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

APPELLEE'S ANSWER BRIEF

[Appearances on next page.]

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STATEMENT OF CASE

Plaintiff, MAID, LLC ("MAID"), filed its Complaint mid-December, 2023. MAID challenges four land use measures passed by the 2023 Montana Legislature. MAID moved for preliminary injunction on two of the measures scheduled to take effect January 1, 2024. They are SB 323 and SB 528.

After notice and hearing, the District Court (Salvagni) entered a preliminary injunction on December 29, 2023, enjoining them.

MAID then moved for partial summary judgment on Count I of its Complaint, in the District Court, arguing that the challenged zoning changes cannot preempt private covenants more restrictive than the changed zoning laws.

The State filed its Notice of Appeal mid-January, appealing issuance of the preliminary injunction.

Rather than respond to the partial motion for summary judgment, the State moved in the District Court to stay the District Court action, a motion opposed by MAID. In the alternative, the State moved for additional discovery pursuant to Rule 56(f), M.R.Civ.P. That motion is pending.

STATEMENT OF FACTS

A. MAID's Complaint and the Preliminary Injunction.

Plaintiff, MAID, is an LLC consisting of homeowners living in various

Montana cities, including Whitefish, Bozeman, Billings, Missoula, Great Falls, Columbia Falls, and Kalispell. Most of the Plaintiff's members reside in areas that have long been zoned for single-family residential purposes. Their neighborhoods are characterized by attractive well-maintained yards and tree-lined streets which remain safe, pleasant places, where families continue to live and raise their children and enjoy the pleasures and benefits of beautiful and peaceful neighborhoods. Most members reside in areas not protected by private restrictive covenants. At least two of the members reside in areas protected by private restrictive covenants. Amended Complaint, ¶ 33 (Dkt. 3); Poritz Dcl., ¶ 2 (Dkt. 20).

MAID's Complaint seeks declaratory and injunctive relief regarding four measures passed in the 2023 session of the Montana Legislature. These attempt to impose top-down "densification" onto certain defined cities. They were purportedly enacted to address Montana's affordable housing problem. However, none of the measures explicitly address the issue of "affordability".

SB 323 amended § 76-2-304, MCA, adding subsections (3) and (5), which require that affected municipalities of at least 5,000 in population allow duplexes in areas now zoned for single-family residences. SB 528 (§ 76-2-345, MCA) requires all cities to allow "accessory dwelling units" on lots located in all areas now zoned for single-family residences.

Although these two measures are the ones subject to the preliminary injunction, they should be considered along with a more sweeping revision of Montana's subdivision and zoning laws, SB 382, called "The Montana Land Use Planning Act", Title 76, Ch. 25. That Bill, also passed in 2023, requires certain local governing bodies, over a 3–5 year period, to engage in massive overhauls of their subdivision and zoning regulations.

SB 382 cuts back on public participation opportunities at the project-specific level, requiring such public participation much earlier or not at all.

B. The Governor's Task Force.

In 2022, Governor Gianforte signed Executive Order (EO) No. 5-2022, creating the Governor's Housing Task Force ("Task Force"). The Task Force was charged with providing recommendations to the Governor "to increase the supply of affordable, attainable workforce housing." *See* State of Montana, Executive Order No. 5-2022[1], p. 2.

The Governor's predisposition was apparent from his instructions to the Task Force—he asserted municipal zoning is a "barrier" to new housing. *Recommendations and Strategies to increase the Supply of Affordable, Attainable*

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[1]https://news.mt.gov/Governors-Office/_documents/EO-5-2022-Establishing-Housing-Advisory-Council.pdf

Workforce Housing[2], p. 19. However, not a single "stakeholder" representing quiet, graceful residential neighborhoods was appointed to the Task Force. *Id.* at pp. 52-54.

In October 2022, the Task Force released its report entitled "*Recommendations and Strategies to Increase the Supply of Affordable, Attainable Workforce Housing*", *supra*. 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. The thrust of these recommendations was to degrade the authority of municipalities and replace it with "top-down" mandates from the State. Further, the Task Force advocated abrogation of existing 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.

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[2] https://deq.mt.gov/files/About/Housing/HTF_PhaseI_Final_10142022.pdf

The Task Force's report does not address issues such as the character of city neighborhoods or attitudes of large groups of stakeholders (homeowners). Its "one size fits all" approach ignored the rich history, culture, and character of long-time city neighborhoods. Instead, this one-dimensional report attacked municipal zoning, municipal subdivision review, and what it characterized as the problem of intolerable delays in the permitting process. It embraced the mantra of many Montana developers that city regulations need to be "streamlined". The Task Force did little to inform themselves about what Montana cities are already doing to create affordable housing[3].

Strikingly, the Governor's Task Force failed to address private restrictive covenants, mentioning them only in passing two times. Task Force Report, pp. 49, 51. This despite the fact that such private covenants cover a good portion of the areas of cities in Montana. *See* Stratton Dcl., ¶ 10 (Dkt. 21).

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

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[3] 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 body of the report.

financial viability of their most important investment.

SB 323 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….

(Emphasis added.)

SB 528 requires 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".

SB 382, although not enjoined, should be considered by this Court in conjunction with the two measures that were enjoined. In reviewing the district court's preliminary injunction for a manifest abuse of discretion, this Court should examine the district court's ruling through the prism of the district court's perspective at the time of issuance of the preliminary injunction. At that time, although SB 382 was to be phased in and was therefore not the subject of the motion for preliminary injunction, its interaction with the two enjoined measures cannot be ignored.

In the district court, MAID opposed the State's motion for a stay of proceedings. (Dkt. 46)[4]. MAID's opposition to the stay noted that only SB 528 and SB 323 were at issue in this appeal, however:

> In reality, the central focus of Plaintiff's Complaint is on SB 382, which imposes drastic changes in zoning of certain defined cities (those with at least 5,000 residents in counties of at least 70,000).

