

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 13-0439

**Daniel and Valery O'Connell,**  
**PRO SE Plaintiffs and Appellants,**

V.

**Glastonbury Landowners Association, Inc., Board of Directors**

**Defendants and Appellees**

**On Appeal from the District Court of the Sixth Judicial District**  
**Hon. Judge Brenda Gilbert**

**FILED**

AUG 26 2013

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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**APPELLANTS' REPLY BRIEF**

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Glastonbury Landowners Association (GLA), a non-profit corporation owned by members is comprised of about 394 members' private property lots in Park County, Montana. Church Universal and Triumphant originally owned & developed the land in the 1980's and conferred its rights to members in 1997 upon GLA's Incorporation. GLA Covenant 10.01 states its Board of Directors are "the sole administrative authority" for the "self-governing" Association." (per Covenants pg.2) Member rights and obligations thereunder GLA Articles of Incorporation, Bylaws, and Covenants are to "run with land" unless an instrument signed by majority of landowners/members has been recorded, agreeing to change

**STATEMENT OF FACTS & PROCEDURAL BACKGROUND**

- I. Did the District Court err to grant GLA's motion for summary judgment & deny O'Connell's motion for summary judgment without a hearing & discovery to settle material facts still in dispute?
- II. Did the District Court err in not enforcing restrictive covenants that prohibit Erickson variances & ignored/denied Erickson CONTRACT Claim?
- III. Did the District Court err in not enforcing restrictive covenants & Section 27-2-202(1), MCA that prohibits GUEST HOUSE assessments?
- IV. Did the District Court err in not enforcing restrictive covenants (against the Election claim) that prohibit "up to 3 votes" per membership/parcel "one vote per [Board] position" for "six vacancies on its board each year?"
- V. Did District Court err to deny laches estoppel & waiver for guest house assessments, & allow laches, estoppel & waiver to deny the Election claim?
- VI. DID the District Court err in not enforcing restrictive covenants prohibiting the MINNICK Contract?

**STATEMENT OF THE ISSUES**

said contracts in whole or part' (see DKT.No. 18, Exhibits C, D, E & G) It is

undisputed that NO such instrument for change was filed with the Clerk &

Recorder of Park County.

In 2005, O'Connell purchased a 9 acre lot in the GLA, thereby becoming

members. In 2010 after his election to the Board, Daniel O'Connell brought to the

Board's attention numerous abuses of its authority & power under its governing

contracts with members. This resulted in two directors resigning & two complaints

filed; Complaint DV-11-114 initially dismissed, was reversed & remanded on

appeal & pending; DV-11-193 was settled out of court in 2012, granting all

O'Connell claims in that matter.

Before case 114 was remanded, O'Connell filed this case (DV-12-220

formerly DV-12-789C) against GLA Directors for new abuses of authority &

powers regarding annual board elections & guest house assessment issues. Unable

to amend case (220), case (DV-12-164) was filed citing new abuses of governing

contracts involving the Minnick contract & Erickson contracts. O'Connell filed

motion to enjoin both cases together.

In 2013, all parties filed summary motions for both cases. DKT No. 10 &

18. O'Connell members & GLA Directors both filed distinctly different Summary

~~Judgment motions, for which the lower court never addressed. GLA Directors on~~

February 13, 2013 filed cross-motion for summary judgement, asking to dismiss

both complaints and ALL claims. O'Connell's summary motion filed January 2013



This is because such June 26th Orders (Dkt. No. 43) asserted that O'Connell's "filed no reply brief," and "no parties requested hearing & discovery," after O'Connell's filed Rule 56, 59, & Rule 60 motions requesting relief from ALL GLA's summary motion and requested a hearing & discovery for material facts in dispute.

District Court's Orders (June 19, 2013, pg. 2), granted GLA Directors summary motion, dismissing "all issues raised in actions DV 12-220 & DV 12-164." Dkt. No. 40. O'Connell's contend the District Court failed to see or read their affidavit & reply brief (Dkt. No. 24 & 25) that gave rebuttal arguments against GLA's summary motion and requested a hearing & discovery for material facts in dispute.

In response to GLA's summary motion against BOTH complainants & all claims, on February 26, 2013 O'Connell's filed an affidavit & Reply Brief entitled "Summary Judgment Motion Replies, & Motion For Hearing & Discovery" (Dkt. No. 24 & 25).

O'Connell's summary motion pg. 14-15 asked for judgment "in whole for any or all of these 3 claims." "The court need only agree that the GLA Defendants governing documents...are absent any specific language or lack authority, thus 1. do not allow guest house assessments, 2. do not allow 3 votes per membership interest per Board election, & 3. do not allow the GLA to abrogate & sell its [authority] powers & duties over to another corporation called Minnick Management Corporation."

contracts in dispute, as follows:  
summary motion asked for the court to settle 3 questions of law, NOT facts or named only "three summary motion claims," not all complainants claims. This

June 19th Orders, *DKT*No. 42. These June 26th Orders thus denied all O'Connells

motions for relief.

On June 28th, notice of appeal was timely filed for relief from both the June 19th & June 26th Orders. This brief follows as timely filed within 30 days from this courts receipt of the record in full on July 26, 2013 (plus an additional two days as day 30 fell on a weekend).

### STATEMENT OF CASE

Both Orders (June 19th & June 26th) are the basis of this appeal properly brought before this court. June 19th Orders were mostly copy pasted from GLA's summary motion. O'Connells contend Orders thereby repeated GLAs mistakes, omissions of law & facts, misconstruction & misinterpretation of covenant/bylaw contracts.

At stake in this matter is O'Connells' private property rights & constitutional due process rights for denial of hearing & discovery, and member claims showing the GLA ignored material laws, and exceeded their authority & power under restrictive GLA covenants, bylaws, & articles of incorporation. Relief for such questions of law can thus be granted by this court.

O'Connells Rule 56, 59 & Rule 60 motions (*Dkt. No. 42, pg. 20*) stated:

The Orders "dismiss all complaint claims not adjudicated on the motions without discovery, hearing or trial. Courts Orders are simply & fatally flawed, for which these rule 59, & 60 motions are warranted relief as stated on pg. 1. Such motions provided ample reasons to reverse all Courts Orders & set trial. To not do so now

without first affording O'Connell's a hearing & discovery to settle material facts of law under U.S. Constitution (14th amendment); for granting summary judgment, reverse the District Court's Orders for violation of O'Connell's right to due process & claims without hearing & discovery. Therefore this Court has authority to

This record factually proves the District Court dismissed all complaints

(2)(a), "in response" to both summary motions" for DV-12-164 & DV-12-220. "requesting hearing & discovery" was timely filed on Feb. 28, 2013 "per rule 56(c) The June 26th Orders first revealed this oversight. The record shows a reply brief hearing or discovery, but only "Oral Arguments" held June 5th 2013. Dkt. No. 31. oversight from a new judge is offered as explanation why there is NO record of a No. 24 & 25) that requested hearing & discovery in both cases 164 & 220. This The lower court apparently did not see or read O'Connell's reply brief (DKT.

within 14 days after that"

reply brief had expired February 28, 2013" & "neither party requested a hearing "Plaintiffs filed no reply brief for 164" "within 14 days after the time for filing a June 26th Orders (pg.2) ignored & denied all motions' claims, except to find,

judgement on the whole action" or the entirety of both complaints. motions," thus "Orders lack jurisdiction & authority under rule 56 to "render per Bylaw XI(C), & other minor claims "NOT adjudicated on the summary Erickson variance claims, GLA breach of duty/liability & breach of due process motions cite eight material facts in dispute including "breach of contract claims, unnecessarily subject all parties to a costly appeal to the Supreme Court." The will further harm members property rights & constitutional due process rights &

still in dispute & showing GLA abused its authority & powers under governing

contracts against other contractual parties or members.

