MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

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MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC, Plaintiff, vs. STATE OF MONTANA, Defendant.	)	Cause No. DV-23-1248C **DECISION AND ORDER RE: PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER/ PRELIMINARY INJUNCTION AND PRELIMINARY INJUNCTION**

On December 15, 2023, Plaintiff Montanans Against Irresponsible Densification filed a Complaint seeking declaratory and injunctive relief regarding four measures passed in 2023 by the Montana Legislature. On December 19, 2023, Plaintiff filed a First Amended Complaint and Motion for Temporary Restraining Order/Preliminary Injunction. The Motion is supported by the affidavit of Glenn Monahan, managing member of Plaintiff LLC.

On December 19, 2023, Plaintiff filed a Brief in Support of Motion for Temporary Restraining Order/Preliminary Injunction. On December 21, 2023, the Court issued a Show Cause Hearing on the Motion for Temporary Restraining Order/Preliminary Injunction. On December 27, 2023, the State filed Defendant's Brief in Opposition to Motion for Restraining Order and Preliminary Injunction.

On December 28, 2023, the Court held a show cause hearing. James H. Goetz and Brian K. Gallik represented Plaintiff. Alwyn Lansing and Thane Johnsons represented the State. No testimony or physical evidence was presented. The parties agreed to proceed on the basis of their

arguments to the Court. On December 29, 2023, the parties filed proposed Orders with the Court. From the Court's review of the parties' briefs and consideration of counsels' arguments at the show cause hearing and the proposed Orders submitted by the parties on December 29, 2023, the Court is fully advised.

INJUNCTIVE RELIEF

In 2023, the Montana Legislature amended the preliminary injunction statute, now codified as § 27-19-201, MCA. In essence, an applicant for a preliminary injunction must establish that (a) it is likely to succeed on the merits, (b) it is likely to suffer irreparable harm in the absence of preliminary relief, (c) the balance of equities tips in the applicant's favor, and (d) the order is in the public interest. The new law provides that the applicant bears the burden of demonstrating the need for an injunction order. Section 27-19-201(3), MCA, further specifies that it is the intent of the Legislature that the Montana standard "mirror" the Federal preliminary injunction standard. *Id*., subsection (4).

Plaintiff moved this Court for a "temporary restraining order and/or a preliminary injunction." Plaintiff served notice of its intention to file that Motion upon the State on December 18, 2023, with a request for the State's position on that Motion. Ct. Doc. 4. According to Plaintiff, the State did not respond to Plaintiff's inquiry. However, on December 27, 2023, the State filed its Brief in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction. The State appeared and fully participated in the show cause hearing.

At the conclusion of the hearing, the State suggested that the Court could issue a temporary restraining order (TRO) for 10 days, and it would/may stipulate to a longer period, in anticipation of another hearing on Plaintiff's motion. The State's position confuses the statutory scheme governing issuance of a temporary restraining order, without notice, with an Order on an

application for a preliminary injunction where both parties (1) have notice; and (2) participate in that hearing. See, § 27-19-316, MCA. Section 27-19-314, MCA, provides: "Where an application for an injunction was made upon notice or an order to show cause, either before or after an answer, the court or judge may enjoin the adverse party, until the hearing and decision on the application, by an order which is called a temporary restraining order."

Here, notice of the application for preliminary injunction was served upon the State nearly 10 days before the hearing, no injunction was issued, temporary or otherwise, and the State fully participated in the hearing. The application was made, no temporary restraining was issued, a show cause Order was issued[1], a hearing was held, and the State appeared and defended. If Plaintiff has established the criteria for a preliminary injunction under § 27-19-201, MCA, a preliminary injunction may be issued by the Court. See also, §§ 27-19-316, 317, 318, MCA, (governing orders issued without notice). Having appeared and defended, the State's remedy with respect to a preliminary injunction issued by the Court is § 27-19-401, MCA ("Application to dissolve or modify injunction.")

The purpose of preliminary injunctive relief is "to so protect the rights of all parties to this suit, that, whatever may be the ultimate decision of these issues, the injury to each may be reduced to the minimum". *Porter v. K&S Partnership*, 192 Mont. 175, 182, 627 P.2d 836, 840 (1981). In *Porter* the Court made it clear that the function of a temporary restraining order is to maintain the "status quo" pending a decision on the merits of the controversy.

