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PARK COUNTY CLERK
OF DISTRICT COURT
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BY PAMELA PENDILL
DEPUTY

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MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

Daniel K. O'Connell & Valery A. O'Connell & on behalf of themselves as members of Glastonbury Landowners Association.	)	Cause No. DV–11–114
Plaintiff(s),	)	
v.	)	**PLAINTIFFS' REPLY & MOTION TO STRIKE PARTIAL SUMMARY JUDGMENT MOTION**
Glastonbury Landowners Association, Inc. & current GLA Board of Directors	)	
Defendant(s)	)	

Plaintiffs & GLA members-Daniel & Valery O'Connell, hereby file this reply that fully opposes Defendants "Motion For Partial Summary Judgement" and also file this motion to strike Defendants Summary Judgment motion pleadings pursuant to **M.R.Civ.P., Rule 12(f)**, which motion pleadings are immaterial & insufficient as cited below. Attached supporting affidavit is hereby incorporated as if fully set forth herein.

FACTUAL ARGUMENTS AND BRIEF

This motion to strike Defendant's partial summary judgment is pursuant to:

M.R.Civ.P., Rule 12(f) "Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act: **(1)** on its own; or **(2)** on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading."

This motion is warranted for reasons 1-5 below to deny and strike Defendant's partial summary judgment motion based on res judicata:

1. The contested (case DV-11-164) proceeding is not closed, but is currently on appeal showing the capacities of the parties differ, thus Res judicata does not apply. *Olson v. Daugenbraugh*, 2001 MT 284, ¶ 22, 307 Mont. 371, 38 P.3d 154. In other words, Plaintiffs have not yet been "afforded a full and fair opportunity to litigate the issue that may be barred."*McDaniel v. State*, 2009 MT 159, ¶ 28, 350 Mont. 422, 208 P.3d 817. **A copy of that case (DV-12-164) notice of appeal is attached hereto.**

2. Also the Erickson variance included in that case Orders June 19th was copied from Defendants summary motion, but the Erickson variance issue was not a claim for relief in that complaint DV-12–164. As proof, this case DV-12-164 mentions the Erickson Variance only in context to the Erickson contracts cited below.

3. The case DV-12-164, Erickson contract issue is insufficient, immaterial being distinctly different from and not the same issues to this case involving Defendants "finding of facts" for Erickson variance process at issue. That case (DV-12-164) involved only Erickson contracts. Plaintiffs affidavit attached to that case only argued against the contracts themselves which merely summarized in small part the variance criteria flaws mentioned in those contracts ..." This case involves Defendants "findings of facts," a key issue found nowhere in that case having nothing to do with this issue regarding "findings of facts." As proof these "finding of facts" pages 1-8 (attached to this motion) are not mentioned nor found anywhere in the June 19th Orders nor in those pleadings.

4. Any Erickson variance issue included in that case Orders June 19th was mistakingly copied from Defendants summary motion, because the Erickson variance issue was never a claim for relief in that complaint DV-12–164. As proof, that case DV-12-164 mentions the Erickson Variance only in context to the Erickson contracts:

page 7 of the DV-12–164 case says "**1.** For the Erickson contracts, one of its stated purposes says the GLA grants the Ericksons requested variances..." Such conditions of contract or the contracts themselves mention the Erickson variances which contract case sought only to bar the Erickson "**inperpetuity**" contracts contrary to §72-2-1002 & §72-2-1005, MCA., and contrary to allowable easements listed in **70-17-101, MCA, and contract conditions contrary to various GLA governing documents. In fact that case claim for relief mentioned on page 15 says"**

"Petitioners respectfully pray this Court for issuance of a **writ of mandamus** directing Respondents to ... cancel two illegal contracts with the Ericksons, which is the subject of this

petition as to form and/or content. **Thus that case DV-12–164 pertained ONLY to the Erickson contracts themselves,** not the Erickson variances which included six variances total.

As for this case, the pleadings below are not found in that case. For instance amended complaint page 12-13 says:

"Plaintiffs have warned the GLA Board for years about misusing its variance clause per GLA Covenant 12.01*. Six variances were tentatively granted the Erickson Project Review in July 2011 for the stated purpose to minimize Erickson's digging or "cuts & fills." However this purpose is contrary to Masterplan 4.2(1) "circumstances exist over which the Landowner has no control" (Complaint at ¶*46* & no floor plans, no complete project review application). Instead Ericksons can minimize cuts and fills by building where land is flatter.

This present case page 16 claim for relief #7 asks to: "**7th:** Reverse all Defendants fact finding [finding of facts], ... & the Erickson project review approval for legal failings of this project review" due to abuse of GLA's variance clause used to grant Ericksons six variances..."

