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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., DAVID KUHNLE, CLARENCE KENCK, MONTANA LEAGUE OF CITIES AND TOWNS, Defendant-Intervenors.	Cause No. DV-2023-0001248 Hon. Michael Salvagni **INTERVENORS DAVID KUHNLE AND CLARENCE KENCK'S REPLY TO PLAINTIFF MAID'S RESPONSE TO INTERVENORS' CROSS-MOTION FOR SUMMARY JUDGMENT**

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On November 15, 2024, Plaintiff Montanans Against Irresponsible Densification ("MAID") filed its Second Motion for Summary Judgment on Counts II–V of MAID's Amended Complaint.

Pursuant to Rule 56, Mont. R. Civ. P., Defendant-Intervenors David Kuhnle and Clarence Kenck opposed MAID's Motion, and in addition on December 10, 2024, moved this Court for entry of a summary judgment order, as a matter of law, in their favor on Counts III, IV, and V. On December 19, 2024, MAID filed its Combined Response/Reply to Kuhnle and Kenck's motion as well as other parties' motions and briefs ("Combined Response/Reply"). This pleading replies to the portions of MAID's Combined Response/Reply that address the arguments Kuhnle and Kenck made that entitle them to summary judgment as a matter of law on Counts III, IV, and V.

Introduction and Background

In response to the ongoing shortage of new housing, in 2023 the Montana Legislature passed, and Governor Greg Gianforte signed into law, a policy reducing restrictions on the production of housing in residentially zoned areas. Specifically, Montana enacted four laws that allow for more building while giving existing homeowners a path to secure the continued single-family character of their lots, blocks, or neighborhoods through private covenants (commonly organized as homeowners' associations). The claims and arguments made by MAID do not foreclose these legislative policy choices; nothing the Legislature passed and the Governor signed violated MAID's rights. That is why the Court should grant summary judgment to Kuhnle, Kenck, the other intervenors, and the State of Montana. A brief review of how we got here is in order.

A. MAID'S Complaint

MAID, a collection of Montanans who own property within the State and who oppose increased densification, opposed the legislative reforms and filed this lawsuit challenging the four

new statutes. MAID challenges the reform laws on five counts: Count I seeks a declaratory judgment that SB 323, SB 528, and SB 382 do not purport to displace, supplant, or otherwise preempt private covenants that are more restrictive than the zoning reforms; Count II alleges SB 382's revised procedures violate Montana's right of public participation; Count III alleges SB 323, SB 528, SB 245, and SB 382 violate the right to equal protection by treating properties subject to private covenants differently from properties not subject to private covenants; Count IV alleges violations of the right to substantive due process due to purported contradictions and inconsistencies within and between the new laws; and Count V alleges a general unconstitutional arrogation of local power by the State. MAID has since moved for summary judgment on all counts.

David Kuhnle and Clarence Kenck, two Montana property owners who intend to rely on the reform laws to build an ADU and duplex, respectively, intervened to defend their interests in ensuring the reforms stand. Kuhnle and Kenck here respond only to Counts III, IV, and V. Neither Kuhnle nor Kenck were engaged in the process leading up to the enactment of Montana's zoning reform laws and as such do not assert standing to defend Count II. But to the extent they would be heard on Count II, they agree with Intervenor League of Cities and its argument, proffered at the December 20, 2024, hearing on the matter, that Count II should be dismissed for the reasons offered by the League of Cities. Kuhnle and Kenck respond to Count I, first raised in MAID's January 16, 2024, Motion for Partial Summary Judgment (Doc. 18) in a separate response to that Motion. What follows from here is Kuhnle and Kenck's reply to MAID's arguments related to Counts III, V, and V.

B. Kuhnle and Kenck's Response to MAID's Second Motion for Summary Judgment on the Counts That Apply to Kuhnle and Kenck, and Their Cross-Motion for Partial Summary Judgment on Those Same Counts

The Montana housing reforms upon which Intervenors Kuhnle and Kenck focus came via two statutes allowing ADUs and duplexes on single-family zoned lots. The duplex law SB 323 (now codified as §§ 76-2-304(3), (5), and 76-2-309, MCA) explicitly states that deed-restricted lots that prohibit duplexes are not bound by the law, and the ADU law SB 528 (now codified as § 76-2-345, MCA) similarly does not apply to deed-restricted lots. In doing so, the Montana Legislature recognized that in generally allowing for more freedom to build, it should also respect the property rights of those who contract with their neighbors or organize into HOAs to prohibit ADUs or duplexes.

