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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT,
GALLATIN COUNTY

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC,

Plaintiff,

v.

STATE OF MONTANA,

Defendant,

and

SHELTER WF, Inc.,

Defendant-Intervenor,

DAVID KUHNLE,

Defendant-Intervenor,

CLARENCE KENCK,

Cause No. DV-16-2023-0001248
Hon. Michael Salvagni

PLAINTIFF'S RESPONSE TO DEFENDANT-INTERVENOR MONTANA LEAGUE OF CITIES AND TOWNS' MOTION TO DISMISS

Defendant-Intervenor,

MONTANA LEAGUE OF CITIES AND TOWNS,

Defendant-Intervenor.

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INTRODUCTION

Defendant-Intervenor Montana League of Cities and Towns ("League") has moved to dismiss, arguing that this case is not "ripe" for judicial review.

Notably, the League's challenge is exclusively based on the ripeness doctrine—there is no argument that MAID lacks standing to bring suit here, on behalf of its members.

The League centers its argument primarily on the public participation claim raised in Count II of MAID's Amended Complaint. The League argues MAID's claims are "speculative", that local governments have not made concrete decisions on public participation and that it is "uncertain" how local regulations will be implemented in terms of site-specific development. League Br., p. 2. Accordingly, it argues MAID's Complaint is premature and unripe for adjudication.

I. The League does not even purport to argue that MAID's challenges to SB 528 and SB 323 are not ripe.

The League bases its ripeness argument solely on the challenged SB 382, now codified as Title 76, Ch. 25, MCA ("Montana Land Use Planning Act" [MLUPA]). No challenge is made to MAID's Complaint regarding SB 323 (the measure requiring allowance of duplexes in all single-family areas) or SB 528 (the measure requiring accessory dwelling units in all areas zoned single-family). In fact, the League's Motion to Intervene dated October 17, 2024, Dkt. 70, specifically notes that, in the 2023 legislative session, "the League opposed SB 323". *Id.* at p. 3. Also, that intervention brief states "the League initially opposed SB 528 but after working with a sponsor on numerous amendments lessening its impact on municipalities, the League was neutral on the final version of the bill." *Id.*

Of course, no good faith argument **could** be made that SB 323 and SB 528 are not ripe for

judicial review. Both were scheduled to go into effect as of January 1, 2024, and with the Supreme Court's reversal of this Court's preliminary injunction on both (*see Montanans Against Irresponsible Densification, LLC, v. State of Montana*, 2024 MT 200, 418 Mont. 78, 555 P.3d 759), both are presently in effect.

II. SB 382 unequivocally eliminates public participation at the site-specific level of a project's application. There is no factual dispute on this.

The League argues that municipalities under the Montana Land Use Planning Act (SB 382) (MLUPA) (§ 76-25-101, *et. seq.*, MCA) have until May 18, 2026, "to adopt a public participation plan". League Br., p. 6. Until then, it argues that we cannot know whether the right of public participation and the right to know is violated. The League argues there must be a concrete decision and that there must be a "factually adequate record upon which to base effective review". *Id*., p. 12.

Curiously, the League says very little about MAID's equal protection, due process, and local self-government claims. League Br., pp. 12–13. Little effort is made by the League to link its ripeness argument to these claims. *Id*.

The League's argument that MAID's public participation claims are hypothetical and present no concrete controversy is unpersuasive. This is most easily demonstrable regarding subdivision applications. Under the present subdivision law (Montana Subdivision and Platting Act, § 76-3-101, MCA), public hearings on site-specific subdivision proposals **are required,** and have been for **fifty years**. [1]

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[1] Public hearings and public participation have been required regarding subdivisions since the Act's inception in 1973. *See Recent Developments in Montana Land Use Law*, James H. Goetz,

But the new MLUPA has changed that with respect to certain cities—those that fall within its ambit (cities of 5,000 population in counties of 70,000 population). Confusingly, Montana now requires local governments to regulate subdivisions under two separate regimes, the present Subdivision Act (Montana "Subdivision and Platting Act", § 76-3-101, *et. seq.*, MCA) and the new MLUPA (§ 76-25-101, *et. seq.*, MCA). Once MLUPA is implemented, **no public hearing is allowed** on site-specific subdivision proposals. Instead, the ultimate decision is to be a "ministerial" one made by an administrative officer. § 76-25-408(7), MCA.

The **present** Montana Subdivision and Platting Act which has been in effect since 1973 requires a hearing on a subdivision application and the city's governing body must, after such public hearing, approve, conditionally approve, or reject the application. § 76-3-605, MCA provides:

> **Hearing on subdivision application**. (1) …at least one **public hearing** on the subdivision application must be held by the governing body, its authorized agent or agency, or both, and the governing body, its authorized agent or agency, or both shall consider all relevant evidence relating to the public health, safety, and welfare, including the environmental assessment if required, to determine whether the subdivision application should be approved, conditionally approved, or denied **by the governing body**.

Emphasis added.

