DA 24-0039

In the Supreme Court of the State of Montana

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC,

Plaintiff/Appellee,

v.

STATE OF MONTANA,

Defendant/Appellant.

Appeal from the Montana Eighteenth Judicial District Court
Gallatin County
Hon. Mike Salvagni, DV-16-2023-1248

BRIEF OF AMICUS CURIAE SHELTER WF, INC.

Jesse Kodadek
PARSONS BEHLE & LATIMER
127 E. Main, Ste. 301
Missoula, MT 59802
(406) 721-3400
jkodadek@wordenthane.com

Attorneys for Amicus
Shelter WF, Inc.

Table of Contents

Table of Authorities 3

Introduction 5

Interest of Shelter WF and background of the pro-housing laws. 6

A. Shelter WF and the Governor's Housing Task Force. 6

B. The laws challenged by MAID and the subject of this appeal emerge from the work of the Task Force, its stakeholders, and other groups—including Shelter WF. 8

C. The now-enjoined laws permit duplexes and accessory dwelling units in most cities across the State and were enjoined on a facial constitutional challenge. 9

Legal Standard 11

Summary of the Argument 12

Argument 13

I. The district court erred in granting a preliminary injunction because MAID is not likely to succeed on the merits when it lacks standing and is seeking an advisory opinion. 15

A. MAID lacks standing for the wide-ranging relief it seeks. 15

B. MAID's claims as they relate to private covenants are nonjusticiable because they seek an advisory opinion based on a hypothetical set of facts. 17

II. MAID is also unlikely to succeed on the merits on substantive grounds because the foremost constitutional interest at stake in zoning is the right to have free use of one's own property, not to limit your neighbor's use of their own property. 19

A. Population-based line-drawing is not arbitrary and is instead evidence that the laws are rationally targeted at urban areas where housing supply issues are more acute. 20

B. Property owners with restrictive covenants are not similarly situated to property owners without them for equal protection purposes. 21

C. Upzoning of property via legislative action does not implicate any due process concerns. 22

D. Allowing certain types of housing as a matter of right does not violate any constitutional right of public participation. 25

III. The only irreparable harm in this case is the ongoing shortage of housing in this State, which has now been aggravated, and the balance of equities and the public interest all favor vacating the injunction. 25

Conclusion 26

Certificate of Compliance 27

Table of Authorities

Cases

Bennett v. Hill,
2015 MT 30, 378 Mont. 141, 342 P.3d 691 17

Boland v. Great Falls,
275 Mont. 128, 910 P.2d 890 (1996) 14

Creveling v. Ingold,
2006 MT 57, 331 Mont. 322, 132 P.3d 531 16

Freeman v. Bd. of Adjustment of City of Great Falls,
97 Mont. 342, 34 P.2d 534 (1934) 14

Geil v. Missoula Irr. Dist.,
2002 MT 269, 312 Mont. 320, 59 P.3d 398 ..... 21, 23

Hamlin v. Mont. DOT,
2022 MT 190, 410 Mont. 187, 521 P.3d 9 24

Kohoutek v. DOR,
2018 MT 123, 391 Mont. 345, 417 P.3d 1105 22

Loch Levan v. Henrico Cnty.,
831 S.E.2d 690 (Va. 2019) 19

McKay v. Wilderness Dev.,
2009 MT 410, 353 Mont. 471, 221 P.3d 1184 17

Micklon v. Dudley,
2007 MT 265, 339 Mont. 373, 170 P.3d 960 16

Minnesota v. Knight,
465 U.S. 271 (1984) 23

Mont. Cannabis Indus. Assn. v. State,
2016 MT 44, 382 Mont. 256, 368 P.3d 1131 ..... 12, 24

Plan Helena v. Helena Reg'l Airport Auth. Bd.,
2010 MT 26, 355 Mont. 142, 226 P.3d 567 18

