MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

* * * * * * * * * *

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC, Plaintiff, vs. STATE OF MONTANA, Defendant, and SHELTER WF, Inc. Defendant-Intervenor, DAVID KUHNLE, Defendant-Intervenor, CLARENCE KENCK, Defendant-Intervenor, MONTANA LEAGUE OF CITIES AND TOWNS, Defendant-Intervenor.	Cause No. DV-16-2023-0001248DK **DECISION AND ORDER RE: PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT, CROSS-MOTIONS FOR SUMMARY JUDGMENT AND LEAGUE'S MOTION TO DISMIS**

Plaintiff's Motion For Partial Summary Judgment And Cross-Motions.

On January 16, 2024, Plaintiff Montanans Against Irresponsible Densification, LLC, ("MAID") filed Plaintiff's Motion for Partial Summary Judgment and Plaintiff's Brief in Support of Motion for Partial Summary Judgment. Ct. Docs. 18, 19.

On November 16, 2024, Defendant-Intervenor Montana League of Cities and Towns ("League") filed Montana League of Cities and Towns Response to Montanans Against Irresponsible Densification Motion for Partial Summary Judgment. Ct. Doc. 103.

On December 10, 2024, Defendant-Intervenors David Kuhnle and Clarence Kenck ("Kuhnle/Kenck") filed Intervenors Opposition to Plaintiff MAID's Motion for Partial Summary Judgment. Ct. Doc. 115.

On December 10, 2024, Kuhnle/Kenck filed Intervenors David Kuhnle and Clarence Kenck's Cross Motion for Partial Summary Judgment (Intervenors oppose Motion for Partial Summary Judgment on Count I and move for summary judgment on Counts III, IV and V). Ct. Doc. 116

On December 10, 2024, MAID filed Plaintiff's Reply to Montana League of Cities and Towns Response to Plaintiff's Motion for Partial Summary Judgment. Ct. Doc. 118.

On December 10, 2024, Defendant-Intervenor Shelter WF, Inc. ("Shelter WF") filed Shelter WF's Cross-Motion for Summary Judgment. Ct. Doc. 119.

On December 10, 2024, Shelter WF filed Shelter WF's Consolidated Brief: In Opposition to MAID's Motions for Summary Judgment and in Support of Shelter WF's Cross-Motion for Summary Judgment (addresses Motion for Partial Summary Judgment and MAID's constitutional claims). Ct. Doc. 120.

On December 19, 2024, MAID filed Plaintiff's Reply to Defendant-Intervenors' Kuhnle, Kenck, and Shelter WF's Responses in Opposition to Plaintiff's Motion for Partial Summary Judgment. Ct. Doc. 138.

On January 13, 2025, the State filed State of Montana's Response in Opposition to Plaintiff's First Motion for Summary Judgment on Count One (Plaintiff's Motion for Partial

Summary Judgment). Ct. Doc 146.

On January 17, 2025, MAID filed Plaintiff's Reply to State's Response Regarding Plaintiff's Motion for Partial Summary Judgment. Ct. Doc. 147.

Plaintiff's Second Motion for Summary Judgment and Cross-Motions.

On November 15, 2024, MAID Plaintiff's Second Motion for Summary Judgment and Plaintiff's Brief in Support of Second Motion for Summary Judgment. Ct. Docs. 93, 94.

On December 6, 2024, State filed State of Montana's Response in Opposition to Plaintiff's Second Motion for Partial Summary Judgment). Ct. Doc. 113.[1]

On December 10, 2024, Kuhnle/Kenck filed Cross Motion for Partial Summary Judgment and Brief in Opposition to Plaintiff's Second Motion for Summary Judgment and in Support of Cross Motion for Partial Summary Judgment. Ct. Docs. 116, 117.

On December 10, 2024, Shelter WF filed Shelter WF's Cross-Motion for Summary Judgment and Consolidated Brief: in Opposition to MAID's Motions for Summary Judgment and in Support of Shelter WF's Cross Motion for Summary Judgment. Ct. Docs. 119, 120.

On December 10, 2024, League filed Montana League of Cities and Towns' Cross Motion for Summary Judgment and Montana League of Cities and Towns Brief in Support of Cross Motion for Summary Judgment. Ct. Docs., 121, 122.

On December 19, 2024, MAID filed Plaintiff's Combined Reply to Defendant and Defendant-Intervenors' Responses to Plaintiff's Second Motion for Summary Judgment. Ct. Doc. 137.

On January 3, 2025, Kuhnle/Kenck filed Reply to Maid's Response to Intervenors' Cross-

[1] The State's Response is captioned with reference to "Plaintiff's Second Motion for Partial Summary Judgment." The State's Response contains arguments opposing MAID's Second Motion for Summary Judgment. MAID has not filed a "Second" Motion for Partial Summary Judgment.

Motion for Summary Judgment. Ct. Doc. 143. On January 3, 2025, League filed Montana League of Cities and Towns' Reply Brief in Support of Cross Motion for Summary Judgment. Ct. Doc. 144. On January 3, 2025, Shelter WF filed Shelter WF's Reply Brief in Support of its Cross-Motion for Summary Judgment. Ct. Doc. 145.

On January 28, 2025, the Court heard oral argument on the Motions. James H. Goetz and Henry J.K. Tesar argued on behalf of MAID. Thane Johnson argued on behalf the State. Jesse Kodadek argued on behalf of Shelter WF. David McDonald argued on behalf of Kuhnle/Kenck. Thomas J. Jodoin argued on behalf of the League. From counsels' arguments made at the hearing and in their briefs the Court is fully advised and issues this Decision and Order.

DISCUSSION

The 2023 Montana Legislature passed four laws relating to zoning and land use planning, Senate Bill ("SB") 245, SB 323, SB 382 and SB 528.

SB 245, now codified in §§ 76-2-304 and 76-2-309 MCA, requires municipalities designated as urban areas to allow as a permitted use multiple-unit dwellings and mixed-use developments that include multiple-unit dwellings on a parcel or lot under certain conditions. [2]

SB 323, now codified in §§ 76-2-304 and 76-2-309, MCA, amends § 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…

SB 382, codified as Title 76, Ch. 25, MCA, creates The Montana Land Use Planning Act ("MLUPA") which applies to municipalities of a population at or exceeding 5,000 located within

[2] MAID explains that it challenges the constitutionality of SB 245, but did not address it in its Brief in Support of Second Motion for Summary Judgment because of space concerns and because SB 245 does not implicate single-family uses.

a county with a population at or exceeding 70,000. The new law requires these municipalities to engage in massive overhauls of their subdivision and zoning regulations, within a five-year period. It changes the way the municipalities conduct long-range community planning. It also defines the nature of public participation in the process, including that relating to site-specific developments. § 76-25-106 (4), MCA.

SB 528, codified as § 76-2-345(9)(a), MCA, defines an "accessory dwelling unit" ("ADU") as "a self-contained living unit on the same parcel as a single-family dwelling of greater square footage." All Montana municipalities are required to adopt regulations allowing an ADU on any "lot or parcel that contains a single-family dwelling."

On December 29, 2023, this Court entered a preliminary injunction, enjoining SB 323 and SB 528, which were scheduled to become effective on January 1, 2024. Ct. Doc. 17. In its Decision and Order granting the preliminary injunction this Court recognized,

> [T]he function of a preliminary injunction is to preserve the *status quo ante*. Although, at the preliminary injunction stage, a court must deal with the merits of a moving plaintiff's claim, it is not the function of a court to resolve these claims with finality. Rather, a court must look at these claims solely with a view, based on a summary examination, that a plaintiff has a likelihood of succeeding on the merits. Thus, the following analysis may not be construed as an ultimate determination on the merits, but only as an expedited examination of whether the claim is sufficient to merit an issuance of interim injunctive relief.

The State appealed this Court's preliminary injunction to the Montana Supreme Court. In its opinion reversing this Court's grant of the preliminary injunction the Montana Supreme Court recognized that the "merit's proceeding" of this case continues to exist. *Montanans Against Irresponsible Densification, LLC, v. State,* 2024 MT 200, ¶ 22, 418 Mont. 78 555 P.3d 759. Because of the Supreme Court's opinion SB 323 and SB 528 presently are in effect. Regardless, the issue of whether MAID's constitutional challenges have merit remains to be determined despite what this Court declared for purposes of considering the request for a preliminary injunction. A

preliminary injunction does not determine the merits of the case but preserves the status quo of the subject in controversy pending an adjudication on the merits. *Knudson v. McDunn* (1995), 271 Mont. 61, 65, 894 P.2d 295, 297-98 (citation omitted). Pertinent to the Court's function in this case is the observation made by the United States Circuit Court in *Morris v. Hoffa,* 361 F.3d 177, 189 (3rd Cr. 2004):

> "[A] decision on a preliminary injunction is, in effect, only a prediction about the merits of the case." *United States v. Local 560 (I.B.T.),* 974 F.2d 315, 330 (3d Cir. 1992). Therefore, "a trial court, in deciding whether to grant permanent relief, is not bound by its decision or the appellate court's decision about preliminary relief." *Id*. Rather, the trial court "is free to reconsider the merits of the case."

MAID is a collection of Montanans who own property within the State, which opposes increased densification, opposes the reforms initiated by the new laws and which filed this lawsuit. Some of MAID's members own property subject to private restrictive covenants. Others own property without restrictive covenants but subject to zoning regulations. In its First Amended Complaint, MAID challenges the four zoning revision laws identified above. Ct. Doc. 3. Count I seeks a declaratory judgment that SB 323, SB 528, and SB 382 do not purport to displace, supplant, or otherwise preempt private covenants that are more restrictive than the zoning reforms. Count II alleges SB 382's revised procedures for public participation violate Montana's Constitution. Count III alleges SB 323, SB 528, SB 245, and SB 382 violate the right to equal protection by treating properties subject to private covenants differently from properties not subject to private covenants. Count IV alleges violations of the right to substantive due process due to purported contradictions and inconsistencies within the new laws. Count V alleges a general constitutional claim of arrogation of local power by the State.

Specifically, in its Prayer for Relief in its First Amended Complaint MAID asks for a declaratory judgment for the Court to declare that:

1. The provisions of SB 323, SB 528, SB 245 and SB 382 may not be used by any person or governmental entity to invalidate or displace covenants that are more restrictive than those developed by Montana's municipal governments.

2. SB 323, SB 528, SB 245 and SB 382 are facially unconstitutional in violation of Montana's constitutional provisions regarding right of public participation and right to know.

3. Any attempt by municipalities to develop an ordinance pursuant to SB 323, SB 528, SB 245 and SB 382 is unconstitutional because they deny Plaintiffs their rights to equal protection of the law.

4. Any attempt by municipalities to develop an ordinance pursuant to SB 323, SB 528, SB 245 and SB 382 is unconstitutional because they deny Plaintiffs their rights to due process of law. Ct. Doc. 3, 58 59.

MAID also asks for a permanent injunction enjoining the State of Montana and its municipalities from implementing SB 323, SB 528, SB 245 and SB 382.

MAID asks for summary judgment on these requests.

In their Cross Motion for Summary Judgment Kuhnle/Kenck as for summary judgment in their favor on Counts III, IV and V of the First Amended Complaint. Ct. Doc. 116. In its Cross-Motion for Summary Judgment Shelter WF asked for summary judgment in favor of Defendant and Defendant-Intervenors on all the constitutional issues. Ct. Doc. 119. In its Cross-Motion for Summary Judgment League asked for summary judgment in its favor on Counts II through V of the First Amended Complaint. Ct. Doc. 121.

