

1 Michael P. Heringer  
2 Seth M. Cunningham  
3 BROWN LAW FIRM, P.C.  
4 315 North 24<sup>th</sup> Street  
5 P.O. Drawer 849  
6 Billings, MT 59103-0849  
7 Tel (406) 248-2611  
8 Fax (406) 248-3128  
9 *Attorneys for Defendants*  
10 *Glastonbury Landowners*  
11 *Association, Inc.*

7 **MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY**

8 DANIEL and VALERY O'CONNELL (for and  
9 on behalf of GLA landowners),

Cause No.: DV-12-789C

10 Plaintiffs,

**DEFENDANTS' REPLY BRIEF IN  
SUPPORT OF ITS MOTION TO DISMISS  
FOR FAILURE TO STATE A CLAIM**

11 v.

12 GLASTONBURY LANDOWNERS  
13 ASSOCIATION, INC. Board of Directors,

14 Defendants.

15 COMES NOW the Defendants Glastonbury Landowners Association, Inc. Board of Directors  
16 (GLA), by and through its attorney of record, and submits this reply to Plaintiffs' Answer to GLA's  
17 Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted.  
18

19 **ARGUMENT**

20 A defense of failure to state a claim upon which relief can be granted may be made by motion  
21 before filing an answer. Mont. R. Civ. P. 12(b). Plaintiffs are seeking a TRO and preliminary injunction  
22 prohibiting the GLA from conducting "any and all business (other than what is absolutely necessary and  
23 minimal) until new elections can be held for all 12 GLA Board positions." (See Pl.'s Com. at ¶ 48).  
24 They request that the Court order a new election according to the way Plaintiffs' interpret the GLA By-  
25 Laws.  
26  
27  
28

1            “An applicant for a preliminary injunction must establish a prima facie case, or show that it is at  
2 least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated. If  
3 either showing is made, then courts are inclined to issue the preliminary injunction to preserve the status  
4 quo pending trial.” *Porter v. K & S Partnership*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981). Status  
5 quo is “the last actual, peaceable, noncontested condition which preceded the pending controversy. “ *Id.*  
6

7            Plaintiffs’ requests for relief do not warrant a TRO or preliminary injunction as they do not ask  
8 the Court to maintain the status quo, and they are not to restrain “the commission or continuance of the  
9 act complained of” nor to prevent “a great or irreparable injury to the applicant.” Mont. Code Ann. §  
10 27-19-201. Nor have Plaintiffs demonstrated they are entitled to the relief demanded. Plaintiffs  
11 complain about the way past elections have been conducted and claim the GLA By-Laws were not  
12 followed.  
13

14            The GLA has been conducting elections in the manner complained of for over a decade. While  
15 Plaintiffs argue they are only contesting the 2011 & 2012 elections of the current Board (See Pl.’s Br. at  
16 11), this fact remains: the act complained of has already occurred. The status quo is what the Plaintiffs  
17 are unhappy with. To grant their request would be to undo what has already occurred. The elections that  
18 have occurred are the “last actual, peaceable, noncontested condition which preceded the pending  
19 controversy,” and it was Plaintiffs Complaint which inserted controversy.  
20

21            Plaintiffs also request a TRO and preliminary injunction to prevent GLA from collecting  
22 assessments on guest houses which was decided in a recent decision. Notably, Plaintiffs claim the Board  
23 was illegally elected comes right after this decision. Injunctive relief to prevent collection of  
24 assessments is also inappropriate because it involved purely money damages which ‘are not considered  
25 “irreparable harm” because money damages may be recovered in an action at law without resort to  
26 equity.’ *Dicken v. Shaw*, 255 Mont. 231, 236, 841 P.2d 1126, 1129 (1992).  
27  
28

1 Plaintiffs allege “the GLA Board again abused its authority and governing documents when it  
2 voted to charge its members with a new annual assessment for all guest houses.” (See Pl.’s Com. at ¶ 7).  
3 What Plaintiffs are asking for is a Court decree as to whether the GLA’s governing documents allow  
4 assessing guest houses and allow elections in the manner they have been conducted for years. This is  
5 not a proper action for an injunction but rather a declaratory judgment action. Mont. Code. Ann. § 27-8-  
6 202. Thus, Plaintiffs are not entitled to any injunctive relief.  
7

8 Here, a preliminary injunction will not prevent irreparable harm to Plaintiffs. As noted, if  
9 Plaintiffs prove their claims regarding the assessments, money damages would provide adequate  
10 remedy. In regards to the elections, Plaintiffs have only now challenged voting practices that have  
11 occurred for years. “A preliminary injunction is sought upon the theory that there is an urgent need for  
12 speedy action to protect the plaintiff’s rights. By sleeping on its rights a plaintiff demonstrates the lack  
13 of need for speedy action.” *Friends of Clearwater v. McAllister*, 214 F.Supp.2d 1083, 1086 (2002).  
14 Plaintiffs have waited years to challenge GLA’s voting practice; clearly there is no urgent need for  
15 injunctive relief, and they have not shown what “irreparable harm” will occur.  
16

17 Finally, Plaintiffs request for a TRO and preliminary injunction prohibiting the GLA from  
18 conducting “any and all business (other than what is absolutely necessary and minimal) until new  
19 elections can be held for all 12 GLA Board positions” is vague and unworkable in the extreme. All of  
20 the GLA’s activities are those necessary for the members of the GLA such as road maintenance, snow  
21 plowing, maintaining common areas, and collecting assessments to fund these actions. Plaintiffs give no  
22 indication how “what is absolutely necessary and minimal” is to be determined.  
23  
24

25 As mentioned before, Plaintiffs real complaints are with how the GLA Board has interpreted its  
26 governing documents. Once the Board voted to assess guest houses, Plaintiffs filed this action to  
27 challenge elections held in years past in an attempt to oust the Board. Injunctive relief is not proper in  
28

1 this case and Plaintiffs requests for TRO's and preliminary injunctions should be dismissed for failure  
2 to state a claim for which relief can be granted.

3 **CONCLUSION**

4 For the reasons stated above, GLA's Motion to Change to Dismiss for Failure to State a Claim  
5 for which can be Granted should be granted.

6  
7 DATED this 29th day of November, 2012.

8  
9 BROWN LAW FIRM, P.C.  
10 315 North 24<sup>th</sup> Street  
11 P.O. Drawer 849  
12 Billings, MT 59103-0849

13 BY: 

14 Michael P. Heringer  
15 Seth M. Cunningham  
16 *Attorneys for Glastonbury*  
17 *Landowners Association, Inc.*

18 **CERTIFICATE OF SERVICE**

19 I hereby certify that a true and correct copy of the foregoing was duly served by U.S. mail,  
20 postage prepaid, and addressed as follows this 29th day of November, 2012:

21  
22 Daniel and Valery O'Connell  
23 PO Box 77  
24 Emigrant, MT 59027  
25 *Plaintiffs pro se*

26 By: 

27 Michael P. Heringer  
28 Seth M. Cunningham