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March 27, 2020

Newman Brozovsky
Glastonbury Landowners Association, Inc.
Board of Directors, President
Via email to newmangla@gmail.com

Of Counsel
Robert L. Sterup

Dear Newman:

**Re: Opinion of Retroactive Application of Mont. Code Ann. § 70-17-901
Our file # 77720.005**

Retired
Rockwood Brown
John Walker Ross
Margy Bonner

At your request, I have reviewed the impact of recently enacted SB 300 (Attached as Exhibit A) and encoded in Mont. Code Ann. § 70-17-901 (Attached as Exhibit B). Specifically, Leo Keeler and Dorothy Keeler have sent notice to the GLA that because of this Bill's passage, they believe their property is exempt from any changes to the GLA Covenants from the date of their acquisition of the property, March 15, 2005. For the reasons set forth below, I believe Mr. and Ms. Keelers' interpretation of the statute is wrong.

Effective Date and Retroactive Application

Mont. Code Ann. § 70-17-901(5) states:

Nothing in this section invalidates existing covenants of a homeowners' association or creates a private right of action for actions or omissions occurring before May 9, 2019. However, after May 9, 2019, unless the member has consented as provided by subsection (1), a homeowners' association may not enforce a covenant, condition, or restriction in such a way that limits the types of use of a member's real property that were allowed when the member acquired the affected real property.

Further, the text of the Bill states: "This act is effective upon passage and approval." By the plain language of the statute and the Bill itself, the statute was not in effect until May 9, 2019.

Additionally, it had no effect on the existing GLA Covenants or Master Plan since those were in place before that date. A law is not retroactive unless it is expressly declared to be so. *Wallace v. Mont. Dept. of Fish, Wildlife & Parks*, 269 Mont. 364, 367-8, 889 P.2d 817, 819-20 (1995). Further, retroactive application of this law would not be allowed since it would impair the vested rights of the GLA landowners. *Id.*

That statute further clarifies: “Nothing in this section may be construed to prevent the enforcement of a covenant, condition, or restriction limiting the types of use of a member's real property as long as the covenant, condition, or restriction applied to the real property at the time the member acquired the member's interest in the real property.” Mont. Code Ann. § 70-17-901(4). So the terms of the GLA Covenants as written, applied to the Keeler property when they purchased it in 2005.

Relation of the Master Plan to the Covenants

The GLA Master Plan is authorized and created under the authority granted by the GLA Covenants. Section 2.06 of the Covenants provides for the creation and adoption of a Land Use Master Plan by majority vote of the GLA members.

Restrictive Covenants are generally treated as contracts. *Czajkowski v. Meyers*, 2007 MT 292, ¶ 21, 339 Mont. 503, 509, 172 P.3d 94, 99. By buying property within the GLA, any owner is essentially agreeing to the GLA Covenants as a contract. When the Keelers purchased their property in 2005, they agreed to a contract term that the Master Plan could be adopted by 51% vote. They were bound by that term in 2005, in 2007 when the Master Plan was adopted, and now, since it has not changed. Mont. Code Ann. § 70-17-901 by its express terms does not change the effect of the GLA Covenants.

Effect of Mont. Code Ann. § 70-17-901 on Future Covenant Changes

Section 2.05 of the GLA Covenants allows for amendment of the Covenants by 51% vote of the GLA members. I do not think Mont. Code Ann. § 70-17-901 changes that. While the new law requires agreement in writing to amend or adopt Covenants in the future, it also has no effect on existing Covenants as discussed above.

Therefore, the GLA's existing Covenants and Master Plan and their existing terms were in effect before the passage of the Bill, and they are not invalidated now. It is my opinion that a Court reviewing a challenge to a future change to the GLA Covenants made in accordance with the § 2.05 Covenants would agree that procedure is still valid because it was in place before the passage of SB300.

Additionally, any future purchaser of land within the GLA would be subject to the Covenants and Master Plan in existence at the time of the purchase.

