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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC, Plaintiff, v. STATE OF MONTANA, Defendant.	Cause No. _____ Hon. _____ **COMPLAINT**

This is a complaint for declaratory and injunctive relief. 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.

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.

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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. 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 member believed, when they moved into the present location, that they were locating in a stable, fixed, and primarily residential neighborhood.

34. 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.

35. Each of Plaintiff's members will be adversely and negatively affected if the challenged measures are allowed to stand. 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, 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.

36. The requested relief will allow Plaintiff's members 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

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

REMEDIES

38. 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

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

40. 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.

41. 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.

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

43. 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.

44. 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.

45. 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.)

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

47. 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.

48. 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.

49. 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.

50. 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.

51. 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).

52. 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.

53. 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.

54. 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.

55. 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."

56. 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.

57. 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.

58. 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.)

59. 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.

60. 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.

61. 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.

62. 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.

63. 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.

64. 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.

65. § 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.

66. 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.

67. 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

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

69. 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."

70. 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.

71. 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.

72. 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.

73. 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.

74. 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.

75. 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

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

77. 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.)

78. 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.

79. 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.

80. 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.

81. 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.

82. 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.

83. 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.

84. 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.)

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

86. 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.

87. 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.)

88. 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".

89. 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.

90. 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).

91. 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.

92. 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.

93. 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.

94. 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).

95. 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.

96. 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.

97. 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.

98. 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).

99. 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.

100. 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…".

101. 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.

102. 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.

103. 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."

104. 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.

105. 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.

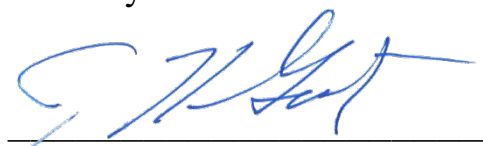
4. For an order awarding Plaintiffs their costs and attorneys' fees pursuant to Montana doctrine regarding Private Attorney Generals.

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

DATED this 15th day of December, 2023.

GOETZ, GEDDES & GARDNER, P.C.

Attorneys for Plaintiff



James H. Goetz
Henry J.K. Tesar

APPENDIX

Appendix	Bill
App. A	SB 323
App. B	SB 382
App. C	SB 528
App. D	SB 345

AN ACT GENERALLY REVISING MUNICIPAL ZONING LAWS; REQUIRING CERTAIN CITIES TO ALLOW THE USE OF DUPLEX HOUSING IN ZONING REGULATIONS; PROVIDING DEFINITIONS; AMENDING SECTIONS 76-2-304 AND 76-2-309, MCA; AND PROVIDING A DELAYED EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 76-2-304, MCA, is amended to read:

"**76-2-304. Criteria and guidelines for zoning regulations.** (1) Zoning regulations must be:

(a) made in accordance with a growth policy; and

(b) designed to:

(i) secure safety from fire and other dangers;

(ii) promote public health, public safety, and the general welfare; and

(iii) facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.

(2) In the adoption of zoning regulations, the municipal governing body shall consider:

(a) reasonable provision of adequate light and air;

(b) the effect on motorized and nonmotorized transportation systems;

(c) promotion of compatible urban growth;

(d) the character of the district and its peculiar suitability for particular uses; and

(e) conserving the value of buildings and encouraging the most appropriate use of land throughout the jurisdictional area.

(3) 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.

(4) As used in this section, the following definitions apply:

(a) "Duplex housing" means a parcel or lot with two dwelling units that are designed for residential occupancy by not more than two family units living independently from each other.

(b) "Family unit" means:

(i) a single person living or residing in a dwelling or place of residence; or

(ii) two or more persons living together or residing in the same dwelling or place of residence.

(c) "Single-family residence" has the meaning provided in 70-24-103."

Section 2. Section 76-2-309, MCA, is amended to read:

"**76-2-309. Conflict with other laws.** (1) Wherever the regulations made under authority of this part require a greater width or size of yards, courts, or other open spaces; require a lower height of building or less number of stories; require a greater percentage of lot to be left unoccupied; or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this part ~~shall~~ must govern.

(2) Wherever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts, or other open spaces; require a lower height of building or a less number of stories; require a greater percentage of lot to be left unoccupied; or impose other higher standards than are required by the regulations made under authority of this part, except for restrictions provided in 76-2-304(3), the provisions of ~~such~~ the statute or local ordinance or regulation ~~shall~~ must govern."

Section 3. Effective date. [This act] is effective January 1, 2024.

- END -

I hereby certify that the within bill,

SB 323, originated in the Senate.

_____

Secretary of the Senate

_____

President of the Senate

Signed this _____day

of_____, 2023.

_____

Speaker of the House

Signed this _____day
of_____, 2023.

SENATE BILL NO. 323

INTRODUCED BY J. TREBAS, C. KNUDSEN, C. HINKLE, M. HOPKINS, K. BOGNER, D. ZOLNIKOV

AN ACT GENERALLY REVISING MUNICIPAL ZONING LAWS; REQUIRING CERTAIN CITIES TO ALLOW THE USE OF DUPLEX HOUSING IN ZONING REGULATIONS; PROVIDING DEFINITIONS; AMENDING SECTIONS 76-2-304 AND 76-2-309, MCA; AND PROVIDING A DELAYED EFFECTIVE DATE.

AN ACT CREATING THE MONTANA LAND USE PLANNING ACT; REQUIRING CITIES THAT MEET CERTAIN POPULATION THRESHOLDS TO UTILIZE THE LAND USE PLAN, MAP, ZONING REGULATIONS, AND SUBDIVISION REGULATIONS PROVIDED IN THE ACT; ALLOWING OTHER LOCAL GOVERNMENTS THE OPTION TO UTILIZE THE PROVISIONS OF THE ACT; REQUIRING PUBLIC PARTICIPATION DURING THE DEVELOPMENT, ADOPTION, OR AMENDMENT OF A LAND USE PLAN, MAP, ZONING REGULATION, OR SUBDIVISION REGULATION; PROVIDING STRATEGIES TO MEET POPULATION PROJECTIONS; PROVIDING FOR CONSIDERATION OF FACTORS SUCH AS HOUSING, LOCAL FACILITIES, ECONOMIC DEVELOPMENT, NATURAL RESOURCES, ENVIRONMENT, AND NATURAL HAZARDS WHEN DEVELOPING A LAND USE PLAN, MAP, AND ZONING REGULATION; PROVIDING FOR A PROCEDURE TO REVIEW SUBDIVISIONS AND APPROVE FINAL PLATS; PROVIDING FOR A LOCAL GOVERNING BODY TO COLLECT FEES; PROVIDING AN APPEALS PROCESS, ENFORCEMENT MECHANISMS, AND PENALTIES; PROVIDING DEFINITIONS; REPEALING SECTIONS 7-21-1001, 7-21-1002, AND 7-21-1003, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Short Title. [Sections 1 through 38] may be cited as the "Montana Land Use Planning Act".

Section 2. Legislative purpose, findings, and intent. (1) It is the purpose of [sections 1 through 38] to promote the health, safety, and welfare of the people of Montana through a system of comprehensive planning that balances private property rights and values, public services and infrastructure, the human environment, natural resources, and recreation, and a diversified and sustainable economy.

(2) The legislature finds that coordinated and planned growth will encourage and support:

(a) sufficient housing units for the state's growing population that are attainable for citizens of all income levels;

(b) the provision of adequate public services and infrastructure in the most cost-effective manner possible, shared equitably among all residents, businesses, and industries;

(c) the natural environment, including wildlife and wildlife habitat, sufficient and clean water, and healthy air quality;

(d) agricultural, forestry, and mining lands for the production of food, fiber, and minerals and their economic benefits;

(e) the state's economy and tax base through job creation, business development, and the revitalization of established communities;

(f) persons, property, infrastructure, and the economy against natural hazards, such as flooding, earthquake, wildfire, and drought; and

(g) local consideration, participation, and review of plans for projected population changes and impacts resulting from those plans.

(3) It is the legislature’s intent that the comprehensive planning authorized in [sections 1 through 38]:

(a) provides the broadest and most comprehensive level of collecting data, identifying and analyzing existing conditions and future opportunities and constraints, acknowledging and addressing the impacts of development on each jurisdiction, and providing for broad public participation;

(b) serves as the basis for implementing specific land use regulations that are in substantial compliance with the local land use plan;

(c) provides for local government approval of development proposals in substantial compliance with the land use plan, based on information, analysis, and public participation provided during the development and adoption of the land use plan and implementing regulations; and

(d) allows for streamlined administrative review decisionmaking for site-specific development applications.

Section 3. Definitions. As used in [sections 1 through 38], unless the context or subject matter clearly requires otherwise, the following definitions apply:

(1) "Aggrieved party" means a person who can demonstrate a specific personal and legal interest, as distinguished from a general interest, who has been or is likely to be specially and injuriously affected by the decision.

(2) "Applicant" means a person who seeks a land use permit or other approval of a development proposal.

(3) “Built environment” means man-made or modified structures that provide people with living, working, and recreational spaces.

(4) “Cash-in-lieu donation" is the amount equal to the fair market value of unsubdivided, unimproved land.

(5) "Certificate of survey" means a drawing of a field survey prepared by a registered surveyor for the purpose of disclosing facts pertaining to boundary locations.

(6) "Dedication" means the deliberate appropriation of land by an owner for any general and public use, reserving to the landowner no rights that are incompatible with the full exercise and enjoyment of the public use to which the property has been devoted.

(7) "Division of land" means the segregation of one or more parcels of land from a larger tract held in single or undivided ownership by transferring or contracting to transfer title to a portion of the tract or properly filing a certificate of survey or subdivision plat establishing the identity of the segregated parcels pursuant to [sections 1 through 38]. The conveyance of a tract of record or an entire parcel of land that was created by a previous division of land is not a division of land.

(8) "Dwelling " means a building designed for residential living purposes, including single-unit, two-unit, and multi-unit dwellings.

(9) "Dwelling unit" means one or more rooms designed for or occupied exclusively by one household.

(10) “Examining land surveyor" means a registered land surveyor appointed by the governing body to review surveys and plats submitted for filing.

(11) "Final plat" means the final drawing of the subdivision and dedication required by [sections 1

through 38] to be prepared for filing for record with the county clerk and recorder and containing all elements and requirements set forth in [sections 1 through 38] and in regulations adopted pursuant to [sections 1 through 38].

(12) "Four-unit dwelling" or "fourplex" means a building designed for four 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, excluding common hallways.

(13) "Immediate family" means a spouse, children by blood or adoption, and parents.

(14) "Irrigation district" means a district established pursuant to Title 85, chapter 7.

(15) "Jurisdictional area" or "jurisdiction" means the area within the boundaries of the local government. For municipalities, the term includes those areas the local government anticipates may be annexed into the municipality over the next 20 years.

(16) “Land use permit” means an authorization to complete development in conformance with an application approved by the local government.

(17) “Land use plan” means the land use plan and future land use map adopted in accordance with [sections 1 through 38].

(18) “Land use regulations” means zoning, zoning map, subdivision, or other land use regulations authorized by state law.

(19) “Local governing body” or "governing body" means the elected body responsible for the administration of a local government.

(20) “Local government” means a county, consolidated city-county, or an incorporated municipality to which the provisions of [sections 1 through 38] apply as provided in [section 5].

(21) "Manufactured housing" means a dwelling for a single household, built offsite in a factory that is in compliance with the applicable prevailing standards of the United States department of housing and urban development at the time of its production. A manufactured home does not include a mobile home or housetrailer, as defined in 15-1-101.

(22) “Ministerial permit” means a permit granted upon a determination that a proposed project complies with the zoning map and the 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.

(23) "Multi-unit dwelling" means a building designed for five or more 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, excluding common hallways.

(24) "Permitted use" means a use that may be approved by issuance of a ministerial permit.

(25) “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 through 38].

(26) "Plat" means a graphical representation of a subdivision showing the division of land into lots, parcels, blocks, streets, alleys, and other divisions and dedications.

(27) "Preliminary plat" means a neat and scaled drawing of a proposed subdivision showing the layout of streets, alleys, lots, blocks, and other elements of a subdivision that furnish a basis for review by a governing body.

