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

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, et al.,

Plaintiff and Appellee,

v.

STATE OF MONTANA,

Defendant and Appellant.

BRIEF OF FAMILIES FOR RESPONSIBLE GROWTH PARTICIPATE AS *AMICUS CURIAE*

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

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Flathead Families for Responsible Growth ("FFRG") submits this brief in support of Appellee Montanans Against Irresponsible Densification, LLC ("MAID") and the Eighteenth Judicial District Court's preliminary injunction order.

INTEREST OF FLATHEAD FAMILIES FOR RESPONSIBLE GROWTH

This case involves the Montana Legislatures enactment of Montana Senate Bills 528 and 323 ("SB 528" and "SB 323"). Flathead Families for Responsible Growth ("FFRG") is a 501(c)(3) not-for-profit organization. Its members represent a diverse cross-section of local residents in Flathead County, Montana. Its mission is to foster responsible growth in the Flathead's varied and unique communities. FFRG has a strong interest in ensuring that Montana's land use laws protect the public's constitutional right to be informed about and meaningfully participate in development proposals in communities throughout the Flathead to ensure that public health, safety, and the general welfare of its citizens are protected.

FFRG works to educate and engage the public on various development proposals throughout the Flathead, which requires that it be informed on these matters to ensure that its participation at the local government level is meaningful. Flathead Families for Responsible Growth, *About FFRG MT* (available at https://ffrgmt.org/about/). FFRG files this amicus brief to explain how SB 528 and SB 323 are inconsistent with the Montana Constitution and will fail to increase

housing or housing affordability in Montana.

STATEMENT OF THE ISSUES

FFRG addresses how SB 528 and 323 will violate equal protection of the laws and the public's right to know about and participate in development proposals that have a real impact on public health, safety, and the general welfare of communities in Flathead County. FFRG further aims to explain why SB 528 and 323 will not increase the supply of affordable housing due to the high cost of urban infrastructure, basic supply and demand economics, and the incentivization of real estate speculation.

STATEMENT OF THE CASE

1. In May 2023, the Montana Legislature enacted SB 323 and 528, 68th Leg., Reg. Sess. (Mont. 2023), which became effective on January 1, 2024. SB 323 mandates that cities with a population of at least 5,000 residents must allow duplex housing by right where a single-family residence is permitted. SB 528 mandates that all municipalities must allow one accessory dwelling unit ("ADU") by right if a lot or parcel contains a single-family dwelling while prohibiting municipalities from imposing certain requirements as a condition of approval for the ADU, including design, parking, owner occupancy, and public street improvement requirements.

2. While SB 323 and 528 purport to address affordable housing shortages in Montana, the Montana Legislature has in fact stymied attempts by local

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

3. In December 2023, Plaintiff Montanans Against Irresponsible Densification, LLC ("MAID") filed suit against Defendant challenging SB 323 and SB 528, as well as Montana Senate Bill 382, 68th Leg., Reg. Sess. (Mont. 2023). SB 382, now codified in pertinent part at § 76-25-106(4)(d), MCA, places significant limitations on the scope and opportunity for public participation and public comment on site-specific development proposals, including zoning proposals, planned unit developments, and subdivisions. In short, SB 323, SB 528, and SB 382 seek to mandate housing densification while restricting the public's fundamental Right to Know and Right to Participate under Article II, Sections 8 and 9 of the Montana

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

Constitution. While the district court did not enjoin SB 382, it is relevant to this appeal given the bill's intent to subject all land use decisions in municipalities "with a population at or exceeding 5,000 located within a county with a population at or exceeding 70,000" to administrative review rather than legislative review of local government boards and councils informed by public participation.

4. MAID's complaint raised several claims, including violations of Equal Protection and Due Process of its citizenry, violations of the Right to Know and Right to Participate, and violations of constitutional self-government powers of local governments.

5. The trial court entered a preliminary injunction against SB 323 and SB 528. On appeal, the State argues that trial court manifestly abused its discretion in granting the injunction, while MAID argues that the district court properly determined that the preliminary injunction was warranted under § 27-19-201, MCA.

SUMMARY OF THE ARGUMENT

In granting the preliminary injunction, the district court properly determined that MAID is likely to succeed on the merits of its claims. SB 323 and 528 abolishes the Right to Know and Participate for some Montana residents by prohibiting local legislative review of certain site-specific zone changes without requiring or resulting in housing affordability. The challenged acts thus undermine the facilitation of the Right to Know and the Right to Participation and violate Equal Protection under the

Montana Constitution and serve no compelling state interest to survive strict scrutiny.

