ETHAN W. BLEVINS
Montana Bar No. 37415893
Pacific Legal Foundation
839 W 3600 S
Bountiful, UT 84010-8423
Telephone: (916) 288-1392
eblevins@pacificlegal.org

MARK MILLER*
Pacific Legal Foundation
4440 PGA Blvd., Ste. 307
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
mark@pacificlegal.org

DAVID MCDONALD*
Pacific Legal Foundation
3100 Clarendon Blvd., Ste. 1000
Arlington, VA 22201
Telephone: (202) 888-6881
DMcDonald@pacificlegal.org
**Pro Hac Vice*

Counsel for Defendant-Intervenors
David Kuhnle and Clarence Kenck

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 OPPOSITION TO PLAINTIFF MAID'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

In Plaintiff Montanans Against Irresponsible Densification (MAID)'s First Amended Complaint at Count I, Plaintiff seeks a declaratory judgment that the housing laws passed by the

Montana Legislature and signed into law by Governor Greg Gianforte in 2023, the laws at issue in this lawsuit, do not infringe on the right of contract private homeowners possess and exercise in some instances by entering into restrictive covenants with their neighbors that bilaterally and by consent restrict their rights to use their property. MAID then filed a motion for partial summary judgment asking this Court to grant them that declaratory relief by way of a declaratory judgment on Count I. Since no one disputes that these housing laws do not infringe upon the rights of contract, Plaintiff MAID's Motion for Partial Summary Judgment seeking a declaratory judgment should be denied. Declaratory relief is only appropriate where rights are actually in dispute, and here—at least on this question—rights are decidedly not in dispute. To the contrary, all parties agree that Montana's 2023 housing reforms do not interfere with or preempt deed restrictions—in fact, the statutory reform says so explicitly. Thus, the relief MAID seeks is inappropriate.

I. MAID'S COUNT I MAKES AN OBSERVATION OF LAW, IT DOES NOT STATE A DISPUTED QUESTION WHERE PARTIES ARE UNSURE OF THEIR RIGHTS, THUS THE COURT NEED NOT—AND SHOULD NOT—GRANT DECLARATORY RELIEF

Count I of MAID's First Amended Complaint asks for two judicial declarations relevant to MAID's claims that Montana's 2023 housing reforms violate the law:

> 1. As a matter of statutory law, SB 323, SB 528 and SB 382 do not preempt restrictive covenants which contain provisions more restrictive than municipal zoning ordinances; and
>
> 2. Any attempt to displace or supersede restrictive covenants, through application of SB 323, SB 528, SB 245, or SB 382 is unconstitutional as an impairment of the obligation of contracts, under both the Montana Constitution and the United States Constitution.

MAID apparently seeks this declaratory relief pursuant to Montana's Uniform Declaratory Judgment Act (UDJA), although neither its First Amended Complaint nor its Motion for Partial Summary Judgment cite that Act. Be that as it may, for a court to declare relief pursuant to the

UDJA certain factors must be present, beginning with the requirement that an *actual* justiciable controversy exists. *See Broad Reach Power, LLC v. Mont. Dep't of Pub. Serv. Regul., Pub. Serv. Comm'n*, 2022 MT 227, ¶ 9, 410 Mont. 450, 520 P.3d 301. But here, though there is a larger justiciable controversy in play vis-à-vis whether the 2023 housing reform laws were lawful, there is no controversy about whether the reforms can preempt private covenants between landowners. They cannot, and no one contends they can.

That no one says the housing reforms preempt private deed restrictions is not just speculation. It's in the law itself and the Intervenors Kuhnle and Kenck do not claim that the new housing reform laws trump private deed restrictions.

First, the new housing reform laws provide that they do not infringe on the contractual rights of property owners to agree to restrictive covenants prohibiting ADUs or duplexes. *See, e.g.*, § 76-2-345(2)(i), MCA ("This subsection ... may not be construed to prohibit restrictive covenants concerning accessory dwelling units entered into between private parties").

Second, both Kuhnle and Kenck in their answers to the complaint agree with MAID that the new laws do not supersede private deed restrictions, and both of them go further and say—consistent with MAID's position here—that if lawmakers had contended that the laws could compel homeowners to ignore deed restrictions and allow ADUs and duplexes, that these law would be an unconstitutional infringement on the right to contract. *See* Kuhnle's Answer at ¶ 30 ("Intervenor admits that none of the challenged laws require or purport to require municipalities to interfere with otherwise valid covenants. Intervenor further avers that any attempt by the State of Montana to do so would be unconstitutional under the U.S. Constitution's prohibition on states impairing the obligations with the right of contract"); Kenck's Answer at ¶ 30 (same).

Since the laws themselves state that they don't interfere with private deed restrictions agreed-to by private parties, and Kuhnle and Kencke both agree that the laws don't operate in the way that MAID speaks to, there's no "real and substantial controversy" here (on the question of deed restrictions and the new laws) that only the Court can resolve by way of a "decree of conclusive character." *Broad Reach Power*, 2022 MT 227, ¶ 10 (quoting *Chovanak v. Matthews*, 120 Mont. 520, 526, 188 P.2d 582, 585 (1948)).

II. MONTANA TEST FOR DECLARATORY RELIEF NOT MET ON THESE FACTS

To determine whether a justiciable controversy exists justifying entry of declaratory judgment, this Court must apply this test:

> (1) a justiciable controversy requires that parties have existing and genuine, as distinguished from theoretical, rights or interests; (2) the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion; and (3) it must be a controversy the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationship of one or more real parties in interest, or lacking these qualities be of such overriding public moment as to constitute the legal equivalent of all of them.