And this present case page 13 requests injunction against GLA Board for their:

(a) "Erickson ...incomplete [project] review"

(b) the Erickson project denies Plaintiffs property rights of "a predominately rural community," and as per GLA Master Plan 1.2 (pg.4) and Covenant 9.05 does not allow "multi-family housing . . . in the Community."

(c) not requiring the Ericksons to subdivide "cheats the entire GLA membership out of these additional subdivision assessment fees as per GLA Covenant 11.03(a) "$120 land assessment for each parcel and 11.03(b.) "$120 dwelling assessment for each dwelling unit located on each parcel . . ."

(d) Mr. O'Connell, a Board member, was illegally denied knowledge as to any of the Boards actions and/or meetings that produced such "findings of facts" for the Erickson's project review." Which findings of facts were approved 5 minutes after they were read aloud on July 14, 2011.

(e) Board member, Mr. O'Connell was ill-prepared to vote on such surprise "finds of facts" that were approved by the GLA Board moments after being read aloud after the private meeting on July 14, that Mr. O'Connell board member was barred from attending that meeting. And several findings of facts contradict the incomplete Ericksons project review application itself.

(f) At least one, if not many "findings of fact" appears to be a lie which states "the variance is the minimum possible remedy under the circumstance." Since the Ericksons have the option or remedy to subdivide the lot, or use a family conveyance, or move two out of four proposed buildings to lot 90 as possible remedies that are available; then these three other remedies do not even require a variance (which variances are considered a last resort, not a first remedy), then these three other remedies are NOT minimum possible remedies" as GLA covenants require.

5. **Other just reasons to deny Defendants partial summary judgment motion:**

The Mt. Supreme Court ruling in *Glacier Tennis Club at the Summit, LLC v. Treweek Constr. Co., Inc.*, 2004 MT 70, ¶ 21, 320 Mont. 351, ¶ 21, 87 P.3d 431, ¶ 21 (citations omitted), "the party moving for summary judgment has the initial burden of proving that there are no genuine issues of material fact that would permit a non-moving party to succeed on the merits of the case, and if the moving party meets that burden, then the non-moving party must provide substantial evidence that raises a genuine issue of material fact in order to avoid summary judgment in favor of the moving party." Glacier, ¶ 21 (citations omitted).

Attached affidavit, and factual evidence below proves there are many material facts for the Erickson issues yet in dispute. M.R.Civ.P., Rule 56(c)(3) says, "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Discovery is needed in order to show that Defendants are not entitled to judgment, especially since it appears the Erickson variances no longer exists and not ripe for judgment.

For instance, this complaint amended a few months ago states at page 12-13, "There is a question as to wether the Erickson project review [for variances] was fully revoked by the Ericksons in 2012. Plaintiffs' were told in court pleadings (DV-12-220 and Bolen"s letter) that Ericksons have removed all requests for variances. However these pleadings are in question as to [their] validity, and discovery is needed to verify this."

As proof, attached is page 4 of GLA's Answer to the Writ Complaint (DV-12-164) which says:

"First Affirmative Defense–Ripeness : All claims involving the Ericksons are not ripe as no variance agreement was ever been executed. At this time, the Ericksons have not met the conditions of the variance and cannot proceed under the variance. Therefore, as the conditions of the variance which is the basis for all of the Erickson claims are not met and Erickson cannot proceed pursuant to the variance[s], these claims are not ripe."

Right after this Answer above given Oct. 2012, the Defendants filed a motion to strike and included a letter (marked "Exhibit B") mailed to all GLA members written by the Board Defendants & Bolen. This letter attached to this motion says at the bottom of page 1:

"In the meantime, the Erickson family... has withdrawn their request for a variance. The letter from Pete Erickson is attached."

As stated on page 2 of that partial summary judgment motion, the "Erickson variance" issues are the sole basis for that motion. However, Defendants own testimony cited above call into question the ripeness of the variance issues and wether or not they now exist after being

withdrawn. Discovery is needed in order to ascertain wether or not Pete Ericksons resubmitted any of his six variances requested, and if so, did the Board approve them. This last question is assumed to be no, since Plaintiff as GLA members were not informed of any Board action to that effect. Therefore the court must assume "all claims are not ripe" for the Erickson issues or "withdrawn" as Defendants said above. In the mean time, these disputed material facts yet require discovery. Discovery is also needed for the key issue above regarding the Erickson variance "finding of facts" attached; which "finding of facts" issue is yet in dispute and not ripe for summary judgment either.

CONCLUSION

As shown above, this motion is warranted for just reasons to deny and strike Defendant's partial summary judgment motion that is "not ripe" as they claimed, lacking discovery, and because res judicata is insufficient & immaterial to these claims above not found in that case (DV-11-164) not settled yet on appeal.