SUMMARY JUDGMENT

Summary judgment is proper when the movant demonstrates that no genuine issues of material fact exist, and that the movant is entitled to judgment as a matter of law. Rule 56(c)(3),

Mont. R. Civ. P. The moving party has the burden of establishing the absence of genuine issues of material fact and their entitlement to judgment as a matter of law. *Grizzly Sec. Armored Express, Inc. v. Bancard Servs.*, 2016 MT 287, ¶ 13, 385 Mont. 307, 384 P.3d 68 (citation omitted). Once the moving party has met its burden, the non-moving party must present "material and substantial evidence" that is not merely "conclusory or speculative demonstrating that a genuine issue of material fact exists." *Needham v. Kluver*, 2019 MT 182, ¶ 14, 396 Mont. 500, 446 P.3d 504. A material fact involves elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact. *Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1**.** A court may enter summary judgment in favor of a nonmoving party under certain circumstances. *Evans v. Fox Island Homeowner's Ass'n*, 2022 Mont. LEXIS 218. Generally, no formal cross motion is necessary for a court to enter summary judgment in favor of the nonmoving party. *In re Estate of Marson*, 2005 MT 222, ¶ 9, 328 Mont. 348, 120 P.3d 382. No party is claiming there are genuine issues of material fact to preclude summary judgment.

RESTRICTIVE COVENANTS

In its First Amended Complaint, MAID asks the Court to declare:

> That the provisions of SB 323, SB 528, SB 245 and SB 382 may not be used by any person or governmental entity to invalidate or displace covenants that are more restrictive than those developed by Montana's municipal governments.

Ct. Doc. 3, 58.

In its Motion for Partial Summary Judgment, MAID asks the Court to declare:

> …that certain zoning/subdivision measures enacted in 2023, which require certain Montana cites to modify their zoning regulations to allow greater density in single-family neighborhoods, do not apply to areas of Montana cities protected by private covenants that are more restrictive than the new 2023 requirements.

Ct. Doc. 18, 2.

At the hearing on December 20, 2024, State's counsel proposed the following resolution

concerning the legal issue raised about restrictive covenants:

> We would agree that the Senate bills do not apply to properties that are subject to covenants that are more restrictive than the four Senate bills, so long as the covenants are enforceable and have not been abandoned or waived under the law.

MAID's counsel was not receptive to the State's proposal. At the hearing on January 28, 2025, League's counsel pointed out that the relief requested in the First Amended Complaint and relief requested in the Motion for Partial Summary Judgment are different. MAID clarified that it seeks the relief requested in the First Amended Complaint.

MAID argues it is entitled to a declaratory judgment that the new planning and zoning changes do not preempt or otherwise supplant more restrictive covenants. Ct. Doc. 19, 3. MAID cites several cases for the general proposition that zoning ordinances cannot override privately placed restrictive covenants. *Id.* MAID cites *State ex. Rel. Region Child & Family Servs. v. District Court,* 187 Mont. 126, 130, 609 P.2d 245, 247 (1980), wherein the Montana Supreme Court, *in dicta,* stated:

> 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 and Planning* § 4 (1976).

The League does not oppose MAID's Motion "to the extent that Plaintiff's motion seeks declaratory judgment that Senate Bills 245, 323, 382, and 528 from the 68th Legislative session do not preempt restrictive covenants." Ct. Doc. 103, 2. Kuhnle/Kenck argue because no one disputes that these new housing laws do not infringe upon the rights of contract the Motion should be denied. Ct. Doc. 115, 2. Shelter WF opposes the Motion arguing there is no justiciable controversy. Ct. Doc. 120, 15. The State also opposes the Motion arguing the motion is not justiciable. Ct. Doc. 146, 8.

The Uniform Declaratory Judgment Act ("UDJA") is remedial in nature and its purpose is

"to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Section 27-8-102, MCA. Section 27-8-202, MCA, states:

> Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Although courts construe the UDJA liberally, courts may only exercise jurisdiction over a matter if a justiciable controversy exists. *Broad Reach Power LLC v. Mont. Dep't of Pub. Serv. Regul., Pub. Serv. Comm'n*, 2022 MT 227, ¶ 9, 410 Mont. 450, 520 P.3d 301. The liberal construction of the UJDA is tempered by the requirement of a judicial controversy. *Northfield Ins. Co. v. Mont. Ass'n of Cnty's,* 2000 MT 256, ¶ 10, 301 Mont. 472, 10 P.3d 813. The controversy must be real and substantial involving a definite and concrete issue implicating the legal relations of parties having adverse legal interests. *Broad Reach Power,* ¶ 10. The Montana Supreme Court applies the following test:

> First, a justiciable controversy requires that parties have existing and genuine, as distinguished from theoretical, rights or interests. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion. Third, [it] must be a controversy the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities be of such overriding public moment as to constitute the legal equivalent of all of them.

Miller v. State Farm Mut. Auto. Ins. Co., 2007 MT 85, ¶ 8, 337 Mont. 67, 155 P.3d 1278. There is no jurisdiction for a court to make speculative, anticipatory, theoretical or purely advisory opinions. *Kageco Orchards, LLC v. Mont. DOT*, 412 Mont. 45, 52, 528 P.3d 1097, 1102 (2023). The key to determining if a controversy is justiciable is whether there is an actual issue that is not theoretical. *City of Missoula v. Fox,* 2019 MT 250, ¶ 11, 397 Mont 388, 450 P.3d 898.

Kuhnle/Kenck argue there is no controversy about whether the new laws can preempt private restrictive covenants between landowners. Ct. Doc. 115, 3. Kuhnle/Kenck agree that the new laws cannot preempt such private covenants. *Id.* Kuhnle/Kenck assert it would be inappropriate for the Court to consider MAID's request for declaratory judgment.

Further, Kuhnle/Kenck point out at least one provision in the new laws acknowledges that the ADU law does not infringe on the contractual rights of property owners to agree to restrictive covenants prohibiting ADUs or duplexes. Section 76-2-345(2)(i), MCA, provides, "[T]his subsection…may not be construed to prohibit restrictive covenants concerning accessory dwelling units entered into between private parties…". Kuhnle/Kenck observe in their Answers they agree with MAID that the new laws do not supersede private deed restrictions and that if the new laws could compel homeowners to ignore deed restrictions and allow ADUs and duplexes they would unconstitutionally infringe on the right to contract. Ct. Doc. 115, 3. Although § 76-2-345(2)(i), MCA, only applies to ADUs, Kuhnle/Kenck's argument also embraces duplexes in their analysis.

Kuhnle/Kenck further argue that MAID's request does not meet the test for finding a justiciable controversy. Kuhnle/Kenck argue when there is no controversy, a declaratory judgment will not have the effect of a final judgment on MAID's question, and the Court cannot use a declaratory judgment to offer an "advisory opinion."

The State and Shelter WF argued at the hearing on January 28, 2025, that a declaratory judgment would be based on "hypothetical" parties. However, in its First Amended Complaint, MAID alleges two of its members, Steve Barrett and Noah Poritz ("Poritz"), own property in Bozeman which is subject to restrictive covenants providing for single-family residences. In its Reply to Defendant-Intervenors' Kuhnle, Kenck, and Shelter WF's Responses MAID represents that Robert James ("James") also owns property protected by single-family covenants. For

clarification, James is listed in the First Amended Complaint as being a member of MAID whose property is not subject to restrictive covenants. Ct. Doc. 3, 24. In his Declaration, Poritz states that he lives in a subdivision in Bozeman, Montana, covered by covenants which provide that the area in which he lives is limited to single-family dwellings. Ct. Doc. 20, 1. Poritz declares that he is a member of a homeowners' association, which has been and continues to be active, meeting once a year. In his Declaration, James states that he lives in a subdivision in Great Falls, Montana, which is subject to a restrictive covenant restricting the use of lots to single-family residences. Ct. Doc. 89. Contrary to the State's assertion, Poritz and James are not "hypothetical."

Shelter WF argues that a declaratory judgment based on MAID's request would be an advisory opinion. Shelter WF argues that the Court reasonably cannot craft a declaratory judgment that will resolve any actual or live controversy. Ct. Doc. 145, 4. Shelter WF argues that there would need to be a determination of whether an individual set of covenants prohibits ADUs or duplexes for MAID to prevail. Shelter WF's position is that without these specifics any declaratory judgment would be an advisory opinion that would resolve nothing. Ct. Doc. 145, 3-4.

Shelter WF argues that the recent case of *Myers v. Kleinhans,* 2024 MT 208, 418 Mont. 113, 556 P.3d 529, is illustrative of the impossibility of MAID's request. In *Myers*, the issue was whether the Kleinhans violated restrictive covenants when they built an ADU in their detached garage and then started renting it out as an Airbnb. Kleinhans' neighbors sued, because the covenants limited each lot to just one "single family dwelling," which was defined as a building under one roof designed and intended for use and occupancy as a residence by a single family, "and because the covenants prohibited commercial use." *Myers,* ¶¶ 10-12.

The Montana Supreme Court agreed with the plaintiff neighbors that renting out the ADU violated the prohibition on commercial use. *Id., ¶ 17.* However, the Supreme Court also agreed

with Kleinhans that the conversion of their garage to an ADU did not violate the "single family dwelling" restriction in the covenants which provided that a "'single family dwelling' shall mean a building under one roof designed and intended for use and occupancy as a residence by a single family." *Id.* ¶ 10. The Montana Supreme Court agreed with Kleinhans that the covenant was a structural restriction that did not necessarily alter the residential purpose of the property. *Id.* That restriction did not restrict the use of the property to single families only. Although *Myers* demonstrates whether a restrictive covenant may be enforceable will depend upon its meaning and the circumstances of its application, *Myers* does not help to resolve the issue here.

The State argues MAID's request seeks a theoretical declaration that the new laws do not apply to all real property across the State covered by any covenants restricting property to single family dwellings whether the covenants are enforceable or not. Ct. Doc. 146, 7. The State reasons that a declaratory judgment would require a specific examination by the Court of each set of covenants to decide if they are enforceable. *Id.* The State acknowledges that the only possible controversy may be whether the challenged laws impact the covenants in the subdivision where Poritz owns his single-family residence property although there is no evidence that anyone is trying to build a duplex or ADU in Poritz's neighborhood. *Id.*

The State also refers to § 70-17-210, MCA, which provides a process by which a governing body of a development or a parcel owner within the development can initiate a legal action to enforce a covenant. Ct. Doc. 146, 6. The State and Shelter WF rely on § 70-17-210, MCA, to support their arguments that every covenant would need to be examined by the Court to determine their legality before the Court could issue a declaratory judgment. Section 70-17-201, MCA, establishes rules for the enforcement of covenants by an association or any party to an interest in land subject to covenants. At the hearing on January 28, 2025, MAID's counsel argued that in

denying the State's Motion for Discovery Under Mont. R. Civ. P. 56(f), the Court held that it does not need to examine every covenant in Montana for the purposes of deciding MAID's Motion for Partial Summary Judgment. See, Ct. Doc. 140, 6. Counsel argued that MAID is not attempting to enforce any restrictive covenants implicating § 70-17-210, MCA. Counsel also argued the new laws do not preempt or supplant restrictive covenants such that § 70-17-210, MCA could be used to find abandonment of the covenants.

Shelter WF asserts that MAID's request is one for a statewide declaration that attempts to exhume covenants that, as a matter of law, have been deemed abandoned and unenforceable. Ct. Doc. 120, 17. Shelter WF claims that a "sweeping, statewide declaration that assumes the ongoing enforceability of every set of covenants with a single-family limitation cannot be appropriate because it would require a holding premised on a hypothetical set of facts." *Id.* Shelter WF argues that the Court should refrain from assuming a "hypothetical that thousands of sets of disparate covenants are automatically enforceable just because MAID wants them to be." *Id.* Shelter WF characterizes that conclusion as an advisory opinion based on an "abstract proposition."

