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DISTRICT OF WYOMING
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U.S. DISTRICT COURT

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Attorney for Intervenor

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF WYOMING

GRACE UNITED METHODIST CHURCH, Plaintiff, vs. CITY OF CHEYENNE, CITY OF CHEYENNE BOARD OF ADJUSTMENT; DOROTHY WILSON, City of Cheyenne Development Director; and CHEYENNE CITY COUNCIL, Defendants.	)	Civil Case No. 02 CV 035B

MOTION TO INTERVENE

Intervenor, Mountview Park Homeowners Association, by and through its counsel, Stephen H. Kline, pursuant to Rule 24 of the Federal Rules of Civil Procedure, moves to intervene in the above-captioned action, and in support of said motion states as follows:

Plaintiff Grace United Methodist Church lies within the Mountview Park Addition to the City of Cheyenne, Wyoming. Intervenor, Mountview Park Homeowners Association, is a

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nonprofit corporation organized for public benefit and was formed by and consists of homeowners in the surrounding neighborhoods. The purposes of the corporation are to assure conformity and harmony of exterior design with existing structures in Mountview Park Addition to the City of Wyoming, Wyoming; to assure compliance with Protective Covenants for Mountview Park Additions; and to otherwise preserve, protect, and advance the quality of life for persons owning homes and/or residing in Mountview Park Additions.

A Declaration of Protective Covenants for the Mountview Park, Fifth Filing, an Addition to the City of Cheyenne, was filed with the Laramie County Clerk's office in Cheyenne, Wyoming on June 12, 1952 setting forth certain conditions applicable to all the property owners in said addition. All properties within the Mountview Park, Fifth Filing, including that of the Grace United Methodist Church, are subject to the covenants of the Mountview Park Addition as subsequently amended. A copy of the covenants applicable to the Church are attached hereto as Exhibit A. Intervenor believes that Plaintiff's plans to expand its facilities to add a commercial day care facility violates the covenants of the Mountview Park Addition.

Intervenor moves to intervene in this action as a matter of right because Intervenor has a direct interest in the property and transaction in question and believes that its interest may be impaired if it is not allowed to intervene and participate fully in the trial of this matter. *Fed. Rules Civ. 24(a), 28 U.S.C.A.* Intervenor's interests are separate and distinct from the interests of the City of Cheyenne in that the enforcement of the covenants lies solely with the homeowners in the area. Moreover, Intervenor believes that there are defenses to the Plaintiff's claims under the Religious Land Use and Institutionalized Person's Act which have not been

previously raised and which need to be addressed by the Court. Specifically, Congress' earlier attempt to limit the application of facially neutral zoning laws to religious institutions was declared unconstitutional in the case of City of Boerne v. Flores, 521 U.S. 507 (1997). Intervenor believes that the RLUIPA statute is similarly unconstitutional, and Intervenor seeks a determination in this regard. Intervenor further believes that the statutory factors established by Congress purporting to create jurisdiction do not exist in this case. Although the Defendants have raised the constitutional issue in their answer, they have not filed a motion regarding the constitutionality of the RLUIPA statutes or the jurisdictional issues.

After having reviewed the Court's Order addressing the summary judgment issues, Intervenor believes that its interests are not adequately represented by the Defendants, and with respect to the issues surrounding the covenants, its interests cannot ever be adequately represented by the Defendants. Although this case was filed a year ago, the Defendants did not file an answer until December 27, 2002. Intervener understands that there presently exist outstanding discovery issues, and Plaintiff has requested a second final pretrial conference. It is likely that the Defendants will seek a postponement of the trial date because of the outstanding discovery issue.

Regardless, Intervenor believes that if it is allowed to intervene that there will be no prejudice to the other parties as the issues that it intends to raise are issues that by necessity must be addressed prior to the Plaintiff ever being allowed to proceed forward with its proposed day care facility. It is in the interests of judicial economy that the issues be heard jointly with those raised by the parties rather than in a separate lawsuit.

WHEREFORE, the Intervenor, Mountview Park Homeowners Association, prays that the Court grant it leave to intervene as a Defendant herein and participate fully in the above-captioned matter. A copy of its proposed answer is attached hereto as Exhibit B.