Simply put, contrary to the arguments advanced by MAID, neither SB 323 nor SB 528 violate the Montana Constitution by denying equal protection or due process to MAID's members. To the contrary, the zoning reform laws reasonably draw distinctions between different types of property that are relevant to the Legislature's purpose in encouraging the development of more housing in the State.

Neither population density nor the existence of private covenants are arbitrary or irrelevant considerations when determining what zoning policies to apply across an entire state, and MAID's arguments, if taken seriously, would render essentially all zoning regulations nationwide unconstitutional violations of the Equal Protection Clause.

MAID's substantive due process arguments are even weaker. None of the minor drafting errors and inconsistencies identified by MAID are sufficiently arbitrary or consequential to constitute a substantive violation of its members' due process rights. Like with equal protection, if Montana's zoning reform laws SB 323 and SB 528 are arbitrary and capricious, then so are most zoning ordinances throughout the country.

Finally, MAID's arguments about the State being prohibited from passing laws in the housing space are similarly misguided. The Montana Constitution's Home-Rule Provision does not give municipalities sovereignty independent of that authority delegated by the State and certainly does not permit municipalities to preempt the State from engaging in reasonable use of its police power.

Argument

I. Montana's Zoning Reform Laws Do Not Violate MAID's Entitlement to Equal Protection of the Laws

Under Montana law, Equal Protection claims are analyzed according to a three-step process: "(1) identify the classes involved and determine if they are similarly situated; (2) determine the appropriate level of scrutiny to apply to the challenged legislation; and (3) apply the appropriate level of scrutiny to the challenged statute." *Goble v. Montana State Fund*, 2014 MT 99, ¶ 28, 374 Mont. 453, 325 P.3d 1211 (citing *Henry v. State Comp. Ins. Fund*, 1999 MT 126, ¶ 27, 294 Mont. 449, 982 P.2d 456). "The basic rule of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment." *Id.* (quoting *Rausch v. State Comp. Ins. Fund*, 2005 MT 140, ¶ 18, 327 Mont. 272, 114 P.3d 192). At pages 16–24 of its response, MAID argues that homeowners of properties not subject to private covenants are being unfairly disadvantaged in favor of homeowners of properties that are subject to private covenants. This is exactly backwards.

As Kuhnle and Kenck explain in their original memorandum of law, they consider the new housing laws (specifically the ADU and duplex laws) to give them *advantages* that those in deed-restricted communities can only avail themselves of if they negotiate for those rights with their deed-restricted neighbors. In other words, MAID purports to represent Kuhnle and Kenck (as property owners not within deed-restricted neighborhoods, which is ostensibly who MAID

represents), yet MAID complains about the very characteristics of the new laws that Kuhnle and Kenck appreciate. Kuhnle and Kenck consider Montana's new housing laws to be a feature, not a bug. Both men *want* to take advantage of their so-called "disparity in treatment," Complaint ¶ 83, to construct structures previously unallowed under their local zoning regimes—ADUs and duplexes. Kuhnle Decl. ¶¶ 3–4; Kenck Decl. ¶¶ 3, 7. MAID's response to Kuhnle and Kenck's argument is silent on this structural flaw in the very premises of its entire lawsuit.

What is really happening here, and what this Court should put a stop to, is MAID's efforts to use the laws to interfere with other people's rights. If the individuals MAID represents do not want to build ADUs or duplexes on their own property, they do not have to. But they should not interfere with the property rights of individuals like Kuhnle and Kenck, and MAID is trying to use the courts and this lawsuit to do just that. There is no equal protection right to have a preferred zoning regime frozen in perpetuity, yet that is what MAID demands this Court enforce via this lawsuit. There is no equal protection right to the zoning you prefer.

A. The cases MAID relies upon to make its equal protection arguments are inapposite

MAID makes its equal protection arguments at pages 16–24 of their Combined Response/Reply. In sum, MAID argues that property owners in deed-restricted communities are similarly situated to property owners in non-deed-restricted communities, and that in all other features they are identical but for the new housing laws that they complain of. They analogize their situation to the plight of a gay common-law-married couple who could not obtain state university employer medical insurance where a heterosexual couple could, *see Snetsinger v. Montana Univ. Sys*., 2004 MT 390, 325 Mont.148, 104 P.3d 445, or to teens who could not get an abortion without their parents' consent. *See Planned Parenthood v. State*, 2024 MT 178, 417 Mont. 457, 554 P.3d 153.

