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June 5, 2015

Board of Directors,
Glastonbury Landowners Association, Inc.
Via Email to info@glamontana.org

RE: O'Connell v. Glastonbury Landowners Association
Our File No. 73200.005

ATTORNEY-CLIENT PRIVILEGED DOCUMENT

To the GLA Board of Directors:

During my meeting via teleconference with the GLA Board on May 18, I reminded all board members that our firm represented each of them in this lawsuit and invited any of you to ask specific questions regarding the litigation. As I stated, the attorney-client privilege is shared between our firm and all the board members, and so any questions I received I would share along with my answers with the other board members as well. This letter is in response to some follow-up questions Ed Dobrowski sent me after the meeting. I have attached those documents for your reference.

The primary concern Mr. Dobrowski raised was that our legal brief for summary judgment would set some sort of precedent for how the GLA must conduct future maintenance activities. Specifically, whether the Court's ruling could be used as a basis by landowners in high south to sue for more maintenance. I do not think the brief or any ruling could be used in that manner.

From the outset of all this litigation, the O'Connell's have constantly challenged the Board's discretionary powers of interpretation and implementation of the Bylaws and Covenants. They challenged things like voting procedures, the variance review process, guest house assessments, and the Minnick Management contract. Each time, we have pointed to specific powers and duties in the Bylaws or Covenants that grant the Board the power and ability to take these actions. The District Court and the Montana Supreme Court have agreed with us.

I do not think the answer in regards to how road maintenance funds are allocated will be any different. If our Summary Judgment Motion is successful, the result is the dismissal of the O'Connells' claim that we are doing it wrong—not the determination of how it must be done. As an example, in the last lawsuit, the Court determined that the Board had the authority to enter into administrative contracts like the Minnick Management contract. Of course, that contract is no longer in place, but the Court's ruling did not require the GLA to have the Minnick contract; it merely said the GLA could have it. No

one could come back now and claim the ruling requires the GLA to use Minnick forever. Similarly, the Court's ruling on our Motion will have the effect of saying the GLA can spend road funds in the current manner—not that it must always spend roads funds in the current manner.

Mr. Dobrowski asked me about the Road Policy and mentioned the GLA has always had a policy in place before the 2008 Road Policy. He also asked why the brief did not mention the tier system. The reason the initial brief did not mention it is because the O'Connell's did not raise it until they replied to our brief in April. They used it as an exhibit, and they allege it is improper because it was enacted without member notice or due process. They also argue that assessments must be spent proportionally according to where they are collected.

I do not know why they have suddenly decided to make the Road Policy as issue. This case has been going on since 2011, and they have had a laundry list of other alleged transgressions that we have addressed. However, I have no problem defending the O'Connells' claims regarding the Road Policy. They are alleging there are limitations within the Covenants that do not exist.

The controlling provisions of the Covenants state:

> The Association intends to maintain a private road system within the platted road easements for vehicular access to the various parcels within the Community. Initial construction by the developer(s) was intended to be to a basic gravel and dirt consistency. The Association may designate and define different qualities or levels of road construction and maintenance within the Community (such as residential roads, foothill roads, mountain roads, etc.) according to its limited ability to deal with such conditions as topography, terrain, elevation, native soil and materials, slope, grade, easement location, parcel location, drainage, climate, weather, snow, ice and mud, and limited resources and equipment. The quality, quantity and/or level of road construction and maintenance may be upgraded by the Association at any time. (Covenants § 8.01(c)).

> The Association's road maintenance responsibility is limited by and conditioned upon the Landowners' individual and collective payment of and the aggregate amount of the "annual community assessment" as provided in Section 11, together with its ability to increase the assessment to keep up with inflation or increased costs. The Association is not obligated to provide maintenance or snowplowing in excess of the amount that has been paid by Landowners through the annual assessment. (Covenants § 8.01(h)).