That contested proceeding is not closed, but is currently on appeal showing the capacities of the parties differ, thus Res judicata does not apply. *Olson v. Daugenbraugh*, 2001 MT 284, ¶ 22, 307 Mont. 371, 38 P.3d 154. In other words, Plaintiffs have not yet been "afforded a full and fair opportunity to litigate the issue that may be barred." **McDaniel v. State, 2009 MT 159, ¶ 28, 350 Mont. 422, 208 P.3d 817.**

Also the summary motion is insufficient for using that case DV-12–164, because that writ case & Orders are being challenged on appeal, may be overturned on appeal thus insufficient evidence. Also the Erickson variance mentioned in that case Orders (June 19th) was immaterial to that case as not the same issues or mistakingly taken out of context to that case Erickson contracts. Those Orders mention the Erickson Variance in context to the Erickson contracts which did not include this case issues involving Defendants "finding of facts" and "variance process" as Defendants call this issue. In fact, the injunction issues & claims cited above, and "finding of facts" regarding Erickson variances were NOT found in that case DV-12–164. This is definitive proof that this case issues above were not the same as that case. The

"findings of facts" (attached to this motion) is a key issue in this case not even mentioned in that case (DV-12-164), nor in the June 19th Orders nor in the pleadings for that case. Yet the "Erickson variance process" issues in this case are the sole basis of Defendants partial summary judgment. Defendants summary motion, page 2, admits this case issue is about the "Erickson variance process;" for which Defendants said were "all withdrawn" and "not ripe." Thus showing this case is distinctly different from that case issues. Discovery is needed the verify the existence of the variance issues, and for the "finding of facts" issue, facts in dispute. In the mean time, this court without any proof to the contrary must assume "all claims are not ripe" for the Erickson issues or "withdrawn" as Defendants said above. After all, since these issues may no longer exist, this is a material fact in dispute too.

Therefore, Defendants motion pursuant to res judicata should be stricken as insufficient & immaterial, not the same issues above, "not ripe" for material facts in dispute, premature for a pending case appeal, and premature pending discovery genuinely needed to divine if the Erickson issues even exist anymore.

Respectfully submitted this **26th** day of July, 2013.

Signed: Daniel O'Connell   Signed: Valery O'Connell

Certificate of Service

A true and correct copy of forgoing document(s) were sent to the following parties via first class mail on this same day to:

Sixth Judicial District Clerk of Court
414 E. Callender St.
Livingston, Mt. 59047

Hon. Judge David Cybulski
573 Shippe Canyon Rd.
Plentywood, Mt. 59254

Brown Law Firm, P.C.
315 N. 24th St. (PO Drawer 849)
Billings, MT. 59103-0849

By: Daniel O'Connell   By: Valery O'Connell

6. UNFINISHED BUSINESS

6.1 Project Review – AA/RS

6.1.1 Lot 38-B (NG) - Yaney - Factory-built home variance – AA

Alyssa reported that there have been no new developments on the project.

6.1.2 Parcels 90 & 91 (SG) - Erickson Preliminary Approval fulfillment of conditions – AA

The Board reviewed documents prepared by Susan Swimley for meeting the requirements of the conditional preliminary approval. There was concern about possible future commercial uses of the property and previous input from landowners. The wording of the Use and Development Agreement, paragraph six, was edited from the third sentence to read as follows: "*In granting the variances and project approvals, the commercial uses of the property such as for a bed and breakfast or commercial lodging facility are prohibited.* [remainder of sentence deleted] *Should the property owner(s) wish to seek removal of this prohibition, the requested change must be approved by the Board.*" The rest of the paragraph remains the same.

MOTION: Alyssa motioned and Sheridan seconded,

Whereas Article 6 Section B2 of the GLA Bylaws states that the Board has the power and duty to enter into contracts and agreements, and that conditions a, b, and c of this section which require member approval of such contracts are not all present in the conjunctive and therefore do not apply;

Whereas the Board acknowledges that the Ericksons have met the criteria of the conditional, preliminary approval granted July 14, 2011, by way of the following agreements: Acknowledgment of Road Policy, the amended Use and Development Agreement, the Declaration of Building and Transfer Restrictions Easement, and the Road Maintenance Agreement;

Erickson Contracts

Be it resolved that the Ericksons residential construction project on Parcel 91, South Glastonbury, is approved with the following conditions:

1. Reseed disturbed land; and
2. Obtain necessary electrical, plumbing and septic permits.

Motion carried unanimously.