Dkt. 46, p. 3. MAID contended that there is no reason that the district court could not continue to address SB 382, particularly in light of the different standards of review, noting that the standard of review in this Court is whether to the district court manifestly abused its discretion in granting the preliminary injunction. (Dkt. 46, pp. 3–6).

ISSUES PRESENTED FOR REVIEW

Whether the District Court manifestly abused its discretion in granting the preliminary injunction.

STANDARD OF REVIEW

The standard of review for this Court's review of a district court's issuance

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[4] The district court retains jurisdiction to proceed on matters not involved in an appeal of preliminary injunction ("if an appeal is taken from a judgment that does not fully determine the entire action, it does not prevent the district court from proceeding with matters not involved in the appeal." *6 Moore's Federal Practice 3 Ed.*, Section 303.32.[2].[b], at pp. 303–83).

of a preliminary injunction is whether the lower court **manifestly** abused its discretion. *Shammel v. Canyon Res. Corp.*, 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912 (resolving previous confusion in Montana cases of whether the standard was merely "abuse of discretion" or "manifest abuse of discretion".) This Court said in *Shammel*: "A 'manifest' abuse of discretion is one that is obvious, evident, or unmistakable. Black's Law Dictionary. 6th Ed." *Id.*

SUMMARY OF ARGUMENT

The limited purpose of a preliminary injunction is to maintain the status quo. This means that the merits should not be resolved by this Court or the District Court at the preliminary injunction stage. The District Court properly abided by that limitation in its Order granting preliminary injunction. That Order carefully skirted any ultimate resolution of the merits.

The well-developed standard for this Court's review of a district court's grant of preliminary injunction is whether it **manifestly** abused its discretion.

The District Court did not manifestly abuse its discretion in determining that MAID would likely prevail on the merits. First, it is crystal clear under the law that zoning does not preempt private restrictive covenants that are more restrictive than zoning strictures.

The District Court was also correct in its preliminary determination that

MAID is likely to succeed on its equal protection and due process claims. The failure of the Legislature to address the pervasive existence of private restrictive covenants results in a class of two otherwise similarly situated groups, one protected by restrictive covenants, the other not. For that reason, the burden of absorbing the efforts of densification in the name of affordable housing falls disproportionately on the older, core, historic neighborhoods of cities, *i.e.*, those which have no restrictive covenant protections. That is a denial of equal protection.

Further, the utter arbitrariness of these Acts, when taken together, constitutes a violation of due process of law. For example, certain cities are subject to the strictures of the efforts to "front-load" public comment and to impose "top-down" zoning, while other similarly sized cities are not. These and other arbitrary features deny members of MAID their rights to due process of law.

Moreover, the attempt by the new laws to "front-load" public involvement and cut off participation at the project-specific stage, is incompatible with Montana's fundamental constitutional provisions guaranteeing the public's right of participation.

The threatened loss of such constitutional rights constitutes irreparable harm *per se*. Moreover, most of MAID's members reside in single-family neighborhoods where their property values and quality of life are seriously

threatened by the challenged top-down zoning measures. Once a duplex or an ADU is established in a neighborhood, that's it. The damage is irreparable.

The District Court was correct in holding that the balance of equities and the public interest favors issuance of the injunction.

Finally, the District Court was correct in rejecting the State's standing arguments because MAID's members stand to suffer serious adverse impacts from the challenged measures.

ARGUMENT

I. The District Court Properly Followed the Statutory Procedures for Issuance of a Preliminary Injunction.

The State argues that it was denied "the opportunity to present its case at a separate evidentiary hearing…", claiming inability to gather its evidence "the week before Christmas…." It argues "there was no hearing on the preliminary injunction." State Br., p. 37.

Yes, there **were** time pressures because the two enjoined measures were scheduled to take effect on January 1, 2024. That pressure was not only on the State, but also on MAID and on the Court. Judge John Brown was initially assigned the case and he set the preliminary injunction hearing for December 28, 2023. (Dkt. 7). The State substituted Judge Brown. Judge Salvagni was only called into the case on December 27, 2023, one day before the scheduled hearing. (Dkt. 9).

That time pressure could easily have been avoided. MAID's Counsel sent a "meet and confer" letter on December 18, 2023, to Attorney General Knudsen, noting MAID's intent to file a preliminary injunction motion. MAID suggested a stipulation to avoid the time pressure:

> Also, I am concerned about the imminency of the Christmas/New Years holiday. We may have a problem locating a judge and your office may be short-staffed, as many are, during the holidays. For that reason, rather than reciting that you oppose a preliminary injunction, **I suggest that we reach a temporary stipulation** to give all parties and the Court breathing room over the holidays. Thus, perhaps we could stipulate that a TRO could be entered temporarily restraining implementation of the two measures, SB 323 and SB 528, for a short period after January 1, 2024—perhaps two weeks or even less till the Court has a place in its calendar to hear our motion.

See Dkt. 4 (emphasis added) (letter attached to MAID's Motion for Temporary Restraining Order/Preliminary Injunction, December 19, 2023). The State didn't even bother to respond to MAID's letter. On December 27, 2023, the day before the scheduled hearing, the State filed its opposition brief. Order, Dkt. 17, p. 1.

Counsel for the State appeared at the December 28 hearing. The Court asked both sides whether they were going to present testimony. Attorney Lansing said, "no testimony, just argument for the State". Transcript, p. 7.

So, contrary to the State's brief, the State **was** afforded a preliminary injunction hearing. There was eight days' notice of the hearing. Dkt. 7. The State

had a full opportunity to make its argument and produce testimony.

The preliminary injunction order notes §§ 27-19-201, 316, 317, 318, MCA, which all support procedural propriety on the Court's approach.

Finally, the preliminary injunction order itself notes:

> Here, notice of the application for preliminary injunction was served upon the State nearly ten days before the hearing…and the State fully participated in the hearing. The application was made, no temporary restraining [order] was issued, a show cause Order was issued, hearing was held, and the State appeared and defended.
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> ****
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> Having appeared and defended, the State's remedy with respect to a preliminary injunction issued by the Court is § 27-19-401, MCA ("application to dissolve or modify injunction").