Those two fact patterns are wildly different from the instant case for the same reason: in those cases, the plaintiffs could not legally obtain something *that others could*. Under the theories of those cases, *the plaintiffs were being disadvantaged*. But in the instant case, no one is denying the MAID plaintiffs anything they want. *They are not being disadvantaged at all*. First, in the health insurance context, the gay couple could not get health insurance, and they wanted health insurance that heterosexual couples could obtain. In the teen abortion case, the premise was that some teens could not get an abortion without parental consent, while others could. But here, the MAID plaintiffs are not being denied anything by the laws at issue. If they do not want to build ADUs or duplexes, they do not have to. If they want to, they can. MAID's complaint is that their neighbors may want to build ADUs or duplexes, and that this somehow offends them. But MAID has no right, equal protection or otherwise, to interfere with what the new laws *allow their neighbors to do*.

To make the insurance or abortion analogies fit the instant case as MAID wants them to fit, the plaintiffs in those two cases would have to have been complaining that *others* might get health insurance that they do not want but legally could have, or *others* could get abortions that they could obtain but do not want. But that is not what those cases are about. As Kuhnle and Kenck explained in their memorandum of law, MAID is inverting the concept of equal protection. Instead of claiming equal treatment for themselves, it is insisting that everyone else be forced to abide by the choices that MAID homeowners prefer for themselves. They are not asking for equal opportunity. They are asking that others be denied opportunity.[1]

[1] *Oberson v. USDA*, 2007 MT 293, 339 Mont. 519, 171 P.3d 715, and *Brewer v. Ski-Lift, Inc.*, 234 Mont. 109, 762 P.2d 226 (1988), are similarly inapposite. In *Oberson* and *Brewer*, the courts were addressing the statutory negligence standard vis-à-vis skiers and snowmobilers. The courts in both cases said that those who engage in inherently dangerous sports should have legal recourse for the

Treating individuals who have voluntarily entered private contracts restricting how they are allowed to alter their property differently from individuals who have not chosen to do so is simply not unequal treatment—the "factor constituting the alleged discrimination," *Goble*, 2014 MT 99, ¶ 29, is a legitimate difference in circumstances. While treating similarly situated groups differently is a violation of equal protection, "the equal protection clause does not preclude different treatment of *different groups* so long as all individuals within the group are treated the same." *Rausch*, 2005 MT 140, ¶ 18 (emphasis added). Moreover, the two groups are being treated the same—every property owner benefits from the change in the housing laws. It's up to the property owners within a deed-restricted community to then negotiate with their HOA to change their private contract to allow for ADUs or duplexes.

Moreover, it must be noted that the distinction on which MAID rests its equal protection claim is not based on an immutable characteristic like race, sex, or national origin, but on the "independent . . . decisions" of the homeowners themselves. *Duane C. Kohoutek, Inc. v. State, Dep't of Revenue*, 2018 MT 123, ¶ 37, 391 Mont. 345, 417 P.3d 1105 (finding difference in compensation provided by statutory scheme based on liquor store sales data did not discriminate between similarly situated classes because the difference in treatment was "attributable to that Agency Liquor Store's independent business decisions [which] created fundamental differences that sufficiently distinguish the classes and render them dissimilar for equal protection purposes").

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negligence of the property owners where they ski and snowmobile. For those cases to have anything to say on the instant case facts, the laws at issue should have had a *lower* negligence standard, and some skiers and snowmobilers should have been suing the state and claiming that, since they prefer to have to prove their negligence cases to a higher standard of proof to overcome any statutory immunity for the resorts, all skiers and snowmobilers should have to abide by that same standard. No plaintiff would proffer such an absurd argument, yet by analogy that is what MAID is doing in the instant case: "*since we don't want the right to build ADUs and duplexes that the state is protecting in favor of property owners, no one should have that right*."

The decision whether to enter a private covenant that places stricter limits on construction projects than state or local authorities (either by creating one with other existing owners or purchasing a property within a deed-restricted community) is an important one but it does not allow the homeowners who have opted to live unencumbered by a private covenant or HOA to legitimately claim that the government somehow has treated them differently in a way that offends the Equal Protection Clause.

Lastly, to the extent that MAID argues that HOA restrictions run with the land, anyone who has lived in a deed-restricted community is aware that those restrictions can be revised through negotiation, like any other contract. As Nollan Gray, author and zoning expert, has explained, "deed restrictions are private, *voluntary* agreements among property owners—typically the homeowners of a particular subdivision or neighborhood—regulating how they can and cannot use their land." M. Nolan Gray, *Arbitrary Lines, How Zoning Broke the American City and How to Fix It* 147 (Island Press 2022). Since they are tied to the land, the home buyer *must agree to them*. *Id.* Contrary to the argument made by MAID, that is called free choice. No one forces deed restrictions on a property owner who chooses to live in a deed-restricted community, and those restrictions can be changed by mutual assent. *Id.* at 149 (describing an example of deed restrictions in action in the city of Houston, Gray notes that deed restrictions may change over time depending on homeowners' preferences, and—pertinent here—as certain restrictions are no longer enforced).

