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**IN THE SUPREME COURT OF THE
STATE OF MONTANA**

Supreme Court Case No. DA 23-_____

**RODNEY BRANDT and HEIDI
BRANDT, MARSHALL FLADAGER
and NEVA FLADAGER, LARRY
LAUTARET and RENA LAUTARET,**

Plaintiffs and Appellees,

vs.

**R&R MOUNTAIN ESCAPES, LLC, a
Montana Limited Liability Company,**

Defendant and Appellant.

DIST. COURT CAUSE NO. DV-22-1201

District Judge: Hon. Danielle Coffman

NOTICE OF APPEAL

(Of Defendant and Appellant R&R Mountain Escapes)

NOTICE IS HEREBY GIVEN that the Defendant and Appellant above-named, R&R Mountain Escapes, LLC, through its undersigned counsel, and pursuant to Rule 4, M.R.App.P., appeals to the Supreme Court of the State of Montana from the final judgment in Cause No. DV-22-1201, in the District Court for the Eleventh Judicial District for Flathead County.

Specifically, the ruling appealed by the Defendant/Appellant is the District Court's November 13, 2023 *Order Granting Motion for Summary Judgment in Favor of Plaintiffs and Denying Defendants' Cross-Motion for Summary Judgment* (Docket 45), and the District Court's November 20, 2023 *Judgment* entered on that order (Docket 46). Copies of the District Court's *Order* and *Judgment*, the rulings from which this appeal is taken, are attached to this *Notice of Appeal* and filed and served herewith.

FURTHER, THE APPELLANT CERTIFIES:

1. **Appellate Mediation.** This appeal is not subject to the mandatory mediation process provided in Rule 7, M.R.App.P.

2. **Rule 54(b) Certified Judgment.** This appeal is from a final judgment and does *not* involve an order certified as final by the District Court under Rule 54(b), M.R.Civ.P.

3. **Transcripts.** The transcript of the oral arguments on the parties' cross motions for summary judgment, heard by the District Court on November 7, 2023, has been ordered from the court reporter on November 30, 2023. It is the only transcript in the matter.

4. **Filing Fee.** Submitted with this *Notice of Appeal* is the requisite filing fee as prescribed by § 3-2-403, MCA.

DATED this 13th day of December, 2023.

Respectfully Submitted,

HASH, O'BRIEN, BIBY & MURRAY PLLP

Electronically signed by

/s/ Donald R. Murray

By: Donald R. Murray
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Attorneys for Appellant/Defendant, R&R Mountain Escapes

CERTIFICATE OF FILING and SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing *Notice of Appeal* with the Clerk of the Montana Supreme Court, and that I have served true and accurate copies of the foregoing *Notice of Appeal* upon the Clerk of the District Court, each attorney of record, each court reporter from whom a transcript has been or may be ordered, and each party not represented by an attorney in the above-referenced District Court action (there are no such unrepresented parties), as follows:

Peg Allison
Clerk of the District Court
11th Judicial District Court
920 South Main, Suite 300
Kalispell, MT 59901-5400

Thomas Sapp
Official Court Reporter
11th Judicial District Court
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Attorneys for Plaintiffs/Appellees

DATED this 13th day of December, 2023.

HASH, O'BRIEN, BIBY & MURRAY PLLP

Electronically signed by

/s/ Donald R. Murray

By: Donald R. Murray

Attorneys for Appellant/Defendant, R&R Mountain Escapes

Judge Danni Coffman
District Court Judge
Department No. 5
Flathead County Justice Center
920 South Main, Suite 310
Kalispell, MT 59901
406-758-5906

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

RODNEY BRANDT and HEIDI BRANDT,	]]	
MARSHALL FLADAGER and NEVA	]]	Cause No. DV-22-1201E
FLADAGER, and LARRY LAUTARET and	]]	
RENA LAUTARET,	]]	Judge Danni Coffman
	]]	
Plaintiffs/Counter-Defendants,	]]	ORDER GRANTING MOTION FOR
-vs-	]]	SUMMARY JUDGMENT IN FAVOR
	]]	OF PLAINTIFFS AND DENYING
R&R MOUNTAIN ESCAPES, LLC,	]]	DEFENDANT'S CROSS-MOTION
	]]	FOR SUMMARY JUDGMENT
Defendant/Counterclaimant.	]]	

Plaintiffs Rodney and Heidi Brandt, Marshall and Neva Fladager, and Larry and Rena Lautaret (collectively Plaintiffs) have filed a Rule 56 Motion for Summary Judgment, and Defendant R&R Mountain Escapes, LLC ("R&R") has filed a Cross-Motion for Summary Judgment. Oral argument was held on November 7, 2023. The material facts in this case are undisputed. Accordingly, determination under Rule 56 is appropriate. For the reasons set forth below, Plaintiffs' motion is **GRANTED** and Defendant R&R Mountain Escapes' cross-motion is **DENIED**.

