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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 22-0577

DA 22-0577

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 119

THE FRIENDS OF LAKE FIVE, INC., and WARD E. "MICK" TALEFF,

Petitioners and Appellees,

v.

FLATHEAD COUNTY COMMISSION; FLATHEAD COUNTY, MONTANA;

Respondent and Appellee,

and

SUSAN DIETZ, Individually and Trustee of G&M TRUST,

Respondent and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DV-20-306A
Honorable Amy Eddy, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

J. Stuart Segrest, Christensen & Prezeau, PLLP, Helena, Montana

For Appellee The Friends of Lake Five, Inc.:

Clifton W. Hayden, Law Office of Clifton W. Hayden, Whitefish, Montana

For Appellee Flathead County:

Susan B. Swimley, Attorney and Counselor at Law, Bozeman, Montana

Tara DePuy, Attorney at Law, PLLC, Livingston, Montana

For Intervenor and Appellee:

Ward E."Mick" Taleff, Taleff & Murphy, P.C., Great Falls, Montana

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Submitted on Briefs: August 16, 2023

Decided: June 4, 2024

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Susan Dietz, Individually and as Trustee of G&M Trust (hereafter collectively referred to as "G&M"), appeals the March 27, 2022 Findings of Facts, Conclusions of Law, and Order and the July 12, 2022 Final Judgment of the Eleventh Judicial District Court, Flathead County which voided the Major Land Use Permit issued to G&M, permanently enjoined all future construction or expansion of use or conversion of G&M's property to any commercial use without first obtaining legal access and complying with all State and local statutes and regulations, ordered restoration of G&M's property to its previously unaltered condition, and awarded attorney fees and costs to Friends of Lake Five, Inc. (FLF). We reframe and address the following issues:

> *Issue One: Whether the District Court erred by voiding the County Commission's zoning approval.*
>
> *Issue Two: Whether the District Court erred by concluding there was insufficient evidence to show "grandfathered" rental status of prior-existing structures on Tract 2.*
>
> *Issue Three: Whether the District Court improperly required complete restoration of the G&M Property.*
>
> *Issue Four: Whether the District Court erred by imposing a permanent injunction prohibiting any change to the G&M Property and holding G&M responsible for half of the awarded attorney fees.*

¶2 We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 This appeal concerns a Major Land Use Application ("Application") by which G&M requested a Major Change in land use and zoning review by Flathead County ("County"). The Application was initially accepted by the County who issued a Major Land Use Permit ("Use Permit"), later voided by the District Court. The property at issue is two adjacent 11.5-acre tracts on the shore of Lake Five (collectively, "G&M Property"). On June 25, 2018, G&M purchased the G&M Property from the Estate of James Sherwood. At the time of purchase, there were several existing structures on Tract 2 including a main house and three cabins. At the time of the 2018 sale, Tract 1 contained no structures or improvements. Prior to the sale, Sherwood had certified that he did not intend to build structures requiring water or sewage disposal on Tract 1 and therefore no subdivision review was required.

¶4 The sole access to the G&M Property is the Grizzly Spur Road, a private road traveling from Blankenship Road to a dead-end along the shoreline of Lake Five.[1] In 1997, four contiguous property owners along Grizzly Spur Road created four easements which granted use of the road sections on their property to the other property owners. At the time the easements were executed, the four properties over which Grizzly Spur Road traverses belonged to: Dian Cox, BNSF, the Ridenour Trust, and Sherwood.

¶5 Except for the easement granted by BNSF, the other 1997 easements restricted access to the property owner's family and their guests, and prohibited use for commercial

[1] A secondary unfinished access road has been abandoned and was neither permitted nor considered in this Application.

purposes. In 2020, G&M and the current owner of the Cox property, Jack Downes, recorded a new Easement. The Ridenour access easement provides that it "shall be used solely for access for residential purposes" and "not be used for any commercial purposes and not to serve smaller tracts created by division of the existing tracts of land, except smaller tracts created solely for use or ownership by the children, grandchildren or other descendants of the Grantees or their spouses and children, and the use by guests of the persons named in this paragraph."

