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MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

DENNIS RILEY, WENDY RILEY,
JERRY LADEWIG, JEFFREY
LADEWIG, MARK SEAVER, ANDREA
SEDLAK, MARTHA McALISTER,
JOHN McALISTER, together with and on
behalf of other lot owners,

Petitioners,

v.

GLASTONBURY LANDOWNERS
ASSOCIATION, INC.,

Respondent.

Cause No. DV-21-101

BRIEF IN RESPONSE TO COURT'S
ORDER AND STATUS REPORT

COMES NOW, Petitioners, by and through their attorney Nick Lofing of
Garlington, Lohn & Robinson, PLLP, and files this Brief in Response to the Court's
Order Allowing Briefing, dated September 12, 2022, inviting the parties to file such
briefs on the issues raised in the Custodian Pendente Lite's report, dated September 6,

2022.

The principal issue to brief is Petitioners' request for separation of the Glastonbury Landowners Association ("GLA") into successor entities: GLA-South and GLA-North. The Petitioners and the prior GLA board have agreed to such resolution. Pursuant to a court-supervised election, the entire GLA electorate was given the opportunity to vote in special election on the separation question, and the GLA electorate has voted by majority for the separation into a GLA-South and GLA-North.

Petitioners now seek this Court's order, affirming the electorate's vote for separation, and approving the settlement of the lawsuit. Petitioners have separately and contemporaneously filed their renewed Motion for Judicial Approval of Parties' Settlement Agreement, incorporating that prior motion filed December 1, 2021 and its supporting documents, now that the judicial stay is lifted and court-supervised election supported separation.

I. BACKGROUND

On June 23, 2021, a lawsuit was filed by eight landowners which requested a judicial dissolution of the Glastonbury Landowners Association (GLA) due to years of dysfunction and Board deadlock. The Court ordered the parties to participate in mediation. The Petitioners, as well as the Board of the GLA with their attorney, Ryan Jackson, mediated with Tracy Axelberg over the course of a long day, October 4, 2021. A settlement was reached in which the parties agreed to separate the GLA into two

entities, North-GLA and South-GLA, and to seek approval at a full Board meeting in due course. At the next duly noticed board meeting, the full GLA Board approved and adopted the settlement agreement. Pursuant to the Agreement, Petitioners next sought judicial review and approval. Judge Gilbert held a hearing in January 2022. The Court ordered a stay of proceedings, pending appointment of a Custodian Pende Lite to conduct special elections for new Board members and to vote on the issue of separation into a North and South GLA. The court-supervised election has been recently completed, with a new panel of Board members elected and the majority vote favoring separation of the association into a North and South GLA.

II. LEGAL ANALYSIS AND POSITION OF PETITIONERS

To determine whether the GLA should be separated into North-GLA and South-GLA as requested by Petitioners, two substantial developments must be considered: (1) court-ordered mediation between the Petitioners and the GLA, resulting in a settlement agreement for separation, followed by full Board approval of the separation, and (2) a court-ordered and court-supervised landowner election, facilitated by court-appointed Custodian Pende Lite, that put the question of separation into a North and South GLA before all landowners, and resulted in a majority vote for separation.

A. Mediation Agreement

Following orders from the Court to enter into mediation, the Petitioners and four members of the GLA Board of Directors met on October 4, 2021, with the question of

dissolution of the GLA on the table. After thorough deliberation, the parties agreed to separate the GLA into two like entities, North-GLA and South-GLA, as a compromise to corporate dissolution. The Settlement Agreement (Agreement) was seen as a reasonable alternative to dissolution, as each entity would become a successor corporation operating under the same Covenants. The two potential successor entities already have a historical differentiation, e.g., each has its own legal parcel map reflected in the Covenants, each selects its own Board members, and each has its own road budget. The two potential successor entities have structural differences, which has led to years of disagreement and deadlock, with a clear and clean pathway to separation, as outlined in the Settlement Agreement.

Two days following the mediation, on October 6, 2021, the full Board of Directors met, in a properly noticed meeting, to vote on the mediated Agreement. A Board majority voted to adopt the Agreement to separate the GLA. Part of the Agreement called for judicial approval of the Agreement reached by the parties, including an opportunity for landowners to voice their support or opposition to the Agreement. A memorandum outlining the outcome of the mediation was sent to the Judge, who ordered a hearing be held January 10, 2022, to provide a forum for landowner input and discuss the Separation Agreement. Following the hearing and after consideration, the Judge ordered a Custodian Pendente Lite to facilitate an election to select a new Board of Directors as well as allow the landowners to vote on the proposed Agreement.