DATED this 21st day of February, 2003.

KLINE LAW OFFICE, P.C.

By _____
Stephen H. Kline
Attorney for Intervenor

CERTIFICATE OF MAILING

I certify that a true and accurate copy of the foregoing instrument was served upon all parties to this action via U.S. mail, postage prepaid, on this 21st day of February, 2003.

Michael D. Basom
City Attorney
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Cheyenne, WY 82001

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Rothgerber, Johnson and Lyons, LLP
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Denver, CO 80202

Andrea L. Richard
John A. Coppede
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2424 Pioneer Avenue, Suite 210
Cheyenne, WY 82003-0808

Stephen H. Kline

Number 72	HKD HOMESITE COMPANY, a corporation	*	PROTECTIVE COVENANTS
		*	
		*	Dated June 10, 1952
	to	*	
		*	Filed June 12, 1952
520-229/ 33	The Public	*	at 9:52 A.M.

KNOW ALL MEN BY THESE PRESENTS: That all lots and blocks lying within Mountview Park, Fifth Filing, an Addition to the City of Cheyenne, Laramie County, Wyoming, the same being a subdivision of a portion of the Northeast Quarter (NE¼) of Section 33, in Township 14 North, Range 66 West of the 6th Principal Meridian, described as follows:

Beginning at the intersection of the centre line of Deming Boulevard and Laurel Drive, which point of intersection bears S 66°45' E 557.33 feet from N¼ corner of said Section 33; thence S 89°58' E along the centre line of Deming Blvd., a distance of 20 feet to a point; thence N 0°02' E a distance of 180 feet to a point on the south R/W line of Pershing Blvd.; thence S 89°58' E, along the south R/W line of Pershing Blvd., a distance of 910 feet to a point; thence S 0°02' W a distance of 522 feet to a point; thence S 89°58' W a distance of 116 feet to a point; thence S 0°02' W a distance of 396.35 feet to a point on the north R/W line of the Lincoln Highway (US #30); thence S 49°30' W, along said R/W line a distance of 629.86 feet to the West line of Spruce Drive extended; thence N 44°37' W, along the west line of Spruce Drive extended a distance of 150 feet to a point on the south line of Forest Drive; thence N 49°30' E, along the south line of Forest Drive, a distance of 30.08 feet to a point on the centre line of Spruce Drive; thence N 44°37' W, along the centre line of Spruce Drive, a distance of 754.72 feet to a point of curve; thence N 52°43' W on the long chord of a 19° curve to the left, a distance of 85.36 feet to the point of intersection with the centre line of Laurel Drive; thence N 26°23' E, on the long chord of a 20° curve to the left a distance of 255.6 feet to the point of tangent; thence N 0°02' E, along the centre line of Laurel Drive, a distance of 504 feet to the point of beginning. All in NE¼, Sec. 33, T. 14 N., R. 66 W., 6th P.M., and containing 30.7 acres, more or less, and situated in said Laramie County, as said addition appears on the official plat thereof which is on file and of record in the office of the Clerk of said County, are now owned and held subject to all the restrictions, conditions, covenants, charges and agreements contained in the within Declaration of Protective Covenants by HKD Homesite Company, a corporation, and said company does hereby covenant and agree that any subsequent grants of any of said lots and blocks shall be made subject to the following covenants and restrictions:

A. All lots in said Mountview Park, Fifth Filing, shall be known and described as residential lots. Except as hereinafter provided, no structures shall be erected, altered, placed or permitted to remain on any lot other than one detached single-family dwelling not to exceed two and one-half stories in height and a private garage for not more than two cars.

