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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.)

**AFFIDAVIT IN SUPPORT OF
MOTION TO STRIKE & DENY
SUMMARY JUDGMENT MOTION**

Glastonbury Landowners Association, Inc.)
& current GLA Board of Directors)
Defendant(s))

STATE OF MONTANA)

:SS

County of Park)

Plaintiff(s) Daniel and Valery O'Connell, on our oath deposed and state to the best of our knowledge and belief, the information herein is true, correct, and complete, as follows:

- (a) We are GLA members/landowners both over the age of 18, of sound mind to lawfully file this affidavit for haveing personal knowledge of such matters herein especially after having attended most GLA meetings since 2007.
- (b) In July 2011, 7 GLA Board Directors approved the Erickson "finding of facts" and gave conditional approval for their project review. This condition was regarding if pending contracts could be agreed to and signed (attached to case DV-12-164); which Erickson contracts had to do with commercial use of property, easements, and cited variance criteria. The writ sought to prohibit those contracts. In fact 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 ..." as follows: "GLA Board tentatively gave Ericksons approval for 6

variances for 4 proposed Department store size buildings on one undivided lot 25 feet from Plaintiffs' common land property not 50 feet from the property line and not 50 feet apart as the covenants require. In fact Plaintiffs affidavit attached to that case explained why the contracts should be prohibited, because: 'This clustering four huge 2 story wood sided buildings together 15-25 feet apart on WUI forest designated land is contrary to state fire prevention and WUI defensible space requirements, creating liability and fire hazard according to Emigrant Fire chief; all materially detrimental to Plaintiffs adjacent common land property. Only 5 landowners contacted were bribed into agreeing to the Erickson project when promised their shared narrow dirt road would be widened and graveled in High South. The Erickson contracts were also called "in-perpetuity" agreement "to never construct anything on their lot 90" as illegal, non-enforceable agreement in violation of Montana constitution & contrary to GLA covenants that run with the land allowing a max. of 2 residences on lot 90. The covenants only allow 2 residences on Ericksons unsubdivided parcels (not larger parcels), per Master plan 1.1.'

- (c) 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 per:

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.

- (d) 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, being distinctly different from and not the same issues to this case involving Defendants "finding of facts" for Erickson variance process at issue. Any Erickson variance issue included in that case Orders June 19th was mistakenly copied from Defendants summary motion, because the Erickson variance issue was never a claim for relief in that complaint DV-12-164.

- (e) The factual evidence proves there are many material facts for the Erickson issues yet in dispute, as contrary to M.R.Civ.P., Rule 56(c)(3). Such factual evidence includes attached 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.”

(f) Defendants own testimony cited above call into question the ripeness of Defendants motion for summary judgment regarding 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. Showing the summary motion pursuant to res judicata should be stricken as insufficient & immaterial, not the same issues, “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.

FURTHER AFFIANT SAYETH NAUGHT.

Dated July 26th, 2013.

Signed *Daniel K. O'Connell*
Daniel O'Connell

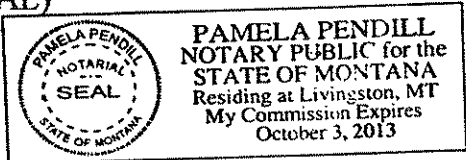
Signed: *Valery O'Connell*
Valery O'Connell

State of Montana)

County of Park)
ss.

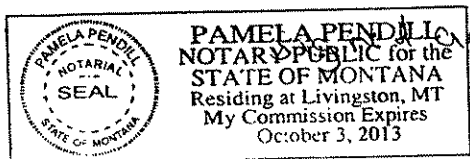
Signed and sworn to before me on July 26, 2013.

(SEAL)



Pamela Pendill
Notary for the State of MT

State of Montana
County of Park



and sworn to before me on July 26, 2013.

Pamela Pendill
Notary Public for the State of MT