### STANDARD OF REVIEW

"We review de novo a district court's decision to [grantor] deny a motion for judgment as a matter of law. Judgment as a matter of law is appropriate only when there is a complete absence of any evidence which would justify submitting an issue to a jury." *Vader v. Fleetwood Enterprises, Inc.*, 2009 MT 6, ¶ 20, 348 Mont. 344, 201 P.3d 139.

Our standard of review for a question of law is plenary. *Collection Bureau Services v. Morrow*, 2004 MT 84, ¶ 6, 320 Mont. 478, ¶ 6, 87 P.3d 1024, ¶ 6.

"Where all of the facts bearing on the resolution of legal issues are before this Court, we have the authority to reverse the trial court's grant of summary judgment & direct it to enter summary judgment in favor of the other party." *Royal Ins. Co. v. Roadarmel*, 2000 MT 259, ¶ 51, 301 Mont. 508, ¶ 51, 11 P.3d 105, ¶ 51.

"We review a district court's legal conclusions for correctness." *Generali v. Alexander* 2004 MT 81, ¶ 17, 320 Mont. 450, ¶ 17, 87 P.3d 1000, ¶ 17.

"The determination of whether a party materially breached a contract is a question of fact." *Sjoberg v. Kravik* (1988), 233 Mont. 33, 38, 759 P.2d 966, 969.

"We review a district court's findings of fact to determine whether they are clearly erroneous." *Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶ 11, 307 Mont. 45, ¶ 11, 36 P.3d 408, ¶ 11.

"The construction & interpretation of a written agreement are questions of law." *In re Estate of Hill* (1997), 281 Mont. 142, 145, 931 P.2d 1320, 1323.

"We examine the district court's conclusions of law to determine whether they are correct." *Kauffman v. Harmon*, ¶ 11. "It is a question of law whether ambiguity exists in a written agreement." *Estate of Hill*, 281 Mont. at 146, 931 P.2d at 1323.

"Courts have no authority to insert or delete provisions of a contract where the contract's provisions are unambiguous." *Topco, Inc. v. State* (1996), 275 Mont. 352, 358, 912 P.2d 805, 809 (citations omitted).

"Where the meaning of a contract is ambiguous, this Court has repeatedly followed the rule that a court should interpret a contract most strongly against the party who drafted the agreement." *Ophus v. Fritz*, 2000 MT 251, ¶ 31, 301 Mont. 447, ¶ 31, 11 P.3d 1192, ¶ 31.

material facts still in dispute by all parties. O'Connell's summary motion &

This shows, GLA's violation of its contracts were obviously questions of

Management."

and sell its powers and duties over to another corporation called Minnick membership interest per Board election, and 3. do not allow the GLA to abrogate authority, thus 1. do not allow guest house assessments, 2. do not allow 3 votes per Defendants governing documents... are absent any specific language or lack in O'Connell's summary motion (pg. 1) "The court need only agree that the GLA These "three summary motion claims" were contract law questions as explained

cited above."

construction the meaning to its governing documents, as contrary to contract law has added language not written, extended by implication or enlarged by (14) stated ONLY "three summary judgment claims" not disputed: (Pg.4) "the GLA Affidavit & reply brief stated several material facts in dispute for which (Pg.

hearing & discovery." Dkt. No. 24, pp. 1, 10, & 13 & affidavit Dkt. No. 25.

summary motions" DV-12-164 & DV-12-220, & such reply brief requested "a

Again, the record shows, Plaintiffs DID file a reply brief in response "to both

discovery."

June 19th Orders found "no material facts in dispute" Orders (June 26th, (pg. 2) found "Plaintiffs failed to file a reply brief" & "no party requested hearing or

against GLA's summary motion:

read O'Connell's affidavit & reply brief, thus never saw rebuttal evidence & facts

The judgments of the lower court reflect that the court never saw or

**SUMMARY OF ARGUMENT**

"This Court interprets restrictive covenants by looking first to the language of the covenant to ascertain its meaning. If the language is clear & explicit, the language will govern. The language of restrictive covenants should be understood in its ordinary & popular sense. Restrictive covenants should be strictly construed & ambiguities resolved to allow free use of the property. However, such free use must be balanced against the rights of other purchasers." Fox Farm Estates & owners v. Kreisich (1997), 285 Mont. 268-69, 947 P.2d 79 & 82.

needed, as follows:

yet stated this Erickson variance issue & contracts are "not ripe," & discovery is the Erickson contracts themselves. O'Connell's Reply brief (*Dkt. No. 24, pg. 13*) this case asked to decide the Erickson contracts themselves. Orders did not rule on variances while mentioned in the Erickson contracts, were not claims for relief, as GLA's summary motion) was is NOT in the complaint DV-12-164. The Erickson Reply Brief & Oral arguments show the Erickson variance issue (added by "Erickson variance request" issue:

four main issues that were contained in both complaints, are as follows:

District Court's decision granting summary judgment, & justice so requires it. The amendment to the U. S. constitution, this court has the authority to reverse the 39). For this clear violation of rights to due process of law under the 14th still in dispute, including facts cited in "Table of Authorities and Notes" (*Dkt.No.* O'Connell's were denied a hearing & discovery to settle such material facts

on the relief sought for summary judgment.

dispute by ALL parties, which is why reply brief (Pg. 2) said, "the parties disagree law claims only. GLA's summary motion included questions of facts still in O'Connell summary motion. O'Connell's summary motion show 3 questions of other minor claims. These complaint claims were thus not adjudicated on the breach of duty/liability claims, nor due process claims per Bylaw XI(C), nor reply brief did NOT include contract violation claims, nor the Erickson claims, nor

single family," which language is not found therein Masterplan 1.1. DISPROVE Orders assertion that a guest house is "designed for occupancy by a Masterplan 1.1 & 6.0 meaningless, because these contract clauses materially dwelling unit with NO restrictions is an absurdity & renders pertinent covenant/ Orders finding a guest house with size & use restrictions are the same as a

use" not as a permanent residence, not to exceed 1,200 square feet." GLA Covenant/Masterplan 6.0, a guest house is "intended for occasional guest

"not as a permanent residence," & limited by size "1,200 square feet:"

family," because a guest house is obviously designed for "occasional guest use"

Reply brief prove a guest house is NOT "designed for occupancy by a single

On the contrary, material evidence contained in O'Connell's affidavit &

family," (emphasis added)

Orders (June 19th, pg. 5) in granting guest house assessments, yet found "there is no specific language in these GLA bylaws/covenants that allows guest house assessments." But the court agreed with "the Board determin[ing] guest houses per Covenant 3.12 were "dwelling units because they had living areas, bathroom & cooking facilities, and were designed for occupancy by a single

Guest house assessment issue:

Reply brief pg. 13, "Plaintiffs deny this Erickson issue [DV 12-164] is ripe for summary judgment, since issues of material facts may not be settled if any Erickson variance agreements still exist or resurrected.. Thus Plaintiffs request a hearing & discovery before the court considers the issue. If there still is a variance [&] agreement, then GLA President-Bolen has either lied to his members or lied to this court in his affidavit to the court." "Oral arguments" pg. 4-5 also show Erickson claims were not ripe for summary motion (DKT.No. 48).