Dkt. 17, p. 3. The State made no application to modify the preliminary injunction.

In short, the preliminary injunction order was issued after full compliance with Montana's statutes regarding preliminary injunctions.

II. The Scope of This Appeal Is Extremely Limited. The Function of a Preliminary Injunction is Merely to Maintain the Status Quo Ante.

A. The limited purpose of a preliminary injunction is to maintain the status quo.

The purpose of preliminary injunctive relief is to "preserve the status quo and minimize the harm to all parties pending final resolution on the merits". *Davis v. Westphal*, 2017 MT 276, ¶ 24, 389 Mont. 251, 405 P.3d 73; *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 18, 395 Mont. 160, 37 P.3d 142; *see also Porter v. K&S*

Partnership, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981). The "status quo" is generally "the last actual, peaceable, noncontested condition" preceding the controversy at issue. *Porter*, 192 Mont. at 181, 627 P.2d at 839.

B. Substantive issues of law should not be resolved at the preliminary injunction stage.

This Court said in *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 13, 410 Mont. 114, 518 P.3d 58, that its analysis "…does not express any opinion about the ultimate merits of the individual issues or of the case." Succinctly stated:

> Our task is not to resolve the substantive matters of law…it is to inquire whether the [d]istrict [c]ourt manifestly abused its discretion.

(citations omitted.) *See also Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 19, 334 Mont. 86, 146 P.3d 714 ("[O]ur task is not to resolve the substantive matters of law…; it is to inquire whether the District Court manifestly abused its discretion by denying Benefis' motion for preliminary injunction"); *Sweetgrass Farms Ltd. v. Board of County Comm'rs.*, 2000 MT 147, ¶ 38, 300 Mont. 66, 2 P.3d 825 ("[i]n determining the merits of a preliminary injunction 'it is not the province of either the District Court or the Supreme Court on appeal to determine finally

matters that may arise upon a trial on the merits'." [citations omitted])[5].

III. The State Has Failed to Show a Manifest Abuse of Discretion Regarding the Four-Factor Test for Issuance of a Preliminary Injunction.

A. Zoning reform, as a solution to housing affordability, is a chimera.

There are many ways to address housing affordability. For example, a city can assess a fee from developers earmarked for affordable housing or it can require a portion of all planned and new developments to be set aside for affordable housing—or it can construct affordable housing itself. There are many other possible approaches. Of these available tools, zoning reform is one with little promise.

The challenged measures, purportedly enacted to alleviate the affordable housing problem, come on the heels of various legislative measures which have done just the opposite. In 2021, the Montana Legislature, largely at the behest of

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[5] The State argues the District Court did not exercise independent judgment because it incorporated a substantial part of MAID's proposed order into its preliminary injunction order. Although verbatim adoption of proposed filings from one party is not optimal, such verbatim adoption "…is not in itself an automatic basis for vacating a judgment." *First Nat'l. Mont. Bank v. McGuiness*, 217 Mont. 409, 418, 705 P.2d 579, 584 (1985). If the findings are sufficiently comprehensive and detailed to justify the decision of the district court, they will be affirmed. *Id.* Here, Judge Salvagni was called into the case only one day before the hearing. The complaint and the briefing were complicated, and the hearing, on December 28, was on a Thursday afternoon, with the January 1, 2024, looming deadline occurring on a Monday (New Years Day). Thus, the Court had fewer than 24 hours (i.e., till late Friday afternoon, December 29), to decide on the preliminary injunction. Further, the transcript shows both that Judge Salvagni had read the briefs, was prepared, and was actively engaged, asking a number of pointed and intelligent questions. *See* Tr. pp. 4–6, 10–11, 29–32, 38–43.

developers and building contractors, took away certain tools which, unlike zoning reforms, had **direct** effects on affordable housing.

Among these constrictive measures was the addition of § 76-2-302(6)(7), MCA, prohibiting assessing a developer for a fee or a dedication of real property for affordable housing. In other words, the Legislature, in 2021, took away from local governments the most direct and effective avenues to address the affordable housing problem.

In short, the affordable housing "solution" is, according to the Legislature, not to make developers and new residents pay their own way. Instead, with the zoning "reforms" the burden will be on the backs of existing residents/taxpayers. MAID's concern is that the new measures will amount to a windfall to developers who will engage in random teardowns in historic neighborhoods.

Having taken the most direct and logical tools off the table, the 2023 Legislature turned to zoning laws as the solution. There is nothing, however, in any of the challenged measures that directly addresses Montana's affordable housing problem. Nor is there any likelihood that any new housing, if any, will be "affordable". Instead, the attitude of the 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. *Recommendations and Strategies to Increase the*

Supply of Affordable, Attainable Workforce Housing[6], October 2022, p. 17. Because none of these "strategies" in SB 382 involve controlling the initial housing price or rent, the price of any units produced will be determined by the local market.

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?*" (Christina Stacy, et al. (2023)). The conclusion of that extensive study was that zoning reforms 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**. *Id.* at p. 28.

B. The District Court did not manifestly abuse its discretion in its determination that MAID is likely to prevail on the merits.

The State emphasizes that duly enacted legislation has a presumption of constitutionality. State Br., p. 5. However, as noted in *Driscoll v. Stapleton*, 2020 MT 247, ¶ 16, 401 Mont. 405, 473 P.3d 386:

> Because a preliminary injunction does not decide the ultimate merits of a case, a party need establish only prima facia violation of its rights to be entitled to a preliminary injunction—even if such evidence ultimately may not be sufficient to prevail at trial (cases omitted). *See also* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure, § 2948.3, 201 (3d. ed.),* 2013. ("All courts agree that a plaintiff must present a prima

[6] https://deq.mt.gov/files/About/Housing/HTF_PhaseI_Final_10142022.pdf

facia case but need not show a certainty of winning".)…

1. The District Court is correct that a zoning change does not supersede private covenants that are more restrictive.

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 (HOAs). Most HOAs maintain restrictive covenants, *i.e.*, contracts. Pertinent here is that most sets of restrictive covenants have single-family designations. In 2018, the Community Association Institute said 61% of new dwelling produced in the United State were covered with private covenants. "Community Association Facebook" (2018). *See also* Stratton Dcl., Dkt. 21, ¶¶ 10.