6.2 Road Management Committee – WS/RS

6.2.1 Jupiter Lane Improvements

Alyssa gave background on Sheridan's subdivision project, which the GLA approved in 2006. Jupiter Way, a Tier 3 road, has not yet been brought up to the new Park County standards. William, Chair of the Road Committee, recommends upgrading the road to fulfill GLA's responsibility to provide access. Alyssa researched with William what other Tier 3 roads exist that are not up to Park County standards; there are no others in North or South Glastonbury. Laura questioned the cost and said that the GLA budgeted only for the Jupiter Way apron off Capricorn. There is a need to check the budget for the funds before proceeding. It was also brought up that there had been only one bid on the road work. Discussion.

ACTION ITEM: ***William*** – Get 2 bids on the Jupiter Way road work to present to the Board for review.

GLA's Answer to Writ Complaint (DV-12-164) Oct. 12th

AFFIRMATIVE DEFENSES

First Affirmative Defense – Ripeness

All claims involving the Ericksons are not ripe as no variance agreement was ever been executed. At this time, the Ericksons have not met the conditions of the variance and cannot proceed under the variance. Therefore, as the conditions of the variance which is the basis for all of the Erickson claims are not met and Erickson cannot proceed pursuant to the variance, these claims are not ripe.

Second Affirmative Defense –

If the variance conditions had been met by the Ericksons, the documents governing Glastonbury allow for the variance and Glastonbury would have followed all of the proper procedures in granting the variance.

Third Affirmative Defense

The Glastonbury governing documents allow Glastonbury to hire a management company to manage the affairs of Glastonbury.

Fourth Affirmative Defense

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

Fifth Affirmative Defense

Defendant denies each and every allegation not specifically admitted herein.

Sixth Affirmative Defense

The claims asserted against Defendants in Plaintiff's Complaint are barred by the equitable doctrines of estoppel, laches, and/or waiver.

Seventh Affirmative Defense

GLASTONBURY LANDOWNERS ASSOCIATION, INC.

P.O. Box 1862, Bozeman, Montana 59771

October 24, 2012

Dear GLA Members:

I am writing to provide you with an update on the legal matters for which the community has been engaged for the past year and a half, and other issues of importance.

As you may recall from previous correspondence, Valery and Daniel O'Connell have filed several lawsuits against the Board, the corporation and several individual Board members.

Beginning in June of 2011, the O'Connells filed an action, Park County DV-2011-114, requesting, among many other things, a restraining order to prohibit the Board's approval of the variance requested by the Ericksons for their building project in South Glastonbury. The O'Connells sought to obtain a default order against the corporation without the corporation having been named nor served. Our attorneys got the Court to set aside the default and to order service of process. Our attorneys then moved for a dismissal of the action and the Court granted the dismissal ordering the O'Connells to pay costs and attorney fees. The O'Connells then appealed to the Montana Supreme Court. Briefs by all parties have been filed and we are awaiting the decision of the Supreme Court. The Court could uphold the Judge's dismissal or return the matter to Park County for hearings on some of the issues. Because some of the Board was sued individually and then the corporation was added, and due to potential conflicts, we were required to employ two attorneys for the defense, Frederick Landers and Alanah Griffith, attorneys at law, both practicing in Bozeman, Montana.

In the meantime, the O'Connells filed another action against the Corporation, Park County DV-2011-193. After numerous motions, counter motions and discovery, and a request for permission to file a counter claim, mediation was ordered by the court. Mediation is for resolution, not for determining who is right or wrong. During mediation, compromises by both parties were made and case no DV-2011-193 was dismissed with prejudice with each party bearing their portion of the costs. The term "with prejudice" means that all of the issues raised in that action are concluded and cannot be resurrected. The board agreed to what it considers a few minor concessions such as not casting proxy votes, and changing the customary practice of the president not voting at board meetings since he would be chairing the meeting, and the O'Connells dismissed their claims. Attorney Frederick Landers represented our Association in the foregoing matter.

A few weeks ago, the O'Connells filed another lawsuit, Park County DV-2012-164, challenging the legality of the Erickson project (the same project addressed in the first lawsuit, no. 114) and challenging the legality of the Board's decision to hire a professional management company to provide the necessary administrative duties for the Association, in this case Minnick Management. Our attorney in this matter, Alanah Griffith, has filed an answer on our behalf denying any validity to the claims by the O'Connells. In the meantime, the Erickson family, frustrated by the repeated lawsuits, has decided to abandon their dreams and has withdrawn their request for a variance. The letter from Pete Erickson is attached.

