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MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

DANIEL and VALERY O'CONNELL (for and on behalf of GLA landowners), Plaintiffs, v. GLASTONBURY LANDOWNERS ASSOCIATION, INC. Board of Directors, Defendants.	Cause No.: DV-2012-220 DV-2012-164 Judge Brenda R. Gilbert **DEFENDANTS' REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT**

COME NOW the above named Defendants Glastonbury Landowners Association, Inc. Board of Directors (GLA) and submits this brief in reply to Plaintiffs' "Summary Judgment Motion Replies & Motion for Hearing & Discovery" filed February 25, 2013 and in support of its "Cross-Motion for Summary Judgment."

ARGUMENT

Plaintiffs raise no issues of genuine material fact in their reply, and the GLA is entitled to summary judgment on all claims asserted by Plaintiffs. Rather, Plaintiffs' reply consists of conclusory and speculative statements and baseless accusations of wrongdoing on the part of the GLA Board. The issues in front of the Court are these:

1) Whether the Minnick Management contract is proper.

2) Whether the Ericksons were granted a proper variance.

3) Whether guest house assessments are proper.

4) Whether GLA election procedures are proper.

Plaintiffs also devote much of their brief to alleging the GLA Board has misappropriated funds and serve only to protect their "gravy train." These new allegations were not part of Plaintiffs' Complaints in cases DV-12-220 and DV-12-164 and were not alleged until Plaintiffs' reply brief. Further, Plaintiffs have filed a separate Amended Complaint in case DV-11-114 before Judge Cybulski with these new allegations. Because these allegations were not originally before the Court, they should be disregarded.

1. The Minnick Management contract is proper under GLA's governing documents.

Plaintiffs continue to argue the GLA board has abrogated its powers and duties to Minnick Management. They argue that the volunteer board "should do most of its duties that it was elected and given power to do." The argument that a non-profit corporation cannot hire employees and agents, and that its board must personally handle every task the corporation undertakes is absurd.

Plaintiffs admit Article VI.B.6. of the GLA Bylaws allows the board to "Appoint and remove, employ and discharge, and, except as otherwise provided in these Bylaws, supervise and prescribe the duties and fix compensation, if any, as necessary, of all officers, agents, employees, or committee members of the Association." However, they argue this 'allows limited duties "as necessary" for agents and employees.' Plaintiffs insert limiting language that is not in the GLA Bylaws. There is no restriction of "limited duties" on agents or employees. Further, Plaintiffs fail to explain the "as necessary" modifier. The elected GLA board is obviously empowered to determine whether it is necessary to hire agents or employees. Plaintiffs simply argue the Minnick contract is not necessary and expect the Court to agree that Plaintiffs should be the sole determiners of what is necessary.

Clearly the board is in the best position to determine what is necessary. While Plaintiffs may disagree with the board's course of action, that does not make the course of action illegal and subject to judicial review. The remedy for disagreeing with the board's course of action is to change the board through the corporation's election procedures. However, it is a democratic organization, and the vast majority of members obviously approve of the board's actions.

The Bylaws empower the board as the supervising body of the GLA. Implementation of the Bylaws is at the discretion of the board. The Board has chosen Minnick Management as its agent in the implementation of their directives. While Plaintiffs disagree with this action, it is not illegal and is well within the powers granted to the board. For these reasons, the GLA's contract with Minnick Management is allowable within its governing documents and Montana law. GLA respectfully requests that the Court enter an Order dismissing with prejudice Plaintiffs' claims regarding the Minnick Management contract and find that the contract is valid.

2. Granting the Ericksons a variance is within the power of the GLA board.

Plaintiffs allege this issue is not a part of summary judgment. However, Plaintiffs raised the issue in their Complaint by alleging the board exceeded its authority in granting the variance. Plaintiffs have not dismissed this count, and GLA requests summary judgment on this issue in its cross-motion for summary judgment. Now Plaintiffs argue this issue is not ripe leaving the GLA to wonder why Plaintiffs brought a claim and forced the GLA to defend if they believe it is not a justifiable claim.

