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FILED  
BY Shelly Bales  
DEPUTY

1 HON. BRENDA R. GILBERT  
2 District Judge  
3 Sixth Judicial District  
4 414 East Callender Street  
5 Livingston, Montana 59047  
6 406-222-4130

7  
8 **MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY**

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

11 Plaintiffs,

12 v.

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

15 Defendants.

Cause No.: DV-2012-220  
DV-2012-164

**ORDER ON PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT AND  
DEFENDANTS' CROSS MOTIONS FOR  
SUMMARY JUDGMENT**

16 The Plaintiffs filed their Petition for a Temporary and Permanent Restraining Order on October  
17 22, 2012. On September 24, 2012, Plaintiffs filed their Cause No. DV 12-164, requesting a Writ of  
18 Mandamus directing the GLA to perform the duties otherwise delegated to Minnick Management  
19 Corporation, to cancel the Minnick Management contract and to cancel two allegedly illegal contracts  
20 with the Ericksons regarding a variance issue. In DV 2012-164, the Petitioners therein, the Plaintiffs  
21 herein, also requested a Writ of Prohibition arresting the proceedings listed within the Minnick and  
22 Erickson contracts until such time as a hearing could be held.  
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25 On December 4, 2012, the Plaintiffs filed their Motion for Declaratory Judgment and Notice to  
26 Join TRO. On January 22, 2013, the Plaintiffs filed their Motion for Summary Judgment and Motion to  
27 Enjoin Cases. The Defendants filed its Cross-Motion for Summary Judgment, requesting that summary  
28

1 judgment be entered in its favor with regard to all issues raised in actions DV 12-220 and DV 12-164.

2 Both parties assert an absence of genuine issue of material facts. The Motions have been fully briefed  
3 by the parties. The Court conducted a hearing on Wednesday, June 5, 2013 and heard oral arguments  
4 with respect to the pending Motions. The Court having considered the Motions, the Briefs and  
5 Affidavits filed with respect to such Motions, the oral argument presented, and all of the records and  
6 files herein, whether specifically mentioned or not, now enters the following Orders:

7  
8 IT IS HEREBY ORDERED AS FOLLOWS:

- 9 1. The Plaintiffs' Motion for Summary Judgment is hereby DENIED.  
10 2. The Defendant's Cross-Motion for Summary Judgment is hereby GRANTED.  
11 3. Any and all further claims, motions, and Writs filed in Cause Numbers DV 12-220 and  
12 DV 12-164, having been effectively resolved by the Court's ruling regarding the summary judgment  
13 motions, are hereby DENIED.  
14

15 EXPLANATORY COMMENTS

16 The issues raised by the pending Motions consist of The Erickson Variance, The Guest House  
17 Assessment Claim, The Minnick Contract, and The Election Procedures. The Court will address these  
18 issues in the order presented by the Plaintiffs in their oral argument.  
19

20 SUMMARY JUDGMENT STANDARD

21 The party moving for summary judgment has the initial burden of showing that no genuine issues of  
22 material fact exist. Once the moving party meets that burden, in order to raise a genuine issue of  
23 material fact the non-moving party must provide substantial credible evidence that one exists. *Von*  
24 *Petersdorff v. Kenyon Noble Lumber Co.*, 2004 MT 382, ¶ 8, 325 Mont. 94, 103 P.2d 1082,  
25

26 For summary judgment to issue, the movant must demonstrate that no genuine issues of material  
27 fact exist. Once this has been accomplished, the burden then shifts to the non-moving party to prove by  
28 more than mere denial and speculation that a genuine issue does exist. Having determined that genuine

1 issues of material fact do not exist, the court must then determine whether the moving party is entitled  
2 to judgment as a matter of law. *Stutzman v. Safeco Ins. Co.* 284 Mont. 372, 376, 945 P.2d 32, 34,  
3 (1997), (citing *Treichel v. State Farm Mut. Auto Ins. Co.*, 280 Mont. 443, 446, 930 P.2d 661, 663,  
4 (1997).

5 Under Rule 56(c) M.R.Civ.P. summary judgment is proper when there is no genuine issue of  
6 material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. It  
7 is never a substitute for a trial on the merits. *Morton v. M-W-M, Inc.* 263 Mont. 245, 249, 868 P.2d  
8 576, 578, (1994) and *Mills v. Mather* 270 Mt 188, 890 P.2d 1277, (1995).