EXHIBIT B

This letter within GLA's Dec. 19th "Response to Plaintiffs Motion for Declaratory Judgment

Daniel & Valery O'Connell-**PRO SE**
P.O. Box 77
Emigrant, Mt. 59027
406-577-6339

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OF DISTRICT COURT

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MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

Daniel K. O'Connell & Valery A. O'Connell & for and on behalf of members of the Glastonbury Landowners Association. Plaintiff(s), v. Glastonbury Landowners Association, Inc. Board of Directors Defendant(s)	Cause No. DV-2012-220 Cause No. DV-2012-164 **PLAINTIFFS' NOTICE OF APPEAL**

NOTICE is hereby given that Daniel and Valery O'Connell, the Appellants above-named and who are the plaintiffs and appellants in that cause of action filed in the Sixth Judicial District, in and for the County of Park, as Cause No.DV-12-220 &DV-12-164, hereby appeals to the Supreme Court of the State of Montana for decree from final judgments or orders entered in such action on the following days: June 19, 2013, & June 26, 2013, & and any other pertinent Orders.

Plaintiffs (the appellants), pursuant to rule App.R.Civ.P., Rule 7(3), requests from the Park County court reporter, in writing, a docket of pleadings on file and transcript of the proceedings deemed necessary for the record on appeal on this same date the notice of appeal was filed.

THE APPELLANT FURTHER CERTIFIES:

1. That this appeal is not subject to the mediation process required by M. R. App. P. 7.
2. That this appeal is not an appeal from an order certified as final under M. R. Civ. P. 54(b). A true copy of the District Court's certification order is attached hereto as Exhibit "A."
3. That if a notice is required by M. R. App. P. 27, it would be given within 11 days of the date hereof, to the Supreme Court and to the Montana Attorney General with respect to a challenge to the constitutionality of any act of the Montana Legislature.
4. If there is transcripts of the proceedings in this cause, such transcripts have herein been ordered from the court reporter contemporaneously with the filing of this notice of appeal, and thus Appellant has complied with the provisions of M. R. App. P. 8(3).

October 18, 2011
Findings of Fact for the Erickson Project

Re: Findings for the Erickson Project and related variance for Parcels 90 & 91 SG

In considering the Erickson project, the Board found the following facts:

<u>From GLA Board of Directors Meeting June 13, 2011:</u>

1. Alyssa Allen investigated potential problems and ways the Erickson project would affect fire safety, sanitation, ground water, road usage, view shed, etc. by contacting Mike Inman at the Park County Planning office, Greg Coleman with the Paradise Valley Fire Department, and Barbara Woodbury the County Sanitarian. Furthermore, a site evaluation will be done by C&H Engineering which will have to show that there will be no pollution to Golmeyer Creek and that drain fields will meet State/County requirements as a condition for project construction.

2. The architects have stated that there is only one foundation for each building.

3. To reduce developmental impact on the land, the cluster of buildings will be built in one consolidated location on Parcel 91 with an agreement, in the form of a covenant running with the land, that no building will take place on Parcel 90 into perpetuity. This will be done to preserve the natural environment by avoiding long driveways and scarring the land with cuts and fills. Ericksons will use stone and recycled wood materials in the buildings to fit in with the surrounding land.

4. Ericksons have agreed to improve the section of Upper Sagittarius Skyway to the cul-de-sac at their own expense. This will make the common use land more accessible to all landowners. Ericksons will pay for snow removal on Upper Sagittarius Skyway when they need access in the winter.

5. A fire fill tank of 20,000 gallons will be installed close to the cul-de-sac, and this cistern could be used for fire protection for all High South properties at the discretion of the Fire Department. Greg Coleman of the Paradise Valley Fire Department pointed out that a development with a watered green lawn is easier to protect than dry grass in the event of a fire. Photos of the building site showed that all trees are much more than 100 feet away from building site.

6. Input submitted by neighboring landowners on variance response forms indicated that none of the adjacent landowners objected to the variance request. One non-adjacent landowner gave negative feedback.
   a. Owner of Parcel 89 stated that he agrees with the project.
   b. Owners of Parcel 92 indicated that they liked the residential nature of the project.
   c. Owner of Parcel 93 responded that "it is an appropriate use of the land and preserves the natural resources."

d. Tim Brocket, non-adjacent owner of Parcel 88A, stated that he was concerned that allowing for the residential compound would harm the view shed, open Glastonbury to high density development, cause a fire hazard, and potentially pollute the common land and Golmeyer Creek. He recommended that the project be moved to the top of the hill or the corner of Parcel 90 and 91 so that a variance would not be needed. Tim has also stated that he approves the variance in principle, and has no problem with a residential compound, but was concerned that it would turn into a subdivision or commercial operation.