(28) "Public utility" has the meaning provided in 69-3-101, except that for the purposes of [sections 1 through 38], the term includes a county water or sewer district as provided for in Title 7, chapter 13, parts 22 and 23, and municipal sewer or water systems and municipal water supply systems established by the governing body of a municipality pursuant to Title 7, chapter 13, parts 42, 43, and 44.

(29) "Single-room occupancy development" means a development with dwelling units in which residents rent a private bedroom with a shared kitchen and bathroom facilities.

(30) "Single-unit dwelling" means a building designed for one dwelling unit that is detached from any other dwelling unit.

(31) "Subdivider" means a person who causes land to be subdivided or who proposes a subdivision of land.

(32) "Subdivision" means a division of land or land so divided that it creates one or more parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section, exclusive of public roadways, in order that the title to the parcels may be sold or otherwise transferred and includes any resubdivision and a condominium. The term also means an area, regardless of its size, that provides or will provide multiple spaces for rent or lease on which recreational camping vehicles or

mobile homes will be placed.

(33) "Subdivision guarantee" means a form of guarantee that is approved by the commissioner of insurance and is specifically designed to disclose the information required in [section 34].

(34) "Tract of record" means an individual parcel of land, irrespective of ownership, that can be identified by legal description, independent of any other parcel of land, using documents on file in the records of the county clerk and recorder's office.

(35) "Three-unit dwelling" or "triplex" means a building designed for three 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, excluding common hallways.

(36) "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.

Section 4. Planning commission. (1) (a) Each local government shall establish, by ordinance or resolution, a planning commission.

(b) Any combination of local governments may create a multi-jurisdiction planning commission or join an existing commission pursuant to an interlocal agreement.

(c) (i) Any combination of legally authorized planning boards, zoning commissions, planning and zoning commissions, or boards of adjustment existing prior to [the effective date of this act] may be considered duly constituted under [sections 1 through 38] as a planning commission by agreement of the governing bodies of each jurisdiction represented on the planning commission.

(ii) If more than one legally authorized planning board, zoning commission, or planning and zoning commission exists within a jurisdiction, the governing bodies of each jurisdiction may agree to:

(A) designate, combine, consolidate, or modify one or more of the authorized boards or commissions as the planning commission; or

(B) create a new planning commission pursuant to this section and disband the existing boards and commissions.

(2) (a) (i) Each planning commission must consist of an odd number of no fewer than three voting

members who are confirmed by majority vote of each local governing body.

(ii) Each jurisdiction must be equally represented in the membership of a multi-jurisdiction planning commission.

(b) The planning commission shall meet at least once every 6 months.

(c) Minutes must be kept of all meetings of the planning commission and all meetings and records must be open to the public.

(d) A majority of currently appointed voting members of the planning commission constitutes a quorum. A quorum must be present for the planning commission to take official action. A favorable vote of at least a majority of the quorum is required to authorize an action at a regular or properly called special meeting.

(e) The ordinance, resolution, or interlocal agreement creating the planning commission must set forth the requirements for appointments, terms, qualifications, removal, vacancies, meetings, notice of meetings, officers, reimbursement of costs, bylaws, or any other requirement determined necessary by the local governing body.

(3) (a) Except as set forth in subsection (3)(b), the planning commission shall review and make recommendations to the local governing body regarding the development, adoption, amendment, review, and approval or denial of the following documents:

(i) the land use plan and future land use map as provided in [section 7];

(ii) zoning regulations and map as provided in [sections 18 through 24];

(iii) subdivision regulations as provided in [sections 25 through 34]; and

(iv) any other legislative land use planning document the local governing body designates.

(b) In accordance with [section 37], the planning commission shall hear and decide appeals from any site-specific land use decisions made by the planning administrator pursuant to the adopted regulations described in subsection (3)(a). Decisions of the planning commission may be appealed to the local governing body as provided in [section 37].

(4) The planning commission may be funded pursuant to 76-1-403 and 76-1-404.

Section 5. Applicability and compliance. (1) A municipality with a population at or exceeding 5,000 located within a county with a population at or exceeding 70,000 in the most recent decennial census shall

comply with the provisions of [sections 1 through 38].

(2) (a) Except as provided in subsection (2)(b), any municipality that meets the population thresholds of subsection (1) on [the effective date of this act] shall comply with the provisions of [sections 1 through 38] within 3 years of [the effective date of this act].

(b) A municipality that has adopted a growth policy within 5 years prior to [the effective date of this act] shall comply with the provisions of [sections 1 through 38] within 5 years of the date that the growth policy was adopted or within the deadline established in subsection (2)(a), whichever occurs later.

(c) A municipality that meets the population thresholds of subsection (1) on any decennial census completed after [the effective date of this act] shall comply with the provisions of [sections 1 through 38] by December 31 of the third year after the date of the decennial census.

(3) (a) A local government that is not required to comply with the provisions of [sections 1 through 38] may decide to comply with the provisions of [sections 1 through 38] by an affirmative vote of the local governing body. After an affirmative vote, the governing body shall comply with the provisions of [sections 1 through 38] by December 31 of the fifth year after the date of the vote.

(b) A local government that votes pursuant to subsection (3)(a) to comply with the provisions of [sections 1 through 38] may subsequently decide to not comply with the provisions of [sections 1 through 38] by an affirmative vote.

(4) A local government that complies with [sections 1 through 38] is not subject to any provision of Title 76, chapters 1, 2, 3, or 8.

Section 6. Public participation. (1) (a) A local government shall provide continuous public participation when adopting, amending, or updating a land use plan or regulations pursuant to [sections 1 through 38].

(b) Public participation in the adoption, amendment, or update of a land use plan or implementing regulations must provide for, at a minimum:

(i) dissemination of draft documents;

(ii) an opportunity for written and verbal comments;

(iii) public meetings after effective notice;

(iv) electronic communication regarding the process, including online access to documents, updates, and comments; and

(v) an analysis of and response to public comments.

(2) A local government shall document and retain all public outreach and participation performed as part of the administrative record in accordance with the retention schedule published by the secretary of state.

(3) (a) A local government may decide the method for providing:

(i) general public notice and participation in the adoption, amendment, or update of a land use plan or regulation; and

(ii) notice of written comment on applications for land use permits pursuant to [sections 1 through 38].

(b) All notices must clearly specify the nature of the land use plan or regulation under consideration, what type of comments the local government is seeking from the public, and how the public may participate.

(c) The local government shall document what methods it used to provide continuous participation in the development, adoption, or update of a land use plan or regulation and shall document all comments received.

(d) The department of commerce established in 2-15-1801 and functioning pursuant to 90-1-103 shall develop a list of public participation methods and best practices for use by local governments in developing, adopting, or updating a land use plan or regulations.

(4) Throughout the adoption, amendment, or update of the land use plan or regulation processes, a local government shall emphasize that:

(a) the land use plan is intended to identify the opportunities for development of land within the planning area for housing, businesses, agriculture, and the extraction of natural resources, while acknowledging and addressing the impacts of that development on adjacent properties, the community, the natural environment, public services and facilities, and natural hazards;

(b) the process provides for continuous and extensive public notice, review, comment, and participation in the development of the land use plan or regulation;

(c) the final adopted land use plan, including amendments or updates to the final adopted land use plan, comprises the basis for implementing land use regulations in substantial compliance with the land use plan; and

(d) the scope of and 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.

(5) The local governing body shall adopt a public participation plan detailing how the local government will meet the requirements of this section.

Section 7. Adoption or amendment of land use plan and future land use map. (1) The local governing body shall adopt or amend by resolution a land use plan and future land use map in accordance with [sections 7 through 17] only after consideration by and on the recommendation of the planning commission.

(2) Prior to making a recommendation to the governing body to adopt or amend a land use plan and future land use map, the planning commission shall:

(a) provide public notice and participation in accordance with [section 6]; and

(b) accept, consider, and respond to public comment on the proposed land use plan and future land use map. All public comment must be part of the administrative record transmitted to the governing body.

(3) After meeting the requirements of subsection (2), the planning commission shall make a final recommendation to the governing body to adopt, modify, or reject the proposed land use plan and future land use map or any amendment to the proposed land use plan and future land use map.

(4) The governing body shall incorporate any existing neighborhood, area, or plans adopted pursuant to Title 76, chapter 1, that meet the requirements of [sections 1 through 38] into the land use plan and future land use map.

(5) (a) The governing body shall consider the recommendation of the planning commission to adopt, modify, or reject the proposed land use plan and future land use map or any amendment to the proposed land use plan and future land use map.

(b) After providing public notice and participation in accordance with [section 6], the governing

body may adopt, with any revisions the local governing body considers appropriate, or reject the land use plan and future land use map or any amendment to the proposed land use plan and future land use map proposed by the planning commission.

(6) An amendment to a land use plan or future land use map may be initiated:

(a) by majority vote of the governing body;

(b) on petition of at least 15% of the electors of the local government jurisdiction to which the plan applies, as registered at the last general election; or

(c) by a property owner applying for a zoning, subdivision, or other land use permit.

(7) (a) After the initiation of an amendment to a land use plan or future land use map allowed in subsection (6), the planning commission shall make a preliminary determination of whether the proposed land use plan or future land use map amendment results in new or increased impacts to or from local facilities, services, natural resources, natural environment, or natural hazards from those previously described and analyzed in the assessment conducted in the development of the land use plan.

(b) If the planning commission finds new or increased impacts from the proposed land use plan or future land use map amendment, the local government shall collect additional data and conduct additional analysis necessary to provide the planning commission with the opportunity to consider all potential impacts resulting from the amendment before proceeding under subsection (2).

(8) The governing body may not amend the land use plan or future land use map unless:

(a) the amendment is found in substantial compliance with the land use plan; and

(b) the potential impacts resulting from development in substantial compliance with the proposed amendment have been made available for public review and comment and have been fully considered by the governing body.

Section 8. Update of land use plan or future land use map. (1) After a local government adopts a land use plan and future land use map in accordance with [section 7], the land use plan and future land use map must be reviewed by the planning commission every fifth year after adoption to determine whether an update to the land use plan and future land use map must be performed. The planning commission shall:

(a) make a preliminary determination regarding the existence of new or increased impacts to or

from local facilities, services, natural resources, natural environment, or natural hazards from those previously described and analyzed when the land use plan and future land use map were previously adopted;

(b) provide public notice and participation in accordance with [section 6]; and

(c) accept, consider, and respond to public comment on the review of the land use plan and future land use map. All public comment must be part of the administrative record transmitted to the governing body.

(2) (a) If the planning commission finds new or increased impacts under subsection (1), the planning commission shall recommend an update to the land use plan, future land use map, or both.

(b) If the planning commission finds no new or increased impacts under subsection (1), the planning commission shall make a recommendation to the governing body that no update to the land use plan or future land use map is necessary.

(3) After receiving the recommendation of the planning commission, the governing body may direct that an update of the land use plan, future land use map, or both be completed or may readopt the current land use plan, future land use map, or both.

(4) (a) In developing, drafting, and considering an update to the land use plan or future land use map, the planning commission shall follow the process set forth in [section 7] with respect to the changes proposed to the land use plan or future land use map.

(b) If the planning commission finds new or increased impacts resulting from the land use plan or future land use map, the local government shall collect additional data and conduct additional analysis necessary to provide the governing body and the public with the opportunity to comment on and consider all potential impacts resulting from an update to the land use plan or future land use map.

(5) At any time before an update is required after a review under subsection (1), the local governing body may direct that an update to the land use plan or future land use map be prepared for consideration by the planning commission and for recommendation to the governing body.

(6) Once an update to the land use plan or future land use map is adopted or the land use plan or future land use map is readopted, the information and analysis contained within the land use plan and future land use map must be considered accurate for the purposes of making site-specific development decisions in substantial compliance with the land use plan and future land use map.

Section 9. Existing conditions and population projections. (1) The land use plan must include, at a minimum, inventories and descriptions of existing conditions of housing, local services and facilities, economic development, natural resources, environment, and hazards, and land use within the jurisdictional boundaries of the land use plan.

(2) As set forth in [sections 10 through 17], the land use plan must include, at minimum, a description, map, and analysis of how the jurisdiction will accommodate its projected population over the next 20 years and the expected impacts of the development in the areas of housing, local services and facilities, economic development, natural resources, environment, and hazards.

(3) The inventories and descriptions in the plan must be based on up-to-date surveys, maps, diagrams, charts, descriptive material, studies, and reports necessary to explain and supplement the analysis of each section of the land use plan.

