

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

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC,

Plaintiff and Appellee,

v.

STATE OF MONTANA,

Defendant and Appellant.

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

BRIEF OF *AMICUS CURIAE* BETTER BOZEMAN COALITION

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae, Better Bozeman Coalition (“BBC”), is a group of concerned citizens and residents of Bozeman who have organized to address the impact of growth on existing and future neighborhoods. BBC’s mission is to preserve the unique character of Bozeman’s neighborhoods while working with the city on historic preservation, housing affordability, availability, and natural resource sustainability.

STATEMENT OF THE CASE

Nobody denies that Montana is facing an affordable housing crisis. “The median price for a single-family home in the greater Bozeman area is currently \$979,500. Seattle’s median is \$52,000 less.” Cassidy Powers, *Bozeman home prices reaching an all-time high, raising the cost across Gallatin County and the region*, KBZK Bozeman (Mar. 6, 2024), <https://www.kbzk.com/news/local-news/bozeman-home-prices-reaching-an-all-time-high-raising-the-cost-across-gallatin-county-and-the-region>.

Densification through upzoning, however, is not a viable solution. “A recent article posted by Bozeman Real Estate Group says one of the main reasons Bozeman houses are so expensive is out-of-state money. People moving to Bozeman from places where real estate is more expensive can easily compete in our

market, outbidding local buyers and paying all cash for homes. According to Montana Title and Escrow, approximately 45% of Montana Title closings in 2021 were cash deals—a threat to locals who wish to stay but simply cannot afford to.”

Id.

BBC believes that the challenges of growth can be met without destroying the things that make Bozeman unique. To do so, however, requires local participation by local residents to affect policies adopted by local government that can affect existing neighborhoods and allow for rational development of future areas of the city. The current legislation adopted by the legislature that is at issue in this case affects the rights of BBC and its members to participate meaningfully in planning the future of their city and affects their lives and quality of life.

STANDARD OF REVIEW

The Montana Supreme Court reviews “a district court’s grant or denial of a preliminary injunction for a manifest abuse of discretion.” *Driscoll v. Stapleton*, 2020 MT 247, ¶ 12, 401 Mont. 405, 413, 473 P.3d 386, 391 (citation omitted).

“A manifest abuse of discretion is one that is ‘obvious, evident, or unmistakable.’”

Id. (citations omitted). “In considering whether to issue a preliminary injunction, neither the [d]istrict [c]ourt nor this Court will determine the underlying merits of the case giving rise to the preliminary injunction, as such an inquiry is reserved for

a trial on the merits.” *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 7, 395 Mont. 160, 437 P.3d 142 (citing *Caldwell v. Sabo*, 2013 MT 240, ¶ 19, 371 Mont. 328, 308 P.3d 81).

SUMMARY OF THE ARGUMENT

The statutes at issue were allegedly enacted under the premise that a denser and more abundant supply of housing in Montana would lead to more affordable housing for Montanans. This “free market” approach to affordable housing is mistaken and the legislation does not allow Montana’s cities and counties to decide how to grow rationally—i.e., by taking into account local issues such as historic preservation and the availability of natural resources. For Bozeman, it means funneling high-price development into Bozeman’s historic neighborhoods without the promised payoff of affordable housing for Bozemanites.

ARGUMENT

To avoid violating due process, laws must bear a reasonable relationship to a permissible government interest. *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 30, 382 Mont. 256, 368 P.3d 1131. The laws in this case violate due process because densification does not bear a reasonable relationship to affordable housing; the laws are unreasonable, arbitrary, and capricious. *See id.*

I. **Densification does not lead to affordable housing.**

It should first be noted that in 2021, the Montana legislature enacted legislation to abrogate direct affordable housing measures: “City zoning laws that require builders to include some affordable homes in developments are now banned in Montana, under a bill signed . . . by Gov. Greg Gianforte.” Mike Dennison, *Gov signs law killing affordable-housing program in Bozeman, Whitefish*, KTHV (last updated Apr. 20, 2021), <https://www.ktvh.com/news/montana-politics/gianforte-signs-bill-offing-affordable-housing-program-in-bozeman-whitefish>.