matter voted on by the members. ”

failed to apply §35-2-536 MCA. This pertinent law allows only “one vote per

says, “a separate and distinct Membership Interest ... is entitled to one (1) vote.” &

summary motion pleadings, Orders completely ignored GLA covenant 3.20 that

hence this language is not found anywhere in the governing contracts. Also cited in

However, such language quoted above was added by the court & Bolen,

*Exhibit A, pg. 5* said, “each membership interest is voting one time per vacancy.”

vacancies on its board each year.” GLA President-Bolen’s affidavit (*Dkt. No. 18,*

“up to 3 votes” per membership/parcel or “one vote per [Board] position” for “six

Orders pg. 8 found the GLA can interpret its bylaws to say members can cast

**Board Election issue:**

not found within covenant 3.12. Such Orders are thus in err & should be reversed.

dispute, and misconstrued & misinterpreted this claim, & added language above

timely after 17 years) arbitrarily & capriciously ignored all these material facts in

The lower court assertion (that guest house assessments were allowed or

Covenant restriction 11.03(d) & failed to apply this above contract law deadline.

contracts were ratified. (see Rule 60 motion pp. 12-14). The court denied this

that the guest house assessment claim was made 17 years after the covenant

per statute §27-2-202, MCA-8 year contract claim deadline, applicable for the fact

per covenant 11.03(d). Also guest house assessments are untimely after 17 years

a guest house assessments exceeds the annual 10% increase limit on assessments

material facts as follow. Covenant restriction 11.03(d) shows the (\$191) charge for

Orders obviously denied strict interpretation of the contract above & other



Orders also completely ignored Bylaw V(F) & Bylaw VI(A) pertinent part that says: for 1997 elections "...Initially this number shall be twelve... Thereafter the board shall have an even number of positions ... not be reduced to fewer than four (4), nor increased to more than twelve (12)..." This Bylaw shows that 1997 was the only year that required a vote for 12 directors, and "thereafter" "reduced" to no "fewer than four" Board members. The assertion of "six vacancies on its board each year" is negated by this bylaw, because up to 8 seats on the board can remain unfilled, thus unfilled seats can not be considered "vacancies" as they are not required to be filled.

These material facts in Bylaw IV(B) & Covenant 3.20 restriction (above of "one vote per membership") also negate the assertion & interpretation that members can cast "up to 3 votes" per membership/parcel or "one vote per [Board] position." Orders IGNORED all these covenants & bylaws & absent a finding of ambiguity, does not allow contract interpretation under Bylaw XIII(A). This bylaw does not allow interpretation of covenants, or Covenant 3.20 material to this issue. The court also found the election issue untimely under GLA's defense of the doctrines laches, estoppel & waiver absent any prejudice or injurious delay of claim, which are key requirements for laches & waiver (estoppel) doctrines to apply; "To establish a waiver, the party asserting waiver must demonstrate ...

prejudice resulted to the party asserting waiver. *Edwards v. Cascade County*, 2009

MT 229, ¶ 30, 351 Mont. 360, 212 P.3d 289 (citations omitted).

Also O'Connell's election claim starting 2011 did not run until then or at the

earliest 2005 when O'Connell's became members. Orders again failed to apply law

§27-2-202, MCA— 8 year deadline, showing the election claim within 7 years of

2005 is timely. Orders also ignored summary motion pleadings that show Board

elections are annual, thus this claim is violated anew every year. Waiver of claims

for past years is thus mute as election claim can be made every year it is violated.

Court's oversight/omission of these material evidence & material facts in

dispute & covenant/bylaw restrictions, & statute (§27-2-202, MCA), all negate the

assertion that the election claim was waived or untimely under the contracts. Such

Orders, that arbitrarily & capriciously deny such due process rights afforded under

law & governing contracts, & added language above not found within covenants or

bylaw, are thus in err & should be reversed.

**Minnick Contract Issue:**

Minnick contract (Addendum III, pg.1) says "GLA hereby grants Minnick Management the authority and power to perform...services outlined below"

Minnick contract cites III "services" such as: "Collection/Disbursement of Monies," "process accounts payable and receivable" "handle payroll ... checks, pay stubs, and reporting" "produce meeting minutes" "oversee election process ... crew and ballot collection; tally and reporting, including absentee and proxy" "serve as point of contact...provide answers to basic landowner inquiries" "provide all documentation & records... to manage & operate the property ..."

This Minnick contract that "grants Minnick Management authority and power" of the board is referred by pertinent covenants/bylaws, facts as follow:

Orders found (pg. 7) that Minnick contract "authority is granted by the bylaws & §35-2-118(1) MCA... to carry out administrative functions."

This assertion that services above are "administrative functions" & allowed,

are referred by the fact that these services are officer duties prohibited by law

§35-2-440, MCA & Bylaws VIII(G) & Bylaw VIII(H) (below). Also this assertion

that Minnick contract "authority is granted by the bylaws & §35-2-118(1) MCA" is

directly referred by Covenant 10.01 that says the Board "is the sole administrative

authority in the Community, and shall exercise its rights, powers and

responsibilities and manage its affairs." not Minnick.

Minnick as "granted authority and power" of the board is further referred by

Bylaw VI(D) that says "Only Committees of Directors..may exercise the authority

or powers of the Board..." & CIA Articles IV(E), "The Association is... to be

limited in the exercise of its powers, as may be further provided from time to time

in such Bylaws;" which includes Bylaw VI(D)above.

Such Orders ignored these two pertinent contract restrictions and the fact

that III services or duties prescribed to Minnick were not "necessary" as required

per Bylaw VI(B)(8). Again these Minnick contract services: "Collection/

Disbursement of Monies," "process accounts payable and receivable" "handle

payroll ... checks, pay stubs, "produce meeting minutes" & more are officer duties prohibited by law §35-2-440, MCA & Bylaw VIII(G) & Bylaw VIII(H):

§35-2-440, MCA. "Duties and authority of officers. Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws..." **VII(G)** "The Secretary shall issue notices of all meetings of the Board of Directors & Members, shall keep Minutes ... shall make reports and perform such other duties as are incident to his office or are properly required of him by the Board or President." **VIII(H)** "The Treasurer shall be the chief financial officer of the Association and have the custody of all the monies and securities of the Association and deposit the same in the name of the Association in such bank or other depository ... shall keep regular books of account and balance the same each month... The Treasurer shall perform all duties incident to his office or that are properly required of him by the Board."

This factual evidence above found in complaint (DV-12-164, & Addendum III), proves that the mailing of member assessments directly to Minnick's corporate address (PO Box 1862, Bozeman, MT. 59771) is in violation of GLA Bylaw **VIII(H)** requiring GLA officer as Treasurer "have the custody of all the monies" and Covenant 11.05 requirement "the Association [is] to maintain control & supervision over the assessment funds," and violation of GLA Bylaw **VIII(G)** requiring the officer as Secretary "shall keep minutes" "and duties incident to his office" now done by Minnick such as: "oversee election process ... crew and ballot collection; tally and reporting, including absentee and proxy" "provide all documentation & records... to manage & operate the property ..." These officer duties in the Minnick contract are thus refused by these bylaws and law requiring the officer perform them, not an agent-Minnick.