ARGUMENT

I. SB 323 AND SB 528 VIOLATE THE RIGHT TO PARTICIPATE AND KNOW BECAUSE IT DEPRIVES THE PUBLIC OF MEANINGFUL, INFORMED REVIEW OF LOCAL ZONING DECISIONS.

Article II, Sections 8 and 9 of the Montana Constitution provide the public with the fundamental right to observe the deliberations of public bodies and participate in the government's decision-making process. These are coextensive provisions, such that the Right to Participate cannot be analyzed in a vacuum, separate and distinct from the Right to Know, because "to participate effectively and knowledgeably in the political process of a democracy[,] one must be permitted the fullest imaginable freedom of speech and one must be fully apprised of what the government is doing, has done, and is proposing to do." *Bryan v. Yellowstone Cnty. Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 31, 312 Mont. 257, 60 P.3d 381. The Right to Participate is contained in the Bill of Rights and, during the course of Montana's 1972 Constitutional Convention, the Bill of Rights Committee described the underpinnings of this fundamental right as follows:

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

> that **maximize** the access of citizens to the decision-making institutions of state government.

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

The Montana Supreme Court has affirmed government agencies' clear legal duty not only to permit and afford citizens' reasonable opportunity to participate in government decision-making processes, but to *secure* and *encourage* the public's exercise of this most fundamental constitutional and statutory right by establishing procedures that assist and provide adequate notice to citizens who wish to submit data, views, or arguments before the government makes a final decision of significant public interest. §§ 2-3-103 and -111; 7-1-4142; and -4143, MCA; *Bryan*, ¶ 43. "The essential elements of public participation" required by Article II, Section 8, are "notice and an opportunity to be heard," which requires "more than simply an 'uninformed opportunity to speak.'" *Citizens for a Better Flathead v. Bd. of County Comm'rs*, 2016 MT 256, ¶ 39, 385 Mont. 156, 381 P.3d 555 (quoting *Bryan*, ¶ 44).

A reasonable opportunity to be heard requires governmental bodies to give "adequate notice of their deliberations… and [give] the public sufficient opportunities to be informed and heard" in a meaningful way. *Citizens*, ¶ 48. For example, the Montana Subdivision and Platting Act ("MSPA") recognizes that residential subdivisions can create a myriad of social, environmental, health and safety impacts on the surrounding community and, as such, recognizes the public's

right to participate in the subdivision review process at the site-specific level. §§ 76-3-102 and -601 *et seq*, MCA.

The importance of public participation in land use development is likewise reflected in Montana's growth policy and zoning statutes as such matters are of significant public interest and should reflect the land use goals and objectives of an entire community, not just the pecuniary interests of developers and the short-term rental market. §§ 76-1-601 and -602, MCA; §§ 76-2-303 and -304, MCA; §§ 76-2-203 and -205, MCA. For example, in 2021, FFRG along with hundreds of other citizens raised concerns about the impacts to traffic, emergency services and fire danger that would have resulted from a 318-unit development, in large part because of the independent research and expert testimony the public was able to proffer when the local planning administrator failed to adequately address the statutory review criterial of § 76-2-304, MCA. Flathead Beacon, *Whitefish Planning Board Votes Against Mountain Gateway Development* (Nov. 21, 2021) (available at https://flatheadbeacon.com/2021/11/21/whitefish-planning-board-votes-against-mountain-gateway-development/).

Here, SB 323 and SB 528 violate the Right to Know and Right to Participate because the Montana Legislature is attempting to take away local, legislative control of zoning decisions, and thereby abrogate the public's right to know about and be heard on these matters. SB 323 and SB 528 also violates equal protection because

the challenged acts bar certain residents from knowing about or participating in local zoning, while other residents are still afforded these rights. *See Mont. Land Title Ass'n v. First Am. Title,* 167 Mont. 471, 475-76, 539 P.2d 711, 713 (1975) ("Equal protection of the laws means subjection to equal laws applying alike to all in the same situation. While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which such classification is imposed; such classification cannot be arbitrarily made without any substantial basis.").

