IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 24-0502

CHARLIE'S WIN, LLC,

Plaintiff/Appellee, vs.

GALLATIN WEST RANCH HOMEOWNERS' ASSOCIATION, INC.,

Defendant/Appellant.

On appeal from the Eighteenth Judicial District Court, Gallatin County Cause No. DV-23-061A, Hon. Peter Ohman

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Appellant's Reply Brief

(Appearances on next page)

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STATEMENT OF THE ISSUES

Gallatin West would like to quickly address Charlie's Win's different issue statements. It appears that all Charlie's Win did was break down Gallatin West's Issue Statement into four separate issue statements, which follow the arguments in both briefs. For clarity, Gallatin West provided the following issue statement:

1. Did the District Court err when it ruled that Gallatin West failed to properly Amend their Third Amended Covenants and that as a result, Gallatin West no longer has any enforceable covenants?

Charlie's Win then broke this down into four issues, all essentially asking the same question, whether the District Court erred in holding that Gallatin West failed to get the necessary vote. Charlie's Win's issues are as follows:

1. Did the District Court err in determining that Gallatin West did not receive enough votes to validly extend the duration of the enforceability of the Third Amended Covenants via the Fourth Amended Covenants?

2. Did the District Court err in determining that the standards contained within the "Renewal Clause," rather than the standards contained within the "Amendment Clause," of the Third Amended Covenants, applied to the issue of whether Gallatin West validly extended the enforceability of the Third Amended Covenants via the Fourth Amended Covenants?

3. To the extent the Supreme Court determines Gallatin West validly extended the duration of the enforceability of the Third Amended Covenants via the Fourth Amended Covenants, do issues of fact remain regarding whether any restrictive covenants are unenforceable for disparate enforcement of those restrictive covenants against Charlie's Win?

4. To the extent the Supreme Court determines Gallatin West validly extended the duration of the enforceability of the Third Amended Covenants via the Fourth Amended Covenants, do issues of fact and law remain regarding Gallatin West's three counterclaims against Charlie's Win that requires further proceedings in the District Court?

These four issue statements generally follow the four arguments in the Opening and Response Briefs. However, Charlie's Win flipped the order, first addressing the Renewal Clause, then the Amendment Clause and last past use and interpretation. Charlie's Win also added an argument regarding remanding the case if Charlie's Win loses this appeal. Gallatin West shall simply follow the order adopted by Charlie's Win so that there is more cohesion for the Court.

ARGUMENT

1. **If the Court finds that Gallatin West must comply with both the Amendment and Renewal Clause to Prevent the Covenants from Sunsetting (or just the Renewal Clause), then Gallatin West's Vote Satisfied the Plain Language of the Renewal Clause (Argument 2 of Opening Brief and Response Brief).**

This argument all comes down to the words "all" and "majority." "All" is the qualifying language *missing* from the Renewal Clause. Without the word "all," the Renewal Clause inherently means that the vote count ONLY includes the votes of the Owners who *showed up* when adding up the 2/3, not "all" of the eligible Owner

votes that could be cast.[1] This is because the word "majority" is defined as a vote of those who are present.

Charlie's Win continually refers to "2/3 of the *eligible votes*" when referring to the Renewal Clause. (See Argument 2, in general) It argues, without any reliance on the law, a dictionary or another type of citation, that the Renewal Clause's language of " a vote of *2/3 majority vote* of the Owners" means a "2/3 vote of all *eligible* votes." However, this clearly adds the word "all" and "eligible votes" to the Renewal Clause, which is not allowed in contract interpretation. Furthermore, it ignores/deletes the word "majority." All of the words in a contract must be given meaning under the rules of contract interpretation. Charlie's Win, and the Court, cannot simply ignore the word majority and its meaning.

