Benefis, supra*. Thus, the following analysis may not be construed as an ultimate determination on the merits, but only as an expedited examination of whether the claim is sufficient to merit an issuance of interim injunctive relief. With that in mind, this Court concludes that Plaintiff has demonstrated a probability of success on the merits.

On Count I, seeking a declaratory judgment that new zoning changes will not displace private restrictive covenants that are more restrictive than the new zoning, Plaintiff is likely to succeed. First, the new laws, themselves, do not purport to displace or supplant those areas subject to covenants more restrictive than the zoning amendments required by the new laws. In fact, SB 528(2)(i) actually provides that this law "may not be construed to prohibit restrictive covenants concerning accessory dwelling units entered into between private parties…".

Restrictive covenants are protected by both the Montana and United States Constitutions. Montana's Constitution provides in Article XI, Section 31 that the State may not make any law "impairing the obligation of contracts". Likewise, the US Constitution, Article I, Section 10 provides that no state shall enact any law "impairing the obligation of contracts".

Plaintiff is likely to prevail on the merits of this claim. That is, Plaintiff will likely obtain a declaratory judgment simply stating that, whatever these new zoning laws say regarding municipal zoning, they do not displace private restrictive covenants that are more restrictive.

Plaintiff argues that two classes, otherwise similarly situated, are treated differently on an arbitrary basis. One class constitutes those homeowners who are protected by private, restrictive covenants. The other class is those who are absolutely similarly situated, and in fact, live just across the street in some circumstances, and have no such protections. Plaintiff argues that such arbitrary distinction, unrelated to the purported purpose of mitigating the shortage of affordable housing, is arbitrary and cannot stand.

Plaintiff argues that this Court should apply the strict scrutiny test because Plaintiff's "inalienable rights" of "acquiring, possessing, and protecting property, and seeking their safety, health and happiness…" are threatened. These rights are found in Montana's Declaration of Rights, Article II, Section 3. The court stated in *Butte Community Union I,* 219 Mont. 426, 428, 712 P.2d 1309, 1310 (1986), that any rights found within Montana's Declaration of Rights (Mont. Const., Article II) are fundamental because they are so designated in Article II. Thus, any threatened infringement of these rights triggers strict scrutiny review. *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1977).

Plaintiff further argues that, at least, mid-tier scrutiny should be applied under *Butte Community Union I*, *supra*.

Finally, Plaintiff argues that unlike the federal "rational basis" test, Montana has applied a more meaningful standard, i.e., a standard with teeth. *See e.g.*, *Jacksha v. Butte-Silver Bow County*, 2009 MT 263, ¶ 21, 352 Mont. 46, 214 P.3d 1248. Plaintiff points out that even the less rigorous Federal Equal Protection rational basis test has been applied by the US Supreme Court to strike down an arbitrary zoning classification, citing *City of Cleburne v. Cleburne Living Center*, 473 US 432 (1985).

This Court need not, at this interim stage, resolve which standard of review applies. Suffice it to say, that by any of these equal protection scrutiny standards, there is at least a probability that Plaintiff will prevail on the merits. The result of the new laws is that two different sets of people, one protected by restrictive covenants, the other not, results in an arbitrary application of Montana law which is unrelated to any legitimate governmental purpose. As a consequence, Plaintiff is likely to succeed on the equal protection claim.

Plaintiff's Complaint, in Count IV also alleges violations of due process. It cites *Newville v. Dep't. Family Services,* 267 Mont. 237, 883 P.2d 793, 802 (1994):

> Substantive due process primarily examines underlying substantive rights and remedies to determine whether restrictions are unreasonable or arbitrary **when balanced against the purposes of a government body in enacting a statute, ordinance or regulation**.

Town & Country Foods, Inc. v. City of Bozeman, 2009 MT 72, ¶17, 349 Mont. 453, 203 P.3d 1283 (citations omitted, emphasis added).

In *State v. Sedler*, 2020 MT 248, ¶ 17, 401 Mont. 437, 473 P.3d 406, the Montana Supreme Court, quoting *State v. Webb*, 2005 MT 5, ¶ 22, 325 Mont. 317, 106 P.3d 521 stated:

> The essence of substantive due process is that the State cannot use its police power to take unreasonable arbitrary or capricious action against an individual. In order to satisfy substantive due process guarantees, a statute enacted state's police power must be reasonably related to a permissible legislative objective.

Federal constitutional case law supports Montana's analysis. In the zoning arena, the lead case is *Moore v. East Cleveland*, 431 US 494 (1977). In *Moore*, applying rational basis review, the court invalidated a discriminatory zoning ordinance that applied to the housing of family members.

Plaintiff demonstrated many examples of how these new statutory provisions to promote "densification" may violate substantive due process.

First, there appears to have been no coordination within the Montana Legislature on these various land use measures. As a consequence of its efforts to promote "densification", there are apparent contradictions and irreconcilable differences among these measures. For example, SB 382 requires affected municipalities to select five housing "strategies" out of a list of 14. Of those fourteen listed strategies, the first listed is the allowance of "duplexes" in all areas zoned for single-family dwellings. However, SB 323 **requires** the allowance of duplexes in all affected cities in all areas zoned as "single-family". Each of these measures has its own separate definition of "duplex" and these definitions are different. Compare the two definitions in § 76-25-103(36) and § 76-2-304(5)(a), MCA.

A similar apparent contradiction exists between SB 382 and SB 528. In SB 382, Section 19, one of the "strategies" of the 14 out of which five must be selected, is to "allow, as a permitted use, for at least one internal or detached accessory unit on a lot with a single-unit dwelling occupied as a primary residence." *See* SB 382, Section 19(e), (§ 76-25-302(e), MCA). But SB 528 requires **all** cities in Montana to allow accessory dwelling units on all lots or parcels designated as single-family.

Plaintiff asserts that these and other problems indicate that little thought, and certainly little coordination, was given to what appears to be the frantic rush for "densification" of Montana's

cities.

The effort by the Montana Legislature to write an entirely new review and approval regime for zoning, subdivisions and annexation, may have resulted in pervasive arbitrariness which runs afoul of both the Equal Protection and the Due Process clauses of the Montana Constitution. For example, as Plaintiff's counsel argued the cities of Hamilton and Polson both have populations of over 5,000, but they are not located in counties of at least 70,000 in population. The cities of Columbia Falls, Whitefish, and Laurel, on the other hand, all of over 5,000 residents, **do** sit in counties of over 70,000 in population. There does not appear to be any reason in public policy or in the professed justification of addressing affordable housing that supports the entirely arbitrary distinctions between these similarly-situated cities. Yet one set is obligated to comply with the burdensome strictures of SB 382, while the other set is not. In the meantime, the newly-enacted SB 323, requires "duplexes" in all cities of 5,000 with no caveat that such cities must be located in counties of at least 70,000 in population. Also, SB 528 requires **all** Montana cities to allow "accessory dwelling units" in areas now zoned for single family use. However, both SB 323 and SB 528 are codified in Title 76, Chapters 2, Part 3, but SB 382's "applicability" section, Section 5(d)(4), makes it clear that those local governments complying with SB 382 are not subject to the provisions of Title 76, Chapters 2, 3, 4, and 8.

Although one of the professed purposes of SB 382 is to "streamline" the subdivision review process and make it more understandable to the public, it appears that it does just the opposite particularly in combination with SB 323 and SB 528. The double standard alleged above is even more pronounced on the subdivision issue. Present law deals with local review of subdivisions in § 76-3-101, MCA. Ironically, its short title is: "**The Montana Subdivision and Planning Act**". Now, Montana has a separate new law in SB 382. Its title is: "**Montana Land Use Planning**

Act". *See* § 76-25-101, MCA. Both chapters purport to deal with local review and approval of subdivision applications. The result is a great deal of confusing redundancy, which is the antithesis of "streamlining". For example, the new law (SB 382) has a definition section at § 76-25-103, MCA, but so does the old subdivision law at § 76-3-103, MCA. The old, but still existing, law has definitions for "minor subdivision", "phased development" and "planned unit developments" (§ 76-3-103(4), (10), and (11), MCA). However, no identical definitions are in the new SB 382 at § 76-25-103, MCA.

It appears that the disparity in treatment between those protected by restrictive covenants and those not so protected, and the chaotic, uncoordinated, and arbitrary applicability requirements in these various new laws are so arbitrary and capricious and so unrelated to a legitimate governmental purpose that they likely constitute a denial of Plaintiff's rights to Due Process of Law.

Also, Plaintiff has established that one of the main intents behind the new measures was to cut back on public participation at the project-specific stage—i.e., the stage at which new developments most imminently threaten Montana's living in single-family neighborhoods. Instead, Plaintiff argues the intent of the new set of laws is to "front load" public comment at the land use plan development stage and to cut it back later.

In fact, with respect to the two measures scheduled to take effect on January 1, 2024, SB 323 and SB 582, there is no public participation at all. At the hearing, the Court questioned State's attorney about whether she agrees that SB 528(5) compels municipalities to permit ADUs immediately, notwithstanding that the municipality has not yet adopted regulations to implement SB 528. The State so conceded. However, in response to the question about where the public participation is allowed in that process, the response was equivocal and not persuasive and

suggested that it was during the legislative process in the adoption of these new laws.

The State cites Section (6)(1) of SB 382 arguing that there is plenty of public participation provided in that Statute. However, that Section applies to the development of a "land use plan" and fits exactly into what Plaintiff is arguing. That is, that this is an effort to "front load" public comment, in contrast to "site-specific" development, where public participation must "be limited". *See* § 76-25-106(4)(d), MCA.

Moreover, it appears that this public participation "front loading" is discriminatory. It applies only to those qualifying cities (i.e. those of over at least 5,000 residents in counties of a population of over 70,000). There is no reason in public policy that the fundamental rights of persons residing in Columbia Falls and Kalispell (to participate in deliberations of the government) are less, than those in Polson, a city of 5,000, but not in a county of 70,000.

The Court concludes Plaintiff has a likelihood of success on the merits of the issues under Article II, Sections 8 and 9 of the Montana Constitution regarding public participation.

BALANCE OF EQUITIES

If the preliminary injunction is issued, little harm is done to the State. With the "top-down" imposition of these measures, Montana's citizens, and particularly the members of Plaintiff, stand to suffer. They dread waking up in the morning, with no notice, and a new, more dense, building is being erected in their family neighborhood. As noted above, this injury would be irreparable. The balance of equities tips in favor of issuing a preliminary injunction.

THE PUBLIC INTEREST

Plaintiff characterizes these zoning measures as a chaotic hodge-podge of bills, completely uncoordinated. As Plaintiff suggests the pause of a preliminary injunction may well give the State an opportunity to revisit and revise these measures to eliminate their internal contradictions.

The applicability section of SB 382 provides that "a local government that complies with this chapter is not subject to any provisions of Title 76, Chapters 1, 2, 3, or 8. § 76-25-105(4), MCA. Thus, it is unclear whether the affected cities (those of population of 5,000 in counties with a population of 70,000) must abide by the requirements of SB 323 or SB 528. But these two challenged measures go into effect automatically on January 1, 2024. Thus, for example, does a city such as Billings have to comply with these two measures when, at a later date, these measures will not apply? It is unclear whether any application of these two challenged measures then become null and void, once the local government complies with SB 382. This failure of the Legislature to address this transitional limbo is another example of the arbitrariness of the challenged 2023 laws. The public interest favors the issuance of the preliminary injunction.