State ex rel. Thelen v. City of Missoula,
168 Mont. 375, 543 P.2d 173 (1975) 15

State v. Eighth Jud. Dist.,
187 Mont. 126, 609 P.2d 245 (1980) 21

Town & Country Foods, Inc. v. Bozeman,
2009 MT 72, 349 Mont. 453, 203 P.3d 1283 ..... 24, 25

Village of Euclid v. Ambler Realty,
272 U.S. 365 (1926) 20

Wadsworth v. State,
275 Mont. 287, 911 P.2d 1165, 1172 (1996) 25

Whistler v. Burlington N. R. Co.,
228 Mont. 150 (1987) 13

Williamson v. Montana PSC,
2012 MT 32, 364 Mont. 128, 272 P.3d 71 16

Statutes

Section 27–19–201, MCA 11
Section 70–17–210, MCA 16, 17, 18
Section 76–2–201, MCA 14
Section 76–2–301, MCA 14
Section 76–2–304, MCA 9
Section 76–2–345, MCA 9

Treatise

Rathkopf's *The Law of Zoning and Planning* § 2:3 (4th ed.) 23

Constitutional Provisions

Article II, § 3 of the Montana Constitution 25
Article II, § 8 of the Montana Constitution 25
Article II, § 17 of the Montana Constitution 22

Shelter WF, Inc. submits this brief as amicus curiae in support of the State of Montana, and in support of vacating the district court's preliminary injunction in favor of Montanans Against Irresponsible Densification, LLC ("MAID").

Introduction

MAID's lawsuit seeks to permanently enjoin what has been called the "Montana Miracle,"[1] which is widely considered to have achieved a comprehensive omnibus-like outcome through several individual bills that seek to increase the supply of housing[2] in Montana. The issue currently before the Court is the district court's order enjoining two parts of that pro-housing package: the ability to build duplexes and accessory dwelling units "by right" on lots zoned single-family in most Montana cities.

According to MAID—and the district court—these laws violate the constitutional rights of property owners in Montana for a host of reasons. But MAID and the district court have it backwards because exclusionary zoning necessarily implicates constitutional rights, and the

---

[1] *See, e.g., How the Bipartisan 'Montana Miracle' Confronts the Housing Crisis Head On*, available at https://www.planning.org/planning/2023/fall/how-the-bipartisan-montana-miracle-confronts-the-housing-crisis-head-on/; *Four Elements of a Successful Housing Task Force: Lessons from the Montana Miracle*, available at https://www.mercatus.org/research/policy-briefs/four-elements-successful-housing-task-force-lessons-montana-miracle.

[2] For background on Montana's dire housing shortage, see Montana Department of Commerce Housing Situation Report, available at https://bit.ly/49Z6cA0.

loosening of exclusionary zoning—or "upzoning"—restores those rights. In this context, MAID fails to state a claim for any constitutional violation, and it will not succeed on the merits. The preliminary injunction should therefore be vacated.

Interest of Shelter WF and background of the pro-housing laws.

A. Shelter WF and the Governor's Housing Task Force.

Shelter WF is a Montana nonprofit public benefit corporation that was formed for one purpose: to make homes in Whitefish more affordable. The scope of its mission has expanded to the entire Flathead Valley and Montana as a whole, but Shelter WF continues to advocate for the same goals it started with: to educate the community about housing affordability; to demystify local government processes; to make it easier for people to understand what is happening with housing law and policy; and to help people understand how to support and accomplish those goals in their own community.

In July of 2022, the Governor established the Housing Advisory Council, also known as the Governor's Housing Task Force. The Task Force was—and remains—charged with developing "short- and long-term recommendations and strategies for the State of Montana to increase the supply of affordable, attainable workforce housing." To meet those goals, the Task Force was directed to seek input from a wide variety of stakeholders.

Shelter WF's co-founder and board president, Nathan Dugan, was

appointed to the Task Force along with 25 others. The members include state legislators, local government officials, representatives from the real estate and construction industries, and representatives from special interest groups that had expertise in affordable housing and related policy issues—like Shelter WF.