It is clear that without the word "all" or any other qualifying language, the phrase "2/3 majority vote" means 2/3rd of the people who show up to vote. *Black's Law Dictionary* clearly states that the phrase, "*majority* vote of the owners" when added to another number (like 2/3), means a vote of those *who are present*. When interpreting the word "majority" with regards to "voting" *Black's* states:

> A majority always refers to more than half of some defined or assumed set. In parliamentary law, that set may be all the members or some subset, such as all members present or all members voting on a

[1] Please keep in mind that the Court does not need to reach this issue if they find that by Amending the Third Amendment in full, the Association automatically reset the sunset date and the Renewal Clause does not apply (See Argument 1 in Opening Brief, and Reply Argument 2)

> particular question. A '*majority' without further qualification* usually means a *simple majority*.
>
> *Black's Law Dictionary,* Edition 10, page 1098. (emphasis added)

In this case, the Renewal Clause contains no qualification for the 2/3 majority vote of owners. It does not say "2/3 majority vote of *all* owners voting", "2/3 majority vote of *all* of the owners in *good standing*" or "2/3 majority vote of *all* the owners *eligible to vote*." Therefore, the Renewal Clause is referring to a simple majority. As stated in the Opening Brief, Black's defines "simple majority" as "A numerical majority of *those actually voting*." *Black's Law Dictionary,* Edition 10, page 1098. In other words, "Majority" when used alone means those who were present.

Taken together, a "2/3 majority" vote of the owners would mean that the vote would need to pass by 2/3rds vote of those owners who were present.

Charlie's Win seems to argue that by including "of the owners" this language somehow qualifies "a vote of 2/3 majority vote" to mean "all" of the eligible votes. (Response Brief, page 18). However, "of the Owners" is a prepositional phrase that identifies the body/entity that is voting, not how the vote is counted. By the owners" means that it is the Owners of the Lots as opposed to, for example, the Members of Gallatin West's Association who are entitled to vote. In other words, the phrase identifies the "who" and not "how many" may vote. Therefore, the

prepositional phrase "of the Owners" does not qualify the number of votes counted when there is a "majority vote."

Charlie's Win's own argument on Pages 18-19 clearly shows that in order for the vote to include all of the eligible votes, the drafters would have needed the word "all." It states:

> Exhibit A to Charlie's Win's appendix shows the Black's Law definition of "Majority" and various ways it can be applied. *See* Charlie's Win's Appendix, Exhibit A. Exhibit A shows that Black's Law states: "A 'majority" *without further qualification*…means a simple majority." *Id.* (Emphasis added). However, further down, Black's Law shows when a majority can be qualified, such as in the instance of "majority of all the members." *Id.* In that instance, a vote is tallied using a "majority of *all the actual members, disregarding vacancies*." (Emphasis added).
>
> [Answer Brief, Pg 18-19, Underline and highlight added]

Black's Law Dictionary, Exhibit A, does not show "when" a majority is qualified, it shows *what it means when* the word "majority" is not used alone and is qualified. (See Exhibit A, Answer Brief.) Charlie's Win does not seem to understand what qualification means. It means that in order for "majority" to mean something other than "who is present may vote", the drafter needs the type of qualification that adjusts that *number* to more or less than those who show up. "Of the owners" in and of itself does NOT modify the number of votes. As defined in the Third Amendment, "owners" is defined as someone who owns a lot.

> "Owner" shall mean the legal titled holders or contract purchasers, whether one or more persons or entities, owning or purchasing a fee simple title to any lot but excluding those having an interest merely as security for the performance of an obligation; provided, however, that prior to the first conveyance of each portion of the properties for value, owner shall mean Declarant.

(Opening Brief, Exhibit 1) Nowhere in this definition does it say, "all owners must vote" or "when used, 'owner' means "all of the owners." Therefore, by using owners in the Renewal Clause, the drafters defined the group that can be present and vote. "2/3 majority of the owners" means that the vote must pass by 2/3rds of the owners, as defined, who are present.

Charlie's Win then applies this erroneous definition to state that "it is clear that the qualification '2/3 vote of the majority' applies directly to Black's Law definition of "majority of all of the members." Again, Charlie's Win is adding the word "all" to the Renewal Clause. That is not allowed in contract interpretation. As stated in *Black's Law Dictionary*, without the word "all", a "majority" is a vote based on those who are present. The non-votes are not counted.

