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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* CITIZENS FOR A BETTER FLATHEAD

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Amicus Curiae, Citizens for a Better Flathead ("Citizens") submits this brief in support of Montanan's Against Irresponsible Densification, LLC ("MAID"), and in support of the district court's preliminary injunction order.

INTEREST OF THE AMICUS CURIAE

Citizens is a Montana 501c3 non-profit incorporated in 1992. The mission of Citizens is to foster citizen participation and champion sustainable solutions needed to keep the Flathead ecologically and economically healthy. Since 1992, Citizens has been a leader at the forefront of addressing the challenges that rapid growth is bringing to the Flathead region. Citizens works to protect the valley's clean water, natural beauty, and friendly communities through community-based planning and policy solutions. Citizens works to foster informed and active citizen participation in the decisions shaping the Flathead's future and to champion the democratic principles, sustainable solutions, and shared vision necessary to keep the Flathead special forever. Since 1992, Citizens has been working to secure policies that will keep the Flathead the place we love as it changes and grows.

Citizens achieves its mission by keeping the public aware of the many opportunities to participate in a broad array of decisions shaping how the Flathead will grow. *See* https://www.flatheadcitizens.org/recent-alters/. Citizens believes that local input and knowledge are fundamental to sound decision-making. Citizens

advocates for informed and robust public participation in the updating and adoption of local government policies—zoning, subdivision, growth policies, neighborhood plans, corridor plans, transportation plans, waste reduction strategies, and the preservation of water quality and other natural resources. Citizens provides in-depth research, analysis, and resources to support meaningful public engagement in the decisions that define the character and quality of the communities that comprise Flathead Valley. Citizens advocates for decisions and policies that serve to enhance the well-being of the community, the environment, and future generations.

STATEMENT OF THE CASE

This case comes to the Montana Supreme Court on the State of Montana's appeal of the district court's order preliminarily enjoining SB 528 and SB 323. SB 528 requires the allowance of "accessory dwelling units" on every lot in cities now zoned for single-family residences. SB 323 requires the allowance of duplexes on every lot in cities now zoned for single-family residences in cities with populations greater than 5,000. While not enjoined by the district court, SB 382 was also included in the suite of bills purportedly aimed at affordable housing in Montana—the specific legislation at issue on appeal need not be viewed in a vacuum. Under SB 382, Citizens and select Montanans will lose the ability to attend public hearings

on proposed land development and to share any concerns they may have about the development. There is not even a requirement for the local government to issue a public notice that a development proposal has been received or that it is under review. That review will be conducted by a "planning administrator" and not the planning board or city council in an open public session.

SB 382, like SB 528 and SB 323, does nothing to address affordable housing; the prices and rents for dwellings built under SB 382 will be determined by the market. Proponents may dispute this, arguing housing will be affordable based on the micro-economics of supply and demand. But in Whitefish, for example, it has already been borne out that additional housing left to the market is not affordable housing. What is undisputed is that the legislation at issue deprives Citizens and other select Montanans of the right to participate in local zoning decisions while allowing others that very same right in their own communities—a right that up until now was equal for all Montanans.

Because the legislation is arbitrary and not reasonably tailored to affordable housing, the deprivation of the right to participate is unlawful.

STANDARD OF REVIEW

This Court "review[s] the grant or denial of injunctive relief for a manifest abuse of discretion by the district court." *Est. of Mandich v. French*, 2022

MT 88, ¶ 16, 408 Mont. 296, 509 P.3d 6 (citing *Shammel v. Canyon Res. Corp.*, 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912).

SUMMARY OF THE ARGUMENT

The legislation at issue abolishes public participation in zoning decisions for Citizens and similarly situated Montanans. This ban is unlawful because it is unreasonable and arbitrary when viewed in the context of the legislature's stated rationale for the ban: affordable housing for Montanans. Nothing in the legislation at issue is certain to deliver on the promise of affordable housing. Studies on the effects of densification on housing prices show that affordable housing is an unlikely outcome, and Whitefish—as a real-world Montana case study—proves that increased density does not lead to affordable housing in a Montana city that is affected by the whole suite of bills challenged by MAID.

ARGUMENT

I. The legislation at issue arrogates local control and abolishes constitutionally protected public participation for some Montanans while leaving those same protections in place for others.

Montana's local governments, while subject to state law, have a long tradition of quasi-independence and the State 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.

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." 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.

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, in addition to providing for the continuance of the county, municipal, and town governmental forms already existing, opened to local governmental units new vistas of shared sovereignty with the state through the adoption of self-government charters. Whereas the 1972 Montana Constitution continues to provide that existing local governmental 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).

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.

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 approve subdivisions. *See generally* Title 76, Chapters 1-4, MCA.