While fringe areas of cities, as they evolved over the years, came to be protected with private restrictive covenants, the core, historic areas generally are not. The net result of the challenged measures is that the burden of addressing densification will fall on the core, historic areas of Montana's cities.

Restrictive covenants are independent of and separate from zoning and stand regardless of zoning changes. Most single-family restrictive covenants in Montana cities call for single-family use—a use more restrictive than the new presently-challenged measures that came out of the 2023 Montana Legislature. Stratton Dcl.,

Dkt. 21, ¶ 12.

The District Court did not manifestly abuse its discretion in finding these new zoning changes likely do not preempt more restrictive private covenants. As stated in *Rathkopf's*, *The Law of Zoning & Planning*:

> An important implication of the "independent operation rule" is the uniformly held view of state courts that a zoning ordinance does not terminate, supersede, or in any way affect a valid private restriction on the use of real property.

Bronin & Merriam, *5 Rathkopf's The Law of Zoning and Planning, § 82:2 at 82–6 (4/2016 ed). Rathkopf's* further states: "[a] municipality has no authority through zoning to abrogate or affect private covenants." *Id.*, 82:3 at 82–12 (citations omitted).

This Court recognizes this principle stating:

> We recognize that there is authority for the statement that zoning ordinances cannot destroy, impair, abrogate or enlarge the force and effect of an existing restrictive covenant. *82 Am. Jur. 2d. Zoning & Planning, § 4 (1976).*

State ex. Rel. Region II Child & Family Servs. v. District Court, 187 Mont. 126, 130, 609 P.2d 245, 247 (1980).

In *Western Land Co. v. Truskolaski*, 495 P.2d 624 (Nv. 1972) the Court stated:

> A zoning ordinance cannot override privately-placed restrictions, and a trial court cannot be compelled to

> invalidate restrictive covenants merely because of a zoning change.

Id. at 627. In *Seaton v. Clifford*, 24 Cal. App. 3d. 46 (1972), the Court said:

> In an unbroken line of cases, California courts have held that a change in the zoning restrictions in an area does not impair the enforceability of existing deed restrictions.

Id. at 52 (citations omitted). *See also Rice v. Heggy*, 322 P.2d 53, 54 (Cal. App. 1958); *Kalenka v. Taylor*, 896 P.2d 222, 227 (Alaska 1995), citing *Singleterry v. City of Albuquerque*, 632 P.2d 3345, 347 (N.M. 1981) ("zoning ordinances cannot relieve private property from valid restrictive covenants even though the ordinances are less stringent"); *McDonald v. Emporia-Lyon County Joint Bd. of Zoning Appeals*, 697 P.2d 69, 71 (Kan. App. 1985) (same); *Ridge Park Homeowners v. Pena*, 544 P.2d 278, 279 (N.M. 1975) (same, citing *Kosel v. Stone*, 146 Mont. 218, 404 P.3d 894 (1965)); *Murphey v. Gray*, 327 P.2d 751, 754 (Az. 1958) ("…it has repeatedly been held that zoning cannot constitutionally relieve land of restrictive covenants affecting its use [citations omitted]"); *Haskell v. Gunson*, 137 A.2d 223, 225 (Pa. 1958) ("[z]oning regulations and private restrictions do not affect each other…").

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

"impairing the obligation of contracts". *See also Seaton*, 24 Cal. App. 3d at 52 ("such an artificial and arbitrary attempt by the State [to propose zoning changes] cannot impair private, contractual and property rights (US Const. art. I, section 10, Cal Const. art. 1, section 16)").

The result is that there are two classes of similarly situated, single-family homeowners, one of which will be impacted by the new legislation, the other, not[7].

Amicus argues that MAID lacks standing to "enforce such covenants". First, MAID is not trying to "enforce" any covenant. Second, the assumption is incorrect. MAID member Noah Poritz has lived in properties in the Bozeman New Hyalite View Subdivision since 1985. New Hyalite View is covered by protective covenants which limit the area to single-family dwellings. Poritz's HOA continues to be active, meeting at least once a year. Poritz Dcl., Dkt. 20, ¶¶ 2–3. He also attests to the adverse effects that he stands to suffer if the contested zone changes are not enjoined. *Id.* at ¶¶ 5–8.

This is adequate to establish standing on Count I. *See Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 43, 360 Mont. 207, 255 P.3d 80 ("It is well established

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[7] The State argues that newly enacted § 70-17-210, MCA, which addresses private covenants, precludes MAID's claim. This law has nothing to do with MAID's claim. MAID simply asked for declaratory judgment that zoning changes do not displace private restrictive covenants.

that an association has standing to bring suit on behalf of its members, even without a showing of injury to the association itself, when (a) at least one of its members would have standing to sue in his or her own right…"); *see also Montana Immigrant Justice Alliance v. Bullock*, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430 (citing *Heffernan*, ¶ 43) ("[a]n association has standing to bring suit…when at least one of the members would have standing to sue in his or her own right, etc.").

2. The District Court did not manifestly abuse its discretion in finding a likelihood of success regarding a violation of equal protection.

This Court in *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, 104 P.3d 445, stated:

> When analyzing an equal protection challenge, we "must first identify the classes involved and determine whether they are similarly situated."

The result of the challenged measures is the creation of two classes of municipal residents who, although otherwise are absolutely similarly situated, face markedly different consequences. Those who are fortunate enough to live in areas protected by restrictive covenants are insulated from these. Others 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.