The Task Force was directed to produce two initial reports, which it did. Both reports were complete before the legislature convened in 2023.

The first report —directed at measures the legislature could consider—is 65 pages long and includes 18 recommendations within three categories: regulatory reform; incentives to encourage regulatory reforms; and investments in improved government efficiency, workforce development, and private sector home construction.

The second report—directed at regulatory changes and best practices that could be adopted by state agencies and local governments—is 59 pages long and includes 18 recommendations within three subcategories: regulatory capacity and efficiency; information gathering and reporting; and the use of new and existing programs to further those goals.

In both reports, the 36 total recommendations include the rationale for each recommendation; the barriers addressed by that recommendation; and the key strategies to implementing each recommendation. Each recommendation also includes any dissenting

opinions, regardless of whether the dissent was from a member of the Task Force or from public comment.

The public participation process was robust. For both reports, all Task Force and subtask force groups held open meetings and encouraged the public to share questions, comments, and suggestions. The Task Force has a website that identified appointed members and their affiliations; published meeting recordings; and solicited public comment through an interactive comment portal.

Overall, the Task Force and its subtask groups met over 30 times. Every meeting was noticed to the public, and every meeting included public comments, questions, and suggestions. All were open for participation from anywhere. The Task Force remains in place, its work is ongoing, and Dugan is still a member.

B. The laws challenged by MAID and the subject of this appeal emerge from the work of the Task Force, its stakeholders, and other groups—including Shelter WF.

During the 2023 legislative session, several pro-housing bills related to the Task Force's work were passed and signed into law. Two of those bills—SB 323 and SB 528—are the subject of this appeal. They require that most Montana cities permit duplexes and accessory dwelling units on any lots zoned single-family. Both bills arose from the Task Force's work, and were sponsored by members of the Task Force who are also legislators.

In stark contrast with many of the laws passed by the 2023

Legislature that have been, are, or will be before this Court, the pro-housing bills now enjoined were the result of work by notably bipartisan coalitions. Those diverse coalitions included entities like Forward Montana, Montana Environmental Information Center, Blackfeet Tribe, Associated Students at the University of Montana, Frontier Institute, Americans for Prosperity, Billings Chamber of Commerce, and Shelter WF itself.

C. The now-enjoined laws permit duplexes and accessory dwelling units in most cities across the State and were enjoined on a facial constitutional challenge.

SB 323, parts of which are now § 76–2–304(3) and (5), requires that cities with populations over 5,000 allow duplexes as a permitted use anywhere a single-family residence is a permitted use. It prohibits zoning regulations for duplexes that are more restrictive than zoning regulations that are applicable to single-family residences.

SB 528, now § 76–2–345, requires all cities to allow accessory dwelling units ("ADUs") "by right" on any lot with a single-family dwelling—the same standard applied to building a single-family residence itself. It also prohibits cities from imposing certain conditions on ADUs, including limiting their size to the lesser of 75% of the gross floor area of the primary single-family residence or 1000 square feet.

Both laws were set to go into effect on January 1, 2024.

MAID filed this action on December 14, 2023. Its Amended Complaint asserts a "facial" constitutional challenge to four bills passed

by the Montana Legislature. MAID's constitutional claims are sweeping and allege, in five counts, that:

1. The ADU and duplex laws cannot "relax" regulations where private restrictive covenants otherwise limit use to a single-family residence. (D.C. Doc. 3 at ¶¶ 41–45);
2. The new laws violate the constitutional right of public participation by allowing ADUs and duplexes "by right." (*Id.* at ¶¶ 47–68.)
3. The new laws deny the Plaintiff's members equal protection by separating them into two classes—those "protected" by private restrictive covenants and those who are not. (*Id.* at ¶¶ 69–76.)
4. The new laws are so "chaotic" that they deny MAID's members the right to due process. (*Id.* at ¶¶ 70–85.)
5. The new laws unconstitutionally "arrogate" local government authority and "undercut the authority of local governments to regulate local affairs." (*Id.* at ¶¶ 86–106).