MATERIAL UNDISPUTED FACTS

1. In 1990, Edna Mae Astrope owned Tracts 2 and 3 of Certificate of Survey (COS) 10024, Flathead County, Montana.
2. On or about November 20, 1990, Astrope recorded against her property a Declaration of Covenants, Conditions, and Restrictions ("Declaration") in the Flathead County Clerk and Recorder's Office as Instrument No. 9032410170.
3. The protections in the Declaration were designed "to encourage the development of said property for country residential living." (Declaration, § A) The Declaration restricted the Astrope property to "only [] country residential purposes," buildings were restricted to "single-family residences," and it expressly prohibited "any business, trade, [] or other

commercial purpose whatsoever.” *Id.*, §§A(1), A(1)(a) and A(2)(a). In addition, the Declaration provides that no structure on a property may be “applied to, used, or occupied, as an apartment or multi-family structure.” *Id.*, §A(2)(a). Finally, the Declaration states that no more than one single-family dwelling unit may be permitted on each five-acre parcel. *Id.*, §§A(4) and A(4)(a)

4. The parties are all owners of properties subject to the Declaration.
5. The Brandts own 15 acres of real property commonly known as 190 E. Blanchard Lake Road, Whitefish.
6. The Fladagers own five acres of real property commonly known as 160 E. Blanchard Lake Road, Whitefish.
7. The Lautarets own five acres of real property commonly known as 178 E. Blanchard Lake Road, Whitefish.
8. R&R owns five acres of real property commonly known as 186 E. Blanchard Lake Road, Whitefish, Montana 59937 and more particularly described as follows:

Tract 1 of Certificate of Survey No. 12222, a tract of land in Government
Lots 1 and 2 of Section 18, Township 30 North, Range 21 West, P.M.M.,
Flathead County, Montana.
9. The principals of R&R, Russell Palmer and Ramona Stewart, acquired their property in November 2020 via a warranty deed subject to “all reservations and exceptions of record.” In February 2022, Palmer and Stewart conveyed their property to R&R Mountain Escapes, LLC via quitclaim deed.
10. R&R’s principals admitted that up to the time of their application for a short-term rental permit, they were unaware that their property was even subject to the Declaration. (Plfs’ Exh. 17)
11. There is no history of short-term rental use on the properties subject to the Declaration. On two previous occasions, prior owners of R&R home attempted to rent on a short-term basis but the Plaintiffs objected to and prevented any such use. (Aff. Brandt, ¶ 4; Aff. Lautaret, ¶ 7)
12. In June 2022, R&R applied for a conditional use permit from Flathead County to use its property as a short-term rental.
13. Upon learning of R&R’s Application for a short-term rental permit, Plaintiff Brandt immediately objected both in person and by submitting written comments to the Planning Department. Ultimately, Flathead County approved R&R’s application and granted a permit.

- 1 14. R&R's short-term rental is actively marketed and managed by I Love Whitefish Vacation
2 Rentals, a vacation rental company in Whitefish. On April 14, 2022, R&R entered into a
3 Management Rental Agreement with I Love Whitefish. (Management Agreement,
4 Exhibit 11). The home is advertised through national companies like Airbnb and VRBO,
5 as well as through I Love Whitefish Vacation Rental's local website. (Exhibits 12, 13,
6 14) These advertisements advertise for up to 10 guests per night. In seven months of
7 2022, the account statement from I Love Whitefish Vacation Rentals shows R&R earned
8 over \$55,000 in gross rental income. (Owner Statement, Exhibit 15; 1099, Exhibit 16).
9 As of February 2023, R&R had bookings for 88 nights and a projected gross income of
10 \$45,599. (Projected Bookings for 2023, Exhibit 17)
- 11 15. Upon approval of a short-term rental permit by Flathead County, Plaintiffs filed suit to
12 declare that short-term rentals violate the provisions of the Declaration and to enjoin any
13 such use as a short-term rental.