MLUPA attempts to water down the rights of Montana's citizens to participate in land-use decisions of their government. It does this in several ways:

Montana LR Vol. 38, pp. 98–100, Winter 1977: "Upon submission of the preliminary plat and environmental assessment by the subdivider, **the governing body must hold a public hearing**, after notice by publication," based upon "all relevant evidence relating to the public health, safety and welfare, including the environmental assessment that was to be approved, conditionally approved or disapproved by the governing body." *Id.* at p. 100. (emphasis added).

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". Commensurately, 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.

Specific language of MLUPA on this issue is § 76-25-408(7)(a), MCA, which provides:

> The scope of an 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.

(Emphasis added). § 76-25-408(7)(b), MCA, states: "The application is **not subject to any further public review or comment**, except as provided in 76-25-503."[2] In short, public participation is **not allowed** on site-specific projects except for the minor exception that allows further public comment (but apparently not a public hearing) in cases where a site-specific proposal is not in "substantial compliance" with the city's growth plan or zoning/subdivision regulations. Who makes that subjective decision as to whether there is or is not "substantial compliance" is unclear under the MLUPA. Thus, on site-specific developments, the ones that actually affect citizens, public participation is severely curtailed.

An example of the attempt to implement MLUPA is found in the City of Bozeman's current effort to revise its Unified Development Code. Presently the Bozeman UDC states, "*all subdivisions require notice and opportunity for public comment*". Section 38.240.140, subsection a. It

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[2] § 76-25-503, MCA, is largely irrelevant here. It is the section providing for an appeal of a subdivision decision.

proceeds to state, in general, there must be "planning board review"—at a regularly noticed public meeting of the public board (except for minor subdivisions). *Id.* Now, however, a recent Bozeman planning memorandum, which addresses SB 382 states: "Notice for a subdivision review **is limited by state law** to only those elements not previously addressed in the land use plan, zoning regulations, or subdivision regulations…." Bozeman Unified Development Code, Draft, August 14, 2023, *Sec. 38.750.080*. Subdivision Notice of Public Comment.[3]

In sum, Montana's new subdivision and zoning laws now purport to take away a fundamental and treasured constitutional right of those citizens who happen to reside in cities subject to the MLUPA—rights that have been in existence for **fifty years**.

There is no doubt that this is purposeful. One of the authors of SB 382, Kelly Lynch, of the League, makes this clear:

> Essentially, we do things backwards in Montana. And so it's no surprise that our permitting processes take too long." Lynch said Wednesday, describing the current system as driven by project-level review instead of proactive planning. "The whole idea behind this is to flip that, so that we do the planning and the public participation up front, we front-load it, then as we get to the permitting and planning, that becomes a very administrative process."[4]

This is a cynical ploy essentially designed drastically to cut back public participation. This Court may take judicial notice of the well-known fact that members of the public do not get very

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[3] Attached as Exhibit C to the Declaration of James H. Goetz, dated November 14, 2024, Dkt. 84.

[4] This quotation is taken from Eric Dietrich, "*Land Planning Overhaul Would Prioritize Proactive Urban Planning*", Montana Free Press, February 23, 2023. The accuracy and authenticity of this quotation is established through the League's responses to MAID's written discovery requests. In particular, Interrogatory No. 5, which sets forth the Lynch statement and asks whether it is accurate. The League's response: "This is an accurate quotation." MAID will seek leave of the Court to file this written discovery.

excited about planning issues at the stage of development of a "growth policy". Instead, the public is, understandably, much more involved when a specific "site-specific" proposal directly affects them. The attempt to derail public participation at the site-specific level is palpably inconsistent with Montana's Right to Participate constitutional provisions.

The League argues that MLUPA makes ultimate site-specific decisions "ministerial" and that such ministerial decisions "are not subject to the public's right to know". League Br., p. 10. (citing *SJL of Mont. Associates Ltd. Partnership v. Billings*, 263 Mont. 142, 867 P.2d 1084, 1087 (1993). Even assuming the questionable validity of that conclusion, the argument makes MAID's point. MLUPA attempts to shift the ultimate decision-making power from a public body to a bureaucrat, thereby eliminating the public's constitutional rights to public participation. That violates the Constitution. In any event, ultimate decisions on land-use can virtually never be "ministerial" in the sense that there is no subjective judgment or discretion involved. It is simply impossible to develop standards that are so objective that a bureaucrat can simply rotely implement them. But that is an issue for another day. For now, this case is clearly ripe for adjudication.

A recent decision of the Pennsylvania Supreme Court, *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (2013), provides some guidance here. There, the Pennsylvania Supreme Court determined that legislative amendments to Pennsylvania's oil and gas law, which drastically displaced local zoning laws, were unconstitutional. The Court found that there was a serious "degradation" of local environmental values encompassed in the locally-enacted zoning laws through this state-imposed law. In essence, Pennsylvania's zoning laws were enacted pursuant to a foundational constitutional environmental protection provision in Pennsylvania,

similar to Montana's right to a clean and healthful environment in Article II, Section 3, Mont. Const. Pennsylvania's oil and gas amendments undermined those environmental/zoning laws and were struck down, in part, for that reason.