MAID moved for a preliminary injunction of the ADU and duplex laws on December 19, the district court set and held a "show cause" hearing on December 28. In other words, the State had less than 10 days to respond over the Christmas holiday. The hearing went ahead on December 28 and the district court issued the preliminary injunction the next day.

The basis was the district court's conclusion that allowing ADUs

and duplexes will "result in irreparable injury to the members of" MAID including by: "deprivation of the members' constitutional right of public participation; unfair and invidious discrimination against single-family owners who must now absorb an arbitrary and disproportionate burden of increased density as opposed to those who are protected by restrictive covenants; and an arbitrary imposition of various conditions, including many who are similarly situated, but are treated differently because they reside in cities that either fall within or outside of the arbitrary definitions in the challenged measures." (D.C. Doc. 17 at 16–17.)

The record is sparse. MAID included a single declaration in support of its application for a preliminary injunction, and at the hearing, no testimony or evidence was presented. (D.C. Doc. 17 at 1.) Even though both the Amended Complaint and the district court's decision focus in large part on restrictive covenants, there are no restrictive covenants in the record.

Legal Standard

The 2023 Legislature amended the rules for granting a preliminary injunction, and preliminary injunction may only be granted if the applicant satisfies all four of the following factors: (1) the applicant is likely to succeed on the merits; (2) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of the equities tips in the applicant's favor; and (4) the order is in the public interest. Section 27–19–201(1).

By mounting a facial constitutional challenge to the ADU and duplex laws, MAID is required to show that there is no set of circumstances under which the challenged laws would be valid, and that the statutes are unconstitutional in all of their applications. *Mont. Cannabis Indus. Assn. v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131. If any doubt exists, it must be resolved in favor of the statute. *Id.*, ¶ 12. The party challenging the constitutionality of the statute bears the burden of proof. *Id.* None of these standards are addressed in the district court's order.

Summary of the Argument

The district court erred in granting a preliminary injunction because MAID is not likely to succeed on the merits—both for procedural and substantive reasons.

First, there are no covenants in the record, and MAID lacks standing to enforce covenants to which its members are not a party. Second, there are many ways covenants can lapse or be waived, and there is no way the district court can rule on the ongoing validity of every set of covenants statewide without rendering an advisory opinion based on a hypothetical set of facts.

MAID will also lose on the merits for substantive reasons. At the outset, MAID fails to recognize that zoning restricts property rights and upzoning restores those rights. MAID has not cited any authority suggesting that they have a property interest in restricting the

upzoning of their neighbor's property—whether covered by restrictive covenants or not. Further, the population-based line drawing the legislature engaged is rationally targeted at urban areas where housing supply issues are most acute, and the legislature is entitled to engage in such line-drawing without implicating any constitutional harm.

Next, property owners with restrictive covenants are not similarly situated for constitutional purposes as property owners not subject to restrictive covenants. If they were, *all* zoning would be constitutionally suspect. Likewise, upzoning via legislative action does not implicate any due process concerns, and MAID cannot show that legislative action is subject to procedural due process challenge anyways, and the actions of the legislature are similarly immune to challenges based on the right to participate. Finally, the balance of the equities, the likelihood of irreparable harm, and the public interest all tilt in favor of allowing more housing, rather than enjoining duly passed laws that are rationally related to legitimate government interests.

Argument

Zoning restricts property rights;[3] upzoning restores those rights. Yet MAID's entire theory of this case, and the district court's opinion, proceeds from the premise that the relaxation or "upzoning" of strict single-family zoning implicates a host of constitutional rights. But it is

[3] Zoning laws are "in derogation of the common law right to free use of private property," and should be strictly construed. *Whistler v. Burlington N.R.Co.*, 228 Mont. 150, 155 (1987).

restrictive zoning itself that implicates fundamental constitutional rights. *Freeman v. City of Great Falls*, 97 Mont. 342, 34 P.2d 534, 538 (1934). The district court's order cites no authority for the proposition that upzoning could infringe on any constitutional right, and Shelter WF has been unable to locate any that even arguably supports that idea.

