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GALLATIN COUNTY CLERK  
OF DISTRICT COURT  
JENNIFER BRANDON

2012 DEC 4 PM 12 02

FILED

**MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY**  
DEPUTY

Daniel K. O'Connell & Valery A. O'Connell )  
& on behalf of themselves as members of )  
Glastonbury Landowners Association. )

Plaintiff(s), )

v. )

Glastonbury Landowners Association, Inc. )  
Board of Directors )

Defendant(s) )

Cause No. DV-12- 789C

**MOTION FOR DECLARATORY  
JUDGMENT & NOTICE TO JOIN TRO**

Plaintiffs, Daniel and Valery O'Connell, & as GLA members, file this motion request for issuance of declaratory relief against Defendants also called GLA Board, pursuant to M.R.Civ.P., Rule 57 & Title 27, chapter 8, Montana Code Annotated, *et seq*, and based upon the TRO/ Affidavits, Exhibits, Petition for Writs and any further evidence that may be adduced in the event a hearing is held hereon. Notice is hereby given that Plaintiffs' TRO & Affidavit are enjoined with this motion as if fully set forth herein. In support of this motion, Plaintiffs aver as follows:

**FACTUAL ARGUMENTS AND BRIEF**

Plaintiffs motion prays for a hearing to prove declaratory relief and TRO relief are just and necessary to retrain, reverse and prevent a multiplicity of covenant, bylaw contract violations by the same Defendants, the GLA/Board of Directors. Authority for declaratory relief is found under rule 57 and M.C.A. Tile 27, Chapter 8, including:

**M.R.C.P., Rule 57. Declaratory Judgments.** These rules govern the procedure for obtaining a declaratory judgment under Title 27, Chapter 8. Rules 38 and 39, subject to the provisions of section 27-8-302, govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.”

§27-8-102, “**Purpose -- liberal construction.** This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.”

This declaratory relief motion is to construe rights cited in GLA contracts pursuant to **27-8-203. When contract may be construed.** A contract may be construed either before or after there has been a breach thereof.”

§27-8-202. **Who may obtain declaratory judgment.** Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

§27-8-201. **Scope of power to render declaratory judgments.** Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

§27-8-313. **Supplemental relief.** Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by a declaratory judgment or decree to show cause why further relief should not be granted forthwith.

1. Per §27-8-202, MCA. and other statutes above, this motion is to obtain Plaintiff members’ declaration of contractual rights, status, or other legal relations cited thereunder the TRO/affidavit; thus necessarily enjoined to this motion. Also pursuant to §27-8-313, MCA., Plaintiffs pray the TRO/affidavit petition used in support of this declaratory motion also be granted as supplemental relief.
2. The Montana Supreme Court has established that to obtain a TRO, the complaint must contain a statement of material facts establishing irreparable injury **OR** a plaintiff’s right to

the relief sought therein. *See Boyer v. Karagacin*, 178 Mont. 26, 32, 582 P.2d 1173, 1177 (1978). Also within §27-19-201, MCA., its subsections are disjunctive in that only one subsection need be satisfied for a TRO to issue, either proving a “*prima facie* case” or “irreparable injury.” *See Porter v. K & S Partnership*, 192 Mont. at 181-82, 627 P.2d at 839-40. (Black’s law defines *prima facie* case “as one that at first glance presents sufficient evidence for the plaintiff to win.”)

3. The same Board Defendants have admitted a long history of such continued and unabated actions which *prima facie* or material facts and evidence show repeated contract violations. Defendants reply brief did not argue against Plaintiffs *prima facie* case. They only claim that the TRO lacks irreparable injury or harm cited within TRO ¶ 8,12-13. However, this claim is disjunctive to this *prima facie* case; as shown by statements of material facts establishing Plaintiffs’ rights to relief; as contained in the TRO/affidavit enjoined to this motion; and contained within GLA/member contracts (attached and provided for the court’s convenience on CD formate called “Exhibit CD”).
4. The Writ case (DV-12-164, Park County), contains more *prima facie* or material facts, and evidence and claims of similar contract violations cited therein. The TRO and Writ case (attached to Defendants motion reply brief) are thereby fully set forth herein for reference and support of this declaratory motion & TRO supplemental relief.
5. Such Defendants repeated contract violations have already resulted in 5 suits filed against the same Defendant Board, including case DV-11-114, case DV-11-193, a countersuit, DV-12-164 (Writs), and now this case filing. The attached “GLA Assessment Policy-Draft” factually shows contract violations and breach of fiduciary duties for 16 years when

Defendants **admitted** that it failed until now to collect these proper assessment penalties and interests as outlined in that new policy (albeit without due process). This case DV-11-193 and countersuit were settled Aug. 2012 via a court ordered settlement agreement giving Plaintiffs all their claims for relief.