Replies, & Motion For Hearing & Discovery") filed on Feb. 28, 2013 " in response

brief & affidavit (DKT. No. 24 & 25 entitled "Summary Judgment Motion

These Orders reflect that the lower court never saw or read O'Connell's reply

hearing within 14 days after that."

filing a reply brief had expired February 28, 2013" & "neither party requested a

said, "Plaintiffs filed no reply brief for 164" "within 14 days after the time for

Rule 56, 59 & Rule 60 Motions were denied by June 26th Orders (pg.2) that

material facts still in dispute; and justice so requires it.

the constitution, without first affording them a hearing & discovery to settle

summary judgment in violation of O'Connell's right to due process of law under

This court has the authority to reverse District Court Orders that granted

discovery to settle material facts in dispute.

deny O'Connell's motion for summary judgment without a hearing &

I. District Court did err to grant GLA's motion for summary judgment &

### ARGUMENT

allowed. Orders thus in err, should be reversed.

governing contracts above, all negate the assertion that the Minnick contract was

arbitrarily & capriciously deny such due process rights afforded under law &

oversight/omission of these material evidence & material facts in dispute that

§35-2-440 MCA, Covenant 11.05, Bylaws VIII(G), and Bylaw VIII(H), Court's

or bylaws, are refuted by all these (Bylaw VI(D), Covenant 10.01, Bylaw VI(B)(8),

Thus Orders, asserting that agent-Minnick somehow had such authority under law

This absurdity allows an agent to manage the "self governing" GLA affairs.

"to both summary motions" DV-12-164 & DV-12-220, & requesting "a hearing &

discovery, as follows:

Reply brief pg. 1 & 14 said, "Plaintiffs... hereby submit this reply regarding both Summary Judgment motions" & per Rule 56 "If the Court for any part can not grant summary judgment in Plaintiffs favor, then this [summary] motion hereby requests a hearing & discovery in support of that hearing" & pgs. 10-13 summary motion reply to Minnick contract issue(s) & Erickson contract issue(s) from DV-12-164; reply brief pg. 13 also said, "Plaintiffs deny this Erickson issue [DV 12-164] is ripe for summary judgment... Thus Plaintiffs request a hearing & discovery before the court considers the issue." (emphasis added)

The Courts oversight & omission prejudiced O'Connell's due process rights, &

chances to overcome GLAs summary motion rebutted by reply brief & affidavit:

Affidavit & reply brief pg. 1 said "Defendants answer & affidavits, mostly error, conjecture & opinion, are refuted herein & in O'Connell's attached affidavit." (Pg. 4) "the GLA has added language not written, extended by implication or enlarged by construction the meaning to its governing documents, as contrary to contract law..." Reply brief (pg. 13) said, "Plaintiffs deny this Erickson issue [DV 12-164] is ripe for summary judgment, since issues of material facts may not be settled if any Erickson variance agreements still exist or resurrected... Thus Plaintiffs request a hearing & discovery before the court considers the issue." "Oral arguments" pg. 4-5 also show Erickson claims were not ripe for summary motion (D.K.T.No. 48). & (Pg. 14) referred to ONLY "three summary judgment claims" not disputed.

O'Connell's summary motion (pg. 1) explained these "three summary motion claims" or contract law questions: "The court need only agree that the GLA Defendants governing documents... are absent any specific language or lack authority, thus 1. do not allow guest house assessments, 2. do not allow 3 votes per membership interest per Board election, and 3. do not allow the GLA to abrogate and sell its powers and duties over to another corporation called Minnick Management."

This record shows, O'Connell members & GLA Directors both filed

distinctly different Summary Judgment motions. GLA's summary motion asked for

Articles IV(E) GLA Corporation "limited in the exercise of its powers, as may be further provided from time to time in such Bylaws;" & Bylaw II(C) GLA "shall be limited in the carrying out of its purposes..." & Bylaw VII(A) limits on contracts; & Bylaw XIII(B) limits on amendments; & Bylaw III "the Corporation shall be

pg.18 "GLA Bylaws...grant the board powers without limiting them" (rebutted by provide otherwise..." which GLA Articles IV(E) do limit their powers as follows: pg.18 per "Catchall" §35-2-118 MCA, the Board "have the power...to do all things necessary" (rebutted by this same law limiting clause that says "Unless the Articles increase by Covenant 11.03(d)).

pg.18 GLA Board "have the power to make and amend bylaws...elect directors...impose dues, assessments" (rebutted by Bylaw XIII(A) requiring 51% vote of all members to amend bylaws, & Bylaw VI(D) "Board of Directors shall be elected by the Members," & NO dues allowed & assessments are limited to 10%

Orders yet repeat errors found in GLA/Brown Law Firm's Oral Arguments:

"Whether a party breached a contract is a question of fact, & that is in dispute. What we're here to determine is the construction & interpretation of the agreements in question, which is a question of law according to *Dames v Knight*." Pg. 4 said. "We only included three issues ripe for summary judgment."

summary judgment. "Oral Arguments" pg. 3 transcript explained:

is why reply brief (Pg. 2) said, "the parties disagree on the relief sought for

summary motion included questions of facts still in dispute by ALL parties, which

O'Connell's summary motion show 3 questions of law claims only. GLA's

"Table of Authorities and Notes" (DKT No. 39).

motion (DKT No. 42) cited 8 material facts still in dispute and more cited in

claims. Such claims were not adjudicated on O'Connell summary motion. Rule 60

of duty/liability claims, nor due process claims per Bylaw XI(C), nor other minor

did NOT include contract violation claims, nor the Erickson claims, nor the breach

dismissal of ALL complaints & claims, O'Connell's summary motion & reply brief

"Where an officer or director acts against the best interests of the corporation.. he is personally liable." *Phillips v. General Motors Corp* (2002), 187 MT. at 425, 610

against Directors personally involved.

signing the Minnick contracts & Erickson variances, & abuse of authority claims

of due process per Bylaw XI(C), tortious interference with covenant contracts by

covenants, GLA's breach of duty (liability) claim (per GLA Article VIII), denial

submit to a jury the GLA's breach of contract claims violate the spirit of restrictive

A review of the record demonstrates that there was sufficient evidence to

*Fleetwood Enterprises, Inc.*

"Judgment as a matter of law is appropriate only when there is a complete absence of any evidence which would justify submitting an issue to a jury." *Vader; Vader v.*

liability for such acts is for a jury to decide, not a judge.

gives rise to personal liability, & acts taken on behalf of a corporation or tortious

contract violation. The difference between conduct which is tortious in nature &

defendants actions were tortious as cited in the complaints for breach of duty &

Also Reply brief (refuting GLA's summary motion, pg. 11) said 'GLA Board

pg. 26: "the board has the power..to establish election procedures" ["3 votes per membership"] (refuted by Bylaw VI(B)(16) limiting clause "election or vote in a manner that is not inconsistent with any provisions of the Covenants, Articles of Incorporation or these Bylaws" & Bylaw III(B) "Each Membership Interest shall be entitled to one (1) vote as defined in the Covenants" & Covenant 3.20 "a separate and distinct Membership Interest ... is entitled to one (1) vote.")

limited in the exercise of its powers..in the covenants; such as Covenant 10.01 "Association is the sole administrative authority in the Community and shall exercise its rights, powers and responsibilities and manage its affairs in accordance with its articles of incorporation, bylaws and rules."



in dispute. But Erickson variance issue was NOT the same issue as the Erickson

Reply Brief & Oral arguments show facts underlying the variance decision

& Pg. 4 said "facts underlying the variance decision are not in dispute."  
June 19th Orders, pg. 3 describe this complaint issue was "to cancel two  
allegedly illegal contracts with the Ericksons [ & GLA ] regarding a variance issue."

