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MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

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–12–220 **SUMMARY JUDGMENT MOTION REPLIES, & MOTION FOR HEARING & DISCOVERY**

Plaintiffs & GLA members-Daniel and Valery O'Connell, do hereby submit this reply regarding both Summary Judgment motions. On Jan. 18, 2013, Plaintiffs filed a motion for summary judgment. On Feb. 11, 2013, GLA Defendants answered that motion and filed a cross-motion for summary judgment, which is without merit. The facts, evidence and attached affidavit in this case support all Plaintiffs claims for relief and summary judgment against Defendants. Alternately if the Court for any part can not grant summary judgment in Plaintiffs favor, then this motion hereby requests a hearing and discovery in support of that hearing.

FACTUAL ARGUMENTS AND BRIEF

Defendants answer & affidavits, mostly error, conjecture & opinion, are refuted herein & in O'Connells **attached** affidavit. Val O'Connell having worked with an attorney for five years for paralegal and research work, knows the sacrifices of time, friends, and money that litigation

takes. That is why the O'Connells pleadings and recorded meetings show they repeatedly try to resolve all issues before a last resort of legal action; which litigation is necessary to protect members private property rights and their personal investments bought with personal sacrifices.

Members claims are serious but have good reason to ask for the Boards removal (the ones that did not resign) after the 114 case cited numerous evidence of GLA Defendants' misappropriation of funds and more. The GLA has never admitted wrongdoing, but instead continue to dump all blame onto Plaintiffs by telling members and this court they're "confused about the law" have "meritless" issues "designed to harass" or again claim were merely brought for "vindictive" or "retaliatory" purpose for Mr. O'Connells removal.* Instead, Justice is long overdue for Defendants many governing contract violations against its members.

*To the contrary, the first complaint-DV-11-114 against the GLA was filed a full three months BEFORE O'Connells' illegal removal without quorum for being a whistleblower; prompting 2 Board Directors to solicit a petition and letters against the O'Connells paid for with GLA funds. Such suit was a last resort after 18 months and after all settlement negotiations failed.

Such repeated attacks on O'Connells character and motives or now claiming "O'Connell have no support from other members" is pathetic and serves only to distract the court away from the true facts in this case. Member support is factually evident in the last 2 election results as over a dozen members voted for O'Connells. Approx. 1/3 of GLA members (65 members in North) bothered to cast votes; which is no more or less votes than before the lawsuits. Of course the total votes cast is triple the number of voters since the GLA solicited members to cast 3 votes per member interest as contrary to the exact language of the covenants and Bylaws in question.

Since half the Board financially benefits from GLA position or money directly or indirectly,** some Defendants have a lot at stake to defend their gravy train. It is no secret that the Board ask their friends to fill seats on the Board when no one else will run, or told not to quit the Board just to keep out those they don't want on the Board.

**Five GLA Defendant Board Directors get income directly or indirectly from the GLA & project reviews. Board Director Alyssa Allen is the active GLA project review manager, and was property manager for several GLA properties until she was hired and paid to manage the GLA with Minnick's paid help costing almost $30,000 for both. GLA Board Director Rich Spallone, a building contractor, is paid by the GLA to maintain and snowplow GLA roads in High South where he lives. At least since 2009, all High South roads or Spallone receive 40–75% of the entire GLA road budget as contrary to Covenant 11.04 requiring aggregate spending on all roads (case claim DV-11-114). Spallone usually contracts out to

members,such as the Erickicsons to extend their road. Another Board Director and surveyor Gerald Dubiel, also gets numerous jobs after being privy to future GLA project reviews. Director William Smith a building engineer has gotten much work from such project reviews or jobs from the contractor –Atkins Construction which company grades GLA Roads. Director Sean Halling reportedly works with Rich Spallone. And Board Director-Scott McBride is married to the president of Church Universal & Triumphant; which church owns 6 properties in the GLA and dozens of adjoining properties to the GLA. Defendants gave exactly the same false conjecture or opinions in the DV-11-193 and the DV-11-114 cases too, yet O'Connells (out of Court) won all claims for relief in the 193 case/countersuit, & the Supreme Court reversed and remanded the dismissal motion in the 114 case now pending.