Charlie's Win then makes an argument about "constitutional majority" and points to it's own Exhibit A, stating that the court should find that the Renewal Clause's reference to "majority" actually is a reference to "constitutional majority" which is defined as "all" of the members. (Answer Brief, Pg. 20) First, the term

"constitutional majority" is NOT used in the Renewal Clause. Only "majority" is used. Therefore, the Court should not add the word "constitutional" into the Renewal Clause. As stated above, "majority" when used without a qualifying term like "constitutional" means a "simple majority" which means those owners that are present are counted. (Exhibit A, Answer Brief)

Charlie's Win also states that Gallatin West made no argument about constitutional majority in its brief in District Court. Of course it did not. That is an argument that Charlie's Win would have made, and Gallatin West points out that Charlie's Win failed to make this argument in District Court. Therefore, it should not be considered by this Court.

Charlie's Win then goes on to say that Gallatin West conceded that the votes should be all eligible voters. Gallatin West never conceded this. On Page 24 of the Opening Brief, Gallatin West argued that "If the drafted intend for it to mean something else, then the drafter must qualify it with further information, like 2/3rds of *all* of the Owners *eligible* to vote." Response Brief, Pg. 20. Charlie's Win argued in the Answer Brief that phrase is "exactly what the Third Amendment did when its language says '2/3 majority vote ***of the owners.***" This is not correct. Again, "of the owners" is a prepositional phrase that identifies that the group voting is the owners. In order for it to be "*all"* of the owners, the drafter would

have needed to include some language modifying "majority vote" like "all" or "constitutional" before or inside of the prepositional phrase "of the owners."

Charlie's Win next points out that Gallatin West did not raise a Montana Non-Profit Corporation Act argument. (Answer Brief, Pg. 20-21) That is because it was not necessary to raise it.

The district court erred in a number of ways. As addressed in the next argument, by amending the Third Amendment entirely and replacing it, Gallatin West only needed to satisfy the Amendment Clause and the Renewal Clause did not apply. Even if Gallatin West did need to satisfy the Renewal Clause, it did so. The Renewal Clause as written clearly means that only the votes present are counted because "majority" inherently means the votes of those who are present. Therefore, as only 16 votes were cast and 15 were in favor, clearly more than 2/3rds of the votes cast were cast in favor of extending the Third Amendment for another 25 years.

2. **Gallatin West's vote Complied with the Plain Language of the Amendment Clause and as the Third Amendment was entirely Replaced, a Vote on the Renewal Clause was not necessary. (Argument 1 of the Opening Brief and Argument 3 Answer Brief)**

Gallatin West complied with the Amendment Clause. The Amendment Clause requires 60% of the Tracts to consent, in writing, to amend the Covenants. Therefore, to expand or modify the Third Amended Covenants, 60% of the Tracts needed to vote yes, in writing, which they did.

The Amendment Clause specifically states that it must be amended by "the written consent of the owners of sixty percent (60%) of the tracts in the subdivision." Art. VII, Sec. 6 of the Third Declaration. (Exhibit 1) This is very specific language which ensures that 60% of the Tracts must consent to the Amendment in writing. Gallatin West hired Wayne Jennings of Jenning Law to help them with rewriting their covenants and to ensure that the covenants did not sunset. Mr. Jennings drafted the Fourth Amendment and helped Gallatin West secure the necessary votes. Gallatin West sent out a written ballot and received, in writing, the consent of at least 60% of the tracts. They received 15 written consents out of 24 tracts, which is 62.5%.

There is nothing in the covenants which prohibited Gallatin West from adopting an entirely new set of covenants by the written consent of 60% of the tracts. This Fourth Amendment (like the Third Amendment) had the effect of resetting the clock. It was a wholly new document that fully superseded the Third Amended Covenants.

Charlie's Win apparently argues that in order to modify the entire Third Amendment, you must hold two votes, one that complies with the Amendment Clause and one that complies with the Renewal Clause. First, this was reached as Gallatin West's vote did comply and reach the threshold of both Clauses. However, even if the vote did not comply with the Renewal Clause (which it did), the Association only needed to comply with the Amendment Clause as the entire document was modified, including the Renewal Clause.

Charlie's Win argues that Gallatin West conceded that they were two "wholly separate clauses." (Answer Brief, Pg. 23) Gallatin West did not concede this. Regarding the cited argument, Gallatin West was merely pointing out that the Amendment Clause and the Renewal Clause are found in two separate areas of the document. Not that you needed two separate votes.