B. No building shall be erected, placed, or altered on any lot, lots or building plot in said Mountview Park, Fifth Filing, until the building plans, specifications, and plot plans showing the location of such building have been approved in writing by a majority of a committee composed of Harry B. Henderson, Hoyt Leech and R. S. Grier, or their authorized representative, for conformity and harmony of external design with existing structures in the subdivision, and as to location of the building with respect to property and building set-back lines. In the case of the death of any members of said committee, the surviving member or members shall have authority to approve or disapprove such

EXHIBIT A

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design or location. If the aforesaid committee or their authorized representative fails to approve or disapprove such design and location within 30 days after plans have been submitted to it, or if no suit to enjoin the erection of such building, or the making of such alterations has been commenced prior to the completion thereof, such approval will not be required. Said committee or their authorized representative shall act without compensation. Said committee shall act and serve for 4 years, at which time the then record owners of a majority of the lots which are subject to the covenants herein set forth may designate in writing duly recorded among the land records their authorized representative who thereafter shall have all the powers, subject to the same limitations, as were previously delegated herein to the aforesaid committee.

C. No building shall be located on any lot or building plot nearer than 25 feet to the front lot line, nor nearer than 7½ feet from any side lot line, nor nearer than 25 feet to any side street line, nor within 5 feet of the alley.

D. No structure shall be erected or placed on any building plot which plot has an area of less than 6,000 square feet and only one structure shall be erected or placed on such building plot, except for garage. Each building plot shall have street and alley access.

E. No noxious or offensive trade or activity shall be carried on upon any lot or block nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood. No liquor shall be sold on any lot or block. No ashpits or incinerators shall be permitted near sidewalks or in front of the structures.

F. No trailer, basement, shack, garage, barn or other outbuildings erected in the subdivision shall at any time be used as a residence temporarily, or permanently as such, nor shall any structure of a temporary character be used as a residence. No unsightly structures or those which may constitute a nuisance shall be erected or maintained.

G. No one story dwelling shall have less than the requisite square feet of floor space or surface, exclusive of garage and basement, on any lot or building plot in the subdivision, which requisite floor space or surface in the various lots and blocks in the subdivision are as follows:

All Blocks 1-10-11 and 34 - - - - 1400 sq. ft.
All Blocks 35-36 - - - - - - - - - 1200 sq. ft.
All Block 12. A church may be erected thereon, but if not, said block shall be divided by a 16 ft. center alley from the north to the south line of said block and 4 lots shall be plotted on each side of said alley, and the requisite floor space of any dwelling thereon limited to a minimum of - - - - 1400 sq. ft.

H. The covenants above set forth are hereby declared by the HKD Homesite Company, a Wyoming corporation, to be covenants running with the lands herein described. Said covenants shall be binding upon all the parties hereto, their heirs, successors, personal representatives, grantees and assigns, and all persons claiming under them until January 1, 1977, at which time said covenants and each of them, shall be automatically extended for successive periods of ten years unless by a vote of the majority of the owners of the lots and blocks at that time, at a meeting convened for that purpose, it is agreed by such majority to change, alter, modify, abolish or otherwise vary the covenants herein expressed, either in whole or in part.

J. If the parties hereto, or any of them, or their heirs or assigns, shall violate or attempt to violate, directly or indirectly, any of the covenants herein set forth, it shall be lawful for any other person or persons owning any real property situated in said development or subdivision to prosecute any proceedings at law or in equity against the persons violating or attempting to violate, di-

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rectly or indirectly, any of the herein described covenants, and either to prevent him or them from so doing or to recover damages or other dues for such violation.

K. Invalidation of any one of these covenants by judgment or court order shall in no wise affect any of the other provisions which shall remain in full force and effect.

Witnessed: Mary Lou Phillips

Signed: HKD HOMESITE COMPANY
By: Harry B. Henderson, President
Attest: E. Keith Thomson, Assistant Secretary

(Corporate Seal)

Acknowledged June 10, 1952 by Harry B. Henderson, President, in behalf of said corporation by authority of its board of directors, before Mary Lou Phillips, Notary Public in Laramie County, Wyoming. (Notarial Seal) Commission expires December 15, 1954.