The State argues "by definition" those who live in neighborhoods with restrictive covenants and those without such covenants "are not similarly situated". State Br., p. 8. This is an *ipse dixit*. One could equally argue that an ordinance restricting public swimming pools to Caucasians is not subject to equal protection because "by definition" Caucasians are different from non-Caucasians[8].

In *Snetsinger*, *supra*, this Court held,

> [T]he University Systems' policy of denying health benefits to unmarried same-sex couples while granting the benefits to unmarried opposite-sex couples results in a denial of equal protection.

Id. at ¶ 27. The Court added,

> These two groups, although similarly situated in all respects other than sexual orientation, are not treated equally and fairly. The principal purpose of the Equal Protection Clause, article II, Section 4 of the Montana Constitution, is to ensure citizens are not subject to arbitrary and discriminatory state action. Therefore, we conclude there is no justification for treating the two groups differently, **nor is the University System's policy rationally related to a legitimate governmental interest**.

Id. (emphasis added).

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[8] The State cites two cases, *Vision Net, Inc. v. State*, 2019 MT 205, 397 Mont. 118, 447 P.3d 1034, and *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, 392 Mont. 1, 20 P.3d 528. In arguing that MAID failed to establish two separate groups "similarly situated", both are distinguishable because the asserted classifications are in fact dissimilar in many respects.

The *Treatise on Constitutional Law* by Rotunda, Nowak, and Young, sets forth a helpful example:

> For example, it is undeniably true that men and women are biologically different. However, that difference does not mean that gender-based classifications will be generally upheld, for most often there is no difference between men and women when it comes to the promotion of a legitimate governmental end. Thus, sex cannot be the basis for determining whether an individual is able to be executor of an estate or mature enough to drink alcoholic beverages.

Id. at Section 18.2. (citations omitted).

Thus, the classification must be assessed in relation to a legitimate governmental purpose. As the *Treatise* states:

> Usually one must look to the end or purpose of the legislation in order to determine whether persons are similarly situated in terms of that governmental system. The judiciary…must decide what is the end of the legislation to be tested. Once a court has found an end of government which does not in itself violate the Constitution, it can analyze the way in which the government has classified purposes in terms of that end.

Id.

In the present case, the governmental end is addressing affordability of housing. Whether a person resides in a home protected by restrictive covenants, or not, is wholly unrelated to that governmental end.

Strict scrutiny is required because fundamental rights, including the rights of

public participation and the rights to own and protect property are fundamental[9]. *See Montana Envt'l. Info. Ctr. v. Department of Envt'l. Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236 (noting the claim at issue "is a fundamental right because it is guaranteed by the Declaration of Rights...").

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." Task Force Report, p. 1.

For purposes of the present preliminary injunction issue, however, the appropriate level of judicial scrutiny need not be resolved. This Court said in *Driscoll v. Stapleton*:

> At this stage of the proceedings, we find it unnecessary to set forth a new level of scrutiny. The case is not before us on a full evidentiary record for evaluation of the ultimate merits. We conclude that, for purposes of resolving the instant preliminary injunction dispute, the level of scrutiny is not dispositive of the issues presented on appeal.

Driscoll, 2020 MT 247, ¶ 20; *see also Mont. Democratic Party v. Jacobsen,* 2022 MT 184, ¶ 21, 410 Mont. 114, 518 P.3d 58.

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[9] Montana's Constitution in Article II, Section 3, under the category of "inalienable rights" provides that all persons have the rights "to a **clean and healthful environment" and of acquiring, possessing and protecting property**, and seeking their **safety, health and happiness**.... (emphasis added).

The challenged measures do not pass constitutional muster even under 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.

Montana's equal protection laws were long ago summarized in "*Interpretations of the Montana Constitution; Sometimes Socratic, Sometimes Erratic*" by James H. Goetz, Montana Law Review, Volume 51, No. 2, p. 289, Summer 1990. There, it is pointed out that, while this Court generally followed the Federal two-tier model when analyzing equal protection claims under the Montana Constitution, "the court applied a rational basis test more stringent than that applied by the US Supreme Court," citing *Oberg v. City of Billings*, 207 Mont. 277, 674 P.2d 494 (1983)[10]. The *Oberg* Court said, regarding the failure of the Legislature to articulate the express purpose of the challenged classification:

> This Court cannot determine whether this classification bears a rational relationship **to a legitimate governmental purpose** because there is no expressed purpose for the classification on the face of the statute or in the statute's legislative history. For that reason, the challenged part of the statute is overbroad and vague on its face, and an

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[10] The State criticizes MAID's citation of a thirty-three-year-old article authored by the undersigned, implying that it is out of date. State Br., p. 19. In fact, that analysis was prescient because the cases, starting with *Oberg,* reinforce the same point: Montana's "rational relationship test" is not toothless.

> unconstitutional violation of the plaintiff's right to equal protection of the law.

207 Mont. at 281, 674 P.2d at 496 (emphasis added).

Importantly, this Court has used the "rational relationship test" numerous times in invalidating arbitrary legislation. In each case, this Court has found that legislation must be tested in connection with any assertion of a "legitimate governmental interest". *See Butte Community Union v. Lewis 1*, 219 Mont. 426, 428, 712 P.2d 1309, 1310 (1986); *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 42, 744 P.2d 895, 897 (1987) (Montana's Constitution "…provides for even more individual protection than the comparable Fourteenth Amendment['s] [Equal Protection Clause]…A classification that is patently arbitrary and bears no rational relationship to a legitimate governmental interest offends equal protection of the laws" (citing in relevant part *Godfrey v. Mont. State Fish & Game Com'n*, 229 Mont. 40, 631 P.2d 1265, 1267 (1981) and *Tipco Corp., Inc. v. City of Billings*, 197 Mont. 339, 346, 642 P.2d 1074, 1078 (1982)); *see also Snetsinger,* 2004 MT 390, ¶ 27; *Reesor v. Mont. State Fund*, 2004 MT 370, ¶ 25, 325 Mont. 1, 103 P.3d 1019; *Davis v. Union Pac. R.R.*, 282 Mont. 233, 242, 937 P.2d 27, 32 (1997); *McKamey v. State*, 268 Mont. 137, 885 P.2d 515 (1994) (holding requirement that firefighters be members of the military violated equal protection); *Arneson v. State*, 262 Mont. 269, 864 P.2d 1245 (1993) (holding that statute regarding post-retirement increases