7. At this meeting, the Board approved a list of conditions to be met for approval of the variance:
   a. Limit number of dwellings on both parcels to five (later changed to four) dwellings on Parcel 91 and no dwellings on Parcel 90. This agreement would be drawn up by the Erickson's attorney and also restrict future commercial use of the residential cluster.
   b. Ownership of both parcels stays as one ownership entity and cannot be subdivided.
   c. Must follow state/county laws regarding sanitation, septic, drain fields, etc.
   d. The GLA does not regulate fire protection, therefore the Ericksons will abide by all fire regulations.
   e. The last .6 miles of Sagittarius Skyway is considered a jeep trail and is not maintained by the GLA. Any improvements to the road will be done voluntarily by the Ericksons at their own expense. The Ericksons are responsible for any damage they cause to the association roads leading to their parcels before, during, and after their construction activities.
   f. Snow plowing of the last .6 miles of Upper Sagittarius Skyway will be paid for by the Ericksons when they need access.
   g. Each dwelling will have impact fees for construction.
   h. Each dwelling pays an assessment.
   i. The GLA is not obligated to provide any road maintenance.
   j. Property is not to be resold as a Commercial Lodging facility such as a B&B or guest ranch because of road impact.
   k. Variance approval is for permission to build 5 (later changed to 4) dwellings as stated in the Erickson's site plan with the 25-foot setback for 3 of the dwellings.
   l. Ericksons must adhere to their site plan as they proceed with the buildings regarding size and location. The first phase is for buildings 2 and 5 (later changed to 2 and 4), which are shown in the application.
   m. Ericksons will submit application details and individual project review forms for the other 3 (later changed to 2) buildings when they are ready to proceed with Phase 2.
   n. Outbuilding development will be limited and the Ericksons will submit a project review application for any future outbuildings.
   o. Limit commercial activity.

p. Require the Ericksons' attorney to draw up an agreement that addresses all the Board's concerns and requirements.
q. Have Hertha Lund, GLA attorney, review the agreement.

8. The conditions of this variance request were tabled until the meeting on June 27, 2011, therefore the variance was not voted on.

From GLA Board Meeting on June 27, 2011:

9. The Ericksons changed their variance request from 5 dwellings to 4 dwellings. Documents reflecting the updated variance request were distributed to members of the Board. Documents from Cikan Architects summarizing the findings of Attorney Susan Swimley, outlining the variance requests, were also distributed to the Board along with the revised site plan of 4 dwellings.

10. Ericksons reaffirmed their commitment to make improvements to GLA roads leading up to the proposed building sites at their own expense.

11. Ericksons reaffirmed their understanding that the GLA is not obligated to maintain the road and provide snow removal on Upper Sagittarius Skyway.

12. Susan Swimley presented evidence on the hardship of topography that would exist if the buildings were located on Parcels 91 and 90, how the overall density between the two parcels would stay the same, that there would be no added impact to the roads, that the cluster of buildings would minimize scarring to the land, and there would be less visual impact on neighboring properties.

13. The 25-foot variance was requested due to a topographical hardship. If a 50-foot setback was used, it would force the project to be constructed on steep terrain. The 25-foot setback is to allow the project to be constructed on the flat terrain of the site. There is still ample room from the common use area and the access point to the common land is not affected. Three of the buildings are one story high and all the buildings are designed to blend into the landscape.

14. The project does not change the tract size and density remains the same.

15. The conditions of the project do not require the GLA to enter into a contract with the Ericksons.

16. Should the development become commercial in the future, the GLA is not obligated to provide road services. Maintenance of the roads is an obligation to a reasonable standard, and the standard is set by the GLA.

17. The "Bambeday" document is not a reflection of the actual variance request and should only be used by the architect to understand the general design principles the Ericksons were seeking with their project.

admitting Bambedgy doc applies

18. Architect Frank Cikan stated that developing the project on two parcels would disallow the use of the medicine wheel design and destroy the medicine wheel concept and, therefore, the whole design around the motif would be gone.

19. Necessary documents ensuring that the GLA be protected from road liability would need to be in place before approval.

20. The assessments to be billed would include 4 house assessments and 2 land assessments.

21. As a way to ensure that no further dwellings would be built on Parcel 90, the 2 allowed dwellings for Parcel 90 could be billed in the assessments as pertaining to this parcel. Essentially, each parcel would be billed for 1 land assessment and 2 dwelling assessments.

22. Multi-family dwellings refer to separate families, not families of origin. The design intent of the Erickson project is not to have multi-family dwellings.

23. Board will review site plans for the 4 buildings, which includes the specific details of the first 2 buildings proposed for Phase 1. When the other 2 buildings for Phase 2 are intended to be built, the detailed plans will be submitted for review by the Board.