* * * * * * * * * * * * * * * * * * * *

Number 72 Continued

520-229/33

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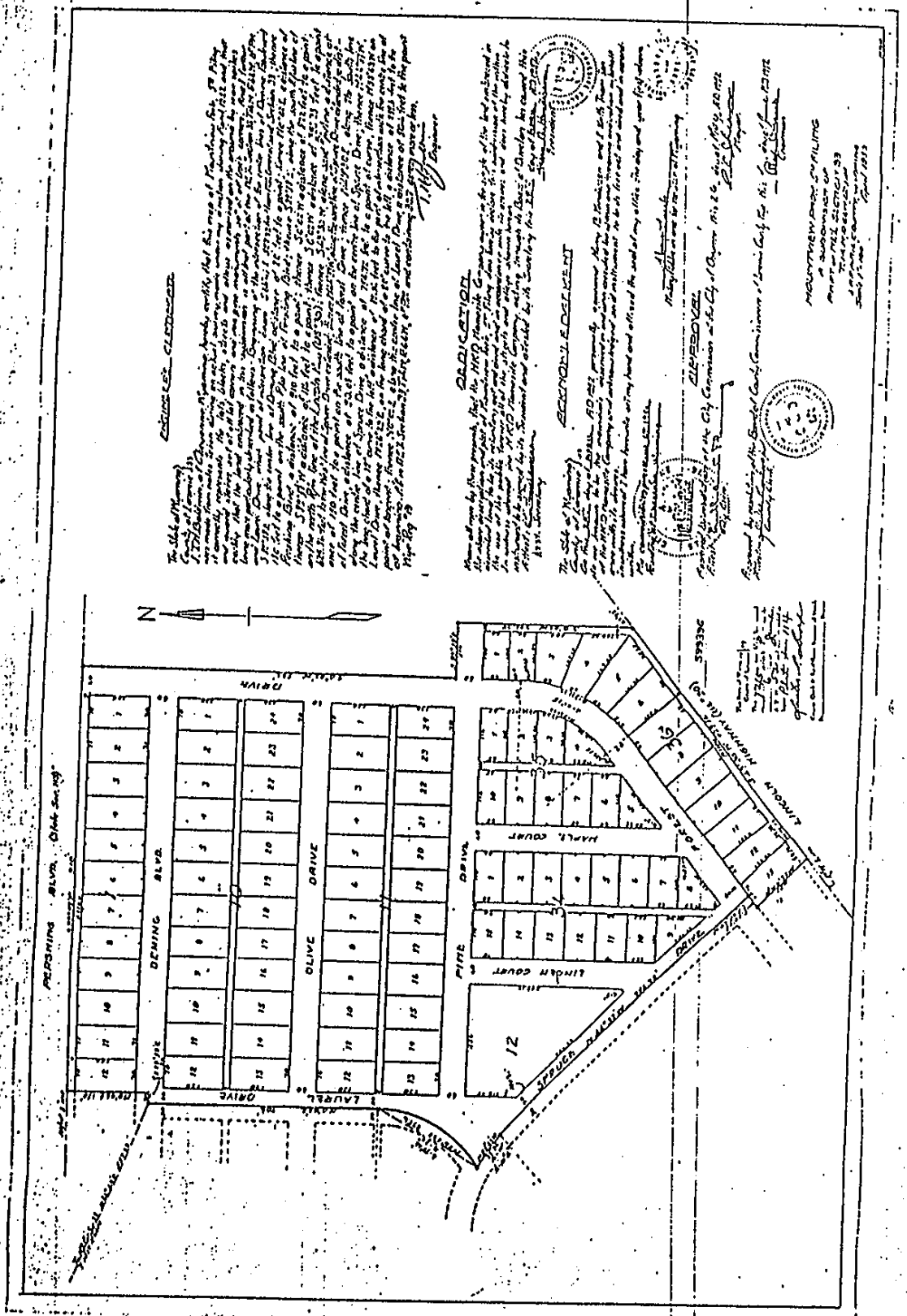
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LINDEN COURT
HAZEL COURT
FOREST DRIVE
SPRUCE
LINCOLN HIGHWAY
DEDICATION
APPROVAL
N

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ANSWER OF DEFENDANT/INTERVENOR
MOUNTVIEW PARK HOMEOWNERS ASSOCIATION

Defendant/Intervenor, Mountview Park Homeowners Association, by and through its attorney, Stephen H. Kline, answers Plaintiff's Complaint as follows:

1. The Defendant/Intervenor admits the allegations contained in paragraph 1 of Plaintiff's Complaint.

EXHIBIT
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B

2. The Defendant/Intervenor admits the allegations contained in paragraph 2 of Plaintiff's Complaint.

3. The Defendant/Intervenor admits the allegations contained in paragraph 3 of Plaintiff's Complaint.

4. The Defendant/Intervenor admits the allegations contained in paragraph 4 of Plaintiff's Complaint.

5. The Defendant/Intervenor has insufficient knowledge to form an opinion as to the merits of paragraph 5, and therefore denies the allegations.