The parallel is clear. Here, Montana has fundamental constitutional rights of public participation and to a clean and healthful environment that are implemented by carefully-drafted statutes. The MLUPA seriously undermines the letter and spirit of these constitutional provisions with its attempt to relegate ultimate land-use site-specific decisions to "ministerial" decisions, without the benefit of public notice, public hearing, and public participation. As in Pennsylvania, such effort to degrade public participation and environmental protection does not square with the Constitution.

But it gets worse, not only does MLUPA degrade the right of certain municipal citizens to participate in important governmental decisions, it is **facially discriminatory**.

MLUPA applies only to cities with 5,000 residents in counties of 70,000 residents, while the existing Subdivision and Platting Act applies to all non-MLUPA cities, and to counties. The result is confusing redundancy, which is the antithesis of the professed "streamlining". More important, the implications affecting the rights of public participation are profound.

Under the present subdivision review law (§ 76-3-605, MCA) the Planning Board first must decide whether to recommend approval of the application and whether to require conditions. Ultimately, the governing body must decide whether to approve or deny the application. Article II, section 8, Mont. Const., of course, guarantees all citizens the right to participate at both levels of review.

Subdivision review, under the MLUPA, however, is ministerial, and, as author Lynch

describes it: "[it] becomes a very administrative process," not subject to public participation. This double standard is violative of equal protection. In short, while public comment and participation is curtailed in cities subject to SB 382, it is not for other Montana cities.

The discriminatory consequences to citizens are illustrated by comparing various cities. Once the MLUPA is implemented by the cities of Whitefish and Columbia Falls, which are located in Flathead County, a county of over 70,000 population, their citizens are then prohibited from public participation on project-specific review of a proposed subdivision. On the other hand, for subdivision applications just outside the city limits of these cities, the **county** residents may fully participate in a final public body review of a subdivision proposal. § 76-3-605, MCA.

Likewise, the City of Polson, of similar size to Whitefish and Columbia Falls, is not covered by the MLUPA because Lake County does not have 70,000 residents. Therefore, Polson's present subdivision review procedures remain in effect. By law, Polson must provide for full public participation, particularly at the site-specific stage. § 76-3-605, MCA. Citizens of Whitefish and Columbia Falls, on the other hand, are required to "front-load" all their comments at the stage of the adoption of the growth policy—or "forever hold their peace". § 76-25-408(7)(a)(b), MCA.

The discrimination is obvious. Some citizens are granted **full** rights of public participation, while others, arbitrarily, are cut way back on that right. There is no public policy that justifies affording citizens of certain Montana cities full rights of public participation in zoning and subdivision matters, but cuts back on the same rights for citizens of other cities.[5] For

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[5] The discussion above concerning subdivision review also applies to municipal zoning actions.

this reason, MLUPA violates equal protection.

More important, for the purposes of the ripeness motion, the facts are clear. The discrimination is facially obvious. The claim is thus ripe for adjudication.

ARGUMENT

I. MAID's Claims Are Fully Justiciable.

All that is required for a case to be justiciable is that it meet the "case-or-controversy" requirements of the Constitution. The seminal case on ripeness is *Reichert v. State, ex. Rel McCulloch*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455. *Reichert* quoted language from *Missoula Air Pollution Control Bd. v. Board of Env'l Rev.*, 282 Mont. 255, 260, 937 P.2d 463, 466 (1997):

> In general terms, a justiciable controversy is one that is "definite and concrete, touching legal relations of parties having adverse legal interests", "admitting of specific relief through decree of conclusive character, as distin-guished from an opinion advising what the law would be upon a hypothetical state of fact, or upon an abstract proposition." *Chovanak v. Matthews*, 120 Mont. 520, 526, 188 P.2d 582, 585 (1948).

Id. ¶ 53. In short, constitutional justiciability simply requires that the issues be presented in an adversary context and the controversy must be one which a Court's judgment will effectively and conclusively operate, as distinguished from the dispute involving a purely political, administrative, philosophical, or academic conclusion.

Many local regulations now provide for issuance of permits, such as variances or conditional use permits, which must be heard by the planning commission and/or the governing body. However, § 76-25-106(4)(d), MCA, limits public participation on "site-specific" zoning applications and confines review to the standard of "substantial compliance" with the land use plan. Attached to this brief is a diagram on Development Review Timelines and Processes from the version of the Bozeman Unified Development Code in effect prior to the MLUPA. This illustrates the process for providing public notice and public hearings on both zoning and subdivision decisions.

A. Where fundamental constitutional rights such as public participation are at issue, hypertechnical justiciability objections cannot constrain a court's duty to interpret the Constitution.

