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11 **MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY**

12 DANIEL and VALERY O'CONNELL (for and
13 on behalf of GLA landowners),

14 Plaintiffs,

15 v.

16 GLASTONBURY LANDOWNERS
17 ASSOCIATION, INC. Board of Directors,

18 Defendants.

Cause No.: DV-2011-114
Judge David Cybulski

**DEFENDANTS' REPLY BRIEF TO
PLAINTIFFS' REPLY IN OPPOSITION TO
DEFENDANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT**

19 COMES NOW the above named Defendants Glastonbury Landowners Association, Inc. Board
20 of Directors (GLA) and submit this brief in reply to Plaintiffs' Reply & Motion to Strike Partial
21 Summary Judgment Motion.

22 **ARGUMENT**

23 Defendants moved for partial summary judgment on Plaintiffs claims regarding the Erickson
24 Project in this case because the claims involve the same parties and the same issues as those already
25 decided by Judge Gilbert in DV-12-164 on June 19, 2013 which bars the claims under the doctrine of
26 *res judicata*. The doctrine of *res judicata* precludes a party from re-litigating claims which have already
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1 been litigated. *Fisher v. St. Farm Gen. Ins. Co.*, 1999 MT 308, ¶ 10, 297 Mont. 201, ¶ 10, 991P.2d 452,

2 ¶ 10. A resolved claim is *res judicata* if four criteria are met:

- 3 1) the parties are the same;
- 4 2) the subject matter is the same;
- 5 3) the issue are the same and relate to the same subject matter; and
- 6 4) the capacities of the parties are the same in reference to the subject matter and issues. *Id.*

7
8 *Res judicata* will also bar a claim if a party had the opportunity to litigate a claim in a prior action. *Id.*

9 Plaintiffs first argue they have not been given a full and fair opportunity to litigate the Erickson
10 issue because they are currently appealing Judge Gilbert's decision to the Montana Supreme Court.
11 Dismissing the Erickson claims in this case would have no bearing on their appeal, and thus this
12 argument has no merit.

13
14 Plaintiffs next argue that Judge Gilbert's order was mistaken and try to add additional
15 information about the Erickson claim. However, whether or not Judge Gilbert's order was a mistake is
16 clearly an issue for appeal and not an issue for another lawsuit in the same District Court. Further,
17 Plaintiffs' attempt to add to the record or enlarge the scope of their claims regarding the Erickson
18 variance is immaterial to whether or not *res judicata* applies.

19
20 Plaintiffs argue that discovery is needed to 'verify the existence of the variance issues, and for
21 the "finding of facts" issue, facts in dispute.'" However, the question is whether or not Plaintiffs were
22 given the opportunity to litigate the claims, not whether they or not they got everything into the record
23 they wanted to. Plaintiffs had every opportunity to litigate the alleged "material facts for the Erickson
24 issues yet in dispute" in DV-12-164. Even if Plaintiffs' failed to do so, *res judicata* still applies because
25 Plaintiffs had to the opportunity to do so. "The "opportunity to litigate" factor does not change the *res*
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1 *judicata* criteria, but merely makes the *res judicata* doctrine applicable-if the criteria have been
2 satisfied-to the claims which could have been litigated but were not.' *Fisher* at ¶ 10.

3 Additionally, Plaintiffs argue the capacities of the parties differ because DV-12-164 is on
4 appeal. Plaintiffs misunderstand the meaning of the term. Clearly, Plaintiffs are bringing this case in
5 their capacity as members of the GLA, the same capacity as in DV-12-164. In the same vein, the
6 Defendants are also named their capacity as the GLA and the board of directors. Clearly, this case has
7 the same parties, the same subject matter, the same issues, and the same capacities.
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9 Plaintiffs mix their argument against Defendants' Motion regarding *res judicata* with their
10 pending appeal arguing Judge Gilbert's decision was mistaken. Plaintiffs confuse this case with their
11 appeal. Obviously, this Court is not the proper place to argue whether Judge Gilbert's decision was
12 correct. The Erickson issue has been decided and is on appeal. Litigating it here would be pointless.
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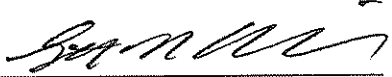
14 Finally, Plaintiffs move to strike Defendants' Motion for Partial Summary Judgment under
15 Mont. R. Civ. P. 12(f). A motion to strike under this rule is to strike matters from pleadings and is not a
16 proper response to a motion for summary judgment. Plaintiffs identify nothing in Defendants' pleadings
17 which to strike and instead ask the court to "strike Defendants Summary Judgment motion pleadings
18 pursuant to M.R.Civ.P., 12(f).... Defendants request the Court to ignore the Motion to Strike and either
19 grant or deny Defendants' Motion for Partial Summary Judgment.
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1 **CONCLUSION**

2 For the above reasons, GLA respectfully requests an Order from the Court entering partial
3 summary judgment in its favor as to Plaintiffs' claims regarding the Erickson Project, and dismissing
4 such claims with prejudice.

5 DATED this 9th day of August, 2013.

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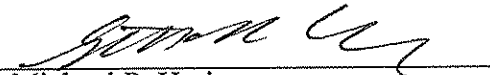
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was duly served by U.S. mail, postage prepaid, and addressed as follows this 9th day of August, 2013:

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