MAID requests a judgment declaring that the "provisions of SB 323, SB 528, SB 245 and SB 382 cannot be used by any person or governmental entity to invalidate or displace covenants that are more restrictive than those developed by Montana's municipal governments."[3] MAID contends that its challenge involves existing and genuine rights of its members.

At the hearing on January 28, 2025, MAID's counsel acknowledged that MAID's request is based upon Poritz being a member of MAID and the rights he has with restrictive covenants. Consequently, the Court concludes that there is a justiciable controversy satisfying the test for a

[3] The Court notes that MAID's request refers to covenants "developed by Montana's municipal governments." Ct. Doc. 3, 58. Giving MAID the benefit of the doubt, the Court assumes that MAID intended to refer to "ordinances or regulations" developed by Montana's municipal governments.

declaratory judgment. The parties have existing and genuine, as distinguished from theoretical, rights or interests. Poritz lives in an area that is protected by restrictive covenants that are more restrictive than the new laws relating to ADUs and duplexes. The controversy here is not a debate or argument invoking a political, administrative, philosophical or academic conclusion. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion. A declaratory judgment will have the effect of a judgment in law or equity upon the rights of Poritz as a member of MAID. In this regard, MAID's request appears to extend beyond the geographical limits of the jurisdiction and the city in which Poritz resides. Although the Court agrees that MAID is entitled to declaratory judgment, the Court disagrees that the declaration should reference "Montana's municipal governments." The Court will issue summary judgment granting MAID's request for a declaratory judgment as follows:

> The provisions of SB 323, SB 528, SB 245 and SB 382 may not be used by any person or governmental entity to invalidate or displace covenants that are more restrictive than zoning regulations.

RIGHT TO PARTICIPATE AND RIGHT TO KNOW

MAID argues that MLUPA (SB 382) is unconstitutional and violates Article II, Section 8 (Right to Participate) and Section 9 (Right to Know), Montana Constitution. MAID focuses on Section 76-25-106(4)(d), MCA, of MLUPA:

> (4) Throughout the adoption, amendment, or update of the land use plan or regulation processes, a local government shall emphasize that:
>
> ****
>
> (d) The scope of and opportunity for public participation and comment on site-specific development in substantial compliance with the land use plan must be limited only to those impacts or significantly increased impacts that were not previously identified and considered in the adoption, amendment, or update of the land use plan, zoning regulations, or subdivision regulations.

MAID argues that SB 382 attempts to water down the right of Montana's citizens to participate in land-use decisions by curtailing public participation in on site-specific developments. Ct. Doc. 94, 19. MAID argues this is done in three ways:

> 1. It seeks to confine public involvement to the early stage of land-use decisions, i.e., it confines public comment to the development of "Growth Policies." Consequently, it seeks to eliminate public comment at the later project-specific level;
> 2. It seeks to make many of the later project-specific decisions "ministerial" meaning that there will be no ultimate review by a public body, and therefore, arguably not subject to Montana's open meetings and public participation laws;
> 3. It eliminates substantive statutory review standards, thereby increasing the discretion of administrators, rending public challenges toothless.

Article II, Section 8, Montana Constitution provides:

> The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as *may be provided by law.* (emphasis added).

Article II, Section 9, 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.

When a constitutional right is non-self-executing it is left to the legislature to define that right within the context of the constitutional right to ensure that the right is provided. *Brown v. Gianforte, 2021 MT 149,* ¶ 23, 404 Mont. 269, 488 P.3d 548. "[O] nce the Legislature has acted, or executed, a provision that implicates individual constitutional rights, courts can determine whether that enactment fulfills the Legislature's constitutional responsibility." *Id.* In this case, Article II, Section 8 is non-self-executing. It requires the Legislature to act, which the Legislature has done by implementing the following statues.

Section 2-3-101, MCA provides:

The legislature finds and declares pursuant to the mandate of Article II, section 8, of the 1972 Montana constitution that legislative guidelines should be established 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.*** (emphasis added).

Section 2-3-102(1), MCA, provides:

"Agency" means any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts…

Section 2-3-103(1)(a), MCA, provides:

Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. ***The procedures must ensure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public***. (emphasis added).

Section 2-3-111(1), MCA, provides

(1) Procedures for assisting public participation must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public.

Section 2-3-112(3), MCA, provides:

The provisions of 2-3-103 and 2-3-111 do not apply to:

* * *

(3) a decision involving no more than a ministerial act.

Section 7-1-4142, MCA provides:

Each municipal governing body, committee, board, authority, or entity, in accordance with Article II, section 8, of the Montana constitution and Title 2, chapter 3, ***shall develop procedures for permitting and encouraging the public to participate in decisions that are of significant interest to the public***. (emphasis added).

The provisions of Article II, Section 9, the right to know, are implemented by the following open meeting laws.

Section 2-3-201, MCA, provides:

> The legislature finds and declares that public boards, commissions, councils, and other public agencies in this state exist to aid in the conduct of the peoples' business. ***It is the intent of this part that actions and deliberations of all public agencies shall be conducted openly***. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of this part shall be liberally construed. (emphasis added).

Section 2-3-303(1), MCA, provides:

> All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds, including the supreme court, must be open to the public.

MAID argues that MLUPA violates the constitutional provisions for three additional reasons: (1) for cities subject to MLUPA, public participation is severely constrained; (2) MLUPA's constraints on public participation violate Montana's constitutional guarantees of public participation; and (3) with respect to public participation, MLUPA's discriminatory application violates equal protection. Ct. Doc. 94, 19-25.

Concerning the first reason, MAID argues that § 76-25-106(4)(d), MCA, violates the letter and spirit of Montana's open government constitutional provisions and the implementing statutes.

Concerning the second reason, MAID argues that MLUPA's denial of full public participation rights at the site-specific development stage is a "cynical ploy to avoid the well-established public participation requirements" of the Constitution. Ct. Doc. 94, 21. MAID argues that citizens normally do not get involved in the development of a "growth policy," but do get involved in site-specific developments that may directly threaten to impact them. MAID accuses the Legislature of purposely attempting to evade the requirements for public participation. MAID argues that the provision for a citizen to have public input on a site-specific development only if the citizen can demonstrate a substantial deviation from the adopted land use plan under § 76-25-

106(4)(d), MCA is "illusory." *Id.* MAID notes that prior to MLUPA, most final land-use decisions were subject to planning board and/or commission review. Analysis of MAID'S claim requires an examination of the applicable statutes in MLUPA.

Concerning the new zoning provisions of MLUPA § 76-25-305, MCA, provides:

> (3) Zoning compliance permits and other ministerial permits may be issued by the planning administrator or the planning administrator's designee without any further review or analysis by the governing body, except as provided in 76-25-503.
>
> (4) ***If a proposed development…is in substantial compliance with the zoning regulations or map and all impacts resulting from the development were previously analyzed and made available for public review and comment prior to the adoption of the land use plan, zoning regulation, map, or amendment thereto, the application must be approved, approved with conditions, or denied by the planning administrator and is not subject to any further public review or comment,*** except as provided in 76-25-503**.** (emphasis added).
>
> (5) (a) ***If a proposed development…is in substantial compliance with the zoning regulations and map but may result in new or significantly increased potential impacts that have not been previously identified and considered in the adoption of the land use plan or zoning regulations, the planning administrator*** shall proceed as follows:
> (b) request that the applicant collect any additional data and perform any additional analysis necessary to provide the planning administrator and the public with the opportunity to comment on and consider the impacts identified in subsection (5)(a);
> (c) collect any additional data or perform additional analysis the planning administrator determines is necessary to provide the local government and the public with the opportunity to comment on and consider the impacts identified in subsection (5)(a); and
> (d) ***provide notice of a 15-business day written comment period during which the public has the reasonable opportunity to participate in the consideration of the impacts identified in subsection (5)(a).*** (emphasis added).
>
> (6) (a) ***Any additional analysis or public comment on a proposed development described in subsection (5) must be limited to only any new or significantly increased impacts potentially resulting from the proposed development, to the extent the impact was not previously identified or considered in the adoption or amendment of the land use plan or zoning regulations.*** (emphasis added).
> (b) The planning administrator shall ***approve, approve with conditions, or deny the application.*** The planning administrator's decision is final and no further action may be taken except as provided in 76-25-503. (emphasis deed).

Concerning the new subdivision provisions of MLUPA, § 76-25-408, MCA, provides:

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

(b) ***The application is not subject to any further public review or comment, except as provided in 76-25-503.*** (emphasis added).

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

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

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

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

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

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

Section 76-25-503, MCA, provides for an appeal process. An appeal challenging the adoption of or amendment to a land use plan, zoning regulation, zoning map, or subdivision

regulation may be made to the governing body. An appeal of a final administrative land use decision may be appealed by "any aggrieved person" to the planning commission. The appellant has the burden of proving that the appealed decision was made in error. An aggrieved person may appeal the decision of the planning commission to the governing body. An appeal of the decision of the governing body may be made to the district court.

MAID argues that MLUPA's method of placing the final decision for site-specific development review in the hands of a planning administrator or designee, and not in an advisory board, as a "ministerial" function, gives too much discretion to local officials. *Id.*, 22-23. Section 76-25-305(3), MCA, provides, "[Z]oning compliance permits and other ministerial permits may be issued by the planning administrator or the planning administrator's designee without any further review or analysis by the governing body… " Section 76-25-103(22), MCA, of MLUPA defines a "ministerial permit" as:

> …a permit granted upon a determination that a proposed project complies with the zoning map and the established standards set forth in the zoning regulations. ***The determination must be based on objective standards, involving little or no personal judgment, and must be issued by the planning administrator.*** (emphasis supplied).

MAID argues the ultimate site-specific decisions of a municipal officer, such as a planning administrator, approving, conditionally approving, or disapproving subdivisions or permits or applications under the zoning laws, involves discretion and judgment on the part of the officer. MAID challenges the notion that growth policies and subsequent zoning and subdivision regulations can be so tightly drawn and objective such that the ultimate site-specific decision is simply ministerial.

Sections 2-3-103(1)(a) and 7-1-4142, MCA require municipalities to adopt procedures to ensure adequate notice and assist public participation before a final agency action is taken that is

of "significant interest to the public." The League and Shelter WF argue that the decision that is of "significant interest to the public" under MLUPA is the adoption of the land use plan itself, rather than the approval of any site-specific project. Ct. Doc. 145, 8.

MAID presents a facial challenge to the constitutionality of MLUPA. At the hearing on January 28, 2025, MAID's counsel asked the Court to invalidate MLUPA in its entirety. With respect to a facial challenge, the Montana Supreme Court has held:

> …a facial challenge is a "difficult" task, requiring the challenger to demonstrate that "no set of circumstances exists under which the challenged sections would be valid . . . ." *Mont. Cannabis Indus. Ass'n*, ¶ 14 (brackets and citations omitted). In other words, it must be demonstrated "that the law is unconstitutional in all of its applications." *Mont. Cannabis Indus. Ass'n*, ¶ 14 (citations omitted). Statutes are presumed constitutional, and the challenger bears the burden of proving a conflict beyond a reasonable doubt. *Mont. Cannabis Indus. Ass'n*, ¶ 12. Facial challenges do not depend on the facts of a particular case. (citations in original omitted). A statute found to be facially unconstitutional cannot be enforced under any circumstances. *Citizens for a Better Flathead*, ¶ 45 (citations omitted); see also, e.g., *Mont. Envtl. Info. Ctr.,* ¶ 80; *Ap, Inc*., ¶¶ 27-28; *Roosevel*t, ¶¶ 51-52.