In *Schoof v. Nesbit*, 2014 MT 6, 373 Mont. 226, 316 P.3d 831, the Court considered whether a citizen had standing to pursue his suit alleging that county commissioners had illegally and secretly voted to pay themselves cash rather than make payments designated for group health insurance. The Court rejected the county commissioners' argument that the citizen lacked standing, holding, under the plain language of Article II, Sections 8 and 9 of the Montana Constitution and their implementing statutes. The Court held the citizen's personal stake was the opportunity to observe and participate in the commissioners' decision-making process:

> 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.**

Id., ¶ 19. *See also* ¶ 21 (emphasis added).

Although *Schoof* is a "standing" case, as opposed to one discussing the "ripeness" doctrine, it offers useful guidance with its focus on the paramount importance of the citizens' right to participate in decisions of their government. [6] In short, the lesson is that, where

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[6] The Court in *Weems v. State*, 2019 MT 98, ¶ 11, 395 Mont. 350, 440 P.3d 4, quoted *Reichert* (¶ 56): "Whether framed as an issue of standing or ripeness, the constitutional inquiry is largely the same: whether the issues presented are definite and concrete, not hypothetical or abstract."

fundamental constitutional rights are at issue, technical justiciability arguments should be viewed with skepticism, "otherwise the constitutional rights to know and participate could well be rendered superfluous…." *Schoof*, *supra*.

B. MLUPA eliminates public participation at the "site-specific" level. No amount of protracted rulemaking can change that.

The League, in making its ripeness argument, focuses on MAID's claims founded on the public participation features of the Montana Constitution. In essence, the League argues MAID's claim is premature because the MLUPA has a deferred implementation date (until 2026) and the local governments are in the process of developing their "public participation" plans.

This argument is unpersuasive for a simple reason—the Act **requires** local government to dispense with public hearings and participation for site-specific use decisions. No amount of administrative rulemaking can alter that.

In *Mont. Democratic Party v. Jacobsen*, 2024 MT 66, 416 Mont. 44, 545 P.3d 1074, the Court found various amendments to Montana's voting laws constitutionally invalid. The State defendant argued that the case was not ripe for review because "the Secretary has not gone through the administrative rulemaking process. And thus we cannot determine what is or is not prohibited by the law." *Id*. at ¶ 90. The State argued that "until the rulemaking is finished, Appellees will not know whether their groups' activities are prohibited by law or will be harmed by it." *Id.* The same argument is made here by the League, which argues that, until local government engage in rulemaking to adopt their participation plans, the case is not ripe.

In *Mont. Democratic Party*, the Court rejected this argument stating:

> The Secretary argues that its eventual rulemaking would "likely" only focus on a cash-per-ballot exchange ban. However, a challenge here is to the broader language of the statute itself and not a rule that

> might be adopted in the future. If the administrative rule narrowed the statute such that it only prohibited cash-per-ballot situations, it would conflict with the plain language of the statute, as well as the provisions directing the Secretary to adopt a rule in substantially the same form as enacted….

Id. at ¶ 94. Thus, the Court held the case "is not a hypothetical dispute and is ripe for review." *Id.*

The same logic applies here. Whatever rules local governments may come up with under MLUPA, such rules still must comply with the language of the statute. This language eliminates public hearings and site-specific review of subdivision proposals.

C. This action is not "premature" or "hypothetical", and is therefore, ripe for judicial review.

As noted, the lead case on ripeness is *Reichert v. McCulloch*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455. That case considered a legislative referendum which would have changed the law so that each Supreme Court Justice elected from one of seven districts of approximately equal population and the voters of each district could vote for only one Justice. It also added a new residency requirement, requiring the Justices to reside in their respective districts. The measure was to be submitted for approval by the Montana electorate in a special election to be held concurrently with the June 5, 2012, primary election.

The State and certain intervening legislators argued that the plaintiff's constitutional challenge was not ripe because the measure had not yet been presented to the Montana electorate for its approval, and, in the end, the voters might well not approve the measure.

Reichert rejected the ripeness challenge, holding, on both constitutional and prudential grounds, the matter was ripe for judicial review. *Id.* ¶¶ 59, 60, n. 7.

1. MLUPA is facially unconstitutional—development of particular facts is unnecessary for that determination.

The State argues this case is premature because it is dependent on factual development. This is not true. Indeed, MAID has moved for summary judgment on all counts precisely because there are no issues of material fact.

Importantly, like *Reichert*, the present case is a **facial** challenge. This is important because a facial challenge is not dependent on the development of particular facts, but instead seeks a declaration as a matter of law.

MAID's Amended Complaint presents a facial constitutional challenge and requests a declaratory judgments. Amended Complaint, Dkt. 3, p. 2, ¶ 2. The Montana Supreme Court has held that a party raising a "bona fide constitutional issue" can seek relief from the courts through a declaratory judgment action. *Stuart v. Dept. of Social & Rehab. Serv.*, 247 Mont. 433, 438–439, 807 P.2d 710, 713 (1991) (quoting *Mitchell v. Town of West Yellowstone*, 235 Mont. 104, 109–110, 765 P.2d 745, 748 (1988)).