**II. District Court did err in not enforcing restrictive covenants that prohibit  
Erickson variances & ignored/denied Erickson CONTRACT Claim.**

motion as a matter of law.

of requested hearing and discovery are more than sufficient to survive summary

The quantum & quality of evidence for these claims and O'Connell's denial

or involvement per Bylaw XI(C).

were initiated without authority or probable cause & without prior member notice

governing documents & contract law; (3) the manner in which those proceedings

& guest house assessment, & election issue is clearly contrary to the terms of the

by officers; (2) the allegations that the Minnick contract & the Erickson variance,

sole administrative authority & the law requires board officers duties be performed

officer duties & "authority & power" even though the bylaw states the GLA is the

ratified a decision to sign the Minnick contract that illegally granted Minnick agent

GLA's tortious & liable conduct is shown by: (1) individual defendants

129, 732 P.2d at 823.

were tortious in nature. *Crystal Springs Trout Co. v. State* (1987), 225 Mont. at

could be held personally liable if they were personally negligent or their actions

708-09. Similarly, in *Crystal Springs Trout Co.*, we held that corporate agents

P.2d at 158 (citations omitted); accord *Bottell*, 237 Mont. at 25, 773 P.2d at

contracts (agreements) in DV-12-164. The court ignored the Erickson contract issue, but instead granted the Erickson variance issue (& "finding of facts.") This Erickson issue was added by GLA's cross-summary motion. O'Connell's reply brief & affidavit rebuttal evidenced disputed all Erickson claims as not being ripe for summary judgment, for which O'Connell's requested hearing & discovery:

O'Connell's summary motion (pg. 6) said, "issues in that case were settled upon cancellation of the Erickson contracts." O'Connell's reply brief (DKT No. 24) pg. 13 then said, "Plaintiffs deny this Erickson issue [DV 12-164] is ripe for summary judgment, since issues of material facts may not be settled if any Erickson variance agreements still exist or resurrected. Thus Plaintiffs request a hearing & discovery before the court considers the issue. If there still is a [Erickson] variance [&] agreement, then GLA President-Bolen has either lied to its members or lied to this court in his affidavit." Oral arguments (DKT No. 48 pg. 4-5) also dispute this issue.

June 19th Orders (pg. 4) said, "the board has the discretion to approve or deny variance requests in accordance with section 12.01 of the Covenants."

Orders yet failed to apply Covenant 12.01 limiting clause saying a variance must "be necessary and where the same will not be injurious to the rest of the Community." Orders failed to show six variances were "necessary" & "not injurious" as this covenant requires. Affidavit & Reply brief (pg. 13) refuted such material facts saying "Erickson six variances to cluster four department store size buildings together & two setback variances not 50 but 25 feet next to members adjacent common land is NOT "for the benefit of Landowners" per Covenant 11.02. Such Orders (pg. 4) also found the variances required Ericksons "the owners of lot 90 and 91 will not be able to build on lot [90] & that both lots 90 & 91 must be

Erickson lots 90 & 91 were legally subdivided lots. Consequently, Orders assertion

No evidence of joinder was found by the court. Covenant "Exhibit B" show

effect a merger of parcels." legal description of the aggregate parcels, clearly expressing the owners intent to parcel(s) described in this instrument" or a similar statement, in addition to the instrument is intended to merge individual parcels of land to form the aggregate parcels of land under subsection (17) (b) (i) unless the instrument states, "This the larger aggregate parcel, (c) An instrument of conveyance does not merge boundaries of the original parcels have been expunged & depicts the boundaries of be merged; or (ii) a certificate of survey or subdivision plat that shows that the parcel & in which the owner expressly declares the owner's intention that the tracts parcels have been assigned a legal description that describes the resulting single owner of the parcel has joined it with other contiguous parcels by filing with the county clerk & recorder; (i) an instrument of conveyance in which the aggregated individual tract of record continues to be an individual parcel of land unless the parcels of land or contiguous tracts of record: § 76-3-103 (17)(b), MCA "Each "in pertinent part as follows with respect to the joinder or merger of contiguous parcels of land or contiguous tracts of record: § 76-3-103 (17)(b), MCA "Each

Rule 60 motion (pgs. 8-10) said:

GLA attempt to subvert the Platting Act & covenants that run with the land,

Section 28-2-102, MCA) & state "Erickson contracts & variance claim by the

Erickson variance issue is not ripe without a signed contract ("a lawful object" per

70-17-203(3), MCA.) O'Connell's "Oral Arguments" & Rule 60 motion also show

therefore is an interest in real property. (See Covenant 2.01 & §70-17-201, MCA &

under the express language of GLA covenant contracts, ran with this land, &

by its rules that runs with the land. The right to build on lot 90 was a right that,

However, GLA covenants obligated Ericksons to join the GLA & be bound

always sold together in the future..." & Plaintiffs have failed to demonstrate any basis for invalidating the Board's discretionary act of granting this variance."

that "precluded any building in the future on lot [90]" & that "both lots 90 & 91 must be always sold together in the future..." frauds the Platting Act & violates Covenants 5.06, 5.08, 5.10, 6.01 allowing buildings presently on lot 90.

Orders also denied a complaint claim requesting notice to all landowners for the Erickson issue. The "neighborhood review" only entailed notice to five landowners. Erickson contracts & variance issues show covenant modification as to not build on lot 90 in exchange for 4 building on lot 91. This covenant modification benefited the Ericksons only. There can be no Erickson variance nor agreement to deny building on lot 90 without consideration given to all GLA landowners & the required vote of 51% of members (per Covenant 2.4); which modifies covenant contracts that run with the land. (Section §28-2-102, MCA).

There is no evidence that Ericksons even have a legal right to deny the GLA covenants that run with their land in order to prevent them or future owners from ever building on lot 90 in exchange for Erickson variances for building 4 homes on lot 91, or to subvert subdivision platting act requirements above. Thus O'Connells rightfully did not include the Erickson claims in their summary motion, & consent of all parties was lacking, nor signed contracts found, & discovery is needed to show if any variance contracts or variances still exists or resurrected.

Construed show a guest house is NOT a dwelling unit & NOT "designed for ... a  
Contrary to courts findings for covenant 3.12, contract clauses above strictly

incorporated into & now part of the covenants.)  
residence & one (1) additional single residence." (Note: Masterplan contract was  
development for an Original undivided Parcel is limited to one (1) single-family  
residence guest apartment per subdivided Tract or Lot..Maximum residential  
parcel is limited to one (1) single-family residence & one (1) Guest House" or in-  
GLA Masterplan 1.1 (pg. 4) "Maximum residential development for a subdivided

house, ..."  
designed for occupancy by a single family" The term includes a boarding  
structure, normally consisting of living area, bathroom & cooking facilities,  
GLA Covenant 3.12 (Pg. 6) defines "dwelling unit" as "a structure or portion of a  
use & not as a permanent residence, not to exceed 1,200 square feet."

GLA Covenant/Masterplan 6.0 a guest house is "intended for occasional guest  
standard of review (on pg. 6) required these ordinary, popular meanings to govern:

Because the court found NO vague or ambiguous contract language, the

occupancy by a single family." (emphasis added)  
they had living areas, bathroom & cooking facilities, & were designed for  
"Board determined guest houses were "dwelling units [per covenant 3.12] because  
covenants that allows guest house assessments." Orders pg. 5 yet agreed the GLA  
The Court found "there is no specific language in these GLA bylaws/

27-2-202(1), MCA that prohibits GUEST HOUSE assessments.  
III. The District Court did err in not enforcing restrictive covenants & Section

that summary judgment is not appropriate to grant the Erickson issues.  
by the lower court. This court can now decide such matters of law & also conclude  
These questions of facts & laws material to the outcome were never consider

O'Connell's rule 60 motion pg. 10 also said, "The Legislature essentially defined diligence in contract situations by setting the statute of limitations for contract [claims] at eight years. Section 27-2-202(1), MCA." "Orders err to allow guest house assessments [per contract covenant 3.12] after 17 years in direct violation of law §27-2-202, MCA."