14 LEGAL STANDARD

15 Summary judgment is appropriate only when the pleadings, depositions, answers to
16 interrogatories, and admissions on file together with any affidavits, demonstrate that no genuine
17 issue exists as to any material fact and that the moving party is entitled to judgment as a matter
18 of law. M.R.Civ.P. 56(c)(3). A material fact is one that involves the elements of the cause of
19 action or defense at issue to such an extent that it requires resolution of the issue by a trier of
20 fact. *Williams v. Plum Creek Timber Co.*, 2011 MT 271, ¶ 14, 362 Mont. 368, 264 P.3d 1090.
21 The movant carries the initial burden of demonstrating the absence of a genuine issue of material
22 fact. *Spain-Morrow Ranch v. West*, 264 Mont. 441, 444, 872 P.2d 330, 332 (1994). The burden
23 then shifts to the non-moving party to prove by more than mere denial or speculation, and by
24 competent evidence, that a genuine issue of material fact exists. *Roy v. Blackfoot Tel. Coop.,*
25 *Inc.*, 2004 MT 316, ¶ 11, 324 Mont. 30, 101 P.3d 301.

26 Upon motion, "evidence must be viewed in the light most favorable to the non-moving
27 party, and all reasonable inferences will be drawn therefrom in favor of the party opposing the
28 summary judgment." *Lopez v. Great Falls Pre-Release Servs.*, 1999 MT 199, ¶ 16, 295 Mont.
416, 986 P.2d 1081.

29 When there are cross-motions for summary judgment, a district court must evaluate each
30 party's motion on its own merits. *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*,
31 2017 MT 246, ¶ 7. On cross-motions for summary judgment, where the district court is not
32 called to resolve factual disputes and only draw conclusions of law, the district court's
33 conclusions of law are reviewed de novo for correctness. *Bud-Kal v. City of Kalispell*, 2009 MT
34 93, ¶ 15. "The fact that both parties have moved for summary judgment does not establish, in
35 and of itself, the absence of genuine issues of material fact." *Sands v. Town of W. Yellowstone*,
36 2007 MT 110, ¶ 17, 337 Mont. 209, 158 P.3d 432.

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In *Craig Tracts*, the Montana Supreme Court held that the common understanding of the word “residential” in covenants often goes beyond the mere existence of an activity at a fleeting instant in time to imply a pattern of regularity or duration. *Craig Tracts*, ¶ 12. Since other areas of Montana law also suggest a duration when discussing residence and the covenants at issue in *Craig Tracts* did not explicitly say how long, if at all, a given person or their belongings must remain within a particular property in order for the property to serve a residential purpose, the Court held the language of the restrictive covenant was ambiguous and it looked to evidence beyond the face of the document. *Id.*, ¶ 15.

In *Craig Tracts*, the Court first noted that the amended covenants at issue removed the prohibition against commercial use that was in the original covenants and held that its removal “suggest[ed] that the parties intended to take a less restrictive approach.” *Craig Tracts*, ¶ 12. Since the Declaration in this case contains a prohibition against commercial use, it suggests that the declarant (Astrope) and Plaintiffs, along with other language, intended for her restriction on “residential use” to be more restrictive.

PROTECTIVE COVENANTS: The following Protective Covenants are designed to . . . preserve, insofar as practical, the natural beauty of said property and to encourage the development of said property for country residential *living*.

1. Land Use: All of the parcels of land within the property are designed and intended as and for small farm or ranch tracts, and shall be used *only* for country residential purposes.

a) No place, parcel, tract, or any part of the property shall be used at any time for any business, trade, manufacture, or any *other commercial purpose whatsoever*, including such as junk or wrecking lots, mobile home parks, etc.

Declaration (emphasis added).

Defendant argued that the provision allowing an owner to advertise for rent, combined with the fact that there is no limitation on the time one has to rent, results in an interpretation that any and all rentals are allowed. That provision expressly prohibits any signage “except for the purpose of advertising for sale or rent the property upon which it is erected.” (Declaration, ¶ 6) When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone.” § 28-3-303, MCA. The “terms of a contract . . . extend[] only to those things concerning which it appears the parties intended to contract.” *Id.* § 28-3-305. This Court may neither insert nor omit terms to the contract. *Sayegusa v. Rogers*, 256 Mont. 269, 271, 846 P.2d 1005, 1006 (1993). Based on these rules of interpretation, Astrope’s intention based on the language in paragraph 6 on signs was only to prohibit signs except signs for sale or rent. § 28-3-303, MCA. The parties do not dispute that “renting” is not the same as short term rentals, which is codified in both local ordinances and the Montana landlord-tenant act.