(4) (a) A jurisdiction shall use demographics provided by:

(i) the most recent decennial census or census estimate of the United States census bureau; and

(ii) population projections for a 20-year period based on permanent and seasonal population estimates:

(A) provided by demographics published by the department of commerce;

(B) generated by the local government; or

(C) produced by a professional firm specializing in projections.

(b) When a population projection is not available, population projections for the jurisdiction must be reflective of the area's proportional share of the total county population and the total county population growth.

Section 10. Housing. (1) A local governing body shall identify and analyze existing and projected housing needs for the projected population of the jurisdiction and provide regulations that allow for the rehabilitation, improvement, or development of the number of housing units needed, as identified in the land use plan and future land use map, including:

(a) a quantification of the jurisdiction's existing and projected needed housing types, including location, age, condition, and occupancy required to accommodate existing and estimated population projections;

(b) an inventory of sites, including zoned, unzoned, vacant, underutilized, and potential redevelopment sites, available to meet the jurisdiction's needed housing types;

(c) an analysis of any constraints to housing development, such as zoning, development standards, and infrastructure needs and capacity, and the identification of market-based incentives that may affect or encourage the development of needed housing types; and

(d) a detailed description of what actions the jurisdiction may take to accommodate the projected needed housing types identified in subsection (1)(a).

(2) The housing section of the land use plan and future land use map may incorporate by reference any information or policies identified in other housing needs assessments adopted by the governing body.

(3) If, after performing the analysis required in subsection (1), the local government determines that the total needed housing types may not be met due to lack of resources, development sites, infrastructure capacity, or other documented constraints, the local government shall establish the minimum number of housing units that may be rehabilitated, improved, or developed within the jurisdiction over the 20-year planning period and the actions the local government may take to remove constraints to the development of those units over that period.

(4) Progress toward the construction of the housing units identified as needed to meet projected housing needs during the 20-year planning period of the land use plan must be documented at each fifth year review of the land use plan as required in [section 8].

(5) The amount of detail provided in the analysis beyond the minimum criteria established in this section is at the discretion of the local governing body.

Section 11. Local services and facilities. (1) The land use plan must:

(a) determine the existing and anticipated levels of public safety and emergency services necessary to serve the projected population of the jurisdiction, including law enforcement, fire protection, emergency management system agencies, and local health care organizations;

(b) contain an inventory and map of existing fire protection, law enforcement, and emergency service jurisdictional areas and anticipated response times, a description of mutual aid or cooperative service

agreements, and the location of hospitals or clinics in the jurisdiction;

(c) identify capital and service improvements for fire, law enforcement, emergency services, and health services for the jurisdictional area necessary to meet the projected population;

(d) determine the existing capacity, existing deficiencies, planned expansion, and anticipated levels of utility services necessary to serve the projected population in the jurisdiction, including water, wastewater, and storm water systems, solid waste disposal, and other utility services, as identified by the local government;

(e) contain an inventory and map of all utility service areas, system networks, and facilities;

(f) identify local utility capital and service improvements for the jurisdictional area necessary to meet the projected population;

(g) determine the existing capacity, existing deficiencies, planned expansion, and anticipated improvements to the transportation network serving the jurisdictional area necessary to serve the projected population in the jurisdiction;

(h) contain an inventory and classification map of all existing and planned roads within the jurisdictional area, including major highways, secondary highways, and local routes, all non-motorized routes, including bike lanes and pedestrian thoroughfares, and all public transit systems and facilities; and

(i) identify planned capital and service transportation improvements necessary to serve the projected population.

(2) The local government shall:

(a) coordinate with school districts within the jurisdiction to determine the existing capacity of, planned expansion of, and anticipated improvements necessary for the local K-12 school system to serve the projected population in the jurisdiction; and

(b) request that the local school district provide any inventory and maps of existing K-12 educational facilities within the jurisdictional area and identify any capital and service improvements necessary to meet the projected population.

(3) The local government may include an analysis of existing capacity and service levels, planned expansions of, and anticipated improvements necessary to provide other services to the projected population in the jurisdiction.

(4) The local government may incorporate by reference any information or policies identified in other relevant local services or facilities assessments adopted by the local governing body, such as a capital improvements plan or an impact fee study.

(5) The amount of detail provided in the analysis beyond the minimum criteria established in this section is at the discretion of the local governing body.

Section 12. Economic development. (1) The land use plan must:

(a) assess existing and potential commercial, industrial, small business, and institutional enterprises in the jurisdiction, including the types of sites and supporting services needed by the enterprises;

(b) summarize job composition and trends by industry sector, including existing labor force characteristics and future labor force requirements, for existing and potential enterprises in the jurisdiction;

(c) assess the extent to which local characteristics, assets, and resources support or constrain existing and potential enterprises, including access to transportation to market goods and services, and assess historic, cultural, and scenic resources and their relationship to private sector success in the jurisdiction;

(d) inventory sites within the jurisdiction, including zoned, unzoned, vacant, underutilized, and potentially redeveloped sites, available to meet the jurisdiction's economic development needs;

(e) assess the adequacy of existing and projected local facilities and services, schools, housing stock, and other land uses necessary to support existing and potential commercial, industrial, and institutional enterprises; and

(f) assess the financial feasibility of supporting anticipated economic growth in the jurisdiction.

(2) The local government may incorporate by reference any information or policies identified in other relevant economic development assessments.

(3) The amount of detail provided in the analysis beyond the minimum criteria established in this section is at the discretion of the local governing body.

Section 13. Natural resources, environment, and hazards. (1) The land use plan must:

(a) include inventories and maps of natural resources within the jurisdiction, including but not limited to agricultural lands, agricultural water user facilities, minerals, sand and gravel resources, forestry

lands, and other natural resources identified by the local government;

(b) describe the natural resource characteristics of the jurisdictional area, including a summary of historical natural resource utilization, data on existing utilization, and projected future trends;

(c) include an inventory, maps, and description of the natural environment of the jurisdictional area, including a summary of important natural features and the conditions of and real and potential threats to soils, geology, topography, vegetation, surface water, groundwater, aquifers, floodplains, scenic resources, wildlife, wildlife habitat, wildlife corridors, and wildlife nesting sites within the jurisdiction; and

(d) include maps of, identify factors related to, and describe natural hazards within the jurisdictional area, including flooding, fire, earthquakes, steep slopes and other known geologic hazards and other natural hazards identified by the jurisdiction, with a summary of past significant events resulting from natural hazards that includes:

(i) a description of land use constraints resulting from natural hazards;

(ii) a description of the efforts that have been taken within the local jurisdiction to mitigate the impact of natural hazards; and

(iii) a description of the role that natural resources and the environment play in the local economy.

(2) The local government may incorporate by reference any information or policies identified in other relevant assessments of natural resources, environment, or hazards.

(3) The amount of detail provided in the analysis beyond the minimum criteria established in this section is at the discretion of the local governing body.

Section 14. Land use and future land use map. (1) A land use plan must include a future land use map and a written description of the proposed general distribution, location, and extent of residential, commercial, mixed, industrial, agricultural, recreational, and conservation uses of land and other categories of public and private uses, as determined by the local government.

(2) The future land use map must reflect the anticipated and preferred pattern and intensities of development for the jurisdiction over the next 20 years, based on the information, analysis, and public input collected, considered, and relevant to the population projections for and economic development of the jurisdiction and the housing and local services needed to accommodate those projections, while acknowledging

and addressing the natural resource, environment, and natural hazards of the jurisdiction.

(3) The future land use map may not confer any authority to regulate what is not otherwise specifically authorized in [sections 1 through 38].

(4) The future land use map and the written description must include:

(a) a statement of intent describing the jurisdiction's applicable zoning, subdivision, and other land use regulations;

(b) descriptions of existing and future land uses, including:

(i) categories of public and private use;

(ii) general descriptions of use types and densities of those uses;

(iii) general descriptions of population; and

(iv) other aspects of the built environment;

(c) geographic distribution of future land uses in the jurisdiction, anticipated over a 20-year planning period that specifically demonstrate:

(i) adequate land to support the projected population in all land use types in areas where local services can be adequately and cost-effectively provided for that population;

(ii) adequate sites to accommodate the type and supply of housing needed for the projected population; and

(iii) areas of the jurisdiction that are not generally suitable for development and the reason, based on the constraints identified through the land use plan analysis;

(d) a statement acknowledging areas within the jurisdiction known to be subject to covenants, codes, and restrictions that may limit the type, density, or intensity of housing development projected in the future land use map; and

(e) areas of or adjacent to the jurisdiction subject to increased growth pressures, higher development densities, or other urban development influences.

(5) To the greatest extent possible, local governments shall create compatibility in the land use plans and future land use map in those areas identified in subsection (4)(e).

(6) The land use plan may:

(a) provide information required by a federal land management agency for the local governing

body to establish or maintain coordination or cooperating agency status; and

(b) incorporate by reference any information or policies identified in other relevant assessments adopted by the local governing body, such as a pre-disaster mitigation plan or wildfire protection plan.

(7) The amount of detail provided in the analysis beyond the minimum criteria established in this section is at the discretion of the local governing body.

Section 15. Area plans. (1) A local governing body may adopt area plans for a portion of the jurisdiction to provide a more localized analysis of all or any part of a land use plan. An area plan may include but is not limited to a neighborhood plan, a corridor plan, or a subarea plan.

(2) The adoption, amendment, or update of an area plan must follow the same process as a land use plan provided for in [sections 7 through 17] and may be adopted as an amendment to the land use plan.

(3) The area plan must be in substantial compliance with the land use plan. To the extent an area plan is inconsistent with the land use plan, the land use plan controls.

Section 16. Issue plans. (1) A local governing body may adopt issue plans for all or part of a jurisdiction that provide a more detailed or thorough analysis for any component of the land use plan.

(2) The adoption, amendment, or update of an issue plan must follow the same process as a land use plan provided for in [sections 7 through 17].

(3) If an issue plan covers the jurisdictional area of the land use plan, the issue plan may serve as the detailed analysis required in the land use plan.

Section 17. Implementation. (1) The land use plan and future land use map is not a regulatory document and must include an implementation section that:

(a) establishes meaningful and predictable implementation measures for the use and development of land within the jurisdiction based on the contents of the land use plan and future land use map;

(b) provides meaningful direction for the content of more detailed land use regulations and future land use maps; and

(c) requires identification of those programs, activities, actions, or land use regulations that may be

part of the overall strategy of the jurisdiction for implementing the land use plan.

(2) The implementation section of the land use plan must include:

(a) if the local jurisdiction does not have current zoning regulations, a schedule by which zoning regulations and a zoning map will be adopted in accordance with the deadlines set forth in [section 5];

(b) if the local jurisdiction has current zoning regulations, an analysis of whether any inconsistencies exist between current zoning regulations and the land use plan and future land use map, including a map of the inconsistencies. If inconsistencies exist, the local government shall identify:

(i) specific implementation actions necessary to amend the zoning regulations and the zoning map to bring the zoning regulations and zoning map into substantial compliance with the land use plan and future land use map;

(ii) a schedule for amending the zoning regulations and zoning map to be in substantial compliance with the land use plan and future land use map, in accordance with the deadlines set forth in [section 5];

(iii) a schedule for adopting a capital improvements program or for amending an existing capital improvements program to be in substantial compliance with the land use plan and future land use map;

(iv) a schedule for expanding or replacing public facilities and the anticipated costs and revenue sources proposed to meet those costs, which must be reflected in a jurisdiction’s capital improvement program;

(v) if applicable, a schedule for updating the plan for extension of services required in 7-2-4732 to be in substantial compliance with the land use plan; and

(vi) a schedule for implementing any other specific actions necessary to achieve the components of the land use plan, including a timeframe or prioritization of each specific public action; and

(c) procedures for monitoring and evaluating the local government’s progress toward meeting the implementation schedule.

Section 18. Authority to adopt local zoning regulations. (1) (a) A local government subject to [sections 1 through 38], within its respective jurisdiction, has the authority to and shall regulate the use of land in substantial compliance with its adopted land use plan by adopting zoning regulations.

(b) The governing body of a county or city has the authority to adopt zoning regulations in

accordance with [sections 18 through 24] by an ordinance that substantially complies with 7-5-103 through 7-5-107.