Charlie's Win also continually refers to the covenants as being restrictive covenants. (Answer Brief, generally) It is important to note that the Fourth Amendment was entirely less restrictive than the Third Amendment, allowing chickens and other new uses formerly not allowed under the Third Amendment. Furthermore, the "restrictive covenants" contain a number of provisions that have nothing to do with restricting the right of a person to use their property. Instead, the Fourth Amendment contains provisions for road maintenance and plowing of the subdivision roads, maintaining Gallatin West's water rights through the

assessment power and a number of other provisions that allow the Association to maintain, repair, replace and insure their common areas. By amending their document pursuant to the Amendment Clause, Gallatin West was ensuring that it could maintain its common areas, which ensured access for emergency vehicles, maintains the water rights and provides insurance for the community as a whole.

Gallatin West relied on *Windemere Homeowners Ass'n Inc. v. McCue,* 1999 MT 292, 297 Mont. 77, 990 P2d 749 for the proposition that if an amendment clause is broad, then the amendment abilities of the association are broad. M.C.A. § 70-17-901 practitioners as the Grandfathering Act) the legislature effectively overruled the Court's holding in *Windemere,* and it would prevent the Association from amending the Renewal Clause. This is not true. The Grandfathering Act only applies to a residential, commercial or agricultural use restriction that becomes more restrictive than was contemplated by the Covenants. M.C.A. § 70-17-901 It allows those lots that do not vote for an amendment, in writing, to ask for an exemption as long as the owner owns the lot. Once the lot is sold, the new owner takes with the amendments. M.C.A. § 70-17-901 The Renewal Clause is not a use restriction, it is an amendment clause which has nothing to do with use. Furthermore, the Third Amendment specifically references both modifying the Third Amendment and extending or modifying the sunset date. Therefore, it is no a new or unthought of clause as was the case in *Windemere.* Therefore, the

Grandfather Act would not apply to this matter, and certainly did not "overrule" *Windemere.*

Charlie's Win argues that because *Bordas* was decided after *Windemere,* somehow *Windemere* is not applicable? However, this argument was not expanded upon and no cite was given by Charlie's Win. The Court should therefore ignore this "argument" as it is incomprehensible and unfinished.

Nothing in the Third Amendment states that the Renewal Clause cannot be amended by the Amendment Clause. In amending the entirety of the Third Amended Covenants, the owners chose to adopt new language, which sunset the Fourth Amended Covenants in 25 years. By amending, the Owners could have chosen to entirely delete the sunset date to make it in perpetuity, could have shortened it to 10 years, could have lengthened it to 50 years. In this case, they adopted a new sunset date of 25 years. This new sunset date will not occur until August 13, 2040. The Court should find that this is clearly allowed by the plain language of the Third Amendment. Therefore, the Fourth Amendment was properly adopted, runs with the land and is enforceable.

3. **In the Alternative, if the Language in the Covenants is Ambiguous, then the Court should find that Based on the history of the use and interpretation of the Clause, that the Fourth Amendment is enforceable**

(Third Argument in Opening Brief, Fourth and Fifth Argument in Answer Brief.)

There is no question that for almost a decade since the Association filed the Fourth Amendment, the Owners believed and acted as if the Fourth Amendment was enforceable. Gallatin West sent out many letters throughout the years giving notice of alleged covenant violations, including to Charlie's Win. (Opening Brief, Exhibit 4) Furthermore, Charlie's Win acquiesced to the validity of the amendment process. Since purchasing the property on August 5, 2016, Charlie's Win has been paying assessments yearly. (Opening Brief, Exhibit 4) Additionally, Charlie's Win submitted at least 2 projects through the ARC process in the last 4 years: a barn addition, loafing sheds, green house, sign, and a new fence which is approved but not built yet. (Opening Brief, Exhibit 4) Jimmy Holmes, the owner of Charlie's Win, also served on the Board of Directors in 2017. (Opening Brief, Exhibit 9)

Charlie's Win argues that instead of following the Court's own case law on the issue of ambiguity and opening the door to past actions, the Court should instead look to a non-cite opinion out of Washington state, *Blue v. Fale,* 21 Wash. App. 2d 1014 (2022). However, *Blue* is not applicable to an ambiguity argument. *Blue v. Fale's* court specifically found that there was no ambiguity in the language in the

covenants. Therefore, it would not look to past actions as the past actions were NOT ambiguous.

