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 *PROPOSED* **ORDER GRANTING PLAINTIFFS SUMMARY JUDGMENT & DISCOVERY**

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. On February 25, 2013 Plaintiffs filed a response to Defendants' cross-motion and an filed an alternate motion for a hearing and discovery. Plaintiffs claim their complaint claims for relief are necessary to protect their investments and members private property rights afforded them within GLA governing bylaws and covenant contracts.

The complaint challenges GLA Defendants undisputed actions not for following or interpreting their GLA governing documents as written, but because GLA Defendants added language not written therein and extended by implication or enlarged by construction its meaning within those governing contracts. This same cause was reportedly the basis for other complaints filed against the same GLA Defendants.

For this complaint, Plaintiffs' Jan. 18th motion listed three main complaint claims ripe for summary judgement including: 1. the Board election/fraud claims, 2. the guest house assessment claim, and 3. the Minnick Management claims.

Defendants cross-motion for summary judgment listed a 4th claim for summary judgment listed in another case (DV-12-164) by requesting this court validate the Erickson variance and documents. However, GLA Defendants answer to that complaint (DV-12-164) admits this issue is not ripe for judgment. Defendants do not show

evidence that the Erickson variance issue is NOT moot since such documents were reportedly withdrawn by the Ericksons. GLA Defendants own admission here proves those Erickson complaint claims (DV-12-164) are not ripe for summary judgment. If and when Erickson documents are signed by the GLA and the issues become ripe for judgment, Plaintiffs complaint necessitates consideration of the declaratory judgment claim (within case DV-12-164) prior to any summary judgment relief. In the mean time such Erickson claims are indefinitely suspended pending Erickson variance requests and documents being signed or "validated" by the GLA.

Mt. Supreme Court cases cited below and in the complaint requires strict construction of restrictive covenants and does not allow added language not written therein GLA governing documents and extended by implication or enlarge by construction its meaning within those governing contracts.

This issuance of summary judgment is based upon the court's finding that: **1. there are no disputes of "material" fact requiring a trial to resolve, and 2. in applying the law to the undisputed facts, one party is clearly entitled to judgment.**

In *Bordas v. Virginia Ranches Assoc.*, 2004 MT 342 at ¶15-17; "*Bordas* pointed out, Montana law requires strict construction of restrictive covenants-citing *Town & Country Estates Association v. Slater* (1987), 227 Mont. 489, 492, 740 P.2d 668, 670-71."

"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 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.

The Montana Supreme Court also 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."

Claim #1-annual GLA Board elections regarding member votes.

The GLA Defendants admit its election practices since 2011-2012 and before this ask members to cast up to 3 votes instead of one vote (per parcel/membership interest) on the matter of annual Board elections. The GLA Defendants pleadings do not dispute its GLA bylaws/covenants ("Exhibit CD") gives no specific authority to cast up to 3 votes per parcel for Board elections. The GLA Defendants said, it allows **"each membership interest up to 3 votes to fill three three separate vacancies."** This language used to justify Defendants election practice is NOT found in the GLA contracts. Wether or not members challenged past elections is a mute issue, since Defendants have violated anew its Covenant 3.20 and Bylaw VI.A..

Defendants also state they solicit members to cast 3 to 4 votes per membership interest or up to 3 votes "per matter" to fill all 12 Board seats. However this election practice is nowhere supported in its governing documents which specifically restricts members to only "one vote per membership interest" for each issue or matter.

GLA Bylaw VI(A) says "the actual number of Directors shall be those who have been nominated and electedfrom 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)..."

and GLA Covenant 3.20, "a separate and distinct Membership Interest ... is entitled to one (1) vote." (Note: North and South Glastonbury voting districts cast votes for their respective Board candidates annually and separately.)

Covenant 3.20 and Bylaw VI(A) allows as few as 4 Board Directors. Bylaw VI(A) requires "the actual number of Directors shall be those who have been nominated and elected;" Thus the members determine the number of Board elected. It is clear that votes are not to be cast according to the number of Board seats being 12. Each of the 12 Board seat is NOT a separate matter to be voted on. Instead there can be as few as

4 Board Directors elected or seats. Thus the number of member votes cast for each Board seat is NOT a separate and distinct matter or issue but all the same matter.

Defendants also claim that the O'Connells have "acquiesced" under the equitable tolling clause, and can NEVER ever challenge 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.** 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 "4" seats up to 12 in any given election; which factually shows that up to eight Board seats can remain unfilled.

What is most troubling is that GLA Defendants admit they solicit ballots to its members telling members to vote 3 times per membership. This action clearly is not authorized nor justified anywhere in the GLA governing contracts and has resulted in skewing or corrupting GLA Board election results.

Claim #2- new Guest house assessments.