(c) A municipality shall adopt zoning regulations for the portions of the jurisdictional area outside of the boundaries of the municipality that the governing body anticipates may be annexed into the municipality over the next 20 years. Unless otherwise agreed to by the applicable jurisdictions, zoning regulations on property outside the municipal boundaries may not apply or be enforced until those areas are annexed or are being annexed into the municipality.

(2) Local zoning regulations authorized in subsection (1) include but are not limited to ordinances prescribing the:

(a) uses of land;

(b) density of uses;

(c) types of uses;

(d) size, character, number, form, and mass of structures; and

(e) development standards mitigating the impacts of development, as identified and analyzed during the land use planning process and review and adoption of zoning regulations pursuant to [sections 1 through 38].

(3) The local government shall incorporate any existing zoning regulations adopted pursuant to Title 76, chapter 2, into the zoning regulations meeting the requirements of [sections 1 through 38].

(4) The local government shall adopt a zoning map for the jurisdiction in substantial compliance with the land use plan and future land use map and the zoning regulations adopted pursuant to this section, graphically illustrating the zone or zones that a property within the jurisdiction is subject to.

(5) The local government may provide for the issuance of permits as may be necessary for the implementation of [sections 1 through 38].

(6) (a) The zoning regulations and map must identify areas that may necessitate the denial of a development or a specific type of development, such as unmitigable natural hazards, insufficient water supply, inadequate drainage, lack of access, inadequate public services, or the excessive expenditure of public funds for the supply of the services.

(b) The regulations must prohibit development in the areas identified in subsection (6)(a) unless

the hazards or impacts may be eliminated or overcome by approved construction techniques or other mitigation measures identified in the zoning regulations.

(c) Approved construction techniques or other mitigation measures described in subsection (6)(b) may not include building regulations as defined in 50-60-101 other than those identified by the department of labor and industry as provided in 50-60-901.

(7) The zoning regulations and map must mitigate the hazards created by development in areas located within the floodway of a flood of 100-year frequency, as defined by Title 76, chapter 5, or determined to be subject to flooding by the governing body. If the hazards cannot be mitigated, the zoning regulations and map must identify those areas where future development is limited or prohibited.

(8) The zoning regulations must allow for the continued use of land or buildings legal at the time that any zoning regulation, map, or amendment thereto is adopted, but the local government may provide grounds for discontinuing nonconforming uses based on changes to or abandonment of the use of the land or buildings after the adoption of a zoning regulation, map, or amendment.

Section 19. Encouragement of development of housing. (1) The zoning regulations authorized in [section 18] must include a minimum of five of the following housing strategies, applicable to the majority of the area, where residential development is permitted in the jurisdictional area:

(a) allow, as a permitted use, for at least a duplex where a single-unit dwelling is permitted;

(b) zone for higher density housing near transit stations, places of employment, higher education facilities, and other appropriate population centers, as determined by the local government;

(c) eliminate or reduce off-street parking requirements to require no more than one parking space per dwelling unit;

(d) eliminate impact fees for accessory dwelling units or developments that include multi-unit dwellings or reduce the fees by at least 25%;

(e) allow, as a permitted use, for at least one internal or detached accessory dwelling unit on a lot with a single-unit dwelling occupied as a primary residence;

(f) allow for single-room occupancy developments;

(g) allow, as a permitted use, a triplex or fourplex where a single-unit dwelling is permitted;

(h) eliminate minimum lot sizes or reduce the existing minimum lot size required by at least 25%;

(i) eliminate aesthetic, material, shape, bulk, size, floor area, and other massing requirements for multi-unit dwellings or mixed-use developments or remove at least half of those requirements;

(j) provide for zoning that specifically allows or encourages the development of tiny houses, as defined in Appendix Q of the International Residential Code as it was printed on January 1, 2023;

(k) eliminate setback requirements or reduce existing setback requirements by at least 25%;

(l) increase building height limits for dwelling units by at least 25%;

(m) allow multi-unit dwellings or mixed-use development as a permitted use on all lots where office, retail, or commercial are primary permitted uses; or

(n) allow multi-unit dwellings as a permitted use on all lots where triplexes or fourplexes are permitted uses.

(2) If a local government's existing zoning ordinance adopted pursuant to Title 76, chapter 2, before [the effective date of this act] does not contain a zoning regulation that is listed as a regulation to be eliminated or reduced in subsection (1), that strategy is considered adopted by the local government.

(3) If the adoption of a housing strategy allowed in subsection (1) subsumes another housing strategy allowed in subsection (1), only one strategy may be considered to have been adopted by the local government.

Section 20. Limitations on zoning authority. (1) A local government acting pursuant to [sections 18 through 24] may not:

(a) treat manufactured housing units differently from any other residential units;

(b) include in a zoning regulation any requirement to:

(i) pay a fee for the purpose of providing housing for specified income levels or at specified sale prices; or

(ii) dedicate real property for the purpose of providing housing for specified income levels or at specified sale prices, including a payment or other contribution to a local housing authority or the reservation of real property for future development of housing for specified income levels or specified sale prices;

(c) prevent the erection of an amateur radio antenna at heights and dimensions sufficient to

accommodate amateur radio service communications by a person who holds an unrevoked and unexpired official amateur radio station license and operator's license, "technician" or higher class, issued by the federal communications commission of the United States;

(d) establish a maximum height limit for an amateur radio antenna of less than 100 feet above the ground;

(e) subject to subsection (2) and outside of incorporated municipalities, prevent the complete use, development, or recovery of any mineral, forest, or agricultural resources identified in the land use plan, except that the use, development, or recovery may be reasonably conditioned or prohibited within residential zones;

(f) except as provided in subsection (3), treat the following differently from any other residential use of property:

(i) a foster home, kinship foster home, youth shelter care facility, or youth group home operated under the provisions of 52-2-621 through 52-2-623, if the home or facility provides care on a 24-hour-a-day basis;

(ii) a community residential facility serving eight or fewer persons, if the facility provides care on a 24-hour-a-day basis; or

(iii) a family day-care home or a group day-care home registered by the department of public health and human services under Title 52, chapter 2, part 7;

(g) except as provided in subsection (3), apply any safety or sanitary regulation of the department of public health and human services or any other agency of the state or a political subdivision of the state that is not applicable to residential occupancies in general to a community residential facility serving 8 or fewer persons or to a day-care home serving 12 or fewer children; or

(h) prohibit any existing agricultural activities or force the termination of any existing agricultural activities outside the boundaries of an incorporated city, including agricultural activities that were established outside the corporate limits of a municipality and thereafter annexed into the municipality.

(2) Regulations that condition or prohibit uses pursuant to subsection (1)(e) must be in effect prior to the filing of a permit application or at the time a written request is received for a preapplication meeting pursuant to 82-4-432.

(3) Except for a day-care home registered by the department of public health and human services,

a local government may impose zoning standards and conditions on any type of home or facility identified in subsections (1)(f) and (1)(g) if those zoning standards and conditions do not conflict with the requirements of subsections (1)(f) and (1)(g).

Section 21. Adoption and amendment of zoning regulations. (1) (a) The governing body shall adopt or amend a zoning regulation or map only after consideration by and on the recommendation of the planning commission.

(b) An amendment to an adopted zoning regulation or map may be initiated:

(i) by majority vote of the governing body;

(ii) on petition of at least 15% of the electors of the local government jurisdiction to which the regulations apply, as registered at the last general election; or

(iii) by a property owner, as related to an application for any zoning, subdivision, or other land use permit or approval.

(2) Prior to making a recommendation to the governing body to adopt or amend a zoning regulation or map, the planning commission shall:

(a) provide public notice and participation in accordance with [section 6];

(b) accept, consider, and respond to public comment on the proposed zoning regulation, map, or amendment. All public comment must be part of the administrative record transmitted to the governing body.

(c) make a preliminary determination as to whether the zoning regulation and map as proposed or as amended would be in substantial compliance with the land use plan, including whether the zoning regulation or map:

(i) accommodates the projected needed housing types identified in [section 10];

(ii) contains five or more specific strategies from [section 19] to encourage the development of housing within the jurisdiction;

(iii) reflects allowable uses and densities in areas that may be adequately served by public safety, emergency, utility, transportation, education, and any other local facilities or services identified by the local government in [section 11];

(iv) allows sufficient area for existing, new, or expanding commercial, industrial, and institutional

enterprises the local government has identified in [section 12] for targeted economic growth in the jurisdiction;

(v) protects and maximizes the potential use of natural resources within the area, as identified in [section 13];

(vi) minimizes or avoids impacts to the natural environment within the area, as identified in [section 13]; and

(vii) avoids or minimizes dangers associated with natural hazards in the jurisdiction, as identified in [section 13]; and

(d) preliminarily determine whether the proposed zoning regulation, map, or amendment results in new or increased impacts to or from local facilities, services, natural resources, natural environment, or natural hazards from those previously described and analyzed in the assessment conducted for the land use plan.

(3) If the planning commission finds new or increased impacts from the proposed regulation, map, or amendment, as provided in subsection (2)(d), the local government shall collect additional data and conduct additional analysis necessary to provide the planning commission and the public with the opportunity to comment on and consider all potential impacts resulting from adoption of the zoning regulation, map, or amendment.

(4) After meeting the requirements of subsections (2) and (3), the planning commission shall make a final recommendation to the governing body to approve, modify, or reject the proposed zoning regulation, map, or amendment.

(5) (a) The governing body shall consider each zoning regulation, map, or amendment that the planning commission recommends to the governing body.

(b) After providing public notice and participation in accordance with [section 6], the governing body may adopt, adopt with revisions the governing body considers appropriate, or reject the zoning regulation, map, or amendment as proposed by the planning commission.

(c) The governing body may not condition an amendment to a zoning regulation or map.

(d) The governing body may not adopt or amend a zoning regulation or map unless the governing body finds that:

(i) the regulation, map, or amendment is in substantial compliance with the land use plan; and

(ii) the impacts resulting from development in substantial compliance with the proposed zoning

regulation, map, or amendment have been made available for public review and comment and have been fully considered by the governing body.

(6) After the zoning regulation, map, or amendment has been adopted by the governing body, there is a presumption that:

(a) all permitting in substantial compliance with the zoning regulation, map, or amendment is in substantial compliance with the land use plan; and

(b) the public has been provided a meaningful opportunity to participate.

Section 22. Effect on zoning regulations and map. (1) After the adoption of a zoning regulation, map, or amendment pursuant to [section 21], any application proposing development of a site is subject to the process set forth in this section.

(2) (a) When a proposed development lies entirely within an incorporated city, or is proposed for annexation into the city, the application must be submitted to and approved by the city.

(b) Except as provided in subsections (2)(a) or (2)(c), when a proposed development lies entirely in an unincorporated area, the application must be submitted to and approved by the county.

(c) If a proposed development lies within an area subject to increased growth pressures, higher development densities, or other urban development influences identified by either jurisdiction in [section 14], the jurisdiction shall provide other impacted jurisdictions the opportunity to review and comment on the application.

(d) If the proposed development lies partly within an incorporated city, the application and materials must be submitted to and approved by both the city and the county governing bodies.

(3) Zoning compliance permits and other ministerial permits may be issued by the planning administrator or the planning administrator's designee without any further review or analysis by the governing body, except as provided in [section 37].

(4) If a proposed development, with or without variances or deviations from adopted standards, is in substantial compliance with the zoning regulations or map and all impacts resulting from the development were previously analyzed and made available for public review and comment prior to the adoption of the land use plan, zoning regulation, map, or amendment thereto, the application must be approved, approved with conditions, or denied by the planning administrator and is not subject to any further public review or comment,

except as provided in [section 37].

(5) (a) If a proposed development, with or without variances or deviations from adopted standards, is in substantial compliance with the zoning regulations and map but may result in new or significantly increased potential impacts that have not been previously identified and considered in the adoption of the land use plan or zoning regulations, the planning administrator shall proceed as follows:

(b) request that the applicant collect any additional data and perform any additional analysis necessary to provide the planning administrator and the public with the opportunity to comment on and consider the impacts identified in subsection (5)(a);

(c) collect any additional data or perform additional analysis the planning administrator determines is necessary to provide the local government and the public with the opportunity to comment on and consider the impacts identified in subsection (5)(a); and

(d) provide notice of a 15-business day written comment period during which the public has the reasonable opportunity to participate in the consideration of the impacts identified in subsection (5)(a).

