



108 N. 11th Ave., Unit #1
Bozeman, MT, 59715
(406) 624-3585

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Glastonbury Landowner's Association, Inc.

Sent by email:

Dear Board of Directors:

You recently asked me to provide a legal opinion regarding your current policy of granting "hardship requests" from landowners who cannot afford to pay their assessments. I have reviewed the following documents:

1. Montana Code Annotated, specifically the Non-Profit Act;
2. Montana Case Law; and
3. GLA's current governing documents including your Covenant and Bylaws.

My understanding of the hardship request is as follows. A landowner approaches the Board with a request to waive all or a portion of the assessments owed on their property because of a certain set of factors, typically, for reasons outside of their control, they cannot afford to pay the amount due. Their request is verified and at the time of decision, the Board is convinced that the person seeking the waiver cannot pay, and will default on their contractual duty to pay the assessments if not granted the waiver. Therefore, the Board has a decision to make. Force a default, and thus a lien and lawsuit or waive a portion of the fee. The issue is whether you have the authority under the law and governing documents to waive the fee at this point.

First, I turned to your Covenants. The first general question that I think must be addressed is one that comes up a lot with your membership. The issue is: "What is meant by 'Association' in your covenants?" The "Association" is defined in your Covenants as "Glastonbury Landowners Association, Inc." Therefore, when a reference is made to Association, then it means the corporation.

The next logical question is "When the Covenants state that the 'Association' may or must do something, who may/must act? The Board? The members?" The answer to this is found within the Montana Non-Profit Act; to wit:

- (1) Each corporation must have a board of directors.

(2) Except as provided in this chapter or subsection (3), all corporate powers are exercised by or under the authority of the board, and the affairs of the corporation managed under the direction of its board.

(3) The articles may authorize a person or persons to exercise some or all of the powers that would otherwise be exercised by a board. To the extent authorized, a person authorized under this subsection has the duties and responsibilities of the directors and the directors must be relieved from the duties and responsibilities to that extent.

Mont. Code Ann. § 35-2-414

Basically, this states that a Board of Directors is elected to make decisions and act on behalf of the membership. This is consistent with your Bylaws, Article VI, B, which state that “the business and affairs of the Association shall be managed by the Board of Directors. Such Directors shall in all cases act as a Board which shall have the powers and duties necessary for the administration for the affairs of the Association and may do all such acts or thing are not by law or by the Covenants, Bylaw or Articles of the Incorporation directed to be exercised and done by Members.”

In other words, if the Covenants specifically states that something needs to be decided by its members, then the members must vote. However, if the Covenants simply state that the “Association” may or must do something, then it is the Board of Directors to which your covenants refer.

Thus, we turn to the power of the Board. Does the Board have the power to negotiate with people who cannot afford the assessment and grant a hardship waiver? I believe that the answer is yes. One of the powers of any non-profit board is the power to sue, along with the power to enter into contracts, assess members and other powers are all found in M.C.A. 35-2-118. As I have discussed before, inherent in any lawsuit is the legal duty to mediate in good faith. If a Board cannot mediate in good faith (i.e. for example, in hardship cases, where a person clearly cannot pay, waive the interest and/or a portion of the assessments) the Court can find the Board in contempt of Court and fine the Board or sanction the Board in any number of ways. Thus, the right to sue, in my opinion, must come with the right to enter into settlements that may be a variance of the Covenants.

I also believe that your Covenants clearly allow for this type of act. According to Section 12.01, “The Association reserves the right to waive or grant variances to any of the provision of this Declaration, where, in its discretion, it believes the same to be necessary and where the same will not be injurious to the rest of the Community.”

These variances are very case specific and typically go to the weight of the harms. For example, in a hardship case, if the person is asking to pay half of the assessment, then that one half is equal to less than one dollar a lot to make up the difference. In the alternative, if the fee is not waived or reduced, the Board takes on the legal duty of filing a lien (at a cost of around \$100.00 for drafting the lien and cost of filing), the proceeding to Court to foreclose on the lien (anywhere from \$600.00-\$20,000.00 depending on how much the owner fights the foreclosure and if there are any other lienholders that must be notified), and then the cost of selling the

property to satisfy the lien. This can only occur if there is enough equity to satisfy the lien amount. In other words, you might end up with a judgment from the Court that is worthless. There is also the reduction of property values in your subdivision because a home was foreclosed upon.

It seems clear that granting the hardship variance in this case is in everyone's best interest. One of the primary purposes of covenants is to protect property values by defining the uses of the properties and limiting certain uses that may decrease the value of the property. It would seem that if you did not grant the variance, then you could bring more harm to the subdivision. Of course, this balance could tip if you had a number of variances. But, it is my understanding that you have only one.

There is also one other item to consider, the assessment language. Unlike many Covenants that I have seen, yours do not specifically state that the annual assessment must be the same for each lot. (See Generally, Section 11.) In fact, it is clear that some lots are treated differently than others. The language does limit the ability of the Board to increase the amount, but does not limit the Board's ability to decrease the amount. Read together, it would seem that the Board has the authority to reduce the amount owed on certain lots.

I, however, would caution the Board. There is an underlying covenant in every contract, the Covenant of Good Faith and Fair Dealing. That means that you need to act fairly in these situations. However, it would seem to satisfy the covenant to reduce the assessments on a Lot for a family who could not pay, when the end result could be a loss of property value and a lot more expense to file the foreclosure action for everyone.

In summary, there is no way to guess what a Court would determine in this matter, there never is. Furthermore, there is no case law on this issue. This does not surprise me since each set of covenants is different. However, based on the language of your covenants, it would appear that the Covenants give you the ability to grant hardship variances on a case by case basis. If you were challenged in Court, you would have a good argument for prevailing on this matter, but keep in mind that you can never see into the mind of a judge.

Please contact me with any question.

Sincerely,

Alanah Griffith