For this summary judgment motion, all parties may agree that some type of summary judgment is appropriate and agreed to enjoin the Writ case DV-12-164. But the parties yet disagree on the relief sought for summary judgment (as summarized below). This is because the GLA in error claim to follow the contracts as written, or merely "interpreted" those governing documents under authority of Bylaw XII.A. (see GLA's motion answer at page 7). This bylaw may allow for some interpretation, but ONLY for the Bylaws, not for covenants.

But this defense misses the issues altogether. **Members complaint challenged GLA Defendants <u>not</u> for following or interpreting the Bylaws as written, but because they deliberately added language not written therein and extended by implication or enlarged by construction its meaning within most governing documents.**

As cited below and bears repeating, MT. Supreme Court does not favor interpretation of contracts unless the contract language, taken as a whole, clearly has two or more distinct meanings, or so vague and ambiguous as to need interpretation. For all GLA contracts in question, there are NO claims that they're ambiguous or vague or contrary meanings; for which the ordinary, popular, and clear, explicit, or plain language as written should govern.

"The Supreme Court demands lower Courts interpret restrictive covenants [and Bylaws] by looking first to the language of the covenant to ascertain its meaning. If the language is clear and explicit, the language will govern. The language of restrictive covenants should be understood in its ordinary and popular sense." Toavs, 934 P.2d at 166-67.

The Montana Supreme Court "stated in Higdem v. Whitham (1975), 167 Mont. 201, 208-09, 536 P.2d 1185, 1189, that restrictive covenants should not be extended by implication or

enlarged by construction and, in Jarrett v. Valley Park, Inc. (1996), 277 Mont. 333, 341, 922 P.2d 485, 489, that the district court could not "broaden" a covenant by adding that which was not contained therein."

The MT. Supreme Court further noted, "restrictive covenants are construed under the same rules as are other contracts. Newman v. Wittmer (1996), 277 Mont. 1, 6, 917 P.2d 926, 929. In that respect, it is well settled that "[w]here the language of an agreement is clear and unambiguous and, as a result, susceptible to only one interpretation, the duty of the court is to apply the language as written." Carelli v. Hall (1996), 279 Mont. 202, 209, 926 P.2d 756, 761 (citing Audit Services, Inc. v. Systad (1992), 252 Mont. 62, 65, 826 P.2d 549, 551). If the terms of the contract are clear, "there is nothing for the courts to interpret or construe" and the court must determine the intent of the parties from the wording of the contract alone. Wray v. State Compensation Ins. Fund (1994), 266 Mont. 219, 223, 879 P.2d 725, 727; Martin v. Community Gas & Oil Co. (1983), 205 Mont. 394, 398, 668 P.2d 243, 245. See also Toavs v. Sayre (1997), 281 Mont. 243, 245-46, 934 P.2d 165, 166-67. Accord Fox Farm Estates Landowners v. Kreisch (1997), 285 Mont. 264, 268-69, 947 P.2d 79, 82.

Defendants claim that Plaintiffs failed to apply the plain meaning of the contracts is bogus and vexatious. As obvious below, it is the GLA who repeatedly failed to apply the language as written therein its governing contracts. Even worse and at the heart of all GLA contract issues, the GLA has added language not written, extended by implication or enlarged by construction the meaning to its governing documents, as contrary to contract law cited above.

I. For the Guest house claim:

Defendants gave only curtsey defense to Plaintiffs other arguments factually supporting this guest house claim, after Defendants spend a lot of time and pages harping on one small argument having to do with M.R.Civ.P., Rule 12. All the while Defendants **added language not written therein and extended by implication or enlarged by construction the contracts.** For example, Defendants (at page 5 & 17 & 18) cite part of Covenant 11.03, which says,

"...The amount of the annual assessment may be increased or decreased from year to year, at the option of the Association..." However, Defendants left off a pertinent part (d) that says, "... the annual assessment may be increased by the Association due to inflation or increased costs or services up to a maximum of 10% per year" or based on the "CPU whichever is greater."