9 All inferences which may be reasonably drawn from the record are to be drawn in favor of the  
10 non-moving party. *Vincelette v. Metropolitan Life Ins. Co.* 903 P.2d 1374, 1376, (1995) citing  
11 *Simmons v. Jenkins* 230 Mont. 429, 432, 750 P.2d 1067, 1069, (1988).

#### 12 13 THE ERICKSON VARIANCE

14 Generally, the Defendant GLA's Covenants and Master Plan allow only two homes per lot. The  
15 Ericksons own two lots, Lots numbered 90 and 91, in South Glastonbury, which lots are adjacent to  
16 one another. The Ericksons requested a variance from the GLA Board that would permit them to  
17 construct 5 houses on their two combined lots. The GLA board discussed the matter and sought input  
18 from other landowners. The requested variance was made known to the other members of the  
19 subdivision and input and comment were sought. Some members voiced concern. The terms of the  
20 variance that were reached precluded any building in the future on Lot 91. The GLA Board then  
21 granted the Ericksons permission to build four homes on Lot 90. The ultimate result was that the only  
22 individuals objecting to the terms of the variance were the Plaintiffs.  
23  
24

25 The Covenants, at Section 12.01, provide that, "The Association reserves the right to waive or  
26 grant variances to any of the provisions in this Declaration, where, in its discretion, it believes the same  
27 to be necessary and where the same will not be injurious to the rest of the Community". The  
28

1 Covenants also provide, at Section 5.01, that the site plans and building plans must be submitted in  
2 advance and are required to be, "satisfactory to the Association". Also, because this request was to  
3 change the allowable number of residences on a lot, a neighborhood review was necessary per Section  
4 4.1 of the Master Plan. The Board conducted such a review and made fairly extensive Findings of Fact  
5 that demonstrated what factors the GLA board considered in granting the variance. (See Exhibit G to  
6 the Brief of the GLA.)  
7

8 The GLA Board approved the variance under Section 4.2 of the Master Plan. The Board has  
9 discretion to approve or deny variance requests in accordance with Section 12.01 of the Covenants.  
10 Given that the owners of Lot 90 and 91 will not be able to build on Lot 91 and that both lots 90 and 91  
11 must be always sold together in the future, the Board believed that the principle of two homes per lot  
12 was effectively served. The factors cited in approving the variance were that it was not materially  
13 detrimental to neighboring properties, the topography on the lots justified the variance, and the  
14 Ericksons would be making road improvements leading to their lot and to the GLA common land and  
15 Forest Service Land.  
16

17 In any event, for purposes of the pending summary judgment motion, the facts underlying the  
18 variance decision are not in dispute. There is no material fact precluding the Court from entering  
19 summary judgment. Summary judgment in favor of the Defendant GLA is appropriately granted as to  
20 this issue as the Plaintiffs have failed to demonstrate any basis for invalidating the Board's  
21 discretionary act of granting this variance.  
22  
23

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25 THE GUEST HOUSE ASSESSMENT CLAIM

26 The Plaintiffs' summary judgment motion encompasses their claim that GLA has imposed new  
27 guest house assessments against some of its members, without having the legal authority to do so. The  
28

1 Plaintiffs claim that the GLA's undisputed actions of "collecting new guest house assessments exceed  
2 its contract authority, rewrite and/or misinterpret its contracts, and/or violate its covenant/bylaw  
3 contracts, and breach their duty to members and the Association pursuant to GLA Art. VIII." The  
4 Plaintiffs contend that a guest house is determined by its intended design and use as defined in GLA  
5 Covenant/Masterplan 6.0 which says a guest house is "intended for occasional guest use and not as a  
6 permanent residence, not to exceed 1,200 square feet." Such a guest house, is, according to Plaintiffs,  
7 not a dwelling unit. Plaintiffs base this contention upon the definition of dwelling units found in  
8 Covenant 3.12 that states it is intended "for occupancy by a single family" and is not restricted in size  
9 or use.  
10

11 The pertinent Section 3.12 of the Covenants defining "dwelling unit" provides as follows:  
12

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

18 Section 1.1 of The Master Plan allows one single-family residence and one guest house per lot, absent a  
19 variance.  
20

21 The GLA responds that its Board determined guest houses were "dwelling units" because they  
22 had living areas, bathroom and cooking facilities, and were designed for occupancy by a single  
23 family. GLA points out that some residents in the GLA reside full time in guest houses. It contends  
24 that the fact that a parcel may have a main house and a guest house does not diminish the fact that  
25 both are "dwelling units" as defined by the Covenants.

