MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

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MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC, Plaintiff, vs. STATE OF MONTANA, Defendant. and SHELTER WF, Inc. Defendant-Intervenor and DAVID KUHNLE Defendant-Intervenor.	Cause No. DV-16-2023-0001248 **DECISION AND ORDER RE: SHELTER WF's MOTION TO INTERVENE AND DAVID KUHNLE'S MOTION TO INTERVENE**

On January 17, 2024, Proposed Intervenor Shelter WF, Inc. (Shelter WF) filed Shelter WF's Motion to Intervene. Ct. Doc. 22. The Motion to Intervene contains Shelter WF's arguments to support the Motion and its Answer in Intervention.

On February 2, 2024, Proposed Intervenor David Kuhnle (Kuhnle) filed Proposed Intervenor David Kuhnle's Motion to Intervene and Incorporated Memorandum of Law

("Memorandum of Law"). Ct. Doc. 27. Kuhnle filed Declaration of Proposed Intervenor David Kuhnle. Ct. Doc. 28. Kuhnle filed Proposed Intervenor David Kuhnle's Answer to Plaintiff's Amended Complaint. Ct. Doc. 29.

On March 8, 2024, Plaintiff Montanans Against Irresponsible Densification , LLC (MAID) filed Plaintiff's Consolidated Response to Motions to Intervene. Ct. Doc. 49.

On March 15, 2024, Kuhnle filed Proposed Intervenor David Kuhnle's Reply in Support of Motion to Intervene ("Reply") Ct. Doc. 50. On March 22, 2024, Shelter WF filed Reply in Support of Shelter WF's Motion to Intervene and Shelter WF's Declaration Index. Ct. Docs. 51, 52.

From the arguments of Proposed Intervenors and MAID the Court is fully advised.

DISCUSSION

Rule 24, Mont. R. Civ. P. provides in part as follows:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
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> * * *
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> (2) claims an interest relating to the property or transaction which is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest.
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> (b) Permissive Intervention.
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> (1) In General. On timely motion, the court may permit anyone to intervene who:
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> (B) has a claim or defense that shares with the main action a common question of law or fact.
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> * * *

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

INTERVENTION AS A MATTER OF RIGHT

Shelter WF and Kuhnle assert that they have the "right" to intervene under Rule 24(a)(2), Mont. R. Civ. P., and also ask, in the alternative, for permission to intervene under Rule 24(b)(1)(B), Mont. R. Civ. P. Defendant State does not oppose the motions to intervene. MAID objects to the motions to intervene.

The test for mandatory intervention under Rule 24(a) requires the applicant for intervention to satisfy the following four factors: "(1) be timely; (2) show an interest in the subject matter of the action; (3) show that the protection of the interest may be impaired by the disposition of the action; and (4) show that the interest is not adequately represented by an existing party." *Estate of Schwenke v. Bechtold,* (1992), 252 Mont. 127, 131, 827 P. 2d 808, 811; *Sportsmen for I-143 v. Montana Fifteenth Jud. Dist. Ct.,* 2002 MT 18, ¶ 17, 308 Mont. 189, 40 P.3d 406; *Loftis v. Loftis*, 2010 MT 49, ¶ 9, 355 Mont. 316, 227 P.3d 1030. "Failure to satisfy any one of the requirements is fatal to the application." *Perry v. Proposition Official Proponents,* 587 F.3d 947, 950 (9th Cir. 2009). In considering whether intervention should be granted the Montana Supreme Court has applied federal case law because Rule 24, Mont. R. Civ. P. "is almost identical to Federal Rule 24(a)." *Estate of Schwenke v. Bechtold, supra.*

MAID argues (1) proposed intervenors do not satisfy the factors set forth in Rule 24, Mont. R. Civ. P. and (2) "participation in this case by either or both proposed intervenors will unduly complicate and protract this litigation, while adding nothing of substance to the defense that the State will provide." Ct. Doc. 49, p. 2.

Concerning the first factor MAID concedes both motions to intervene were timely filed.

Thus, the Court only considers the remaining factors, if necessary.

1. **SHELTER WF**

Shelter WF represents it is a Montana nonprofit public benefit corporation that was formed in April 2022 for the purpose of making homes in Whitefish , Montana, more affordable. Ct. Doc. 22, 2. According to Shelter WF its mission has expanded to the entire Flathead Valley and Montana as a whole. Shelter WF also claims that it advocates for these goals: to educate the community about housing affordability; to demystify local government purposes; to make it easier for people to understand what is happening with housing law and policy; and to help people understand how to get involved to support and accomplish those goals in their own community. Shelter WF's co-founder and board president was appointed by the Governor to a Task Force created in 2022 to develop "short-and long-term recommendations and strategies for the State of Montana to increase the supply of affordable, attainable workforce housing." Ct. Doc. 22, Ex. 1. The Task Force created two reports which were published before the 68th Montana Legislature convened on January 2, 2023. According to Shelter WF, SB 323 and SB 528, which are two of the bills subject to this litigation, arose directly from the work of the Task Force. SB 245, which is a subject of this litigation, contained recommendations from the reports of the Task Force. Shelter WF worked to find sponsors for SB 245 and coordinated with the Frontier Institute on drafting and sponsorship of SB 382, another bill subject to this litigation. SB 528 and SB 382 were sponsored by members of the Task Force.

Shelter WF further represents that it became the leading voice for pro-housing policy during the 2023 legislative session. Shelter WF claims that because of its involvement with the legislation it is uniquely situated to defend the challenged laws involved in this case. Shelter WF provides that it is "well-positioned to coordinate with other groups and individuals who sponsored

and supported the bills to marshal the evidence needed to show that the challenged bills pass constitutional muster. Shelter WF also has the will and the resources to see this case to conclusion, no matter how long it takes." Ct. Doc. 22, 7-8.