Rather, this Court has long recognized that when zoning ordinances were first enacted, they were "attacked as unconstitutional" on the grounds that "they deprived the owner of liberty and property without due process of law, and denied the equal protection of the law." *Freeman*, 34 P.2d at 536–37. But even then, the Court recognized that the "modern trend" was to uphold the validity of zoning ordinances and their enabling statutes. *Id.* The Court went on to explain that zoning "statutes and ordinances are generally sustained upon the theory that they constitute a valid exercise of the police power; that is to say, they have a substantial bearing upon the public health, safety, morals and general welfare of a community." *Id.*

That police power, however, does not come from local governments—it comes from the State. The State has, in turn, expressly delegated those powers to local governments. *See* § 76–2–301 (legislative authorization of municipal zoning) *and* § 76–2–201 (legislative authorization of county-level zoning); *Boland v. Great Falls*, 275 Mont. 128, 132, 910 P.2d 890, 892 (1996). This Court has long held

that, while local governments may prefer to maintain full control of their zoning authority, "there is no question that the power of the legislature over the city in this manner is supreme." *State ex rel. Thelen v. City of Missoula*, 168 Mont. 375, 380, 543 P.2d 173, 176 (1975). Thus, the "legislature can give the cities of this state the power to regulate through zoning commissions, and the legislature can take it away." *Id.*

Here, by legislatively upzoning single-family zones to allow duplexes and ADUs, the legislature has chosen to restore one small stick in the bundle of property rights that single-family zoning otherwise took away. That change was well within the legislature's powers. It does not implicate any constitutional right of the neighboring property owners—whether they have restrictive covenants or not, or whether they live in more "urban" counties or not—and the district court's preliminary injunction should therefore be vacated.

I. The district court erred in granting a preliminary injunction because MAID is not likely to succeed on the merits when it lacks standing and is seeking an advisory opinion.

A. MAID lacks standing for the wide-ranging relief it seeks.

MAID has multiple standing problems that will prevent the court from issuing a statewide declaratory judgment about the effect of private covenants on the ADU and duplex laws. Those standing problems fall into at least three categories: statutory, common law, and

contractual.

First, MAID has a statutory standing problem. Section 70–17–210(1)—also passed during the past session— provides that "[o]nly the governing body of a development or a parcel owner within a development can initiate a legal action to enforce covenants, conditions, or restrictions." Under this statute, MAID cannot seek declaratory relief on behalf of non-member property owners.

Second, MAID has a common law standing problem. Covenants are contracts, and any person having an interest under a writing constituting a contract may seek declaratory relief about the interpretation of such a contract. *Creveling v. Ingold*, 2006 MT 57, ¶ 8, 331 Mont. 322, 132 P.3d 531. But MAID's members do not have any interest under most covenants in Montana, and therefore MAID lacks standing to enforce covenants that do not apply to its members. *Williamson v. Montana PSC*, 2012 MT 32, ¶ 40, 364 Mont. 128, 272 P.3d 71.

Third, MAID has a wide-ranging contractual standing problem because most private covenants say they can be enforced only by the governing body, the declarant, or another property owner. Of course, it is impossible to say whether any of MAID's members' covenants say this because MAID declined to put a single set of covenants into the record in this case, which should have been fatal to all its covenant-based claims in the first place.

B. MAID's claims as they relate to private covenants are nonjusticiable because they seek an advisory opinion based on a hypothetical set of facts.

Even if MAID could fix its standing problems, its claims related to restrictive covenants are nonjusticiable because they seek an advisory opinion based on a hypothetical set of facts. Like any other contract, covenants must be read as a whole. *Micklon v. Dudley*, 2007 MT 265, ¶ 10, 339 Mont. 373, 170 P.3d 960. Without any covenants in the record, the district court was, by definition, speculating on what those covenants say.