¶6 Upon purchase, G&M began several remodeling, demolition, and construction projects on both Tract 1 and Tract 2. On Tract 1, G&M built a structure resembling a fire tower and placed a "caboose" on a trailer with the intent to rent them nightly to the public. By August 2019, G&M had received notices of multiple violations from both the DEQ and Flathead County. The notices advised that these new structures violated local Canyon Area Land Use Regulatory System ("CALURS") zoning regulations, and the "no facilities" exclusion on Tract 1 for water and sewer facilities, in accordance with Sherwood's certification that he did not intend to build structures requiring water or sewage disposal on Tract 1.

¶7 On October 22, 2019, G&M submitted the Application, proposing new structures including a single-family residence, small cabins, RV station, caboose, and fire tower which would be used as "short-term/vacation" nightly rentals. The Application was initially reviewed by the Middle Canyon Land Use Advisory Committee which recommended it be denied, based in part, on road access concerns and the potential impact

on wildlife and wetland habitat. The County Planning Board next considered the Application. The Board discussed issues with access via the Grizzly Spur Road, including the easement's prohibition on commercial use. Members of the Zoning office explained that while the easement prohibited commercial use, under CALURS the proposed short-term rentals would be considered residential and thus would not violate the easement. The Board recommended approval of the Application.

¶8 The Board's recommendation then went to the Flathead County Commission for review. Members of the Zoning Office explained that it was their understanding the existing buildings on Tract 2 (the main house and three cabins) were rented on a short-term basis prior to the 2019 CALURS amendments and were therefore considered grandfathered. Whether the Application qualified as a residential or commercial development was again discussed. The Zoning Office explained their conclusion that, unless the courts determined otherwise, the existing easements provided "legal and physical access" for the proposed use. The Commission set additional conditions of approval, including increased supervision of the construction and minor improvements to Grizzly Spur Road, and granted G&M's Use Permit.

¶9 On March 27, 2020, FLF filed a "Complaint & Petition for Appellate Review," in which it sought certain declaratory relief and judicial review of the County Commission's final decision. After the District Court granted a preliminary injunction, holding the permit in abeyance, G&M moved to intervene for the limited purpose of challenging the preliminary injunction. On December 28, 2020, the District Court granted G&M's motion

to intervene but granted G&M full intervention so as not to delay the proceedings any further.

¶10 On January 8, 2021, FLF filed "Plaintiff's First Amended Complaint and Petition for Appellate Review, Injunctive and Declaratory Relief," in which it asserted claims against both G&M and the County. On January 19, 2021, the County filed an Answer to FLF's First Amended Complaint and a Cross Claim against G&M. On February 1, 2021, G&M filed an Answer to the County's Cross Claim. On February 5, G&M filed an Answer to FLF's First Amended Complaint.

¶11 Following discovery and pretrial motions, the District Court held a hearing on FLF's First Amended Complaint and Petition for Appellate Review, Injunctive and Declaratory Relief on September 8, 2021. The District Court noted that the hearing was a "mixed" hearing, in which issues involving the County's issuance of the Permit would be limited to the record, while issues involving the relief sought by FLF were both factual and legal. The District Court heard testimony from several witnesses, and numerous exhibits were admitted.

¶12 After the hearing, the District Court entered Findings of Fact, Conclusions of Law and Order. The District Court voided the Use Permit, ordered all construction on G&M's property to cease immediately, ordered the property to be restored to "its previously unaltered condition," permanently enjoined future construction or expansion of use for commercial purposes, and granted FLF its attorney fees, expenses, and costs.

¶13 FLF filed a statement of attorney fees and costs, requesting $61,020 in attorney fees and $1,878.10 in costs. The County and G&M objected and responded. Prior to a hearing on the matter, the County settled with FLF which prompted FLF to modify its requests for fees and costs against G&M to a total of $15,898.10, which FLF represented was the balance still owing after the settlement. On June 15, 2022, the District Court held a hearing regarding FLF's claim for fees and costs against G&M. G&M objected to any award of fees and costs under the Uniform Declaratory Judgments Act ("UDJA"). G&M also objected to any award of fees and costs on the basis that it was unclear which fees FLF incurred pursuing claims against Flathead County as opposed to claims against G&M. On that point, the District Court noted that G&M conceded the claims were intertwined and that the record confirms that the claims against the County and G&M "are so intertwined as to be almost indistinguishable."