THE BOND ISSUE

Plaintiff takes the position that the Court should require no bond, citing § 27-19-206, MCA, which allows waiver of the bond "in the interest of justice". The State has requested no bond.

CONCLUSION

Based upon the Court's discussion in this Decision and Order the Court concludes Plaintiff has met its burden under § 27-19-201, MCA, and has established that (a) it is likely to succeed on the merits, (b) it is likely to suffer irreparable harm in the absence of preliminary relief, (c) the balance of equities tips in the applicant's favor, and (d) the order is in the public interest. Plaintiff has demonstrated its need for a preliminary injunction order.

The reason for the issuance for this preliminary injunction is that unless this order is entered, SB 323 and SB 528 will go into effect as of January 1, 2024. These measures, calculated to increase density in single-family zoned areas of Montana's cities will result in irreparable injury to the members of the Plaintiff LLC. These include: deprivation of the members' constitutional

right of pubilc participation; unfair and invidious discrimination against single-family owners who must now absorb an arbitrary and disproportionate burden of increased density as opposed to those who are protected by restrictive covenants; and an arbitrary imposition of various conditions, including many who are similarly situated, but are treated differently because they reside in cities that either fall within or outside of the arbitrary definitions in the challenged measures.

For these reasons, the Court enters the Order and Preliminary Injunction.

ORDER AND PRELIMINARY INJUNCTION

IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Preliminary Injunction is **GRANTED**.

2. Defendant State of Montana, its officers, agents, employees, and attorneys, and its municipalities, and their officers, agents, employers, and attorneys, and those in active concert or participation with them, are **ENJOINED** from implementing:

A. SB 323, codified as § 76-2-304(3), (5), and § 76-2-309, MCA;

B. SB 528, codified as § 76-2-345, MCA.

3. Plaintiff is not required to post a bond.

4. This Preliminary Injunction shall remain in effect until a hearing or trial on a permanent injunction is held or until the Court otherwise determines.

5. The Clerk of the District Court shall immediately provide copies of this Decision and Order and Preliminary Injunction to counsel.

Dated December 29, 2023.

Mike Salvagni

Hon. Mike Salvagni
Presiding Judge

cc: James H. Goetz/Henry J.K. Tesar
Brian K. Gallik
Austin Knudsen/Alwyn Lansing/Thane Johnson

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 E Main Street, Suite 203
PO Box 70
Bozeman, MT 59771-0070
Ph: 406-404-1728
Email: brian@galliklawfirm.com

Attorneys for Plaintiff

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT,
GALLATIN COUNTY

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC, Plaintiff, v. STATE OF MONTANA, Defendant.	Cause No. DV-16-2023-0001248-DK Hon. John Brown **FIRST AMENDED COMPLAINT**

This is an amended complaint for declaratory and injunctive relief, filed pursuant to Rule 15(a)(1)(A) of the Montana Rules of Civil Procedure. This is a facial challenge to four measures passed by the 2023 Montana Legislature and

enacted into law, SB 323, SB 382, SB 528, and SB 245. These measures, purportedly designed to enhance affordable housing opportunities, seek to arrogate traditional local control over local zoning matters, and impose upon Montana's largest municipalities, restrictions on zoning and subdivision review powers.

None of these measures passes constitutional muster.

INTRODUCTION

1. Plaintiff Montanans Against Irresponsible Densification, LLC ("MAID"), is an LLC consisting of homeowners who reside in their homes in various Montana cities, including Whitefish, Bozeman, Billings, Missoula, Great Falls, Columbia Falls, and Kalispell. Each of the Plaintiff's members resides in areas that have long been zoned for residential purposes—predominately characterized as single-family residences. Their neighborhoods are characterized by single-family homes, attractive well-maintained yards, and quiet streets, which remain safe, pleasant places, where families continue to live and raise their children and enjoy the pleasures and benefits of a beautiful, leafy, and peaceful neighborhood. Some of the members reside in geographic areas covered by private covenants that are more restrictive than the zoning regulations now mandated by the new measures challenged by this Complaint.

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FACIAL CHALLENGE

2. There were four bills passed by the 2023 Montana Legislature which attempt to impose top-down "densification" onto certain defined cities. This is a facial constitutional challenge to these measures. SB 323, now codified as §§ 76-2-304(3), (5) and 76-2-309, MCA; SB 528, now codified as § 76-2-345, MCA; SB 245, now codified as § 76-2-304(4), (5) and (c), (d), MCA; and SB 382, now codified as Title 76, Chapter 25. SB 323 requires that affected municipalities (those of over 5,000 in population) allow duplexes in areas now zoned for single-family residences. SB 528 requires all cities to allow "accessory dwelling units" on lots located in areas zoned for single-family residences. SB 245, which requires cities of 5,000 or more to allow "mixed use" and "multiple unit" dwellings in commercial areas, was effective upon passage and purports to be retroactive.

3. SB 382 was effective upon passage (Section 41). SB 382, called "the Montana Land Use Planning Act", requires certain local governing bodies to engage in massive overhaul of their subdivision and zoning regulations. It gives affected cities up to three years after the effective date (until May, 2026) or up to five years after the date the city's growth plan was adopted, to implement the new Act, whichever is later. Accordingly, the affected cities are required to move forthwith, undertaking these massive alterations to regulations and procedures.

4. The applicability of these four measures is chaotic and uncoordinated. For example, SB 382, applies to all Montana municipalities with a population of at least 5,000 residents, located in counties with at least 70,000 residents. SB 323, compelling an allowance of duplexes in single-family zoned areas, applies to cities with a population of at least 5,000, but it does not have the county population of 70,000 qualifier that is in SB 382. The same is true of SB 245. SB 528, requiring the allowance of accessory dwelling units ("ADU's"), applies to **all** Montana cities.

5. Because of these challenged measures, Montana cities are under time pressure to undertake the expensive and time-consuming task of implementing the new legislation, yet, the Legislature provided no funding to local governments for the purpose of accomplishing these massive revisions.

6. The City of Bozeman which is already undertaking a wholesale revision of its zoning ordinance ("Unified Development Code"), sometimes claiming that such revision is required by SB 582. Bozeman began this undertaking before the passage of SB 382, but now seeks the cover of SB 382 to justify these proposed changes, claiming that it has no choice but to comply with SB 382. Bozeman, however, has recently paused its aggressive timeline due to a large outcry from its citizenry.

7. All efforts of Montana cities to implement these challenged measures

will be wasted effort, however, because these measures are unconstitutional on their faces, because they are so arbitrary that they deny Equal Protection and Due Process for the citizenry, because they drastically reduce the ability of the public to participate in governmental decision making, in violation of Article II, Sections 8 and 9 of the Montana Constitution, and because they attempt to arrogate to the State powers constitutionally reserved for local governments. For that reason, the present facial challenge is of statewide importance and time is of the essence.

FACTS AND ALLEGATIONS

A. Montana's Affordable Housing Problem and the Legislative Hostility to Direct Efforts to Address.

8. Many municipalities in the State of Montana have a shortage of what is known as "affordable housing". What that means is that some segments of the population of Montana's cities do not have sufficient means with which to purchase a house. The reasons for this are myriad, including severe wealth disparity as a byproduct of our capitalistic economic system, the increasing phenomenon of working remotely, greater wealth of many who re-locate to Montana, the exodus to escape the pandemic, high land and building material and labor costs in the construction industry, high inflation generally, high mortgage rates, and relatively low wage scales. One unique, ubiquitous feature of the US housing market, and in Montana, is the thirty-year fixed rate mortgage. For

example, a New York Times article recently stated:

> It isn't just that new buyers face higher interest rates than existing owners. It's that the US mortgage system is discouraging existing owners from putting their homes on the market—because if they move to another house, they'll have to give up their low interest rates and get a much costlier mortgage. Many are choosing to stay put, deciding they can live without the extra bedroom or put up with a long commute a little while longer.
>
> The result is a housing market that is frozen in place. With few homes on the market—and fewer still at prices that buyers can afford—sales of existing homes have fallen more than 15% in the past year, to the lowest level in over a decade. Many in the millennial generation, who are already struggling to break into the housing market, are finding they have to wait yet longer to buy their first homes.
>
> "Affordability, no matter how you define it, is basically at its worst point since mortgage rates were in the teens" in the 1980s, said Richard K. Green, director of the Lusk Center for Real Estate at the University of Southern California. "We sort of implicitly give preference to incumbents over new people, and I don't see any particular reason that should be the case."

Casselman, Ben, a "A 30-Year Trap: The Problem With America's Weird Mortgages". New York Times, November 19, 2023.

9. To address this affordable housing problem, some Montana municipalities have sought to take action. For example, the City of Bozeman, a few years ago, initiated programs to address affordable housing through City

assessments on new construction, the proceeds of which were earmarked for production of affordable housing. Other cities have attempted to use density bonuses to try to increase affordable housing.

10. In recent years, the Montana Legislature has engaged extensively in the process of preempting local governmental actions and authority. Such actions include attempts to preempt local authority on gun regulation, pandemic response, and school curricula. These acts of preemption have extended to the issue of land-use and housing. In the Legislative session of 2021, the Montana Legislature, largely at the behest of real estate developers and building contractors, enacted legislation designed to abrogate direct affordable housing measures, such as those used by the cities of Bozeman and Whitefish. For example, in 2021 the Legislature amended Montana's zoning laws by adding § 76-2-302(6)(7), MCA. That provision provides that "zoning regulations may not include a requirement to: (a) pay a fee for a purpose of providing housing for specified income levels or add specified sales prices; or (b) dedicate real property for the purpose of providing housing for specified income levels or at specified sales prices." Also, § 76-2-302(6)(7) provides "a dedication of real property as prohibited in subsection (6)(b) includes a payment or other contribution to a local housing authority or the reservation of real property for future development of housing for a specified income level, or

specified sales prices."

11. In other words, the Legislature, in 2021, took away from local governments the most direct and effective avenues to address the affordable housing problem. The 2023 Montana Legislature followed suit, voting down several affordable housing proposals, including a housing tax credit which would have incentivized affordable rental development, a housing trust fund, which would have subsidized the construction of roughly 500 additional low-income apartments every year. The 2023 Montana Legislature perpetuated statutory restrictions on local governmental tools to address affordable housing by incorporating those limitations in SB 382. SB 382, Section 20(1)(b). *See also* § 76-25-303(1)(b).

B. The Governor's Housing Task Force

12. On July 14, 2022, Governor Gianforte signed Executive Order (EO) No. 5-2022, creating the Housing Advisory Council also known as the Governor's Housing Taskforce (Taskforce). The Taskforce was charged with providing short-and-long term recommendations and strategies to the Governor for the State of Montana "to increase the supply of affordable, attainable workforce housing."

13. The composition of the Governor's Taskforce appointed by the Governor is heavily weighted towards realtors and developers and right-wing members, including a long reach across the country to involve Dr. Emily Hamilton,

senior research fellow and director of the Urbanity Project at Mercatus Center (a market-oriented libertarian think tank affiliated with George Mason University in Virginia), Kendall Cotton, president and CEO of the Frontier Institute (a right-wing self-proclaimed "think tank" funded in part by organizations affiliated with the Koch brothers), and Mark Egge (listed as an "affordable housing advocate"), a person with a published anti-zoning agenda. Despite its assumption that municipal zoning is a "barrier" to new housing, not a single "stakeholder" member representing quiet, graceful residential neighborhoods, was appointed to the Task Force. This is a serious omission because there are two sides to the issue regarding zoning, but only one side was represented.