City of Missoula v. Mt. Water Co., 2018 MT 139, ¶ 21, 391 Mont. 422, 419 P.3d 685.

Montana courts presume that enacted laws are constitutional. *Powder River Cnty. v. State,* 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. Every possible presumption in favor of the constitutionality of a law must be indulged in favor of its constitutionality. *Id.,* ¶¶ 73-74. The question for a reviewing court is not whether it is possible to condemn, but whether it is possible to uphold the statute. *Satterlee v. Lumberman/s Mut. Cas. Co.*, 2009 MY 368, ¶ 10, 353 Mont. 265, 222 P.3d 566.

"Analysis of a facial challenge to a statute differs from that of an as-applied challenge." *Mont. Cannabis Indus. Assn.,* ¶ 14. If any constitutional application of a statute is shown, the facial challenge fails. *Advocates for Sch. Tr. Lands v. State,* 2022 MT 46, ¶ 29, 408 Mont. 39,

505 P.3d 825. If any doubt exists, it must be resolved for the statute. *Mont. Cannabis Indus. Assn.,* ¶ 12.

To meet Montana's constitutional and statutory guarantees of public participation, laws must ensure the public has "notice and an opportunity to be heard." *Carbon Cnty. v. Res. Council v. Mont. Bd. of Oil & Gas Conservation,* 2016 MT 240, ¶ 21, 385 Mont. 5, 380 P.3d 798 (internal citations omitted). "[T]he right of participation was intended to afford citizens a reasonable opportunity to know about and participate in any government decision." *Shockley v. Cascade County.* 2014 MT 281, ¶ 17, 376 Mont. 493, 336 P.3d 375. Public participation procedures "must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments." Section 2-3-111(1), MCA.

In support of its position the State relies on the requirement in MLUPA for a municipality to "provide continuous public participation when adopting, amending, or updating a land use plan or regulations." *See*, Section 76-25-106(1), MCA. The State also points to the various statements of intention made by the Legislature in MLUPA: § 76-25-102(3), MCA (comprehensive planning provides for "broad public participation, while allowing for "streamlined administrative review decisionmaking for site-specific development applications."); Section 76-25-106, MCA, (a process for the applicable municipalities to follow when developing and adopting a land use plan, including a public participation plan detailing how the local government will meet the requirements of this section."); and Section 76-25-106, MCA, (detailed provisions for public participation in the adoption, amendment, or update of a land use plan or implementing regulations under MLUPA).

Kuhnle/Kenck argue that MAID misapprehends how MLUPA will work. Ct. Doc. 120, 21. Kuhnle/Kenck argue that MLUPA does not undercut the right to participate or know in the

process but simply shifts the public participation process to the front end of the process, i.e., in the development of the land use plan, zoning regulations and subdivision regulations and not at the site-specific development stage.

The League argues that MLUPA provides "extensive opportunities for public participation when a local government develops and decides its land use plan, land use map, zoning regulations, zoning map, and subdivision regulations." Ct. Doc. 144, 3. The League argues MAID is attempting to have a second opportunity at the administrative review phase of the site-specific development proposal to express opposition to the land use plan which was developed after public participation in the development of the land use plan and regulations. *Id.*

The State, Shelter WF and League argue that MLUPA's shift of public participation process to the front end of the process in the development of a land use plan and regulations is recognized in the implementation statutes. MLUPA requires public participation in the development of a land use plan (Section 76-25-106, MCA), in the adoption or amendment of zoning regulations and maps (Section 76-25-304(2)(a), MCA), and public notice and public participation prior to the adoption or amendment of subdivision regulations. (Section 76-25-403(2), MCA).

MAID cites *Jones v. County of Missoula,* 2006 MT 2, 330 Mont. 205, 127 P.3d 406, which involved the extension of health benefits to domestic partners of Missoula County employees. The Montana Supreme Court held that a "significant public interest" is defined as "…***any non-ministerial decision or action***…which has meaning to or affects a portion of the community. *Id.* ¶ 16 emphasis added)." In *Jones*, The Montana Supreme Court said:

> The term "significant public interest" is not defined in the Montana Public Meeting Act. This Court has not previously defined the term in the context of § 2-3-103(1), MCA. However, in 1998, the Attorney General addressed this issue, and concluded that "any non-ministerial decision or action of a county commission which has

> meaning to or affects a portion of the community requires notice to the public and the opportunity for the public to participate in the decision-making process." 47 Mont. Op. No. 13 Atty. Gen. at 6. The Attorney General reasoned that the term significant public interest, as it applies to public participation in agency actions, is limited by § 2-3-112(3), MCA, which excepts a decision involving no more than a ministerial act from the requirements of § 2-3-103(1), MCA. 47 Mont. Op. No. 13 Atty. Gen. at 5. **The Attorney General opined that a ministerial act was one performed pursuant to legal authority, and requiring no exercise of judgment**. 47 Mont. Op. No. 13 Atty. Gen. at 5. (emphasis added).

Id.

The Montana Supreme Court also explained that because of national attention given to its decision in *Snetsinger v. Mont. Univ. Sys*., 2004 MT 390, 325 Mont. 148, 104 P.3d 445, there was an indication that Missoula County's decision to extend health care benefits to domestic partners was one of significant public interest. *Id.,* ¶ 19. In *Snetsinger*, the Montana Supreme Court held that Montana University System's policy of extending dependent health care benefits to university employees, who claimed they were married by common law, while denying benefits to same-sex domestic partners, violated the equal protection clause, Article II, Section 4, of the Montana Constitution. *Snetsinger*, ¶¶ 27, 35. In *Jones,* the Supreme Court noted that its *Snetsinger* decision received state and nation-wide coverage in the media due to the high level of public interest in issues relating to gay and lesbian rights. *Id.,* ¶ 20. Consequently, the Montana Supreme Court held, "With all the public attention and scrutiny attendant to government decisions surrounding health insurance benefits for domestic partners, we conclude that the issue of extending health insurance benefits to the domestic partners of Missoula County employees is an issue of significant public interest." *Id.*, ¶ 22. In a subsequent case, the Montana Supreme Court "note[d] that the *Jones* inquiry regarding "significant public interest" was fact-intensive. *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 29, 334 Mont. 86, 146 P.3d 714.

MAID argues that the Legislature may not evade the constitutional right of public participation by making reviews of on site-specific developments as "ministerial." Ct. Doc. 137,

11. Notably, even a "ministerial permit" under MLUPA does not preclude all judgment in the issuance of such a permit because it is "based on objective standards involving little or no personal judgment" on the part of the planning administrator (§ 76-25-103(22), MCA).

With respect to an application for a proposed development under the zoning laws the application is reviewed by the planning administrator who may approve, approve with conditions or deny the application without any further public review or comment except through the appeal process. Section 76-25-305(4), MCA. This subsection does not mention "ministerial." A similar subsection applies to an application for approval of a preliminary plat of a subdivision. An application is reviewed by the planning administrator who "shall issue a written decision to approve, approve with conditions, or deny the preliminary plat" without any further public review or comment except through the appeal process. Section 76-25-408(7), MCA. This subsection does not mention "ministerial."

The relevant inquiry is whether the public official exercises judgment in the decision on an application. In *State ex rel. Div. Worker's Compensation v. District Court*, 246 Mont 225, 229, 805 P.2d 1272, 1275 (1990), the Montana Supreme Court defined "ministerial act" as:

> …an act performed in a prescribed legal manner, in obedience to the law or the mandate of legal authority, without regard to, or the exercise of, the judgment of the individual upon the propriety of the act being done.

MAID argues that the ultimate site-specific decision of the planning administrator approving, conditionally approving, or disapproving permits or applications under the zoning and subdivision laws involves discretion and judgment on the part of the planning administrator. Ct. Doc. 137, 14. As the Supreme Court has reinforced, a ministerial act for purposes of an exception to the constitutional right to participate is one performed pursuant to legal authority, and requiring no exercise of judgment. Further, § 2-3-112(3), MCA, provides that the requirements for procedures

to assure notice and public participation do not apply to a "decision involving no more than a ministerial act." The decision of the planning administrator involves more than a ministerial act. The Court agrees with MAID's argument.

Although public participation is not an issue with the development of a land use plan and zoning and subdivision regulations, it is an issue with the review and approval of an application for a zoning permit or preliminary plat of a subdivision. The dominant issue here is whether MLUPA is facially unconstitutional. The Court concludes that Section 76-25-106(4)(d), MCA, Section 76-25-305 (4), (5)(a)(b)(c)(d) and (6)(a)(b) MCA, and Section 76-25-408 (7)(a)(b), (8)(a)(i)(ii)(ii) and (b) MCA, of MLUPA violate Article II, Section 8 of the Montana Constitution. These provisions of the law precluding public participation without notice and opportunity to be heard at the decision making stage by the planning administrator on a proposal for a site-specific development are facially unconstitutional. This blanket prohibition for notice and opportunity to be heard offends the Constitution.

The Court recognizes that one of the Legislative purposes here is to facilitate administrative review of the proposals for zoning permits or applications for preliminary plat approval of a subdivision. MAID suggests that an administrator should not be the entity conducting the review but should be a public body. In this regard, the Court also recognizes that the Court "cannot dictate process to government agencies administering programs and functions within their authority" and this Court's role is limited to assessing compliance with the Constitution. *See*, *Citizens for a Better Flathead v. Bd. of County Comm'rs*, 2016 MT 256, ¶ 49, 385 Mont. 156, 381 P.3d 555. The Court also recognizes that the "Montana Constitution is to be given a broad and liberal interpretation. (citation omitted)…While the Legislature is free to pass laws implementing constitutional provisions, its interpretations and restrictions will not be elevated over the

protections found within the Constitution." *Bryan v. Yellowstone County Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 23, 312 Mont. 257, 60 P.3d 381. Characterizing the decisions to be made by the planning administrator in the review and approval process as ministerial, when they are obviously discretionary, does not validate those provisions under the Constitution.

Concerning the third reason, MAID also argues MLUPA is discriminatory on its face in violation of equal protection. "'To prevail on an equal protection challenge, the plaintiff 'must demonstrate that the law at issue discriminates by impermissibly classifying individuals and treating them differently on the basis of that classification.' (citation omitted). A plaintiff must first show that the challenged law creates a classification between two classes which are otherwise similarly situated. (citation omitted*)."* *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 90, | 382 Mont. 256, 368 P.3d 1131.

MAID argues that MLUPA creates a separate new subdivision law for cities with populations of at least 5,000 residents in counties of 70,000 residents, which is different from the current "Montana Subdivision and Platting Act" ("MSPA"), § 76-3-101 et seq, MCA. Under the MSPA, the process for subdivision review includes a planning board and governing body with public participation. MAID compares the MSPA process to the process provided for in MLUPA and reasons that citizens in cities subject to MLUPA are discriminated against as opposed to citizens in counties subject to MSPA; and citizens in cities subject to MLUPA are discriminated against as opposed to citizens in cities not subject to MLUPA. However, on this issue MAID does not engage in the analysis of the test to determine if an equal protection violation has occurred based upon differences in procedures applicable to city residents and county residents or city residents subject to different procedures based upon population. The test to determine an equal protection violation is discussed below.