Gallatin West is arguing that if the Court finds that the language in the Third Amendment is ambiguous, it should look at the facts in evidence that clearly show that the owners and Charlie's Win accepted the Fourth Amendment for almost a decade, including having Charlie's Win's sole owner and member, Jim Holmes, serve as a member of the Gallatin West Board of Directors. Mr. Holmes and Charlie's Win should not be able to now make an argument that the Fourth Amendment is unenforceable because one of their desired uses is a clear violation of the Fourth Amendment.

Charlie's Win argues that Gallatin West should be declared to have drafted the Third Amendment since it is the successor in interest to the declarant. However, the law on contract interpretation states: "In cases of uncertainty not removed by parts 1 through 5 of this chapter, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be that party." M.C.A. § 28-3-206.

Technically, the promisors to a set of restrictive covenants are each of the individual owners, not the association. The association is typically simply given the right to maintain, repair and replace the common areas, collect assessments and

enforce the covenants. It is the individual owners that promise to abide by the covenants, and who have the power to modify the covenants. That is certainly the case in Gallatin West. Therefore, Charlie's Win is actually the promisor who is presumed to be the party causing the uncertainty.

Gallatin West did not draft the covenants. The Declarant did. Charlie's Win and the other owners inherited the Declarant's power to modify the covenants. The Association has no power to change the covenants at all. Therefore, the Court must hold any uncertainty against Charlie's Win.

In the alternative that the Court finds the Third Amendment ambiguous, the Court look at the past acts of the parties and hold that the Fourth Amendment is enforceable.

4. **This matter must be remanded if the Court finds in favor of Gallatin West.**

Gallatin West agrees that this matter must be remanded to the District Court if the Court finds that the Fourth Amendment is enforceable.

CONCLUSION

Gallatin West properly adopted the Fourth Amended Covenants pursuant to

the unambiguous language of the Third Amended Covenants. The Amendment Clause of the Third Amended Covenants contains broad language allowing 60% of the tracts, in writing, to amend the covenants. There are 24 lots. 15 lots returned a written ballot voting to adopt the Fourth Amended Covenants, which is 62.5%. Therefore, the Fourth Amended Covenants are enforceable covenants running with the Gallatin West land.

While Gallatin West did not have to comply with the Renewal Clause of the Covenants, and instead could and did adopt new Covenants with a new sunset provision, it also complied with the plain language of the Renewal Clause. The Renewal Clause language specifically states that the "The Covenants as outlined herein shall be in effect for a period of 25 years, that thereafter can be extended by a vote of *2/3 majority vote of the owners*." (emphasis added) (Exhibit 1, Third Amended Covenants, Preamble, "Renewal Clause") According to Black's Law Dictionary, "Majority Vote" has very a specific meaning. It means that only the votes cast are counted towards the 2/3rds requirement. Therefore, because only 16 votes were cast and 15 votes were in favor of the amendment, the vote passed by 93.75%, far more than the required 2/3rds.

In the alternative, if the language is ambiguous, then the historical use and interpretation by Gallatin West and Charlie's Win supports the conclusion that the Fourth Amended Covenants were properly adopted. There is no question that for

almost a decade since the Association filed the Fourth Amendment, the Owners believed and acted as if they were enforceable. Gallatin West sent out many letters throughout the years giving notice of alleged covenant violations, including to Charlie's Win. Furthermore, Charlie's Win acquiesced to the validity of the amendment process. Since purchasing the property on August 5, 2016, Charlie's Win has been paying assessments yearly. Additionally, Charlie's Win submitted at least 2 projects through the ARC process in the last 4 years: a barn addition, loafing sheds, green house, sign, and a new fence which is approved but not built yet. Jimmy Holmes, the owner of Charlie's Win, also served on the Board of Directors in 2017. Therefore, the Fourth Amended Covenants are enforceable.

This case must be remanded back to district court for further rulings on the remaining facts.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word does not exceed 5,000 words, excluding the

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