14. By date of October 15, 2022, the Governor's Housing Taskforce released its report entitled "Recommendations and Strategies to Increase the Supply of Affordable, Attainable Workforce Housing". Somehow in this process, zoning became the culprit—the "flavor of the day". Strategies were developed to water down zoning regulations and "reign in" local governments. The report recommended bills to modify municipal zoning powers in § 76-2-306(6), MCA. Essentially the general thrust of these measures was to degrade the authority of municipalities. Further, the Task Force advocated abrogation of late public participation in favor of what it called "front-loading" input stating:

- Front-load subdivision planning and public process by requiring a more robust comprehensive planning process to address growth.

***

- Once there has been a robust public process for growth planning through the comprehensive plan, make the subdivision process administrative.

Governor's Housing Task Force Report, § 2C, ¶ 14.

15. The Governor's Task Force's report does not address issues such as the character of city neighborhoods, attitudes of large groups of stakeholders (homeowners), the history of municipalities and of long-time city neighborhoods, or the culture and character of neighborhoods. Instead, its one-dimensional report attacked municipal zoning, municipal subdivision review, and what it characterized as the problem of intolerable delays in the permitting process—adopting the mantra of many Montana developers that city regulations need to be "streamlined". In following a "one size fits all" approach, the Task Force failed to give any consideration to the rich culture and history of Montana's cities. The Task Force did little to inform themselves about what Montana cities are already doing to create affordable housing. Although a detailed description of affordable housing programs already underway was provided by the cities themselves and attached as an appendix to the final report, there is virtually no reference to these efforts in the report itself.

C. "Densification" Legislation in the 2023 Legislative Session

16. The measures described above, SB 245, SB 323, SB 528, and SB 382[1], emanated from the recommendations of the Governor's Housing Task Force. Their aim was to "streamline" permit approvals and facilitate denser housing.

17. With respect to zoning regulations, the Bills introduced were described by one journalist as follows:

> With housing affordability a top-tier issue for the governor and Montana public following years of rising rents and home prices, Republican and Democratic law makers at the legislature have floated an array of ad-hoc zoning reform bills this year that would generally rein in city zoning powers in an effort to promote the construction of new urban housing[2].

Eric Dietrich, Montana Free Press, February 23, 2023.

This article accurately addresses the overall thrust of the zoning measures introduced in the 2023 Montana Legislative session. That the Legislature felt that Montana's cities needed to be legislatively "rein[ed]" in is accurate. This "top-down" approach drastically departs from Montana's long tradition of local

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[1] For the convenience of the Court, copies of these four Bills are attached in the Appendix to this Complaint.

[2] This article discusses several other pieces of legislation. For example, HB 337 would force cities to allow development on smaller home lots and HB 553 would require a local government to permit accessory dwelling units, or smaller homes built on existing lots. These did not pass.

governmental control over local matters.

SB 382 substantially limits public involvement. When a subdivision or zoning permit application is made to the planning administrator, there is no requirement that the city issue a public notice that an application is under review or has even been received. Public notices are only issued upon appeal of the planning administrator's decision, or if the planning administrator requests additional data and/or analysis on any potential impacts not identified and considered by the land use plan. If there is a subsequent public hearing to look at the supplemental information, public comment is limited to the supplemental information and no public testimony on any other impacts of the development are allowed. SB 382, Sections 22 and 37, § 76-25-305(6), and § 76-25-503, MCA.

D. SB 323 (§ 76-2-304(3), (5), and § 76-2-309, MCA)

18. Areas zoned for single-family uses have a long and venerable history in the United States and in Montana cities. Homeowners in Montana have traditionally relied on single-family zoning designations to protect the scale, character, and financial viability of their most important investment.

19. SB 323 erodes this long history of single-family zoning. It amends current § 76-2-304, MCA, by adding a subsection "(3)" which provides, in part,

> In a city with a population of at least 5,000 residents, **duplex housing must be allowed** as a permitted use on a

> lot where a single-family residence is a permitted use, and zoning regulations that apply to the development or use of duplex housing may not be more restrictive than zoning regulations that are applicable to single-family residences.

(Emphasis added.)

E. SB 528 (§ 76-2-345, MCA)

20. SB 528 further erodes Montana's history of single-family zoning by requiring that all Montana municipalities adopt regulations allowing "accessory dwelling units" on any "lot or parcel that contains a single-family dwelling". It also forbids the affected municipalities from requiring "that a lot or parcel have additional parking to accommodate an accessory dwelling unit or require fees in lieu of additional parking".

F. SB 245 (§ 76-2-304(4), (5), (c) and (d), MCA)

21. SB 245 requires Montana cities of at least 5,000 residents to enact zoning which allows "mixed use" and multiple-unit dwellings in commercial areas.

G. SB 382 (Title 76, Chap. 25, MCA)

22. SB 382 is the measure with the most drastic implications for certain Montana cities. It is much more complex than the other three challenged measures. Among other things SB 382 preempts certain local zoning regulations by requiring municipalities who fit its definition to "include a minimum of five of the following housing strategies, applicable to the majority of the area, where residential

development is permitted…". SB 382, Section 19 (§ 76-25-302). Among the array of the "housing strategies" set forth are "(a) allow, as a permitted use, for at least a duplex where single-unit dwelling is permitted". Other potential strategies include zoning for higher density housing near transit stations, areas of employment, higher education facilities, and population centers; elimination or reduction of off-street parking requirements which require no more than one parking space per dwelling unit, elimination or reduction of impact fees for accessory dwelling units by at least 25%, elimination of minimum lot sizes or reduction of minimum lot size requirements by at least 25%, elimination of aesthetic, material, shape, bulk, size, floor area, and other massing requirements for multi-unit dwelling, elimination of setback requirements by reduction of 25%, increase building height limits by at least 25%, allow multi-unit dwellings in certain areas not previously allowed; and others.

23. There is nothing in SB 382, SB 323, SB 245 or SB 528 that directly addresses Montana's affordable housing problem. Nor is there any guarantee, or even a likelihood, that any new housing, if any, will be "affordable". Instead, the attitude of the Governor's Task Force, expressed by one of its members was a "build more" solution, relying on the assumption that, with more houses built, prices will go down. Because none of these "strategies" in SB 382 involve controlling the initial housing price or rent or any subsequent price or rent, the

price of any units produced will be determined by the local market. The result is that none of these strategies offer assurance that any affordable units will be produced at all. In March 2023, the Urban Institute published a study entitled "Land-Use Reforms and Housing Costs: Does Allowing for Increased Density Lead to Greater Affordability?". The conclusion of that extensive study was that zoning reforms, introduced over the last decade and a half, which loosen restrictions on development, are associated with a very small increase in housing supply (0.8 percent increase in housing units at least three years after the reform was implemented), **but not with a reduction in housing costs or with greater availability of units**.

H. *Euclid v. Ambler Realty*, 1926.

24. In 1926, the US Supreme Court issued its opinion in *Euclid v. Ambler Realty Co.*, 272 US 365 (1926). In *Euclid*, the US Supreme Court upheld the constitutionality of the zoning law of the Village of Euclid, Ohio, rejecting the claim that the zoning law violated the Fourteenth Amendment's protection of liberty and property described in the Due Process and Equal Protection Clauses. Since the *Euclid* decision, virtually all cities in the United States proceeded to adopt zoning regulations through geographic districting. Commonly, zones designated as "R-1", or bearing a similar designation, are limited to single-family dwellings, while "R-2"

allows both single-family and duplexes. Other designations allow for multi-family and more dense housing, commercial and industrial/manufacturing zones, and numerous other classifications.

25. Montana first granted statutory authority for zoning by municipalities in 1929. Chapter 136, *Laws of 1929.* Montana's cities followed suit after *Euclid,* developing their own municipal zoning ordinances. The City of Bozeman, for example, did its first zoning ordinance in 1935, adopting a "Euclidian-type" set of geographic zoned districts—a practice that has continued, with various iterations, over the years until the present.

I. The Development of Restrictive Covenants

26. The cities in Montana, historically, have grown from small settlements in the 1800's, to towns, to, now, densely populated cities. That growth has been accomplished, in part, through the process of approval of subdivisions and/or annexation of land subject to homeowners associations (HOA's). Most HOAs maintain restrictive covenants, i.e. contracts. Among typical covenants, there are restrictions on lot size, building size, landscape design, sidewalks, fences, driveways, lighting, colors, building materials, and the like. Most all sets of restrictive covenants of these HOAs, contain variations of single-family designations in certain geographic areas. For example, in Bozeman, the "Alder

Creek Subdivision" adopted its "first amended declaration of protective covenants for Alder Creek Subdivision" on May 8, 2008. This provides for the designation of certain areas in the subdivision as "single-family". 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."

27. Also within the City of Bozeman is the Meadow Creek South Condominiums development. In 2021, that development adopted its "Tenth Amendment (fully superseding all prior declarations) for Meadow South Condominiums", which likewise, provides for areas of single-family occupancy.

28. Article IV of the covenants of the Meadow Creek Condominiums Development provides for "Relationship to City of Bozeman", and provides in Section 4.1:

> **Conflicting Documents**: the property is located within the jurisdiction of the City of Bozeman. In some cases, the uses allowed under the City of Bozeman's zoning regulations may be different than this Declaration. The Association has the right to enforce this Declaration even if the use is allowed by the City of Bozeman.

Within the City of Bozeman, an area known as Sundance Springs similar provisions in its "Declaration of Covenants, Conditions, and Restrictions for Sundance Springs". Section 1, single family residential properties, provides:

> The covenants detail how the lands within the Sundance Springs Subdivision are to be developed and authorized **beyond the minimum requirements of the Bozeman Zoning Code**. This exists of the date of the execution of this document. More specifically, the Covenants define how the single-family residential homes are to be designed and landscaped, and how the Common Open Space use matters to maintain through the Open Space Management Plan.

(Emphasis added.)

29. Because of this patchwork of areas covered with restrictive covenants within the boundaries of Montana's cities, a substantial area of the cities is specified, by covenant, for single-family use with various restrictions relating to lot sizes, dwelling sizes, and the like, regardless of what zoning regulations specify. Presently, single-family areas, protected by restrictive covenants are common in a substantial part of each of Montana's cities.

30. None of the measures herein challenged, SB 323, SB 528, SB 245 and SB 382, purport to require Montana's cities to impose their "top-down" limitations in a manner that would replace or preempt restrictive covenants in areas that are subject to restrictive covenants.

31. The net result of this geographic happenstance is that the Legislature's top-down imposition of zoning requirements force the core historic areas of Montana's 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 historical core homeowners of their Due Process and Equal Protection Rights.

PARTIES

A. Plaintiffs

32. Plaintiff Montanans Against Irresponsible Densification, LLC ("MAID"), is an organization consisting of various members, each of whom is a homeowner who resides in their homes in single-family neighborhoods in Whitefish, Bozeman, Billings, Missoula, Great Falls, Columbia Falls, and Kalispell. Some of Plaintiff's members' properties are not subject to restrictive covenants, but others are. Collectively, they live in areas that have long been zoned for residential purposes. The areas in which they live are predominately characterized by single-family residences, attractive well-maintained yards, and quiet streets.