In any case, a variance agreement was reached but not executed. Plaintiffs alleged that not only was the variance agreement illegal but the process used to reach the agreement was illegal. Contrary to the Plaintiffs' assertions, the variance process did not need a vote by all GLA members. The GLA board has the power to grant variances and did so properly under its governing documents.

Further, Plaintiffs contend they are partial owners of common land adjacent to the Ericksons and that the Ericksons plan to build four department store size buildings. First, the common land is owned by the GLA, and GLA members are allowed to use it for recreational purposes. For Plaintiffs to claim

they are partial owners is inaccurate. Second, to say the Erickson homes are department store size is a gross exaggeration, and in any case the GLA does not restrict the square footage of dwellings on original undivided parcels (the Ericksons' two parcels total 41 acres) in any manner. Thus, there is no legal basis to challenge the variance based on the proposed size of the dwellings.

Further, the GLA board specifically found the nature of the project would preserve the natural environment by reducing the need for long driveways, cuts, and fills. Additionally, the Ericksons agreed to improve the road making access to the common land better for all GLA members.

In any case, the GLA requests summary judgment on whether its variance process and the variance agreements were proper. Plaintiffs raised this issue in their Complaint. The Ericksons have only begun construction on the two dwellings for which a variance is not required because of this unnecessary litigation. The GLA would like certainty that its variance process is legal and that the pending variance agreements with the Ericksons are legal and not subject to further attack by Plaintiffs. GLA respectfully requests that the Court enter an Order dismissing with prejudice Plaintiffs' claims regarding the Erickson variance and finding that the variance agreements valid.

3. Guest house assessments are allowable assessments under the governing documents.

Plaintiffs add nothing to their arguments against guest house assessments. They maintain guest houses are not "dwelling units" and that these assessments are illegal. They incorrectly argue that a guest house cannot also be a "dwelling unit" as defined by GLA governing documents. Section 11.03 of the Covenants (Previously filed as Exhibit E to Supplemental Affidavit of Richard Bolen) states:

> Each Landowner shall pay an annual community assessment . . . to the Association for the uses and purposes described above . . . The amount of the annual assessment may be increased or decreased from year to year, at the option of the Association, based upon the amount of work to be done and the estimated or anticipated cost of labor, equipment and materials involved . . . The amount of the annual assessment beginning January, 1998 shall be as follows:
>
> a. $120 land assessment for each parcel, plus an additional $120 for each undivided tenancy-in-common interests in excess of one per parcel; plus
>
> b. $120 dwelling assessment for each dwelling unit located on each parcel or owned in association with each undivided tenancy-in-common interest in a parcel;

Section 3.12 of the Covenants defines "dwelling unit" as:

> A structure or portion of a structure, normally consisting of living area, bathroom and cooking facilities, designed for occupancy by a single family. The term includes a boarding house but not the individual rooms within a boarding house that do not contain a bathroom and cooking facilities.

Section 1.1 of the Master Plan allows one single-family residence and one guest house per lot. (Previously filed as Exhibit G to Supplemental Affidavit of Richard Bolen).

The fact that a parcel may have a main house and a guest house does not diminish the fact that both are "dwelling units" as defined by the Covenants. If a guest house contains a living area, bathroom, cooking facilities, and is designed for occupancy by a single family then it is clearly a "dwelling unit." Whether or not the owner uses to quarter guests, lives in it permanently, or rents it out is immaterial. The term "dwelling unit" contains no requirement for time of occupancy. The fact that a "dwelling unit" exists on the lot is all that is required to assess it. Owners and occupants of guest houses receive the benefits provided to the "dwelling unit" by the GLA.

Contrary to Plaintiffs' arguments, the GLA Board has not extended, rewritten, or added language in its decision to assess guest houses. The documents allow such assessments without the need for any revisions. Plaintiffs state that guest houses have never been subject to assessment for the past 17 years. However, the term "guest house" has never been used until the adoption of the Master Plan in 2007. Until then, lots with multiple dwelling units have been assessed multiple dwelling unit assessments. Guest houses which contain living areas, bathrooms, cooking facilities, and are designed for occupancy by a single family are assessed on the same basis as all the other pre-existing "dwelling units." It would be unfair and contrary to the written documents to allow "dwelling units" built after 2007 and designated guest houses to avoid paying for the benefits the GLA provides while their neighbors with additional "dwelling units" built before 2007 bore the burden.