B. SB 382's establishment of new zoning criteria does not violate equal protection

MAID also asserts in its response (pages 23–24) that SB 382's establishment of new criteria local governments covered by the law must consider when evaluating zoning changes violates equal protection. MAID argues this is "systemic" discrimination against homeowners who choose to live in urban areas and voluntarily do not live in deed-restricted communities. *Id.* First,

as discussed earlier, there is no injury suffered by MAID. These homeowners, including Kuhnle and Kenck, benefit from the new law. Second, as with the distinction between those who are subject to private covenants and those who are not, individuals living in less densely populated areas are not similarly situated to those individuals living in the more urbanized areas subject to Montana's zoning reforms. Urban and rural environments are obviously different and because of that difference different types of land use policy—accepting that government land use policy is a valid exercise of police powers, as MAID's arguments assume—make sense as a question of policy. Again: there is no constitutional right to the zoning regime you prefer.

II. MAID Has Failed to Demonstrate That Montana's Zoning Reform Laws Violate Its Substantive Due Process Rights

MAID's Combined Response/Reply brief is thin on its substantive due process arguments against Montana's new housing laws. The inconsistencies identified by MAID are too minor and inconsequential to support a claim for a violation of their substantive due process rights, should those rights even exist in this context, which is more akin to using a claim to substantive due process as a sword to interfere with one's neighbors' rights, rather than a true substantive due process right as generally understood.

First, MAID reiterates its accusation that Montana's zoning reform laws are "geographically haphazard" because not all the provisions of the multiple challenged statutes apply to the same cities. MSJ at 17. Next, MAID points to supposedly contradictory definitions of "duplex" found in § 76-25-103(36), MCA ("a building designed for two attached dwelling units . . . which . . . share a common separation") and § 76-2-304(5)(a), MCA ("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"), as its prime example of arbitrariness, but now it acknowledges that this error does not rise to a violation of substantive due process if standing alone. MAID's

Combined Response/Reply at 27. De minimis instances of what can be characterized at worst as irregular drafting regarding technical definitions across three separate statutes hardly rises to the level of a violation of substantive due process.

Montana's liberalization of its zoning laws, including its limitations on the applicability of those reforms, are clearly related to the permissible legislative objective of increasing the amount of housing available to meet the needs of Montana's rapidly growing population. Therefore, to the extent that MAID even has substantive due process rights, those rights are not violated here.

III. MAID Has Failed to Show that the State Has Violated State Constitution's Home-Rule Provision, Because It Cannot Make Such a Showing

Lastly, MAID continues to argue that Montana's zoning reform laws somehow violate the Home-Rule Provision of the Montana Constitution. But municipalities are creatures of the state, possessing no sovereign authority beyond that which has been delegated to them by constitutional provision or by statute. The Home-Rule Provision included in the 1972 Constitution does nothing to change this. *See D&F Sanitation Service v. City of Billings*, 219 Mont. 437, 444–45, 713 P.2d 977 (1986) ("[T]he 'shared powers' concept does not leave the local unit free from state control.") (quoting 1972 Mont. Const., Con. Committee Notes (1972), Vol. II, pp. 796–97). The Home-Rule Provision states: "A local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter. This grant of self-government powers may be extended to other local government units through optional forms of government provided for in section 3." Mont. Const. art. XI, § 6. The provision does not give municipalities sovereignty or the power to constrain the lawful authority of the State Legislature. It does not prohibit the State from acting in areas recently reframed as a matter of "local control," such as zoning. And it certainly does not institute some kind of reverse preemption regime.

To the contrary, the Home-Rule Provision explicitly states that, when there is a conflict between state and local law (even local law passed by municipalities possessing Home-Rule charters), state law controls. Mont. Const. art. XI, § 6 (delegating to Home-Rule municipalities "any power not prohibited by this constitution, law, or charter").

Conclusion

For the foregoing reasons and the reasons offered in Kuhnle and Kenck's cross-motion for summary judgment and memorandum of law in support, the Court should deny MAID's Second Motion for Summary Judgment and grant Kuhnle and Kenck's Cross-Motion for Partial Summary Judgment on Counts III, IV, and V.

DATED: January 3, 2025.

Respectfully submitted,

/s/ Ethan W. Blevins

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