33. MAID has associational standing to bring this lawsuit on behalf of its members. Without waiving its or its members' right to challenge the constitutionality of § 27-19-104, MCA (1) based on its unnecessary and burdensome requirement to name MAID's individual members to seek an injunction and the concomitant interference with the members' rights to privacy and freedom of association in violation of the First and Fourteenth Amendments of

the United State Constitution as well as (2) a violation of separation of powers in that the Montana Supreme Court, and not the legislature, is charged with enacting the Rules of Civil Procedure, MAID lists its members, their addresses, and a statement of their injuries as follows:

a. Single-Family Zoned Residential Members Without Restrictive Covenants.

i. Glenn Monahan, 420 N. 10th Avenue, Bozeman, MT 59715. Mr. Monahan and the other Single-Family Residential Zoned Members listed below face imminent injury if the Court does not enjoin and strike down the challenged measures. To wit:

1. SB 323, SB 528, SB 245, and SB 382 substantially diminish or eliminate Mr. Monahan and the other Single-Family Residential Zoned Members' constitutionally and statutorily protected public involvement in ultimate land use decisions. Each is actively engaged in their communities and has taken advantage of their right to public participation in zoning and other decisions affecting their homes and way of life. SB 323 requires municipalities with populations of over 5,000 to allow

duplexes in areas now zoned for single-family residences. SB 323 diminishes or eliminates Mr. Monahan and the other Single-Family Residential Zoned Members' public involvement in deciding whether to allow duplexes in their neighborhoods. SB 528 requires all cities to allow accessory dwelling units on lots located in areas zoned for single-family residences. SB 528 diminishes or eliminates Mr. Monahan and the other Single-Family Residential Zoned Members' public involvement in deciding whether to allow accessory dwelling units in their neighborhoods. SB 382 requires certain local governing bodies to engage in massive overhauls of their subdivision and zoning regulations and purports to "front load" public participation. SB 382 diminishes or eliminates Mr. Monahan and the other Single-Family Residential Zoned Members' public involvement in decisions affecting their single-family residences and neighborhoods.

2. If Plaintiff is successful in Count I, below, SB 323, SB 528, SB 245, and SB 382 create two or more classes of

municipal residents in violation of Mr. Monahan and the other Single-Family Residential Zoned Members' right to equal protection secured to Montana's citizens under the Montana Constitution. Mr. Monahan and the other Single-Family Residential Zoned Members live in cities of at least 5,000 residents located in counties with at least 70,000 residents and do not live in neighborhoods with restrictive covenants. Each is actively engaged in their communities and has taken advantage of the right to public participation in zoning and other decisions affecting their homes and way of life. SB 323, SB 528, SB 245, and SB 382 substantially diminish or eliminate their rights to such public participation and force changes to their neighborhoods while arbitrarily not doing so for individuals who, depending on the legislation, (a) live in cities of less than 5,000 residents, (b) live in cities of at least 5,000 residents but in counties of less than 70,000 residents, and (c) live in cities of at least 5,000 residents and counties of at least 70,000 residents but have

restrictive covenants that prohibit some or all requirements in, or effects of, the SB 323, SB 528, SB 245, and SB 382. Mr. Monahan and the other Single-Family Residential Zoned Members will be forced to carry the burden of "top-down" zoning in Montana without the opportunity to participate, while others will not be forced to carry the burden and/or will have the opportunity to participate in zoning decisions.

3. SB 323, SB 528, SB 245, and SB 382 deprive Mr. Monahan and the other Single-Family Residential Zoned Members of due process guaranteed under the Montana Constitution. In acquiring their homes, Mr. Monahan and the other Single-Family Residential Zoned Members exercised their rights of acquiring and possessing property, as well as finding a safe, healthful environment, that would facilitate happiness. These are fundamental, inalienable rights. SB 323, SB 528, SB 245, and SB 382 arbitrarily deprive them of these rights.

ii. Kristen Charron, 1121 S. 3rd Avenue, Bozeman, MT 59715;

iii. Richard Charron, 1121 S. 3rd Avenue, Bozeman, MT 59715;

iv. Jinny Stratton, 915 S. 3rd Avenue, Bozeman, MT 59715;

v. Brad Stratton, 915 S. 3rd Avenue, Bozeman, MT 59715;

vi. Daniel Carty, 213 N. 3rd Avenue, Bozeman, MT 59715;

vii. Kenneth Silvestri, 5785 Saxon Way, A, Bozeman, MT 59718;

viii. Nancy Schultz, 420 N. 10th Avenue, Bozeman, MT 59715;

ix. Jane Jelinski, 433 N. Tracy Ave., Bozeman, MT 59715;

x. Robert James, 332 Fox Dr., Great Falls, MT 59404;

xi. Karen Jarussi, 1131 N. 32 St., Billings, MT 59101;

xii. Gene Jarussi, 1131 N. 32 St., Billings, MT 59101;

xiii. Steve Berglund, 604 7th Ave. W., Kalispell, MT 59901;

xiv. Jennifer Young, 604 7th Ave. W., Kalispell, MT 59901;

xv. John Carter, 925 Taylor, Missoula, MT 59802;

xvi. Patrick Malone, 1373 Wild Cat Dr., Columbia Falls, MT 59912;

xvii. Susan Bonar Mayer, 510 Woodworth Ave, Missoula, MT 59801;

xviii. Michael S. Mayer, 510 Woodworth Ave, Missoula, MT 59801;

xix. Anne Couser, 1306 E. 3rd St., Whitefish, MT 59937.

b. Single-Family Zoned Members with Restrictive Covenants.

i. Steve Barrett, 2475 Fairway Dr., Bozeman, MT 59715. Mr. Barrett and the other Single-Family Zoned Members with Restrictive Covenants are protected from the imposition of "top-down" zoning if Plaintiff is successful in Count I below; otherwise, Mr. Barrett and the Single-Family Zoned Members with Restrictive Covenants listed below face imminent injury consistent with Plaintiff's members above, in addition to losing right to their restrictive covenants.

ii. Noah Poritz, 1418 Maple Dr., Bozeman, MT 59715.

34. For each of Plaintiff's members, their investment in their house and property constitutes their single most important monetary investment in their lifetime. Each member of the organizational Plaintiff banks on their home and property as a vital component of their nest egg for retirement. Each of Plaintiff's members believed, when they moved into the present location, that they were locating in a stable, fixed, and primarily residential neighborhood.

35. Plaintiff's members are actively engaged in their communities and have taken advantage of their right to public participation in zoning and other decisions affecting their homes and way of life.

36. Each of Plaintiff's members will be adversely and negatively affected if

the challenged measures are allowed to stand. Plaintiff's members' injuries stemming from the changes to Montana's zoning laws are distinguishable from those suffered by the public generally because they live in single-family zoned districts within Montana's largest cities and counties. Without being afforded the opportunity for public participation as required by the Montana constitution, Plaintiff's members' neighborhoods will be forced to undergo drastic and arbitrary changes in character based on the changes in Montana's zoning laws in SB 323, SB 528, SB 245, and SB 382. If the relief requested below is not granted, each of Plaintiff's members will be forced to live not in the residential neighborhood they chose, but instead in a densely populated area with more buildings, larger buildings, increased traffic, and/or any number of other changes that spur uninterrupted development under the guise of affordable housing. SB 382, for example, provides only illusory participation at the "land use plan" stage. The land use plan must address how the jurisdiction will meet its projected population over the next twenty years and provide regulations to allow for the rehabilitation, improvement, or development of the number of housing units needed. This process must be revisited every five years to determine whether to update the land use plan. SB 382 sets forth a self-fulfilling prophecy, which Plaintiff's members—and cities like Bozeman, Missoula, and Whitefish—will be forced to endure without legitimate

public participation: Montana's largest cities (based on an arbitrary distinction) will grow and continue to grow.

37. The requested relief will redress the unique harms Plaintiff's members stand to suffer. The requested relief will vindicate Plaintiff's members' right to equal protection and allow them to continue to meaningfully participate in rationally based decisions affecting the future of their property and lives—as is required by the law.

B. Defendant

38. The State of Montana is a duly constituted state of the United States of America.

REMEDIES

39. Injunctive relief is appropriate in that there is no other adequate remedy at law. Plaintiff's members are imminently threatened with irreparable injury by the challenged measures and actions which will be taken pursuant to those measures, as complained of in this Complaint.

COUNT I – DECLARATORY JUDGMENT RE: RESTRICTIVE COVENANTS

40. Plaintiffs incorporate by reference each of the foregoing allegations.

41. The changes in Montana's zoning laws in SB 323, SB 528, SB 245, and SB 382 which require a relaxation of certain zoning regulations, to the extent that

they purport to loosen restrictions, do not displace, supplant or otherwise preempt, private covenants that are more restrictive.

42. As a matter of statutory interpretation, SB 323, SB 528, SB 245 or SB 382 do not purport to displace or supplant private covenants which are more restrictive.

43. Restrictive covenants are contracts. As such, the obligations of such contracts may not be impaired by legislative action, or action by the state.

44. The Montana Constitution, in Article II, Section 31, provides:

> **Ex post facto, obligation of contracts, and irrevocable privileges**. No ex post facto law **nor any law impairing the obligation of contracts,** or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the Legislature.

45. Likewise, the US Constitution, Article I, Section 10 provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto, or Law, **impairing the Obligation of Contracts**, or grant any Title of Nobility.

46. Plaintiffs are entitled to a declaratory judgment, declaring:

1. As a matter of statutory law, SB 323, SB 528 and SB 382 do not preempt restrictive covenants which contain provisions more restrictive than municipal

zoning ordinances;

2. Any attempt to displace or supersede restrictive covenants, through application of SB 323, SB 528, SB 245, or SB 382 is unconstitutional as an impairment of the obligation of contracts, under both the Montana Constitution and the United States Constitution.

COUNT II – CONSTITUTIONAL RIGHT OF PUBLIC PARTICIPATION (SB 382's effort to make final project approval "ministerial" to avoid the constitutional requirements of public participation.)

47. Plaintiffs incorporate by reference each of the foregoing allegations.

48. SB 382 seeks to substantially diminish or eliminate public involvement in ultimate land use decisions regarding subdivision and zoning permits. One Montana newspaper's characterization of the Bill when it was pending stated that the Bill seeks to do so by concentrating "public participation in land use planning earlier in the process, inviting more public input as growth plans are being written and limiting public comment once specific projects are proposed." Eric Dietrich, "*Land Planning Overhaul Would Prioritize Proactive Urban Planning*", Montana Free Press, February 23, 2023.

49. SB 382 provides that the final adopted land use plan comprises the basis for implementing land use regulations and it severely curtails public comment

and participation on "site specific" developments. Section 6(4)(d) of SB 382 provides:

> The scope of an opportunity for public participation and comment on **site-specific** development in substantial compliance with the land use plan **must be limited** only to those impacts or significantly increased impacts that were not previously identified and considered in the adoption, amendment or update of the land use plan, zoning regulations, or subdivision regulations.

Codified as § 76-25-106(4)(d), MCA. (Emphasis added.) Thus, on site-specific developments, the ones that actually affect citizens, public participation is now severely curtailed.

50. Speaking of SB 382, with respect to public involvement, Kelly Lynch of the Montana League of Cities and Towns, who was one of the authors of SB 382, was quoted as saying:

> 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."

Eric Dietrich, "*Land Planning Overhaul Would Prioritize Proactive Urban Planning*", Montana Free Press, February 23, 2023.

