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68th Montana Legislature

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TO: Local Government Committee Members

FROM: Julie Johnson, Staff Attorney

RE: Housing Litigation Update - Revised

DATE: July 17, 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.

On April 3, 2024, the Gallatin County District Court granted the State's request to stay the District Court proceedings pending the appeal of the preliminary injunction before the Montana Supreme Court. Nothing more has been filed in the District Court since the committee’s May meeting.

II. Montana Supreme Court (DA 24-0039)

The State appealed the preliminary injunction to the Montana Supreme Court on January 17, 2024. The State filed its opening brief on March 18, 2024. In it, the State argued that MAID is not likely to succeed on the merits of the case and had not shown irreparable harm. The State also argued that the balance of equities weighed in favor of the State.

MAID filed its response brief on March 27, 2024. MAID argued that the District Court did not abuse its discretion in granting a preliminary injunction given that it is likely to succeed on the merits of the case.

The State filed its reply brief on May 10, 2024. The appeal has been fully briefed since that time. In addition, the Supreme Court has allowed six other entities to file an amicus brief with the Court:

- Land Use Consultants (in support of the Plaintiff)
- Shelter Whitefish (in support of the State)
- Citizens for a Better Flathead (in support of the Plaintiff)
- Better Bozeman Coalition (in support of the Plaintiff)
- Institute for Justice (in support of the State)
- Montana Legislature (in support of State)

[The amicus brief on behalf of Montana legislators](#) was filed with the Montana Supreme Court on June 24, 2024. As stated in the brief, “[a]mici are individual legislators who hold leadership positions in the Montana Legislature or were involved in the creation and enactment of the challenged bills.”

The main arguments in the State’s brief are:

- Separation of Powers and Judicial Second Guessing
- Citizens Like Those Behind MAID Were Represented in the Process
- Legislative History of SB 323 and SB 528 Demonstrates the Responsiveness of the Legislature
- Legislative History Demonstrates the Support These Bills Received From Diverse Participants
- MAID’s Unsupported or Contested Claim that Density Does Not Affect Housing Affordability

The appeal has been fully briefed since May 10, 2024. The last filing with the Montana Supreme Court was the amicus brief of the Montana Legislature, filed on June 24, 2024.