'Covenant 6.06 shows, "there are habitations separate from dwelling units" like guest houses. Also, guest house assessments were not enforced "for 17 years" so members "who built their guest house thinking they were not going to get an assessment.. all of a sudden are being that they have to pay a full assessment, \$191.00 assessment for guest houses that the GLA has already said that they can not use more than six months out of the year."

contract differences. Oral arguments (pgs. 7-10) also dispute this claim:

neither a family residence nor dwelling unit. The court did not reconcile these emulates a dwelling unit intended for a "family," but a guest house emulates

definitions & treatment of guest houses & family residences. Family residences Masterplan 6.0 & 1.1. are yet pertinent to this issue as they give separate

dwelling unit" is an absurdity & renders Masterplan 1.1 & 6.0 above meaningless.

found "a guest house" with size & occasional use restrictions "is the same as a further shows a guest house is treated differently from a dwelling unit. Orders that

failed to give strict interpretation of the restrictive covenants above. Masterplan 6.0

The court yet ignored this ordinary & popular meaning for a guest house &

use" "not as a permanent residence," & limited by size "1,200 square feet"

single family," because a guest house is obviously designed for "occasional guest

The court ignored all pleadings, bylaws, covenants, & law above factually negating guest house assessments & showing such claim untimely after 17 years as this statute shows, as follows:

§27-2-202, MCA, "an action upon any obligation founded upon an instrument in writing must be commenced within eight years..." "This Court has held that the eight-year statute of limitations set forth in § 27-2-202, MCA, applies to cases involving covenants." *Scherpenseel v. Binney* (1993), 263 Mont. 68, 74, 865 P.2d 1145, 1149 (citing *Majors v. Shining Mountains* ..."

O'Connell's Reply Brief (pg. 4-5) also disputed such guest house assessments pursuant to Covenant 11.03(d) by stating 'a full assessment of \$191 for guest houses (limited in size & use) is not justifiable nor allowed per covenant 11.03(d), because this (\$191) is a 100% assessment increase thus exceeds this covenant restriction of 10% maximum yearly assessment increase,' as follows in part:

Covenant 11.03(d) "...The amount of the annual assessment may be increased or decreased from year to year, at the option of the Association..." However, Defendants [summary motion] left off a pertinent part (d) that says, "... the annual assessment may be increased by the Association due to inflation or increased costs or services up to a maximum of 10% per year" or based on the "CPU whichever is greater."

These disputed material facts, & court's oversight/omission of reply briefs & material evidence, & claim contrary to §27-2-202, MCA, all negate the assertion that guest house assessments are allowed or timely after 17 years. Such Orders, arbitrarily & capriciously ignore this law & covenant restrictions, & misinterpret the contracts, that fatally denied members' property rights afforded under the law, constitution, & restrictive covenants. Orders thus err & should be reversed.

IV. District Court did err in not enforcing restrictive covenants (against the Election claim) that prohibit "up to 3 votes" per membership/parcel "one vote per [Board] position" for "six vacancies on its board each year."

GLA President-Bolen's affidavit (DKT.No. 18, Exhibit A, pg. 5) said, "each membership interest is voting one time per vacancy."

Orders pg. 9 said, "GLA Board has the authority to administer the elections as it has done historically --- although the Bylaws do not specify election procedures." June 19th Orders (pg. 8) said the Board can interpret the bylaws to say members can cast "up to 3 votes" per membership/parcel or "one vote per [Board] position" for "six vacancies on its board each year." Orders rely on Bylaw XIII(A) " that says "the board shall have the power to interpret all these bylaws..."

However, such language quoted above was added by the court & Bolen, hence this language is not found anywhere in the governing contracts. Also cited in summary motion pleadings, Orders completely ignored GLA covenant 3.20 that says, "a separate and distinct Membership Interest ... is entitled to one (1) vote." & failed to apply §35-2-536 MCA. This pertinent law allows only "one vote per matter voted on by the members," which is explained below.

"The language will govern the covenant's interpretation when the words are plain & unambiguous." *Gosney v. Big Sky Owners Ass.* (1983), 205 Mont. at 227, 666 P. 2d at 1250. "Courts have no authority to insert or delete provisions of a contract where the contract's provisions are unambiguous." *Topco, Inc. v. State* (1996) citing *Jarrett v. Valley Park, Inc.* (1996), 277 Mont. 333, 341, 922 P.2d 485, 489, we clarified that "our meaning was that the district court could not 'broaden' the covenant by adding a limitation not contained therein." Orders did exactly that:

Absent any finding of ambiguity, contract interpretation is not allowed under Bylaw XIII(A), & this bylaw does not allow interpretation of covenant 3.20 material to this issue (cited in pleadings). The assertion & interpretation that



members can cast "up to 3 votes" per membership/parcel or "one vote per [Board]

position," are negated by Bylaw V(F), Bylaw IV(B), Covenant 3.20 as follows:

Bylaw V(F), "For purposes of tabulating the written vote ... Each Membership Interest is entitled to one vote;" Bylaw IV(B), Each Membership Interest shall be entitled to one (1) vote as defined in the Covenants;" & Covenant 3.20 says, a "Membership Interest ... is entitled to one (1) vote."

Orders failed to consider Statute §35-2-536 MCA, as material because this

law "one vote per matter voted on by the members;" helps explain another

pertinent contract bylaw, Bylaw VI(A) as follows in part:

Bylaw VI(A) says for board elections, "...Initially [1997] this number shall be twelve... Thereafter the board shall have an even number of positions ... not be reduced to fewer than four (4), nor increased to more than twelve (12)..."

This Bylaw shows that 1997 was the only year that required 12 directors,

and "thereafter" "reduced" to no "fewer than four" Board members. Orders ignored

this law, Covenants, & Bylaws (above) that materially dispute Orders finding "six

vacancies on its board each year." Unfilled seats can not be considered "vacancies"

that don't require filling, because up to 8 seats on the board can remain unfilled.

This dispute should not involve whether or not the 12 board seats are

vacancies, because the word "vacancies was added by the Court & GLA. The word

vacant or "vacancies" is found only in Bylaw VIII(B) for officer "vacancies,"

Bylaw X(E) for ombudsman vacancies, and Bylaw VI(E) as follows:

Bylaw VI(E) "Vacancies in the Hoard [sic] of Directors between Annual Meetings, caused by any reason, shall be filled by a vote of a majority of the remaining members of the Board at a Special Meeting of the Board held for that purpose, even though the members present at such meeting may constitute less than a quorum. Each person so elected shall be a member of the Board of Directors for the remainder of the term of the member whose term he is filling and until his successor shall be elected and shall qualify."

Strict interpretation of these bylaws show that "vacancies" requiring a

"Special election" between elections have NOTHING to do with board annual

elections. The court and Bolen added such words as "vacancies" which extended

by implication & enlarged by contraction the meaning of Covenant 3.20, one vote.

(Note: Members can vote for more than one candidate by fractional voting to

split their one vote in half or one third & still comply with one vote per covenant

3.20 (as oral arguments explained & fairly resolves this issue for all parties).