Accordingly, because there was a hearing, this Court deems this matter suitable for

[1] The Court's Show Cause Order states "IT IS ORDERED that all Parties shall appear before this Court on the 28 day of December, 2023, 1:30 o'clock, PM, at which time, the Defendant will have the opportunity to show cause why the preliminary injunction or temporary restraining order should not be granted." At the show cause hearing, Plaintiff acknowledged that this was in err and the burden rests with Plaintiff.

consideration of the issuance of a preliminary injunction, as opposed to a temporary restraining order.

BACKGROUND

According to Plaintiff's Complaint, Plaintiff is a limited liability corporation whose members are residents of various Montana cities, including Bozeman, Whitefish, Kalispell, Missoula and Billings. The members generally reside in areas zoned for single-family uses.

The challenged measures were purportedly enacted to address Montana's affordable housing problem, but Plaintiff argues these measures do not directly address that problem and, in fact, even if allowed to go into effect, will hardly make a dent. Plaintiff argues these measures attempt to impose top-down "densification" unto certain defined cities.

Two of the challenged Acts are scheduled to take effect on January 1, 2024. They are SB 323, now codified as § 76-2-304(3), (5), and § 76-2-309, MCA, and SB 528, now codified as § 76-2-345, MCA. SB 323 requires that affected municipalities of at least 5,000 in population allow duplexes in areas now zoned for single-family residences. SB 528 will require all cities to allow "accessory dwelling units" on lots located in all areas now zoned for single-family residences.

Although these two measures are the ones subject to the present motion for preliminary injunction, Plaintiff argued that they need to be considered along with a much more sweeping revision of Montana's subdivision and zoning laws, SB 382, called "The Montana Land Use Planning Act". SB 382 was also passed by the 2023 Montana Legislature. It requires certain local governing bodies to engage in massive overhauls of their subdivision and zoning regulations. It gives affected cities up to three years after the effective date (until May, 2026) or up to five years after the date the city's growth plan was adopted, to implement the new Act, whichever is later. Accordingly, the affected cities are required to move forthwith, undertaking these massive

alterations to regulations and procedures.

STANDING

At the outset, the State argues Plaintiff lacks standing to bring this case, arguing Plaintiff offers only generalized fears and speculation about the effects of these challenged laws. State relies mainly on *Mont. Immigrant Justice All v. Bullock*, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430, arguing that the alleged injury must be "concrete", meaning actual imminent and not abstract, conjectural or hypothetical." However, the *Immigrant Justice* case actually found standing on the part of the Association to represent its members, based on allegations in the complaint, similar to the Complaint involved in this case. *See* First Amended Complaint, ¶ 32. *See also Immigrant Justice*, 2016 MT 104, ¶ 19, citing *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 43, 360 Mont. 207, 255 P.3d 80, for the broad proposition that an association has standing to bring suit on behalf of its members even without showing an injury to the association itself, as long as at least one the members has standing to sue in his or her own right.

To establish constitutional standing, one or more plaintiffs must have a "personal stake in the outcome". *Heffernan*, ¶¶ 28-29. The "irreducible constitutional minimum" of standing requires: (1) an injury in fact, i.e., past or threatened injury; (2) causation; and (3) redressability. *Heffernan*, ¶ 32.

This is a threshold issue but it is a low threshold, particularly in the constitutional arena. Because "Montana's Constitution is to be broadly and liberally construed[,]" courts reject "hypertechnical" standing complaints and will hear claims brought by "anyone" with a "true stake" in a challenged government action. *Fleenor v. Darby Sch. Dist.*, 2006 MT 31, ¶ 8, 331 Mont. 124, 128 P.3d 1048, *overruled in part by Schoof v. Nesbit*, 2014 MT 6, 373 Mont. 226, 316 P.3d 831 (taking an even more expansive view of citizen standing); *see also*, *e.g.*, *Brown v. Gianforte*, 2021

MT 149, 404 Mont. 269, 488 P.3d 548.

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

The Montana Supreme Court disagreed, avowing that Montana courts will not "ignore the rights of citizens to assert the public interest in challenging the legality of legislative action that allegedly flies in the face of our state constitution." *Id*. at 111. This is "particularly so where the constitutional provision is intended to benefit the public as a whole . . . ." *Id.* The Montana Supreme Court found the Framers were concerned, not with conferring benefits on individual judges or candidates, but with safeguarding the judicial system for the public good. *Id.* at 109. Ensuring the integrity of such essential public institutions is a matter of public interest that confers, on interested private citizens, "standing to assert that public interest by contending that the constitutional provision has been the victim of legislative strangulation." *Id.* at 108.