Regarding the second factor, Shelter WF argues it has a substantial interest in the subject matter of this case. To support its argument Shelter WF relies on *Sportsmen for I-143*, wherein the Montana Supreme Court stated:

> A mere claim of interest is insufficient to support intervention as of right under Rule 24(a) (2),M.R.Civ.P. A district court must determine whether the party seeking intervention has made a prima facie showing of a "'direct, substantial, legally protectable interest in the proceedings.'" *DeVoe v. State* (1997), 281 Mont. 356, 363, 935 P.2d 256, 260 (citing *Aniballi v. Aniballi* (1992), 255 Mont. 384, 386-87, 842 P.2d 342, 343-44 (citation omitted)) . Such a determination is a conclusion of law which we will review to determine whether the court's interpretation of the law is correct. *DeVoe*, 281 Mont. at 363, 935 P.2d at 260 (citations omitted) .

Sportsmen for I-143, ¶ 9.

Sportsmen for I-143 was before the Supreme Court on a petition for writ of supervisory control. Sportsmen for I-143 was a sportsmen's groups which sought to intervene in an action in the district court challenging the enforcement of ballot Initiative 143, which proposed a prohibition of the shooting of alternative livestock for a fee. Initiative 143 was approved by the voters in the November 2002 election. The district court found that the sportsmen's groups did not have a legally protectable interest in the property (livestock) or the lawful business transactions between two alternative livestock owners. *Id.,* ¶ 10. The district court also found that because the validity of I-143 was not at issue the sportsmen's group did not have a cognizable interest in the litigation. *Id.,* ¶ 10. The Montana Supreme Court disagreed with the district court and held:

> The Sportsmen's Groups, however, claim they have a legally protectable interest in the validity and enforceability of I-143 because their members, as Montana citizens, are the beneficiaries of the State's obligations as trustee for the management and protection of game animals. They note that although Montana law has not addressed

> intervention by ballot supporters, the Ninth Circuit has approved of such intervention.
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> On this issue, the Ninth Circuit has stated that "[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Federation v. Babbitt* (9th Cir. 1995),58 F.3d 1392, 1397 (citing *Sagebrush Rebellion*, 713 F.2d at 527). *See also Michigan State AFL-CIO v. Miller* (6th Cir. 1997),103 F.3d 1240, 1245-47; *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior* (10th Cir. 1996),100 F.3d 837, 842. We find the Ninth Circuit precedent persuasive. In this case, the Sportsmen's Groups were the authors, sponsors, active supporters and defenders of I-143. Accordingly, we conclude that the Sportsmen's Groups have a direct, substantial, legally protectable interest in the instant action challenging the interpretation of I-143, and, as such, they are entitled to intervene as a matter of right. We hold that the District Court incorrectly held that the Sportsmen's Groups did not have an interest in this litigation sufficient to support intervention.

Sportsmen for I-143, ¶¶ 11-12.

Shelter WF argues it is a "public benefit corporation that worked to conceptualize, draft, and shepherd the now-challenged laws through the legislative process, and it has a direct, substantial, and legally protectable interest in this litigation, which is sufficient to mandate intervention as a matter of right." Ct. Doc. 22, 9. MAID does not dispute Shelter WF's involvement with developing the legislation but argues that Shelter WF's interest falls short of the standard required for intervention. Ct. Doc. 49, 10.

MAID relies on *Mont. Quality Educ. Coalition v. Mont. Eleventh Jud. Dist. Ct.,* 2016 Mont. LEXIS 1121 arguing that Shelter WF's role in this case is distinguishable from the role that the sportsmen's groups played in *Sportsmen For I- 143.* MAID acknowledges that in *Sportsmen for I- 143*, the Montana Supreme Court "allowed intervention to the prospective intervenors as the authors, sponsors, active supporters and defenders of I-143." Ct. Doc. 49, 11. MAID also argues that *Mont. Quality Educ. Coalition, Mont. Shooting Sprots Ass'n v. Mont First Jud. Dist. Ct.,* 405 Mont. 541, 495 P.3d 424 (there is a "distinction between the role of primary proponent of a valid

initiative verse the role of lobbyist") and *Driscoll v. Stapleton*, 2020 Mont. LEXIS 20198 (intervention by Legislators denied because they did not show an interest in the subject matter of the action or that their interest may be impaired by the disposition of the action) defeat Shelter WF's argument that its interest in this case satisfies the second factor. Shelter WF argues that *Mont. Quality Educ. Coalition* and *Mont. Shooting Sports Ass'n* have no precedential value because these cases were before the Montana Supreme Court on petitions for writ of supervisory control in which the Supreme Court decided the appropriateness of supervisory control and not the issue of intervention. Ct. Doc. 51, 7.

Specifically, MAID argues that Shelter WF's activities do not rise to the level of a primary proponent of legislation but merely to the role of a lobbyist seeking passage of laws through the normal legislative process. MAID accuses Shelter WF of trying to embellish its involvement with the legislation in this case.

Shelter WF disputes MAID's accusation by pointing out that it is an established nonprofit that has worked hard to advance the policy goals at the heart of that legislation. Shelter WF argues that its role went far beyond that of being merely a lobbyist as it relates to the conceptualization, drafting, and passage of the laws being challenged. Ct. Doc. 51, 3. Shelter WF notes that MAID does not dispute that Shelter WF's founder and board president served on the Housing Task Force, and that Shelter WF coordinated with other entities "on the drafting and sponsorship" of some of the laws MAID now challenges. *Id.* Shelter WF points out that SB 245, challenged by MAID in this case, was not specifically addressed in the Task Force reports. Shelter WF represents it essentially wrote SB 245 on its own, and agues the bill would have died but for Shelter WF's work. *Id.* Shelter WF asserts that except for SB 383, it is likely none of the bills challenged in this lawsuit would have passed without Shelter WF's work. *Id.*, 3.