The Covenants make it clear that the GLA intends to maintain the roads, but they leave the details of how that is done up to the GLA—the Covenants create broad discretionary powers. The one major limitation are the assessments collected—if you do not have the money you cannot do the work. The Covenants are the controlling document. The Road Policy is your implementation document which uses the discretionary power given by the Covenants to create a road maintenance plan for the community. The Road Policy derives its authority from the Covenants and must not conflict with the Covenants. The Road Policy can be changed as circumstances in the community dictate. It can be changed by the Board and not a member vote. However, it is a good idea to get member input when changing it so that the members' expectations can adjust accordingly.

Our response to the allegations of the O'Connell's is that disagreement with the Board's use of discretionary powers to maintain the roads is not a valid basis for a lawsuit. I do not think our brief or any ruling by the Court in our favor creates a precedent for how spending must always be in the GLA. We did not ask the Court to determine how spending must be done—only to affirm that the GLA has the discretion to determine spending based on resources, weather, location, etc. The Covenants make it clear the GLA has the power to designate levels or qualities of maintenance. Ultimately, we are taking the position that there are broad powers in regards to road maintenance, and that the O'Connells' disagreement with discretionary actions is baseless.

Using your example of Jim Kelly, if a member in high south sued the GLA because he claimed the GLA was not plowing enough or he wanted Sagittarius changed from a fifth tier road to a third tier road, I would make the same argument. I would point out the GLA has the discretion as to what level of maintenance is given pursuant to § 8.01(c) of the Covenants. I would not be worried at all that such a member would be able to use this lawsuit to argue in his favor.

That being said, is there some basic level of maintenance the GLA is obligated to provide? Probably yes. The Covenants encompass all the platted roads. While the Covenants give the GLA discretion on how to maintain the roads, that discretion must be exercised fairly and reasonably. There is also the statement that the developers intended roads to be "a basic gravel and dirt consistency."

So I do not think you could decide to abandon maintaining a road completely without changing the Covenants. As long as a road is encompassed by the Covenants, some consideration has to be given to maintaining that road. All members have the right to use all the roads. Montana case law is clear that with the right to use an easement also comes the obligation to maintain it. The GLA has the ability to decide the level of maintenance, and it should be done as fairly and reasonably as possible.

I had another case where two home owners associations within the same subdivion were arguing over how road maintenance costs should be divided. It was a very large subdivision, and the group of owners living closer to the highway were arguing they should not have to pay for any of the roads that went to owners further back in the subdivision. The judge ultimately decided everyone had to share equally in the maintenance costs of all the roads. She said something to the effect that everyone who bought land and paid assessments was paying for access to their property regardless of where it was located in the subdivision, and the cost of access should be born equally. From a practical standpoint, I do not think the judge wanted to get involved in figuring out how much each lot owner should be paying.

Here, I think a judge would read your Covenants and determine much like the judge in the other case that every owner is entitled to some level of maintenance and access to property bought within the GLA regardless of location. So it must be done fairly and reasonably by making sure landowners and prospective landowners understand what the policy is. When they purchase land they should know what to expect as far grading, plowing, etc. They could also look at the Road Policy and rely on historical practices.

You also asked a follow-up question: is there anything in the Road Policy that conflicts with the Covenants? The one conflict I see in the Road Policy is the third sentence, "It is the Association's duty to allocate the assessments in a way that serves the greatest number of

landowners which is why Primary Roads receive the greatest amount of funds from the GLA budget on an ongoing basis." The term "duty" is a legal term that carries special meaning. It implies there is some legal document mandating this. I do not know what the intent behind the use of the word "duty" was, but I have not seen it in the Covenants or the Bylaws. The number of landowners served may be a factor to consider when determining what is fair and reasonable, but there is nothing mandating a "duty" in this regard.

One other thing that is not necessarily a conflict but you should be aware of is the part about local improvement districts in the last paragraph of the Road Policy. § 11.04 of the Covenants creates rules for specially assessing less than all of the properties in the GLA. The Covenants control how a special assessment is to be done, and so the procedure in the Road Policy must follow that.