Taken as a whole, GLA assessment maximum increase is 10%, but taken apart to justify guest house assessments as the Defendants did, left out this limitation part, thus **extended by implication or enlarged by construction its meaning.**

Defendants do not deny the fact that there is no specific language in the GLA bylaws/ covenants that allows guest house assessments. Instead, Defendants ignore some and rewrite other covenants to falsely claim, "a guest house is a dwelling unit." For this claim, they also basically ignored Masterplan 1.1 and failed to consider 6.6 (below), and instead **extended by implication or enlarged by construction the meaning therein Covenant 3.12.;**

Covenant 3.12 defines "dwelling unit" as "a structure or portion of a structure, normally consisting of living area, bathroom and cooking facilities, designed for occupancy by a single family" The term includes a boarding house, ..." (NOTE: This covenant definition 3.12 by itself would seem to apply to dozens of GLA bomb shelters, and even guest houses, but for the fact that covenants, taken as a whole refute this.

Masterplan 6.0 says a guest house is "intended for occasional guest use and not as a permanent residence, not to exceed 1,200 square feet;",

Masterplan 1.1 "Maximum residential development for a subdivided parcel is limited to one (1) single- family residence and one (1) Guest House or in-residence guest apartment per subdivided Tract or Lot. A guest house or guest apartment is only allowed on lots or tracts that are equal to or greater than the minimum lot size specified in the Residential Topographical Areas and Density Schedule (Section 3.5) and having a suitable dwelling site per the Project Review Committee. Maximum residential development for an Original undivided Parcel is limited to one (1) single-family residence and one (1) additional single residence, both owned by the Landowner who owns the parcel...."

Adopted in 2007 as part of the covenants, this Masterplan part 1.1 above and part 6.6 are key and can not be ignored as Defendants attempted to do. Masterplan 1.1 gives a separate and distinct treatment of a guest house from a singe family residence (dwelling unit). "Undivided parcels" are allowed two "single family residences." But a 'divided parcel" is allowed only one "single family residence" and one "guest house" "per lot." Also notice this language or name

"single family residence" can not be construed as a "guest house," otherwise they would not have given them 2 different names above and completely separate definitions.

In fact, the name or language "single family residence" found in Masterplan 1.1 is only found within the covenant 3.12 definition of a dwelling unit. Defendants thus ignored the plain language of these covenant/masterplan clauses taken together because "dwelling unit" and "guest house" are defined differently and treated differently when you compare Covenant 3.12 with Masterplan 1.1 and 6.0. A small guest house "intended for occasional guest use and not as a permanent residence, not to exceed 1,200 square feet." The obvious wording "occasional guest use" is clear, plainly different from a large single family "dwelling unit" full time occupancy.

The authors of the Masterplan-including Laura Boise and Daniel Kehoe and other past Board clearly did NOT treat a family residence/dwelling unit the same as a guest house, which same interpretation for the past 17 years is why the GLA has never collected assessments for guest houses, until now. Summary judgment is warranted against new guest house assessments, since ordinary, popular, and plain language as written shows a guest house is not a dwelling unit.

II. GLA election claim:

Defendants state their election procedures are "consistent with its governing documents," thus defiantly claim its members the "Plaintiffs can not challenge" "GLA's long standing election" practices (see GLA answer at page 18). Of course the Board can be challenged by its members, and that especially includes integral elections of its Board. But Defendants follow this with another absurd claim that the O'Connells have "acquiesced" under the equitable tolling

clause, and can NEVER ever challenge any GLA elections even in the future simply because they "consented" to past election practices by casting ballots or Daniel was on the Board.

There are many flaws here including the arguments for the doctrine of consent, equitable estoppel and equitable tolling; which all are based on a previous act. Defendants do not deny that every year new GLA elections are held. Thus every year the GLA election practice in question violates the same governing documents by soliciting and giving "each membership interest up to 3 votes to fill three three separate vacancies." **Such language is nowhere in the GLA contracts.**

So this election claim does not include past elections before Nov. 2011, thus the doctrine of consent, equitable estoppel and equitable tolling do not apply to new acts, or in this case new elections committed by the Board in violation of its contracts. It would make a mockery of justice and of the rule of law to allow GLA's **repeated** violations just because past violations were committed with alleged consent under the same election practices. Wether or not members challenged past elections is a mute issue, since every year Defendants have violated anew its Covenant 3.20 and Bylaw VI.A. as follows:

Plaintiffs affidavit shows they did NOT knowingly consent to the illegal election practice, and only recently discovered this with the help of a contract lawyer that the GLA election practice is in violation of its governing documents, specifically Covenant 3.20 & Bylaw VI.A..