This Court must determine whether the party seeking intervention has made a prima facie showing of a "direct, substantial, legally protectable interest in the proceedings." *Sportsmen for I-143,* ¶ 9. Although Shelter WF was not the sponsor of the legislation involved in this case through the legislative process, Shelter WF's activities in the development of the legislation were more than those of a mere lobbyist. The Court concludes that Shelter WF has made the requisite prima facie showing to satisfy the second factor.

Regarding the third factor, Shelter WF argues that it has shown that the protection of its interest may be impaired by the disposition of the action. Shelter WF claims that its work on the Task Force and its role in shepherding the challenged laws through the legislative process, both of which are to support its overall policy goals of expanding the supply of affordable housing in Montana, would be impaired if MAID's challenge is successful. Shelter WF asserts that if it is not allowed to intervene its "core interests will be seriously impaired and its efforts before and during the 2023 legislative session will be for naught." Ct. Doc. 22, 10.

In its Consolidated Response, MAID primarily focuses on the fourth factor required to be shown for intervention as if right. Ct. Doc. 49, 9. MAID argues that Shelter WF fails to satisfy the fourth factor and because of this failure, MAID finds no need to address the third factor, i.e., that the interest of the proposed intervenor's ability to protect its interest will be impaired. Consequently, the Court will consider MAID's silence on Shelter WF's satisfaction of the third factor to be a concession by MAID that Shelter WF meets the third factor. Consequently, no further discussion of this factor is required.

Regarding the fourth factor, a public interest group that meets the criteria of the other factors "must show that their interest is not adequately represented by an existing party," which as to Shelter WF is the State. *Sportsmen for I-143,* ¶ 14. Shelter WF argues that its burden for

meeting this requirement is "minimal" as enunciated in *Sportsmen for I-143.* Ct. Doc. 51, 7. In *Sportsmen for I-143,* the Montana Supreme Court relied on *Stagebrush Rebellion* in adopting this requirement. MAID argues that the Ninth Circuit case of *Sagebrush Rebellion* is inapplicable because it has largely been superseded by later Ninth Circuit case law.

MAID argues *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003) is applicable to this case. *Arakaki* involved native Hawaiians who sought to intervene in a lawsuit brought by taxpayers who alleged that the provision of benefits by State of Hawaii and its subdivisions to native Hawaiians and Hawaiians violated the Equal Protection Clause and violated their rights under a public land trust. The United States District Court denied the motion to intervene. The native Hawaiians appealed. The denial of the motion to intervene was affirmed.

The Ninth Circuit Court noted that if the taxpayers prevailed the native Hawaiians' continued receipt of benefits would cease altogether. *Araka*ki 324 F.3d at 1086. The Ninth Circuit Court found that the native Hawaiians would be justified in intervention to protect the continued receipt of benefits if it demonstrates that existing parties do not adequately protect its interest. *Id*.

In affirming the denial of intervention, the Ninth Circuit Court found a presumption of adequate representation where the applicant's interest is identical to that of the existing party:

> The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties. 7 C Wright, Miller & Kane § 1909, at 318 (1986). When an applicant for intervention and an existing party have the same ultimate objective a presumption of adequacy of representation arises. *League of United Am. Citizens,* 131 F.3d at 1305. If the applicant's request is identical to that of one of the present party's, a **compelling showing** should be required to show inadequate representation. 7 C Wright, Miller & Kane § 1909, at 318–19.

Id. (emphasis added).

In *Arakaki* the Ninth Circuit Court also said:

> There is also an assumption of adequacy when the government and the applicant are on the same side. *City of Los Angeles*, 288 F.3d at 401–02. In the absence of a "very compelling showing to the contrary, it will be presumed that a State adequately represents its citizens when the applicant shares the same interests." 7 C Wright, Miller & Kane § 1909, 332. Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention. *Los Angeles*, 288 F.3d at 402.

Id.

In *Freedom from Religion Found, Inc. v. Geithner*, 644 F.3d 836 (9th Cir. 2011), the Ninth Circuit Court also affirmed denial of intervention of right. The Ninth Circuit Court found that the government adequately represented the interests of a pastor who sought to intervene to protect a "parsonage exemption" in the tax code against a claim that such exemption violated the Establishment Clause of the US Constitution. In that case the Ninth Circuit Court, citing *Arakaki, supra*, and *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947 (9th Cir. 2009), said: "where the party and the proposed intervenor share the same 'ultimate objective' a presumption of adequacy of representation applies". *Freedom from Religion Found, Inc.*, 644 F.3d at 841.

Shelter WF argues that Montana law in *Sportsman I-143* controls and its burden is limited to making a "minimal showing" that representation of its interests by the State may be inadequate. Ct. Doc 51, 7. Shelter WF disputes that its burden is to make a "compelling showing" as articulated by the Ninth Circuit Court in *Arakaki.* Shelter WF also argues that MAID's reliance on *Arakaki* is misplace because it has been superseded by later case law. To support its argument Shelter WF cites *Wilderness Soc'y. v. U.S. Forest Service*, 630 F.3d 1173 (9th Cir. 2011).

