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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-16-2023-0001248 Hon. Michael Salvagni **INTERVENORS DAVID KUHNLE AND CLARENCE KENCK'S BRIEF IN OPPOSITION TO PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Introduction and Background

In response to the ongoing shortage of new housing, last year the Montana Legislature passed, and the governor signed into law, a policy liberalizing the production of housing in residentially zoned areas. Montana enacted a law that allows 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). This contrasts with other state governments, such as California, which have enacted policies to address housing shortages through counterproductive subsidies to developers, development mandates, and other schemes that violate the rights of either developers or property owners.

A. MAID'S Complaint

Montanans Against Irresponsible Densification (MAID), a collection of Montanans who own property within the State and who oppose increased densification, opposes these 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. 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.

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 a private covenant are arbitrary or irrelevant considerations when determining what zoning polices 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.

This Court should not reward MAID for its inversion of the concept of equal protection to require the State interfere with private contractual relationships (itself a violation of both the Montana and United States Constitutions) to allow MAID's members to bully their neighbors into using their property in the way MAID's members prefer. And because MAID has failed to adequately show either the disparate treatment of similarly situated groups or an arbitrary and capricious failure to align legal enactment with legitimate government purpose, this Court should deny MAID's Second Motion for Summary Judgment on Counts II and III and grant Intervenors' Kuhnle and Kenck's Cross-Motion for Partial Summary Judgment on Count II.

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 imbue municipalities with 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.

Statement Regarding Material Facts

Kuhnle and Kenck agree with MAID that, at least with respect to the allegations in Counts III and IV of the Complaint, there are no genuine disputes of material fact. But whereas MAID contends that the law applied to the undisputed material facts mean summary judgment should be entered for MAID, Kuhnle and Kenck counter that the Court should grant summary judgment to Defendant-Intervenors Kuhnle and Kenk on those Counts III and IV. Kuhnle and Kenck are entitled to judgment as a matter of law on MAID's equal protection and substantive due process claims, regardless of whether any facts pertinent to the remaining claims are contested by the other parties, subjects to which Kuhnle and Kenck do not opine.

Standard of Review

Under Rule 56(c)(3) of the Montana Rules of Civil Procedure, summary judgment is appropriate when "there is no genuine issue as to any material fact and [] the movant is entitled to judgment as a matter of law."

Argument

I. MAID Has Failed to Demonstrate That Montana's Zoning Reform Laws Violate Equal Protection of the Law, Thus the Court Should Grant Summary Judgment in Favor of Kuhnle and Kenck on Count III

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). 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, but this argument fails because the two groups are not similarly situated in ways relevant to the statutes at issue.

And because equal protection is concerned only with differential treatment between persons or groups who are similarly situated, if a court determines that the classes involved were not "equivalent in all relevant respects other than the factor constituting the alleged discrimination," then "it is not necessary . . . to analyze the challenge further." *Vision Net, Inc. v. Dep't of Revenue*, 2019 MT 205, ¶ 16, 397 Mont. 118, 447 P.3d 1034 (quotations omitted). This Court therefore need not determine a constitutional level of scrutiny, nor attempt to balance the equities involved, as MAID has neither proven nor properly alleged that the two groups of homeowners are similarly situated.

It is also worth noting at the outset that MAID has failed to adequately articulate how exactly its members have been injured by their purported unequal treatment. The Complaint makes general reference to Article II, Section 3, of the Montana Constitution's guarantee of "inalienable rights," which "include the right to a clean and healthful environment . . . , acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways," but MAID refuses to elaborate further in either its Complaint or Second Motion for Summary Judgment. Complaint ¶¶ 77–78. Leaving aside, for the moment, whether the classes MAID describes are similarly situated for equal protection purposes, it is just as easy to argue that MAID's members are the *beneficiaries* of Montana's zoning reforms, while residents of some deed-

restricted communities are unfortunately unable to take advantage of the State's liberalization of zoning restrictions.