The GLA Association as a non-profit corp. subject to the Montana Nonprofit Corporation Act (MNCA) Section 35-2-113, et seq., MCA, especially 35-2-536 that says in part:

35-2-536. Voting entitlement generally. (1) Unless the articles or bylaws provide otherwise, each member is entitled to one vote on each matter voted on by the members..."

Member voting entitlement per statute **35-2-536** above allows members only one vote "unless the articles or bylaws provide otherwise." All parties agree Board elections are based on "membership interest" defined under Covenant 3.20. that states in part:

Covenant 3.20. "a separate and distinct Membership interest ...is entitled to one (1) vote" for each "parcel" "undivided tenancy-in-common" or "condominium unit."

Bylaw V(F), "Each Membership Interest is entitled to one vote;..."

GLA Bylaw VI.A. "The Initial Directors shall be those Members of the Association appointed by the Incorporator identified in the Articles of Incorporation. Thereafter, the Board shall have an even number of positions available to be filled at election. Initially, this number shall be twelve (12). [Thereafter] The actual number of Directors shall be those who have been nominated and elected to office from time to time as provided herein; however, the number of Directors shall not be reduced to fewer than four (4), nor increased to more than twelve (12)..."

Defendants council (on page 7) claim their GLA client merely "interpreted" under authority of its Bylaw XII.A.,[1] to allow "3 votes for each membership to fill three three separate vacancies" or "one vote per vacancy;" In fact, Defendants do not deny that Covenant 3.20 and Bylaw VI.A. (above) lacks specific authority to give "3 votes for **each** membership to fill three three separate vacancies." Such language is nowhere within the GLA governing documents; which shows that the GLA **deliberately added language not written therein and extended by implication or enlarged by construction the meaning** of covenant 3.20 and Bylaw VI.A..

Plaintiffs words

Then Defendants pleadings on page 8 erroneously misconstrues ~~this issue~~ by saying "each membership interest is given one vote ... regardless of the number of vacancies.' The

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[1] Again Bylaw XII.A. does not apply to the covenants and misses the fact that **members complaint challenged GLA Defendants not for interpreting the Bylaws as written, but because they deliberately added language not written therein and extended by implication or enlarged by construction its meaning within most governing documents.** Nor does the higher court allow for interpretation of contracts unless the contract language clearly has two distinct meanings, or so vague and ambiguous as to need interpretation.

number of so called "**vacancies**" on the Board has nothing to do with this issue. The Board can not dole out votes as it has to members based on so called "**vacancies,**" because Bylaw VI.A. (above) allows less than 12 Board seats and as few as 4 seats to be filled: which would seem to allow up to 8 so called "vacancies" on the Board. This Bylaw at least shows all 12 seats do NOT have to be filled and thus the 8 unfilled seats are allowed and are not so called "vacancies."

In fact, the word "vacancy" is not found anywhere in the covenants and only found within Bylaw VI.L.(6) applicable only when a Director is removed from office or quits, and Bylaw X.E. for Ombudsman, is not applicable here. Thus nowhere does it say members get "3 votes for **each** membership to fill three three separate vacancies." This language simply does not exist and the word "vacancy" was added by Defendants to justify their position.

Thus Defendants admittedly solicit "up to 3 votes for each membership" "for three separate vacancies," which simply rewrites or ignores Covenant 3.20 restricting clause, "one vote per membership" for this matter. Defendants rewrote or ignore this covenant as well as rewrote or ignore BylawVI.A., because there is NO authority for the Board to fill all 12 Board seats even by calling them "vacancies." The number of open Board seats to be filled is ONLY determined by the number of candidates "nominated and elected" to the board (per Bylaw VI.A.) and can be "no fewer than 4" seats up to 12 in any given election; which factually shows that up to eight Board seats can remain unfilled.