For these reasons, this Court concludes, solely on an interim basis and for purposes of deciding the issue of an interim injunctive relief, that Plaintiff has standing to bring this action.

PROBABILITY OF IRREPARABLE INJURY

Plaintiff argues, supported by the affidavit of Glenn Monahan, that its members will suffer irreparable injury if interim injunctive relief is not granted. In essence, Plaintiff is concerned that, should these challenged measures not be enjoined, they could wake up one morning to find that, without any notice at all, a new duplex or ADU ("Accessory Dwelling Unit") is going up next door in their previously peaceful and well-maintained single-family neighborhood. *See* Monahan Affidavit, ¶¶ 4-9. This threatened injury is sufficient to establish the probability of irreparable

injury for purposes of issuing interim injunctive relief.

SB 528 is a law requiring all cities to allow ADUs in areas previously set aside for single-family use. Section One of that Act requires a municipality to adopt regulations "that allow a minimum of one accessory dwelling unit by lot or parcel that contains a single-family dwelling." At first glance, Section One appears to allow some breathing space because it requires a municipality to "adopt regulations", which would take some time. However, Section Five of that dispels any notion that there is any breathing space. Section (5) provides:

> (5) a municipality that has not adopted or amended regulations pursuant to this section by January 1, 2024, must review and permit accessory dwelling units in accordance with the requirements of this section until regulations are adopted or amended. Regulations in effect on or after January 1, 2024, that apply to accessory dwelling units and do not comply with this section are void.

SB 528, Section (5).

Accordingly, the consequences of this measure are imminently threatening. An examination of other features of SB 528 buttress Plaintiff's claim of irreparable injury. For example, SB 528, Section (2) says that a municipality may not require additional parking to accommodate ADUs or require fees in lieu of additional parking, assess impact fees in connection with new ADUs or require improvements to public streets as a condition for permitting ADUs, set maximum building heights, minimum set back requirements, minimum lot sizes, and other conditions which are typically imposed by cities as conditions for ADUs.

The same is true of SB 323, now codified as § 76-2-304(3), MCA, which goes into effect January 1, 2024, and simply states that "duplex housing must be allowed as a permitted use on a lot when a single-family residence is a permitted use." Thus, without further notice, hearing or other review, a duplex can go up in the neighborhood.

The State argues that this threat is insufficient to establish the likelihood of irreparable

injury, arguing that Plaintiff must adduce evidence that there is actually an imminent threat by a developer who begins construction in a single-family neighborhood. The law is not so rigid. For example, in the standing context, the court in *Heffernan* found that past or "threatened" injury is sufficient to support standing. That concept applies here to irreparable injury. *See Palmer Steel Structures v. Westech Inc.*, 178 Mont. 347 ("therefore if further proceeding or arbitration proceeding are allowed, or not enjoined, Palmer faces a real threat of **irreparable injury**. Allowing the arbitrators to make decisions might have the effect or rendering the District Court judgment ineffective...with additional cost to the parties and a multiplicity of proceedings, judicial or otherwise.) (emphasis added); *Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, LLC*, 810 MT 63, 355 Mont. 387, 228 P.3d 1134 ("the flexible nature of equitable principles allows Neighbors to attempt to establish a prima facie case for a preliminary injunction by showing 'that it is at least doubtful whether or not [they] will suffer irreparable injury', citing *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 14, 334 Mont. 86, 146 P.3d 714"); *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (irreparable injury factor satisfied if Plaintiff will experience harm that cannot be compensated after the fact by monetary damages, **even if harm is not certain to occur**) (emphasis added.).

The State also argues that the Court should be dubious about Plaintiff's claim of urgency given its delay in filing its motion for interim injunctive relief. Although the delay may be a factor to be considered, any "delay" here was, as explained by Plaintiff's counsel, largely due to the extreme complexity of the issues presented by the four challenged measures. The Court accepts that explanation given the obviously complex nature and interaction of the measures challenged. Plaintiff argued that the applicability of the challenged measures is chaotic and uncoordinated. For example, SB 382 applies to all Montana municipalities with a population of at least 5,000 residents,

located in counties with at least 70,000 residents. SB 323, requiring that duplexes be allowed in single-family zoned areas, applies to cities with a population of at least 5,000, but does not have the county population of 70,000 qualifier, that is in SB 382. SB 528, requiring the allowance of ADUs, applies to **all** Montana cities.