¶14 Of the original total amount of fees and costs claimed, the District Court did not consider any which were incurred prior to G&M's motion to intervene, reducing the amount to $45,053.75. Of that amount, the District Court found it "reasonable and equitable considering the scope of the litigation, the nature of the claims, the number of pleadings filed by the respective parties, and their participation at trial, to allocate one-half of the incurred fees to Dietz/G&M Trust, which is $22,526.86." The District Court further held that to avoid a double-recovery and any windfall to FLF, an additional reduction was necessary to account for the settlement with the County. After accounting for that offset, the District Court therefore awarded FLF $14,020 in attorney fees and $1,878.10 in costs.

STANDARDS OF REVIEW

¶15 When reviewing a zoning decision, "the courts give deference to the decisions of the local board". *Powell Cnty* v. *Country Vill., LLC,* 2009 MT 294, ¶ 8, 352 Mont. 291, 217 P.3d 508 (citing *Town & Country Foods, Inc. v. City of Bozeman*, 2009 MT 72, ¶ 14, 349 Mont. 453, 203 P.3d 1283). This Court reviews a district court's conclusions of law to determine whether they are correct. *Town & Country Foods,* ¶ 12. Construction and interpretation of a contract, including whether ambiguity exists, is a question of law. *Mary J. Baker Revocable Trust v. Cenex Harvest States, Coops., Inc*, 2007 MT 159, ¶ 19, 338 Mont. 41, 164 P.3d 851 (citation omitted). The interpretation of an easement is also a question of law. *Mary J. Baker Revocable Trust*, ¶ 18. A district court's interpretation of a restrictive covenant is a conclusion of law which this Court reviews for correctness. *Craig Tracts Homeowners' Ass'n v. Brown Drake, LLC*, 2020 MT 305, ¶ 7, 402 Mont. 223, 477 P.3d 283 (citation omitted). We will "affirm the district court when it reaches the right result, even if it reaches the right result for the wrong reason." *State v. Ellison*, 2012 MT 50, ¶ 8, 364 Mont. 276, 272 P.3d 646 (citation omitted).

¶16 The grant of attorney fees pursuant to § 27-8-313, MCA, is within the "discretionary province" of district courts and we therefore review this decision for an abuse of discretion. *Renville v. Farmers Ins. Exch.*, 2004 MT 366, ¶ 20, 324 Mont. 509, 105 P.3d 280, (citations omitted). We review the granting or denial of a permanent injunction under the deferential "manifest abuse of discretion" standard. *Bitterrooters for Planning v. Bd. of Cnty. Comm'rs*, 2008 MT 249, ¶ 12, 344 Mont. 529, 189 P.3d 624 (citations omitted). A manifest

abuse of discretion is one that is "obvious, evident, or unmistakable." *Bitterrooters for Planning*, ¶ 12 (citation omitted).

DISCUSSION

¶17 *Issue One: Whether the District Court erred by voiding the County Commission's zoning approval.*

¶18 Flathead County and G&M argue we should reverse the District Court's order voiding the Use Permit because the District Court utilized the incorrect standard of review: arbitrary and capricious[2] rather than abuse of discretion. G&M argues that by not applying the correct abuse of discretion standard, the District Court failed to give proper deference to the County, sitting instead as a "super-zoning board". See *Town & Country Foods*, ¶ 14.