Summary judgment is thus warranted against Defendants and new elections should be held for the entire Board using "one vote per membership interest" per election, and the ordinary, popular, and plain language does NOT allow more votes based on so called "vacancies."

III. Minnick contract claim (DV-12-164):

Plaintiffs contend most GLA duties given over to "agent" Minnick Management were not prescribed "as necessary" per Bylaw VI.B., evident by GLA performing most of these duties for the past 17 years. Plaintiffs also contend that Defendants deliberately violated its governing documents by allowing Minnick their "agent" to take over its GLA "**authority and power**." GLA claims the Minnick contract does follow governing documents as written, or merely "interpreted" those documents under authority of Bylaw XII.A.*

(*see GLA's motion answer at page 7. Again, MT. Supreme Court does not favor interpretation of contracts unless the contract language, taken as a whole, clearly has two or more distinct meanings, and this Bylaw does not apply to covenants.)

Defendants admit they amended the Minnick contract AFTER Plaintiffs filed the 164 complaint, and for which some of the contentious language in the original first paragraph was removed regarding Minnick control of member property and conspicuously absent. This is a small victory for members. However, most of the rest of the illegal contract remains the same.

The Minnick contract was entered into between the GLA Defendants and their so called "agent" Minnick without member input or due process. This word "agent" is only mentioned a few times within the GLA Bylaws, but the problem is that nowhere does it give "**authority and power**" to an "agent." This point is the crux of this issue.

The Minnick contract states, "GLA hereby grants Minnick Management Inc. the authority and power to perform any and all lawful actions necessary for the accomplishment of services outlines below." (GLA answer Exhibit H, page 1 at ¶ 17-18)

GLA Bylaw VI.B, part (6): "Appoint and remove, employ and discharge, and, except as otherwise provided in these Bylaws, supervise and prescribe the duties and fix compensation, if any, as necessary, of all officers, agents, employees, or committee members of the Association;"

Notice this Minnick contract clause above gave "agent" Minnick its GLA "**authority and Power**." Notice also GLA BylawVI.B.(6) above gives no "**authority or power**" to "agents," and prescribes them only limited duties "as necessary." Plaintiffs contend the Minnick contract is illegal, because the GLA had no right or authority to abrogate its **"authority and power"** over to an agent-Minnick, and no right to abrogate most duties to agent-Minnick.

Defendants responded Minnick contract authority is found under this Bylaw VI.B.(14), "Do any and all things necessary to carry into effect these Bylaws and to implement the purposes and exercise the powers as stated in the Articles of Incorporation, Covenants, Bylaws, Rules and any Land Use Master Plan adopted pursuant to the Covenants;" (answer page 11)

This so called "catchall " clause applies to the governing documents taken as a whole, thus GLA's power found elsewhere limits agents agent duties and excludes agents power as given to committees. But the GLA (at page 12) argues it can not give its powers to committees (which is allowed), because then the "GLA board would have to personally handle every task related to the GLA" "and could not hire a secretary, accountant, and plow operator" "making all provisions for contracts, employees and agents void." This assumption is false, because Bylaw VI/B. part 6 yet allows limited duties "as necessary" for agents and employees; thus does not omit agent duties altogether.

Yet a volunteer non-profit Board of 12 Directors should do most of its duties that it was elected and given power to do. The GLA Boards' whole reason for being is to voluntarily "Conduct, manage and control the affairs and business of the Association" per Bylaw VI.B(1). Such duties were thus not "necessary" per Bylaw VI.B., evident by GLA July 2012 newsletter that admits, "over the years, the Board has been handling the many administrative tasks necessary for operation of the association...." The conundrum for the Board is that they no longer

want to do volunteer Board duties, and do not want to give up their gravy train by quitting, so they recently hired Minnick to do all their former "volunteer" duties.