In *Wilderness Soc'y* the Ninth Circuit Court considered whether a "federal defendant" rule categorically precluded private parties and state and local governments from intervening of right as defendants on the merits of actions brought under the National Environmental Policy Act ("NEPA"). *Wilderness Soc'y*, 630 F.3d at 1177. The Ninth Circuit Court discussed that the

historical rationale for the rule provided that private parties and state and local governments in NEPA litigation lacked a "significantly protectable" interest warranting intervention of right under Rule 24(a)(2) because NEPA is a procedural statute that binds only the federal government. *Id.*

The Ninth Circuit Court abandoned the so-called "federal defendant" rule explaining as follows:

> The "federal defendant" rule runs counter to all of the above standards. In applying a technical prohibition on intervention of right on the merits of all NEPA cases, it eschews practical and equitable considerations and ignores our traditionally liberal policy in favor of intervention. It also fails to recognize the very real possibility that private parties seeking to intervene in NEPA cases may, in certain circumstances, demonstrate an interest "protectable under some law," and a relationship between that interest and the claims at issue. Courts should be permitted to conduct this inquiry on a case-by-case basis, rather than automatically prohibiting intervention of right on the merits in all NEPA cases.

Wilderness Soc'y, 630 F.3d at 1179. The Ninth Circuit Court observed "[A] putative intervenor will generally demonstrate a sufficient interest for intervention of right in a NEPA action, as in all cases, if "it will suffer a practical impairment of its interests as a result of the pending litigation." *California ex rel. Lockyer*, 450 F.3d at 441." *Id.,* 1180-1181. Clearly, in *Wilderness Soc'y*, the Ninth Circuit Court was concerned with the third factor to be shown for intervention as a matter of right. Whether Shelter FW has an interest in the subject matter of this litigation is not argued by MAID

Notably, *Wilderness Soc'y* does not deal with the fourth factor relating to adequate representation. Therefore, whenever a proposed intervenor and an existing party have the same ultimate objective a presumption of adequacy of representation arises. *Araka*ki, *supra.* In the face of that presumption, a compelling showing by the proposed intervenor is required to show inadequate representation. *Id*.

Shelter WF argues that it has met the fourth factor by showing that its interests are not adequately represented by the State. The Attorney General's office represents the State. Shelter WF acknowledges that the State is staffed with capable attorneys. However, Shelter WF is concerned that the State may not address issues that are pertinent to this case. For example, Shelter WF argues that in considering whether a preliminary injunction should have issued the State did not address the first principle of a constitutional challenge to a statute, i.e., the constitutionality is *prima facie* presumed and the party challenging the statute bears the burden or proving the statute is unconstitutional beyond a reasonable doubt. Ct. Doc. 22, 10. Shelter WF contends that the State did not present any argument to challenge MAID' s position that the challenged laws are facially unconstitutional. Shelter WF also expressed concern about the State's apparent failure to address the work of the Governor's Task Force in opposing MAID's application for preliminary injunction.

Shelter WF also argues that its interests, goals, and values are not the same as those of the State or the Attorney General. Shelter WF describes several interests and concerns that it has which according to Shelter WF distinguishes it from the interests of the State, i.e., environmental stewardship, support of land use policies that minimize sprawl and promote denser housing, and policies which crucial to protecting wild spaces, outdoor recreation, and connected natural ecosystems. Ct. Doc. 51, 5-6. Shelter WF claims to have a significant interest in the equities of the housing market and in reducing homelessness. *Id.* Shelter WF argues its membership is composed of actual Montana workers and families who need the challenged laws on the books to have a real shot at stable housing in the state. *Id.* Shelter WF claims to have an interest in the property tax implications of the legislation, because more homes in already developed areas means a larger tax base. *Id.* Shelter WF argues that these concerns are not identical to the State's concerns

in merely defending existing legislation. Without being specific Shelter WF asserts there is a real possibility that its concerns are antithetical to the current views of the executive branch offices currently tasked with defending these laws. *Id.* Shelter WF argues the State is unlikely to lean very hard on Shelter WF's interests, which do not have anything to do with the Attorney General's job in defending duly passed legislation. *Id.*

In arguing that the State may not adequately represent its interest in this case, Shelter WF references other recent cases in which the Attorney General's Office has represented the State and the State has not prevailed in the cases *Id.,* 8-9. Incidentally, in this case the State prevailed in its appeal challenging this Court's preliminary injunction. *See, Against Irresponsible Densification, LLC v. State*, 2024 MT 200, 2024 Mont. LEXIS 949. Shelter WF emphasizes that the State's attorneys are not bad at their jobs but asserts that no small group of attorneys can be experts at everything. Shelter WF also appears to fault the State for not raising any issues concerning restrictive covenants or countering MAID's claims about restrictive covenants. *Id.* Specifically, Shelter WF contends "MAID is asking this Court to (a) issue an advisory opinion on covenants that are not even in the record, and (b) declare as enforceable covenants that have been deemed abandoned an [sic] unenforceable as a matter of law under § 70-17-210(2), (3), MCA." *Id.,* 9. According to Shelter WF, the State did not respond to those issues in MAID's application for a preliminary injunction. Although MAID disputes Shelter WF's characterization of its claims, MAID points out that the State has made the arguments which Shelter WF complains to be lacking. MAID refers to Ct. Doc. 41 (Thane Johnson Affidavit) ¶ 8, ("Plaintiff's Motion for Partial Summary Judgment appears to attempt to circumvent Section 70-17-210, MCA, the enforcement and abandonment statutes for restrictive covenants.)" Ct. Doc. 49, 7, fn. 3. MAID also refers to

State's Brief in support of Motion to Stay District Court Proceedings, and Alternative Motion for Discovery Under M.R.Civ.P. 56(f) (Doc. 40), p. 4 (extensively discussing § 70-17-210, MCA). *Id.*