(Note: Plaintiffs contend Defendants already violated that case settlement agreement by its historic failure to provide minutes and documents to members and written requests 4 months after the settlement, but since November now demand members pay exorbitant fees for research just to view or copy current Board minutes, also violating state statutes. In fact except for discovery requests, Defendants have NEVER provided its members any requested documents, membership lists, meeting minutes, and more.)

6. Thus it is no surprise that the same Defendants for this fifth case historically and repeatedly have breach its contracts with members, and breach their duties per GLA Art. VIII., deny its members due process rights per GLA Bylaw XI., nor attempt to settle or mediate as Plaintiffs repeatedly request, nor seek any preventative measures before litigation, resulting in this multiplicity of injuries, liability, and enormous legal costs paid by the Association further harming members and Association.
7. There are two issues in dispute for this motion and *prima facie* case. The enjoined TRO/ affidavit statements of material facts supporting this motion both request to restrain and declare that Defendants' historic 1) election practices 2) and new guest house assessments both exceed its contract authority, rewrite and/or misinterpret its contracts, violate its covenant/bylaw contracts, and breach their duty to members and the Association pursuant to GLA Art. VIII.
8. Defendants reply brief and attached Dec. 2012 GLA newsletter defends and admits its election practices since its inception (1997) and recently voted to collect guest house assessments upon new AND existing guest houses for the first time ever, thereby claiming

other associations have similar voting practices and charges for guest houses. This is not a legal defense since Plaintiffs contend many other associations do not do this, and more importantly, the GLA TRO reply brief does not deny GLA covenants and bylaws are absent such specific language or authority.

9. In fact this GLA newsletter admits that 3 votes are cast per ballot or membership interest; which disregards GLA Bylaws & Covenant 3.20 (cited in the TRO) that says, “a separate and distinct Membership Interest ... is entitled to one (1) vote.” The newsletter also admits 475 votes were cast for the 2011 GLA elections, and since approx. only 40% (or 159 out of 391) membership interest voted, the 475 votes cast is 82 more votes than the 391 total membership interests.
10. Thus it is necessary to restrain, nullify, thereby prevent a multiplicity of more such unauthorized GLA election practices and also restrain new assessment charges upon member’s guest houses for the first time ever Jan. 1, 2013. Defendants admit in their newsletter they disregarded Covenant addendum–Masterplan 6.0 “A guest house is a separate structure owned by the Landowner intended for occasional guest use and not as a permanent residence, not to exceed 1,200 square feet” thus proving a guest house is not a dwelling unit “designed for occupancy by a single family.”
11. Therefore this 2012 GLA newsletter is key *prima facie* or material fact and evidence proving unauthorized election practices and guest house assessments “for occasional occupancy by guests” should not be assessed as a dwelling unit “designed for occupancy by a single family.” These undisputed Defendant actions will no doubt continue unless restrained and found to be contractual violations.

12. Since the TRO is in support of this declaratory motion and supplemental relief, this motion necessarily addresses Defendants' motion to dismiss the TRO. The Mt. Sup. Court held, where this declaratory and TRO "complaint states facts sufficient to constitute a cause of action upon any theory, a motion to dismiss must be overruled, but when a complaint alleges facts and, assuming the facts are true, there is still no claim for relief under any theory, a motion to dismiss must be granted. *Pelton v. Markegard* (1978), 179 Mont. 102,586 P.2d 306. The facts show this motion & TRO are preserved under this theory ruling, at the very least.
13. New council for Defendants' in its reply brief, seek to mislead this court away from the true facts of this case by having the court believe Defendants filed a motion to dismiss the entire TRO complaint. This is factually not true, because Defendants motion asked only that the election fraud claim be dismissed, but not the guest house assessment claim. For this reason, Also, dismissal of Plaintiffs' guest house claim within Defendants reply brief is mute because it was not pleaded in its motion to dismiss and should be stricken. In fact as Plaintiffs response brief said, "Defendants [motion to dismiss] refused to give answer or otherwise defend against the TRO claims themselves" either.
14. Defendants reply brief at page 2 also falsely claims that Plaintiffs failed to request status quo be maintained. To the contrary, ¶4, ¶10 & this quote at ¶11 of the TRO prays "to "maintain the status quo" [and for] thereby restraining the Defendants violations of member rights under GLA Bylaws, Covenants, Articles, and statutes."
15. And Defendants reply brief at page 2, lines 18-20 falsely claim the "status quo" "uncontested condition" was AFTER the annual elections and that Plaintiffs inserted