(6) (a) Any additional analysis or public comment on a proposed development described in subsection (5) must be limited to only any new or significantly increased impacts potentially resulting from the proposed development, to the extent the impact was not previously identified or considered in the adoption or amendment of the land use plan or zoning regulations.

(b) The planning administrator shall approve, approve with conditions, or deny the application. The planning administrator's decision is final and no further action may be taken except as provided in [section 37].

(7) If an applicant proposes to develop a site in a manner or to an extent that the development is not in substantial compliance with the zoning regulations or map, the applicant shall propose an amendment to the regulations or map and follow the process provided for in [section 21].

Section 23. Zoning and annexation. (1) A municipality shall review and consider a proposed annexation in conjunction with the zoning regulations for the property to be annexed adopted pursuant to [section 18(1)(c)] following the procedures set forth in [section 22].

(2) The joint public process authorized in subsection (1) fulfills the notice and public hearing requirements for a proposed annexation required in Title 7, chapter 2, parts 42 through 47.

Section 24. Interim zoning ordinances. (1) A local government, to protect the public safety, health, and welfare and without following the procedures otherwise required prior to adopting a zoning regulation, may adopt an interim zoning ordinance as an urgency measure to regulate or prohibit uses that may conflict with a zoning proposal that the governing body is considering or studying or intends to study within a reasonable time.

(2) Before adopting an interim zoning ordinance, the governing body shall first hold a public hearing upon notice reasonably designed to inform all affected parties. A notice must be published in a newspaper of general circulation at least 7 days before the public hearing.

(3) An interim zoning ordinance takes effect immediately on passage and approval after first reading

and may be in effect no longer than 1 year from the date of its adoption.

(4) A local government may not act under the authority provided for in this section until the local government has adopted a land use plan and zoning regulations pursuant to [sections 1 through 38].

Section 25. Authority to adopt local subdivision regulations -- limitations. (1) Within its respective jurisdiction, a local government shall regulate the creation of lots in substantial compliance with its adopted land use plan and zoning regulations by adopting subdivision regulations.

(b) The governing body of a county or city has the authority to adopt subdivision regulations in accordance with [sections 25 through 34] by an ordinance that substantially complies with 7-5-103 through 7-5-107.

(c) A municipality shall adopt subdivision regulations for those portions of the jurisdictional area outside the boundaries of the municipality that the governing body anticipates may be annexed into the municipality over the next 20 years. Unless otherwise agreed to by the applicable jurisdictions, subdivision regulations on property outside the municipal boundaries may not apply or be enforced until the areas are annexed or being annexed into the municipality.

(2) The subdivision regulations must provide a process for the application and consideration of subdivision exemptions, certificates of survey, preliminary plats, and final plats as necessary for the implementation of [sections 1 through 38].

(3) (a) A local governing body may not require, as a condition for approval of a subdivision under this [sections 25 through 34]:

(i) the payment of a fee for the purpose of providing housing for specified income levels or at specified sale prices; or

(ii) the dedication of real property for the purpose of providing housing for specified income levels or at specified sale prices.

(b) A dedication of real property prohibited in subsection (3)(a)(ii) includes a payment or other contribution to a local housing authority or the reservation of real property for future development of housing for specified income levels or specified sale prices.

(4) The local governing body may not change, in the subdivision regulations or in the process for subdividing, any timelines or procedural requirements for an application to subdivide other than provided for in [sections 25 through 34].

Section 26. Exemptions to subdivision review. (1) The following divisions of land, if made in substantial compliance with zoning regulations adopted pursuant to [sections 18 through 24], are not subject to the requirements of [sections 1 through 38]:

(a) subject to subsection (2), the creation of four or fewer new lots or parcels from an original lot or parcel:

(i) by order of a court of record in this state;

(ii) by operation of law; or

(iii) that, in the absence of agreement between the parties to a sale, could be created by court order in this state pursuant to the law of eminent domain, Title 70, chapter 30;

(b) subject to subsection (3), the creation of a lot to provide security for mortgages, liens, or trust indentures for the purpose of construction, improvements to the land being divided, or refinancing, if the land that is divided is not conveyed to any entity other than the financial or lending institution to which the mortgage, lien, or trust indenture was given or to a purchaser upon foreclosure of the mortgage, lien, or trust indenture;

(c) the creation of an interest in oil, gas, minerals, or water that is severed from the surface ownership of real property;

(d) the creation of cemetery lots;

(e) the reservation of a life estate on a portion of a tract of record;

(f) the lease or rental of a portion of a tract of record for farming and agricultural purposes;

(g) the division of property over which the state does not have jurisdiction;

(h) the creation of rights-of-way or utility sites;

(i) the creation of condominiums, townhomes, townhouses, or conversions, as those terms are defined in 70-23-102, when any applicable park dedication requirements as set forth in [sections 18 through 24] are complied with;

(j) the lease or rental of contiguous airport-related land owned by a city, a county, the state, or a municipal or regional airport authority;

(k) subject to subsection (4), a division of state-owned land, unless the division creates a second or subsequent residential parcel from a single tract for sale, rent, or lease after July 1, 1974;

(l) the creation of lots by deed, contract, lease, or other conveyance executed prior to July 1, 1974;

(m) the relocation of common boundary lines between or aggregations of adjoining properties that does not result in an increase in the number of lots;

(n) a single gift or sale in each county to each member of the landowner's immediate family; or

(o) subject to subsection (5), the creation of lots by deed, contract, lease, or other conveyance in which the landowner enters into a covenant with the governing body that runs with the land that provides that the divided land must be used exclusively for agricultural purposes.

(2) Before a court of record orders a division of land under subsection (1)(a), the court shall notify the governing body of the pending division and allow the governing body to present written comment on the division.

(3) A transfer of divided land by the owner of the property at the time that the land was divided to any party other than those identified in subsection (1)(b) subjects the division of land to the requirements of [sections 1 through 38].

(4) Instruments of transfer of land that is acquired for state highways may refer by parcel and project number to state highway plans that have been recorded in compliance with 60-2-209 and are exempted

from the surveying and platting requirements of [sections 1 through 38]. If the parcels are not shown on highway plans of record, instruments of transfer of the parcels must be accompanied by and refer to appropriate certificates of survey and plats when presented for recording.

(5) The governing body, in its discretion, may revoke the covenant provided for in subsection (1)(o) without subdivision review if the original lot lines are restored through aggregation of the covenanted land prior to or in conjunction with the revoking of the covenant.

Section 27. Adoption and amendment of subdivision regulations. (1) (a) The governing body shall adopt or amend subdivision regulations only after consideration by and on the recommendation of the planning commission.

(b) An amendment to adopted subdivision regulations may be initiated:

(i) by majority vote of the governing body;

(ii) on petition of at least 15% of the electors of the local government jurisdiction to which the regulations apply, as registered at the last general election; or

(iii) by a property owner, as related to an application for any zoning, subdivision, or other land use permit or approval.

(2) Prior to making a recommendation to the governing body to adopt or amend subdivision regulations, the planning commission shall:

(a) provide public notice and participation in accordance with [section 6];

(b) accept, consider, and respond to public comment on the proposed subdivision regulation or amendment to a subdivision regulation. All public comment must be part of the administrative record transmitted to the governing body.

(c) make a preliminary determination as to whether the subdivision regulation or amendment to a subdivision regulation is in substantial compliance with the land use plan and zoning regulations, including whether the regulation or amendment:

(i) enables the development of projected needed housing types identified in the land use plan and zoning regulations;

(ii) reflects applicable strategies from the land use plan and zoning regulations to encourage the

development of housing within the jurisdiction;

(iii) facilitates the adequate provision of public safety, emergency, utility, transportation, education, and any other local facilities or services for proposed development, as identified in the land use plan and zoning regulations;

(iv) reflects standards that provide for existing, new, or expanding commercial, industrial, and institutional enterprises identified in the land use plan and zoning regulations for economic growth;

(v) protects and maximizes the potential use of natural resources within the area, as identified in the land use plan and zoning regulations;

(vi) contains standards that minimize or avoid impacts to the natural environment within the area, as identified in the land use plan and zoning regulations; and

(vii) contains standards that avoid or minimize dangers associated with natural hazards in the jurisdiction, as identified in the land use plan and zoning regulations; and

(d) preliminarily determine whether the proposed subdivision regulation or amendment to a subdivision regulation results in new or increased potential impacts to or from local facilities, services, natural resources, natural environment, or natural hazards from those previously described and analyzed in the assessments conducted for the land use plan and zoning regulations.

(3) If the planning commission finds new or increased potential impacts from the proposed regulation or amendment to a regulation pursuant to subsection (2)(d), the local government shall collect additional data and conduct additional analysis necessary to provide the planning commission and the public with the opportunity, pursuant to [section 6], to comment on and consider all potential impacts resulting from adoption of the subdivision regulation or amendment to a subdivision regulation.

(4) After meeting the requirements of subsection (2), the planning commission shall make a final recommendation to the governing body to approve, modify, or reject the proposed subdivision regulation or amendment to a subdivision regulation.

(5) (a) The governing body shall consider each subdivision regulation or amendment to a subdivision regulation that the planning commission recommends to the governing body.

(b) After providing public notice and participation in accordance with [section 6], the governing body may adopt, adopt with revisions that the governing body considers appropriate, or reject the subdivision

regulation or amendment to a subdivision regulation as proposed by the planning commission.

(c) The governing body may not adopt or amend a subdivision regulation unless the governing body finds:

(i) the subdivision regulation or amendment to a subdivision regulation is in substantial compliance with the land use plan and zoning regulations; and

(ii) the impacts resulting from development in substantial compliance with the proposed subdivision regulation or amendment to a subdivision regulation have been made available for public review and comment, which have been fully considered by the governing body.

(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 to participate.

Section 28. Contents of local subdivision regulations. (1) The subdivision regulations adopted under [sections 25 through 34] are limited to the following requirements:

(a) the date the regulations initially become effective under [sections 1 through 38] and the effective dates and the ordinance numbers for all subsequent amendments;

(b) design standards for all subdivisions in the jurisdiction, which may be incorporated by reference or may be based on the information and analysis contained in the land use plan and zoning regulations, including:

(i) standards for grading and erosion control;

(ii) standards for the design and arrangement of lots, streets, and roads;

(iii) standards for the location and installation of public utilities, including water supply and sewage and solid waste disposal;

(iv) standards for the provision of other public improvements; and

(v) legal and physical access to all lots;

(c) when a subdivision creates parcels with lot sizes averaging less than 5 acres, a requirement

that the subdivider:

(i) reserve all or a portion of the appropriation water rights owned by the owner of the subject property, transfer the water rights to a single entity for use by landowners within the subdivision who have a legal right to the water, and reserve and sever any remaining surface water rights from the land;

(ii) if the land to be subdivided is subject to a contract or interest in a public or private entity formed to provide the use of a water right on the subdivision lots, establish a landowner's water use agreement that is administered through a single entity and that specifies administration and the rights and responsibilities of landowners within the subdivision who have a legal right and access to the water; or

(iii) reserve and sever all surface water rights from the land;

(d) except as provided in subsection (2), a requirement that the subdivider establish ditch easements that:

(i) are in locations of appropriate topographic characteristics and sufficient width to allow the physical placement and unobstructed maintenance of open ditches or belowground pipelines for the delivery of water for irrigation to persons and lands legally entitled to the water under an appropriated water right or permit of an irrigation district or other private or public entity formed to provide for the use of the water right on the subdivision lots;

(ii) unless otherwise provided for under a separate written agreement or filed easement, provide for the unobstructed use and maintenance of existing water delivery ditches, pipelines, and facilities in the subdivision that are necessary to convey water through the subdivision to lands adjacent to or beyond the subdivision boundaries in quantities and in a manner that are consistent with historic and legal rights;

(iii) are a sufficient distance from the centerline of the ditch to allow for construction, repair, maintenance, and inspection of the ditch; and

(iv) prohibit the placement of structures or the planting of vegetation other than grass within the ditch easement without the written permission of the ditch owner;

(e) criteria that the planning administrator must use to determine whether a proposed method of disposition using the exemptions provided in [sections 1 through 38] is an attempt to evade the requirements of [sections 1 through 38];

(f) a list of the materials that must be included in order for the application to be determined

complete;

(g) subject to subsection (4), identification of circumstances or conditions that may necessitate the denial of any or specific types of development, such as unmitigable natural hazards, insufficient water supply, inadequate drainage, lack of access, inadequate public services, or the excessive expenditure of public funds for the supply of the services;

(h) subject to subsection (5), a list of public utilities and agencies of local, state, and federal government that the local government must seek input from during review of an application and for what information or analysis; or

(i) subject to subsection (6), requirements for the dedication of land, cash-in-lieu thereof, or a combination of both for parks and recreation purposes, not to exceed 0.03 acres per dwelling unit.