That is certainly the case for Intervenors David Kuhnle and Clarence Kenck. Both men are property owners in areas covered by Montana's zoning reforms, lacking the "protection" of homeowners' associations or population-based exemptions. Kuhnle Decl. ¶¶ 1–2; Kenck Decl. ¶¶ 1, 7. Both men would like to take advantage of their "disparity in treatment," Complaint ¶ 83, to construct structures previously unallowed under their local zoning regimes. Kuhnle Decl. ¶¶ 3–4; Kenck Decl. ¶¶ 3, 7. Kuhnle and Kenck are squarely within the class of property owners whose interests MAID claims to represent, and they fail to see how they have been harmed by the *loosening* of regulatory restrictions on how they can use their own property. Whether from an economic perspective (Kuhnle intends to build an ADU to use as an investment property and expects to financially benefit from the reforms, Kuhnle Complaint Decl. ¶ 5), or a familial perspective (Kenck intends to build a duplex to support his aging brothers, Kenck Complaint Decl. ¶¶ 3–6), SB 382 and SB 528 are incredibly *beneficial* for them. To the extent there has been any differential treatment between different classes of property owners (which one should expect, considering the classes are not similarly situated, *see* Section I(a), *infra*), the question of which group received the better outcome is a matter of considerable controversy, as the difference in opinions between Intervenors and MAID's members demonstrates.

A. Homeowners of properties subject to private covenants are not similarly situated to homeowners of properties not subject to private covenants

Equality before the law does not demand absolute equality of treatment across the board. "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415

(1920)). *See also Gazelka v. St. Peter's Hospital*, 2018 MT 152, ¶ 17, 392 Mont. 1, 420 P.3d 528 ("[A] 'statute does not violate the right to equal protection simply because it befits a particular class,' as discrimination only exists when people in *similar circumstances* are treated unequally.") (quoting *Wrzesien v. State*, 2016 MT 242, ¶ 9, 385 Mont. 61, 380 P.3d 805). Denying toddlers the right to operate motor vehicles or incarcerated felons the right to move about freely are obviously not violations of the Equal Protection Clause. Similarly, 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).

It is insufficient for the two classes being compared to merely be similar in some respect; the groups must be similar in a way that is materially relevant to the purported purpose of the challenged government action. *See Gazelka*, 2018 MT 152, ¶¶ 18–24 (Holding that patients "insured by the insurer that negotiated the most favorable" deal were not similarly situated to all other patients because "insured patients who have contracts with insurers and pay insurance premiums are in completely different positions than uninsured patients who do not have contracts with insurers or pay for the benefits of negotiated, reduced fees." Such a statutory distinction was "plainly related to the statute's underlying justification."). Similarly, in *Goble*, 2014 MT 99, ¶ 37, this Court upheld the denial of an equal protection claim made by workers compensation applicants whose claims were denied because they were incarcerated, reasoning that "[p]ermitting incarcerated claimants to collect workers' compensation benefits . . . would undercut a principal

objective of the [statute] to provide wage-loss benefits that bear a reasonable relationship to actual wages lost as a result of a work-related injury."

Indeed, limiting the ability to use one's property as freely as one would be otherwise permitted by the applicable laws and zoning regulations (and being secure in the knowledge one's neighbors are similarly limited) is the entire reason many have for entering private covenants in the first place. *See* Robert H. Nelson, *Homeowners Associations in Historical Perspective*, 71 Pub. Admin. Rev. 546, 546–49 (2011). By the same token, many Americans choose to avoid living in communities governed by private covenants precisely because they chafe at such restrictions and prefer to live in a more laissez-faire environment. *Id*. Homeowners who use the power of contract and free association to choose to live in a particular type of community where they are not subject to—nor pay to enforce—restrictive rules regarding what they can do with their property cannot cry foul now that they face the possibility of their neighbors doing something they don't like.

Further, it bears noting 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"). 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 with various benefits and

drawbacks that may or may not appeal to any individual homeowner. They don't render 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 because of the homeowners' own choices. This Court should not allow them to do so.

B. The Court need not decide what level of scrutiny would apply if the two groups of property owners were similarly situated

Because homeowners owning property subject to private covenants are not similarly situated to homeowners owning property that are not subject to private covenants, it is unnecessary for this Court to proceed with the second and third stages of the equal protection analysis. *Vision Net*, 2019 MT 205, ¶ 16. The existence of similarly situated groups or individuals who have been treated differently is a prerequisite for any equal protection challenge, and there is no need for the Court to waste time and judicial resources determining what tier of scrutiny applies or to attempt to balance the equities of any differential in treatment without it. *See Gazelka*, 2018 MT 152, ¶ 25 (refusing to engage further with equal protection argument after determining the plaintiff failed at step one: "We conclude that Gazelka's proposed classes are not similarly situated and that she has not satisfied the first step of the equal protection analysis. Therefore, our inquiry ends and Gazelka's equal protection claim fails.").