Summary

It is my opinion that SB 300:

- 1) Does not retroactively change any provisions of the GLA Covenants or Master Plan including the methods for amending them.
- 2) An owner who purchased land before the passage of SB 300 is still subject to the Covenants and Master Plan.
- 3) All owners are subject to the amended and/or adopted Covenants and Master Plan after the date of their purchase if those amendments and/or adoptions were done in accordance with the Covenants.
- 4) Any future owner will be subject to the Covenants and Master Plan in place at the time of purchase.

Please let me know if you have any additional questions.

Sincerely

A handwritten signature in blue ink, appearing to read 'Seth M. Cunningham', with a stylized flourish at the end.

Seth M. Cunningham

SMC:ss
Enc.

SENATE BILL NO. 300

INTRODUCED BY K. BOGNER

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A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING PROPERTY LAWS TO PROTECT PROPERTY RIGHTS; PREVENTING HOMEOWNERS' ASSOCIATIONS FROM IMPOSING MORE ONEROUS RESTRICTIONS ON A PROPERTY OWNER'S BASIC RIGHTS THAN WHEN THE PROPERTY OWNER ACQUIRED THE PROPERTY; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Homeowners' association restrictions -- property rights.** (1) A

homeowners' association may not enter into, amend, or enforce a covenant or condition in such a way that imposes more onerous restrictions on a member's basic rights to use the member's real property than those restrictions that existed when the member acquired the member's interest in the real property, unless the member who owns the affected property expressly agrees to the restriction in writing at the time of the adoption or amendment of the covenant or condition.

(2) A successor-in-interest to a member's real property may not claim the benefit of subsection (1) to the extent that the homeowners' association entered into, amended, or enforced a covenant, condition, or restriction before the successor-in-interest purchased the real property, even if the covenant, condition, or restriction was not enforceable against the previous owner pursuant to subsection (1), unless the successor-in-interest is owned by or shares ownership with the previous member.

(3) Nothing in this section may be construed to prevent the enforcement of a covenant, condition, or restriction limiting a member's basic rights as long as the covenant, condition, or restriction applied to the real property at the time the member acquired the member's interest in the real property.

(4) Nothing in this section invalidates existing covenants of a homeowners' association or creates a private right of action for actions or omissions occurring before [the effective date of this act]. However, after [the effective date of this act], unless the member has consented as provided by subsection (1), a homeowners' association may not enforce a covenant, condition, or restriction in such a way that limits the basic rights of a member that existed when the member acquired the affected property.

(5) As used in this section, the following definitions apply:



- 1 (a) "Basic rights" means the following rights of a member:
- 2 (i) the right to use real property for residential, agricultural, or commercial purposes;
- 3 (ii) the right to rent the real property, including the land and structures on the real property, for any
- 4 amount of time; and
- 5 (iii) the right to otherwise develop the property in accordance with the laws of this state.
- 6 (b) "Homeowners' association" means:
- 7 (i) an association of all the owners of real property within a geographic area defined by physical
- 8 boundaries which:
- 9 (A) is formally governed by a declaration of covenants, bylaws, or both;
- 10 (B) may be authorized to impose assessments that, if unpaid, may become a lien on a member's real
- 11 property; and
- 12 (C) may enact or enforce rules concerning the operation of the community or subdivision; and
- 13 (ii) an association of unit owners as defined by 70-23-102 subject to the Unit Ownership Act.
- 14 (c) "Member" means a person that belongs to a homeowners' association and whose real property is
- 15 subject to the jurisdiction of the homeowners' association.
- 16 (d) "Person" means one or more individuals or a legal or commercial entity.
- 17 (e) "Real property" has the meaning provided in 70-1-106, except that it is limited to real property
- 18 governed by a homeowners' association.

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20 **NEW SECTION. Section 2. Restriction on covenants by association of unit owners.** An association

21 of unit owners shall abide by the provisions of [section 1].

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23 **NEW SECTION. Section 3. Codification instruction.** (1) [Section 1] is intended to be codified as an

24 integral part of Title 70, and the provisions of Title 70 apply to [section 1].

25 (2) [Section 2] is intended to be codified as an integral part of Title 70, chapter 23, and the provisions

26 of Title 70, chapter 23, apply to [section 2].