The Uniform Declaratory Judgments Act, found at Title 27, Chapter 8, MCA, provides it is remedial and it is to be "liberally construed and administered to permit courts to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations…." § 27-8-102, MCA.

In response to the State's argument that the courts must accord great deference to legislative judgment, *Reichert* said:

> Such deference and restraint do not apply, however where a challenged measure is **facially defective**. In that event, the courts **have a duty** to exercise jurisdiction and declare the measure invalid.

Reichert, ¶ 59 (emphasis added). In addition to rejecting the State's ripeness argument based on constitutional concerns, *Reichert* also rejected the prudential aspect of the State's argument

stating:

> Where a measure is **facially defective**, placing it on the ballot does nothing to protect voters' rights. It instead creates a sham out of the voting process by conveying the false appearance that a vote on the measure counts for something, when in fact the measure is invalid regardless of how the electors vote…Deferring decision to a later date so the measure can go forward is senseless. It consumes resources with no corresponding benefit. **Nothing in ripeness doctrine mandates such an approach**. Indeed, "the prudential concerns of the ripeness doctrine [are] not implicated" where the possible **Constitutional infirmity [is] clear on the face "of the measure."**

Id. (emphasis added). In *Air Pollution Control Board,* 282 Mont. at 260, 937 P.2d at 466, the Court stated regarding the prudential aspect of justiciability:

> With respect to the prudential basis for standing, this Court has stated that the trial courts' discretion cannot be defined by hard and fast rules, and that the **importance of the question to the public "surely is an important factor"**. *Committee for an Effective Judiciary v. State* (1984), 209 Mont. 105, 110, 679 P.2d 1223, 1226.

Id. at 282 Mont. at 260, 937 P.2d at 466 (emphasis added). That language applies here. The question whether or not the sprawling MLUPA is constitutionally defective is one of immense importance to the people of Montana. Its resolution should not be delayed.

Eschewing a bright-line approach to ripeness, the Court said in *Reichert*: "the more the question presented is purely one of law, and the less that the additional facts aid the court's inquiry, the more likely the issue is to be ripe, and vice-versa." *Id.* ¶ 56 (citations omitted).

2. Numerous Montana cases follow *Reichert* making it clear that the present case is ripe for review.

Reichert was followed by *MEA-MFT v. McCulluch*, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075, held that the pre-election challenge ripe and justiciable because it was facially unconstitutional:

> In the present case, as in *Reichert*, the issues **are definite and concrete, not hypothetical and abstract….As in *Reichert***, allowing the defective referendum to proceed to election does nothing to protect voter rights. Placing a **facially invalid measure** on the ballot would be a waste of time and money for all involved, including State and local voting officials, the proponents and opponents of the measure, the voters, and the taxpayers who bear the expenses of the election.

MEA-MFT, ¶ 18 (emphasis added).

Significantly, in a discussion of the constitutional basis for the ripeness doctrine, *Reichert* relied on *Gryczan v. State*, 283 Mont. 433, 443-444, 942 P.2d 112, 118-119 (1997). In *Gryczan* the plaintiff filed a declaratory judgment action to challenge a Montana statute that prohibited same-gender sexual conduct even between consenting adults. The Court held that case justiciable even though the challenged deviate-sexual-conduct statute had never been enforced against consenting adults. *Reichert*, ¶ 58.

The State argued that the plaintiffs lacked standing because they had not been prosecuted under the statute arguing that prosecution under a criminal statute must be imminent before standing to challenge the statute is established. The State pointed to a long history of non-enforcement of a criminal statute. In response the Montana Supreme Court stated it relied on *Lee v. State*, 195 Mont. 1, 635 P.2d 1282 (1981). The *Gryzcan* court noted, regarding *Lee*:

> [W]e did not require the plaintiff to suffer arrest to challenge a criminal statute. We held in *Lee*, that plaintiff had standing to challenge the 55-mph limit even though he had not been arrested for speeding, because otherwise acts of the legislature that affect large segments of the public would be insulated from judicial attack. *Lee*, 635 P.2d at 1285.

Gryzcan, 283 Mont. at 443, 942 P.2d at 118.

In *Lee*, the Court rejected the State's standing objection, determining that,

> Gary Lee is directly affected by the operation of the statute he

> attacks in this case. His right or privilege to drive a motor vehicle by the basic rule of safety under § 61-8-303, MCA, has been adversely limited by the enforcement **or threatened enforcement** of § 61-8-303, MCA.

Lee, 195 Mont. at 6, 635 P.2d at 1284 (emphasis added).

In rejecting the State's argument that Lee was not uniquely impacted because he was but a member of a large segment of the public who suffered the same effects, the Court said:

> The acts of the legislature directly concern large segments of the public, or all the public, are not thereby insulated from judicial attack. Otherwise, the Uniform Declaratory Judgment Act would become largely useless where a plaintiff proposed to test the constitutional validity of a statute directly affecting him.
>
> ***
>
> Were we to hold otherwise, we would deprive Lee of judicial relief, and let stand the conflict that now exists between two enactments of the legislature.