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

MAID also asserts that SB 382's establishment of new criteria local governments covered by the law must consider when determining whether zoning changes violates equal protection. According to MAID, because SB 382's streamlined administrative review procedures are mandatory only in municipalities meeting certain population thresholds (exempting cities and towns with fewer than 5,000 residents and/or within counties of less than 70,000 residents but permitting such municipalities to affirmatively vote to comply with the new procedures), Montana

is engaging in illegal discrimination against residents of the covered municipalities. This argument fails for at least two reasons.

First, as discussed earlier, it is not at all clear that MAID's members have even been injured. Indeed, Intervenors Kuhnle and Kenck—both members of the class MAID claims to represent—will benefit from the loosening of restrictions on what they can do with their own property. Mere policy disagreement with a law is not a constitutional injury.

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 make sense. Urban areas struggle with problems stemming from high concentrations of people, e.g., noise pollution and the like. Rural areas struggle with problems stemming from the opposite, e.g., lack of infrastructure and distance from emergency services. A housing reform that might be urgently needed to deal with an affordable housing crisis in Billings or Missoula may be unnecessary in sparsely populated areas of the State. The State's purpose in enacting its zoning reforms was to respond to Montana's current housing shortage, which is primarily impacting the State's urban areas. *See* Executive Order Creating the Housing Advisory Council, No. 5-2022 (July 14, 2022) ("driven by shortage of housing supply, Montana faces a crisis of affordable, attainable housing that poses substantial challenges to hardworking Montanans, employers, communities, and the State's economic health"). It is therefore reasonable that the Legislature chose to focus its efforts in the areas where it would do the most impact while allowing less populous (and less wealthy) localities to avoid the administrative costs inevitably associated with any regulatory change (e.g., producing new forms and government websites, training

employees on the new regulations, etc.). As will be further explicated in Part II(a), *infra*, nearly all bright line demarcations made by the law are, at some level, arbitrary, but recognizing that having the exact same zoning regime in a city of 100,000 and an unincorporated county of 1,000 is hardly novel or some kind of cover for invidious discrimination; incorporating population thresholds into the statute was directly related to the Legislature's stated purpose of ensuring "sufficient housing units for the state's growing population" while balancing "private property rights and values, public services and infrastructure, the human environment, natural resources, and recreation, and a diversified and sustainable economy." SB 382, Section 2, 68th Leg. (2023).

D. This Court should not allow MAID to wield the shield of equal protection as a sword against the right of private contract

MAID's theory of the Equal Protection Clause is exactly backwards. Rather than use it to seek protection from oppressive government actions treating people unfairly, MAID wields equal protection to attack a reform package that *lifts* government restrictions on their own members' property and bully its members' neighbors into doing what they were either unable or unwilling to negotiate for fairly. People who cannot convince their neighbors to agree to restrictive covenants and therefore turn to the power of the state to implement their will by force are not a protected class, and being told you can no longer bully your neighbors into conforming to your narrow view of how they should use their own property is not oppression.

It is absurd that MAID seeks to cloak its motives behind a curtain of equal protection and faux concern over their right to a "clean and healthful environment," Complaint ¶¶ 56, 69,[1] particularly when it is asking this Court to run roughshod over another longstanding and

[1] How, exactly, the existence of ADUs and duplexes pose a threat to Montanans' "inalienable rights" to a "clean and healthful environment;" the acquisition, possession, and protection of "property;" and "safety, health and happiness," Mont. Const. art. II, § 3, is left as an exercise to the reader.

constitutionally guaranteed right—the right to private contract. Montana law's respect for private contract is the culmination of hundreds of years of Anglo-American legal tradition. *See, e.g.*, *Ogden v. Saunders*, 25 U.S. 213, 345 (1827) (Marshall, C.J., remarking on the long history of the natural law right to contract); Hadley Arkes, *The Shadow of Natural Rights, or a Guide from the Perplexed*, 86 Mich. L. Rev. 1492, 1511–14 (1988) (discussing history of the right to contract). It is recognized by both the Montana and United States Constitutions. Mont. Const. art. II, § 31 ("No ex post facto law nor any law impairing the obligation of contracts . . . shall be passed by the legislature."); U.S. Const. art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]"). In fact, it is precisely because of these constitutional prohibitions on impairing the obligation of contracts that Montana attempting to enforce its reforms on communities protected by private covenants restricting development to single-family homes would itself be a constitutional violation. As this Court recognized in *Gazelka*, 2018 MT 152, ¶ 23,

> [I]f the Court were to accept that [a party who has chosen not to be protected by a voluntarily entered-into private contract] was similarly situated to those who pay for [the benefit], any contract facilitated by a statute could become the basis for an equal protection challenge by those who have not received the benefit of the contract.