Any threat to the deprivation of fundamental rights, such as the right of free speech, constitutes, for purposes of a preliminary injunction, irreparable injury *per se*. *See Elrod v. Burns*, 427 US 347, 373 (1976); *Planned Parenthood Assoc. of Cincinnati v. City of Cincinnati*, 822 F.2d 1390, 1400 (1987).

PROBABILITY OF SUCCESS ON THE MERITS

The 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. *See Benefis, supra*. 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. With that in mind, this Court concludes that Plaintiff has demonstrated a probability of success on the merits.

On Count I, seeking a declaratory judgment that new zoning changes will not displace private restrictive covenants that are more restrictive than the new zoning, Plaintiff is likely to succeed. First, the new laws, themselves, do not purport to displace or supplant those areas subject to covenants more restrictive than the zoning amendments required by the new laws. In fact, SB 528(2)(i) actually provides that this law "may not be construed to prohibit restrictive covenants concerning accessory dwelling units entered into between private parties…".

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

Plaintiff is likely to prevail on the merits of this claim. That is, Plaintiff will likely obtain a declaratory judgment simply stating that, whatever these new zoning laws say regarding municipal zoning, they do not displace private restrictive covenants that are more restrictive.

Plaintiff argues that two classes, otherwise similarly situated, are treated differently on an arbitrary basis. One class constitutes those homeowners who are protected by private, restrictive covenants. The other class is those who are absolutely similarly situated, and in fact, live just across the street in some circumstances, and have no such protections. Plaintiff argues that such arbitrary distinction, unrelated to the purported purpose of mitigating the shortage of affordable housing, is arbitrary and cannot stand.

Plaintiff argues that this Court should apply the strict scrutiny test because Plaintiff's "inalienable rights" of "acquiring, possessing, and protecting property, and seeking their safety, health and happiness…" are threatened. These rights are found in Montana's Declaration of Rights, Article II, Section 3. The court stated in *Butte Community Union I,* 219 Mont. 426, 428, 712 P.2d 1309, 1310 (1986), that any rights found within Montana's Declaration of Rights (Mont. Const., Article II) are fundamental because they are so designated in Article II. Thus, any threatened infringement of these rights triggers strict scrutiny review. *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1977).

Plaintiff further argues that, at least, mid-tier scrutiny should be applied under *Butte Community Union I*, *supra*.

Finally, Plaintiff argues that unlike the federal "rational basis" test, Montana has applied a more meaningful standard, i.e., a standard with teeth. *See e.g.*, *Jacksha v. Butte-Silver Bow County*, 2009 MT 263, ¶ 21, 352 Mont. 46, 214 P.3d 1248. Plaintiff points out that even the less rigorous Federal Equal Protection rational basis test has been applied by the US Supreme Court to strike down an arbitrary zoning classification, citing *City of Cleburne v. Cleburne Living Center*, 473 US 432 (1985).

This Court need not, at this interim stage, resolve which standard of review applies. Suffice it to say, that by any of these equal protection scrutiny standards, there is at least a probability that Plaintiff will prevail on the merits. The result of the new laws is that two different sets of people, one protected by restrictive covenants, the other not, results in an arbitrary application of Montana law which is unrelated to any legitimate governmental purpose. As a consequence, Plaintiff is likely to succeed on the equal protection claim.

Plaintiff's Complaint, in Count IV also alleges violations of due process. It cites *Newville v. Dep't. Family Services,* 267 Mont. 237, 883 P.2d 793, 802 (1994):

> Substantive due process primarily examines underlying substantive rights and remedies to determine whether restrictions are unreasonable or arbitrary **when balanced against the purposes of a government body in enacting a statute, ordinance or regulation**.

Town & Country Foods, Inc. v. City of Bozeman, 2009 MT 72, ¶17, 349 Mont. 453, 203 P.3d 1283 (citations omitted, emphasis added).

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

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

Federal constitutional case law supports Montana's analysis. In the zoning arena, the lead case is *Moore v. East Cleveland*, 431 US 494 (1977). In *Moore*, applying rational basis review, the court invalidated a discriminatory zoning ordinance that applied to the housing of family members.

Plaintiff demonstrated many examples of how these new statutory provisions to promote "densification" may violate substantive due process.