(2) A land donation under this section may be inside or outside of the subdivision.

(3) The regulations may not require ditch easements if:

(a) the average lot size is 1 acre or less and the subdivider provides for disclosure, in a manner acceptable to the governing body, that adequately notifies potential buyers of lots that are classified as irrigated land that the lots may continue to be assessed for irrigation water delivery even though the water may not be deliverable; or

(b) the water rights are removed or the process has been initiated to remove the water rights from the subdivided land through an appropriate legal or administrative process and the removal or intended removal is denoted on the preliminary plat. If removal of water rights is not complete upon filing of the final plat, the subdivider shall provide written notification to prospective buyers of the intent to remove the water right and shall document that intent, when applicable, in agreements and legal documents for related sales transactions.

(4) (a) The regulations must prohibit development in circumstances or conditions identified in subsection (1)(g) unless the hazards or impacts may be eliminated or overcome by approved construction techniques or other mitigation measures identified in the subdivision regulations.

(b) Approved construction techniques or other mitigation measures described in subsection (4)(a) may not include building regulations as defined in 50-60-101 other than those identified by the department of labor and industry as provided in 50-60-901.

(5) If a proposed subdivision is situated within a rural school district, as described in 20-9-615, the

local government shall provide a copy of the application and preliminary plat to the school district.

(6) (a) A park dedication may not be required for:

(i) land proposed for subdivision into parcels larger than 5 acres;

(ii) subdivision into parcels that are all nonresidential;

(iii) a subdivision in which parcels are not created, except when that subdivision provides multiple permanent spaces for recreational camping vehicles, mobile homes, or condominiums; or

(iv) a subdivision in which only one additional parcel is created.

(b) Subject to the approval of the local governing body and acceptance by the school district trustees, a subdivider may dedicate a land donation provided in subsection (6)(a) to a school district to be used for school facilities or buildings.

Section 29. Local review procedure for divisions of land. (1) An applicant may request a preapplication submittal and response from the planning administrator prior to submitting a subdivision application. The preapplication review must take place no more than 30 business days from the date that the planning administrator receives a written request for a preapplication review from the subdivider.

(2) On receipt of an application for an exemption from subdivision review under [section 26] that contains all materials and information required by the governing body under subsection (5), the local government:

(a) shall approve or deny the application within 20 business days;

(b) may not impose conditions on the approval of an exemption from subdivision review except for conditions necessary to ensure compliance with the survey requirements of [section 33(1)]; and

(c) may require the certificate of survey to be reviewed for errors and omissions in calculation or drafting by an examining land surveyor before filing with the county clerk and recorder. The examining land surveyor shall certify compliance in a printed or stamped certificate signed by the surveyor on the certificate of survey. A professional land surveyor may not act as an examining land surveyor in regard to a certificate of survey in which the surveyor has a financial or personal interest.

(3) (a) When a proposed subdivision lies entirely within an incorporated city or is proposed for annexation into the city, the application and preliminary plat must be submitted to and approved by the city.

(b) Except as provided in subsection (3)(c), when a proposed subdivision lies entirely in an unincorporated area, the application and preliminary plat must be submitted to and approved by the county.

(c) If the proposed subdivision lies within an area subject to increased growth pressures, higher development densities, or other urban development influences identified by either jurisdiction in [section 14], the jurisdiction shall provide other impacted jurisdictions the opportunity to review and comment on the application.

(d) If the proposed subdivision lies partly within an incorporated city, the application and preliminary plat must be submitted to and approved by both the city and the county governing bodies.

(4) A subdivision application is considered received on the date the application is delivered to the reviewing agent or agency if accompanied by the review fee.

(5) (a) The planning administrator has 20 business days to determine whether the application contains all information and materials necessary to complete the review of the application as set forth in the local subdivision regulations.

(b) The planning administrator may review subsequent submissions of the application only for information found to be deficient during the original review of the application under subsection (5)(a).

(c) A determination that an application contains sufficient information for review as provided in subsection (5)(a) does not ensure approval or conditional approval of the proposed subdivision and does not limit the ability of the planning administrator to request additional information during the review process.

(6) A subdivider may propose a phasing plan for approval with a preliminary plat. The phasing plan must include a phasing plan and map that demonstrates what lots will be included with each phase, what public facilities will be completed with each phase, and the timeline for the proposed phases.

(7) (a) If an application proposes a subdivision of a site that, with or without variances or deviations from adopted standards, is in substantial compliance with the zoning and subdivision regulations and all impacts resulting from the development were previously analyzed and made available for public review and comment prior to the adoption of the land use plan, zoning regulations, and subdivision regulations, or any amendment thereto, the planning administrator shall issue a written decision to approve, approve with conditions, or deny the preliminary plat.

(b) The application is not subject to any further public review or comment, except as provided in [section 37].

(c) The decision by the planning administrator must be made no later than 15 business days from the date the application is considered complete.

(8) (a) If an application proposes subdivision of a site that, with or without variances or deviations from adopted standards, is in substantial compliance with the zoning and subdivision regulations but may result in new or significantly increased potential impacts that have not been previously identified and considered in the adoption of the land use plan, zoning regulations, or subdivision regulations, or any amendments thereto, the planning administrator shall proceed as follows:

(i) request the applicant to collect additional data and perform additional analysis necessary to provide the planning administrator and the public with the opportunity to comment on and consider the impacts identified in this subsection (8)(a);

(ii) collect additional data or perform additional analysis that the planning administrator determines is necessary to provide the local government and the public with the opportunity to comment on and consider the impacts identified in this subsection (8)(a); and

(iii) provide notice of a written comment period of 15 business days during which the public must have a reasonable opportunity to participate in the consideration of the impacts identified in this subsection (8)(a).

(b) Any additional analysis or public comment on the proposed development is limited to only new or significantly increased potential impacts resulting from the proposed development to the extent that the impact was not previously identified in the consideration and adoption of the land use plan, zoning regulations, subdivision regulations, or any amendments thereto.

(9) Within 30 business days of the end of the written comment period provided in subsection (8)(a)(iii), the planning administrator shall issue a written decision to approve, conditionally approve, or deny a proposed subdivision application.

(10) The basis of the decision to approve, conditionally approve, or deny a proposed preliminary plat is based on the administrative record as a whole and a finding that the proposed subdivision:

(a) meets the requirements and standards of [sections 1 through 38];

(b) meets the survey requirements provided in [section 33(1)];

(c) provides the necessary easements within and to the proposed subdivision for the location and

installation of any planned utilities; and

(d) provides the necessary legal and physical access to each parcel within the proposed subdivision and the required notation of that access on the applicable plat and any instrument of transfer concerning the parcel.

(11) (a) The written decision must identify each finding required in subsection (10) that supports the decision to approve, conditionally approve, or deny a proposed preliminary plat, including any conditions placed on the approval that must be satisfied before a final plat may be approved.

(b) The written decision must identify all facts that support the basis for each finding and each condition and identify the regulations and statutes used in reaching each finding and each condition.

(c) When requiring mitigation as a condition of approval, a local government may not unreasonably restrict a landowner's ability to develop land. However, in some instances, the local government may determine that the impacts of a proposed development are unmitigable and preclude approval of the subdivision.

(12) The written decision to approve, conditionally approve, or deny a proposed subdivision must:

(a) be provided to the applicant;

(b) be made available to the public;

(c) include information regarding the appeal process; and

(d) state the timeframe the approval is in effect.

(13) The planning administrator's decision is final, and no further action may be taken except as provided in [section 37].

(14) Any changes to an approved preliminary plat that increases the number of lots or redesigns or rearranges six or more lots must undergo consideration and approval of an amended plat following the requirements of this section.

Section 30. Effect of preliminary plat approval. (1) (a) An approved or conditionally approved preliminary plat must be in effect for not more than 5 calendar years and not less than 1 calendar year.

(b) At the end of the period, the planning administrator may, at the request of the subdivider, extend the approval once by written agreement.

(c) On receipt of a request for an extension, the planning administrator shall determine whether

the preliminary plat remains in substantial compliance with the zoning and subdivision regulations. If the preliminary plat is no longer in substantial compliance with the zoning or subdivision regulations, the extension may not be granted.

(d) After a preliminary plat is approved, the local government may not impose any additional conditions as a prerequisite to final plat approval if the approval is obtained within the original or extended approval period.

(e) Any subsequent requests by the subdivider for extension of the approval must be reviewed and approved by the governing body.

(2) An approved or conditionally approved phased preliminary plat must be in effect for 20 calendar years.

Section 31. Local review procedure for final plats. (1) The following must be submitted with a final plat application:

(a) information demonstrating the final plat conforms to the written decision and all conditions of approval set forth on the preliminary plat;

(b) a plat that meets the survey requirements provided in [section 33(1)]; and

(c) confirmation the county treasurer has certified that all real property taxes and special assessments assessed and levied on the land to be subdivided have been paid.

(2) The final plat may be required to be reviewed for errors and omissions in calculation or drafting by an examining land surveyor before filing with the county clerk and recorder. The examining land surveyor shall certify compliance in a printed or stamped certificate signed by the surveyor on the final plat. A professional land surveyor may not act as an examining land surveyor in regard to a plat in which the surveyor has a financial or personal interest.

(3) A final plat application is considered received on the date the application is delivered to the governing body or the agent or agency designated by the governing body if accompanied by the review fee.

(4) (a) Within 10 business days of receipt of a final plat, the planning administrator shall determine whether the final plat contains the information required under subsection (1) and shall notify the subdivider in writing.

(b) If the planning administrator determines that the final plat does not contain the information required under subsection (1), the planning administrator shall identify the final plat's defects in the notification.

(c) The planning administrator may review subsequent submissions of the final plat only for information found to be deficient during the original review of the final plat under subsection (4)(a).

(d) A determination that the application for a final plat contains sufficient information for review as provided in subsection (4)(a) does not ensure approval of the final plat and does not limit the ability of the planning administrator to request additional information during the review process.

(5) Once a determination is made under subsection (4) that the final plat contains the information required under subsection (1), the governing body shall review and approve or deny the final plat within 20 business days.

(6) The subdivider or the subdivider's agent and the governing body or its reviewing agent or agency may mutually agree to extend the review periods provided for in this section.

(7) (a) For a period of 5 years after approval of a phased preliminary plat, the subdivider may apply for final plat of any one or more phases following the process set forth in subsections (1) through (6).

(b) After 5 years have elapsed since approval of a phased preliminary plat, the planning administrator shall review each remaining phase to determine if a phase may result in new or significantly increased potential impacts that have not been previously identified and considered in the adoption of the land use plan, zoning or subdivision regulations, or review and approval of the phased preliminary plat. If the planning administrator identifies any new or significantly increased potential impacts not previously identified and considered, the planning administrator shall proceed as set forth in [section 29(8)].

(c) If necessary to mitigate impacts identified in subsection (7)(b), the planning administrator may impose conditions on any phase before final plat approval is sought.

Section 32. Filing and recordation of plats and certificates of survey. (1) (a) Except as provided in subsection (1)(b), every final plat or certificate of survey must be filed for record with the county clerk and recorder before title to the land may be sold or transferred in any manner. The clerk and recorder of the county may not accept any final plat or certificate of survey for record that has not been approved in accordance with [sections 25 through 34] unless the final plat or certificate of survey is located in an area over which the state

does not have jurisdiction.