51. This is a cynical ploy to avoid the well-established public participation

requirements of Article II, Sections 8 and 9 of the Montana Constitution. It is cynical for two reasons. First, it is common knowledge that most Montana citizens do not get excited about the ordinary planning process, including development of a "growth policy", now known as a "land use plan", but generally get more extensively involved in "project-level" developments which threaten direct impact on them. Thus, the conscious attempt to focus public comment at the stage of development of the "land use plan" amounts to a purposeful attempt to evade constitutional public participation requirements. Second, the standard for allowing project-specific public input is limited to the establishment of a showing of a "substantial" deviation from the earlier-adopted "land use plan". This is largely an illusory standard because growth policies or land use plans are very general in nature, largely platitudes, designed to please everybody, that have little specific meaning. Also, the goals of such plans are often internally conflicting. For example, Goal N in "Bozeman MT Community Plan", adopted in 2020, provides, "continue to encourage Bozeman's sense of place". Goal N-4.1 provides:

> Continue to recognize and honor the unique history, neighborhoods, neighborhood character, and buildings that contribute to Bozeman's sense of place, through programs and policy led by both City and community efforts.

Id. at p. 30. And yet, somewhat contradictorily, Goal N-3.8 provides, for example:

> Promote the development of "Missing Middle" housing (side by side or stacked duplex, triplex, live-work, cottage housing, group living, row houses/townhouses, etc.), one of the most critical components of affordable housing.

The standard of "substantial compliance" with these vague mandates is largely illusory because of their general, subjective, and conflicting natures.

52. Moreover, SB 382 additionally tries to limit public participation in certain final decisions which were previously subject to board or commission review but now become "ministerial". SB 382 defines "permitted use" as "a use that may be approved by issuance of a ministerial permit" (*see 3*(24)), and "planning administrator"…means the person designated by the local governing body to review , analyze, provide recommendations, or make final decisions on any or all zoning, subdivision, and other development applications as required in [sections 1-38]. SB 382, Section 3(25) (§ 76-25-103(25), MCA). The new law defines "ministerial permit" as:

> "Ministerial permit" means 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).

53. With respect to subdivisions, prior to SB 382, two separate and

mutually exclusive public decisions were to be made. According to that regime, the Planning Board, except for minor exempt subdivision applications, first decided whether to recommend approval of the application and whether such approval will be based on certain conditions. Second, the Governing Body ultimately decided to approve or deny the application. Pursuant to Article II, Section 8, citizens had the right to participate at both levels of review.

54. For Montana cities of at least 5,000 residents in counties of at least 70,000 residents, SB 382 replaces these review procedures. This new regime, called the Montana Land Use Planning Act, limits public involvement regarding "site-specific" permits or project developments. *See* SB 382, § 6(4)(d). It also now provides for the adoption and the amendment of subdivision regulations with a "presumption" of compliance. That is now codified as § 76-25-304(6). Subsection 6(a) states the compliance in "standard" as follows:

> (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.

55. The same is true of municipal zoning actions. Many local regulations

now provide for issuance of permits which must be heard by the planning commission and/or the governing body. However, Section (4)(d) of SB 382, now codified as § 76-20-106(4)(d), MCA, limits public participation on "site-specific development" and limits review to the standard of "substantial compliance" with the land use plan. This limitation applies both to zoning regulations and subdivision and annexation regulations.

56. SB 382, Section 22(3), (§ 76-25-305(3)) provides that "zoning compliance and other ministerial permits may be issued by the planning administrator or the planning administrator's designee for any further review or analysis by the governing body [except for the ultimate appeal process provided in a different section]." In a July 17, 2023 memorandum to the "Community Development Board", Bozeman Planning Staff presented an "Overview of Senate Bill 382", and noted among other changes: "the Act changes development processes so that both subdivision and zoning site specific reviews will be "ministerial" decisions with no advisory board participation." *Memo*, ¶ 6. It also states "one key change in the zoning amendment process is there is no protest provision…" and "public notice and comment during the amendment process is limited only to those areas not previously settled with adoption of a land use plan (LUP) or issue plan."

57. Over the years, Montana has developed a significant and well-reasoned body of case law calculated to ensure compliance with Montana's land use laws and also Montana's constitutional provisions regarding public participation. For example, § 76-2-304, MCA, requires cities, in considering zone changes, to consider nine criteria, including the city's growth policy. These have become known as the "Lowe criteria", based on the seminal case *Lowe v. City of Missoula*, 165 Mont. 38, 41, 525 P.2d 551, 553 (1974). *Lowe* was followed by a number of other cases, including *Schanz v. City of Billings*, 182 Mont. 328, 335-336, 597 P.2d 67, 71 (1979), *Little v. Bd. of Co. Comm'rs.,* 193 Mont. 334, 354, 631 P.2d 1182, 1292 (1981), and *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 87, 360 Mont. 207, 255 P.3d 80. The statutory factors in § 76-2-304, MCA, are designed to ensure careful review of proposed regulations and is in accordance with Article II, Section 3, of the Montana Constitution, securing the inalienable right to a "clean and healthful environment" and Article II, Sections 8 and 9, Mont. Const., ensuring the rights to public participation. To these ends, the *Heffernan* Court held:

> A governing body must develop a record that fleshes out all pertinent facts upon which its decision was based in order to facilitate judicial review….

2011 MT 91, ¶87.

58. SB 382 seeks to avoid this well-established body of case law through its

"applicability" section. Section 5(4) (§ 76-25-105(5), MCA), provides "a local government that complies with [section 1 – 38] is not subject to any provision of Title 76, chapters 1, 2, 3, or 8." The "Lowe criteria", § 76-2-304, MCA, are located within Chapter 3, Title 76, and therefore are no longer applicable to these cities falling within the definition of SB 382 (cities of at least 5,000 in counties of at least 70,000). Thus, compliance with *Lowe* and its progeny, is arguably no longer required.

59. This change is summarized in a July 17, 2023 memorandum from the Bozeman Community Development Board, which states:

> Amendment Process Changes. The former enabling acts had specific amendment criteria for zoning and subdivision that the public and decision makers have seen many times in staff reports. The zoning criteria were referred to as the *Lowe criteria* after a notable court case. **None of those criteria carried forward into the act.** New criteria have been established for zoning and subdivision regulations. These criteria will be the standards against which the UDC replacement will be evaluated as will all future amendments. Sections 21 and 27 contain these requirements, and also changes who may initiate amendments.

Memorandum to "Community Development Board" from Chris Saunders, Community Development Manager, et al., July 17, 2023. 4th (unnumbered) page. (Emphasis added.)

60. SB 382 creates a double standard. For cities and towns of fewer than

5,000 residents, and even for those cities of at least 5,000, but which are not located in counties of at least 70,000 residents, **the subdivision review and zoning statutes remain in place**. SB 382 now waters down these requirements for cities with at least 5,000 residents in counties of at least 70,000.

61. This double standard is also reflected in the public participation features of SB 382. The same memo referred to above by the Bozeman Community Development Manager, characterizes the changes as follows:

> One key change in the zoning amendment process is that there is no protest provision. The prior protest provisions gave some members of the community more influence on land use decisions than others. With removal of the protest provision all input carries the same weight and must be considered solely on the merits of the information presented. All decisions to approve or deny any amendment will be a simple majority of the City Commission.
>
> Public notice and comment during the amendment process is limited only to those areas not previously settled with adoption of a Land Use Issue Plan. If the amendment is consistent with the analysis and conclusions of the earlier documents it is not a proper subject for public notice or comment, per the Act.

Memorandum to "Community Development Board" from Chris Saunders, Community Development Manager, et al., July 17, 2023. 4th (unnumbered) page. (Emphasis added.)

Again, this is a double standard. In the cities subject to SB 382, public

comment and participation is curtailed. In the other cities, it is not. No reason or public policy justifies a law that affords to citizens of certain Montana cities full rights of public participation in zoning and subdivision matters, but cuts back on the same rights for those citizens who live in cities that meet the applicability requirements of SB 382. This double standard is even more invidious because certain cities of approximately the same size (at least 5,000 residents) may or may not be subject to SB 382. It depends if they are also located in counties of at least 70,000 in population. For example, the City of Polson (population of 5,637) in Lake County, which has fewer than 70,000 residents, does not fall within the ambit of SB 382, while the similarly sized city of Columbia Falls (population 5,966) in Flathead County does fall with the ambit of SB 382.

62. Sections of Montana law that provide for environmental review and public participation may be nettlesome to city governments and planners, however they are important tools to implement Montana's constitutional mandates. SB 382's attempt to end-run these important constitutional provisions and judicial decisions through enactment of SB 382, but only for certain qualifying cities, is not consistent with the Montana Constitution.

63. Article II, Section 8 Right of Participation of the Montana Constitution provides:

> The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

64. Further, Article II, Section 9 Right to Know of the Montana Constitution provides:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

65. Pursuant to § 2-3-101, *et al.*, MCA, the Montana Legislature provides statutory and regulatory guidance in order to "secure to the people of Montana their constitutional right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of the agency." MCA § 2-3-103 provides that the public must be given advance notice of proposed government actions and precludes the agency from taking any action on any matter discussed unless specific notice of that matter is included in an agenda and public comment has been allowed on that matter. Yet SB 382 does not even require the local government to issue a public notice when an application for a subdivision or zoning permit is received by the planning administrator.

66. § 2-3-201, MCA provides that the intent of that statute is that "actions and deliberations of all public agencies shall be conducted openly." It

notes that "the people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of this part shall be liberally construed." These statutes require agencies to develop procedures for permitting and encouraging public participation and to provide that there must be adequate notice of planned actions. § 2-3-103(1)(a), MCA.

67. SB 382's attempt to concentrate public involvement at an early stage where few members of the public will be likely involved, and to severely curtail public comment on the ultimate land use decisions, and to mandate certain project-specific decisions be relegated to "administrative review" so as to avoid public participation, is in violation of both the letter and the spirit of Montana's public participation constitutional requirement and must be declared unconstitutional.

68. Article II, Sections 8 and 9 of the Montana Constitution guarantee the right of citizens to participate in governmental decisions of significant public interest. The Montana Legislature may not simply wave a wand and declare final acts of approval "ministerial" and thereby avoid constitutional rights of public participation.

COUNT III – EQUAL PROTECTION

69. Plaintiffs incorporate by reference each of the foregoing allegations.

70. Montana's Constitution in Article II, Section 3, under the category of

"**inalienable rights**" provides:

> All persons are born free and have certain inalienable rights. They include the right to a **clean and healthful environment** and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, **acquiring, possessing and protecting property**, and seeking their **safety, health and happiness** in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

(Emphasis added.) Montana's Governor, Greg Gianforte, put it this way in his "message" to Montanans which he submitted with the first draft of the Montana Housing Task Force report: "Owning a home is foundational to the American dream."

71. Plaintiffs' members, in acquiring their homes in residential areas, exercised their inalienable rights of acquiring and possessing property, as well as finding a safe, healthful environment which would facilitate happiness. In bringing this lawsuit, Plaintiffs now exercise their inalienable rights of protecting their property and their inalienable right to seek safety, health and happiness in lawful ways. They also, in pursuing this lawsuit, seek to advance their right to a clean and healthful environment. These are fundamental, inalienable rights, which cannot be taken away or compromised without a compelling countervailing interest on the part of the state. Accordingly, any government laws or regulations which may adversely impact these rights must be strictly scrutinized by the courts to make

sure they are constitutional.