Craig Tracts next considered the prior history of allowing short-term rental use as it “not only sheds light on the interpretation of the Amended Covenants but raises issues of Brown Drake’s reasonable expectation of the use of its property.” *Craig Tracts*, ¶ 17. Unlike the HOA in *Craig Tracts* which allowed the former president of the HOA to rent his home on a short-term

1 basis for approximately eight years, the homeowners in this case have never allowed any home
2 to be rented on a short-term basis and twice objected and thwarted efforts by predecessors to
3 R&R's property from doing so. It is also significant that the Plaintiffs are all the remaining
4 homeowners subject to the Declaration. As for R&R's expectation, the record is undisputed that
5 its principals were not even aware of the Declaration.

6 R&R's use of its property are further considerations. Unlike the owner in *Craig Tracts*
7 that stayed on their property throughout the majority of the year, R&R's principles only stay on
8 their property for approximately eight weeks a year. *Craig Tracts*, ¶ 18; Aff. Ramona Stewart, ¶
9 3. Further, unlike the HOA in *Craig Tracts* that did not claim the owner's use was a source of
10 disturbance or intrusive, nuisance-like activity, all of the Plaintiffs as well as long-time
11 homeowners in the neighborhood not subject to the Declaration testified that R&R's use is a
12 nuisance and distracts from their use and enjoyment of their own property. The adverse impacts
13 include noise, speeding cars, inability to enjoy walks on the single-lane road, disregarding
14 property rights, etc.

15 For the reasons stated above, this Court finds that R&R's short-term rental violates the
16 Astrope Declaration. The Declaration prohibits any short-term rental, which is defined
17 consistent with Flathead County Zoning Regulations as any use for periods of time less than 30
18 days. Flathead County Zoning Regulation § 5.11.010 (2022). Plaintiffs are entitled to summary
19 judgment on their claim for declaratory relief.

20 Plaintiffs are accordingly entitled to summary judgment on their claim to enjoin R&R
21 from using its property for short-term rentals or allowing any rentals for a period of less than 30
22 days.

23 Plaintiffs' claim for attorneys' fees is denied. The Court finds that the language
24 permitting an award of fees in the Declaration is permissive, not mandatory. Because the Court
25 found that the language in the Declaration was ambiguous, it would not be in the interests of
26 fairness to penalize the Defendant with an award of fees.

27
28 *ELECTRONICALLY SIGNED AND DATED BELOW.*

Judge Danni Coffman
District Court Judge
Department No. 5
Flathead County Justice Center
920 South Main, Suite 310
Kalispell, MT 59901
406-758-5906

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

RODNEY BRANDT and HEIDI BRANDT,	]]	
MARSHALL FLADAGER and NEVA	]]	Cause No. DV-22-1201E
FLADAGER, and LARRY LAUTARET and	]]	
RENA LAUTARET,	]]	Judge Danni Coffman
	]]	
Plaintiffs/Counter-Defendants,	]]	JUDGMENT
-vs-	]]	
	]]	
R&R MOUNTAIN ESCAPES, LLC,	]]	
	]]	
Defendant/Counterclaimant.	]]	

Based on this Court's Order Granting Motion for Summary Judgment in Favor of
Plaintiffs and Denying Defendant's Cross-Motion for Summary Judgment dated November
13, 2023 (Doc. 45), and for good cause appearing;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Judgment shall be
entered in favor of Plaintiffs and against Defendant consistent with that opinion.

ELECTRONICALLY SIGNED AND DATED BELOW.

CERTIFICATE OF SERVICE

I, Donald R. Murray, hereby certify that I have served true and accurate copies of the foregoing Notice - Notice of Appeal to the following on 12-13-2023:

Therese Fox Hash (Attorney)
136 First Ave., West
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Representing: R&R Mountain Escapes, LLC
Service Method: eService

Sean S. Frampton (Attorney)
530 West 19th Street #301
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Representing: Rodney Brandt, Heidi Brandt, Marshall Fladager, Neva Fladager, Larry Lautaret, Rena Lautaret
Service Method: eService

Electronically signed by Lacie LeeAnn Hill on behalf of Donald R. Murray
Dated: 12-13-2023