The Montana Supreme Court has addressed the authority for zoning by municipalities, noting that such statutory authority was first adopted in 1929, and stating, "[h]istorically, the grant of the zoning authority is broadly stated, as characterized in § 76-2-301, MCA . . . :"

> [Municipal Zoning Authorized.] 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, residence, or other purposes.

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

Montana's constitution guarantees rights that are not provided for in the federal constitution. Article II, Section 8, of the Montana Constitution, for example, 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 decisions as may be provided by law." The essential elements of public participation as required by this section are notice and an opportunity to be heard. *Citizens for a Better Flathead v. Bd. of County Comm'rs*,

2016 MT 256, ¶ 39, 385 Mont. 156, 381 P.3d 555. In executing this constitutional mandate, agencies are obligated to "develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public." Section 2-3-103, MCA.

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." Section 2-3-102, MCA, defines "agency" as "any board, bureau, commission, department, authority, or officer of the state, or local government . . . ."

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.

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 challenged measures are all measures that undercut the authority of local governments to regulate local affairs. For example, SB 323 requires municipalities

with populations of over 5,000 to allow duplexes in areas now zoned for single-family residences and SB 528 requires all cities to allow accessory dwelling units on lots located in areas zoned for single-family residences. These "top-down" directives fail to account for differences in cities and towns.

In taking away local control, the challenged measures take away from certain segments of the population, depending on where they live, the right to participate in zoning decisions. Other segments are still afforded the opportunity to participate. In this case, the challenged measures violate due process and equal protection because densification does not create affordable housing and the classifications are completely arbitrary.

Local governments 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:

> 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.

Evers v. County of Custer, 745 F.2d 1196, 1203 (9th Cir. 1984).

The challenged measures, particularly SB 382, are affirmative directives to

local governments, commandeering local officials and resources to adopt the Legislature's chosen "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."

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. **States 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.

Principles of Home Rule for the 21st Century, NATIONAL LEAGUE OF CITIES (2020), HTTPS://WWW.NLC.ORG/WP-CONTENT/UPLOADS/2020/02/HOME-RULE-PRINCIPLES-REPORTWEB-2-1.PDF.

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.

II. The legislation at issue violates due process because densification does not lead to affordability.

"A statute that is unreasonable, arbitrary, or capricious and bears no reasonable relationship to a permissible government interest offends due process. . . . In contrast, a statute that is neither unreasonable nor arbitrary 'when balanced against the purpose of the legislature in enacting the statute' does not offend due process." *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 30, 382 Mont. 256, 270, 368 P.3d 1131, 1143 (citations omitted).

The legislation at issue seeks to arrogate traditional local control over—and, perhaps most importantly, local participation in—local zoning matters under the guise of enhanced affordable housing opportunities. The rectitude of the legislature's purported "purpose" it chooses to hide behind is belied by the fact that the Montana legislature, in 2021, took away from local governments the most direct and effective avenues to address the affordable housing problem.

Inclusionary zoning is a practice that requires developers to devote some units to low- and middle-income families or else pay a fee.[1] The 2021 legislature

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[1] https://localhousingsolutions.org/housing-policy-library/inclusionary-zoning/.

amended Montana's zoning laws by adding § 76-2-302(6)–(7) to prohibit municipal zoning regulations that created affordable housing through inclusionary zoning. The law "was backed by powerful building and real estate industry groups who say inclusionary zoning doesn't work and unfairly shifts the financial burden of providing affordable housing onto developers. It was sponsored by Rep. Sue Vinton, R-Billings, who owns a construction company with her husband and claimed inclusionary zoning 'has failed time and again across the country.'" Chad Sokol, *Gianforte signs bill stripping Whitefish affordable-housing program*, DAILY INTER LAKE (April 22, 2021), https://dailyinterlake.com/news/2021/apr/22/gianforte-signs-bill-affordable-housing/.

The law had an immediate effect on Whitefish, which had implemented inclusionary zoning programs. *Id.* (Bozeman had also implemented inclusionary zoning.) "The Whitefish City launched the Legacy Homes Program nearly two years [before]. It work[ed] by using deed restrictions to link home prices to the county's median income, and requiring developers to pitch in when they build certain multifamily projects with discretionary permits, such as conditional-use permits." *Id.* The new law upended the Legacy Homes Program. *Id.*

The 2023 legislature followed suit, voting down several affordable housing

proposals, including a housing tax credit that would have incentivized affordable rental development (HB 829[2]) and a housing trust fund that would have subsidized the construction of roughly 500 additional low-income apartments every year (HB 574[3]).

Instead, the 2023 legislature decided how Montana's municipalities—with their hands tied—must grow. This "top-down" approach drastically departs from Montana's long tradition of local governmental control over local matters.

A. A recent study shows that densification/upzoning does not lead to affordable housing.

The Legislation at issue is supposedly aimed at creating affordable housing in Montana for Montanans. In a recent study called "Land-Use Reforms and Housing Costs: Does Allowing for Increased Density Lead to Greater Affordability?", the authors found "no statistically significant evidence that additional lower-cost units became available or moderated in cost in years following [upzoning] reforms."