in pension violated equal protection); *Brewer v. Skilift, Inc.*, 234 Mont. 109, 762 P.2d 226 (1988) (holding that portions of the "skier's responsibility" statutes violated equal protection); *Timm v. Mont. Dep't. of Pub. HS.,* 2008 MT 126, ¶ 40, 343 Mont. 11, 184 P.3d 994; *Jaksha v. Butte-Silver Bow County*, 2009 MT 263, ¶¶ 23–24, 352 Mont. 46, 214 P.3d 1248 (striking down, under rational basis review, a maximum hiring age for new firefighters in § 7-33-4107, MCA, on the ground that the cut-off age of 34 was "wholly arbitrary").

If federal equal protection law is followed, the lead case in the zoning area supports MAID's argument here. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). In that case, Cleburne Living Center applied for a special use permit to establish a group home for the mentally impaired. The US Supreme Court, applying the federal rational basis test, found the classification to be in violation of equal protection:

> To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related **to a legitimate governmental purpose**.
>
> ***
>
> The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.

473 U.S. at 446, 105 S.Ct. 3258, 87 L.Ed.2d at 324 (emphasis added). *See also Willowbrook v. Olech*, 528 US 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000).

SB 382, with its directive to "front-load" participation and eliminate such participation in the final approval process, also results in an equal protection violation. For example, once SB 382 is implemented by the cities of Whitefish and Columbia Falls, their citizens are then prohibited from public participation on, for example, (project-specific) review of a proposed subdivision. On the other hand, just outside the city limits of these cities, the **county** residents may fully participate in a final public body review of a subdivision proposal. § 76-3-605, MCA.

Likewise, the City of Polson, of similar size to Whitefish and Columbia Falls, is not covered by SB 382. Therefore, Polson's **present** subdivision review procedures remain in effect. They provide for full public participation[11]. § 76-3-605, MCA. Citizens of Whitefish and Columbia Falls, on the other hand, are required to "front-load" all their comments at the stage of the adoption of the growth policy—or "forever hold their peace". § 76-25-106(d), MCA.

The discrimination is obvious. Some citizens are granted **full** rights of public participation, while others, arbitrarily, are cut way back on that right.

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[11] Public hearings and public participation have been required regarding subdivisions since the Act's inception in 1973. *See Recent Developments in Montana Land Use Law*, James H. Goetz, Montana LR Vol. 38, pp. 98–100, Winter 1977: "Upon submission of the preliminary plat and environmental assessment by the subdivider, **the governing body must hold a public hearing**, after notice by publication," based upon "all relevant evidence relating to the public health, safety and welfare, including the environmental assessment that was to be approved, conditionally approved or disapproved by the governing body." *Id.* at p. 100. (emphasis added).

3. The District Court did not manifestly abuse its discretion in finding a likelihood of success regarding a violation of due process.

A statute that is arbitrary and not reasonably tailored to governmental needs offends substantive due process. *See Newville v. Department of Family Servs.*, 267 Mont. 237, 252–253, 883 P.2d 793, 802 (1994); *Town & Country Foods, Inc. v. City of Bozeman*, 2009 MT 72, ¶ 17, 349 Mont. 453, 203 P.3d 1283.

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

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

2020 MT 248, ¶ 17.

Federal constitutional case law supports Montana's analysis. In the zoning arena, the lead case is *Moore v. East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). In *Moore*, applying rational basis review, the court invalidated a discriminatory zoning ordinance that applied to the housing of family members.

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.

a. Lack of a coordinated transition.

There was no coordination regarding the applicability and implementation dates regarding the contested measures. SB 382 provides that cities affected (those of 5,000 population and 70,000 county population) have three-five years to implement their mandates. Once implemented, SB 382 provides that these affected cities are **exempted** from all provisions of Title 76, Chapters 1, 2, 3, or 8. § 76-25-104(4), MCA.

The problem is, **SB 323 and SB 528** require these same cities to **immediately** (*i.e.*, as of January 1, 2024) implement the mandate requiring ADUs and duplexes in all areas zoned for single-family use. So, are these January 1, 2024 requirements binding on cities that are subject to SB 382? Is the City of Billings, for example, required immediately to implement the duplex and ADU mandates, even though, once it implements the requirements of SB 382 it will no longer be bound by those requirements? The failure of the Legislature to address this transitional limbo is a prime example of the arbitrariness of the challenged 2023 laws.

b. Geographic arbitrariness in application.

Another problem is the arbitrary **application**, geographically, of the challenged measures. There are three statutes, each with a separate definition of

which cities apply to which. SB 528, requiring the allowance of accessory dwelling units ("ADU's"), applies to **all** Montana cities. 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 (*e.g.*, Columbia Falls/Flathead County). 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 (*e.g.*, Polson/Lake County).

The cities of Livingston 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.

c. Contradictions between SB 382 and SB 323 and SB 528.

SB 382 requires affected municipalities to select five housing "strategies" out of a list of fourteen. § 76-25-302, MCA. Of those fourteen listed strategies, the first listed is the allowance of "duplexes" in all areas zoned for single-family

dwellings. But, SB 323 **requires** the allowance of duplexes in all affected cities in all areas zoned as "single-family".

Each of these measures has its own separate definition of "duplex" and these definitions are different. Compare the two definitions in § 76-25-103(36), MCA ("a building designed for two attached dwelling units…which…share a common separation") and § 76-2-304(5)(a), MCA ("…a parcel with two dwelling units that are designed for residential occupancy for more than two family units living independently from each other.")

