

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, )  
 )  
 and )  
 )  
 CLARENCE KENCK, )  
 )  
 Defendant-Intervenor. )

Cause No. DV-16-2023-0001248

**DECISION AND ORDER RE:  
CLARENCE KENCK'S  
MOTION TO INTERVENE**

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On September 27, 2024, Proposed Intervenor Clarence Kenck (Kenck) filed Proposed Intervenor Clarence Kenck's Motion to Intervene and Incorporated Memorandum of Law. Ct. Doc. 63. Kenck also filed Declaration of Proposed Intervenor Clarence Keck and Proposed Intervenor Clarence Kenck's Answer to Plaintiff's Amended Complaint. Ct. Docs. 64, 65.

On October 11, 2024, Plaintiff Montanans Against Irresponsible Densification, LLC (MAID) filed Plaintiff's Brief in Opposition to Proposed-Intervenor Kenck's Motion to Intervene. Ct. Doc. 67. On October 25, 2024, Kenck filed Clarence Kenck's Reply in Support of Motion to Intervene. Ct. Doc. 72.

From the arguments of Kenck and MAID the Court is fully advised.

### **DISCUSSION**

In its Decision and Order re: Shelter WF's Motion to Intervene and David Kuhnle's Motion to Intervene (Sept. 24, 2024), this Court discussed the rules and court precedents relating to intervention as a matter of right and permissive intervention under Rule 24, Mont. R. Civ. P. *See*, Ct. Doc. 60.

Kenck seeks to intervene as a matter of right or alternatively for permission to intervene. Specifically, Kenck seeks to intervene to defend SB 323, now codified as §§ 76-2-304(3), (5), and 76-2-309, MCA (collectively referred to as SB 323) which would require all Montana cities with at least 5,000 residents to allow duplex housing (defined in the statute as "a parcel or lot with two dwelling units that are designed for residential occupancy by not more than two family units living independently from each other") on lots located in all areas now zoned for single-family residences. Kenck asserts he has an interest in this new law because he intends to build a duplex on his property which is allowed by the new law. According to Kenck, he intends to use the duplex as a residence for himself and his two aging brothers (disabled Vietnam veterans) to live close enough for family support while remaining independent.

This Court granted MAID's request for a preliminary injunction to preclude SB 323 from going into effect on January 1, 2024. Thus, Kenck could not build his duplex. The Montana Supreme Court reversed this Court's order granting a preliminary injunction and remanded to this

Court for further proceedings. *Montanans Against Irresponsible Densification, LLC v. Montana*, 2024 MT 200, 418 Mont. 78, 555 P.3d 759. In its opinion, the Montana Supreme Court recognized that the “merit’s proceeding” of this case continues to exist. *Id.*, ¶ 22. Although the preliminary injunction was reversed, Kenck contends he has an interest in this case because the issue of a permanent injunction remains to be decided. Kenck asserts that he meets the four factors for intervention as a matter of right.

MAID does not present any argument or legal analysis relating to the four factors for intervention as a matter of right. MAID merely opposes Kenck’s request and does not present any argument to support its opposition or to contradict Kenck’s arguments but only references this Court’s opinion about that right in the Court’s earlier Decision and Order (Ct. Doc. 60). MAID asserts no further briefing is necessary. Ct. Doc. 87, 2.

The Montana Supreme Court does not consider unsupported arguments or issues where a party has failed to develop legal analysis to support the party’s position. *See, In Re Marriage of Snow*, 2002 MT 143, ¶ 28, 310 Mont. 260, 49 P.3d 610; *In re Water Complaint of Kelly*, 2010 MT 14, ¶ 27, 355 Mont. 86, 224 P.3d 640. This Court applies that principle here. In the absence of any argument or legal analysis by MAID, the Court rejects its opposition to Kenck’s request to intervene as a matter of right. The Court notes that the Court’s discussions and conclusions about intervention relating to the requests by Shelter WF and David Kuhnle may or may not be relevant to the request by Kenck. However, it is not the Court’s responsibility to develop that analysis without any input from MAID.

Because the Court concludes that Kenck has the right to intervene, the Court does not consider permissive intervention. However, the Court observes that MAID expresses concern about Kenck’s permissive intervention because this case is “becoming overcrowded.” Ct. Do. 67,

2. MAID's concern is not relevant to Kenck's intervention as a matter of right but only to permissive intervention. *See*, Rule 23(b)(3), Mont. R. Civ. P.; *Perry v. Proposition Official Proponents*, 587 F.3d 947, 955 (9<sup>th</sup> Cir. 2009).

Without distinguishing between intervention as a matter of right and permissive intervention MAID also points out that there is nothing to prohibit Kenck from building his duplex because Missoula's single-family zoning ordinance is superseded by the new state law. Based upon that fact MAID argues that Kenck's request for intervention is moot. MAID also makes this argument in a footnote relative to Kuhnle's intervention. Ct. Doc, 67, 3 fn. 1. That issue has not been raised in the Court's consideration of David Kuhle's request to intervene. However, MAID does not cite any authority for the proposition that intervention in a case to defend the constitutionality of a law, which is in effect, is precluded when a permanent injunction is sought to challenge the constitutionality of the law. As Kenck points out, his interest in defending the new law is just as strong now as it was when the preliminary injunction was in effect. Ct. Doc. 72, 3. As to the issue of intervention, the Court agrees. Kenck's application to intervene is not moot.

## **ORDER**

IT IS HEREBY ORDERED:

1. Clarence Kenck's Motion to Intervene as a matter of right is **GRANTED**. Clarence Kenck shall be allowed to proceed as a Defendant-Intervenor in this case.

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

3. Within seven (7) days of the date of this Order Clarence Kenck shall cause his Proposed Intervenor Clarence Kenck's Answer to Plaintiff's Amended Complaint filed as Ct. Doc. 65 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 of the Answer shall be modified to state: Clarence Kenck's Answer in Intervention. The Answer shall not contain any other modification or amendment.

Dated October 28, 2024.



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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  
Michael D. Russell, attorney for State of Montana  
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Ethan W. Blevins, attorney for Intervenors David Kuhnle and Clarence Kenck  
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David C. McDonald, attorney for Intervenors David Kuhnle and Clarence Kenck  
Jesse Kodadek, attorney for Intervenor Shelter WF  
Thomas J. Jodoin, attorney for Proposed Intervenor Montana League of Cities and Towns