Shelter WF suggests that the State's failure to make certain arguments is indicative of the incredible breadth of cases the State is required to defend, and the fact that the State's attorneys "are not necessarily versed in the specifics of property law and housing policy as they relate to the issues in this case." *Id.* Shelter WF also faults the State for failing to respond to MAID's claim that the legislation is facially unconstitutional. However, Shelter WF does not dispute that the State is able or willing to provide a defense to MAID's constitutional challenges which are the crux of MAID'S allegations. In this case, the State points out that six attorneys are identified as representing the State. In the *Freedom from Religion* case the Ninth Circuit Court observed:

> This presumption of adequacy is "nowhere more applicable than in a case where the Department of Justice applies its formidable resources to defend the constitutionality of a congressional enactment." *Lockyer*, 450 F.3d at 414.

Freedom from Religion Found., Inc. 644 F.3d at 841.

MAID argues that Shelter WF shares the same ultimate objective as does the State, which is to defeat MAID's claims that certain zoning measures violate the Constitution. Shelter WF has an interest in affordable housing. Ct. Doc. 22, ¶ A. 1. ("Shelter WF, Inc…was formed for one purpose: to make homes in Whitefish more affordable."). Shelter WF also acknowledges that the State has an interest in affordable housing and in defending the constitutionality of the duly passed legislation. *Id.,* ¶ 33. Indeed, in its Answer the State alleges that the challenged statutes "serve and are supported by rational, legitimate, and compelling state interests, including but not limited to addressing the housing shortage and housing affordability crisis in Montana." Ct. Doc., 26, ¶ 113. Nevertheless, Shelter WF maintains that its interests in this litigation are different from those of the State.

Shelter WF cites *Sportsmen for I-143,* wherein the Montana Supreme Court held that "groups who actively drafted and supported [legislation] may be in the best position to defend their interpretation of the resulting legislation." *Sportsmen for I-143,* ¶ 17. MAID's challenges relate to a claimed priority of restrictive covenants over zoning regulations and alleged constitutional violations by the new legislation.

In *Shuff v. Huff,* 706 F.3d 345, 352 (4th Cir. 2013), the Fourth Circuit Court of Appeals held that where a government agency and proposed intervenor want a statute to be constitutionally sustained the proposed intervenor "must mount a strong showing of inadequacy. To hold otherwise would place a severe and unnecessary burden on government agencies as they seek to fulfill their basic duty of representing the people in matters of public litigation."

The Fourth Circuit Court described the rationale underlying the presumption of adequacy:

> [I]t is among the most elementary functions of a government to serve in a representative capacity on behalf of its people. In matters of public law litigation that may affect great numbers of citizens, it is the government's basic duty to represent the public interest. And the need for government to exercise its representative function is perhaps at its apex where, as here, a duly enacted statute faces a constitutional challenge. In such cases, the government is simply the most natural party to shoulder the responsibility of defending the fruits of the democratic process. As the Supreme Court stated in the related standing context *in Diamond v. Charles*, "[b]ecause the State alone is entitled to create a legal code, only the State has the kind of direct stake" needed to defend "the standards embodied in that code" against a constitutional attack. 476 U.S. 54, 65, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986) (internal quotation marks omitted).

Stuart, 706 F.3d at 351.

The Fourth Circuit Court continued:

> [T]o permit private persons and entities to intervene in the government's defense of a statute upon only a nominal showing would greatly complicate the government's job. Faced with the prospect of a deluge of potential intervenors, the government could be compelled to modify its litigation strategy to suit the self-interested motivations of those who seek party status, or else suffer the consequences of a geometrically protracted, costly, and complicated litigation. In short, "the business of the government could hardly be conducted if, in matters of litigation, individual

> citizens could usually or always intervene and assert individual points of view." 6 Moore's Federal Practice § 24.03[4][a][iv][A] (3d ed. 2011).

Id.

In summary, Shelter WF and the State have the same ultimate objectives with promoting affordable housing and with upholding the constitutionality of the new laws at issue in this case. Therefore, a presumption of adequacy of representation exists. Shelter WF has failed to make a compelling showing of inadequate representation by the State. "It is on this issue that public interest groups often fail to make their showing in the Rule 24(a) analysis." *Brumback v. Ferguson,* 343 F.R.D. 335, 345 (E.D. Wash., Sept. 27, 2022). Shelter WF has failed to show that its interest is not adequately represented by the State as required by the fourth factor for intervention as a matter of right.

2. **KUHNLE**

Kuhnle seeks to intervene as a matter of right to defend SB 528, which is now codified as § 76-2-345, MCA, which the Court enjoined from going into effect on January 1, 2024. SB 528 requires all cities to allow an Accessory Dwelling Unit ("ADU") of up to 1,000 square feet on lots located in all areas now zoned for single-family residences. Kuhnle also asserts that SB 323, now codified as §§ 76-2-304(3), (5), and 76-2-309, MCA, which requires affected municipalities of at least 5,000 in population allow duplexes in areas now zoned for single-family residences and which the Court also enjoined, is pertinent to his plans. Kuhnle claims he has a particular interest in SB 528 because he intended to build an ADU on his property in Missoula, Montana, and then rent the ADU. The Court recognizes that Kuhnle's arguments were made after the Court issued its preliminary injunction. The Court observes that the reversal of the preliminary injunction by the Montana Supreme Court does not preclude Kuhnle from making his arguments. The issue of a permanent injunction requires resolution.