¶19 A reviewing court is authorized by § 76-2-227, MCA, to hold a hearing to reverse, affirm, or modify a zoning decision made by a board of county commissioners or board of adjustment. *Powell Cnty.*, ¶ 8. A district court reviews a zoning authority's decision for an abuse of discretion. *Powell Cnty,* ¶ 8; *Town & Country Foods*, ¶ 13. A zoning authority abuses its discretion when the information upon which the authority based its decision is "so lacking in fact and foundation that it is clearly unreasonable." *Powell Cnty*, ¶ 8 (quoting *Town & Country*, ¶ 13). When reviewing a zoning decision, "the courts give deference to the decisions of the local board." *Powell Cnty,* ¶ 8 (citing *Town & Country*, ¶ 14).

[2] The parties agree with the District Court's conclusion that the Montana Subdivision and Platting Act ("MSPA"), which employs the arbitrary and capricious standard of review, does not apply here to the Flathead County Commission's approval of the Application.

¶20 We have consistently held that "[t]he District Court's job is not to re-try the facts, but to review the city commission's decision for an abuse of discretion." *Town & Country Foods*, ¶ 27 (citation omitted). We will still "affirm the district court when it reaches the right result, even if it reaches the right result for the wrong reason." *State v. Ellison*, ¶ 8 (citation omitted).

¶21 As part of its CALURS approval, the County Commission must consider if the development complies with access and road standards. CALURS § 4.1(B). The County Commission concluded that with the imposition of certain conditions, Grizzly Spur Road provided adequate access and was in compliance. The County Commission did not consider the other property owners' restrictive easements on Grizzly Spur Road, believing that consideration of easement restrictions was outside their purview. CALURS § 1.6 states: "Whenever the provisions of this regulatory system are in variance with other lawfully adopted rules, regulations, *deed restrictions or covenants,* the provision setting the greater restriction or higher standard shall apply" (Emphasis added.) The County Commission abused its discretion by failing to consider the easement restrictions which are expressly incorporated into CALURS § 1.6.

¶22 The Ridenour easement allows access solely for "residential purposes" and "not [] for any commercial purposes." G&M argues that CALURS definitions of "residential use" and "short-term rental housing," as amended on April 11, 2019, should be applied to the easement language. Because CALURS defines short-term rentals as residential use, G&M argues, its proposed use was allowed.

¶23 G&M submits that this Court's recent opinion in *Craig Tracts* is instructive. In *Craig Tracts,* we considered whether a covenant that restricted property uses to "residential purposes only" prohibited short-term rental use. *Craig Tracts,* ¶ 2. We held that because there are multiple reasonable interpretations of this plain language, it is ambiguous. *Craig Tracts,* ¶ 15. Looking beyond the face of the document, we found that because the covenant was amended to remove the original prohibition against the use of the property for "commercial or business use or for the use of a motel, hotel, or apartment house" the intent of the parties was to take a less restrictive approach. *Craig Tracts*, ¶ 16.

¶24 G&M's reliance on *Craig Tracts* is misplaced. G&M claims that because CALURS defines short-term rentals as residential use, the District Court should not have considered extraneous evidence to determine the parties' intent. But the CALURS definition, enacted in 2019, provides no insight as to the parties' intent when the restricted easements were entered into in 1997. As the District Court aptly observed:

> There is no evidence in the record to support the apparent argument of G&M/Dietz that in drafting the earlier easements in 1997 the parties were prescient enough to anticipate how the County would define "residential" use in its revisions in 2019 to CALURS. Any such interpretation is unreasonable, especially in view of the drafters' choice of the expression "one family" rather than solely relying on the term "residential."[3]

[3] The "one family" language is found only in the original Cox Easement which stated that use was limited to only "the members of one family per tract." While G&M and the current owner of the Cox property recorded a new easement in 2020, the District Court referenced the "one family" language as but one reference to the clear expression of the neighboring property owners' intent in 1997 to prohibit commercial use. Beyond this language in the Cox easement, this intent is reinforced by the language of the 1997 Ridenour access easement which provides that Grizzly Spur Road "shall be used *solely* for access for residential purposes" and "*not be used for any commercial purposes* and not to serve smaller tracts created by division of the existing tracts of land, except smaller tracts created solely for use or ownership by the children, grandchildren or

G&M provides no evidence or argument that would indicate that the drafters of the 1997 easement agreements understood the term "residential" to include short-term rentals. Moreover, the plain language of the Ridenour easement not only limited the easement use for "residential purposes," it expressly noted that it could not be used "for any commercial purposes."