Id.

Although *Gryzcan* and *Lee* were, technically, "standing" cases, they apply because, in both cases, the Court found a justiciable conflict, and because the ripeness doctrine is closely related to the standing doctrine.

More recently, in *McDonald v. Jacobsen*, 2022 MT 160, 409 Mont. 405, 415 P.3d 777, the Court considered legislation very similar to that constitutional challenge faced in *Reichert*. The Legislature passed a legislative referendum to submit a proposal to Montana voters in the November 2022 general election, which, if passed, would establish seven Supreme Court districts with each Supreme Court seat assigned to one of the seven districts. It also would require each seat to run for election solely within the district assigned to that seat. When challenged, the State defendant argued that judicial resolution should await the results of the general election. In other words, the State argued the challenge was premature and the challenge

was not ripe for adjudication. In this connection, the League argues that, because the ultimate implementation date of MLUPA is deferred for several years, MAID has "not alleged a present deprivation." League Br., p. 6. Many cases reject this crabbed argument, finding that allegation of a **threatened** deprivation is sufficient to establish justiciability. For example, *McDonald v. Jacobsen*, rejected the ripeness challenge, stating a "threatened injury" is sufficient:

> However, the cited passage of *Reichert* reveals that the key element upon which the Court's justiciability analysis turned was that the plaintiffs, like those in the present case, allege[d] a *threatened* injury because [the legislative referendum], should it pass, would deprive them of their right to vote for reach seat on the Supreme Court. Thereby presenting issues that are sufficiently definite and concrete, rather than purely hypothetical or abstract. *See Reichert, ¶ 58*. (emphasis added).

McDonald, ¶ 10 (italics supplied by *McDonald* quote).

McDonald also cited the recent case regarding judicial nomination process, stating:

> Moreover, the future installment of judicial officers pursuant to and allegedly constitutionally-defective measures constitute a **threatened injury** sufficient to satisfy the constitutional case-or-controversy justiciability requirement. *See Brown v. Gianforte*, 2021 MT 149, ¶¶ 15–19, 404 Mont. 269, 488 P.3d 548 (finding challenge to the constitutionality of newly-enacted law to change judicial appointment process **in the future** met the necessary case-or-controversy requirement because the law, if unconstitutional, would result in future judicial appointments of individuals in whom the judicial power never vests…).

McDonald, fn. 2 (emphasis added).

The League cites *Advocates for School Trust Lands v. State,* 2022 MT 46, 408 Mont. 39, 505 P.3d 825, arguing, accurately, that one part of the challenged statute was not ripe because the claim depended on a future denial of water right to establish whether the denial diminished the value of the specific school trust property. League Br., p. 8. However, that case rejected a ripeness objection to a separate claim stating:

> But a facial challenge may be ripe if it does not depend on the development of a factual record. *See Reichert*, *¶ 60*; …the crux of a facial challenge is that the statute is unconstitutional in all its applications.

Id, ¶ 29. Thus, the court found that the particular claim gives rise "to a sufficiently concrete harm that is ripe for review." *Id*. *See also State v. Avista Corp.*, 2023 MT 6, 411 Mont. 192, 523 P.3d 44, which also found certain claims unripe but others ripe for judicial review. *Id*, ¶ 15. The State's "unilateral action of directing payments into escrow rather than to the State created a definite and concrete injury—the State has been deprived of a concrete injury…." ("We have little trouble concluding the District Court's decision on whether the MF&C has been triggered and provides a current basis for Avista to withhold rental payments satisfies constitutional and prudential ripeness requirements…"). *Id*.

Finally, the League's brief concedes regarding *Weems v. State*, 2019 MT 98, 395 Mont. 350, 440 P.3d 4, "that facial challenge was ripe because 'the very enactment of the statute threatened to deprive plaintiffs of a constitutional right.' [citing *Advocates*]" League Br., p. 7.

In *Weems* the Court held that courts have power to resolve "actual cases or controversies, requiring a plaintiff to show, 'at an irreducible minimum', that she 'has suffered a past, present, or threatened injury to a property or civil right, and that the injury would be alleviated by successfully maintaining the action'." (Citing *Schoof v. Nesbitt*, *supra*). The Court rejected a standing/ripeness objection, citing *Lee v. State*, *supra*, noting that *Lee* held that the "Uniform Declaratory Judgments Act allows a plaintiff to 'test the constitutional validity of a statute directly affecting him'". *Weems* at ¶ 14.

In sum, MAID has alleged a concrete set of injuries which are subject to alleviation through the present lawsuit. Based on the above authorities, this case is ripe for review.

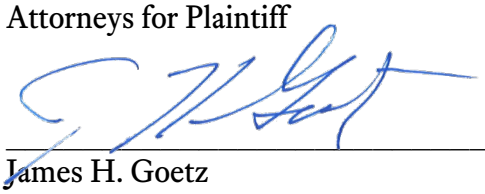
CONCLUSION

For the foregoing reasons, the League's Motion to Dismiss on ripeness grounds must be denied.