controversy then for not disputing other past elections before 2011. It is true that Plaintiffs do not dispute any other past elections before 2011, but the Supreme Court has held that just because rights were not defended for past violations does not bar such defense and relief for recent repeated violations or future contract violations. In other words a new claim is established every time the GLA conducts fraudulent elections. Thus the TRO status quo is maintained by restraining all contested fraudulent election practices since 2011, AND new unauthorized guest house assessments; which also prevents such “multiplicity of judicial proceedings” (per §27-19-102, MCA.).

### CONCLUSION

Thus for this declaratory relief motion, Plaintiffs, as members, pray the court declare whether or not Defendants were negligent in their duties per GLA Art. VIII. for contract violations (regarding elections & guest house assessments, and/or for not charging such assessments and proper penalties/interests) as the GLA newsletter and assessment policy both factually show. Plaintiffs pray the court also determine if this Defendants’ negligence of duty caused damage to the association and members by loss of assessments approx.. \$100,000 and loss of penalties/interests up to \$75,000 over a 16 year period. After all, Defendants claim its covenants allow this new assessment and penalties/interests, yet have never collected such fees before now.

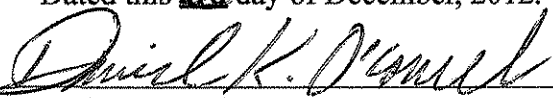
Defendants did NOT file a motion to dismiss the entire TRO complaint, just the election issue which portion and TRO is preserved by a “theory of a claim” or *prima facie* material facts found within the TRO & Affidavit, GLA contracts, GLA Assessment Policy-Draft, and GLA Nov. 2012 newsletter admitting such Defendants’ actions since the GLA’s inception.

Enjoined TRO & Affidavit supporting this declaratory relief shows a *prima facie* case or statements of material facts necessary to restrain and declare that Defendants' historic 1) election practices 2) and new guest house assessments both exceed its contract authority, rewrite and/or misinterpret its contracts, violate its covenant/bylaw contracts, and (per GLA Art. VIII.) breached their duty to members and the Association.

Plaintiffs pray for a hearing to prove such declaratory relief and enjoined TRO are just and necessary to retrain, reverse and prevent such multiplicity of covenant, bylaw contract violations by the same Defendants, the GLA Inc. Board of Directors, and to obtain all such declaration of rights, status, or other legal relations cited thereunder GLA contracts, and TRO/affidavit.

And this TRO/declaratory relief prayed for will necessarily prevent a multiplicity of such judicial proceedings, liability and costs, given the fact that ALL five cases thus far have been filed against the same GLA Board Defendants for their alleged unabated and repeated contract violations and breach of duties.

Dated this <sup>4<sup>th</sup></sup> ~~2<sup>nd</sup>~~ day of December, 2012.

By:   
Daniel O'Connell

By:   
Valery O'Connell

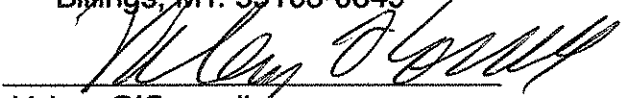
#### Certificate of Service

I, Daniel and Val O'Connell, swear that a true and correct copy of the forgoing document was sent to the following parties via first class mail on the same day to:

Eighteenth Judicial District Clerk of Court  
615 S. 16th Ave., Room 312  
Bozeman, Mt. 59715

Brown Law Firm, P.C.  
315 North 24th St.  
P.O. Drawer 849  
Billings, MT. 59103-0849

By:   
Daniel O'Connell

By:   
Valery O'Connell



# Glastonbury Landowners Association

Newsletter  November 2012

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## Annual Meeting & Elections Update

Despite snowy conditions, our November 10, 2012 Annual Meeting and Elections was well attended. Minnick Management assisted in handling the many duties required to hold the meeting and run the elections, along with board members and numerous volunteers. We offer our sincere appreciation and thanks for all of their hard work and community spirit!