¶25 General rules of contract interpretation apply to restrictive covenants. *Creveling v. Ingold*, 2006 MT 57, ¶ 8, 331 Mont. 322, 132 P.3d 531 (citation omitted). Like contracts, when restrictive covenants have been reduced to writing, the intention of the parties is to be first ascertained, when possible, from the writing alone. *Creveling*, ¶ 8 (citations omitted). Where language is clear and explicit the court will apply the language as written. *Craig Tracts,* ¶ 9 (citation omitted). The language should be interpreted as to its ordinary and popular meaning. *Craig Tracts*, ¶ 9.

¶26 The County abused its discretion by failing to consider the restrictive easements on Grizzly Spur Road as required by CALURS § 1.6. The District Court correctly interpreted the ambiguity in the easement language to discern the intention of the parties in 1997 as preventing the type of short-term rental use that the Application proposed. While the District Court did not use the correct standard of review, it correctly held that the County abused its discretion in approving the Use Permit. The District Court did not err by voiding the Use Permit.

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other descendants of the Grantees or their spouses and children, and the use by guests of the persons named in this paragraph." (Emphasis added.)

¶27 *Issue Two: Whether the District Court erred by concluding there was insufficient evidence to show "grandfathered" rental status of prior-existing structures on Tract 2.*

¶28 G&M argues if the prior-existing cabins on Tract 2 were rented in 2018, prior to when the regulations were changed in April of 2019, they should be given grandfathered status and permitted to continue as short-term rental housing.

¶29 CALURS § 2.8 allows for "grandfathered" uses which were "*lawfully* existing prior to the adoption of these regulations" to generally "continue in the manner and to the extent that it was used or was being used at the time of adoption of these regulations." (Emphasis added.) In 2019, several changes were made to CALURS which defined short-term rental housing and required Minor Land Use approval for short-term rental housing. These 2019 changes did not alter § 1.6 of CALURS which incorporated application of the more restrictive road easement, as discussed above. So even if G&M had rented existing buildings in 2018, that rental use would not be a "lawful" use because of the easement restrictions as incorporated through § 1.6 of CALURS. Consequently, under CALURS § 2.8, it would not qualify for permitted grandfathered use. The District Court did not err by holding there were no structures on the G&M Property where short-term rentals may be "Grandfathered" through CALURS §2.8.

¶30 *Issue Three: Whether the District Court improperly required complete restoration of the G&M Property.*

¶31 In addition to enjoining any further construction or commercial use of the property, the District Court ordered G&M to "restore the Property to its previous unaltered condition." G&M contends that the District Court did not reference any authority that

would allow for requiring restoration other than a reference to the "Lakeshore Act" and to the Certificate of Survey limitations earlier in its Conclusions of Law. G&M contends:

> The district court's decision voiding the permit, even if warranted, should result only in Dr. Dietz being prohibited from renting the new structures and from building additional new structures for rent as proposed in the application. Neither CALURS nor other law provides for restoration of the property "to its previous unaltered condition."

¶32 None of the Appellees provided any substantive response on this issue. "It is not the job of this Court . . . to guess at [a party's] precise position [] or to develop legal analysis that may lend support to that position." *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 27, 409 Mont. 378, 515 P.3d 301 (citing *Whitefish Credit Union v. Sherman*, 2012 MT 267, ¶ 16, 367 Mont. 103, 289 P.3d 174). Although the District Court was correct in its determination that the G&M Property may not be used for commercial purposes, the authority upon which the District Court relied for ordering restoration of the property to its original condition is not readily apparent, and the Appellees have not offered any analysis or argument in support of this portion of the District Court's Order. Accordingly, we hold that the District Court erred by ordering G&M to restore the property to its previous unaltered condition.