And even if MAID were able get a representative from every single set of properties covered by private covenants that purported to limit use to one single-family residence, it would still not be enough because covenants can be rendered unenforceable by multiple equitable principles, including waiver or laches. *Bennett v. Hill*, 2015 MT 30, ¶ 25, 378 Mont. 141, 342 P.3d 691; *McKay v. Wilderness Dev.,* 2009 MT 410, ¶ 33, 353 Mont. 471, 221 P.3d 1184. Both are equitable doctrines, under which this Court reviews "independently all questions of fact as well as questions of law." *McKay*, ¶ 35. Under this standard, applying fact-specific equitable principles to thousands of different contracts, with different language and different on-the-ground circumstances, is an impossible and non-justiciable task.

These equitable principles are codified in § 70–17–210(2), which now provides that any "covenant, condition, or restriction is deemed

abandoned for purposes of enforcement if no enforcement action has been undertaken" for eight years. The same statute also limits the potential enforceability of older covenants, because "when the governing body formed within covenants, conditions, or restrictions has not met for a period of 15 years, it constitutes substantial noncompliance, and the governing body is prohibited from taking any enforcement action regarding the covenants" except to comply with other laws. Section 70–17–210(3).

MAID's request for a statewide declaration thus attempts to exhume covenants that, as a matter of law, have been "deemed abandoned" and unenforceable. For these reasons, 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. For the same reason, this Court should not assume the hypothetical that thousands of sets of disparate covenants are automatically enforceable just because MAID wants them to be. That would be an advisory opinion based on an abstract proposition—something this Court does not do. *Plan Helena v. Helena Reg'l Airport*, 2010 MT 26, ¶ 9, 355 Mont. 142, 226 P.3d 567.

II. MAID is also unlikely to succeed on the merits on substantive grounds because the foremost constitutional interest at stake in zoning is the right to have free use of one's own property, not to limit your neighbor's use of their own property.

At the outset, MAID's arguments and the district court's order appear to create a sort of constitutional smoothie, with the district court mixing and matching various constitutional standards and never settling on a chosen standard of constitutional review. This makes it difficult to address each issue raised in the injunction order.

But one thing the district court does *not* address on any level is apparent: courts generally conclude that upzoning does not implicate any constitutional interest in neighboring properties. This Court does not appear to have directly addressed this issue, but as far as Shelter WF can discern, it is universally held that, in the context of zoning, "a landowner has no vested rights in the zoning classification or land uses of his or her neighbor." *Loch Levan v. Henrico Cnty.*, 831 S.E.2d 690, 698 (Va. 2019).

Ultimately, Shelter WF's position is that MAID has not stated a claim for any constitutional violation. If the Court disagrees, however, it should review all of MAID's constitutional claims under the rational basis test, because that is the test applied to zoning enactments that *restrict* the free use of property, and there is no reason to apply a higher standard to laws that *restore* small sticks in the bundle of property rights.

A. Population-based line-drawing is not arbitrary and is instead evidence that the laws are rationally targeted at urban areas where housing supply issues are more acute.

Population-based line drawing is not arbitrary. Instead, it is evidence that the legislature was rationally targeting larger urban agglomerations where housing supply issues are more acute. In other words, mandating that cities with 5,000 or more residents allow duplexes makes sense. And so does requiring different planning strategies in counties with more than 70,000 people. At minimum, it is not "entirely arbitrary," as the district court found. Instead, one can conjure many reasons that cities like Whitefish and Columbia Falls—which are part of a much larger housing market including Kalispell—are differently situated for purposes of housing policy than Polson, which does not have any larger cities nearby.

As discussed above, because upzoning restores rather than restricts property rights, there is no authority for the proposition that upzoning implicates any level of constitutional review. But if it did, the proper standard of review would be—at best—rational basis, because as the United States Supreme Court long ago held, if the validity or legislative classifications for zoning purposes is even "fairly debatable," the legislative judgment must be allowed to control. *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 388 (1926).