24. Any future outbuildings would need to be reviewed through the GLA project review process.

25. Impact fees for the variance request would need to be adjusted on the application to reflect the actual costs incurred by the GLA in processing the application.

26. The Board approved a preliminary variance approval based on the following contingencies:
    a. The GLA and the Erickson's attorney will formulate a Road Policy acknowledgement that protects the GLA into perpetuity regarding its obligation to provide road services to Upper Sagittarius Skyway. The policy will indicate that the Ericksons acknowledge and accept the GLA Road Policy, and that the GLA is not obligated to provide an increase in road maintenance and snowplowing services over the current and historical levels of service, regardless of any road improvements made to Hercules Drive and/or Sagittarius Skyway. The road policy document will reference Covenant 8.01(c) and the GLA Road Policy. The document will include that no snow removal or maintenance services are required by the GLA between Parcels 88 and 93 on Sagittarius Skyway, since this area had not been intended for year-round access. This road policy will run with the land in the event that the Ericksons transfer their property.
    b. The project and all proposed documents and agreements will be reviewed by Hertha Lund, GLA attorney, for her approval before the preliminary

approval can be valid, and adjustments to the project can be made to incorporate any recommended changes.

c. The preliminary approval for the project is based on residential use. A legal way to constrain commercial activity such as a B&B or commercial lodging facility will be established. If, in the future, any commercial use of the property is contemplated (that requires licensing of any kind or has an impact on road usage, water, sewer, or noise), it shall require approval by the GLA, and at the Board's discretion; this may include a "High South" neighborhood area review prior to any commercial activity being allowed. Any commercial activity will be reviewed under applicable regulations at the time. This agreement will extend into perpetuity in case the property is sold.
d. Applicable assessments for 2 dwellings and 1 land assessment will be charged equally on each of the Parcels 90 and 91.
e. A legal way to limit any further dwellings on Parcel 90 will be established and run with the land.
f. No further dwellings shall be allowed beyond this four dwelling development on either Parcel 90 or 91. This covenant shall run with the land.
g. A reasonable basis for maintaining the roads impacted by the Erickson's construction activities will be established, specifically but not limited to Hercules Drive and Sagittarius Skyway, and the Erickson's will agree to remedy any damage to the roads caused by their construction activities throughout the 2 different phases of the project. Appropriate repairs, as shown by the GLA, will be made at the Erickson's expense.
h. The Erickson's will agree to pay the GLA for extra expenses related to the processing of this variance, such as attorney costs incurred at the July 14, 2011 meeting.
i. Once the contingencies for approval are met, the standard conditions of approval will be added such as obtaining necessary permits and reseeding disturbed land.

27. The motion to approve a preliminary variance was passed.

From GLA Board Meeting on July 14, 2011:

28. An update to the Erickson's application (dated 6/27/11) was distributed to the Board showing how the number of residences was reduced from 5 to 4. Certain areas on the application where changes had been made were initialed by Mr. Erickson, and included an update to the impact fees to be charged so these would be based on the actual administrative and legal costs incurred by the GLA in processing the variance. A new site map with building footprints for the 4 residences was included.

29. Attorneys Hertha Lund and Susan Swimley responded to questions from the Board, Landowners and Guests. The following points were covered:
    a. Commercial Activity: Hertha stated that the GLA's governing documents allow certain types of commercial activity. An applicant can agree to limit

certain types of commercial activities and the Board can take that into consideration for a variance. This limitation would then become a covenant for that parcel/lot and runs with the land.

b. Contracts & Hardships: The Board can enter into contracts. The Board has the power to determine what it believes is a hardship when considering a variance, and may require conditions and restrictions before granting a variance.
c. Fire Codes: It is the County's job to enforce fire codes.
d. Multi-Family Dwellings: Valery O'Connell expressed concern that the five children living with the parents in the four dwellings constitute a multi-family dwelling. Susan Swimley stated that it is the job of the applicant to meet criteria of the governing documents, which is why she recommended that the Erickson's change their original plan from 5 dwellings to 4. Hertha stated that the Board has to determine, based on the governing documents and the definitions, if this project is a multi-family dwelling. Laura stated that the intent of the multi-family wording in the Master Plan was to prevent apartments and condominiums.
e. Subdividing: Daniel O'Connell stated that the Erickson's should subdivide the two parcels and exhaust all possibilities before asking for a variance. Hertha stated that it is not required by the governing documents that the Erickson's exhaust all possibilities before applying for a variance.
f. Road Access: Peter Naclerio expressed concern that the GLA would be liable to maintain 12-month road access to the end of Sagittarius Skyway if this variance were granted. Hertha stated that the Road Policy is very clear and the GLA will not be liable to maintain 12-month access.
g. Commercial Use: Tim Brockett expressed concern that the 4 dwellings could be used in the future for a retreat or other commercial use, especially if the property sold. Susan Swimley stated that future owners would be bound by any agreement between the GLA and the Erickson's to limit commercial use. If a future owner wanted to use the property for commercial purposes they would have to apply for a variance.
h. Conservation Easements & Limiting Development: Hertha stated she does not recommend conservation easements, and this did not have to be pursued for this variance. Daniel O'Connell raised the concern that limiting future dwellings on Parcel 90 is a limiting of property rights. Susan Swimley stated that the Erickson's are free to choose to limit development for themselves more than the Board can limit them. The Erickson's can choose to restrict all future dwellings on Parcel 90 and are free to adopt restrictive covenants for their own land that would be established in addition to the GLA Covenants.