EQUAL PROTECTION

MAID requests the Court to declare that any attempt by municipalities to develop an ordinance pursuant to the new laws is unconstitutional because the new laws deny "Plaintiffs" their rights to equal protection of the law. Ct. Doc. 3, 59. MAID alleges that the new laws create two classes of municipal residents who face different consequences. For purposes of its equal protection claim MAID does not specify which of its members claim the denial of equal protection. It appears that it may be the members who are identified as those owning property, which is not subject to restrictive covenants, but to zoning ordinances.

Under the Fourteenth Amendment to the United States Constitution, and Article II, Section 4, of the Montana Constitution, no person shall be denied equal protection of the laws. Under Montana law, equal protection claims are analyzed according to a three-step process: "(1) identify the classes involved and determine if they are similarly situated; (2) determine the appropriate level of scrutiny to apply to the challenged legislation; and (3) apply the appropriate level of scrutiny to the challenged statute." *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 28, 374 Mont. 453, 325 P.3d 1211 (citing *Henry v. State Comp. Ins. Fund,* 1999 MT 126, ¶ 27, 294 Mont. 449, 982 P.2d 486). "The basic rule of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment." *Id.* (*Rausch v. State Compen. Ins. Fund,* 2005 MT 140, ¶ 18, 327 Mont 272, 114 P.3d 192).

The Court identifies similarly situated classes by isolating the factor allegedly subject to impermissible discrimination; if two groups are identical in all other respects, they are similarly situated. *Hensley v. Mont. State Fund,* 2020 MT 317, ¶ 19, 402 Mont. 277, 477 P.3d 1065. "If the classes are not similarly situated, then it is not necessary for [the Court] to analyze the challenge further." *Vision Net, Inc. v. State*, 2019 MT 205, ¶ 16, 397 Mont. 118, 447 P.3d. 1034. Only if a

plaintiff survives step one do courts proceed to determining the appropriate level of scrutiny. *Gazelka v. St. Peter's Hop.*, 2018 MT 152, ¶ 15, 392 Mont. 1, 420 P.3d 528.

If the relevant classifications have been identified, the court then determines the appropriate level of scrutiny to apply: strict scrutiny, middle-tier scrutiny, or rational basis scrutiny to the statute. *Snetsinger v. Mont. Univ. Sys.,* 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445. The Court then applies the appropriate level of scrutiny to the statute. *Id.*

The threshold question is whether the two classes involved are similarly situated for purposes of equal protection consideration. In *Snetsinger,* the Montana University System provided health insurance coverage for employees and their beneficiaries but prohibited employees from receiving insurance coverage for their same-sex domestic partners. Plaintiffs challenged the constitutionality of the University's policy. The district court held that the relevant classification was marital status and rejected plaintiff's challenge. *Id.*

The Montana Supreme Court disagreed, concluding that the district court misinterpreted the University System policy. The Supreme Court said, "marital status is not the defining difference." *Id.,* ¶ 27. The Supreme Court observed that "unmarried opposite-sex couples are able to avail themselves of health benefits under the University System's policy while unmarried same-sex couples are denied the health benefits." *Id.* The Supreme Court found that these two groups were "similarly situated in all respects other than sexual orientation" and concluded they were not treated equally and fairly. *Id*.

In *Planned Parenthood of Montana v. State*, 2024 MT 178, 417 Mont 457, 554 P.3d 153, the Montana Supreme Court considered the constitutionality of The Parental Consent for Abortion Act of 2013, which conditioned a minor's right to obtain an abortion on parental consent unless a judicial waiver was obtained. It did not require a corresponding limitation on a minor who sought

medical or surgical care otherwise related to her pregnancy or her child. For purposes of equal protection, the Supreme Court found the similarly situated individuals were "pregnant minors who want to obtain an abortion" and "pregnant minors who do not want an abortion" because they were alike in all respects except their choice to receive an abortion. The regulations only affected minors seeking an abortion. *Id.*, ¶ 28.

MAID submits that the challenged laws result in two classes of municipal residents as being similarly situated, "those who are fortunate enough to live in areas protected by restrictive covenants" and those "who do not live in these restrictive covenant areas." Ct. Doc. 94, 9. MAID contends that homeowners who do not live in the restrictive covenant areas "will suffer inordinately the full burden of these legislative measures." Ct. Doc. 94, 9. MAID alleges that its single-family zoned residential members will suffer injury by diminishing their right to public participation in zoning and other decisions affecting their single family residences, by allowing duplexes and ADUs in their neighborhoods, by forcing these members to carry the burden of "top-down" zoning without the opportunity to participate, and by denying them equal protection and due process. Ct. Doc. 3, ¶ 33. Public participation is discussed in the preceding section of this Decision.

Kuhnle/Kenck, who are not subject to restrictive covenants, disagree with MAID's characterization that they are somehow disadvantaged by the new laws. Kuhnle/Kenck contend that the argument can be made that MAID's members who are not subject to restrictive covenants are the beneficiaries of these new laws while residents subject to restrictive covenants are "unfortunately" unable to take advantage of the State's zoning reforms. Kuhnle/Kenck refer to their situations. They would like to construct structures previously not allowed under their local zoning schemes. Ct. Doc. 117, 6. They cannot see how they have been harmed by the loosening

of regulatory restrictions on how they can use their own property. Kuhnle intends to build an ADU to use as an investment property. Kenck intends to build a duplex to support his aging brothers. *Id.*

The Court finds that the two groups of homeowners for purposes of the equal protection analysis are those whose properties are subject to private restrictive covenants and those whose properties are not. The crux of MAID's argument rests on a restrictive covenant limiting property to a single-family residence and a zoning law which would permit allow a duplex or ADU on a lot zoned for a single-family residence. MAID does not cite any other restrictive covenant. A restrictive covenant is defined as a "[p]rovision in a deed limiting the use of the property and prohibiting certain uses." (citation omitted). *Scherpenseel v. Bitney*, 263 Mont 68, 74, 865 P.2d 1134 (1993). Assuming the validity of the restrictive covenant involved in this case, i.e., restriction for single-family residences, the Montana Supreme Court has recognized "[z]oning ordinances cannot destroy, impair, abrogate or enlarge the force and effect of an existing restrictive covenant (citation omitted)." *State ex rel. Region II Child & Family Servs. v. District Court*, *supra.* Thus, a homeowner whose property is subject to a restrictive covenant would be bound by the covenant. A homeowner whose property is not subject to a restrictive covenant but whose property is in a zoning area would be bound by the applicable zoning ordinance. Shelter WF argues that those classes existed prior to MLUPA and the new laws. Ct. Doc. 120, 4. Shelter WF also argues the new laws are not the isolating factor behind the alleged discrimination. *Planned Parenthood,* ¶ 29. However, it is the action of private property owners to create covenants, or not create covenants, that creates the difference.

"The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."

Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992). "[A] 'statute does not violate the right to equal protection simply because it benefits a particular class,' as discrimination only exists when people in similar circumstances are treated unequally." (quoting *Wrzesien v. State,* 2016 MT 242, ¶ 9, 385 Mont. 61, 380 P.3d 805). *Gazelka*, 2018 MT 152, ¶ 16. "[T]he equal protection clause does not preclude different treatment of different groups so long as all individuals within the group are treated the same. (citation omitted). Thus, to prevail on an equal protection challenge, a party must demonstrate that the State has adopted a classification which discriminates against individuals similarly situated by treating them differently based on that classification. (citation omitted)." *Rausch v. State Comp. Ins. Fund*, 2005 MT 140, ¶ 18, 327 Mont. 272, 114 P.3d 192.

Kuhnle/Kenck and Shelter WF also argue that treating individuals who have voluntarily entered private covenants restricting how they are allowed to alter their property differently from individuals who have not chosen to do so is not unequal treatment. Ct. Doc. 117, 8; Ct. Doc. 120, 18. Rights created by restrictive covenants are contractual rights. *Sheridan v. Martinsen*, 164 Mont. 383, 523 P.2d 1392, 1395 (1974). A covenant is a contract and an ordinance is not. *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 899 (7th Cir. 2004). A restrictive covenant is not a provision of a zoning code. *Lewington v. Parsons*, 2016 Wash. App. LEXIS 957, ¶ 33. A restrictive covenant is a private agreement restricting the use of land, largely as a matter of property common law. *Id.* A zoning code is the exercises of the police power, the power of government to regulate in the public interest. *Id*

Citing *Gazelka v. St. Peter's Hosp.*, ¶ 23, Shelter WF argues that the Montana Supreme Court has rejected contract-based equal protection arguments. At issue in *Gazelka* was the Montana Preferred Provider Agreements Act, §§ 33-22-1701 to -1707, MCA, which allowed for

Preferred Provider Agreements (PPAs) in Montana. A PPA is an agreement between an insurer and a healthcare provider reducing the amount of money a provider will accept as satisfaction for an insured person's treatment. Consequently, two patients may ultimately pay different amounts for treatment depending on whether the patient is insured or uninsured and, if insured, depending on the terms of a particular PPA. If a patient is uninsured, the patient pays the amount the provider charged, less any discount she may receive through a provider's financial assistance program. Uninsured persons are not parties to and do not benefit from PPAs. If a patient is insured, the patient or the insurer pays the amount the provider agreed to accept as satisfaction for that treatment pursuant to the negotiated PPA. *Gazelka*, ¶ 3. In *Galzeka* the plaintiff was the uninsured who did not have a contract with insurers and claimed the denial of equal protection. The Montana Supreme Court held the classes were not similarly situated because insured patients who have contracts with insurers and pay insurance premiums are in completely different positions than uninsured patients who do not have contracts with insurers or pay for the benefits of negotiated, reduced fees. *Id.*, ¶ 23. Classes cannot be similarly situated based on whether they have entered into private contracts.

Further, Shelter WF argues that Montanans can choose to buy a home in an area subjected to restrictive covenants, or they can choose not to. Shelter WF, 120, 19. MAID points out that many residents came into cities with restrictive covenants. However, Shelter WF points out that a person who chooses a home subject to restrictive covenants voluntarily opts out of public reform. *Id.* Shelter WF contends that nothing prohibits existing property owners from banding together with their neighbors and agreeing on new covenants that would limit their own property rights by prohibiting ADUs. Thus, Shelter WF maintains that there is nothing invidious about people choosing to make home-buying decisions in this context and that economic decision-making of

this sort cannot make these alleged "classes of homeowners similar for equal protection purposes. *See, e.g., Kohoutek v. DOR* 2018 MT 123, ¶ 37, 391 Mont. 345, 417 P.3d 1105 (independent business decision renders businesses dissimilar classes for equal protection purposes). *Id.*

In this case, the classes are not similarly situated. They are not alike in all respects. One group is governed by restrictive covenants concerning single-family residences. The other group is governed by zoning ordinances. MLUPA did not create that difference. It existed before the enactment of MLUPA.

MAID also argues that MLUPA eliminates the "Lowe criteria" for cities with at least 5,000 residents in counties of at least 70,000 residents. Ct. Doc. 94, 15. The "Lowe criteria" found in § 76-2-304, MCA, requires cities in considering zone changes to consider nine criteria, including the city's growth policy. The "Lowe criteria" is based on the case *Lowe v. City of Missoula,* 165 Mont. 38, 41, 525 P.2d 551, 553 (1974). A city subject to MLUPA that complies with MLUPA is not subject to any provision of Title 76, chapters 1, 2, 3, or 8. Section 76-25-105, MCA.

The State asserts that MAID merely makes the perfunctory conclusion that having different criteria for larger Montana cities is discriminatory treatment and a denial of equal protection." Ct. Doc. 113, 10. The State argues MAID does not engage in an analysis to identify two similarly situated classes for purposes of a claim of denial of equal protection with respect to the "Lowe criteria." The Court agrees with the State.