He originally designed the ADU to be 600 square feet, which was allowed by the Missoula City Code, but redesigned it to be 1,000 square feet because of the new law. Kuhnle was ready to submit his plans for the larger design after January 1, 2024, but because of the preliminary injunction he could not proceed as he planned. However, Kuhnle claims that expanding the size of the ADU would allow him to add a bedroom to the ADU, making it more valuable as a rental property. Ct. Doc. 27, 4. Kuhnle contends he has an interest that would be affected by this case because this case could either result in the laws being permanently enjoined or maintained in force. Ct. Doc. 27, 3. Kuhnle also claims that because no one in this case is now a property owner, there is no one to adequately represent his interest. *Id.*

As noted at the outset, MAID conceded that Kuhnle's Petition to Intervene was timely.

Regarding the second factor for intervention as a matter of right, Kuhnle argues that he has an interest relating to the property or transaction which is subject of this action. The federal courts explain that this "interest relating to . . . [what is] . . . the subject of the action" test is not a bright-line rule but is instead met if the proposed intervenors will "suffer a practical impairment of [their] interests as a result of the pending litigation." *California ex rel. Lockyer*, 450 F.3d 436, 441 (9th Cir. 2006). The types of interests protected are interpreted "'broadly, in favor of the applicants for intervention.'" *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993) (quotation omitted). In *Sierra Club,* the Ninth Circuit Court also observed that the word "interest" in the second factor of Rule 24(a) has been interpreted to require that the word be qualified by the adjective "protectable." *Sierra Club,* 995 F.2d at 1481. The Ninth Circuit Court notes that the requirement of "protectability" was formulated by the Supreme Court in *Donaldson v. United States*, 400 U.S. 517, 27 L. Ed. 2d 580.

In *Mt. Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc*., 72 F.3d 361, 366 (4th Cir. 1995), the Fourth Circuit Court of Appeals held:

> According to the Supreme Court, an intervenor's interest must be one that is "significantly protectable." *Donaldson v. United States*, 400 U.S. 517, 531, 27 L. Ed. 2d 580, 91 S. Ct. 534 (1971). In defining the contours of a "significantly protectable" legal interest under Rule 24(a)(2), we have held that, "'the interest must be a legal interest as distinguished from interests of a general and indefinite character.' * * * The applicant must demonstrate that there is a tangible threat to a legally cognizable interest to have the right to intervene." (citations omitted)… This interest is recognized as one belonging to or being owned by the proposed intervenor. (citations omitted).
>
> * * *
>
> In general, a mere economic interest in the outcome of the litigation is insufficient to support a motion to intervene. See, e.g., *Alcan Aluminum*, 25 F.3d at 1185 ("Some courts have stated that a purely economic interest is insufficient to support a motion to intervene."); *New Orleans Public Service, Inc. v. United Gas Pipe Line Co*., 732 F.2d at 464 (in banc) ("It is plain that something more than an economic interest is necessary.").

Id.

In determining what constitutes "a direct, significant legally protectable interest" the Fifth Circuit Court said:

> By requiring that the applicant's interest be not only "direct" and "substantial," but also "legally protectable," it is plain that something more than an economic interest is necessary. What is required is that the interest be one which the substantive law recognizes as belonging to or being owned by the applicant.

New Orleans Public Service, Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 464 (5th Cir. 19844).

The Montana Supreme Court has held "[A] party seeking intervention as a matter of right 'must make a prima facie showing of a direct, substantial, legally-protectable interest in the proceedings" as a "mere claim of interest is insufficient to support intervention as a matter of right.'" (citations omitted). *Loftis v. Loftis*, 2010 MT 49, ¶13, 355 Mont. 316, 227 P.3d 1030; *Sportsmen for I-143,* ¶ 9.

In opposing Kuhnle's argument MAID cites *Cal. Dep.'t of Toxic Substances Control v. Jim Dobbas, Inc*. 54 F.4th 1078, 1087 (9th Cir. 2021) where the Ninth Circuit Court confirmed that the second factor requires that the proposed intervenor have a "significantly protectable interest." MAID argues that Kuhnle's interest falls short of this standard. MAID characterizes Kuhnle's interest as "attenuated" and "merely economic." MAID contends that Kuhnle "merely asserts some kind of property interest to develop an ADU of 1,000 square feet, as opposed to the 600 square feet now allowed by the City of Missoula." Ct. Doc. 49, 10.

Kuhnle maintains that he does not tentatively hope for a financial return on an investment at some non-specified point in the future. Kuhnle argues that his interest is not based upon a bare expectation but on a tangible interest in real property that has already been impacted by the preliminary injunction. Ct. Doc. 50, 2.

In his Memorandum of Law, Kuhnle states:

> Based on the ADU law at issue here, [Kuhnle] planned to build a 1,000-sqaure-foot ADU-but those plans are now on hold pending the outcome of this case. Kuhnle Decl. ¶ 4. If the ADU law is forever enjoined, then Kuhnle will be forced to either not build an ADU on the property or build a much smaller ADU, less than 600 square feet, consistent with what Missoula's local ordinances allow. Kunle Decl. ¶ 3-8. If forced to build this smaller ADU, he will be forced to forego the additional rent he would bring in from a larger ADU with the third bedroom that a 600 square-foot cap does not allow for. Kuhnle. Decl. ¶ 6.

Ct. Doc. 27, 10-11; *see also*, Declaration of Proposed Intervenor David Kuhnle, Ct. Doc. 28.