72. The result of the imposition of restrictions upon local governments stemming from SB 323, SB 528, SB 245 and SB 382 is the creation of two classes of municipal residents who, although otherwise are absolutely similarly situated, face markedly different consequences. Those residents who are fortunate enough to live in areas protected by restrictive covenants will be largely unaffected by these legislative measures. On the other hand, other residents 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 the full inordinate burden of these legislative measures.

73. The difference in the treatment of these two classifications, one protected by restrictive covenants, the other not so protected, is unrelated to any legitimate governmental purpose, and clearly not related to the "problem" seeking a solution—inadequate affordable housing.

74. Further, SB 382 creates an entirely new regulatory regime for review of zoning, annexation and subdivisions. However that new regime applies only to persons who live in cities of at least 5,000 residents and in counties of at least 70,000 residents. Thus, two or more separate classes are created by these new challenged Acts, and they are arbitrary, not based on any legitimate governmental

purpose that would justify treating one set of citizens differently from another.

75. SB 323, SB 528, SB 245 and SB 382 do not pass constitutional muster under the strict scrutiny test or even a less rigorous standard of scrutiny, such as the "mid-tier" scrutiny, or rational basis, because they are utterly arbitrary and capricious in relation to the professed governmental objective of facilitating affordable housing.

76. This arbitrary distinction between these groups denies Plaintiff's members their constitutional right to equal protection of the laws.

COUNT IV – DUE PROCESS OF LAW

77. Plaintiffs incorporate by reference each of the foregoing allegations.

78. Montana's Constitution in Article II, Section 3, under the category of "**inalienable rights**" provides:

> All persons are born free and have certain inalienable rights. They include the right to a **clean and healthful environment** and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, **acquiring, possessing and protecting property**, and seeking their **safety, health and happiness** in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

(Emphasis added.)

79. Plaintiff's members, in acquiring their homes in residential areas, exercised their rights of acquiring and possessing property, as well as finding a safe,

healthful environment which would facilitate happiness. In bringing this lawsuit, Plaintiff's members now exercise their inalienable rights of protecting their property and their inalienable right to seek safety, health and happiness in lawful ways. They also, in pursuing this lawsuit, seek to advance their right to a clean and healthful environment. These are fundamental, inalienable rights, which cannot be taken away or compromised without a compelling countervailing interest on the part of the state. Accordingly, any government laws or regulations which may adversely impact these rights must be strictly scrutinized by the courts to make sure they are constitutional.

80. There was little coordination in the Legislature in its efforts to promote "densification". As a consequence, there are contradictions and irreconcilable differences among these measures. For example, SB 382 requires affected municipalities to select five housing "strategies" out of a list of fourteen. Of those fourteen listed strategies, the first listed is the allowance of "duplexes" in all areas zoned for single-family dwellings. However, a separate measure, SB 323, **requires** the allowance of duplexes in all affected cities in all areas zoned as "single-family". Each of these measures has its own separate definition of "duplex" and these definitions are different. For example, SB 382 defines "duplex" as:

> 'two-unit dwelling' or 'duplex' means a building designed for two attached dwelling units in which the dwelling units share a common separation, such as a ceiling or wall, and in which access cannot be gained between the units through an internal doorway.

SB 382(3)(36). (§ 76-25-103(36)).

SB 323 on the other hand, defines "duplex" as,

> 'duplex housing' means a parcel or lot with two dwelling units that are designed for residential occupancy by not more than two family units independently from each other.

SB 323(4)(a), (§ 76-2-304(5)(a)).

This difference is not trivial, SB 323's definition of "duplex" could be interpreted to allow two separate single-family dwellings on a lot that is presently zoned as single-family, while SB 382 has a different definition requiring a "common separation" between the two units.

A similar contradiction exists between SB 382 and SB 528. In SB 382, Section 19, one of the "strategies" of the fourteen out of which five must be selected, is to "allow, as a permitted use, for at least one internal or detached accessory unit on a lot with a single-unit dwelling occupied as a primary residence." *See* SB 382, Section 19(e), (§ 76-25-302(e), MCA). But SB 528 requires **all** cities in Montana to allow accessory dwelling units on all lots or parcels designated as single-family.

These and other problems indicate that little thought, and certainly little coordination, was given to what appears to be the frantic rush for "densification" of Montana's cities.

81. The effort by the Montana Legislature to write an entire new review and approval regime for zoning, subdivisions and annexation, has resulted in pervasive arbitrariness which runs afoul of both the Equal Protection and the Due Process clauses of the Montana Constitution. For example, the cities of Hamilton and Polson both have populations of over 5,000, but they are not located in counties of at least 70,000 in population. The cities of Columbia Falls, Whitefish, and Laurel, on the other hand, all of over 5,000 residents, **do** sit in counties of over 70,000 in population. There is no reason in public policy or in the professed justification of addressing affordable housing, that supports the entirely arbitrary distinctions between these similarly-situated cities. Yet one set is obligated to comply with the burdensome strictures of SB 382, while the other set is not. In the meantime, the newly-enacted SB 323, requires "duplexes" in all cities of 5,000 with no caveat that such cities must be located in counties of at least 70,000 in population. Also, SB 528 requires **all** Montana cities to allow "accessory dwelling units" in areas now zoned for single family use. However, both SB 323 and SB 528 are codified in Title 76, Chapters 2, Part 3, but SB 382's "applicability" section,

Section 5(d)(4), makes it clear that those local governments complying with SB 382 are not subject to the provisions of Title 76, Chapters 2, 3, 4, and 8.

82. Although one of the professed purposes of SB 382 is to "streamline" the subdivision review process and make it more understandable to the public, it does just the opposite. The double standard alleged above is even more pronounced on the subdivision issue. Present law deals with local review of subdivisions in § 76-3-101, MCA. Ironically, its short title is: "**The Montana Subdivision and Planning Act**". Now, Montana has a separate new law in SB 382. Its title is: "**Montana Land Use Planning Act**". *See* § 76-25-101, MCA. Both chapters purport to deal with local review and approval of subdivision applications. The result is a great deal of confusing redundancy, which is the antithesis of "streamlining". For example, the new law (SB 382) has a definition section at § 76-25-103, MCA, but so does the old subdivision law at § 76-3-103. The old, but still existing, law has definitions for "minor subdivision", "phased development" and "planned unit developments" (§ 76-3-103(4), (10), and (11), MCA). However, no identical definitions are in the new SB 382 at § 76-25-103.

83. Moreover, no reasonable transition is provided by the 2023 laws. For example, qualifying cities under SB 382 (those of 5,000 population and 70,000 county population) are exempted from all provisions of Title 76, Chapters 1, 2, 3, or

8. *See* § 76-25-105(4). However, under the same statute, these local governments have until May 17, 2026 to comply with the provisions of SB 382. In the meantime, what happens to cities such as Great Falls and Missoula on January 1, 2024, when both SB 323 (mandating duplexes in all single-family zones) and SB 528 (mandating the allowance of ADUs in all cities)? Do they go into effect automatically for these cities on January 1, 2024? Do they then become null and void, once the local government complies with SB 382? This failure of the Legislature to address this transitional limbo is another example of the arbitrariness of the challenged 2023 laws.

84. The disparity in treatment between those protected by restrictive covenants and those not so protected, and the chaotic, uncoordinated, and arbitrary applicability requirements in these various new laws are so arbitrary and capricious and so unrelated to a legitimate governmental purpose that they constitute a denial of Plaintiffs' rights to Due Process of Law.

85. Even if the rights Plaintiffs seek to protect do not rise to the level of "fundamental" rights, subject to strict scrutiny by the courts, these measures fail because they are so arbitrary and capricious, they fail under an even less rigorous constitutional standard.

COUNT V – UNCONSTITUTIONAL ARROGATION OF LOCAL POWER
(And compulsory violation of public participation requirements.)

86. Plaintiffs incorporate by reference each of the foregoing allegations.

87. Montana's local governments, while subject to state law, have a long tradition of quasi-independence and the State of Montana has long relied on the practical tradition of dependence on local governments to solve local problems without undue state interference. Local governments are constitutionally established and governed by the Montana Constitution. The 1972 Montana Constitution, following the previous 1889 Constitution, sets forth a separate article, Article XI dealing with local governments.

88. Montana's public participation and public meeting constitutional provisions apply to local governments and local officials. Article II, Section 9 of Mont. Const., for example, provides that all persons have the right to observe deliberations of all "public bodies or agencies of state government **and its subdivisions**." (Emphasis added.) Section 2-3-102, MCA, defines "agency" as "any board, bureau, commission, department, authority, or officer of the state, **or local government**…." (Emphasis added.)

89. Article XI provides in Section 4(a) that incorporated cities without self-government powers have, among others, the general power "of a municipal corporation and legislative, administrative, and other powers, that are implied by

law".

90. Prior to the 1972 Montana Constitution, and during the period that the 1889 Montana Constitution controlled, local governments in Montana could exercise only such powers as were expressly granted to them by the State together with such implied powers as were necessary for the execution of the powers expressly granted.

91. Montana's 1972 Constitution now provides the opportunity for greater latitude for local governments through the adoption of a "self-government charter". Article XI, Section 6 "Self-Government Powers" provides:

> A local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter.

Local governments with "self-government charters" have greater local powers than those set forth in Article XI, Section 4(a). The Montana Supreme Court has characterized the 1972 self-government provision as follows:

> The 1972 Montana Constitution…continues to provide that existing local forms have such powers as are expressly provided or implied by law (to be liberally construed). *1972 Mont. Const. Art. XI, § 4*. A local government unit may act under a self-government charter with its powers uninhibited except by express prohibitions of the Constitution, law or charter. *1972 Mont. Const. Art. XI, § 6*.

State ex. Rel. Swart v. Molitor, 190 Mont. 515, 518, 21 P.2d 1100, 1102 (1981).

92. Montana law provides, in § 7-1-103, MCA, that a local government with self-government powers,

> which elects to provide a service or provide a function that may also be provided or performed by a general power of government is not subject to any limitation in the provision of that service or performance or that function except such limitations as are contained in its charter or in state law specifically applicable to self-government units.

Also, in § 7-1-106, MCA, it is provided:

> The powers and authority of a local government unit with self-government powers shall be liberally construed. Every reasonable doubt as to the existence of a local government power or authority shall be resolved in favor of the existence of that power or authority.

93. There are 34 municipalities in Montana, including consolidated governments of Anaconda-Deer Lodge and Butte-Silver Bow, that have self-government charters. Among these are Belgrade, Billings, Bozeman, Great Falls, Helena, Missoula, and Whitefish. *Source:* MSU, Local Government Center, Chapter 1.

94. Among the general specified and implied powers of municipalities, and particularly those with self-government charters, is the general power to promulgate and enforce zoning regulations, provide for annexation, and to approve subdivisions. *See generally* Title 76, Chapters 1-4, MCA.

95. The Montana Supreme Court has addressed the authority for zoning

by municipalities, noting that such statutory authority was first adopted in 1929, and stating: historically, the grant of the zoning authority is broadly stated, as characterized in § 76-2-301, MCA…:

> Municipal Zoning Authority. For the purpose of promoting health, safety, morals, or the general welfare of the community, the city or town council…is hereby empowered to regulate and restrict…the density of population; and the location and use of buildings, structures, and land for trade, industry, residences, or other purposes.

State ex. Rel Diehl Co., v. Helena, 181 Mont. 306, 313, 593 P.2d 458, 461 (1979).