MAID has not satisfied the first step of the analysis. MLUPA does not deny MAID and its members equal protection of the laws because the classes are not similarly situated. Consequently, the Court is not required to analyze the challenge further. *Vision Net, Inc., supra.*

MAID's Equal Protection claim fails.

SUBSTANTIVE DUE PROCESS

MAID argues that the 2023 zoning and planning laws collectively violate due process because they are arbitrary and not reasonably tailored to government needs. The Fourteenth Amendment to the United States Constitution and Article II, section 17 of the Montana Constitution provide that no person shall be deprived of life, liberty, or property without due process of law. The guarantee of due process has both a procedural and a substantive component. Procedural due process is not an issue here. Substantive due process bars arbitrary governmental actions regardless of the procedures used to implement them and serves as a check on oppressive governmental action. *State v. Egdorf*, 2003 MT 264, ¶ 19, 317 Mont. 436, 77 P.3d 517 (citing *Englin v. Bd. of County Com'rs,* 2002 MT 115, ¶ 14, 310 Mont. 1, 48 P.3d 39).

The Montana Supreme Court has said: "In reviewing constitutional challenges to legislative enactments, the 'constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt.'" (citations omitted). Thus, the party challenging a statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute. (citation omitted). *Egdorf*, ¶ 12.

Courts "analyze substantive due process claims by examining (1) whether the legislation in question is related to a legitimate governmental concern, and (2) whether the means chosen by the Legislature to accomplish its objective are reasonably related to the result sought to be attained." *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 21, 382 Mont. 256, 368 P.3d 131(citing *Walters v. Flathead Concrete Prods.,* 2011 MT 45, ¶ 18, 359 Mont. 346, 249 P.3d 913). "Substantive due process analysis requires a test of the reasonableness of a statute in relation to the State's power to enact legislation." *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 29, 302 Mont. 518, 15 P.3d 877 (quoting *Newville v. State Dept of Family Services*, 267 Mont.

at 250, 883 P.2d at 801). "Since the State cannot use its power to take unreasonable, arbitrary or capricious action against an individual, a statute enacted by the legislature must be reasonably related to a permissible legislative objective in order to satisfy guarantees of substantive due process." *Id.*

The first step is for the Court to examine the purpose of the legislation. *Mont. Cannabis Indus. Ass'n*, ¶ 22. A purpose may be explicit, or otherwise. *Id.* SB 382 (MLUPA) contains sections explaining the purpose of the legislation. "It is the purpose of this chapter to promote the health, safety, and welfare of the people of Montana through a system of comprehensive planning that balances private property rights and values, public services and infrastructure, the human environment, natural resources, and recreation, and a diversified and sustainable economy." Section 76-25-102(1), MCA. Among other findings, the Legislature finds that "coordinated and planned growth will encourage and support…(a) sufficient housing units for the state's growing population that are attainable for citizens of all income levels…" Section 76-25-102(2)(a), MCA. SB 245 (urban areas), SB 323 (duplex), and SB 528 (ADU) do not state explicit purposes. However, their purposes "may be any possible purpose of which the court can conceive." *Id.* These Bills were adopted by the 2023 Montana Legislature with MLUPA. The State contends it easily has a legitimate purpose in mitigating the harm that housing shortages impose on all Montanans. Ct. Doc. 113, 13-14. In general, these new laws when considered together allow for an additional living unit, such as a duplex or ADU, on a lot that previously was restricted to a single-family residence by a zoning ordinance. Although the term "affordable housing" is not used in § 76-25-102, MCA, the Legislature expresses a concern about the availability of housing for "[Montana] citizens" of "all income levels." Although the term "affordable housing" is not used in SB 245, SB 323 and SB 528, the Legislature's concern to allow additional housing in larger

municipalities and ADUs in all cities is a legitimate purpose. Further, MAID recognizes that Montana has a "housing affordability problem." Ct. Doc. 94, 4. The State asserts that SB 382 reworks how Montana's municipalities "go about planning and development, streamlining burdensome regulations to increase opportunities for new development and, in turn, increase the supply of housing." Ct. Doc. 113, 4. Clearly, housing affordability is a legitimate governmental concern and the new laws at issue relate to that concern.

One "possible legitimate purpose" is enough for the Court to conclude that the first step in the substantive due process analysis is satisfied. *Satterlee,* ¶ 34. Having made the determination that the new laws serve a legitimate objective, the Court considers the second step of the analysis of whether these laws are reasonably related to the intended objective. *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 30.

When considering the second step the Court's function is to determine whether the statutes are reasonably related to achieving a legislative purpose. *Powell,* ¶ 29. MAID argues that there is nothing in the new laws that directly addresses Montana's affordable housing problem. Ct. Doc. 94, 4. MAID's argument is premised on the proposition that apparent inconsistencies in the new laws and different applications of the new laws to differently sized cities result in arbitrariness. For example, MAID argues that the new laws are "geographically haphazard." Ct. Doc. 94, 17. MAID points out that the new laws each have separate definitions of which cities are covered by the laws. SB 528 requiring the allowance of an ADU applies to all Montana cities. SB 382, MLUPA, applies to all Montana municipalities with a population of at least 5,000 residents, located in counties with at least 70,000 residents. SB 323, requiring an allowance of duplexes in single-family zoned area, applies to cities with a population of at least 5,000 residents, but it does not have the county population of 70,000 residents that is in SB 382. MAID also argues that

conflicting definitions in the laws are arbitrary. SB 382 requires affected municipalities to select five housing "strategies" out of a list of 14. § 76-25-302, MCA. Of the 14, the first listed is the allowance of "duplexes" in all areas zoned for single-unit dwelling. SB 323 requires the allowance of duplexes in all affected cities (a city with a population of at least 5,000 residents) in all areas where "single family residence is a permitted use." MAID observes that each of these measures has its own definition of "duplex", and these definitions are different.

SB 382 defines "duplex" as "a building designed for two attached dwelling units…which …share a common separation." Section 76-25-103(36). SB 323 defines "duplex housing" as "….a parcel or lot with two dwelling units that are designed for residential occupancy by not more than two family units living independently from each other." Section 76-2-304(5)(a), MCA.

MAID agrees that these differences do not necessarily mean they violate the Constitution, but contends that when they are taken cumulatively, they are so "numerous and pervasive" and arbitrary such that they violate substantive due process. Ct. Doc. 94, 18-19.

MAID relies on *Moore v. East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed. 2d 531 (1977) to support its position. In *Moore,* the plaintiff lived in her home together with her son and two grandsons, who were first cousins. *Id.,* at 496-497. The City of East Cleveland's housing ordinance defined "family" to forbid plaintiff from having her two grandsons live with her. Plaintiff challenged the ordinance on the grounds it arbitrarily defined "family." The new definition meant that, by having one of her grandsons live with her, plaintiff violated the housing ordinance. Plaintiff was charged and convicted of violating the housing ordinance. The United States Supreme Court invalidated the ordinance, finding that the City of East Cleveland "regulate[d] the occupancy of its housing by slicing deeply into the family itself." *Id.* at 498. The Supreme Court said:

> When a city undertakes such intrusive regulation of the family …the usual judicial deference to the legislature is inappropriate.
>
> * * *
>
> When thus examined, this ordinance cannot survive. The city seeks to justify it as a means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system. Although these are legitimate goals, the ordinance before us serves them marginally, at best. For example, the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation. The ordinance would permit a grandmother to live with a single dependent son and children, even if his school-age children number a dozen, yet it forces [plaintiff] to find another dwelling for her grandson John, simply because of the presence of his uncle and cousin in the same household. We need not labor the point. Section 1341.08 HN3 has but a tenuous relation to alleviation of the conditions mentioned by the city.

Id. at 499-500. As quoted above, the Supreme Court found that "preventing overcrowding, minimizing traffic and parking congestion and avoiding an undue financial burden on East Cleveland's school system" were legitimate goals. However, the Supreme Court recognized that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Id.* at 503-504.

In this case, unlike in *Moore,* MAID does not base its alleged substantive due process violation of a fundamental right but on alleged arbitrariness. Indeed, MAID cites *State v. Sedler,* 2020 MT 248, ¶17, 401 Mont. 437, 473 P.3d 406 which held "where a fundamental right is not implicated, '[s]ubstantive due process requires a test of the reasonableness of a statute in relation to the State's power to enact legislation'." Ct. Doc. 137, 26. Although MAID asserts that the fundamental constitutional rights of its members are involved in this case, its alleged substantive

due process claim is based on the assertion that the new laws are "pervasively and irredeemably arbitrary." *Id.*, *27. Moore* is not helpful to the Court's analysis.

The State argues that the new laws are the Legislature's reasonable response to the State's housing shortage. Ct. Doc. 113, 4. MAID agrees that the "(legitimate) governmental end of the challenged zoning laws is addressing the affordability of housing." Ct. Doc. 94. The State argues that the goal of the new laws is to "streamline" government approval of land use proposals in MLUPA to enhance housing construction and to address the State's legitimate interest in mitigating harm caused by housing shortages. The State characterizes the new laws as concrete steps toward alleviating the problem with housing shortages.

The State contends that SB 528 and SB 323 create more housing supply through ADU's and duplexes. SB 245 ensures that all urban areas facilitate a regulatory environment that is not hostile to mixed-use and multi-unit development.

The State argues that the different definitions of "duplex" in SB 323 and SB 382 are not contradictory resulting in arbitrariness to deny substantive due process. The State urges the Court to apply the rules of statutory construction to determine whether the definitions are contradictory. When interpreting a statute, the Court's function is to implement the objectives the Legislature sought to achieve, and if the legislative intent can be determined from the plain language of the statute, the plain language controls. *Montanans v. State,* 2006 MT 277, ¶ 60, 334 Mont. 237, 146 P.3d 759. "Furthermore, a statute 'must be read as a whole, and its terms should not be isolated from the context in which they were used by the Legislature.'" *Eldorado Coop Canal Co. v. Hoge*, 2016 MT 145, ¶ 18, 383 Mont. 523, 373 P.3d 836 (quoting *Fellows v. Saylor*, 2016 MT 45, ¶ 21, 382 Mont. 298, 367 P.3d 732) (citation omitted). A statute must be interpreted "as a part of a whole statutory scheme and construe it so as to forward the purpose of that scheme" and "to avoid an

absurd result." *Eldorado Coop Canal Co*., ¶ 18 (quoting *Stokes v. Mont. Thirteenth Judicial Dist. Court*, 2011 MT 182, ¶ 15, 361 Mont. 279, 259 P.3d 754).

SB 382 (§ 76-25-103(36), MCA) is codified in a different section from SB 323 (§ 76-2-304(5)(a), MCA). SB 382 creates a new statutory scheme in the Montana Land Use Planning Act. SB 382 defines "two unit dwelling" or "duplex" as being a "building designed for two attached dwelling units in which the dwelling units share a common separation, such as a ceiling or wall, and in which access cannot be gained between the units through an internal doorway." Section 76-25-103(36), MCA. Under MLUPA, a municipality subject to the Act, i.e. a "municipality with a population at or exceeding 5,000 located within a county with a population at or exceeding 70,000" must include in its zoning regulations a minimum of five of the 14 housing strategies specified in the Act. Section 76-25-302(1), MCA.[4] The first discretionary strategy is "to allow, as a permitted use, for at least a duplex where a single-unit dwelling is permitted." Section 76-25-302(1), MCA. Thus, pursuant to MLUPA a municipality that is required to follow MLUPA may include as one of its strategies provisions for a duplex as defined in § 76-25-103(36), MCA ("As used in this chapter, unless the context or subject matter clearly requires otherwise, the following definitions apply…**duplex…**" (emphasis added). Section 76-25-103(36), MCA).