Despite his explanation and version of his interest being more rental income, Kuhnle disputes that his interest is merely economic. Ct. Doc. 50, 2. The primary focus of Kuhnle's contention is clearly based on an interest in the economics of realizing more rent from the construction of a larger ADU. Ct. Doc. 50, 2. An economic stake in the outcome of the litigation, even if significant, is not enough for there to be a right to intervene under Rule 24(a)(2). *Clear*

Blue Specialty Ins. Co. v. Ozy Media, Inc., 2023 U.S. Dist. LEXIS 197963 *14 (N.D. Cal., Nov. 3, 2023).

The Court agrees with MAID and concludes that Kuhnle's interest for purposes of determining whether he has a right to intervene is merely economical. Kuhnle has failed to show that his interest is a "direct, substantial, legally-protectable interest." Although Kuhnle claims an interest, his interest for purposes of the second factor is based upon a bare expectation of increase rent. Having failed to show the existence of the second factor in the analysis Kuhnle does not have the right to intervene. The Court need not consider factors three and four.

PERMISSIVE INTERVENTION

The Court considers both motions for permissive intervention in this section. Because the Court has concluded that neither Shelter WF nor Kuhnle has a right to intervene, the Court considers whether permissive intervention is appropriate.

Shelter WF argues that it should be granted permission to intervene under Rule(b)(1)(B) because it has defenses to MAID's Amended Complaint that include questions of law and fact that are shared with this action.

Kuhnle argues that he should be granted permission to intervene because he has defenses that include questions of law and fact that are shared with this action. Kuhnle reiterates that MAID obtained the preliminary injunction prohibiting SB 528, now codified as § 76-2-345, MCA, from becoming effective. Consequently, Kuhnle's plan to build a 1,000-square-foot ADU on his rental property was blocked. However, Kuhnle contends he will show, if allowed to intervene, that MAID's contention that a law allowing for a property owner to use his property to build an ADU does not violate his neighbors' due process or equal protection rights. Kuhnle also argues his

property rights were interfered with because of the preliminary injunction. Because of the request for a permanent injunction, Kuhnle's arguments may still be relevant.

MAID argues the Court should exercise its discretion to deny both Shelter WF and Kuhnle's requests to have the Court's permission to intervene. To support its argument MAID cites *Perry* where the Ninth Circuit Court held :

> A district court may grant permissive intervention under Federal Rule of Civil Procedure 24(b)(1)(B) where the applicant "shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Nw. Forest Res. Council*, 82 F.3d at 839. Where a putative intervenor has met these requirements, the court may also consider other factors in the exercise of its discretion, including "the nature and extent of the intervenors' interest" and "whether the intervenors' interests are adequately represented by other parties." *Spangler v. Pasadena City Bd. of Educ*., 552 F.2d 1326, 1329 (9th Cir. 1977). Rule 24(b)(3) also requires that the court "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(3).

Perry, 587 F.3d at 955.

MAID also cites *Stuart* where the Fourth Circuit Court stated:

> It is incontrovertible that motions to intervene can have profound implications for district courts' trial management functions. Additional parties can complicate routine scheduling orders, prolong and increase the burdens of discovery and motion practice, thwart settlement, and delay trial.

Stuart, 706 F.3d at 350.

MAID contends that practical and equitable considerations weigh against permissive intervention. MAID speculates that adding another party to this case will "almost certainly delay the proceedings and increase costs to all parties, including taxpayers." Ct. Doc. 49, 13. MAID asserts that intervention will potentially complicate a straightforward legal question, and that intervention will place additional burdens on the parties and on the Court from redundant briefing and discovery requests. *Id*.

Under Rule 24(b)(1)(B), Mont. R. Civ. P. permissive intervention may be allowed when the application for permissive intervention is timely and when an applicant's claim or defense and the main action have a question of law or fact in common. *Estate of Schwenke*, 252 Mont. at 133. In exercising its discretion when deciding an application for permissive intervention this Court is required to consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Rule 24(b)(3), Mont. R. Civ. P. The Court has broad discretion to grant or deny permissive intervention. *Dep.'t of Fair Emp't & Hous. v. Lucent Techs*., 642 F.3d 728, 740 (9th Cir. 2011).

In exercising its discretion, a court generally examines:

> … the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case[,] . . . whether the intervenors' interests are adequately represented by other parties, . . . and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

Spangler v. Pasadena City Bd. of Ed., 552 F.2d 1326, 1329 (9th Cir. 1977). The Montana Supreme Court has also stated:

> In addition, under M. R. Civ. P. 24, a district court may allow a non-party to intervene in a case to represent their interests. Except where intervention is required by law, district courts have broad discretion to determine whether to allow a party to enter a case. *See Shilhanek*, ¶ 48. A district court may allow intervention where a party has a claim or defense that shares a common question of law or fact with the main action. M. R. Civ. P. 24(b)(1)(B).

In re Est. of Burns, 2023 MT 253, ¶16, 414 Mont. 365, 540 P.3d 1029.

The Montana Rule does not require a showing of independent grounds for jurisdiction, which is required by the Federal Rule. There is no dispute that both motions to intervene were timely filed. Shelter WF shares common questions of law or fact with the main action. The crucial issues in this case involve the constitutionality of the statutes. Indeed, MAID even

acknowledges that Shelter WF shares the same ultimate objective as does the State, which is to defeat MAID's claims that the zoning laws at issue violate Constitution. Ct. Doc. 49, 5. Shelter WF meets the threshold requirements of timeliness and commonly shared questions of law or fact for permissive intervention to be warranted.