In a similar case, Washington Court of Appeals found that East Lake's

bylaws "that limit the defendant [members of the nonprofit corporation

association] to one vote was constitutional." *East Lake Water Ass'n v. Rogers*

(Wash.Ct.App. 1988), 761 P.2d 627.

Such Orders, oversight/omission of reply briefs & material evidence

arbitrarily & capriciously ignore laws above & covenant restrictions, &

misinterpret the contracts, thus fatally denied members' property rights afforded

under the law, constitution, & restrictive covenants, & should be reversed.

V. District Court did err to deny laches or estoppel (waiver) for guest house

assessments, & allowed laches or estoppel (waiver) to deny the Election claim.

Orders (pg. 9-10) found "Plaintiffs objections to the [election] procedures... can not be sanctioned under the doctrine of equitable estoppel. Plaintiffs acquiesced in the election procedures..." consented] to & active participation in the current election process in prior years constitutes a waiver of the right to

“Although there is no absolute rule, we have asserted repeatedly that two requirements be met for laches to apply. The district court must find both a lack of diligence by the party against whom the defense is being asserted & prejudice to the party asserting the defense.” *Que, 245 Mont. at 120, 799 P.2d at 545; In the Matter of Johnson, 2004 MT 6, ¶ 20, 319 Mont. 188, ¶ 20, 84 P.3d 637, ¶ 20.*

prejudice or “inequitable” delay of this election claim as required to assert laches:

O’Connell’s also plead that Orders found NO lack of due diligence, NO

within the 8 year deadline for contract claims & 27-2-202, MCA.

annually violated, or did not begin to run until O’Connell’s membership in 2005

consent to election practices, & were NOT barred by laches, estoppel, or waiver, as

This pleading, material facts in dispute, shows members did not knowingly

“This election claim does not include past elections before Nov. 2011, thus the doctrine of consent, equitable estoppel & equitable tolling do not apply to new acts, or in this case new elections [claims] committed by the Board in violation of its contracts.” O’Connell’s summary motion affidavit (¶ 1) also said, “O’Connell’s did not knowingly consent to [waive] illegal election practices, but only recently discovered this with the help of a contract lawyer.” Board elections are annual, thus election claim is violated anew every year for which the complaint only made this election claim for 2011, 2012 and future elections not past elections.”

summary motion reply brief & affidavit (pg. 7):

Arguments against laches & estoppel, & waiver are also found in O’Connell’s

O’Connell’s became members, thus not barred by estoppel & laches” or waiver.

§27-2-301, MCA says the elections claim is timely made after 2005 when

effectively BARS guest house assessments after 8 years, & contract law per

ent & must be reversed, because the contract limitations per §27-2-202(1) MCA., Orders above were refused by O’Connell’s Rule 60 motion (pg. 1), “Orders

procedures is barred by the doctrine of laches.”

challenge it. *Kelly v. Lovejoy* ...” Plaintiffs claim regarding the GLA election

"The doctrine of laches applies where there has been such delay as to render enforcement of the asserted right inequitable." *Marriage of Deist*, 2003 MT 263, ¶ 17, 317 Mont. 427, ¶ 17, 77 P.3d 525, ¶ 17.

O'Connell's summary motion said these doctrines do NOT apply to this election claim. The court misapplied laches & equitable estoppel here for courts failure to find any prejudice OR injurious delay, as key requirements for these doctrines. The court yet found that O'Connell members "waived their right to object [to election claim] when they participated in such elections."

"A waiver is the intentional relinquishment of a known right, claim, or privilege. *Collection Bureau Services, Inc. v. Morrow*, 2004 MT 84, ¶ 9, 320 Mont. 478, ¶ 9, 87 P.3d 1024, ¶ 9.

Election claim, violated anew each year by the GLA, does not waive new violations that are timely. O'Connell's summary affidavit yet disputed intentional waiver of their claim since membership 2005 & only recently discovered this claim (per §27-2-301 MCA). Exhibit B (certified election results, complaint DV-12-220) critical to proving this issue, were denied to all members until 2012 upon discovery requested from another legal case DV-11-193. The documents show number of votes casts per election exceeded quorum or total membership interests combined.

Thus Orders, finding election claim untimely or denied per laches, estoppel & waiver, is refused for absence of required prejudice & injurious delay, & such election claim, annually created, is timely per (§27-2-202, MCA-8 year deadline), thus in error such Orders should be reversed.

"administrative functions" or duties. Orders failed to address the main issue in

Several governing contracts cited below refute courts assertion. But besides

of the GLA.

§35-2-118(1), MCA) allows agent "Minnick to carry out administrative functions" authority & authority granted by the bylaws" (per Bylaw VI(B)(14) & power which the GLA confers." June 19th Orders (p.7-8) found that "statutory Bolen's affidavit (DKT.No. 38, pg. 3) admitted "its agent [Minnick] only has the

the MINNICK Contract.

VI. District Court did err in not enforcing restrictive covenants prohibiting

MCA. & as refuted by strict interpretation of covenant 3.12, Masterplan & bylaws.

& prejudices members property rights for such untimely delay per law §27-2-202,

this law & laches, estoppel, & waiver; which claim is "inequitable" as it encumbers

time barred & constitutes a 17 year waiver of claim. Orders denied due process of

assessment claim was made, thus such contract claim under the covenants is now

This contract law (§27-2-202(1), MCA) shows for 17 years, no guest house

3d 481, ¶ 15.

Hanson v. Water Ski Mania Estates, 2005 MT 47, ¶ 15, 326 Mont. 154, ¶ 15, 108 P. "Restrictive covenants are under the same rules as are applied to contracts."

covenant contracts were ratified. (see Rule 60 motion pp. 12-14).

the fact that the guest house assessment claim was made 17 years after the

after 17 years as contrary to §27-2-202, MCA-8 year claim deadline: applicable for

However, Orders ignored material facts that this election claim is untimely

yet found 'Covenant 3.12 obligates members to now pay guest house assessments.'

Lower court found covenants did not expressly allow guest house assessments,

negated by facts showing III services or duties prescribed were not "necessary"

Orders (pg.7) assertion that Minnick services are "administrative" are

"Courts have no authority to insert or delete provisions of a contract where the contracts provisions are unambiguous." *Topco, Inc. v State citing Jorrett v Valley Park, Inc.* (1996), 277 Mont. 333, 341, 922 P.2d 485, 489.

ambiguity in these contracts. Orders yet ignore, delete contract restrictions above.

These covenants' restrictive language is clear & explicit & Orders found no

(above).

may be further provided from time to time in such Bylaws:" such as Bylaw VI(I) IV(E) says, "The Association is... to be limited in the exercise of its powers, as powers and responsibilities and manage its affairs" not Minnick; & GIA Articles sole administrative authority in the Community, and shall exercise its rights. powers of the Board of Directors:" & Covenant 10.01 that says the Board "is the Bylaw VI(I), "Only Committees of Directors ..... may exercise the authority or

issue shows, is refuted by Bylaw VI(I), Covenant 10.01, & GIA Articles IV(E):

administrative functions" or GIA "authority and power" given to Minnick as this

Orders (pg. 7) asserting that bylaws grant Minnick "authority" "to carry out

"provide all documentation & records... to manage & operate the property ... " proxy " "serve as point of contact...provide answers to basic landowner inquiries" process ...crew and ballot collection; tally and reporting, including absentee and pay stubs, and reporting "produce meeting minutes" "oversee election Monies," "process accounts payable and receivable" "handle payroll ... checks, Minnick contract cites III "services" such as: "Collection/Disbursement of

power to perform...services outlined below...:"

(Addendum III, pg.1), "GIA hereby grants Minnick Management the authority &

"authority & power" to agent-Minnick; evidenced by Minnick contract

dispute, as members contend, that there is NO authority for GIA to give its

as required per Bylaw VI(B)(8), & these Minnick contract services: "Collection/ Disbursement of Monies," "process accounts payable and receivable" "handle payroll ... checks, pay stubs, " "produce meeting minutes" & more are officer duties prohibited by law §35-2-440, MCA & Bylaws VII(G) & VI(H), in pertinent part:

§35-2-440, MCA. "Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws..." **GLA Bylaw VII(G)** "The Secretary shall issue notices of all meetings of the Board of Directors & Members, shall keep Minutes ... shall make reports and perform such other duties as are incident to his office or are properly required of him by the Board or President." **GLA Bylaw VII(H)** "The Treasurer shall be the chief financial officer of the Association and have the custody of all the monies and securities of the Association and deposit the same in the name of the Association in such bank or other depository ... shall keep regular books of account and balance the same each month... The Treasurer shall perform all duties incident to his office or that are properly required of him by the Board."