It is absurd to say they need Minnick because the GLA can not find quality contractors. The same contractors have been servicing the roads for years, CPA's to do books are everywhere even online, and the manager-Ms. Allen make up the entire contractor list. This is merely a small non-profit landowners association after all, not a big corporation. Minnick has only 3 employees and manages more than 20 HOA's according to their website, yet Minnick is also now doing the work that 12 GLA Board Directors now simply refuse to do for free. Then to claim GLA growth created too much work for a volunteer 12 member Board is disproven by the attached CD showing that in the last 9-10 years, GLA membership/parcels have only increased by 23 memberships: from 370 memberships to 393.

Furthermore, Minnick contract and GLA violated more Bylaws to hand its officer duties over to agent-Minnick. Examples of officer duties performed by Minnick include: issuing notices of all meetings, keeping Minutes, keep charge of GLA corporate minutes book and/or records, make reports, custody of all the assessment monies collect assessments and enforce assessments thru liens, and deposit the same in the name of the Association in such bank, keeps regular books of account and balance the same each month, renders an account of transactions and of the financial condition of the Association, Register the addresses and phone numbers of the Members, tally ballots, etc...

Bylaw VI.B(6) says, "except as otherwise provided in these Bylaws....[GLA shall] supervise and prescribe the duties ... as necessary, of all officers, agents..." This exception on

officers AND agent duties is found in Bylaw V.D. and Bylaws VII.E-H. that says in part, officers shall "perform such other duties as are incident to his office" similar to §35-2-440, MCA. below;

§35-2-440, MCA. Duties and authority of officers. Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties and authority prescribed in a resolution of the board or by direction of an officer authorized by the board to prescribe the duties and authority of other officers.

GLA duties, officer duties, authority and powers given over to agent-Minnick by the Minnick contract thus in many ways violates GLA governing documents and state statue. But the GLA also for its deliberate and literal breach of duty should be found liable pursuant to GLA Art. VIII. and sanctioned or removed from office.

Erickson contract/agreements (DV-12-164 writ case):

This issue was **NOT** part of Plaintiffs summary judgment motion, because the Bolen letter (attached to Defendants Motion to Strike) claimed the Ericksons revoked all variance agreements or contracts with the GLA. Now Defendants counter-motion for summary judgment apparently included it; which Plaintiffs disagree with their claims and defense.

Defendants again attack O'Connells character or motive to claim this issue was "to vex the GLA and exercise power." How ridiculous this is considering the fact that Plaintiffs are partial owners of the common land property adjacent to the Ericksons, for which such Erickson **four** department store size buildings and variances would negatively impact.

However, Plaintiffs deny this Erickson issue is ripe for summary judgment, since issues of material facts may not be settled if any Erickson variance agreements still exist or resurrected. Thus Plaintiffs request a hearing and discovery before the court considers the issue. If there still is a variance agreement, then GLA President–Bolen has either lied to its members or lied to this court in his affidavit to the court.

CONCLUSION

The ordinary, popular, and plain language as written in GLA contracts & taken as a whole supports Plaintiffs issues. The GLA failed to so apply the language as written therein its own governing contracts. Even worse and at the heart of all GLA contract issues, the GLA obviously added language not written, extended by implication or enlarged by construction the meaning to its governing documents, as contrary to these and contract law. Defendants answer and counter-motion for summary judgment is thus without merit and just another attempt to dismiss the complaints, and to argue anew their entire defense for both 164 and this case. GLA's insurance company represented by Brown Law Firm certainly wants to dismiss its clients' liability for their misappropriations and breach of duty per GLA Art. VIII.. Therefore, Plaintiffs three summary judgment claims above are warranted against Defendants to restrain and deter the GLA acting outside their official capacities beyond the scope of their duties and powers. Alternately if the Court for any part can not grant summary judgment in Plaintiffs favor, then this motion hereby requests a hearing and discovery in support of that hearing.

DATED this 25th day of February, 2013.

Signed _____ Signed: _____
Daniel O'Connell Valery O'Connell

Certificate of Service

A true and correct copy of forgoing document(s) were sent to the following parties via first class mail on this same day to:

Sixth Judicial District Clerk of Court
414 E. Callender St.
Livingston, Mt. 59047

The GLA attorney of record:
Brown Law Firm, P.C.
315 N. 24th St. (PO Drawer 849)
Billings, MT. 59103-0849

By _____ By: _____
Daniel O'Connell Valery O'Connell