We welcome the following directors and ombudsmen who were elected to serve two-year terms on the Glastonbury Board of Directors, and one-year terms for Ombudsmen:

<u>North Glastonbury</u>	<u>South Glastonbury</u>
Gerald Dubiel	Alyssa Allen
Janet Naclerio	Laura Boise
Sheridan Stenberg	Rich Spallone

Specific voting results for directors are as follows:

Donna Andersen: 52	Alyssa Allen: 65
Gerald Dubiel: 64	Laura Boise: 45
Janet Naclerio: 62	Tim Brockett: 31
Daniel O'Connell: 9	Rich Spallone: 55
Valery O'Connell: 8	
Sheridan Stenberg: 68	
Bob Wallace: 1	
Ron Wartman: 1	

Ombudsmen elected are:

Miriam Barker: 58 (1 write-in received 1 vote for SG)  
Hettie Wortelboer: 75 (no write-in votes for NG)

These volunteer positions are a way that landowners can participate in bettering our community, and we thank all who ran for election for being willing to serve.

Kenneth Haug, Paul Ranttalo and William Smith from North Glastonbury; and Richard Bolen, Sean Halling and Scott McBride from South Glastonbury are completing the remainder of their two-year terms.

Officer and committee chair positions as well as the 2013 Board Meeting Schedule will be announced in our next newsletter.

**Note:** Each membership interest is allowed to cast one ballot whereby 3 unique candidates may be selected for each of the 3 director positions, and 1 candidate for the ombudsman position. Voting has been done this way since the GLA's inception, and is consistent with voting practices among many other corporations.

## Assessment Payment Policy

As mentioned in our July 2012 Newsletter, starting in January 2013, assessments are to be paid in the following manner in order to be in strict compliance with the Covenants:

- 1) Paid in full by the end of January, or
- 2) Paid in equal quarterly payments by January 31, April 31, July 31, and October 31.

As stated in the Covenants, there is a 30-day grace period for payments, after which a 5 percent penalty and 1.5 percent monthly interest will begin to accrue.

To ensure that the timing of how assessments are to be paid is clear and the consequences when they are not paid, we have enclosed an assessment payment policy for your review.

## Guesthouse Assessment

The Covenants state that an assessment is charged for each division of land and for each dwelling unit (11.03), and the association has been charging assessments accordingly to the best of its ability.

Since guesthouses fulfill the description of a dwelling unit (3.12), and the Covenants do not base assessments on usage (nor is the association able to monitor such a thing), the board has determined that guesthouses are to be assessed as dwelling units. Landowners with guesthouses will see this reflected on their January 2013 statements.

## Phone Announcements for Meeting Schedule and Road Condition Information

Exciting news! We are now set up with our VoiceNation PBX Assistant service to provide timely road condition reports during snowstorms, as well as meeting date announcements for those who wish to call in.

If you are interested, simply dial the GLA's voicemail phone number: 406-451-0033, and press the appropriate extension to hear the announcement.

Road information will be provided with a separate extension for each of the three areas: North Glastonbury – Ext. 107; Lower South Glastonbury – Ext. 108; Upper South Glastonbury – Ext. 109. Meeting date information will be provided on Ext. 105.

Road conditions will be periodically reported during snowstorms by our snow removal employees and contractors as progress is made. Please do not call these people directly as this would become burdensome and distracting to them as they attempt to do their work. For future reference, you may cut off the bottom of this page and keep the phone and extension numbers handy.

**Note:** If you wish to receive monthly board meeting agendas and scheduling information via e-mail, please contact us with your name and e-mail address (which will be kept confidential).

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GLASTONBURY VOICEMAIL ANNOUNCEMENTS: 406-451-0033

Meeting Schedule Announcements: Ext. 105

North Glastonbury Road Information: Ext. 107  
Lower South Glastonbury Road Information: Ext. 108  
Upper South Glastonbury Road Information: Ext. 109

**GLA Assessment Policy - Draft**  
**November 10, 2012**

**1. Assessment Notice**

Each Landowner shall be informed in writing of the annual assessments owed for their property on or around January 15 of each year. [Covenant 11.03]

**2. Payment of Assessments**

The GLA current annual assessment must be paid either:

- a. Annually on or before midnight Jan. 31 (or 15 days from the statement date if it was not mailed by Jan. 15); or
- b. Quarterly in four equal increments on or before Jan. 31, April 30, July 31 and October 31 of the current year. [11.03]

Any annual assessment not paid in this manner is considered delinquent. [11.06]

Landowners must be current in the payment of all assessments in order to be considered in good standing and eligible to vote. [3.19]

**3. Penalties and Interest for Delinquent Accounts**

If a delinquent assessment remains unpaid for 30 days after the initial due date, a 5% penalty is applied and interest accrues from Jan. 31, (or from the subsequent quarterly date) at the rate of 1.5% per month, compounded monthly. [11.06].

The 5% penalty and 1.5% monthly interest will be assessed within one week of an account becoming over 30 days delinquent.