City managers from both Whitefish and Bozeman touted their cities’ inclusionary zoning as one of the best ways to create affordable housing. *Id.* Apparently, the legislature crumbled to developers who blamed market forces—like the skyrocketing price of lumber—for the housing crisis and stated they **could not** offer affordable homes and apartments. *See id.*

After stripping away the only tool that **guaranteed** affordable housing, the 2023 Montana legislature purportedly relied on the premise that removing zoning protections and land use rules would allow developers to essentially build anything, anywhere in cities like Bozeman in **hopes** that these additional units would make housing affordable by simply increasing supply. This “free-market” ideal may seem simple enough but is directly contradicted by evidence that increased housing

density and up-zoning do not often produce more affordable housing. Upzoning and higher-density housing can actually increase land costs and values, thus decreasing affordability.

For instance, the efforts to upzone land for more density in Vancouver, Canada actually drove up land values and costs, thus making housing more expensive. The expectation in Vancouver “was that adding new rental supply would lead to increased competition between landlords and thus lower rents.” Patrick Condon, *When Will Rents Come Down?*, THE TYEE (Feb. 2, 2023), <https://thetyee.ca/Analysis/2023/02/02/When-Will-Rents-Come-Down/>.

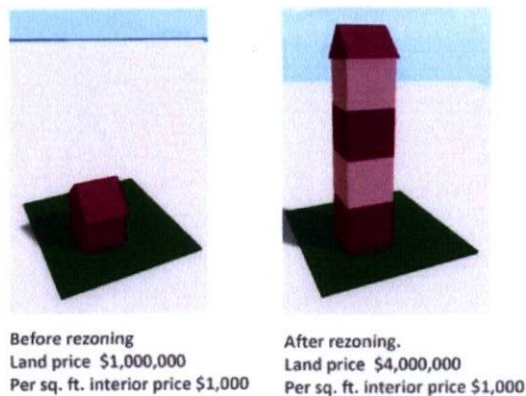
A report from the Canada Mortgage and Housing Corporation found that this “free market” approach did not work. *Id.* Specifically, the report found that “average rents for new two-bedroom units (\$2,823) were nearly identical to the asking rent (\$2,865) for vacant two-bedroom units of all ages.” *Id.* And, “new two-bedroom units, newly abundant in relative terms, are unaffordable to average renters—median household income of renter households is around \$50,000, meaning rents above \$1,300 per month are unaffordable.” *Id.*

For Patrick Condon—with over thirty years of experience in sustainable urban design as a city planner, teacher, and researcher—the problem lies not in zoning restrictions or land use regulations but rather in escalating the cost of land

further driven higher by upzoning and infill density pursuits.

“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 ratio of 1 (FSR 1) selling for \$2 million prior to rezoning. After allowable density is doubled (FSR 2), the potential redevelopment value increases in kind, forcing a near doubling in the value of land. . . . [T]he evidence shows that increases in allowable density (particularly in job-rich coastal cities where rent levels are inflating rapidly) merely increase land price, i.e., increase the level of Rent, with the only benefit going to land speculators.” Patrick M. Condon, *SICK CITY DISEASE, RACE, INEQUALITY AND URBAN LAND* pp. 117–118 (2021) (emphasis added).¹

The following illustration is based on the same concept:



¹ Available at https://uploads-ssl.webflow.com/5efd1c1c4e2740c1bb1bfb69/60001a4f82797d502d088dcf_Sick%20City%202021.pdf.

Vancouver's Smartest Planner, Prof. Patrick Condon, Says Upzoning is a Costly Mistake, LIVABLE CALIFORNIA (Feb. 6, 2021),

<https://www.livablecalifornia.org/vancouver-smartest-planner-prof-patrick-condon-calls-california-upzoning-a-costly-mistake-2-6-21/>.

“The commonly accepted theory of supply and demand has been undercut by the observed reality; i.e., that no matter how much a metropolitan area adds new housing units, housing prices continue to rise. This begs the question: If the high price of housing is not caused by constrained supply, what is the problem? The problem seems to be the cost of land.” SICK CITY, *supra*, p. 38.

Bozeman (*see infra*) and Vancouver are not alone: marginal reductions in supply constraints alone are unlikely to reduce rent burdens. In 2018, a group of economists ran a simulation that increased housing supply in various cities across the U.S. and found that increasing housing units by 20% would only result in a minimal decrease in rent costs of less than 2%:

Table 3: Simulation Results - Increasing Housing Stock to Single Neighborhoods

City	Rent response to adding +X% housing stock			
	+1%	+5%	+10%	+20%
Atlanta	-0.06%	-0.31%	-0.61%	-1.18%
Boston	-0.05%	-0.25%	-0.49%	-0.93%
Chicago	-0.07%	-0.34%	-0.66%	-1.27%
Dallas	-0.07%	-0.36%	-0.71%	-1.35%
Houston	-0.06%	-0.30%	-0.58%	-1.11%
Los Angeles	-0.07%	-0.36%	-0.71%	-1.36%
Miami	-0.06%	-0.30%	-0.59%	-1.13%
Philadelphia	-0.07%	-0.34%	-0.66%	-1.27%
San Francisco	-0.10%	-0.49%	-0.95%	-1.82%
Washington DC	-0.07%	-0.34%	-0.67%	-1.29%

Anenberg, Elliot, and Edward Kung (2018). “Can More Housing Supply Solve the Affordability Crisis? Evidence from a Neighborhood Choice Model,” Finance and Economics Discussion Series 2018-035. Washington: Board of Governors of the Federal Reserve System, <https://doi.org/10.17016/FEDS.2018.035>.

Taken together, this evidence shows that a “free market-based” de-zoning approach in the City of Bozeman is unlikely to deliver on the promise of affordable housing. If it is not working in Vancouver, Canada, a city with some of the highest housing density rates and land costs in the world, it will also not work in Bozeman, another location with very high land costs that make providing affordable housing prohibitive.

In Bozeman, supply was already outpacing demand at the end of 2023— “[t]he vacancy rate currently stands at 7.14%, indicating an oversupply.” Maggie Collister, *Big Changes in Bozeman’s Housing Market*, STERLING CRE ADVISORS (Sep. 24, 2023), <https://www.sterlingcreadvisors.com/big-changes-in-bozemans-housing-market/>.

But the same developers who said they could not abide by actual affordable housing requirements refuse to lower rents to a level that is affordable for Bozeman citizens:

Developers are unlikely to drop rents and will continue to offer concessions such as free months, reduced deposits,

and waiving application fees. **Rent drops are a last resort to fill units.** Most developers have a targeted timeline to lease-up buildings and the closer that deadline looms, the more concessions they will offer.

Id. (emphasis added).

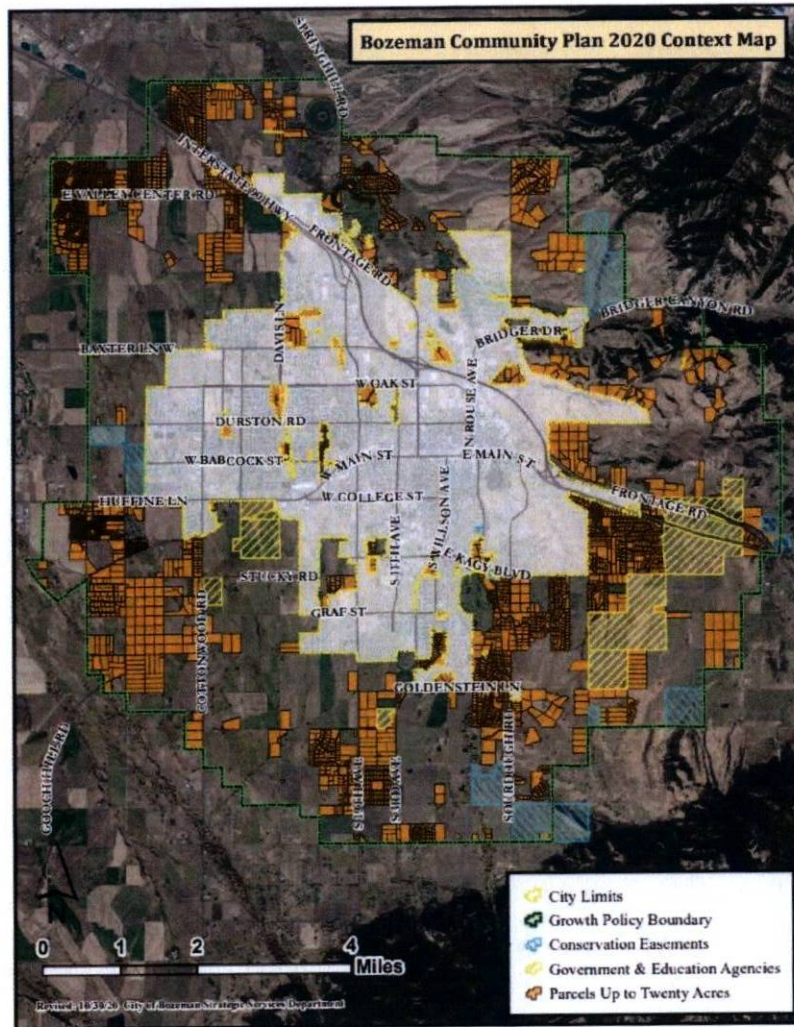
“Currently, the average asking rent in Bozeman is \$2,140 per month” or \$25,680 per year. *Id.* A household looking to rent in Bozeman must make over \$70,000 to limit rent to 30% of income. The median household income in Bozeman in 2021 was \$67,354. <https://uspopulation.org/montana/gallatin-county/bozeman/>.