And under Montana law, population-based line-drawing is appropriate because the legislative authority is not bound to extend to

all cases it might possibly reach. *Geil v. Missoula Irr. Dist.*, 2002 MT 269, ¶ 48, 312 Mont. 320, 59 P.3d 398. The legislature can recognize degrees of harm, and if a law "presumably hits the evil where it is most felt," it should not be overturned just because there are other instances to which it might have been applied. *Id.*

B. Property owners with restrictive covenants are not similarly situated to property owners without them for equal protection purposes.

The ADU and duplex laws do not purport to supersede private covenants, and there is no dispute that restrictive covenants can be more restrictive than zoning. *State v. Eighth Jud. Dist.*, 187 Mont. 126, 130, 609 P.2d 245, 247 (1980). But that does not mean that property owners *without* restrictive covenants are somehow similarly situated as property owners *with* restrictive covenants. The district court's conclusion that the ADU and duplex laws constitute "invidious discrimination" against property owners without restrictive covenants is ultimately nonsensical. If treating those with restrictive covenants differently than those without violates any constitutional rights, then *all* zoning laws and ordinances would violate those same constitutional rights.

Prospective property owners can choose to buy homes covered by restrictive covenants, or they can choose to buy homes that are not. If they pick the former, the homeowners can voluntarily opt out of public reform, and that also means they sacrifice the value of their land to

limit its uses for their own lifestyle choices. But restricting your own deed does not generate a claim on the public policy governing your neighbor's deeds.[4]

Second, nothing prohibits existing single-family property owners from banding together with their neighbors and agreeing on new covenants that would prohibit ADUs and duplexes. Landowners are thus free to opt out of the new reforms—but the fact that most will not is evidence that most disagree with MAID's views on land use. There is nothing "invidious" about people choosing to make home-buying decisions in this context, and economic decision-making of this sort does not 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.

C. Upzoning of property via legislative action does not implicate any due process concerns.

Article II, Section 17 of the Montana Constitution provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." Procedural due process requires notice of a proposed action which could result in depriving a person of a property interest,

[4] For example, a covenant may require that all homes be of a certain set of colors. But that does not mean that someone *without* a restrictive covenant suffers a constitutional injury just because their neighbor paints their house a garish color that would be prohibited by covenants in the next subdivision over. This example is absurd, but so are all of MAID's equal protection arguments.

and the opportunity to be heard regarding that action. *Geil*, ¶ 54. But in the context of zoning decisions, the only due process required is when governmental bodies perform the quasi-judicial function of determining the rights of a particular landowner related to the use and development of *her own land* under the criteria for approval set out in a zoning code. Rathkopf's *The Law of Zoning and Planning* § 2:3 (4th ed.).

Further, the legislature's actions do not implicate procedural due process concerns because due process protections are generally not required when the government takes action that is legislative, rather than adjudicative. *Minnesota v. Knight*, 465 U.S. 271, 284–85 (1984). This is because the government makes so many policy decisions affecting so many people that "it would likely grind to a halt were policymaking constrained by constitutional requirements on whose voices must be heard." *Id*.

Here, because property owners do not have a protected property interest in their neighbor's property rights, and because the ADU and duplex laws are just that—legislatively passed laws—no procedural due process concerns are implicated. The legislation simply allows duplexes and ADUs as a matter of right. Consider, for example, existing areas zoned single-family. If a property owner in one of those zones acquires a permit to build a single-family home, no neighbor has a due process right to contest the issuance of that permit. The same rationale applies when someone now acquires a permit to build an ADU or duplex that is

otherwise compliant with a municipality's zoning regulations and the new laws. The permits are issued as a matter of right, without the exercise of any discretion on behalf of the municipality. Therefore, a neighbor has no procedural due process right to challenge the ADU or duplex permit any more than they have a right to challenge a regular, single-family home permit.

