



PO BOX 201706  
Helena, MT 59620-1706  
(406) 444-3064  
FAX (406) 444-3036

## Local Government Interim Committee

68th Montana Legislature

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TO: Local Government Committee Members

FROM: Julie Johnson, Staff Attorney

RE: Housing and SB 442 Litigation Update

DATE: March 11, 2024

### **Montanans Against Irresponsible Densification, LLC v. State:**

#### **I. District Court (DV-23-1248C)**

Montanans Against Irresponsible Densification, or MAID, filed suit against the State challenging the constitutionality of the following pieces of legislation passed in the 2023 session:

- [Senate Bill 382](#), the Montana Land Use Planning Act, which requires a municipality with a population at or exceeding 5,000 located within a county with a population at or exceeding 70,000 to comply with the Act.
- [Senate Bill 245](#), which requires cities of 7,000 residents or more to allow apartment-style housing in most areas set aside as commercial zones.
- [Senate Bill 323](#), which requires cities to allow duplex housing on any home lot in cities with 5,000 residents or more.
- [Senate Bill 528](#), which requires cities to adopt regulations allowing more construction of accessory dwelling units, or secondary housing structures that share parcels with larger homes.

In their Complaint, the Plaintiffs sought the following relief:

A declaratory judgment that the provisions of SBs 323, 528, 245 and 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.
  - are facially unconstitutional in violation of Montana’s constitutional provisions regarding rights of public participation and rights “to know”;
  - That 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;
  - That 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.
2. A permanent injunction, enjoining the State of Montana and its municipalities from implementing SB 323, SB 528, SB 245 and SB 382.
  3. A preliminary injunction, preliminarily enjoining the State of Montana and its municipalities from implementing SB 323 and SB 528, both of which are scheduled to take effect January 1, 2024, and preliminarily enjoining SB 245 which purported to go into effect on passage, and purports to be retroactive.
  4. An order awarding Plaintiffs their costs and attorneys’ fees.

On December 29, 2023, following a show cause hearing the day before, the District Court issued a preliminary injunction enjoining the implementation of SB 323 (legalizing duplexes) and SB 528 (legalizing accessory dwelling units) on residential land across the state. The District Court ruled that these two laws would do "irreparable" damage to residents of single-family neighborhoods. The ruling on the preliminary injunction on SB 323 (legalizing duplexes) and SB 528 (legalizing accessory dwelling units) has been appealed to the Montana Supreme Court, which is discussed in Section II.

The remainder of the case is still in Gallatin County District Court. A party has filed to intervene in the case. The State had requested that the District Court stay proceedings pending the appeal before the Montana Supreme Court. The plaintiffs have sought an extension of time to respond to pleadings.

## II. Montana Supreme Court (DA 24-0039)

The State appealed the preliminary injunction to the Montana Supreme Court on January 17, 2024. The State requested and received an extension of time to file its opening brief on or before March 18, 2024. In the meantime, a third party called Shelter Whitefish filed a motion with the Supreme Court to intervene in the appeal. The State did not object to the motion to intervene, however, the Plaintiffs did. While the Supreme Court denied the motion to allow the Shelter Whitefish to intervene, it granted Shelter Whitefish the opportunity to file an *amicus* (friend of the court) brief. Shelter Whitefish describes itself as the "leading voice for pro-housing policy and the now-challenged bills."

### **Montana Wildlife Federation et al v. Montana Governor Gianforte DV-2023-411**

On January 16, 2024, a District Court judge ruled that lawmakers must have the opportunity to override the Governor's veto of Senate Bill 442. Since then, many pleadings have been filed. This includes the Governor filing a motion to stay the District Court's judgment pending appeal to the Supreme Court and Plaintiffs filing a motion for attorney's fees.

In the Governor's motion to stay the judgment, filed on February 6, 2024, counsel for the Governor noted that a court considers the following when assessing stay motions:

- whether the stay applicant has made a strong showing that it is likely to succeed on the merits;
- whether the applicant will be irreparably injured absent a stay;
- whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
- where the public interest lies

Counsel for the Governor argued that a stay was warranted because all of the considerations weighed in favor of granting a stay pending the appeal of the ruling to the Montana Supreme Court.

On March 5, 2024, the District Court denied the Governor's motion to stay. The District Court also gave the State 14 days, by March 19<sup>th</sup>, to grant lawmakers the ability to override the veto, appeal to the Montana Supreme Court, or both. In its order, the District Court stated:

The court finds ordering a stay would be inimical to the public interest as it would prevent the lawmaking process from moving forward. . . While this case involves technicalities of in-session versus out-of-session veto procedures, no party has convincingly argued the Legislature had a meaningful opportunity to respond to Gianforte's veto. The public interest lies in removing any uncertainties, which may lead to gamesmanship in the lawmaking process.

The Court ordered the poll would proceed concurrently with the appeal process, reasoning:

If the poll proceeds concurrently with the appeal process, the entire issue may be resolved at the same time. Should the Montana Supreme Court overturn this court's judgment on appeal, the governor's veto will stand regardless of the results of the poll. On the other hand, if the Montana Supreme Court affirms this court's judgment, the results of the poll will control SB 442's status.

An update to both cases will be presented at the next LGIC meeting.