6. The Defendant/Intervenor denies the allegations contained in paragraph 6 of the Plaintiff's Complaint.

7. The Defendant/Intervenor has insufficient knowledge to form an opinion as to the merits of paragraph 7, and therefore denies the allegations.

8. The Defendant/Intervenor denies the allegations contained in paragraph 8.

9. The Defendant/Intervenor denies the allegations contained in paragraph 9.

10. The Defendant/Intervenor denies the allegations contained in paragraph 10.

11. The Defendant/Intervenor denies the allegations contained in paragraph 11.

12. The Defendant/Intervenor denies the allegations contained in paragraph 12.

13. The Defendant/Intervenor denies the allegations contained in paragraph 13

14. The Defendant/Intervenor denies the allegations contained in paragraph 14.

15. The Defendant/Intervenor admits the allegations contained in paragraph 15.

16. The Defendant/Intervenor denies the allegations contained in paragraph 16.

17. The Defendant/Intervenor denies the allegations contained in paragraph 18.

18. The Defendant/Intervenor denies the allegations contained in paragraph 18.

19. The Defendant/Intervenor denies the allegations contained in paragraph 19.

20. The Defendant/Intervenor denies the allegations contained in paragraph 20.

21. The Defendant/Intervenor denies the allegations contained in paragraph 21.

22. The Defendant/Intervenor denies the allegations contained in paragraph 22.

23. The Defendant/Intervenor admits the allegations contained in paragraph 23.

24. The Defendant/Intervenor denies the allegations contained in paragraph 24.

25. The Defendant/Intervenor denies the allegations contained in paragraph 25.

26. The Defendant/Intervenor admits the allegations contained in paragraph 26.

27. The Defendant/Intervenor denies the allegations contained in paragraph 27(a) through (d).

28. The Defendant/Intervenor denies the allegations contained in paragraph 28.

29. The Defendant/Intervenor denies the allegations contained in paragraph 29.

30. The Defendant/Intervenor denies the allegations contained in paragraph 30.

AFFIRMATIVE DEFENSES

1. The Plaintiff has failed to state a claim upon which relief may be granted.

2. The Court does not have jurisdiction to hear Plaintiff's claim under §2000cc(a) of the Religious Land Use and Institutionalized Persons Act because none of the factors extending jurisdiction to the federal courts exists in this case.

3. The Plaintiff's claim should be denied because the Religious Land Use and Institutionalized Persons Act is unconstitutional.

COUNTERCLAIM

1. Defendant/Intervenor incorporates the answers and affirmative defenses set forth above as if re-stated herein.

2. The Plaintiff's land use is subject to and governed by the covenants of the Mountview Park, 5th Filing, an Addition to the City of Cheyenne. Those covenants restrict the uses in the neighborhood to residential and church related activities.

3. The Plaintiff's intended use of the property for a commercial daycare venture violates the terms and spirit of the covenants applicable to the property.

4. The Defendant/Intervenor, Mountview Park Homeowners Association, seeks a declaratory ruling from the Court that the relief sought by the Plaintiff is prohibited under the terms of the covenants.

WHEREFORE, the Defendant/Intervenor prays that the Plaintiff's Complaint be dismissed with prejudice, that judgment be entered in its favor, and that the Defendants be awarded costs and attorney's fees in having to defend this action.

DATED this 21st day of February, 2003.

KLINE LAW OFFICE, P.C.

By _____
Stephen H. Kline
Attorney for Defendant/Intervenor

CERTIFICATE OF MAILING

I certify that a true and accurate copy of the foregoing instrument was served upon all parties to this action via U.S. mail, postage prepaid, on this 21st day of February, 2003.

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