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[2]https://www.mthousingcoalition.org/wp-content/uploads/2023/03/MHC-HB-829-Tax-Credit-One-Pager-March-2023.pdf;
https://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20231&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=829&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=.

[3] https://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20231&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=574&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=.

Christina Stacy et al., *Land-Use Reforms and Housing Costs: Does Allowing for Increased Density Lead to Greater Affordability?*, URBAN STUDIES, March 21, 2023, p. 1.[4] The study focused on housing that is affordable, which the authors defined as "units that cost no more than 30% of income for low- and moderate-income families, both in subsidized and non-subsidized projects[.]" *Id.*, p. 3.

The study found that "cities that passed reforms loosening land-use regulations (increasing allowed housing density, or 'upzoning') saw a statistically significant increase in their housing supply compared to cities without reforms" but that the increase "occurred predominantly for rental units affordable to households with higher-than-middle incomes over the short- and medium-term following reform passage[.]" *Id.*, pp. 3–4.

Commenting on previous studies, the authors state, "[w]e may thus expect reforms reducing restrictiveness to decrease affordable housing supply." *Id.*, p. 7.

The study found that "land-use reforms that reduce restrictions to increase allowed density lead to a 0.8% increase in housing supply, on average, in the cities we study. However, we find no statistically significant evidence that these reforms lead to an increase in affordable rental units within 3 to 9 years of reform passage."

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[4] The pre-print version is available at https://www.urban.org/research/publication/land-use-reforms-and-housing-costs.

Id., p. 28.

The legislation at issue may cause density, for density's sake; lining the pockets of developers while failing to put a dent in Montana's affordable housing crisis. While the Montana legislature banned reforms that are obviously related to providing (and would provide) more affordable housing, the legislation at issue cannot be said to be even rationally related to those same ends.

B. Such an approach did not work in Whitefish.

Whitefish is a perfect example. Unlike the Montana legislature, prior to the legislation at issue, Whitefish locals were asking hard questions at public hearings about the non-affordability of proposed new developments, which did not meet the workforce-priced housing the Flathead needed to fill the demand for local jobs. Simply adding more housing has done little to nothing to reduce the cost of housing in the Flathead. To start with, studies show that housing is less affordable in high tourist, recreation-dependent, counties, where folks are moving to as fast as they can to take advantage of the existing recreational and small-town qualities, and pricing locals out of housing options. *See* Megan Lawson, Ph.D., *Housing in recreation-dependent counties is less affordable*, HEADWATERS ECONOMICS (May 18, 2020), https://headwaterseconomics.org/equity/housing-affordability-recreation-counties/. "But simply adding new units is not enough: new housing units

affordably priced for lower-income households are needed to serve those most burdened and avoid exacerbating housing inequality." *Id.*

For example, in 2016, a housing needs assessment conducted by the City of Whitefish found the town needed 980 new housing units over the next four years, with 605 of those priced below market rate to ensure that people who work in the community are able to live there. By 2021, the City had added 1,069 new housing units, but only 7% of those units were priced below the market rate. (This was likely due in part to the 2021 legislature denying Whitefish and other communities across the state the ability to require a percentage of housing built to be affordable.)

The 2022 Whitefish Housing Needs Assessment also showed that 40% of Whitefish residences are owned by out-of-area homeowners and investors and 30% of homes are used as second homes and vacation homes. There has been a 160% increase in short-term rentals since 2016. The legislature is stripping local governments of the power to prioritize the housing needs of local workforces and, instead, is forcing Whitefish to continue on this runaway train path.

The legislation violates due process because it is unreasonable, arbitrary, or capricious and bears no reasonable relationship to a permissible government interest.

III. The legislation at issue violates equal protection because similarly situated people are treated differently.

"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. Arbitrary selection cannot be justified by calling it classification." *Mont. Land Title Ass'n v. First Am. Title*, 167 Mont. 471, 475-76, 539 P.2d 711, 713 (1975) (collecting cases).

The challenged measures are all measures that undercut the authority of **some** local governments to regulate local affairs but not others. These "top-down" directives fail 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. Instead, the directives arbitrarily dictate who can participate in local zoning decisions based on population size alone.

The challenged measures thus take away from certain segments of the population, depending on where they live, the fundamental constitutional rights to participate and know. Other segments are still afforded those same rights. Such a

distinction, in this case, violates equal protection because it is patently arbitrary and bears no rational relationship to a legitimate government interest.

CONCLUSION

Based on the foregoing, the district court did not abuse its discretion. The preliminary injunction should be affirmed.

DATED this 29th day of March, 2024.

/s/ Peter Michael Meloy
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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 (3,609).

/s/ Peter Michael Meloy
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