SB 323 (Section 76-2-304(5)(a), MCA) defines "duplex housing" as "a parcel or lot with two dwelling units that are designed for residential occupancy by not more than two family units living independently from each other." Section 76-2-304, MCA, applies to the following cities:

> (3) In a city with a population of at least 5,000 residents, duplex housing must be allowed as a permitted use on a lot where a single-family residence is a permitted use, and zoning regulations that apply to the development or use of duplex housing

[4] "A local government that is not required to comply with the provisions of this chapter may decide to comply with the provisions of this chapter by an affirmative vote of the local governing body." Section 76-25-105(3)(a), MCA.

> may not be more restrictive than zoning regulations that are applicable to single-family residences.
>
> (4) (a) In a municipality that is designated as an urban area by the United States census bureau with a population over 5,000 as of the most recent census, the city council or other legislative body of the municipality shall allow as a permitted use multiple-unit dwellings and mixed-use developments that include multiple-unit dwellings on a parcel or lot that…

Thus, in a city with a population of at least 5,000 residents duplex housing must be allowed.

The definitions of "duplex" and "duplex housing" need to be read in conjunction with the type of municipality or city in which a "duplex" or "duplex housing" is required or permitted. Clearly, these laws are not contradictory when its terms and definitions are read as a whole and not isolated from the context in which they are used by the Legislature. As MAID acknowledges "[I]f the only issue here were a difference in the definition of 'duplex', between two of the contested measures, MAID would not be here." Ct. Doc. 137, 27. That acknowledgement is consistent with the Court's conclusion that the new laws relating to "duplex" and "duplex housing" are clear and not contradictory.

MAID also includes the provisions for ADUs in its collective challenge to the new laws. SB 528 requires all Montana cities to allow ADUs. Section 76-2-345, MCA. MAID points out that Section 76-25-302(1)(e), MCA, lists allowing ADUs as a permitted use in areas zoned for single-family primary dwelling residences as one of the 14 housing strategies of MLUPA. MAID argues that this is a contradiction which indicates that there was little coordination among the various sponsors of the new laws. Ct. Doc. 94, 18. MAID argues that the applicability of the new laws to different municipalities and the dates of applicability contribute to the arbitrariness of the laws.

The State argues that MAID's accusation of arbitrariness is not supported by the reasons for the new laws. For example, the State argues that SB 528, the ADU allowance statute, applies

to all Montana cities. The State asserts, "Housing shortage may affect different areas differently, but the whole state generally benefits from increased new development." Ct. Doc 113, 15. SB 323 and SB 245 both deal with expanding permissions for duplex housing, and mixed-use and multi-unit development in urban areas. While the new laws generally respond to the issue of housing shortage across the state, the State argues these provisions respond to the unique challenges all large cities face. SB 382, MLUPA, specifically responds to issues uniquely faced by some of Montana's most densely populated cities. It is reasonable for the Legislature to have concern for the unique issues facing densely populated cities in densely populated counties. These new laws are not arbitrary.

MAID asserts, "[T]he lack of coordination and these geographic and applicability anomalies do not necessarily mean they conflict with the Constitution. It is well established that legislative enactments enjoy a presumption of constitutionality, and courts, absent special contrary reasons normally accord great deference to legislative enactments. Not every arbitrary enactment rises to the level of a violation of the Constitution." Ct. Doc. 94, 19. However, MAID argues that these laws, taken collectively, are so arbitrary that they violate substantive due process.

Here, the issue is whether the means chosen by the Legislature to accomplish its objective in these various zoning and planning laws are reasonably related to the result sought to be attained. Clearly, each of the challenged new laws are reasonably related to achieving the purpose of addressing the affordable housing problem. Considering them collectively in the overall scheme of the Legislature's purpose does not diminish their constitutionality. Through the provisions of these laws the Legislature has enunciated its means for achieving its purposes. It is not the Court's function to second guess the prudence of the Legislature. *Satterlee v. Lumberman's Mut. Cas. Co.*, ¶ 34. MAID's alleged violation of substantive due process fails.

ARROGATION OF LOCAL POWER

MAID argues the new laws undercut the authority of local governments that have self-government powers to regulate local affairs. Ct. Doc. 94, 26. It appears that MAID mainly focuses on four areas: (1) SB 528 (§ 76-2-345, MCA) which requires the allowance of ADUs on lots now zoned for single-family residences, (2) SB 323 (§ 76-2-304, MCA - the duplex law), (3) SB 382 (MLUPA – § 76-25-302(1)(d) MCA), which requires municipalities to select at least five of the listed 14 strategies for implementation, including one which calls for either an elimination of or a 25% across-the-board decrease in impacts for dwelling units; and (4) a deprivation of Montanans rights to publicly participate at the local government level by "front-loading" public comment.

MAID asserts these measures unconstitutionally interfere with the self-government powers of Montana's municipalities. MAID accuses the Legislature of micromanaging local zoning which constitutes an invasive incursion into powers that traditionally have been considered local.

MAID points out that there are 34 municipalities in Montana that have self-government charters, including Belgrade, Billings, Bozeman, Great Falls, Helena, Missoula and Whitefish. Ct. Doc. 94, 32-33. MAID also points out that most Montana cities already have regulations allowing ADUs, specifically referring to Billings, Bozeman, Great Falls, Whitefish, and Kalispell. Ct. Doc. 94, 26-27. These facts are not disputed.

Article XI, Section 6, Mont. Const. provides, "A local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter." "In Montana, a local government with self-governing powers may exercise any power or provide any service except those **specifically prohibited** by the constitution, laws, or its charter. (Art. XI, Sec. 6, Mont. Const.; §§ 7-1-101 and 7-1-102, MCA)." *Ennis v. Stewart*, 247 Mont. 355, 361, 807 P.2d 179 (1991). The Montana Supreme Court recently explained this principle:

> However, local government units that adopt self-government powers through a charter, see Article XI, Sections 5 and 6, of the Montana Constitution, will "share powers with the state government" and have "considerably more freedom in determining their local affairs." Committee Proposals, pp. 796-97. This new constitutional provision reversed the general rule requiring legislative action before local action was permitted:
>
> > Legislative inaction no longer could block local action; instead, such inaction on the state level would serve as a go-ahead for local governments. Significantly, the "shared powers" concept *does not leave the local unit free from state control*; it does, however, change the basic assumption concerning the power of local government. At present [under the 1889 Montana Constitution], that assumption is that local government lacks power unless it has been specifically granted. Under the shared powers concept, the assumption is that local government possesses the power, *unless it has been specifically denied.*
> >
> > The legislature, in areas such as pollution control where statewide uniformity is desirable, still could impose statewide standards under the shared powers concept. Some areas—such as the definition and punishment of felonies—undoubtedly would be retained by the legislature.
>
> Committee Proposals, p. 797 (italicized emphasis added); see also Convention Transcript, p. 2528 (discussing once a charter is adopted, it is the local government's form of government "and they don't have to follow any of the other statutes, except for . . . wherever they're limited [by the Legislature]"); Convention Transcript, pp. 2529-30; *Am. Cancer Soc'y v. State*, 2004 MT 376, ¶ 9, 325 Mont. 70, 103 P.3d 1085. Thus, "[a] local government unit adopting a self-government charter may exercise any power *not prohibited by this constitution, law, or charter*." Mont. Const. art. XI, § 6 (emphasis added).5 See also *Armitage*, ¶ 17 ("The authority of a local government with self-government powers can be limited by express prohibitory language.").

Cottonwood Env't L. Ctr. v. State, 2024 MT 313, ¶ 11, 419 Mont. 457, 2024 Mont. LEXIS 1398.

Section 7-1-111(1)-(30), MCA, specifies several powers which are prohibited for local governments with self-government powers to exercise. Section 7-1-112, MCA, specifies five powers that require delegation. Neither of these statutes prohibit local powers in the land-use area. Section 7-1-105, MCA, provides, “[A]ll state statutes shall be applicable to self-government local units until superseded by ordinance or resolution in the manner provided in chapter 5, part 1 and

subject to the limitations provided in this part." Section 7-1-114(1)(e), MCA, provides, "[A] local government with self-government powers is subject to the following provisions…(e) all laws that require or regulate planning or zoning."

The State argues that by enacting the new laws the Legislature merely modified the scope of the local power it granted to the municipalities. Ct. Doc. 113, 20. The State asserts the Legislature does not violate local power and merely exercised power plainly within its purview. *Id.* MAID asserts that the question here is whether the State's interest in micromanaging the issue of housing affordability is strong enough to overcome local control. Ct. Doc. 94, 34. The State disagrees and asserts the correct question is whether the Montana Constitution permits the Legislature to explicitly prohibit local governments from exercising zoning power. Ct. Doc. 94, 20. Kuhnle/Kenck argue that MAID's claim rests primarily on policy arguments regarding the relative expertise of local versus state official and out-of-state court decisions interpreting other states' constitutions. Ct. Doc. 117, 17. In response to the claim that MAID argues policy, MAID "pleads guilty as charged." Ct. Doc. 17, 31.

To support its acknowledgment about arguing policy, MAID relies on *City of Redondo Beach, et al. v. Rob Bonta,* Case No. 22 Step. 01143 (April 22, 2024). In *Redondo,* the issue was whether a new law which required that a proposed housing development containing no more than two units in a single family residential zoning district be approved ministerially. The primary issue in the case was whether the new law violated a charter city's authority to manage municipal affairs. The California Superior Court noted that under California jurisprudence a state law may overcome the home rule doctrine if it is reasonably related to the resolution of a matter of statewide concern. The California Court then applied a four-part test to resolve the issue of whether the new law superseded local land use authority.

MAID also relies on *Robinson Twp. v. Commonwealth,* 623 Pa 564, 83 A. 3d 901(2013). In that case, Pennsylvania Legislature amended the Pennsylvania Oil and Gas Act by adopting Act 13 relating to oil and gas development. Act 13 curtailed any control by local authorities over oil and gas development. The Pennsylvania Supreme Court considered the constitutionality of the amendments relating to local authority under Article I, Section 27 of the Pennsylvania Constitution which provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. Art. I, § 27. The Pennsylvania Supreme Court concluded that municipalities also have constitutional duties with respect to the environment holding, "[T]he constitutional command respecting the environment necessarily restrains legislative power with respect to political subdivisions that have acted upon their Article I, Section 27 responsibilities." *Id.*, 623 Pa. 564, 689. The Pennsylvania Court held, "in enacting this provision of Act 13, the General Assembly transgressed its delegated police powers which, while broad and flexible, are nevertheless limited by constitutional commands, including the Environmental Rights Amendment." *Id.,*

There is no Montana case like *City of Redondo Beach* or *Robinson Twp.* MAID would have this Court venture into the realm of policy considerations in deciding the issue of whether the Legislature has usurped the powers of self-government municipalities in the area of planning and zoning. The constitutional issue raised here can be decided by reference to Montana's statutes specifying the rules by which self-government municipalities operate.

Sections 76-2-301 and 76-25-301(1) MCA, authorize municipal zoning. Thus, a municipality derives its authority to zone from the state. Shelter WF asserts that § 7-1-114(1)(e),

MCA is the controlling statute in this case. Citing *City of Missoula v. Fox,* 2019 MT 250, Shelter WF argues that the presumption that the powers of self-governing local governments must be liberally construed cannot override a specific legislative preemption, namely, Section 7-1-114(1)(e), MCA. Ct. Doc. 120, 22. The statute at issue in *City of Missoula v. Fox,* § 45-8-351, MCA, provided a city….may not prohibit, register, tax, license…a rifle, shotgun, handgun, or concealed handgun, etc. " *Id.*, ¶ 19. The Montana Supreme Court held, "The express statutory prohibition upon cities in § 45-8-351(1), MCA, is a limitation on Missoula's self-governing powers." *Id.*, ¶ 23. *City of Missoula v. Fox* is not helpful to the Court. Section 7-1-114(1)(e), MCA, does not contain any specific prohibitory language which would limit a self-government municipality from exercising its self-government powers.