26 The stated justification for assessing the guest houses as "dwelling units", according to GLA,  
27 ensures that those receiving the benefit of GLA services such as snow removal and road maintenance,  
28 are contributing like their neighbors. Thus the GLA Board has determined that if a structure has

1 living areas, a bathroom, and cooking facilities, and it was designed for occupancy by a single family,  
2 then it is subject to the “dwelling unit” assessment.

3 No disputed material facts exist with respect to this issue. Both parties so have alleged and  
4 have requested summary judgment be entered. Covenants are construed under ordinary principles of  
5 contract law. When interpreting a contract, “the words of a contract are to be understood in their  
6 ordinary and popular sense...” Section 28-3-501, MCA.

7  
8 The GLA Board’s determination that a guest house is a dwelling unit because it has living areas,  
9 a bathroom, and cooking facilities, and is designed for occupancy by a single family, is a  
10 straightforward interpretation of the Covenants. The fact that the Master Plan restricts the size of the  
11 guest house to 1200 square feet and states that they structures not intended to be permanent residences  
12 does not change the fact that a guest house fits within the definition of a dwelling unit.

13  
14 GLA’s cross-motion for summary judgment is granted as to this issue and the Plaintiffs’ motion  
15 for summary judgment as to the guest house assessment issue is denied.

16  
17 Further, the Plaintiffs’ argument that they are entitled to judgment on this issue because the GLA  
18 did not address this claim in its initial Motion to Dismiss is not well taken. The Defendant’s Motion  
19 altered the time to respond to all of the causes of action. Plaintiffs did not seek to default GLA on this  
20 claim, nor would such a request have been appropriate. When the Court denied the Motion to Dismiss  
21 by its Order of January 9, 2013, the GLA filed its Answer on January 17, 2013, well within the time  
22 allotted by Mont. R. Civ. P. 12(a)(4)(A).

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24  
25 THE MINNICK CONTRACT

26 On June 1, 2012, the GLA entered into a contract with Minnick Management Corporation.  
27 (hereinafter referred to as Minnick) There is no dispute regarding the fact that Minnick has performed  
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1 duties under that contract since June of 2012. Minnick performs the administrative functions for the  
2 GLA such as mailings, bookkeeping, taking meeting minutes, collecting assessments, paying bills, and  
3 other support functions. Prior to contracting with Minnick, GLA used various independent contractors  
4 to perform such functions. Of the approximately 360 landowners in the GLA, only the Plaintiffs have  
5 objected to the Minnick contract.  
6

7 Section 35-2-118(1), MCA allows nonprofit corporations to enter into contracts and to hire  
8 employees and appoint agents. The GLA Bylaws give the GLA the power to enter into contracts, hire  
9 employees and agents and to “Do any and all things necessary to carry into effect these bylaws and to  
10 implement the purposes and exercise the powers as stated in the Articles of Incorporation, Covenants,  
11 Bylaws, Rules and any Land Use Master Plan adopted pursuant to the Covenants Section VI.B”.

12 (Bylaws, Article VI.B.14)  
13

14 With statutory authority and authority granted by the bylaws, the Board has hired Minnick to  
15 carry out administrative functions. This does not constitute an abrogation of the Board’s authority to  
16 Minnick. Indeed, if the GLA Board were tasked with performing all of the administrative tasks being  
17 performed by Minnick at this time, it would probably find it very difficult to fill the Board positions.  
18

19 The Affidavit of Richard Bolen is instructive as to the nature of the responsibilities that have  
20 been delegated to Minnick, and the Plaintiffs have not disputed the assertions therein. According to the  
21 Bolen Affidavit, Minnick collects assessments, files liens, processes accounts payable and receivable,  
22 maintains GLA accounts, obtains approval for payment of bills from the GLA Board, produces  
23 monthly financial statements, maintains employment and contractor records, maintains membership  
24 records, takes minutes at meetings, makes copies of agendas and handouts, completes mailings, helps  
25 collect and tally ballots, serves as a point of contact for inquiries, mails out newsletters and quarterly  
26 reports and responds to service requests.  
27  
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1 By way of contrast, Minnick does not oversee contracts for road and building maintenance, work  
2 with utilities, handle insurance matters, handle covenant enforcement, approve or deny variance  
3 requests, approve building designs, designate committees, approve expenditures of funds, promulgate  
4 rules and regulations, hire or fire employees, or set assessments. The GLA board reserved its decision-  
5 making powers and Minnick has been contracted to complete administrative functions.