During this time of consistently un-affordable rental properties and homes, Bozeman had already expanded the housing potential:

The Planning Area for the BCP is approximately 70 square miles. Most of that area lies outside of the existing municipal limits. However, it is not free from development pressure or change. As shown on the map . . . much of the land within the Planning Area and outside the City has already been subdivided and developed to some degree, mostly as suburban and rural housing.

Bozeman MT 2020 Community Plan, p. 10

<https://www.bozeman.net/home/showpublisheddocument/1074/638212934420400000>.



Bozeman exemplifies the legislature’s folly. Increased development in Montana’s largest cities, without requiring affordability, does not lead to affordable housing.

Now, Bozeman’s attempt to implement SB 382 takes away citizens’ right to participate in actually crafting solutions. Presently, Section 38.240.140 of Bozeman’s Uniform Development Code (“UDC”) regarding “subdivision notice and public comment” states “*all subdivisions require notice and opportunity for public*

comment” (subsection a). It proceeds to state that, in general, there must be “planning board review” —at a regularly noticed public meeting of the public board (except for minor subdivisions). 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...”. Exhibit A, attached hereto.

Without being reasonably related to affordable housing, the laws at issue violate Montanans’ constitutional rights.

II. Densification may actually destroy the best source of current affordable housing.

Increased density does not lead to homeownership for those Montanans looking to buy or rent who are currently priced out of the market. Condon, *supra*. Increased density is actually likely to reduce their chances of finding an affordable housing by converting existing homes into high-priced developments.

“In many communities, smaller, older single-family homes are the largest source of naturally occurring affordable housing (NOAH)—unsubsidized privately owned residences that are affordable to low- or moderate-income households.”

Donald L. Elliot, *Zoning Practice, Preserving Naturally Occurring Affordable Housing*,

APA (Dec. 2023), p. 2.² “The key fact is that Americans’ earning power continues to rise much more slowly than the costs of land, materials, labor, transportation and energy necessary to build new rental or for-sale housing units.” *Id.*, p. 3. “Given the slow rate at which the U.S. housing stock grows, it is not likely that we will be able to build ourselves out of the affordability crisis.” *Id.*

“The more fundamental challenge is to retain a housing stock that is affordable to many more lower and middle income American households.” *Id.*

“[Many] . . . NOAH units are vulnerable to loss through redevelopment. Over the past decades, individuals and custom homebuilders have often purchased older single-family homes simply for the value of their lots and their desirable locations. The NOAH structure is then demolished and replaced with a much larger and more expensive home that is not affordable to existing residents of the neighborhood. In addition to individual home replacements, some larger housing builders have acquired multiple adjacent NOAH properties, demolished those homes, merged the lots, and constructed a larger number of attached townhomes, apartments, or condominiums on the combined properties.” *Id.*, pp. 3–4.

“Since building new houses requires the purchase of new construction

² Available at https://planning-org-uploaded-media.s3.amazonaws.com/publication/download_pdf/Zoning-Practice-2023-12.pdf.

materials and the hiring of labor and equipment that would not be required if the old dwelling units had been preserved in their current state, the sales prices and rental rates of the resulting housing are often much higher than those of the existing NOAH units. This is part of the business model; there is money to be made in replacing older, smaller units with newer, larger units, and even more money to be made if one unit can be replaced with more than one unit on the same property.” *Id.*, p. 4.

Affordable homes simply cannot be created by densifying. Instead, densification in areas like downtown Bozeman will lead to higher land prices, pricing out the prospective buyers (and renters) the legislation purports to assist.

III. Local infrastructure and environmental concerns must be addressed locally before densification.

Local governments in cities like Bozeman must be allowed to deal with how much development to permit, when, and where. While other examples exist, likely the most pressing issue that requires local control and oversight is water scarcity. In Bozeman, located in a headwaters watershed, water quantity is limited.

<https://www.bozeman.net/departments/utilities/water-conservation>.