With respect to SB 323, local government legislative bodies "in cities with a population of at least 5,000 residents" will no longer be able to meaningfully review or regulate zoning changes to single-family zoning districts when duplexes are proposed in these often traditional, historic neighborhoods. As a result, those who live in cities with a population of at least 5,000 residents will be shut out of the administrative and bureaucratic review process and will not be given an informed opportunity to speak and engage even when property values, transportation, water, sewer, schools, or public safety in a community will be impacted. *See* § 76-2-304(1)(b)(i)-(iii) (listing zoning review criteria).

Likewise, with SB 528, because local *municipal* legislative bodies cannot meaningfully review or regulate ADU's – while *county* legislative bodies still can –

municipal residents will have no notice or opportunity to be heard when these mostly short-term, market rate rental units are proposed in their communities. The cumulative effect and intent of SB 323 and SB 528 overlayed with the SB 382's bar against public participation for site specific development proposals will be the densification of Montana's traditional neighborhoods without a corresponding meaningful local legislative review of the impacts to the public's health and safety and the general welfare of its citizenry that will result from densification. These bills, now codified and in effect as of January 1, 2024, undermine the facilitation of the Right to Know and the Right to Participation and violate Equal Protection under the Montana Constitution.

II. SB 323 AND SB 528 ARE NOT NARROWLY TAILORED TO EFFECTUATE A COMPELLING STATE INTEREST BECAUSE THESE BILLS WILL NOT RESULT IN THE CREATION OF AFFORDABLE HOUSING.

Because MAID's rights under Article II, Sections 8 and 9 are implicated in this case, and because these fundamental rights are included within the Declaration of Rights, the Legislature's infringement of these rights trigger strict scrutiny – the Court's highest level of protection – and must serve a compelling state interest and be narrowly tailored to effectuate that interest. *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165 (1996).

However, rather than serve a compelling a compelling state interest, SB 323, SB 382, and SB 528 defeats Equal Protection and the public's Right to Know and Right

to Participate, and the strong public interest in maintaining local control over zoning to ensure that the public health, safety and general welfare are protected. There is no compelling state interest in requiring certain local governments to shortage its residents' right to know about and participate in an informed and meaningful way on zoning changes in order to further the economic interest of real estate developers and the short-term rental market. *See Bryan*, ¶¶ 43, 59.

Further, SB 323, SB 382, and SB 528 does nothing to address the issue of affordable housing shortages in Montana because any new housing units created as a result of these bills will be market rate housing, not deed restricted for affordability. Indeed, the Montana Legislature has in fact prohibited such local measures requiring housing affordability. §§ 76-2-114 ("A local governing body may not adopt a resolution under this part that includes a requirement to…dedicate real property for the purpose of providing housing for specified income levels or at specified sales prices.") and 76-3-514, MCA ("A local governing body may not require, as a condition for approval of a subdivision under this part,…the dedication of real property for the purpose of providing housing for specified income levels or at specified sales prices.").

While SB 323, SB 382, and SB 528 bills will result in the densification of certain municipalities – and further strain schools and road, water, sewer, and other infrastructure in these cities – densification will not increase affordability because

upzoning to allow more density increases the value of land by increasing the development value, as explained by Professor Patrick M. Condon:

> If you simply increase allowable density without requiring affordability, here is what happens: Imagine a 4,000 square foot parcel with an allowable floor/surface ration of 1 (FSR 1) selling for $2 million prior to rezoning. After the allowable density is doubled (FSR 2), the potential redevelopment value increases in kind, forcing a near doubling the value of land.

Patrick M. Condon, *Sick City*, 117 (2021) (available at https://justice landandthecityblogspot.com/p/download-sick-city-pdf.html); *See also* Randal O' Toole, *Density Makes Housing Less Affordable, Not More* (Apr. 26, 2021) (available at https://www.cato.org/commentary/density-makes-housing-less-affordable-not-more) ("Abolishing single family zoning won't make housing more affordable, but it will make homeownership less desirable, and the nation will lose the benefits of such homeownership.").

CONCLUSION

Because there is no compelling state interest in this case, narrowly tailored to protect MAID's fundamental, constitutional rights to equal protection and to know and participate in site-specific development in their unique and varied communities, MAID is likely to succeed on the merits of its claims because SB 323, SB 528, and SB 382 are facially unconstitutional.

Respectfully submitted this 1st day of April, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to M. R. App. P. 11, the undersigned certifies that this brief is set in a proportionally spaced font and contains fewer than 5,000 words (2582).

/s/ Michelle T. Weinberg
Michelle T. Weinberg

CERTIFICATE OF SERVICE

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