GLA Defendants admit to charging its members new assessment charges for new and existing guest houses starting January 2013 for the first time in 17 years. The fact that such assessments have never been collected before is either a breach of duty per GLA Art. VII. or else not allowed under existing governing documents.

Such guest house assessments together with all other assessments are now collected and payable to another corporation called Minnick Management that without authority was given most GLA duties and authority as contrary to GLA Bylaws and

Covenants; such as Covenant 11.03 that demands assessments be given to the GLA, not an agent (& introduces possible theft).

GLA Board defendants continue to adamantly insist that they are entitled to charge members new assessments for guest houses, but such claim and actions disregarded GLA Covenants 11.03(b), 3.12, and Masterplan 6.0 as cited in the TRO complaint. This is because a guest house is determined by its intended design and use as defined in GLA Covenant/Masterplan 6.0 which says a guest house is "intended for occasional guest use and not as a permanent residence, not to exceed 1,200 square feet;" Such guest house is thus not a dwelling unit; which dwelling unit is defined by Covenant 3.12 that states its intended "for occupancy by a single family" and not restricted in size or use. In fact, there is no specific language in the GLA bylaws/covenants that allows guest house assessments, because a guest house is distinct from and defined differently than a "dwelling unit." The TRO complaint at pages 4-5 explains further;

"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 also, "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 court finds that there is no specific language in the GLA bylaws/covenants that allows guest house assessments, thus GLA's undisputed actions of collecting new guest house assessments exceed its contract authority, rewrite and/or misinterpret its contracts, and/or violate its covenant/bylaw contracts, and may be a possible breach their duty pursuant to GLA Art. VIII.. State statute **35-2-517., MCA. also** applies to this case:

35-2-517. Member's liability for dues, assessments, and fees. A member may become liable to the corporation for dues, assessments, or fees. However, an article or bylaw provision or a resolution adopted by the board authorizing or imposing dues, assessments, or fees does not, of itself, create liability.

Member liability for a guest house assessment is created only by a vote of 51% of its members to adopt new guest house assessments, not by the Board's unauthorized demands as is the case here. Therefore summary judgment is warranted against GLA Defendants to refund to its members within 60 days any and all guest house assessments and applicable fees collected so far. The GLA will also inform its members that guest house assessments are not authorized under current GLA governing documents.

Claim #3-GLA/Minnick Contract

Plaintiffs (members) filed a writ (DV-12-164) to oppose a GLA/Minnick contract. All parties agree and admit that the GLA Respondents entered into such contracts with Minnick starting June 1, 2012 (see GLA's Reply brief page 2, ¶ 3 of case DV-12-164). Defendants admit they amended the Minnick contract AFTER Plaintiffs filed this 164 complaint, and for which some of the contentious language in the original contract was removed regarding the GLA Defendants giving control of its member property over to an agent-Minnick. The GLA also does not deny that Petitioner members are the same landowners whose property is impacted by GLA/Minnick contracts.All parties further agree that within the amended Minnick contract, all such GLA authority, powers and duties as listed in that Minnick contract are currently being exercised by so called "agent" Minnick Management Corp. whose offices are in Bozeman, Mt..

Contrary to Defendants allegation, Plaintiffs never argued that that the GLA cannot hire employees and agents. 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, yet it does not give "**authority and power**" to an agent. Instead, Bylaw VI.B(8) allows GLA authority or powers can ONLY be given over to "committees of Directors," not agents. This fact is critical to this Minnick contract 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;"

GLA Bylaw VI.B, part (8): "Have the right to delegate such powers as may be necessary to carry out the function of the Board to committees as the Board of Directors designates from time to time by resolution as provided in these Bylaws;"

Plaintiffs also contend GLA **duties** given over to "agent" Minnick Management were not prescribed "as necessary" per Bylaw VI.B. part 6 above, as evident by the same GLA Directors performing these same duties for the past 6 years and other Directors performing such duties for the past 17 years.

The GLA Boards' duty is to voluntarily "Conduct, manage and control the affairs and business of the Association" per Bylaw VI.B(1). Plaintiffs agree that GLA Bylaw VI.B. part 6 allows only limited duties "as necessary" for agents and employees, but does not omit agent duties altogether. The same contractors have been servicing the GLA roads for years, CPA's to do books are everywhere even online which duties require more skills or equipment making these two duties necessary for an agent or employee to do. Evidence shows the same volunteer non-profit Board of 12 Directors can do all other duties that it was doing a few months ago and elected to do. Nor do defendants deny this fact as raised by Plaintiffs.

Pursuant to Bylaw VI.B., all other duties given over to agent Minnick are obviously not "necessary" to be done by this agent. This is evident by GLA doing all such duties for 17 years and the GLA July 2012 newsletter that admits, "over the years, the Board has been handling the many administrative tasks necessary for operation of the association...." This is merely a small non-profit landowners association after all, not a big corporation.