Your other follow-up question asked whether the Covenants or state law prevents the GLA from snowplowing Dry Creek Road or from maintaining is in cooperation with the county. The key part here is cooperation of the county. It is their road so legally you need their permission to maintain it. If they agree to let you plow it or maintain it, then you need to also look at the Covenants.

Section 8 of the Covenants define Platted Road Easements and state the GLA intends to maintain the platted road easements. I have not seen the Certificate of Survey, but it likely does not include the county owned portion of Dry Creek Road. So arguably, maintaining it would go beyond the intention of the Covenants.

However, Section 11 of Covenants states that assessments shall be used for the maintenance and snowplowing of roads serving the community. So the counter to the above point would be that Dry Creek Road serves the community and maintaining it is necessary to serve the community. If the GLA entered into an agreement with the county, I think the safest way to resolve the issue is to have member vote on it. That way no one can claim they did not get to give input on the issue. I understand you have kind of an informal agreement with the county in regards to just plowing, and the Road Policy does state that. If members have not complained about the GLA's plowing as outlined in the 2008 Road Policy, then they have likely waived any objection.

You should also make sure your liability insurer is aware you are plowing a portion of a county road in addition to the GLA roads.

Your other follow-up questions were: Does the Road Policy need to delineate or specify the level and type of maintenance given to 4th and 5th tier roads and/or other roads? Wouldn't that obligate the GLA to meet those standards?

As I pointed out above, the level of detail as to the maintenance given any tier of road is at the discretion of the GLA. You are not required to set specific standards such as the amount of grading each year, new gravel laid, etc. Doing so would set expectations for landowners, but any standards should come with the caveat that they are subject to change. This is a point I try to make in the brief: that circumstances change. The blizzard in 2010 is an excellent example because deciding not to plow would have endangered people. Extraordinary weather events may dictate the need to spend money in a manner unplanned for. The GLA has the flexibility to adapt to the circumstances.

I do not want to add an addendum to the brief at this point primarily because the O'Connell's would then be able to file more responses. It is certainly something that would be a good talking point during oral arguments. Your concern is that the Court will determine that the emergency spending is the "normal" spending. Again, we are not asking the Court to determine what normal spending should be because that should be left to the members of the GLA.

The same applies to your concern that the Court may determine all roads must be maintained the same. Our brief is not asking for that ruling; it is asking that the standards be left to the discretion of the GLA. While there is likely some basic level of maintenance ("basic gravel and dirt consistency"), the GLA clearly has the authority to "designate and define different qualities or levels of road construction and maintenance." Clearly, this language does not mean all roads get the same level or maintenance. In this particular case, the O'Connell's have challenged particular actions of the GLA. Summary judgment in our favor would dismiss those claims but would not establish how things must be done in the future.

I understand there is a conflict among board members regarding the Road Policy and potential changes to it. A specific concern was doing road maintenance to roads in high south "above and beyond what our covenants and road policy call for." The core of our argument in the brief is that the level and quality of road maintenance is a matter for the GLA to decide through its members and the elected board—not through litigation. The Covenants do not put limits on what level and quantity of maintenance can be done on any road. The Road Policy can establish standards and expectations, but it is subject to change and subordinate to the Covenants.

I will abstain from offering my opinion on whether the Road Policy should be changed or what level of maintenance should be given to particular roads or how it should be funded. I will only offer the opinion that the GLA has the power to create a Road Policy designating the level and quality of maintenance given to particular roads, and it has the power to assess members at large or specially to fund maintenance. The hard work of addressing all the competing interests and trying to be reasonable and fair is better left to the Board.

Ultimately, whatever policy the GLA adopts should be followed as best as possible. If it is not being followed, it should be changed or repealed. One foothold any potential litigant could gain is by pointing to a policy that is not being followed or is being selectively enforced. I hope that this answers the questions presented.

Sincerely,

Seth M. Cunningham

SMC:saw