DATED this 9th day of December, 2024.

GOETZ, GEDDES & GARDNER, P.C.

Attorneys for Plaintiff

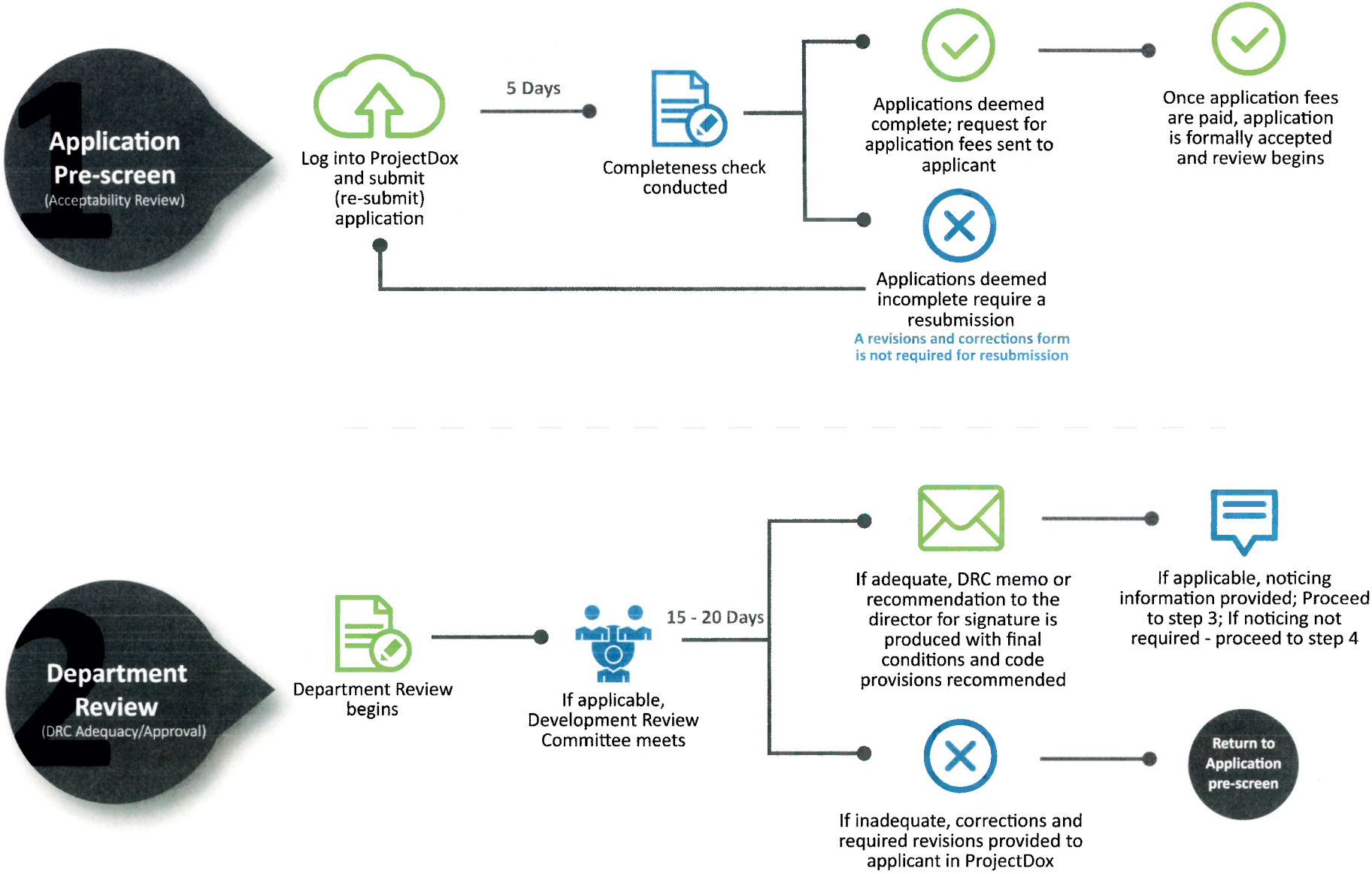


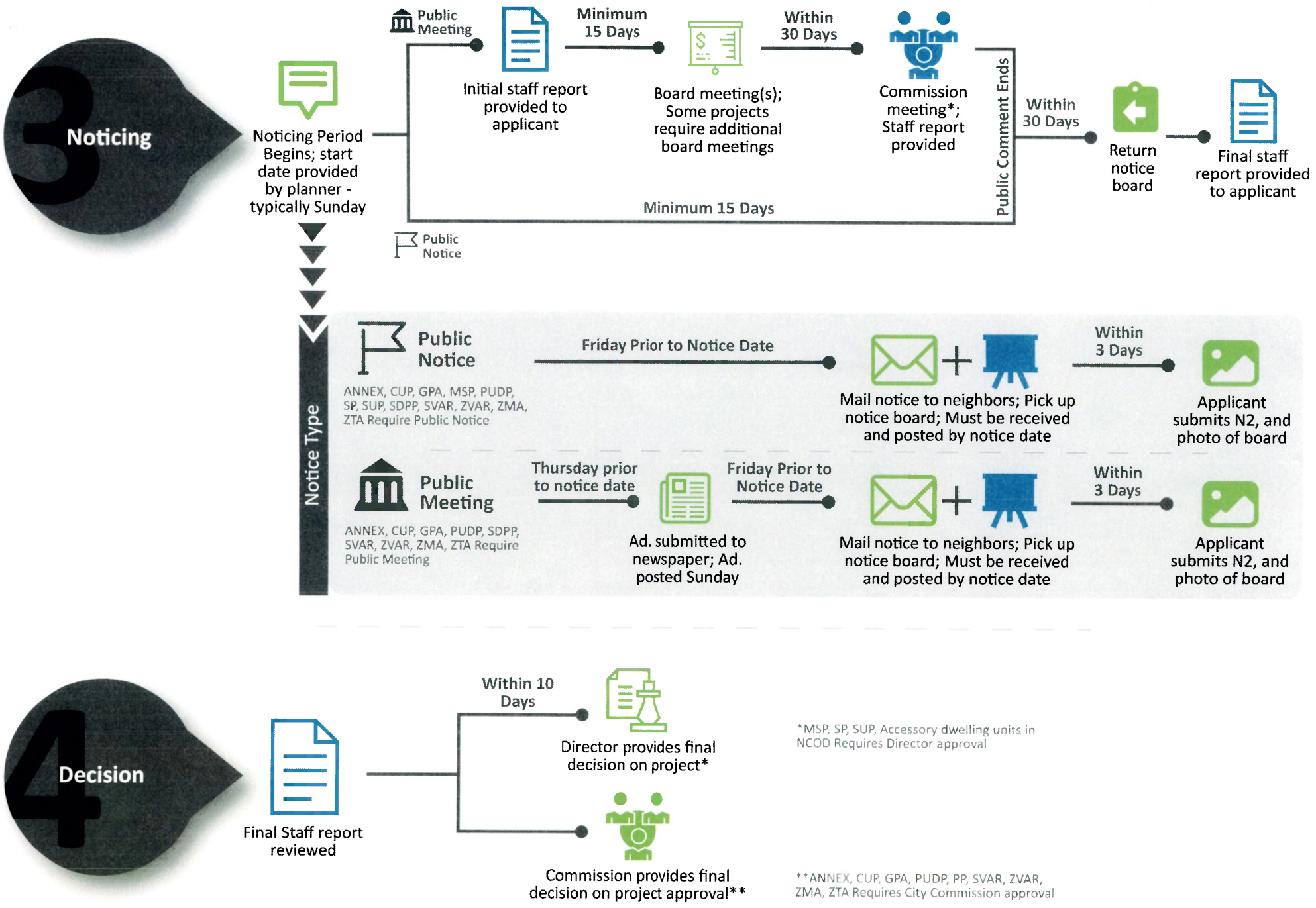
James H. Goetz
Henry J.K. Tesar

cc: Hon. Michael Salvagni (via email only at msalvagni@aol.com)

BOZEMAN MT
Community Development

Development Review Timelines and Processes




3
Noticing
Noticing Period Begins; start date provided by planner - typically Sunday
Public Meeting
Initial staff report provided to applicant
Minimum 15 Days
Board meeting(s); Some projects require additional board meetings
Within 30 Days
Commission meeting*; Staff report provided
Public Comment Ends
Within 30 Days
Return notice board
Final staff report provided to applicant
Minimum 15 Days
Public Notice
Notice Type
Public Notice
ANNEX, CUP, GPA, MSP, PUDP, SP, SUP, SDPP, SVAR, ZVAR, ZMA, ZTA Require Public Notice
Friday Prior to Notice Date
Mail notice to neighbors; Pick up notice board; Must be received and posted by notice date
Within 3 Days
Applicant submits N2, and photo of board
Public Meeting
ANNEX, CUP, GPA, PUDP, SDPP, SVAR, ZVAR, ZMA, ZTA Require Public Meeting
Thursday prior to notice date
Ad. submitted to newspaper; Ad. posted Sunday
Friday Prior to Notice Date
Mail notice to neighbors; Pick up notice board; Must be received and posted by notice date
Within 3 Days
Applicant submits N2, and photo of board
4
Decision
Final Staff report reviewed
Within 10 Days
Director provides final decision on project*
Commission provides final decision on project approval**
*MSP, SP, SUP, Accessory dwelling units in NCOD Requires Director approval
**ANNEX, CUP, GPA, PUDP, PP, SVAR, ZVAR, ZMA, ZTA Requires City Commission approval

CERTIFICATE OF SERVICE

I, James H. Goetz, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Response Brief to the following on 12-09-2024:

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Dated: 12-09-2024