The Court focuses on the specific laws identified by MAID. Section 76-2-345, MCA (SB 528) requires a municipality to adopt regulations that allow a minimum of one ADU by right on a lot or parcel that contains a single-family unit. As noted earlier, MAID has identified chartered municipalities which have adopted regulations allowing ADUs. Section 76-2-345(2), MCA, prohibits a municipality from requiring certain conditions on an ADU. MAID acknowledges that § 76-2-345(2), MCA, purports to prohibit certain regulations in relation to ADUs, and in that regard meets the standard to determine whether a power is specifically prohibited. MAID argues the prohibitions in § 76-2-345(2), MCA, drastically curbs local regulation of ADU's. However, the language in § 76-2-345(2), MCA, is specifically prohibitory.

MAID argues § 76-2-304(3) and (5), MCA and § 76-2-309, MCA, (SB 323) are not specifically prohibitory. Sections 76-2-304 and 76-2-309, MCA requires a city with a population of at least 5,000 residents to allow duplex housing as a permitted use on a lot where a single-family residence is a permitted use. MAID reasons that because these laws mandate certain actions the

State is commandeering local government. Ct. Doc. 137, 30. To support its argument MAID relies on *Am. Cancer Soc'y v. State*, 2004 MT 376, 325 Mont. 70, 103 P.3d 1085.

In *Am. Cancer Soc'y* Helena, Missoula, Bozeman, and Great Falls, municipalities with self-government powers, adopted local ordinances limiting-or prohibiting altogether-the smoking of tobacco products in buildings open to the public. Helena adopted an ordinance that applied, without limitation, to premises with state licenses for the operation of video gambling machines. In response to these ordinances, the Legislature enacted Section 7-1-120, MCA,[5] that exempted establishments having video gambling machines on the premises from local government smoking ordinances that are more stringent than the Montana Clean Indoor Air Act of 1979 (MCIAA), §§ 50-40-101 to 109, MCA.

A group of activists sued to challenge the constitutionality of § 7-1-120, MCA. The Supreme Court considered whether the exemption constitutes an express prohibition that forbid local governments with self-government powers from acting in a certain area. The Supreme Court held that the exemption was ineffectual rather than unconstitutional because the exemption did not deny cities the power to act but merely created an exception to certain ordinances. *Id*., ¶ 21.

MAID argues that the same logic applies in this case. In *Am. Cancer Soc'y* the cities had acted with the adoption of ordinances. In this case, MAID has not cited any ordinance that any city with a population of at least 5,000 residents with self-government powers has adopted prohibiting duplexes, which are required by § 76-2-304(3), MCA. Absent a superseding ordinance, all state statutes are applicable to self-government local units. § 7-1-105, MCA. MAID's Motion on the issue of local power is not supported.

[5] Section 7-1-120, MCA, was repealed in 2005. Sec. 10, Ch. 268, L. 2005.

MAID also argues that the imposition of public participation constraints on local governments coerces such governments into violating the Constitution. Ct. Doc. 94, 35. Because of the Court's Decision on the issue of public participation, the argument raised by MAID is moot.

MOTION TO DISMISS

On November 28, 2024, 2024, the League filed Montana League of Cities and Towns Motion to Dismiss for Lack of Ripeness. Ct. Doc. 105. On December 9, 2024, MAID filed Plaintiff's Response to Defendant-Intervenor Montana League of Cities and Towns' Motion to Dismiss. Ct. Doc. 114. On December 16, 2024, League filed Montana League of Cities and Towns' Reply Brief in Support of Cross Motion for Summary Judgment [sic]. Ct. Doc. 130.[6] On December 20, 2024, the Court heard oral argument on the Motion.

League argues that MAID's facial challenge to the constitutionality of MLUPA under Article II, Section 8 of the Montana Constitution (right of participation) is not ripe for review because the scope of the right is dependent on future final decisions made by the local legislative body. Ct. Doc. 130, 4. League contends that this "court, as a matter of law, cannot determine whether an opportunity to participate has been provided, much less whether it is reasonable, until the court has before it a decision that is alleged to have been made without reasonable opportunity to participate." *Id,* 6.

MAID cites *Schoof v. Nesbit*, 2014 MT 6, 373 Mont. 226, 316 P.3d 831, a "standing case" as opposed to one discussing the "ripeness" doctrine as a useful guide with its focus on the importance of the citizens' right to participate in decision of the government. Ct. Doc. 114, 10. In *Schoof*, the Supreme Court considered whether a citizen had standing to pursue his suit alleging

[6] League's Reply Brief is incorrectly titled "Reply Brief in Support of Cross Motion for Summary Judgment." It should be titled "Reply Brief in Support of Motion to Dismiss."

the county commissioners had illegally and secretly voted pay themselves cash rather than make payments designed for group health insurance. The Montana Supreme Court held:

> Under the plain language of Article II, Sections 8 and 9, and the implementing statutes, the personal stake that Schoof has here is the reasonable "opportunity" to observe and participate in the Commissioners' decision-making process, including submission of information or opinions. To vindicate these rights Schoof should not be required to demonstrate a personal stake in the "cash in lieu" policy or an "injury" beyond being deprived of adequate notice of the Commissioners' proposed action and the corresponding opportunity to observe and participate as a citizen in the process. Otherwise, the constitutional rights to know and participate could well be rendered superfluous because members of the public would be unable to satisfy traditional standing requirements to properly enforce them.

Schoof, ¶ 19.

In essence, the League argues MAID's claim is premature because MLUPA has a deferred implementation date (until 2026), and the local governments are in the process of developing their public participation plans. However, whatever rules local governments may develop under MLUPA, such rules must still comply with the language of the statutes. The League's argument is not persuasive because the statutes contain a prohibition for notice and opportunity to be heard. Section 76-25-106(4)(d), MCA, Section 76-25-305 (4), (5)(a)(b)(c)(d) and (6)(a)(b) MCA, and Section 76-25-408 (7)(a)(b), (8)(a)(i)(ii)(ii) and (b) MCA, eliminate public notice and public participation in the review process of applications for site-specific developments by the planning administrator submitted under the zoning and subdivision process. Because of the Court's Decision on equal protection and substantive due process, the League's arguments on those issues are moot. The League's Motion to Dismiss on the issue of public participation has no merit.

Based upon the foregoing Decision, the Court issues the following Order.

ORDER

IT IS HEREBY ORDERED:

1. The League's Motion to Dismiss is **DENIED**.

2. MAID'S Motion for Partial Summary on Count 1 of its First Amended Complaint is **DENIED in part and GRANTED in part**. Shelter WF's Cross-Motion for Summary Judgment on Count I is **DENIED**. MAID is entitled to a declaratory judgment declaring:

> The provisions of SB 323, SB 528, SB 245 and SB 382 may not be used by any person or governmental entity to invalidate or displace covenants that are more restrictive than zoning regulations.

3. MAID's Second Motion for Summary Judgment on Count II of the First Amended Complaint (public participation) is **GRANTED in part and DENIED in part**. Shelter WF's Motion for Summary Judgment is **DENIED.** The League's Cross-Motion for Summary Judgment is **DENIED**. MAID is entitled to a declaratory judgment declaring that Section 76-25-106(4)(d), MCA, Section 76-25-305 (4), (5)(a)(b)(c)(d) and (6)(a)(b) MCA, and Section 76-25-408 (7)(a)(b), (8)(a)(i)(ii)(ii) and (b) MCA, are facially unconstitutional. MAID is not entitled to a declaratory judgment declaring that the entirety of the Montana Land Use Planning Act is unconstitutional. MAID is entitled to a permanent injunction enjoining the State of Montana and its municipalities from implementing Section 76-25-106(4)(d), MCA, Section 76-25-305 (4), (5)(a)(b)(c)(d) and (6)(a)(b) MCA, and Section 76-25-408 (7)(a)(b), (8)(a)(i)(ii)(ii) and (b) MCA.

4. MAID's Second Motion for Summary Judgment on Count III of the First Amended Complaint (equal protection) is **DENIED.** Kuhnle/Kenck's Cross-Motion for Partial Summary Judgment is **GRANTED**. Shelter WF's Motion for Summary Judgment is **GRANTED**. The League's Cross-Motion for Summary Judgment is **GRANTED**. MAID is not entitled to a declaratory judgment declaring that SB 323, SB 528, SB 245 and SB 382 are unconstitutional for reasons of equal protection. MAID is not entitled to a permanent injunction enjoining the State of Montana and its municipalities from implementing SB 323, SB 528, SB 245 and SB 382 under Count III of the First Amended Complaint. Kuhnle/Kenck, Shelter WF and the League are entitled

to summary judgment denying MAID's request for relief under Count III.

5. MAID's Second Motion for Summary Judgment on Count IV of the First Amended Complaint (substantive due process) is **DENIED.** Kuhnle/Kenck's Cross-Motion for Partial Summary Judgment is **GRANTED**. Shelter WF's Motion for Summary Judgment is **GRANTED**. The League's Cross-Motion for Summary Judgment is **GRANTED**. MAID is not entitled to a declaratory judgment declaring that SB 323, SB 528, SB 245 and SB 382 are unconstitutional for reasons of substantive due process. MAID is not entitled to a permanent injunction enjoining the State of Montana and its municipalities from implementing SB 323, SB 528, SB 245 and SB 382 under Count IV of the First Amended Complaint. Kuhnle/Kenck, Shelter WF and the League are entitled to summary judgment denying MAID's request for relief under Count IV.

6. MAID's Second Motion for Summary Judgment on Count V of the First Amended Complaint (arrogation of local power) is **DENIED.** Kuhnle/Kenck's Cross-Motion for Partial Summary Judgment is **GRANTED**. Shelter WF's Motion for Summary Judgment is **GRANTED**. The League's Cross-Motion for Summary Judgment is **GRANTED**. MAID is not entitled to a declaratory judgment declaring that SB 323, SB 528, SB 245 and SB 382 are unconstitutional for reasons of substantive due process. MAID is not entitled to a permanent injunction enjoining the State of Montana and its municipalities from implementing SB 323, SB 528, SB 245 and SB 382 under Count V of the First Amended Complaint. Kuhnle/Kenck, Shelter WF and the League are entitled to summary judgment denying MAID's request for relief under Count V.

7. The parties shall be responsible for their own attorney fees and costs.

Dated March 3, 2025.

Mike Salvagni

Hon. Mike Salvagni
Presiding Judge

cc: James Goetz, attorney for Plaintiff
Henry Tesar, attorney for Plaintiff
Brian K. Gallik, attorney for Plaintiff
Austin Knudsen, attorney for State of Montana
Thane Johnson , attorney for State of Montana
Alwyn Lansing, attorney for State of Montana
Michael D. Russell, attorney for State of Montana
Michael Noonan, attorney for State of Montana
Ethan W. Blevins, attorney for Intervenors David Kuhnle and Clarence Kenck
Mark Miller, attorney for Intervenors David Kuhnle and Clarence Kenck
David C. McDonald, attorney for Intervenors David Kuhnle and Clarence Kenck
Jesse Kodadek, attorney for Intervenor Shelter WF
Thomas J. Jodoin, attorney for Intervenor Montana League of Cities and Town