96. Over the past few years, the general powers of local government have been incrementally eroded by aggressive acts of state government, including legislative and executive branches. State actors have insidiously arrogated to themselves powers historically considered to be reserved to local governments. This phenomenon was particularly evident during the COVID pandemic. One example of state overreach occurred in 2021 when the Montana Attorney General, an elected State official, undercut local health officials including that of Gallatin County, as these local officials were attempting to take reasonable medically protective measures to combat the pandemic. For example, in 2021, when the Gallatin County Attorney attempted to enforce a curfew requiring taverns to close at 10pm, the Montana Attorney General *sua sponte* ordered him to desist—despite

the fact that the State was not a party to that litigation. Examples of state overreach abound, but need not be listed here.

97. The four challenged measures, SB 323, SB 528, SB 245 and SB 382, are all measures that undercut the authority of local governments to regulate local affairs. For example, SB 528 now requires the allowance of "accessory dwelling units" on every lot now zoned for single-family residences. This "top-down" directive fails to account for the myriad of local impacts such as parking, history, aesthetics, congestion, neighborhood characteristics, costs of infrastructure and other factors that local, but not state, governments are equipped to assess. The same applies to SB 323, which requires duplexes to be allowed in every single-family area without regard to the consequences to local government.

98. The most serious incursion into the realm of local government is SB 382, which compels local governments to select five "strategies" to increase housing out of a list of fourteen "strategies". SB 382, Section 19 (§ 76-25-302), for example, lists several such "strategies" which are within an area that were previously considered local and can be handled locally on a more refined basis. One such strategy for example, calls for either an elimination of or a 25% across-the-board decrease in "impact fees" for accessory dwelling units. SB 382, Section 19(d), (§ 76-25-302(d)). This is a "top-down" imposition of an arbitrary figure, the

predicate of which is that local government has not, in the past, carefully calculated the additional impact and cost on local governments for infrastructure improvement. For example, Bozeman's present growth policy states:

> Impact Fees: impact fees are costs charged to new development to construct fire, water, sewer, and transportation facilities to support new development. There are strict rules to ensure that the impact fees don't fix existing problems. Impact fees enable the City to more closely keep up with water and sewer treatment capacity and other infrastructure needed for new development to be functional and safe.

Bozeman Community Plan, 2020, p. 15. SB 382's meat cleaver approach either assumes that local governments didn't know what they were doing when they calibrated such impact fees, or state officials and legislators just don't care.

Eliminating or reducing the carefully calibrated impact fees on ADUs will result in the cities, through their present taxpayers, absorbing the extra cost of the ADUs which arise because of the added pressure on city infrastructure. This will amount to an improper windfall to homeowners who choose to build ADUs. That is, present city taxpayers will have to subsidize homeowners who choose to construct ADUs.

SB 382, in attempting to increase ADUs by lowering or eliminating impact fees, could have a set of conditions assuring affordability of some or all units as a condition for elimination or reduction of impact fees. It did not do that. The

strategy of lowering or eliminating impact fees by 25% is another example of a "strategy" so arbitrary that it amounts to an unconstitutional violation of Due Process.

99. Other examples of "strategies" contemplated by SB 382 are "eliminate minimum lot sizes or reduce the minimum lot size required by at least 25%". SB 382, § 19(h). Another is "eliminate setback requirements or reduce existing setback requirements by at least 25%"; and another, "increase building height limits for dwelling units by at least 25%". Subsection (d) would eliminate or reduce off-street parking requirements to "require no more than one parking space per dwelling unit". *Id*, subsection (c).

100. This attempted micromanagement of local zoning by the Legislature, which, unlike city governments, lacks planning expertise, time, staff, and appreciation of local issues, constitutes an aggressive incursion into powers that have traditionally been considered local. SB 382 purports to require local public bodies to retrench on public meetings and public right to participate and comment by designating certain actions as "administrative" or "ministerial" and/or severely limiting public hearings regarding "site-specific" applications or projects, and by limiting public comment to a wholly subjective standard of whether such site-specific proposal deviates from the city's growth plan and/or subdivision or zoning

regulations.

101. An example of the attempt to implement SB 382 is found in the City of Bozeman's current effort to revise its Unified Development Code. Presently, Section 38.240.140 regarding "subdivision notice and public comment", the Bozeman UDC states "*all subdivisions require notice and opportunity for public comment*" (subsection a). It proceeds to state, in general, there must be "planning board review"—at a regularly noticed public meeting of the public board (except for minor subdivisions). Now, however, the proposed Bozeman UDC draft, which purports to be developed pursuant to SB 382, provides in Section 38.750.080 – Subdivision notice and public comment – for "public comment". It provides, "Notice for a subdivision review **is limited by state law** to only those elements not previously addressed in the land use plan, zoning regulations, or subdivision regulations…".

102. For these reasons, SB 382 attempts to compel local governments to violate Article II, Sections 8 and 9, of the Mont. Const., and their implementing statutes.

103. Local governments, under SB 382, are now subjected to potential violations of citizens' constitutional rights because any defense that local officials were merely following state law does not shield the local government from liability.

See Evers v. County of Custer, 745 F.2d 1196, 1203 (1984):

> The County argues that it should be immune because it was merely acting according to state law, rather than carrying out County policy. This argument, however, goes only to the question of the Commissioners' good faith in applying the statute. The fact that the Commissioners are immune from suit under § 1983 because of their good faith does not relieve the County from liability. *See Owen v. City of Independence*, 445 US 622…1979.

104. The challenged measures, particularly SB 382, are affirmative directives to local governments, commandeering local officials and resources to adopt certain strategies for addressing the affordable housing problem. They do not fall within the legislative power to "prohibit". This is particularly the case, given Article XI, Section 4(2), "that the powers of incorporated cities and towns shall be liberally construed."

105. In 2020, the National League of Cities published a brochure called "Principles of Home Rule for the Twenty-First Century". Among these principles is:

> Finally, a fourth principle recognizes that contemporary home rule must accord its highest protection—in terms of authority and constraints on state displacement—to the core of local democracy, namely the choices communities make in how they structure and exercise their governance. **The state should have an extremely strong reason** to displace local decisions about representation and governmental structure as well as the choices that local governments make about their personnel and property,

> and punitive state preemption which threatens to translate policy disagreement into a deep disincentive for public service should play no part in contemporary home rule.

(Emphasis added.)

This rule is consistent with the long tradition in Montana, particularly since the 1972 Montana Constitution, of affording great latitude to local governments, to manage local affairs.

106. The challenged statutory measures, SB 323, SB 582, SB 245 and SB 382, are unconstitutional as an improper attempt to impose "top-down" zoning and preempt local control and authority and compel local governments to violate public participation constitutional requirements and expose themselves to liability for constitutional violations of these citizens' right to know.

PRAYER FOR RELIEF

Wherefore Plaintiffs pray:

1. For a declaratory judgment:

    a. That the provisions of SB 323, SB 528, SB 245 and SB 382 may not be used by any person or governmental entity to invalidate or displace covenants that are more restrictive than those developed by Montana's municipal governments;

    b. That SB 323, SB 528, SB 245 and SB 382 are facially

unconstitutional in violation of Montana's constitutional provisions regarding rights of public participation and rights "to know";

c. That any attempt by municipalities to develop an ordinance pursuant to SB 323, SB 528, SB 245 and SB 382 is unconstitutional because they deny Plaintiffs their rights to equal protection of the law;

d. That any attempt by municipalities to develop an ordinance pursuant to SB 323, SB 528, SB 245 and SB 382 is unconstitutional because they deny Plaintiffs their rights to due process of law.

2. For a permanent injunction, enjoining the State of Montana and its municipalities from implementing SB 323, SB 528, SB 245 and SB 382.

3. For a preliminary injunction, preliminarily enjoining the State of Montana and its municipalities from implementing SB 323 and SB 528, both of which are scheduled to take effect January 1, 2024, and preliminarily enjoining SB 245 which purported to go into effect on passage, and purports to be retroactive.

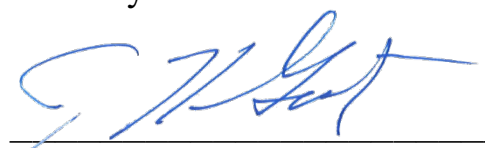
4. For an order awarding Plaintiffs their costs and attorneys' fees pursuant to Montana doctrine regarding Private Attorney Generals.

5. For such other relief as the Court deems appropriate.

DATED this 19th day of December, 2023.

GOETZ, GEDDES & GARDNER, P.C.

Attorneys for Plaintiff



James H. Goetz
Henry J.K. Tesar

CERTIFICATE OF SERVICE

I, James H. Goetz, hereby certify that I have served true and accurate copies of the foregoing Complaint - Amended Complaint to the following on 12-19-2023:

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

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

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

Electronically signed by Myriam Quinto on behalf of James H. Goetz
Dated: 12-19-2023

Update on Grant Funding Received by the City of Billings January 2024

Billings Fire Department

The City of Billings Fire Department won a $10,000 grant to help fund disaster preparedness training.

The City of Billings Fire Department has been awarded a $10,000 grant by State Farm Insurance to help fund structural collapse specialist training for some of its firefighters.

More About This Project

The collapse specialist training will:

- provide 5-7 firefighters with specialist certification in structural collapse response.
- those trained will be available to both the Billings Fire Department and to other regional partners to manage structural collapse situations - securing the situation so that victims can be safely removed.
- training will occur sometime in 2024.
- the fire department is currently seeking further grant funding so that more firefighters can be trained.
- current structural collapse training and certification costs for seven fire fighters is estimated at $36,000.

To learn more about this grant-funded project, contact:
Ted Wilson
City of Billings Grants Administrator
406-869-3997
wilsont@billingsmt.gov

Citizen Police Advisory Committee

2023 Annual Report

Purpose

Members will examine and make recommendations to the Chief of Police, City Administrator, and city council on the following key objectives:

1. Recruitment
2. Retention and workplace diversity
3. Crime prevention and diversion
4. Community support and engagement
5. Data collection and analysis.

Board Accomplishments 2023

Development of Bylaws

Consistent Board Members and Attendance

Variety of Educational Sessions

Minutes were moved to audio for community access

Recommendation and development of a Public Safety Community Engagement Plan

Challenges of 2023

Developing a consistent meeting time with regular attendance

Parliamentary process development

Create a shared understanding of how BPD works

Goals for 2024

Review of 2023 CPAB learning

Action planning for identified areas

- Community Service Officer Extension
- Crisis Response Unit Expansion

Deliverables:

- Advisory action plan for committee and BPD
- Public Safety Community Engagement Plan

CPAB Requests for Council:

Create an extension of the CPAB Board Resolution amendment

Increase Community Service Officer Budget

Recommend an increase in budget support for Crisis Response Unit expansion.

Once drafted, approved the Public Safety Community Engagement Plan

Action Item #1 for consideration

Create an extension of the CPAB Board – Resolution adjustment.

The board would like to request an additional year to:

a. Create an advisory action plan

b. Develop budget recommendations for the Council

c. Submit a Public Safety Community Engagement Plan

Action Item #2 for consideration

Increase Community Service Officers with BPD

a. 12 officer staff

b. Budget recommendation: Increase to cover ____officers, additional are funded privately

Action Item #3 for consideration

Increase Crisis Response Units CRU

a. Increase to three CRU Teams

b. Fiscal Impact:

c. Value add is reduced time for BPD to be on scene, and 80% of calls are resolved on scene.