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, 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 ADUs on all lots or parcels designated as single-family.

These and other problems indicate little coordination.

d. The arbitrary confusion stemming from now having two separate subdivision laws.

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, particularly in combination with SB 323 and SB 528. Present law deals with local review of subdivisions in § 76-3-101, MCA. Ironically, its short title is: "**The Montana Subdivision and Platting 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 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(9), (10), and (11), MCA). However, no identical definitions are in the new SB 382 at § 76-25-103.

Under SB 382, site-specific subdivision reviews will be "ministerial" with no advisory board participation. § 76-25-103(22), § 76-25-102(d). In contrast, the existing subdivision law requires a site-specific review by the governing body for full rights of public participation. §76-3-605.

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.

4. The District Court correctly determined that Plaintiff is likely to succeed on its public participation claims.

The two measures on appeal, SB 323 and SB 528, purport to impose "top-down" zoning without **any** local or public participation at all. Under present law, any attempt to establish a duplex in areas zoned for single-family use would require a variance, which, in turn, would require a public hearing with public notice and input. Likewise, depending on local regulations, the construction of an ADU in a residential neighborhood may require public notice and participation. Absent the preliminary injunction, SB 323 and SB 528 would have dispensed with **all** public notice and hearing requirements. They would have automatically required cities to allow duplexes and ADUs in areas zoned for single-family use.

SB 382 is worse. It attempts to "front-load" public participation by requiring that it be concentrated at the stage of the development of a general land-use plan. At the same time, the Bill seeks to cut back the public's right to participate in the ultimate site-specific zoning and subdivision decisions. Section 6(4)(d) of SB 382 (§ 76-25-106(4)(d), MCA) limits "site-specific" public participation in circumstances where there are significantly increased impacts not identified at the time of the adoption of the Land Use Plan. Thus, on site-specific developments, the ones that actually affect citizens, public participation is now severely curtailed.

Moreover, SB 382 additionally seeks to limit public participation in certain final decisions which were previously subject to board or commission review, following public participation and comment, but now become "ministerial". §§ 76-25-103(22), 76-25-408(7).

Article II, Section 8, Mont. Const. Guarantees the Right of Participation in government affairs. Art. II, Sec. 9 guarantees the public's right to examine documents and observe the deliberations of all public bodies.

Pursuant to § 2-3-101, *et al.*, MCA, the Montana Legislature provides statutory and regulatory guidance 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. § 76-25-408.

C. The District Court did not manifestly abuse its discretion in making a threshold determination that irreparable injury is likely to occur.

1. Threatened deprivation of fundamental constitutional rights is irreparable injury *per se*.

In *Mont. Cannabis Indus. Ass'n. v. State* ("MCIA I"), 2012 MT 201, 366 Mont. 224, 286 P.3d 1161, addressing irreparable injury, this Court said:

> The [district] court properly concluded that the loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued. *Elrod v. Burns*, 427 US 347, 373…(1976).

Id. at ¶ 15. This holding was followed by *Driscoll*, 2020 MT 247, ¶ 15, 401 Mont. 405, 473 P.3d 387 ("For the purposes of a preliminary injunction the loss of a constitutional right constitutes an irreparable injury. *See MCIA I*, ¶ 15"); *see also Jacobsen*, 2022 MT 184, ¶ 15, 410 Mont. 114, 518 P.3d 58 ("The loss of a constitutional right constitutes harm or irreparable injury for the purposes of issuing a preliminary injunction", *Driscoll*, ¶ 15 (citing *MCIA, I*, ¶ 15; *see also Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 60, 409 Mont. 378, 515 P.3d 301 (same)).

In the present case, the district court made a threshold finding that Plaintiff is likely to succeed on the merits of its various constitutional claims, including claims of infringement on Plaintiff's fundamental right to know and to participate regarding governmental deliberations, and Plaintiff's fundamental right to equal

protection and due process of the laws. Dkt. 17, pp. 9–15. Under the above authorities, such threat to fundamental constitutional rights constitutes irreparable injury *per se* warranting issuance of a preliminary injunction.

2. The District Court correctly addressed Plaintiff's members' likelihood of suffering irreparable injury.

The immediate application of the two enjoined measures would have meant that duplexes or ADUs would be allowed in areas now zoned for single-family use. These "top-down" measures were to take effect regardless of any input, regulations or position of any local government. For example, if a local government now imposes parking requirements or impact fees on ADUs (because it makes local good sense to do so), it would now be prohibited from doing that.

The threatened consequences to the members of MAID are serious and irreparable. They are irreparable because once a duplex or an ADU is established in a neighborhood, that's it. There is no going back. Thus, the "irreparability" factor in the statute is met. Also, the damages are serious because MAID's members have lived for years in these single-family neighborhoods, banked on them for their nest egg retirement value of the homes, and have long enjoyed the peace and quiet of their single-family neighborhoods.

D. The District Court did not manifestly abuse its discretion in finding the public interest supports issuance of a preliminary injunction.

The challenged zoning measures amount to a chaotic hodge-podge of bills, completely uncoordinated. The pause of a preliminary injunction will give the State an opportunity to revisit and revise these measures to eliminate their internal contradictions. It is obvious that the jamming of these measures through the last Legislative session now results in significant problems for the public, which will probably just engender other litigation—not to mention the problems for planning staffs of Montana's cities.

E. The District Court did not manifestly abuse its discretion in finding that the balance of equities tips in favor of issuance of the injunction.

If the preliminary injunction is affirmed, little harm is done to the State. In fact, with respect to the idea of increasing density allowing duplexes and ADUs, local governments are already trying to do that separately from the challenged measures. However, local government can do it with sensitivity and with appropriate conditions, such as providing for parking and local aesthetics and, most important, all the benefits of public input and participation required by the Constitution.