MAID has not shown—and cannot show—that its members are similarly situated to property owners who are not subject to the new zoning laws, either with respect to private covenant status or to population thresholds. Montana recognized the substantial distinctions between differently situated groups of people and reasonably tailored its legislative reforms accordingly. Defendants are therefore entitled to judgment on the pleadings, MAID's Second Motion for Summary Judgment should be denied, and Kuhnle and Kenck's Cross-Motion for Partial Summary Judgment should be granted with respect to Count III.

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

A. The Laws' population thresholds are not arbitrary

All thresholds, cutoffs, and other bright lines are inherently somewhat arbitrary, in the sense that marginally raising them higher or lower rarely makes a significant difference and other, similar thresholds may work just as well, but this alone does not render them so arbitrary as to be constitutionally infirm. *See Solar Energy Indus. Assoc. v. Fed. Energy Reg. Comm'n*, 80 F.4th 956, 978–79 (9th Cir. 2023) (This problem "is one that arises frequently in administrative rulemaking . . . . [A]gencies often must select a single quantitative threshold from among a range of reasonable options. . . . A 55-mile-per-hour speed limit is not 'arbitrary' just because 50 miles per hour, or 60 miles per hour, would work equally well."). Montana recognized that legal reforms focusing on allowing more density are more necessary in areas with more demand for housing (more densely populated) than in areas with less demand for housing (less densely populated), and established population thresholds accordingly. Is 5,000 the optimal population threshold to begin requiring municipalities to adopt the new zoning regulations, or would 6,000 make more sense? Intervenors can't even begin to guess, and neither can MAID, and that's the point.

The Montana Legislature is hardly the first government body to discover that different population sizes and densities tend to call for different approaches to the regulation of land use. Different populations have different problems, needs, and preferences, and virtually all states and localities in America have adopted regulations demarcating what forms of development shall be allowed in what areas under what circumstances. *See* Nathaniel Meyersohn, *The invisible laws that led to America's housing crisis*, CNN (Aug. 5, 2023), https://www.cnn.com/2023/08/05/business/single-family-zoning-laws/index.html. These regulations are often complex, voluminous, and full to bursting with seemingly arbitrary lines, boundaries, and thresholds:

everything from development zone and school district boundaries forcing students to switch schools over and over as demographics shift, *see, e.g.*, Charlie Klepps, *Billings Public Schools proposes redistricting plan to even enrollment*, KTVQ (Nov. 23, 2022), https://www.ktvq.com/news/local-news/billings-public-schools-proposes-redistricting-plan-to-even-enrollment, to height and setback restrictions justified on purely aesthetic grounds, *see, e.g.*, Missoula Mun. Code, § 20.110.050 (setbacks), to random stretches of highway with unusually slow speed limits intended to capture unaware out-of-staters in revenue-generating speed traps. *See, e.g.*, C.J. Ciaramella, *11 Insanely Corrupt Speed-Trap Towns*, Reason (June 2022), https://reason.com/2022/05/08/11-insanely-corrupt-speed-trap-towns/. Laws sometimes require bright lines, which will always be, at least to some extent, arbitrary. If Montana's zoning reforms are arbitrary enough to violate substantive due process, so is just about every other zoning law in the country.

B. The inconsistencies in language MAID complains of are minor and do not rise to the level of a due process violation

Intervenors are sympathetic toward MAID's argument regarding the inconsistency of statutory language. After all, "[i]f men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021). The inconsistencies identified by MAID in its brief, however, are too minor and inconsequential to support a claim for a violation of their substantive due process rights, should they exist in this context.

First, MAID accuses Montana's zoning reform laws of being "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. MSJ at 18. MAID goes on to complain that SB 382 lists allowing ADUs in areas zoned for single-family homes as one of 14 housing strategies, of which cities must select at least 5 to pursue, while SB 528 requires ADUs be allowed in all areas zoned for single-family homes. MSJ at 18. This is the sum of evidence MAID brings to bear in support of its argument that Montana's zoning reform laws are so arbitrary that they deny its members due process of law. Four 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.