Action Item #4 for consideration

Public Safety Community Engagement Plan

a. Participate in plan development and eventual adoption

b. Champion plan to city constituents

Budget Implications for Action Items

CPAB Budget Recommendations		
Community Service Officers		
Current Officers x 4 @ $55,000		220,000
Increase CSO x 6 @ $55,000		330,000
Office personnel x 1 $50,000		50,000
Total Payroll		$ 600,000
Mobile Crisis		
Current Staffing		220,000
EMT x 2		330,000
		50,000
Total Payroll		$ 600,000
BPD Efficiencies		
Additional officers needed 8 not 11		220,000
		330,000
		50,000
Total Payroll		$ 600,000
Total Budget Request		$ 1,800,000

2024 COUNCIL MEETINGS SCHEDULE
(Year to date listing appears at the end of this schedule)

February 5, 2024 – WORK SESSION
1. MRM update – Matt Lundgren
2. CRU and MRT Updates (Pepper and Banfield)
3. Family Violence Response Unit Update (St. John per Owen's Initiative)
4. CPTED
5. Skate Park
6. Local Government Review – Resolution for June Ballot
7. Council Discussion

February 12, 2024 - REGULAR BUSINESS

CONSENT:
1. Bid Award: Landon's Inclusive Playground and Phase II Parking Lot Poly Vista Park
2. Bid Award: W.O. 24-07: Safe Routes to School
3. Bid Award: W.O. 24-19: Arnold Drain Intake Structure
4. Purchase 8 Police Utility Vehicles from Duval Ford
5. Purchase Night Vision Systems for Police S.W.A.T. Team
6. Contract for Uniform Rental / Purchase and Laundry Services for Public Works
7. Contract for scanning services with DIS Technologies
8. Contract for New City Hall Elevator Modernization
9. Amendment 15 with Morrison-Maierle, Inc. for Engineering Services to Construct Cargo Ramp Slot 5
10. Amendment 16 with Morrison-Maierle, Inc. for Engineering Services to Rehabilitate Aviation Place Access Road
11. Fire grant from State Farm NOT IN AQ
12. Annual Certified Local Government Grant Program for Historic Preservation
13. Second Reading BMCC Water and Wastewater

REGULAR:
1. PH and RES Creating SID 1426, Arvin Lane
   a. Bid Award: SID 1426, Arvin Lane
2. PH and RES Creating SID 1427, Hancock Drive
   a. Bid Award: SID 1427, Hancock Drive
3. PH and 1st Reading ORD – ZC 1042, 655 West Wicks Lane NOT IN AQ
4. New City Hall Security and additional updates (Kevin)
5. PH and RES gifting land to YVAS (Gina and Chris) NOT IN AQ

CM Rupsis Initiative – BUILT Environment

February 20, 2024 (Tues.) – WORK SESSION
1. Billings Mustangs??
2. PLACEHOLDER – Jail discussion re: short term holding facility

3. City Ordinance Amendments – Code Enforcement (Tina Hoeger)
4. PLACEHOLDER – update Comprehensive Planning Process (SB 382) Wyeth
5. PMD Assessment Approval Discussion (Per Rupsis's question) (Schedule Staff Prep meeting to discuss the impacts of Rupsis's questions)
6. Council Discussion

February 26, 2024 - REGULAR BUSINESS

CONSENT:

1. Boards and Commissions
2. Local Government Review – Resolution for June Ballot
3. Amend Park Development Council budget
4. Purchase of 2024 Asphalt Roller
5. Change Order 1 - Public Library Hail Repairs
6. Second Reading ZC 1042

REGULAR:

1. PH & RES for Nuisance Property Abatement Assessments
2. PH & RES for Weed Assessments
3. PH for Sale of City Hall, South Parking Lot, and North Parking Lot

March 4, 2024 – WORK SESSION

1. 2024-2028 Transportation Improvement Program Review (Lora Mattox)
2. Safe Routes to Schools, Phase II Study (Lora Mattox)
3. Tax Abatement Policy (Dianne, BSEDA/Chris)??
4. Prep for retreat (Rupsis land use follow up)
5. Council Discussion

March 11, 2024 - REGULAR BUSINESS

CONSENT:

1. 2nd/Final Reading ORD – ZC 1042 – 655 West Wicks Lane
2.

REGULAR:

1. Downtown Billings Partnership - Tax Increment Assistance - Rockman Hotel Project

March 15 and 16, 2024 (Council Retreat) 8 am - 7 pm Friday March 15 only??

March 15, 2024 - Council Retreat
March 16, 2024 - Council Retreat

March 18, 2024 – WORK SESSION
CLOSED EXECUTIVE SESSION 4:30 – 5:30 PM

1. Council Goals and Strategies
2. Council Discussion

March 25, 2024 - REGULAR BUSINESS

CONSENT:

1.

REGULAR:

1.

April 1, 2024 – WORK SESSION

1.
2. Council Discussion

April 8, 2024 - REGULAR BUSINESS

CONSENT:

1. Adoption of Council Goals and Strategies

REGULAR:

1.

April 15, 2024 – WORK SESSION

1.
2. Council Discussion

April 22, 2024 - REGULAR BUSINESS CHRIS OUT

CONSENT:

1.

REGULAR:

1.

**Judge Kolar would like to be first during budget meetings

May 6, 2024 (BUDGET) – WORK SESSION

1.
2. Council Discussion

May 13, 2024 - REGULAR BUSINESS

CONSENT:

1.

REGULAR:

1.

May 20, 2024 (BUDGET) – WORK SESSION

1.
2. Council Discussion

May 28, 2024 (Tues.)- REGULAR BUSINESS

CONSENT:

1.

REGULAR:

1.

June 3, 2024 – WORK SESSION

CLOSED EXECUTIVE SESSION 4:30 – 5:30 PM

1.
2. Council Discussion

June 10, 2024 - REGULAR BUSINESS

CONSENT:

1.

REGULAR:

1.

June 17, 2024 – WORK SESSION

1.
2. Council Discussion

June 24, 2024 - REGULAR BUSINESS

CONSENT:

1.

REGULAR:

1.

July 1, 2024 – WORK SESSION

1.
2. Council Discussion

July 8, 2024 - REGULAR BUSINESS

CONSENT:

1.

REGULAR:
1.

July 15, 2024 – WORK SESSION
1.
2. Council Discussion

July 22, 2024 - REGULAR BUSINESS CHRIS OUT
CONSENT:
1.

REGULAR:
1.

August 5, 2024 – WORK SESSION
1.
2. Council Discussion

August 12, 2024 - REGULAR BUSINESS
CONSENT:
1.

REGULAR:
1.

August 19, 2024 – WORK SESSION
1.
2. Council Discussion

August 26, 2024 - REGULAR BUSINESS
CONSENT:
1.

REGULAR:
1.

September 3, 2024 (Tues.) – WORK SESSION
CLOSED EXECUTIVE SESSION 4:30 – 5:30 PM
1.
2. Council Discussion

September 9, 2024 - REGULAR BUSINESS
CONSENT:

1.

REGULAR:
1.

September 16, 2024 – WORK SESSION
1.
2. Council Discussion

September 23, 2024 - REGULAR BUSINESS

CONSENT:
1.

REGULAR:
1.

October 7, 2024 – WORK SESSION
CLOSED EXECUTIVE SESSION 4:30 – 5:30 PM CA Annual Review
1. Council Discussion

October 15, 2024 - REGULAR BUSINESS

CONSENT:
1.

REGULAR:
1.

October 21, 2024 – WORK SESSION
1.
2. Council Discussion

October 28, 2024 - REGULAR BUSINESS

CONSENT:
1.

REGULAR:
1.

November 4, 2024 – WORK SESSION
1.
2. Council Discussion

November 12, 2024 (Tues.) - REGULAR BUSINESS

CONSENT:
1.

REGULAR:
1.

November 18, 2024 – WORK SESSION
1.
2. Council Discussion

November 25, 2024 - REGULAR BUSINESS

CONSENT:
1.

REGULAR:
1.

December 2, 2024 – WORK SESSION
CLOSED EXECUTIVE SESSION 4:30 – 5:30 PM
1.
2. Council Discussion

December 9, 2024 - REGULAR BUSINESS

CONSENT:
1. Beartooth RC&D MOU

REGULAR:
1.

December 16, 2024 – WORK SESSION (Vacate?)
1.
2. Council Discussion

December 23, 2024 - REGULAR BUSINESS

CONSENT:
1.

REGULAR:
1.

****

January 2, 2024 (Tues.) – WORK SESSION

1. Administration of Oaths and Affirmations of Office for reelected Councilmembers
2. DES Emergency Management Update (K.C. Williams)
3. Ordinance Amendments to Water and Wastewater Utilities
4. Stormwater Billing
5. Council Discussion

January 8, 2024 - REGULAR BUSINESS

CONSENT:

A. Bid Award: W.O. 24-03: Contract 2 Chip Seal / Scrub Seal
B. Bid Award: W.O. 23-46: Compost Facility Waterline
C. Purchase Water Reclamation Facility Equipment – Disinfection parts
D. City-County Special Investigations Unit (CCSIU) Agreement for 2024
E. W.O. 19-42: WE Water Treatment contract - Dick Anderson
F. Bureau of Reclamation WaterSMART Small-Scale Water Efficiency Projects
G. Donations to Library
H. MT FWP trail stewardship grant application
I. Northwestern Energy easement for Mountview Cemetery
~~J. Easements North 28th Street~~

REGULAR:

2. PH and 1st reading ORD – Cemetery Code changes
3. PH and 1st reading ORD – ZC 1040 - 1404 and 1406 Avenue B
4. PH and 1st reading ORD – Special Review 998 – 1406 Avenue B
5. Nomination and Election of Deputy Mayor Pro Tempore

January 16, 2024 (Tues.) – WORK SESSION at the Library!

1. Crime Prevention Round Table Discussion – focused on Crime Prevention
2. Council Discussion

January 22, 2024 - REGULAR BUSINESS

CONSENT:

1. Change Order 1 – New City Hall Access Control and Camera System
2. Contract for Airport Master Plan update
3. Memorandum of Understanding with Yellowstone County - West End Neighborhood Plan Update
4. Amendment to Memorandum of Understanding with the Yellowstone Conservation District for West End Reservoir Master Plan
5. Amend Park Development Council 2024 Proposed Budget
6. Federal Aviation Administration Airport Improvement Program Grants
7. Montana Community Reinvestment Plan Act Planning Grant (SB 382) growth policy
8. Donation to Parks from Billings Go Kickball to Youth Scholarship Fund
9. Donation to Parks from Scheels for Youth Scholarship Fund
10. Release of Perpetual ROW Easements - North 28th Street
11. Preliminary plat extension request for Annafeld North Subdivision, 2nd Filing
12. Resolution Authorizing the Filing and Acceptance of Transit Grant Funds and Related Documents
13. Resolution Authorizing the Issuance and Private Negotiated Sale of Expanded North 27th Street Tax Increment Bonds
14. Resolution of Intent to Create District and Set a Public Hearing-SID 1427
15. Resolution of Intent to Create District and Set a Public Hearing-SID 1426
16. 2nd/ Final Reading ORD. – ZC 1040 – 1404 and 1406 Avenue B
17. 2nd/ Final Reading ORD amending Cemetery Rules and Regulations and Repealing ORD 03-5240

REGULAR:

2. PH - MT Dept. of Commerce Infrastructure Grant Application
3. PH and 1st reading ORD - BMCC Chapter 26 Water and Wastewater First Reading and Public Hearing
4. Appointments to Council Subcommittees and Boards and Commissions