Although Shelter WF failed to show that the State inadequately represents its interests for purposes of intervention as of right, that failure does not defeat permissive intervention. *See e.g., Doe v. Harris,* 2013 U.S.Dist. LEXIS 4215 (N.D. Cal. Jan 10, 2013). The Court anticipates that the presence of Shelter WF in this case will contribute to the just and equitable resolution of the issues involved. As noted earlier, Shelter WF was significantly involved in the development of the challenged zoning laws. Shelter WF undoubtedly has significant knowledge relating to the subject matter of this case which includes the applicable zoning laws and defense of their constitutionality. Shelter WF does not request to bring any counterclaims or cross-claims. In considering intervention of proponents of a ballot initiative, the California Supreme Court has observed the participation of official proponents in a suit challenging a ballot initiative may help ensure that the interests of the voters who approved the initiative are fully represented and that "all viable legal arguments in favor of the initiative's validity are brought to the court's attention." *Perry v. Brown*, 52 Cal. 4th 1116, 1151, 134 Cal. Rptr. 3d 499, 265 P.3d 1002 (2011). That rationale applies to Shelter WF's request for permission to intervene.

Regarding Kuhnle's alternative request for permission to intervene, the availability of permissive intervention turns on the existence of a common question of law or fact rather than the potential impairment of a significantly protectable interest. *Cochran v. Accellion, Inc*., 2021 U.S. Dist. LEXIS 214686, *7 (N.D. Cal. Nov. 5, 2021). Although Kuhnle failed to show that he has a "direct, substantial, legally-protectable interest" to intervene as a matter of right there is no

question that he has a claim or defense shared with the main action a common question of law or fact. As with the State's interest, Kuhnle's defense concentrates on the constitutionality of SB 528. Kuhnle argues that if he is allowed to intervene, he will show MAID's contention that a law allowing for a property owner to use the owner's property to build an ADU does not violate his neighbors' due process or equal protection rights. Ct. Doc. 27, 15. Further, like Shelter WF Kuhnle does not request to bring any counterclaims or cross claims. Kuhnle satisfies the factor specified by Rule 24(b)(1)(B) for permissive intervention.

The final dispositive issue is whether Shelter WF and/or Kuhnle's intervention would cause undue delay or prejudice to the adjudication of the rights of MAID or the State. On April 3, 2024, this Court granted the State's motion to stay these proceedings, without objection by MAID, until the State's appeal of this Court's preliminary injunction to the Montana Supreme Court was resolved. In its opinion reversing this Court's grant of the preliminary injunction the Montana Supreme Court recognized that the "merit's proceeding" of this case continues to exist. *Montanans Against Irresponsible Densification, LLC,* ¶ 22. Although there is no preliminary injunction, Shelter WF and Kuhnle continue to have an interest in the final resolution of MAID's claims for declaratory injunction and permanent injunction. Kuhnle argues that a permanent injunction would have the same consequence to him as did the preliminary injunction. Ct. Doc. 27, 10-11. Like MAID and the State, Shelter WF and Kuhnle have an interest in the speedy resolution of the issues in this case. Whether any future delay might be caused by the interventions is merely speculative.

MAID's concerns that permissive intervention of Shelter WF and Kuhnle will increase the cost of this litigation and will complicate what MAID characterizes as straight forward legal questions are outweighed by the contributions that Shelter WF and Kuhnle can bring to this

litigation. Shelter WF brings its substantial involvement in the development and advocacy for the laws. Kuhnle contends his participation in this case provides a unique and helpful perspective from his status as an affected owner.

Further, MAID's concerns that intervention will place additional burdens on the parties and the Court from redundant briefing and discovery requests can be controlled by the application of and compliance with the Montana Rules of Civil Procedure, Montana Uniform District Rules and Montana Eighteenth Judicial District Court Rules. In addition, the Court expects that Shelter WF and Kuhnle will collaborate and coordinate their efforts with the State to avoid placing undue burden on the Court, counsel and all parties.

For these reasons, Shelter WF and Kuhnle's requests for permissive intervention are appropriate.

ORDER

IT IS HEREBY ORDERED:

1. Shelter WF's Motion to Intervene as a matter of right is **DENIED**. Shelter WF's alternative request for permission to intervene is **GRANTED**. Shelter WF shall be allowed to proceed as Defendant-Intervenor in this case.

2. David Kuhnle's Motion to Intervene as matter of right is **DENIED**. David Kuhnle's alternative request for permission to intervene is **GRANTED**. David Kuhnle shall be allowed to proceed as Defendant-Intervenor in this case.

3. The case caption shall be modified as set forth in the caption of this Order.

4. Within 10 days of the date of this Order Shelter WF, Inc. shall cause its Answer in Intervention attached as Exhibit 6 to Ct. Doc. 22 to be filed with the Clerk of the District Court. The Answer in Intervention shall contain the modified caption, a revised date and new signature

and shall include Shelter WF, Inc.'s name preceding Answer in Intervention in its title. The Answer shall not contain any other modification or amendment.

5. Within 10 days of the date of this Order David Kuhnle shall cause his Proposed Intervenor David Kuhnle's Answer to Plaintiff's Amended Complaint filed as Ct. Doc. 29 to be refiled with the Clerk of the District Court. The Answer shall contain the modified caption, a revised date, and new signature. The title shall be modified to state: David Kuhnle's Answer in Intervention. The Answer shall not contain any other modification or amendment.

Dated September 24, 2024.

Mike Salvagni

Hon. Mike Salvagni
Presiding Judge

cc: James Goetz, attorney for Plaintiff
Henry Tesar, attorney for Plaintiff
Brian K. Gallik, attorney for Plaintiff
Austin Knudsen, attorney for State of Montana
Thane Johnson , attorney for State of Montana
Alwyn Lansing, attorney for State of Montana
Emily Jones, attorney for State of Montana
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Mark Miller, attorney for Proposed Intervenor David Kuhnle
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Jesse Kodadek, attorney for Proposed Intervenor Shelter WF