First, there appears to have been no coordination within the Montana Legislature on these various land use measures. As a consequence of its efforts to promote "densification", there are apparent contradictions and irreconcilable differences among these measures. For example, SB 382 requires affected municipalities to select five housing "strategies" out of a list of 14. Of those fourteen listed strategies, the first listed is the allowance of "duplexes" in all areas zoned for single-family dwellings. However, SB 323 **requires** the allowance of duplexes in all affected cities in all areas zoned as "single-family". Each of these measures has its own separate definition of "duplex" and these definitions are different. Compare the two definitions in § 76-25-103(36) and § 76-2-304(5)(a), MCA.

A similar apparent contradiction exists between SB 382 and SB 528. In SB 382, Section 19, one of the "strategies" of the 14 out of which five must be selected, is to "allow, as a permitted use, for at least one internal or detached accessory unit on a lot with a single-unit dwelling occupied as a primary residence." *See* SB 382, Section 19(e), (§ 76-25-302(e), MCA). But SB 528 requires **all** cities in Montana to allow accessory dwelling units on all lots or parcels designated as single-family.

Plaintiff asserts that these and other problems indicate that little thought, and certainly little coordination, was given to what appears to be the frantic rush for "densification" of Montana's

cities.

The effort by the Montana Legislature to write an entirely new review and approval regime for zoning, subdivisions and annexation, may have resulted in pervasive arbitrariness which runs afoul of both the Equal Protection and the Due Process clauses of the Montana Constitution. For example, as Plaintiff's counsel argued the cities of Hamilton and Polson both have populations of over 5,000, but they are not located in counties of at least 70,000 in population. The cities of Columbia Falls, Whitefish, and Laurel, on the other hand, all of over 5,000 residents, **do** sit in counties of over 70,000 in population. There does not appear to be any reason in public policy or in the professed justification of addressing affordable housing that supports the entirely arbitrary distinctions between these similarly-situated cities. Yet one set is obligated to comply with the burdensome strictures of SB 382, while the other set is not. In the meantime, the newly-enacted SB 323, requires "duplexes" in all cities of 5,000 with no caveat that such cities must be located in counties of at least 70,000 in population. Also, SB 528 requires **all** Montana cities to allow "accessory dwelling units" in areas now zoned for single family use. However, both SB 323 and SB 528 are codified in Title 76, Chapters 2, Part 3, but SB 382's "applicability" section, Section 5(d)(4), makes it clear that those local governments complying with SB 382 are not subject to the provisions of Title 76, Chapters 2, 3, 4, and 8.

Although one of the professed purposes of SB 382 is to "streamline" the subdivision review process and make it more understandable to the public, it appears that it does just the opposite particularly in combination with SB 323 and SB 528. The double standard alleged above is even more pronounced on the subdivision issue. Present law deals with local review of subdivisions in § 76-3-101, MCA. Ironically, its short title is: "**The Montana Subdivision and Planning Act**". Now, Montana has a separate new law in SB 382. Its title is: "**Montana Land Use Planning**

Act". *See* § 76-25-101, MCA. Both chapters purport to deal with local review and approval of subdivision applications. The result is a great deal of confusing redundancy, which is the antithesis of "streamlining". For example, the new law (SB 382) has a definition section at § 76-25-103, MCA, but so does the old subdivision law at § 76-3-103, MCA. The old, but still existing, law has definitions for "minor subdivision", "phased development" and "planned unit developments" (§ 76-3-103(4), (10), and (11), MCA). However, no identical definitions are in the new SB 382 at § 76-25-103, MCA.

It appears that the disparity in treatment between those protected by restrictive covenants and those not so protected, and the chaotic, uncoordinated, and arbitrary applicability requirements in these various new laws are so arbitrary and capricious and so unrelated to a legitimate governmental purpose that they likely constitute a denial of Plaintiff's rights to Due Process of Law.

Also, Plaintiff has established that one of the main intents behind the new measures was to cut back on public participation at the project-specific stage—i.e., the stage at which new developments most imminently threaten Montana's living in single-family neighborhoods. Instead, Plaintiff argues the intent of the new set of laws is to "front load" public comment at the land use plan development stage and to cut it back later.

In fact, with respect to the two measures scheduled to take effect on January 1, 2024, SB 323 and SB 582, there is no public participation at all. At the hearing, the Court questioned State's attorney about whether she agrees that SB 528(5) compels municipalities to permit ADUs immediately, notwithstanding that the municipality has not yet adopted regulations to implement SB 528. The State so conceded. However, in response to the question about where the public participation is allowed in that process, the response was equivocal and not persuasive and

suggested that it was during the legislative process in the adoption of these new laws.