Defendants responded to this by claiming GLA growth created too much work for a volunteer 12 member Board. This assertion not raised by Defendants before now is disproven by a CD attached to Plaintiffs summary motion reply showing that in the last 9-10 years, GLA membership/parcels have only increased by 23 memberships: from 370 memberships to 393. These facts also disprove the growth assertion including 3 Minnick agents apparently can manage more than 20 HOA's according to their website,

and can also handle most GLA duties or work that these same 12 GLA Board Directors used to do a few months ago. Thus Defendants assertion that the GLA growth has created too much work load for 12 GLA Directors is unfounded by evidence to the contrary.

The court agrees with Plaintiffs contention that Defendants violated its governing documents and breached its duties by giving Minnick their "agent" its GLA "**authority and power**" and duties not necessary. This court agrees the GLA Board violated its Bylaws cited above when it entered into contracts with Minnick thereby abrogating its authority over to agent-Minnick. The Plaintiffs also contend that giving GLA officer duties over to agent-Minnick further breaches their duties and limited authority under GLA governing contracts.

Examples of GLA officer duties listed in the Minnick contract 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.part 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 Bylaw V. part D. and Bylaws VII.E through H. require GLA officers to perform such duties "incident to their office." This requirement coupled with the requirement that GLA authorities which can only be given over to "committees of

Directors," per Bylaw VI.B, part 8 clearly together forbids agents for doing officer duties that can be done and have been done by the same GLA officers. Therefore, the GLA Defendants violated its expressed authority in the GLA Bylaws when it gave its officer duties and authority over to agent-Minnick.

The GLA provided no factual evidence that such officer duties were "necessary" to justify handing over most GLA duties to an agent-Minnick. An officer of a board is in a fiduciary relationship with the beneficiary members. Such relationship can not be abrogated merely by claiming that it is "necessary" to hand over such GLA duties and authority to an agent. Instead it must be shown that an officer of the Board lacks some technical skill or training to perform a board duty. The GLA Defendants never made such claims, and thus lack this key element that helps determine what is "necessary" for an agent or employee to be given Board duties.

The court thus finds that, other than road and CPA duties, many other GLA duties, officer duties, especially authority and powers given over to agent-Minnick by the Minnick contract was excessive, not necessary, and thus contrary to GLA governing documents and state statues cited above; including GLA Defendants breach of duty to the association and its members pursuant to GLA Art. VIII.

Defendants raised no issues of genuine fact in their reply. Pursuant to M.R.Civ.P. Rule 56, the Court finds the Members are entitled to summary judgment on all claims asserted by Plaintiffs, and for good cause appearing:

IT IS HEREBY ORDERED that Plaintiffs Motion for Summary Judgement is **GRANTED** on all claims 1-3 as described below. It is also ordered that Plaintiffs Motion to join cases DV-12-220 and DV-12-164 in this Montana Sixth Judicial District Court, is **GRANTED**.

Claim #1-annual GLA Board elections regarding member votes.
For this 1st issue, Summary judgment is justified to nullify all GLA Board Director positions. Using the Bylaw guidelines for the first ever Board elections held on or about 1997, new elections must be held within 70 days of this Order under the restriction that GLA ballots do not solicit more than one vote per membership interest regardless of the number of Board seats. The GLA will immediately make available to its members all election ballots cast and all proxies cast at all elections in order for its members and the

Board to verify the actual number of Directors elected (somewhere between 4 and 12) were those nominated and elected by members. This prevents election fraud and assures that the members decide the actual number of GLA Board Directors. Furthermore the court imposes sanctions on the current GLA Board Defendants by forbidding them to run for the GLA Board for a period of no less than 6 years.

Claim #2- new Guest house assessments.

Summary judgment is warranted against GLA Defendants to refund to its members within 60 days any and all guest house assessments and applicable fees which may have been collected so far. The GLA will also inform its members that guest house assessments are not authorized under current GLA governing documents.

Claim #3-GLA/Minnick Contract

The Minnick contract which exceeds or violated GLA Defendants authority, is hereby voided immediately. Within 30 days of this Order, all parties must submit arguments as to why sanctions should or should not be imposed against GLA Defendants for its breach of duties.

The GLA also does not deny Plaintiffs allegation that several GLA Defendant Board Directors get income directly or indirectly from the GLA & project reviews. Because of the GLA fiduciary relationship with its beneficiary members, all GLA Directors are required to avoid such obvious and numerous conflicts of interest, or else take steps to mitigate such conflicts of interest in the future.

DATED this _____ day of February, 2013.

By: _____
Hon. Brenda Gilbert
District Court Judge

c: Daniel and Valery O'Connell,
Brown Law Firm–Seth M. Cunningham,
Park County Clerk of Court.