Nor do the ADU and duplex laws implicate substantive due process. That analysis requires a test of the reasonableness of a statute in relation to the State's power to enact legislation. *Hamlin v. Mont. DOT*, 2022 MT 190, ¶ 39, 410 Mont. 187, 521 P.3d 9. The legislation's purpose does not have to appear on the face of the legislation, "but may be any possible purpose of which the court can conceive." *Id.* The Court will not strike down a statute as a violation of substantive due process just because it does not agree with the legislature's policy decisions. *Mont. Cannabis. Indus. Assoc.*, ¶ 31. That remains true even if the Court is convinced that the statutes could have been implemented "with greater precision," because rational distinctions "may be made with substantially less than mathematical exactitude." *Id.*

It is beyond dispute that the State is in the middle of an ongoing housing crisis. The legislature—with the help of a Task Force holding diverse political and social viewpoints—came up with ways to increase the supply of housing in Montana. This Court does not sit as a super-legislature when considering zoning matters, *Town & Country v.*

Bozeman, 2009 MT 72, ¶ 14, 349 Mont. 453, 203 P.3d 1283, and it can easily conclude that the legislature acted within its authority to address the real housing problems faced by hardworking Montanans.

D. Allowing certain types of housing as a matter of right does not violate any constitutional right of public participation.

The district court concluded that the ADU and duplex laws allow "no public participation at all" and are therefore constitutionally infirm. (D.C. Doc. 17 at 14.) Article II, § 8 of the Montana Constitution requires "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." But the legislature is specifically exempted from this requirement. Section 2–3–102(1)(a). The district court therefore erred in this conclusion.

III. The only irreparable harm in this case is the ongoing shortage of housing in this State, which has now been aggravated, and the balance of equities and the public interest all favor of vacating the injunction.

Housing is a basic human necessity, and the inalienable right to pursue life's necessities is a fundamental right under Article II, § 3 of the Montana Constitution. *Wadsworth v. State*, 275 Mont. 287, 299, 911 P.2d 1165, 1172 (1996). Because MAID failed to establish that it has a constitutionally protected interest in what others do with their own property, it failed to show it was likely to suffer from irreparable harm. Instead, the irreparable harm in this case is not the hypothetical

parade of horribles suggested by MAID—it is the real lack of housing supply, and the district court's order is currently preventing the construction of much-needed housing across the State. The balance of the equities and the public interest therefore tilt in favor of allowing more housing.

Conclusion

The district court's grant of a preliminary injunction should be vacated.

March 18, 2024.

PARSONS BEHLE & LATIMER
Attorneys for Shelter WF, Inc.

/s/ Jesse C. Kodadek
Jesse C. Kodadek

Certificate of Compliance

The undersigned hereby certifies that the body of this brief contains 4,957 words, as calculated by Microsoft Word. The brief is double-spaced in size 14 Century Schoolbook typeface.

/s/ Jesse C. Kodadek

CERTIFICATE OF SERVICE

I, Jesse C. Kodadek, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 03-18-2024:

James H. Goetz (Attorney)
PO Box 6580
Bozeman MT 59771-6580
Representing: Montanans Against Irresponsible Densification, LLC
Service Method: eService

Henry Tesar (Attorney)
35 North Grand
Bozeman MT 59715
Representing: Montanans Against Irresponsible Densification, LLC
Service Method: eService

Brian K. Gallik (Attorney)
777 E. Main St., Ste. 203
PO Box 70
Bozeman MT 59771
Representing: Montanans Against Irresponsible Densification, LLC
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620
Representing: State of Montana
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: State of Montana
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: State of Montana
Service Method: eService

Michael Noonan (Govt Attorney)
215 N SANDERS ST
HELENA MT 59601-4522
Representing: State of Montana
Service Method: eService

Electronically Signed By: Jesse C. Kodadek
Dated: 03-18-2024