B. Landowner Election

The landowner election was facilitated by court appointed retired Judge Nels Swandal and held from July 12 to August 19, 2022, via absentee ballot. Honorable Swandal completed his assignment and provided a report to Judge Gilbert on September 6, 2022.

Of the 333 total properties in good standing, 233 ballots (70%) were received. Of these, 229 ballots (69%) included a vote on the question of separation. The majority of the 229 ballots voted yes for separation, with 126 (55%) voting yes and 103 (45%) voting no. Glastonbury South had a greater number and majority of voters than Glastonbury North for the separation question, 122 from South and 107 from North. Of these, 81 (66%) from South voted yes and 45 (42%) from North voted yes. Status Report at 4, Sept. 6, 2022.

Pursuant to this special election, the electorate has spoken, with a 55% majority requesting separation. All landowners received the ballot packet from the Custodian Pendente Lite Swandal. The ballot packet contained thorough pro and con statements regarding separation. See Status Report at 1. While 30% of landowners in good standing did not vote out of either disinterest or ambivalence, the voter turnout was considerable as compared with past elections, as those who were for or against separation campaigned via informational websites and landowner meetings. Based on the election results of the interested landowners who chose to vote, the question to separate into North-GLA and

South-GLA was approved.

C. The majority vote of a the special election requires separation, with such a majority vote being consistent with the standard for Bylaw amendments; the Covenant standard for amendments does not apply.

The Articles of Incorporation (“Articles”) outlines that the affairs of the Association may be changed through the Bylaws – “To adopt, alter, amend, or repeal such Bylaws as may be necessary or desirable for the proper management of the affairs of the Association...” Article X, Amendments, states “Amendments to these Articles of Incorporation shall be adopted, if at all, in the manner set forth in the Bylaws...”

The Declaration of Covenants (“Covenants”), provide at 10.03 the right to “assign or transfer all of its rights, powers and responsibilities as established under this Declaration (of Covenants)...to a successor organization” Found. Decl. Nicholas J. Lofing ¶ 4, Nov. 16, 2021 (“Decl. Lofing”), Ex. C: Restated Decl. Cov. Community Glastonbury ¶ 10.03, Sept. 26, 1997. Covenant 2.05 refers to Amendments to Covenants and describes that modifications to the Covenants can be made with an “affirmative vote of at least fifty-one percent (51%) of the Membership Interests of the Association in good standing at the time.” Decl. Lofing ¶ 4, Ex. C ¶ 2.05.

The Restated Bylaws (“Bylaws”) cover the governing and administrative structure of the GLA. Article II states, “The purposes of the corporation are as set forth in the Articles of Incorporation, and more specifically as follows: To provide for the management, administration, maintenance, preservation and control of the parcels, roads

and common properties...” (Article II, Objects, B). The Bylaws, Article V, provide as follows: “If the total number of qualifying votes equals or exceeds fifty-one percent (51%) of the total Membership Interests of the Members in good standing who cast votes at the meeting, the vote shall be effective and shall have passed.”

Despite the clear majority election for separation among those voting, some landowners argue that a majority of all landowners must vote for separation. This minority view is based on a strained reading of the Covenant’s standard, requiring 51% of all landowners in good standing, regardless of whether they cast a vote or not. However, the Petitioners are not requesting a change to the Covenants, and the Covenants will not be modified with separation. Similarly, the mediated separation agreement also does not ask that the Covenants be modified. The Covenants’ standard simply does not apply to this situation.

The Bylaws, on the other hand, define the governing and administrative structure of the GLA. As made very clear by the Articles, the affairs of the Association are amended through the Bylaws, which in turn requires only a majority vote of the voting landowners in good standing. Here, a special election was held, and a majority of the voting landowners requested separation, which is consistent with the Bylaws standard and further consistent with the Bylaw amendments that will be needed to effectuate the separation into the two successor entities.

III. Conclusion

There is an agreed-upon mediated settlement to separate GLA with Board approval. There has also been a landowner vote which is in favor of separation. Taken together, and in light of this Court's record, Petitioners renew their request for the Court's approval of the Settlement Agreement, resolving Petitioners' claims, by separating the GLA into separate successor entities: North-GLA and South-GLA.

DATED this 11th day of October, 2022.

/s/ Nicholas J. Lofing
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Nicholas J. Lofing, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Response Brief to the following on 10-11-2022:

Ryan Kurt Jackson (Attorney)
35 North Bozeman
Bozeman MT 59715
Representing: Glastonbury Landowners Association, Inc.
Service Method: eService

Electronically signed by Katelyn Van Gilder on behalf of Nicholas J. Lofing
Dated: 10-11-2022