On the other hand, with the "top-down" imposition of these measures,

Montana's citizens, and particularly the members of MAID, stand to suffer. They dread waking up in the morning, with no notice, and a new, more dense, building is being erected in their "family neighborhood". Monahan Affidavit, Dkt. 6, ¶ 7. As noted above, this injury would be irreparable and the balance of equities tips in favor of issuing a preliminary injunction.

IV. The State's Tired "Standing" Argument Was Correctly Rejected By the District Court.

The State argues that MAID lacks standing, arguing that it alleges only generalized fears and speculation about the challenged laws. State Br., pp. 9–14. The State emphasizes that MAID has pointed to no imminent subdivision or duplex project that would directly impact MAID's members.

The enjoined measures, SB 323 and SB 528, have no requirements that neighbors, or the public, be notified prior to construction. It makes no sense to impose a standing requirement that requires unattainable clairvoyance, and there are numerous cases that find standing based on a "threatened" potential injury.

For example, in *Mont. Immigrant Justice Alliance*, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430[12], the Court said that a plaintiff must clearly allege past,

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[12] The State actually relies on this case (State Br., pp. 9–14), even though this Court actually found that the plaintiffs there had standing based on allegations very similar to the allegations of MAID.

present or **threatened** injury to a property or civil right. (Emphasis added). In *Gryczan v. State*, 283 Mont. 433, 442–443, 942 P.2d at 112 (1997), this Court said "[t]he complaining party must clearly allege past, present, or **threatened** injury to a property…right." (emphasis added) (citations omitted). In *Mont. Env. Info. Ctr.*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236, this Court found standing because the conduct "[h]as an **arguably** adverse impact on the area in the headwaters of the Blackfoot River, in which they fish and otherwise recreate…". *Id.* at ¶ 45 (emphasis added). In *Park Cty. Envtl. Council v. Mont. Dep't. of Envrl. Quality*, 2020 MT 303, 402 Mont. 168, 477 P.3d 588, this Court said, "[m]embers of the Council and Coalition have clearly alleged a **threatened** injury to their property, recreational, and aesthetic interests." *Id.* at ¶ 22. (Emphasis added). In *Heffernan,* 2011 MT 91, 360 Mont. 207, 255 P.3d 80, this Court said "[t]he plaintiff must clearly allege a past, present or **threatened** injury to a property or civil right…that would be alleviated by successfully maintaining the action. *Id.* at ¶ 33 [citations omitted])." (emphasis added). In *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, 356 Mont. 41, 230 P.3d 808, this Court found standing based on the allegation that the dense development and accompanying storm water run-off would "**potentially**" disturb natural recharge to the aquifer taking place on agricultural land and could adversely impact the quality of his water supply. *Id.* at ¶ 41. This

Court also noted that the impacts to wildlife habitat and wetlands, increased noise, traffic, and light pollution, which could result in "a decrease in the value of this property". *Id.* (emphasis added).

In short, bulldozers need not be at the door before a citizen has standing. Allegations of a "threatened" or "potential" injury suffice to establish standing.

The Monahan Affidavit attests to the serious adverse effects that he and other members stand to suffer. "I dread the possibility of waking up one morning and finding that one of my neighbors has sold their property to a developer who is then erecting a multi-unit building or a duplex…right next to our nice, and carefully maintained single-family dwelling. This would be particularly disturbing if there was no public notice and no public hearing and this kind of development happened out of the blue." *Id.* at ¶ 7, Dkt. 6. He further attests that he has invested $25,000 in solar panels, and "if they become shaded by [a large next-door structure] my investment is lost." He also attests that, for members of MAID, investment in their home constitutes their single most important monetary investment of their lifetime and addresses the threatened adverse effects. *Id.* at ¶¶ 5, 8. Under well-established Montana law, this is more than sufficient to establish standing.

Under the standing analysis, standing may be found based on an aesthetic or recreational interest. *See Heffernan*, 2011 MT 91, ¶ 38 (finding property owner had

standing where proposed development could decrease wildlife presence and increase traffic, noise, and pets); *Aspen Trails Ranch,* 2010 MT 79, ¶¶ 41–42; *see also Park Cty. Envt'l. Council*, 2020 MT 303, ¶ 21 (finding standing for council members who "hike, climb, skied and biked" the Emigrant gulch as well as on property owned by Chico Hot Springs).

In *Committee for an Effective Judiciary v. State*, 209 Mont. 105, 679 P.2d 1223 (1984), a group of voters challenged the constitutionality of a judicial election law. Like this case, the State attempted to avoid judicial review by arguing the plaintiffs were not "sufficiently affected" to claim any real injury. 209 Mont. at 108, 679 P.2d at 1224.

This Court disagreed, stating that Montana courts will not "ignore the rights of citizens to assert the public interest in challenging the legality of legislative action that allegedly flies in the face of our state constitution." *Id.* 209 Mont. at 111, 679 P.2d at 1226. This is "particularly so where the constitutional provision is intended to benefit the public as a whole . . . ." *Id.* The Court found the Framers were concerned, not with conferring benefits on individual judges or candidates, but with safeguarding the judicial system for the public good. 209 Mont. at 109, 679 P.2d at 1224. Ensuring the integrity of such essential public institutions is a matter of public interest that confers, on interested private citizens, "standing to assert

that public interest by contending that the constitutional provision has been the victim of legislative strangulation." *Id.* 209 Mont. at 108, 679 P.2d at 1225.

In sum, MAID's standing, based on the adverse effects on its members, is well established under Montana law.

CONCLUSION

For these reasons, the preliminary injunction entered by the District Court must be affirmed.

DATED this 27th day of March, 2024.

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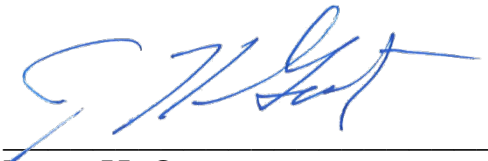
CERTIFICATE OF COMPLIANCE

Pursuant to M. R. App. P. 11, the undersigned certifies that this brief is set in a proportionally spaced font and contains fewer than 10,000 words (9,699).



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