(b) After the preliminary plat of a subdivision has been approved or conditionally approved, the subdivider may enter into contracts to sell lots in the proposed subdivision if all of the following contract conditions are imposed and met:

(i) the purchasers of lots in the proposed subdivision make payments to an escrow agent, which must be a bank or savings and loan association chartered to do business in the state of Montana;

(ii) the payments made by purchasers of lots in the proposed subdivision may not be distributed by the escrow agent to the subdivider until the final plat of the subdivision is filed with the county clerk and recorder;

(iii) if the final plat of the proposed subdivision is not filed with the county clerk and recorder within the approval period of the preliminary plat, the escrow agent shall immediately refund to each purchaser any payments the purchaser has made under the contract;

(iv) the county treasurer has certified that no real property taxes assessed and levied on the land to be divided are delinquent; and

(v) the following language is conspicuously set out in each contract: "The real property that is the subject of this contract has not been finally platted, and until a final plat identifying the property has been filed with the county clerk and recorder, title to the property may not be transferred in any manner".

(2) (a) Subject to subsection (2)(b), no division of land may be made unless the county treasurer has certified that all real property taxes and special assessments assessed and levied on the land to be divided have been paid.

(b) (i) If a division of land includes centrally assessed property and the property taxes applicable to the division of land are not specifically identified in the tax assessment, the department of revenue shall prorate the taxes applicable to the land being divided on a reasonable basis. The owner of the centrally assessed property shall ensure that the prorated real property taxes and special assessments are paid on the land being sold before the division of land is made.

(ii) The county treasurer may accept the amount of the tax prorated pursuant to this subsection (2)(b) as a partial payment of the total tax that is due.

(3) (a) The county clerk and recorder shall maintain an index of all recorded and filed subdivision

plats and certificates of survey.

(b) The index must list plats and certificates of survey by the quarter section, section, township, and range in which the platted or surveyed land lies and must list the recording or filing numbers of all plats or certificates of survey depicting lands lying within each quarter section. Each quarter section list must be definitive to the exclusion of all other quarter sections. The index must also list the names of all subdivision plats in alphabetical order and the place where filed.

(4) The recording of any plat made in compliance with the provisions of [sections 1 through 38] must serve to establish the identity of all lands shown on and being part of the plat. When lands are conveyed by reference to a plat, the plat itself or any copy of the plat properly certified by the county clerk and recorder as being a true copy thereof must be regarded as incorporated into the instrument of conveyance and must be received in evidence in all courts of this state.

(5) (a) Any plat prepared and recorded as provided in [sections 25 through 34] may be vacated either in whole or in part as provided by 7-5-2501, 7-5-2502, 7-14-2616(1) and (2), 7-14-2617, 7-14-4114(1) and (2), and 7-14-4115. Upon vacation, the governing body or the district court, as provided in 7-5-2502, shall determine to which properties the title to the streets and alleys of the vacated portions must revert. The governing body or the district court, as provided in 7-5-2502, shall take into consideration:

(i) the previous platting;

(ii) the manner in which the right-of-way was originally dedicated, granted, or conveyed;

(iii) the reasons stated in the petition requesting the vacation;

(iv) the parties requesting the vacation; and

(v) any agreements between the adjacent property owners regarding the use of the vacated area.

The title to the streets and alleys of the vacated portions may revert to one or more of the owners of the properties within the platted area adjacent to the vacated portions.

(b) Notwithstanding the provisions of subsection (5)(a), when any poleline, pipeline, or any other public or private facility is located in a vacated street or alley at the time of the reversion of the title to the vacated street or alley, the owner of the public or private utility facility has an easement over the vacated land to continue the operation and maintenance of the public utility facility.

Section 33. Survey requirements. (1) Divisions of land under [sections 1 through 38] must follow the uniform standards governing monumentation, certificates of survey, and subdivision plats prescribed and adopted by the board of professional engineers and professional land surveyors.

(2) All division of sections into aliquot parts and retracement of lines must conform to United States bureau of land management instructions, and all public land survey corners must be filed in accordance with Title 70, chapter 22, part 1. Engineering plans, specifications, and reports required in connection with public improvements and other elements of the subdivision required by the governing body must be prepared and filed by a registered engineer or a registered land surveyor, as their respective licensing laws allow, in accordance with [sections 25 through 34] and regulations adopted pursuant to [sections 25 through 34].

(3) All divisions of land for sale other than a subdivision created after July 1, 1974, divided into parcels that cannot be described as 1/32 or larger aliquot parts of a United States government section or a United States government lot must be surveyed by or under the supervision of a registered land surveyor. Surveys required under this section must comply with the requirements of subsection (8).

(4) Except as provided in 70-22-105, within 180 days of the completion of a survey, the professional land surveyor responsible for the survey, whether the surveyor is privately or publicly employed, shall prepare and submit for filing a certificate of survey in the county in which the survey was made if the survey:

(a) provides material evidence not appearing on any map filed with the county clerk and recorder or contained in the records of the United States bureau of land management;

(b) reveals a material discrepancy in the map;

(c) discloses evidence to suggest alternate locations of lines or points; or

(d) establishes one or more lines not shown on a recorded map, the positions of which are not ascertainable from an inspection of the map without trigonometric calculations.

(5) A certificate of survey is not required for any survey that is made by the United States bureau of land management, that is preliminary, or that will become part of a subdivision plat being prepared for recording under the provisions of [sections 1 through 38].

(6) It is the responsibility of the governing body to require the replacement of all monuments removed in the course of construction.

(7) (a) A registered land surveyor may administer and certify oaths when:

(i) it becomes necessary to take testimony for the identification of old corners or reestablishment of lost or obliterated corners;

(ii) a corner or monument is found in a deteriorating condition and it is desirable that evidence concerning it be perpetuated; or

(iii) the importance of the survey makes it desirable to administer an oath to the surveyor's assistants for the faithful performance of their duty.

(b) A record of oaths must be preserved as part of the field notes of the survey and noted on the certificate of survey filed under subsection (4).

(8) (a) (i) A surveyor who completes a survey identified in subsection (8)(b) that establishes or defines a section line and creates a parcel that crosses the established or defined section line so that an irrigation district assessment boundary is included in more than one section shall note on the survey the acreage of the farm unit or created parcel in each section.

(ii) The surveyor shall notify the appropriate irrigation district of the existence of the survey and the purpose of the survey.

(b) The requirements of subsection (8)(a) apply only to surveys for which the surveyor determines that, based on available public records, the survey involves land:

(i) traversed by a canal or ditch owned by an irrigation district; or

(ii) included in an irrigation district.

Section 34. Public improvements and extension of capital facilities. (1) Except as provided in subsections (1)(a) and (1)(c), the governing body shall require the subdivider to complete required improvements within the proposed subdivision prior to the approval of the final plat.

(a) (i) In lieu of the completion of the construction of any public improvements prior to the approval of a final plat, the governing body shall, at the subdivider's option, allow the subdivider to provide or cause to be provided a bond or other reasonable security, in an amount and with surety and conditions satisfactory to the governing body, providing for and securing the construction and installation of the improvements within a period specified by the governing body and expressed in the bonds or other security. The governing body shall reduce

bond or security requirements commensurate with the completion of improvements. Failure of the local government to require the renewal of a bond does not waive the subdivider's responsibility to complete the required improvements prior to the approval of the final plat.

(ii) In lieu of requiring a bond or other means of security for the construction or installation of all the required public improvements under subsection (2)(a)(i), the governing body may enter into a subdivision improvements agreement with the subdivider that provides for an incremental payment, guarantee plan, or other method of completing the necessary improvements to serve the development as set forth in the preliminary plat approval.

(b) Approval by the governing body of a final plat prior to the completion of required improvements and without the provision of the security required under subsection (1)(a) is not an act of a legislative body for the purposes of 2-9-111.

(c) The governing body may require a percentage of improvements or specific types of improvements necessary to protect public health and safety to be completed before allowing bonding, other reasonable security, or entering into a subdivision improvements agreement for purposes of filing a final plat. The requirement is applicable to approved preliminary plats.

(2) (a) A local government may require a subdivider to pay or guarantee payment for part or all of the costs of extending capital facilities related to public health and safety, including but not limited to public roads, sewer lines, water supply lines, and storm drains to a subdivision. The costs must reasonably reflect the expected impacts directly attributable to the subdivision. A local government may not require a subdivider to pay or guarantee payment for part or all of the costs of constructing or extending capital facilities related to education.

(b) All fees, costs, or other money paid by a subdivider under this subsection (2) must be expended on the capital facilities for which the payments were required.

Section 35. Variances. (1) All land use regulations must include a process for the submission and review of variances.

(2) The application for a variance must be for relief from land or building form design standards or subdivision design and improvement standards.

(3) Variance applications must be considered and approved or approved with conditions before application or in conjunction with application for a zoning permit or subdivision approval.

(4) The granting of a variance must meet all of the following criteria:

(a) the variance is not detrimental to public health, safety or general welfare;

(b) the variance is due to conditions peculiar to the property, such as physical surroundings, shape, or topographical conditions;

(c) strict application of the regulations to the property results in an unnecessary hardship to the owner as compared to others subject to the same regulations and that is not self-imposed;

(d) the variance may not cause a substantial increase in public costs; and

(e) the variance may not place the property in nonconformance with any other regulations.

(5) Additional criteria may apply if the variance is associated with a floodplain or floodway pursuant to the requirements of Title 76, chapter 5.

(6) Variance requests must be reviewed and determined by the planning administrator. The planning administrator's decision is final and no further action may be taken except as provided in [section 37].

Section 36. Fees. The governing body may establish reasonable fees to be paid by an applicant for a zoning permit, subdivision application, appeals, or any other review performed by the local government pursuant to [sections 1 through 38] to defray the expense of performing the review.

Section 37. Appeals. (1) Appeals of any final decisions made pursuant to [sections 1 through 38] must be made in accordance with this section.

(2) For a challenge to the adoption of or amendment to a land use plan, zoning regulation, zoning map, or subdivision regulation, a petition setting forth the basis for the challenge must be presented to the district court within 30 days of the date of the resolution or ordinance adopted by the governing body.

(3) (a) Any final administrative land use decision, including but not limited to approval or denial of a zoning permit, preliminary plat or final plat, imposition of a condition on a zoning permit or plat, approval or denial of a variance from a zoning or subdivision regulation, or interpretation of land use regulations or map may be appealed by the applicant or any aggrieved person to the planning commission.

(b) An appeal under subsection (3)(a) must be submitted in writing within 15 business days of the challenged decision, stating the facts and raising all grounds for appeal that the party may raise in district court.

(c) The planning commission shall hear the appeal de novo. The planning commission is not bound by the decision that has been appealed, but the appeal must be limited to the issues raised on appeal. The appellant has the burden of proving that the appealed decision was made in error.

(e) A decision of the planning commission on appeal takes effect on the date when the planning commission issues a written decision.

(4) (a) Any final land use decision by the planning commission may be appealed by the applicant, planning administrator, or any aggrieved person to the governing body.

(b) An appeal under subsection (4)(a) must be submitted in writing within 15 business days of the challenged decision, stating the facts and raising all grounds for appeal that the party may raise in district court.

(c) The governing body shall hear the appeal de novo. The governing body is not bound by the decision that has been appealed, but the appeal must be limited to the issues raised on appeal. The appellant has the burden of proving that the appealed decision was made in error.

(d) A decision of the governing body on appeal takes effect on the date when the governing body issues a written decision.

(5) (a) No person may challenge in district court a land use decision until that person has exhausted the person's administrative appeal process as provided in this section.

(b) Any final land use decision of the governing body may be challenged by presenting a petition setting forth the grounds for review of a final land use decision with the district court within 30 calendar days after the written decision is issued.

(c) A challenge in district court to a final land use decision of the governing body is limited to the issues raised by the challenger on administrative appeal.

(6) Every final land use decision made pursuant to this section must be based on the administrative record as a whole and must be sustained unless the decision being challenged is arbitrary, capricious, or unlawful.

(7) Nothing in [sections 1 through 38] is subject to any provision of Title 2, chapter 4.

Section 38. Enforcement and penalties. (1) A local government may, by ordinance, establish civil penalties for violations of any of the provisions of [sections 1 through 38] or of any ordinances adopted under the authority of [sections 1 through 38].

(2) Prior to seeking civil penalties against a property owner, a local government shall provide:

(a) written notice, by mail or hand delivery, of each ordinance violation to the address of the owner of record on file in the office of the county recorder;

(b) a reasonable opportunity to cure a noticed violation; and

(c) a schedule of the civil penalties that may be imposed on the owner for failure to cure the violation before expiration of a time certain.