“Bozeman relies on snowpack for its water supply, with 80% coming from snowmelt in the Gallatin Range, which feeds Bozeman Creek and Hyalite Creek. The other 20% comes from a developed spring at the headwater of Lyman Creek in

the Bridger Range.” *Id.* “With shifting climate patterns, our water supplies are likely to become less reliable. . . . Plus, Bozeman is [already] booming, growing at a rate far above the national average. More people will need more water, and eventually, these supplies won’t be enough. . . . Without more water conservation, Bozeman could be facing a water shortage within the next 10 years.” *Id.*

“When new development occurs, the City [of Bozeman] requires that new development to provide either water rights to the City or to pay an equal amount of money so the City can acquire water rights adequate to serve the new development. **Existing water users are not required to pay for water rights for new development.**” Bozeman MT 2020 Community Plan, *supra*, pp. 14–15 (emphasis added).

Requiring Bozeman and other cities to comply with the legislation at issue immediately has the potential to exacerbate already tenuous carrying-capacity issues like water scarcity, without allowing those cities and their citizens to engage in thoughtful planning. New development on existing lots—existing water users—are not required to pay to acquire new water rights, even if more water could be found. *See id.*

The legislation at issue violates BBC’s members’ inalienable right to a “clean and healthful environment.” The statutes at issue are unconstitutional

because they take away any “ability to determine in advance whether a given activity will cause environmental harm and thereby take actions to ‘prevent unreasonable depletion and degradation of natural resources’ as required by Article IX, Section 1(3), of the Montana Constitution.” *See Park Cty. Env'tl. Council v. Mont. Dep't of Env'tl. Quality*, 2020 MT 303, ¶ 88, 402 Mont. 168, 204, 477 P.3d 288, 310.


Montanans’ right to a clean and healthful environment is complemented by an affirmative duty upon their government to take active steps to realize this right. Article IX, Section 1, Subsections 1 and 2, of the Montana Constitution command that the Legislature “shall provide for the administration and enforcement” of measures to meet the State’s obligation to “maintain and improve” the environment. Critically, Subsection 3 explicitly directs the Legislature to “provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.” Mont. Const. art. IX, § 1(3).

Id., ¶ 63.

CONCLUSION

The legislation at issue unlawfully curtails the constitutional rights of Montana’s citizens. The Court should affirm the district court’s preliminary injunction order.

DATED 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 (2,743).



Brian F. Close

APPENDIX

<u>App. Number</u>	<u>App. Title</u>
A	Proposed Bozeman UDC Draft: Sec. 37-350-080 (Subdivision notice draft)

Sec. 38.750.080. - **Subdivision notice and public comment.**

A. Notice of subdivision is provided as required in **38.730**.

1. Public comment. 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, or any amendments to those documents. All written public comment received during a noticed public comment period must be incorporated into the written record of the review. Minutes or a recording must be taken of verbal comment received during any public meeting. All public comments must be provided to the review authority prior to a decision on a preliminary plat.
2. If an applicant proposes a phased subdivision per [Section 31(7) Montana Land Use Planning Act] additional public notice and review consistent with statute must be conducted.

Sec. 38.750.090. - **Review and decision.**

A. **Criteria for city decision.**

The basis for the review authority's decision to approve, conditionally approve or deny the subdivision is whether the subdivision application, advisory boards and agencies advice and recommendation, public comment, and additional information demonstrates that development of the subdivision complies with this chapter, the city's land use plan, the Montana Land Use Planning Act and other adopted state and local ordinances, including, but not limited to, applicable zoning requirements. When deciding to approve, conditionally approve or deny a subdivision application, the review authority must:

1. Review the preliminary plat, together with required supplementary information, to determine if it meets the requirements of this chapter, the development standards and policies of the city, the city's land use plan, the Montana Land Use Planning Act, and other adopted state laws and local ordinances, including but not limited to applicable zoning requirements.
2. Determine whether 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 including issue plans, zoning regulations, subdivision regulations, or any amendment thereto.
3. Consider written comments from appropriate public agencies, utilities or other members of the public.
4. Consider the following:
 - a. Standards for grading and erosion control;
 - b. Standards for the design and arrangement of lots, streets, and roads;
 - c. Standards for the location and installation of public utilities, including water supply and sewage and solid waste disposal;
 - d. For the provision of other public improvements; and
 - e. Legal and physical access to all lots.
5. If the review authority finds that the proposed subdivision is in substantial compliance with the zoning and subdivision regulations and all impacts resulting from the development were



CERTIFICATE OF SERVICE

I, Brian F Close, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 04-01-2024:

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