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28 **NEW SECTION. Section 4. Severability.** If a part of [this act] is invalid, all valid parts that are severable

29 from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part

30 remains in effect in all valid applications that are severable from the invalid applications.

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2 NEW SECTION. **Section 5. Effective date.** [This act] is effective on passage and approval.

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- END -

Montana Code Annotated 2019

TITLE 70. PROPERTY

CHAPTER 17. SERVITUDES, EASEMENTS, AND COVENANTS RUNNING WITH THE LAND

Part 9. Restrictions Pertaining to Homeowners' Associations

Homeowners' Association Restrictions -- Real Property Rights

70-17-901. Homeowners' association restrictions -- real property rights. (1) (a) A homeowners' association may not enter into, amend, or enforce a covenant, condition, or restriction in such a way that imposes more onerous restrictions on the types of use of a member's real property than those restrictions that existed when the member acquired the member's interest in the real property, unless the member who owns the affected real property expressly agrees in writing at the time of the adoption or amendment of the covenant, condition, or restriction.

(b) When a member claims the benefit of this subsection (1), the member shall request that the homeowners' association record, or allow recording of, the exception applicable to the member. Upon request by the member, the homeowners' association, the member, or a designee shall record the member's exception with the office of the county clerk and recorder of the county where the real property is situated. The member shall provide the homeowners' association with the date the real property was conveyed to the member and shall pay the recording fees for the document setting forth the exception.

(2) A successor-in-interest to a member's real property may not claim the benefit of subsection (1) to the extent that the homeowners' association entered into, amended, or enforced a covenant, condition, or restriction before the successor-in-interest purchased the real property, even if the covenant, condition, or restriction was not enforceable against the previous owner pursuant to subsection (1), unless the successor-in-interest is owned by or shares ownership with the previous member or unless the successor-in-interest is a lender that acquired the real property through foreclosure.

(3) This section does not apply to a covenant, condition, or restriction:

(a) that is not subject to enforcement by a homeowners' association; or

(b) that is required in order to comply with applicable federal, state, and local laws, ordinances, and regulations.

(4) Nothing in this section may be construed to prevent the enforcement of a covenant, condition, or restriction limiting the types of use of a member's real property as long as the covenant, condition, or restriction applied to the real property at the time the member acquired the member's interest in the real property.

(5) Nothing in this section invalidates existing covenants of a homeowners' association or creates a private right of action for actions or omissions occurring before May 9, 2019. However, after May 9, 2019, unless the member has consented as provided by subsection (1), a homeowners' association may not enforce a covenant, condition, or restriction in such a way that limits the types of use of a member's real property that were allowed when the member acquired the affected real property.

(6) As used in this section, the following definitions apply:

- (a) "Homeowners' association" means:
- (i) an association of all the owners of real property within a geographic area defined by physical boundaries which:
 - (A) is formally governed by a declaration of covenants, bylaws, or both;
 - (B) may be authorized to impose assessments that, if unpaid, may become a lien on a member's real property; and
 - (C) may enact or enforce rules concerning the operation of the community or subdivision; or
 - (ii) an association of unit owners as defined by **70-23-102** subject to the Unit Ownership Act.
- (b) "Member" means a person that belongs to a homeowners' association and whose real property is subject to the jurisdiction of the homeowners' association.
- (c) "Person" means one or more individuals or a legal or commercial entity.
- (d) "Real property" has the meaning provided in **70-1-106**, except that it is limited to real property governed by a homeowners' association.
- (e) "Types of use" means the following lawful types of use of the real property:
- (i) use for residential, agricultural, or commercial purposes, unless the use was impermissible according to the written or recorded restrictions;
 - (ii) the ability to rent the real property, including the land and structures on the real property, for any amount of time; and
 - (iii) the ability to otherwise develop the real property in accordance with applicable federal, state, and local laws, ordinances, and regulations, unless the ability was impermissible according to the written or recorded restrictions.

History: En. Sec. 1, Ch. 339, L. 2019.