30. The following motion was made and voted on:
Section 4.2 Criteria:
a. Exceptional circumstances exist over which the landowner has no control in that both lots have significant severe slopes which severely restrict the landowner's ability to locate any structure on the properties other than the chosen site which is a relatively flat portion of Lot 91.

b. The variance is not materially detrimental to neighboring properties. With the clustering of the residential dwellings the visual impact is significantly reduced as to the neighboring private landowners. The clustering of four residential dwellings is not materially detrimental to the commonly-owned land and the proponents will construct an improved road making access to the common land much easier, thus allowing people who are entitled to enjoy the common land easier access. The same is true for forest service access since that is through the common land.
c. The variance is the minimum possible remedy for the particular circumstance. The two large lots owned by the Ericksons are granted four dwellings. By placing the four dwellings in one location there is no increase in the number of dwellings while reducing the overall impact to the adjacent private land, reducing road cuts and fills and increasing access to the common land and forest service land. In the absence of the variance both lots would be subject to construction including cutting, filling and blasting which would be more visible and cause a greater impact on the community.
d. The variance meets all local, county and state requirements.
e. The variance does not seek a reduction in acreage from the minimum acreage and does not increase the number of lots/tracts beyond that which was established in the Residential Topographical Areas and Density Schedule.

Section 4.0 Criteria:

f. The special and unusual circumstances related to these lots are the fact that there is very little naturally flat area which lends itself to building without significant cuts and fills and that the lots are adjacent to commonly-owned land and forest service land instead of privately owned lots. Requiring the owner to put two homes per lot causes an undue hardship by requiring the owner to interrupt the natural topography. The interruption and need to cut and fill to build two dwellings on each lot is an unnecessary hardship when the same number of dwellings can be located on a naturally flat area which does not require the changing of the landscape to construct the same number of dwellings.
g. The variance request is not materially detrimental to the neighboring properties. Reducing the setback from 50 feet to 25 feet does not affect any private land since the setback is adjacent to forest service boundary and the common land so there is no visual impact on any private land. The 25-foot setback does not affect the use of common land or forest service land. There will be very little, if any, visual impact on the common land due to topography.
h. The variance is the minimum possible remedy under the circumstance. The original covenants allowed a twenty-five foot setback. The 25-foot setback is consistent with the original setback requirements before the newer 50-foot setback requirements were changed but there are no private dwellings affected by the 25-foot setback. The Master Plan allows the 50-foot setback be reduced where the 50-foot setback is not possible. In

order to get the appropriate separation of buildings for both visual impact and fire protection there is not sufficient space without significant excavation and radically changing the design concept. The variance is the minimum possible under the circumstance as it would otherwise force the Ericksons to make significant alterations to the terrain and to their planned residential dwellings.

i. The self-imposed restriction on Lot 90, which would be granted for enforcement by the GLA or other 3rd party, does not require an amendment to the Master Plan. The offer to file a restriction simply informs everyone that no dwellings will be constructed on Lot 90.
j. There appear to be no increases in fire risk caused by the variance request. These residential dwellings will not be constructed in a heavily forested area, and by clustering them rather than having them separated into two lots, there is no increase in fire danger.
k. There are no alternate provisions for processing a variance request when the property is adjacent to common land.
l. Neither of the requests for variance presented seek a variance as contemplated in Section 4.2.4 of the Master Plan in that no reduction of acreage is sought nor is there a change to the density.
m. For the Ericksons to build on two separate lots would be an undue hardship in that it would force the family to live apart, at a distance of over 1,000 feet. This distance is hard to cover, especially in the wintertime. Allowing them to construct a cluster of residential dwellings in close proximity would alleviate this unnecessary hardship.
n. The Erickson's respect for the land makes it undesirable for them to unnecessarily scar the land with long driveways, cuts and fills.
o. The previous conditions established by the Board stand.

31. The variance was approved per the above motion.