(3) A local government may, in addition to other remedies provided by law, seek:

(a) an injunction, mandamus, abatement, or any other appropriate action provided for in law;

(b) proceedings to prevent, enjoin, abate, or remove an unlawful building, use, occupancy, or act; or

(c) criminal prosecution for violation of any of the provisions of [sections 1 through 38] or of any ordinances adopted under the authority of [sections 1 through 38] as a misdemeanor punishable by a fine not to exceed $500 per day for each violation.

(4) In any enforcement action taken under this section or remedy sought thereunder, the parties shall pay their own costs and attorney fees.

Section 39. Repealer. The following sections of the Montana Code Annotated are repealed:

7-21-1001. Legislative findings and purpose.

7-21-1002. Definitions.

7-21-1003. Local government regulations -- restrictions.

Section 40. Codification instruction. [Sections 1 through 38] are intended to be codified as an integral part of Title 76, and the provisions of Title 76 apply to [sections 1 through 38].

Section 41. Effective date. [This act] is effective on passage and approval.

Section 42. Applicability. [This act] applies to local governments that currently meet the population thresholds in [section 5].

- END -

I hereby certify that the within bill,

SB 382, originated in the Senate.

_____

Secretary of the Senate

_____

President of the Senate

Signed this _____day

of_____, 2023.

_____

Speaker of the House

Signed this _____day
of_____, 2023.

SENATE BILL NO. 382

INTRODUCED BY F. MANDEVILLE, D. FERN, S. VINTON, M. BERTOGLIO, L. BREWSTER, M. HOPKINS, E. BOLDMAN, G. HERTZ, C. FRIEDEL, J. KARLEN

AN ACT CREATING THE MONTANA LAND USE PLANNING ACT; REQUIRING CITIES THAT MEET CERTAIN POPULATION THRESHOLDS TO UTILIZE THE LAND USE PLAN, MAP, ZONING REGULATIONS, AND SUBDIVISION REGULATIONS PROVIDED IN THE ACT; ALLOWING OTHER LOCAL GOVERNMENTS THE OPTION TO UTILIZE THE PROVISIONS OF THE ACT; REQUIRING PUBLIC PARTICIPATION DURING THE DEVELOPMENT, ADOPTION, OR AMENDMENT OF A LAND USE PLAN, MAP, ZONING REGULATION, OR SUBDIVISION REGULATION; PROVIDING STRATEGIES TO MEET POPULATION PROJECTIONS; PROVIDING FOR CONSIDERATION OF FACTORS SUCH AS HOUSING, LOCAL FACILITIES, ECONOMIC DEVELOPMENT, NATURAL RESOURCES, ENVIRONMENT, AND NATURAL HAZARDS WHEN DEVELOPING A LAND USE PLAN, MAP, AND ZONING REGULATION; PROVIDING FOR A PROCEDURE TO REVIEW SUBDIVISIONS AND APPROVE FINAL PLATS; PROVIDING FOR A LOCAL GOVERNING BODY TO COLLECT FEES; PROVIDING AN APPEALS PROCESS, ENFORCEMENT MECHANISMS, AND PENALTIES; PROVIDING DEFINITIONS; REPEALING SECTIONS 7-21-1001, 7-21-1002, AND 7-21-1003, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE.

AN ACT REVISING MUNICIPAL ZONING LAWS TO ALLOW FOR ACCESSORY DWELLING UNITS; REQUIRING MUNICIPALITIES TO ADOPT CERTAIN REGULATIONS IN RELATION TO ACCESSORY DWELLING UNITS; PROHIBITING CERTAIN REGULATIONS IN RELATION TO ACCESSORY DWELLING UNITS; ALLOWING A MUNICIPALITY TO CHARGE A FEE TO REVIEW APPLICATIONS TO CREATE ACCESSORY DWELLING UNITS; AND PROVIDING A DELAYED EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Accessory dwelling units -- regulations -- restrictions. (1) (a) A municipality shall adopt regulations under this chapter that allow a minimum of one accessory dwelling unit by right on a lot or parcel that contains a single-family dwelling.

(b) An accessory dwelling unit may be attached, detached, or internal to the single-family dwelling on a lot or parcel.

(c) If the accessory dwelling unit is detached from or attached to the single-family dwelling, it may not be more than 75% of the gross floor area of the single-family dwelling or 1,000 square feet, whichever is less.

(2) A municipality may not:

(a) require that a lot or parcel have additional parking to accommodate an accessory dwelling unit or require fees in lieu of additional parking;

(b) require that an accessory dwelling unit match the exterior design, roof pitch, or finishing materials of the single-family dwelling;

(c) require that the single-family dwelling or the accessory dwelling unit be occupied by the owner;

(d) require a familial, marital, or employment relationship between the occupants of the single-family dwelling and the occupants of the accessory dwelling unit;

(e) assess impact fees on the construction of an accessory dwelling unit;

(f) require improvements to public streets as a condition of permitting an accessory dwelling unit, except as necessary to reconstruct or repair a public street that is disturbed as a result of the construction of the accessory dwelling unit;

(g) set maximum building heights, minimum setback requirements, minimum lot sizes, maximum lot coverages, or minimum building frontages for accessory dwelling units that are more restrictive than those for the single-family dwelling on the lot;

(h) impose more onerous development standards on an accessory dwelling unit beyond those set forth in this section; or

(i) require a restrictive covenant concerning an accessory dwelling unit on a parcel zoned for residential use by a single-family dwelling. This subsection (2)(i) may not be construed to prohibit restrictive covenants concerning accessory dwelling units entered into between private parties, but the municipality may not condition a permit, license, or use of an accessory dwelling unit on the adoption or implementation of a restrictive covenant entered into between private parties.

(3) Nothing in this section prohibits a municipality from regulating short-term rentals as defined in 15-68-101.

(4) A municipality may require a fee for reviewing applications to create accessory dwelling units. The one-time application fee may be up to $250 for each accessory dwelling unit. Nothing in this section prohibits a municipality from requiring its usual building fees in addition to the application fee.

(5) A municipality that has not adopted or amended regulations pursuant to this section by January 1, 2024, shall 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.

(6) The provisions of this section do not supersede applicable building codes, fire codes, or public health and safety regulations adopted pursuant to Title 50, chapter 2.

(7) A municipality may require an accessory dwelling unit to have a will-serve letter from both a municipal water system and a municipal sewer system.

(8) Nothing in this section prohibits a municipality from adopting regulations that are more

permissive than the accessory dwelling unit provisions provided in this section.

(9) For the purposes of this section:

(a) "accessory dwelling unit" means a self-contained living unit on the same parcel as a single-family dwelling of greater square footage that includes its own cooking, sleeping, and sanitation facilities and complies with or is otherwise exempt from any applicable building code, fire code, and public health and safety regulations adopted pursuant to Title 50, chapter 2.

(b) "by right" means the ability to be approved without requiring:

(i) a public hearing;

(ii) a variance, conditional use permit, special permit, or special exception; or

(iii) other discretionary zoning action other than a determination that a site plan conforms with applicable zoning regulations;

(c) "gross floor area" means the interior habitable area of a single-family dwelling or an accessory dwelling unit;

(d) "municipality" means an incorporated city, town, or consolidated city-county that exercises zoning powers under this part; and

(e) "single-family dwelling" means a building with one or more rooms designed for residential living purposes by one household that is detached from any other dwelling unit.

Section 2. Codification instruction. [Section 1] is intended to be codified as an integral part of Title 76, chapter 2, part 3, and the provisions of Title 76, chapter 2, part 3, apply to [section 1].

Section 3. Effective date. [This act] is effective January 1, 2024.

- END -

I hereby certify that the within bill,

SB 528, originated in the Senate.

_____

Secretary of the Senate

_____

President of the Senate

Signed this _____day

of _____, 2023.

_____

Speaker of the House

Signed this _____day
of _____, 2023.

SENATE BILL NO. 528

INTRODUCED BY G. HERTZ

AN ACT REVISING MUNICIPAL ZONING LAWS TO ALLOW FOR ACCESSORY DWELLING UNITS; REQUIRING MUNICIPALITIES TO ADOPT CERTAIN REGULATIONS IN RELATION TO ACCESSORY DWELLING UNITS; PROHIBITING CERTAIN REGULATIONS IN RELATION TO ACCESSORY DWELLING UNITS; ALLOWING A MUNICIPALITY TO CHARGE A FEE TO REVIEW APPLICATIONS TO CREATE ACCESSORY DWELLING UNITS; AND PROVIDING A DELAYED EFFECTIVE DATE.

AN ACT REVISING MUNICIPAL ZONING LAWS; REQUIRING CERTAIN MUNICIPALITIES TO ALLOW MULTIPLE-UNIT DWELLINGS AND MIXED-USE DEVELOPMENT; PROVIDING DEFINITIONS; AMENDING SECTIONS 76-2-304 AND 76-2-309, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 76-2-304, MCA, is amended to read:

"**76-2-304. Criteria and guidelines for zoning regulations.** (1) Zoning regulations must be:

(a) made in accordance with a growth policy; and

(b) designed to:

(i) secure safety from fire and other dangers;

(ii) promote public health, public safety, and the general welfare; and

(iii) facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.

(2) In the adoption of zoning regulations, the municipal governing body shall consider:

(a) reasonable provision of adequate light and air;

(b) the effect on motorized and nonmotorized transportation systems;

(c) promotion of compatible urban growth;

(d) the character of the district and its peculiar suitability for particular uses; and

(e) conserving the value of buildings and encouraging the most appropriate use of land throughout the jurisdictional area.

(3) (a) In a municipality that is designated as an urban area by the United States census bureau with a population over 5,000 as of the most recent census, the city council or other legislative body of the

municipality shall allow as a permitted use multiple-unit dwellings and mixed-use developments that include multiple-unit dwellings on a parcel or lot that:

(i) has a will-serve letter from both a municipal water system and a municipal sewer system; and

(ii) is located in a commercial zone .

(b) Zoning regulations in municipalities meeting the requirements of subsection (3)(a) may not include a requirement to provide more than:

(i) one off-street parking space for each unit and accessible parking spaces as required by the Americans With Disabilities Act of 1990, 42 U.S.C. 12101, et seq.; or

(ii) an equivalent number of spaces required under subsection (3)(b)(i) provided through a shared parking agreement.

(4) As used in this section, the following definitions apply:

(a) "Mixed-use development" means a development consisting of residential and nonresidential uses in which the nonresidential uses are less than 50% of the total square footage of the development and are limited to the first floor of buildings that are two or more stories.

(b) "Multiple-unit dwelling" means a building designed for five or more dwelling units in which the dwelling units share a common separation like a ceiling or wall and in which access cannot be gained between units through an internal doorway, excluding common hallways."

Section 2. Section 76-2-309, MCA, is amended to read:

"**76-2-309. Conflict with other laws.** (1) Wherever the regulations made under authority of this part require a greater width or size of yards, courts, or other open spaces~~;~~, require a lower height of building or ~~less~~ a fewer number of stories~~;~~, require a greater percentage of a lot to be left unoccupied~~;~~, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this part ~~shall~~ govern.

(2) Wherever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts, or other open spaces~~;~~, require a lower height of building or a ~~less~~ fewer number of stories~~;~~, require a greater percentage of a lot to be left unoccupied~~;~~, or impose other higher standards than are required by the regulations made under authority of this part, except for restrictions provided in 76-2-304(3),

the provisions of ~~such~~ the other statute or local ordinance or regulation ~~shall~~ govern."

Section 3. Effective date. [This act] is effective on passage and approval.

Section 4. Retroactive applicability. [This act] applies retroactively, within the meaning of 1-2-109, to municipal zoning regulations enacted or adopted on or before [the effective date of this act].

- END -

I hereby certify that the within bill,

SB 245, originated in the Senate.

_____

Secretary of the Senate

_____

President of the Senate

Signed this _____day

of_____, 2023.

_____

Speaker of the House

Signed this _____day
of_____, 2023.

SENATE BILL NO. 245

INTRODUCED BY D. ZOLNIKOV, C. FRIEDEL, J. ELLSWORTH, K. BOGNER

AN ACT REVISING MUNICIPAL ZONING LAWS; REQUIRING CERTAIN MUNICIPALITIES TO ALLOW MULTIPLE-UNIT DWELLINGS AND MIXED-USE DEVELOPMENT; PROVIDING DEFINITIONS; AMENDING SECTIONS 76-2-304 AND 76-2-309, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.