Simply put, a guest house is a "dwelling unit." Certainly, the reverse may not be true, but here, it is immaterial as assessments are based on "dwelling units" not the particular type of "dwelling unit." GLA respectfully requests that the Court enter an Order dismissing with prejudice Plaintiffs' claims regarding guest house assessments and finding that guest houses may be assessed as "dwelling units" as a matter of law.

4. GLA's long-standing election procedures are consistent with its governing documents and Plaintiffs cannot challenge them.

Plaintiffs maintain their argument that each membership interest is entitled to only one vote regardless of the number of vacancies on the board. Plaintiffs cite Mont. Code Ann. § 35-2-536(1) which states: "Unless the articles or bylaws provide otherwise, each member is entitled to one vote on each matter voted on by the members." The statute does not support Plaintiffs' arguments, but it is contrary to them. A member is entitled to one vote on each matter. Are three vacancies on the GLA Board one matter or three separate matters? Logically it is three separate matters. There are three seats to be filled, and a membership interest votes for three candidates to fill them.

This is the way the GLA has conducted elections from its inception. Plaintiffs have voted this way without complaint for years. Plaintiffs also ignore the general powers of the GLA Board to interpret and implement the Bylaws. The Bylaws are silent on voting procedures other than requiring board members to be elected. The GLA Board has implemented procedures which are consistent with the Bylaws and Montana law.

Plaintiffs state they did not knowingly consent to these election procedures and only recently discovered this with the help of a contract lawyer. This argument is conclusory and speculative. Plaintiffs provide no legal basis for it nor has this "contract lawyer" appeared to argue the matter. Plaintiffs did knowingly vote this way. Plaintiffs have waited nearly ten years before challenging GLA's election procedures. Laches bars a claim where the person asserting it has been negligent in

asserting it. *Cole v. State ex rel Brown*, 2002 MT 32, ¶ 24, 308 Mont. 265, ¶ 24, 42 P.3d 760, ¶ 24. Plaintiffs waited until they were dissatisfied with the election results to assert this claim. When the election went in their favor, they made no move to correct this supposed mistake. The length and character of Plaintiffs' delay in asserting this claim would render enforcing their assertions inequitable. *Id.*

Plaintiffs further argue that the 12 seats on the board do not need to be filled. This is correct. There are 12 potential seats on the board. They are filled by those who have been nominated and elected. (See Article VI.A of the Bylaws previously filed as Exhibit D to Supplemental Affidavit of Richard Bolen). If there were a situation where there were fewer candidates nominated than seats available then the board would consist of fewer than 12 members. For example, if there were three vacancies and two nominated candidates then a membership interest would only get two votes because that is all that would be possible. However, that has not been the case. As the previously filed election ballots going back to the first election in 1997 show, there have always been a number of nominated candidates equal to or greater than the number of vacancies. However, this point has no bearing on the issue which Plaintiffs complain about which is that each membership interest is allowed one vote for each vacancy. This long-standing and legal voting process should be upheld.

GLA respectfully requests that the Court enter an Order dismissing with prejudice Plaintiffs' claims regarding GLA election procedures and finding that GLA election procedures are in accordance with its governing documents as a matter of law.

5. Hearing and Discovery

Although Plaintiffs were the party who originally moved for summary judgment, they alternatively request a hearing and discovery in support of a hearing if the Court does not grant summary judgment in their favor. The GLA does not oppose a hearing on these motions for summary

judgment. It is unclear what Plaintiffs mean by "discovery in support of that hearing." However, Plaintiffs have failed to show by affidavit why they cannot present facts essential to justify opposition to summary judgment which would allow an order to conduct discovery. Mont. R. Civ. P. 56(f).

CONCLUSION

For the above stated reasons, Plaintiffs' Complaints (DV 12-164 and DV 12-220) should be dismissed with prejudice and judgment as a matter of law should be entered for Defendants.

DATED this 15th day of March, 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 15th day of March, 2013:

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