Kageco Orchards, LLC v. Montana Dep't of Transportation, 2023 MT 71, ¶ 12, 412 Mont. 45, 52, 528 P.3d 1097, 1102 (quoting *Miller v. State Farm Mut. Auto. Ins. Co.*, 2007 MT 85, ¶ 8, 337 Mont. 67, 155 P.3d 1278 (citing *Northfield Ins. Co. v. Mont. Ass'n of Counties*, 2000 MT 256, ¶ 12, 301 Mont. 472, 10 P.3d 813)). None of these elements are met as presented by MAID.

First, as stated above, there exists no justiciable controversy on the question of whether the Montana housing reforms preempt deed restrictions: they do not, as the law says itself and Kuhnle and Kenck note above.

Second, there is no controversy here—legal, political, philosophical, or any other type of controversy. No one contests what MAID asks for a declaratory judgment on. Perhaps MAID

should ask that the Court take judicial notice of what the law says, and the parties agree it says. But that is not what MAID has done. MAID has asked for declaratory relief where there is nothing to relieve MAID of: no one is pressing a contrary position to the position MAID is asking for relief about.

Third, a declaratory judgment on this point will not "have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationship of one or more real parties in interest[.]" *Id.* No one's rights will be impacted by entry of a declaratory judgment on the question as posed by MAID here. Rather, at most what MAID will receive is a form of judicial advice. But the Court cannot not use a declaratory judgment to offer an "advisory opinion." *Broadreach Power*, 2022 MT 227, ¶ 10. To the extent it matters for purposes of MAID's equal protection argument that deed-restricted homeowners are treated differently by the housing reforms than non-deed-restricted homeowners, that the law says it treats them differently is a point MAID can make (and has made) in its motion for summary judgment on that cause of action. But it cannot assert that what is no more than an observation of what the law says entitles it to declaratory relief. No one's rights will be impacted premised on this proposed declaratory judgment.

Finally, giving MAID declaratory relief on this point would not be harmless; to the contrary, it would potentially put MAID in the position of claiming prevailing party status on a point of law that is not even disputed. Thus, if the Court improperly granted this relief, then MAID would be in the position of asserting a claim for an award of attorneys' fees from the taxpayers for the time it expended seeking a declaratory judgment that does nothing more than "declare" what everyone already knows.

CONCLUSION

Declaratory relief is only appropriate where rights are actually in controversy and the judgment sought would clear up the controversy. Here, there is no controversy. Deed-restricted homeowners are treated differently under Montana's housing reforms than non-deed-restricted homeowners. No one is suggesting that Montana's 2023 housing reforms preempt deed restrictions. For this reason, declaratory relief is neither necessary nor allowed, and the Court should deny MAID's Motion for Partial Summary Judgment.

DATED: December 10, 2024.

Respectfully submitted,

/s/ Ethan W. Blevins

ETHAN W. BLEVINS
Montana Bar No. 37415893
Pacific Legal Foundation
839 W 3600 S
Bountiful, UT 84010-8423
Telephone: (916) 288-1392
eblevins@pacificlegalfoundation.org

MARK MILLER*
Pacific Legal Foundation
4440 PGA Blvd., Ste. 307
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
mark@pacificlegal.org

DAVID MCDONALD*
Pacific Legal Foundation
3100 Clarendon Blvd., Ste. 1000
Arlington, VA 22201
Telephone: (202) 888-6881
DMcDonald@pacificlegal.org

Counsel for Defendant-Intervenors David Kuhnle and Clarence Kenck
**Pro Hac Vice*

CERTIFICATE OF SERVICE

I, Ethan Winfred Blevins, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief in Opposition to the following on 12-10-2024:

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: State of Montana
Service Method: eService

Michael Noonan (Govt Attorney)
215 N SANDERS ST
HELENA MT 59601-4522
Representing: State of Montana
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: State of Montana
Service Method: eService

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620
Representing: State of Montana

Service Method: eService

Jesse C. Kodadek (Attorney)
Parsons Behle & Latimer
127 East Main Street
Suite 301
Missoula MT 59802
Representing: Shelter WF, Inc
Service Method: eService

James H. Goetz (Attorney)
PO Box 6580
Bozeman MT 59771-6580
Representing: Montanans Against Irresponsible Densification, LLC
Service Method: eService

Brian K. Gallik (Attorney)
777 E. Main St., Ste. 203
PO Box 70
Bozeman MT 59771
Representing: Montanans Against Irresponsible Densification, LLC
Service Method: eService

Henry Tesar (Attorney)
35 North Grand
Bozeman MT 59715
Representing: Montanans Against Irresponsible Densification, LLC
Service Method: eService

Thomas J. Jodoin (Attorney)
P.O. Box 7388
Helena MT 59604
Representing: Montana League of Cities and Towns
Service Method: eService

David C. McDonald (Attorney)
3100 Clarendon Blvd, Suite 1000
Arlington VA 22201
Representing: David Kuhnle, Clarence Kenck
Service Method: Email

Mark Miller (Attorney)
4440 PGA Blvd, Suite 307
Palm Beach Gardens FL 33410
Representing: David Kuhnle, Clarence Kenck
Service Method: Email

Electronically Signed By: Ethan Winfred Blevins
Dated: 12-10-2024