The State cites Section (6)(1) of SB 382 arguing that there is plenty of public participation provided in that Statute. However, that Section applies to the development of a "land use plan" and fits exactly into what Plaintiff is arguing. That is, that this is an effort to "front load" public comment, in contrast to "site-specific" development, where public participation must "be limited". *See* § 76-25-106(4)(d), MCA.

Moreover, it appears that this public participation "front loading" is discriminatory. It applies only to those qualifying cities (i.e. those of over at least 5,000 residents in counties of a population of over 70,000). There is no reason in public policy that the fundamental rights of persons residing in Columbia Falls and Kalispell (to participate in deliberations of the government) are less, than those in Polson, a city of 5,000, but not in a county of 70,000.

The Court concludes Plaintiff has a likelihood of success on the merits of the issues under Article II, Sections 8 and 9 of the Montana Constitution regarding public participation.

BALANCE OF EQUITIES

If the preliminary injunction is issued, little harm is done to the State. With the "top-down" imposition of these measures, Montana's citizens, and particularly the members of Plaintiff, stand to suffer. They dread waking up in the morning, with no notice, and a new, more dense, building is being erected in their family neighborhood. As noted above, this injury would be irreparable. The balance of equities tips in favor of issuing a preliminary injunction.

THE PUBLIC INTEREST

Plaintiff characterizes these zoning measures as a chaotic hodge-podge of bills, completely uncoordinated. As Plaintiff suggests the pause of a preliminary injunction may well give the State an opportunity to revisit and revise these measures to eliminate their internal contradictions.

The applicability section of SB 382 provides that "a local government that complies with this chapter is not subject to any provisions of Title 76, Chapters 1, 2, 3, or 8. § 76-25-105(4), MCA. Thus, it is unclear whether the affected cities (those of population of 5,000 in counties with a population of 70,000) must abide by the requirements of SB 323 or SB 528. But these two challenged measures go into effect automatically on January 1, 2024. Thus, for example, does a city such as Billings have to comply with these two measures when, at a later date, these measures will not apply? It is unclear whether any application of these two challenged measures then become null and void, once the local government complies with SB 382. This failure of the Legislature to address this transitional limbo is another example of the arbitrariness of the challenged 2023 laws. The public interest favors the issuance of the preliminary injunction.

THE BOND ISSUE

Plaintiff takes the position that the Court should require no bond, citing § 27-19-206, MCA, which allows waiver of the bond "in the interest of justice". The State has requested no bond.

CONCLUSION

Based upon the Court's discussion in this Decision and Order the Court concludes Plaintiff has met its burden under § 27-19-201, MCA, and has established that (a) it is likely to succeed on the merits, (b) it is likely to suffer irreparable harm in the absence of preliminary relief, (c) the balance of equities tips in the applicant's favor, and (d) the order is in the public interest. Plaintiff has demonstrated its need for a preliminary injunction order.

The reason for the issuance for this preliminary injunction is that unless this order is entered, SB 323 and SB 528 will go into effect as of January 1, 2024. These measures, calculated to increase density in single-family zoned areas of Montana's cities will result in irreparable injury to the members of the Plaintiff LLC. These include: deprivation of the members' constitutional

right of pubilc 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.

For these reasons, the Court enters the Order and Preliminary Injunction.

ORDER AND PRELIMINARY INJUNCTION

IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Preliminary Injunction is **GRANTED**.

2. Defendant State of Montana, its officers, agents, employees, and attorneys, and its municipalities, and their officers, agents, employers, and attorneys, and those in active concert or participation with them, are **ENJOINED** from implementing:

A. SB 323, codified as § 76-2-304(3), (5), and § 76-2-309, MCA;

B. SB 528, codified as § 76-2-345, MCA.

3. Plaintiff is not required to post a bond.

4. This Preliminary Injunction shall remain in effect until a hearing or trial on a permanent injunction is held or until the Court otherwise determines.

5. The Clerk of the District Court shall immediately provide copies of this Decision and Order and Preliminary Injunction to counsel.

Dated December 29, 2023.

Mike Salvagni

Hon. Mike Salvagni
Presiding Judge

cc: James H. Goetz/Henry J.K. Tesar
Brian K. Gallik
Austin Knudsen/Alwyn Lansing/Thane Johnson