**4. Clarification of 5% Penalty**

The 5% penalty is charged once on the amount that has newly become delinquent. This one-time 5% penalty is then added to the outstanding balance and then the total balance receives the 1.5% monthly interest fee. The 5% penalty and 1.5% interest will be applied at the time that an account becomes 30 days late, after any of the quarterly points throughout the year.

**5. Delinquent Accounts**

Annually in February, a delinquent accounts report will be generated based on delinquency time frame:

- a. **CURRENT YEAR DELINQUENT – Penalty/Interest charged:** Those who have not paid the *current* year's assessment or first quarterly payment by the due date of January 31, will be charged the annual 5% penalty and the 1.5% monthly interest. Landowners who are delinquent will see these charges on their April 15<sup>th</sup> statement, and on subsequent statements if the delinquency continues. Other than the quarterly statements, no other notification regarding these charges will be sent. These same charges will be applied to the account when any of the quarterly payment due dates are missed during the year. The bookkeeper will send this report to the Treasurer/Board for their information.
- b. **ONE YEAR DELINQUENT – Notice of Lien & Collections Year:** To those who have not paid the *previous* year's assessments by January 31, a 30-day Lien Warning letter will be sent.
  - 1) Landowners may negotiate a payment plan with the Treasurer or petition the Board within the 30 days before a lien is filed.
  - 2) Landowners who don't pay all past assessments and fees or negotiate a payment plan within 20 days will receive a final 10-day Lien Warning letter.
  - 3) If there is no response to the 10-day Lien Warning letter, a lien will be placed on the property within one week of the 10-day period passing.
  - 4) For accounts that do not respond and thereby have a lien placed on the property, a 30-day Collection Warning letter will be sent within 30 days of a lien being filed.
  - 5) The collection process will commence one week after the 30-day period has passed with no response to the Collection Warning letter by turning the account over to a collection process.

Note: Properties sold or foreclosed with assessments owing may be turned over for collection at the Board's discretion and depending on the circumstances.

**BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE**



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DISCIPLINARY COUNSEL

**RELEASE OF INFORMATION**  
**RE: HERMAN RICHARD BOLEN, BPR #7073**  
**CONTACT: SANDY GARRETT**  
**BOARD OF PROFESSIONAL RESPONSIBILITY**  
**615-361-7500**

November 20, 2000

**KNOXVILLE ATTORNEY PUBLICLY CENSURED**

On November 11, 2000, the Board of Professional Responsibility of the Supreme Court of Tennessee publicly censured Knoxville attorney Herman Richard Bolen. Mr. Bolen was given notice of the public censure and did not request a hearing.

The Board of Professional Responsibility found that in April, 1997, Mr. Bolen began conducting title business under the corporate name of Royal American Trust, Inc., with authorization to issue title insurance on behalf of First American Title Insurance Company. In May, 1998, First American Title Insurance Company (First American) audited Royal American Trust, Inc.'s escrow account and determined Royal American did not have a reconciliation program for their escrow account. First American Title Insurance Company auditors advised Mr. Bolen that First American required a monthly reconciliation and Mr. Bolen's office promised future compliance with this requirement. In May, 1998, two individuals not associated with Mr. Bolen or Royal American Trust, Inc., forged two checks from Royal American's escrow account in the amount of \$45,489.00 and \$37,489.00. These two individuals have now been indicted for these forgeries. These checks were passed and paid in June, 1998, however, Mr. Bolen did not learn of these forgeries until approximately October 9, 1999, since Royal American was not reconciling its escrow account. Royal American was unable to survive this financial loss and ceased doing business on approximately January, 1999. First American Title Insurance Company's losses caused by these forgeries total approximately \$35,000. Mr. Bolen has not made any restitution to First American Title Insurance Company.

In a second complaint, the Board of Professional Responsibility found that Mr. Bolen received \$15,075.00 of escrow funds for repairs for a loan to a certain individual. Mr. Bolen forwarded \$5,025.00 to the borrower to begin repairs leaving \$10,050.00 in escrow in Royal American Trust, Inc. When the borrower's repairs were completed, a letter was sent to Mr. Bolen's office to release the remaining escrow funds. Mr. Bolen then subsequently advised that this \$10,050.00 was no longer held in escrow and had been stolen from Royal American Trust, Inc.'s escrow account. Mr. Bolen nor Royal American Trust, Inc. made restitution.

The Board of Professional Responsibility found Mr. Bolen's actions violated the Code of Professional Responsibility rules regarding trust accounting and, therefore, publicly censured Mr. Bolen.