¶33 *Issue Four: Whether the District Court erred by imposing a permanent injunction prohibiting any change to the G&M Property and holding G&M responsible for half of the awarded attorney fees.*

¶34 G&M argues that the permanent injunction imposed by the District Court was overbroad and superfluous. The injunction prevents "construction or expansion of use or conversion of the [G&M] Property to commercial uses, including but not limited to,

overnight vacation resort accommodations, absent G&M Trust or its successors obtaining legal access and compliance with all State and local regulation, including CALURS, Flathead County Lakeshore Regulations, and Flathead County Zoning regulations."

¶35 While G&M retains residential access under the applicable easements, the meaning of "residential" under those easements does not comport with commercial uses, including overnight vacation resort accommodations. Because CALURS §1.6 incorporates "the greater restriction or higher standard" of any deed restrictions or covenants, the injunction preventing overnight vacation resort accommodations comports with the easement restrictions as discussed in our resolution of Issue One. The District Court did not err by issuing the permanent injunction.

¶36 G&M asserts that the District Court erred by awarding attorney fees against it in addition to the County. G&M argues that "the court held that [G&M] was liable for half the attorney fees after [it] intervened as a party, even though it was the district court that required [G&M] to be joined as a full party." G&M argues that the only rationale the District Court provided for an award of fees was public participation violations, which were solely the County's responsibility.

¶37 The District Court awarded attorney fees against G&M under the UDJA. Section 27-8-313, MCA, of the UDJA provides that supplemental relief is available when the district court, in its discretion, deems it "necessary or proper." We have held that an award of fees to prevailing parties is not warranted "in every garden variety declaratory judgment action." *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, ¶ 44, 354 Mont. 50, 221 P.3d

1230. A trial court must make a threshold determination that equitable considerations support an award of attorney fees. *Mungas*, ¶ 45.

¶38 The District Court held that the equities supported allocating one-half of the incurred fees to G&M after consideration of "the scope of the litigation, the nature of the claims, the number of pleadings filed by the respective parties, and [G&M's] participation at trial." The District Court concluded that attorney fees were appropriate under the UDJA as necessary and proper because the "Certificate of Survey 13305 clearly barred construction of buildings requiring water and sewer on Tract 1 prior to the start of construction, and Grizzly Road easements restricted use of both Tracts 1 and 2 to family and guests only, a permanent injunction against use of the Properties for commercial purposes is appropriate, along with an award of attorneys' fees to [FLF]." The necessity of obtaining a permanent injunction against use of the G&M Property for commercial purposes was specific to G&M. The District Court provided an adequate basis for its threshold determination that equitable considerations supported an award of attorney fees on the record before it.

¶39 As for G&M's contention that "it was the district court that required [G&M] to be joined as a full party," this is not an entirely accurate account of the District Court's Order. As Intervenor Ward "Mick" Taleff points out, the minute entry for the December 15, 2020 pretrial conference reflects that G&M's counsel inquired "as to whether the Intervenors are *allowed* a limited or complete intervention, and the Court states a full intervention is allowed and necessitates a scheduling order." (Emphasis added.) After being allowed full

intervention, G&M fully participated in the proceedings, including conducting discovery, filing discovery motions, and a motion for partial summary judgment. As the District Court noted in its Order Re: Attorney's Fees and Costs that was specific to G&M, G&M conceded that the claims were intertwined but that notwithstanding that concession, counsel for G&M "objected, without citation to legal authority, to any award of fees against Dietz/G&M Trust, as it was unclear which fees were incurred by Plaintiffs in pursuing their claims against Flathead County in contrast to the claims against Dietz/G&M Trust." The District Court noted that its review of the court record "confirms the claims against the Defendants in this case are so intertwined as to be almost indistinguishable." The District Court did not abuse its discretion in awarding attorney fees against G&M.

CONCLUSION

¶40 We affirm the District Court's determination that the Major Change in Use Permit is void. We affirm the District Court's award of attorney fees and grant of permanent injunction. We reverse the District Court's requirement that G&M restore the G&M Property to its previous unaltered condition outside of the lakeshore zone and remand for further proceedings consistent with this opinion.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ INGRID GUSTAFSON