MAID acknowledges that the mere "lack of coordination and these geographic and applicability anomalies do not necessarily mean they conflict with the Constitution," MSJ at 18, and that the standard is that "a statute enacted under the state's police power must be reasonably related to a permissible legislative objective." MSJ at 16–17 (quoting *State v. Sedler*, 2020 MT 248, ¶ 17, 401 Mont. 437, 473 P.3d 406). As already discussed, Montana's liberalization of its zoning laws, including its limitations on the applicability of those reforms, are clearly at least related to the permissible legislative objective of increasing the amount of housing available to meet the needs of Montana's rapidly growing population.

That this is an inappropriate case for a substantive due process claim is amply demonstrated by MAID's own choice of authority. *Moore v. East Cleveland*, 431 U.S. 494, 495–98 (1977), which MAID cites as the leading federal case on substantive due process in "the zoning arena," MSJ at 17, concerned a situation where a homeowner was *convicted of a crime* for violating a housing ordinance that defined "family" in such a way that her grandson was not allowed to live with her.

The U.S. Supreme Court held that the ordinance violated substantive due process because this sort of arbitrary and "intrusive regulation of the family" failed to rationally serve the city's legitimate goals of preventing overcrowding, congestion, and financial strain on the school system. 431 U.S. at 499–500. The situation here is far from similar. Rather than inserting itself into the domain of a specific private home and disrupting family life for those involved, here the State is *loosening* its zoning restrictions—in a way that directly benefits nontraditional family units just like the one at issue in *Moore* by allowing cheaper and semi-detached living arrangements—on many thousands of individuals. This is clearly not a case where "that freedom of personal choice in matters of marriage and family life [that] is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment" is threatened. *See id.* at 499 (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974)). Homeowners concerned about potential dips in property values due to lower cost housing being built in their neighborhoods (which they are perfectly within their rights to avoid by joining a homeowners' association that restricts ADUs and duplexes) are not the victims of arbitrary government intrusion upon the sacred space of the home and the ancient right of intimate association, they're just bad neighbors.

III. MAID Has Failed to Show that Montana Has Somehow Illegally Arrogated the Powers of Local Governments in Violation of the State Constitution's Home-Rule Provision

Lastly, MAID argues that Montana's zoning reform laws somehow violate the Home-Rule Provision of the Montana Constitution. But just as with its equal protection argument, MAID attempts to twist Home Rule into a weapon to use against its political opponents in a way that is completely at odds with the constitutional provision's purpose.

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 imbue municipalities with sovereignty or give them 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.[2] It certainly does not institute some kind of reverse preemption regime where municipalities can prevent the State from regulating an area by passing their own regulations first, as MAID appears to suggest. Municipal enactments must still be "not inconsistent with state law." *Diefenderfer v. City of Billings*, 223 Mont. 487, 490, 726 P.2d 1362 (1986).

It is telling that MAID's claim here rests primarily on policy arguments regarding the relative expertise of local versus state officials and out-of-state court decisions interpreting other states' constitutions, because there is no argument under Montana law that the enactment of the challenged zoning reform laws requiring ADUs and duplexes in areas zoned for single-family homes violated the Constitution's Home-Rule provision. The Home-Rule Provision explicitly states that, when there is a conflict between state and local law (even local law passed by

[2] The best form of "local control" is not properly vested in local government, as MAID would have it; instead, "local control" should be vested in the individual property owners with the constitutional property rights to decide what to do with their own properties, subject to nuisance principles and the like. *See, e.g.*, Ilya Somin, *YIMBYism is the Ultimate Localism*, The Volokh Conspiracy (Aug. 8, 2024), https://reason.com/volokh/2024/08/08/yimbyism-is-the-ultimate-localism/. Be that as it may, there is nothing in Montana law that preempts the State from acting within its police powers on matters of land use within the boundaries of the State.

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**") (emphasis added). This remains true regardless of however "liberally construed," § 7-1-106, MCA, the authority of a local government may be. It is the State's action—not the action of any municipality, it should be remembered—that has been challenged in this lawsuit, and MAID has failed to provide any reason these state legislative acts unconstitutionally intrude into any area reserved by law to local governments.

Conclusion

For the foregoing reasons, 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.

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Respectfully submitted,

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