6  
7 The Plaintiffs' position that the GLA board can only delegate its powers to a committee, rather  
8 than a corporation, under Article VI.B.8, does not take into consideration the principle of reading the  
9 Bylaws as a whole. The Bylaws give the GLA Board the authority to hire employees and appoint  
10 agents in order to do any and all things necessary to conduct the business and affairs of the  
11 Association.

12  
13 The Minnick contract is allowed by the Bylaws and by statute. It appears to be a necessary  
14 delegation of administrative duties, particularly given the large number of GLA members. The  
15 Plaintiffs' Motion for Summary Judgment on this issue is denied and the Defendant's Motion for  
16 Summary Judgment on this issue is granted.

#### 17 18 19 THE ELECTION PROCEDURES

20 The GLA has six vacancies on its board each year, three positions from North Glastonbury and  
21 three positions from South Glastonbury. Voting is based upon a "membership interest", which is  
22 derived from ownership of a parcel, (including an undivided tenancy-in-common interest or a joint  
23 tenancy), or a condominium unit. Articles IV.B and V.F. of the Bylaws provide that each membership  
24 interest is entitled to one vote.

25  
26 The Plaintiffs complain that the GLA November newsletter states that the GLA Board allows its  
27 members to cast "up to 3 votes" per membership/parcel or "one vote per position" instead of one vote.  
28



1 The Plaintiffs contend that this newsletter, the GLA Ballots and GLA Bylaw/Covenants attached to  
2 their Complaint are prima facie evidence that all 12 Board seats will get votes this way and never be  
3 eliminated.

4 The GLA responds by noting that, since its inception, the GLA has sent separate ballots to each  
5 membership interest for North and South Glastonbury. The ballots list all candidates for the three  
6 vacancies and instruct the holder of the membership interest to vote for three separate candidates to fill  
7 the three separate vacancies. Each membership interest has one vote per vacancy. The three  
8 candidates with the most votes win seats on the board. The GLA submits that each membership  
9 interest has one vote per issue. When there are three vacancies on the board, a membership gets to vote  
10 for one candidate per vacancy.  
11

12 The elections have been conducted this way since the GLA was formed in 1997. The Plaintiffs  
13 have not objected to these procedures until 2012. The Plaintiffs have run for election and Plaintiff  
14 Daniel O'Connell was elected to the GLA Board in 2009 under these election procedures. The GLA  
15 claims that the Plaintiffs' complaints about the election procedures are barred by equitable estoppel,  
16 acquiescence, and waiver.  
17

18 The Court concludes that the GLA Board has the authority to administer the elections as it has  
19 done historically and is currently doing. Although the Bylaws do not specify election procedures,  
20 Article XII.A of the Bylaws provides that, "The Board shall have the power to interpret all the  
21 provision of these Bylaws and such interpretation shall be binding on all persons."  
22

23 The ballots complained of by the Plaintiffs clearly allow each membership one vote, per issue-  
24 that is per board vacancy. Moreover, Plaintiffs have acquiesced in the election procedures. Plaintiff  
25 Daniel O'Connell ran for director and won under these procedures. The Court concludes that the  
26 Plaintiffs' objections to the procedure after the last two elections have not gone their way can not be  
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1 sanctioned under the doctrine of equitable estoppel. Plaintiffs' consent to and active participation in the  
2 current election process in prior years constitutes a waiver of the right to challenge it. *Kelly v. Lovejoy*,  
3 172 Mont. 516, 520, 565 P.2d 321, 324 (1977). Finally, Plaintiffs' claim regarding the GLA's election  
4 procedures is barred by the doctrine of laches. The Plaintiffs' Motion for Summary Judgment on this  
5 issue is denied and the Defendant's Motion for Summary Judgment on this issue is granted.  
6

7 DATED this 19<sup>th</sup> day of June, 2013.

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11 BRENDA R. GILBERT, District Judge

12  
13  
14 CC: Daniel K. O'Connell/ Valery A. O'Connell  
Michael P. Heringer / Seth M. Cunningham

} mld  
6-19-13  
SB