Complaint (DV-12-164) factual evidence (Addendum III) proves members assessments are mailed to Minnick's corporate address (PO Box 1862, Bozeman, MT. 59771) in violation of **GLA Bylaw VII(H)** requiring **GLA officer** as Treasurer "have the custody of all the monies" & Covenant II.05 requiring "the Association to maintain control & supervision over the assessment funds." & **GLA Bylaw VII(G)** officers as Secretary "shall keep minutes" "and duties incident to his office" now done by Minnick such as: "produce meeting minutes" "oversee election process ... crew and ballot collection; tally and reporting, including absences and proxy" "provide all documentation & records... to manage & operate the property..." "These officer duties listed in Minnick

Defendants must show "a complete absence of any evidence [genuine issue in dispute] which would justify submitting an issue to a jury" (as this court found in *Vader*). Here, a review of the record demonstrates that there was sufficient evidence to submit to a jury material facts in dispute for GLA's breach of contract claims violate the spirit of restrictive covenants, GLA's breach of duty (liability claim (per GLA Article VIII), denial of due process per Bylaw XI(C), tortious For GLA's motion for judgment to prevail as a matter of law, GLA

**CONCLUSION**

contract also violate statute §35-2-440 MCA requirement that officers perform them, not agent-Minnick. Such Orders, asserting agent-Minnick had authority under law or bylaws, are refused by all these contracts. These covenant, bylaw language above is clear, explicit, & absent ambiguity. Yet Orders ignore or delete these contract restrictions above ((Bylaw VI(D), Covenant 10.01, Article IV(E), Bylaw VI(B)(8), §35-2-440 MCA, Covenant 11.05, Bylaws VII(G), and Bylaw VII(H,)) that negate the Minnick contract authority. Court's oversight/omission of these material evidence & material facts in dispute that arbitrarily & capriciously deny due process rights Minnick contract was allowed. Orders thus in error, should be reversed and the Minnick contract denied thereby.



DATED this 26th day of August, 2013.

dispute remanded for further discovery & hearing by jury, & costs incurred

questions of law strictly construed in members favor, & any remaining issues in

For the foregoing reasons, Summary Judgment Orders should be reversed &

without a hearing & discovery to settle numerous material facts in dispute.

law under the constitution (14th amendment), when it granted summary judgment,

reverse District Court's Orders for violation of O'Connell's right to due process of

hearing & discovery as timely requested. This court has authority to therefore

motion that dismissed all complaints claims & material facts in dispute without

matters. The record factually proves the District Court granted GLA's summary

This issues of private property rights & due process rights are serious

liability for such acts is for a jury to decide, not a judge.

gives rise to personal liability, & acts taken on behalf of a corporation or tortious

contract violation. The difference between conduct which is tortious in nature &

GLA's actions were tortious as cited in the complaints for breach of duty &

to survive summary motion as a matter of law. Summary motion reply (pg. 11) said

The quantum & quality of evidence for these claims is more than sufficient

issues, & abuse of authority claims against Directors personally involved.

interference with covenant contracts by signing the Minnick contracts & Erickson

ASSESSMENT BILLING ADDRESS

MINNICK CONTRACT & MINNICK/GLA

DISTRICT COURT ORDERS

NOTICE OF FILING

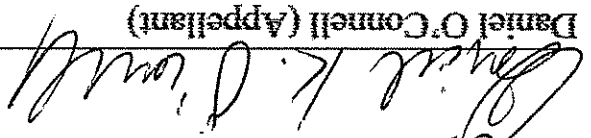
APPENDIX I

APPENDIX II

APPENDIX III

**APPENDICES**

Daniel O'Connell (Appellant)

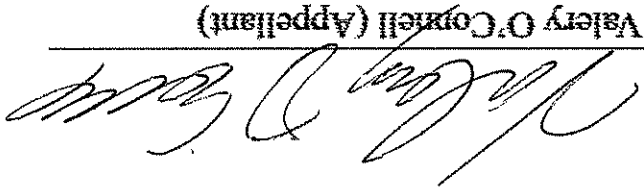


Billings, MT. 59103-0849

315 N. 24th St. (PO Drawer 849)

Brown Law Firm, P.C.

Valery O'Connell (Appellant)

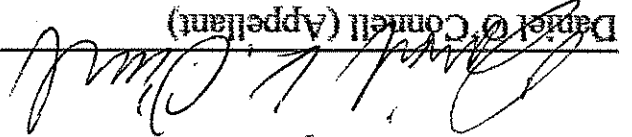


follows via first class mail this 26th day of August, 2013 to:

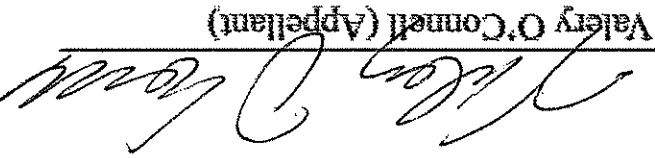
We hereby certify that a true & accurate copy of the foregoing Appellant Brief is filed with the Clerk of the Montana Supreme Court, & we have served true & accurate copies of the foregoing upon each attorney of record, & each party not represented by an attorney in the above-referenced Mt. Supreme Court action, as follows via first class mail this 26th day of August, 2013 to:

**CERTIFICATE OF SERVICE**

Daniel O'Connell (Appellant)



Valery O'Connell (Appellant)



& certificate of compliance.

Pursuant to Rule 11(3-4) of the Montana Rules of Appellant Procedure, We certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; & the word count calculated by Microsoft Word 2009, is not more than 10,000 words, excluding titles, certificate of service, & certificate of compliance.

**CERTIFICATE OF COMPLIANCE**

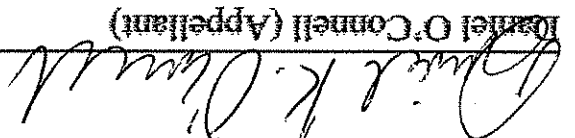
406-577-6339

dko@mac.com

Emigrant, Mt. 59027

P.O. Box 77

Daniel O'Connell (Appellant)



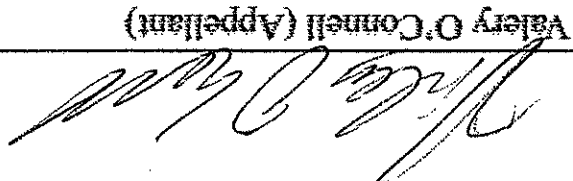
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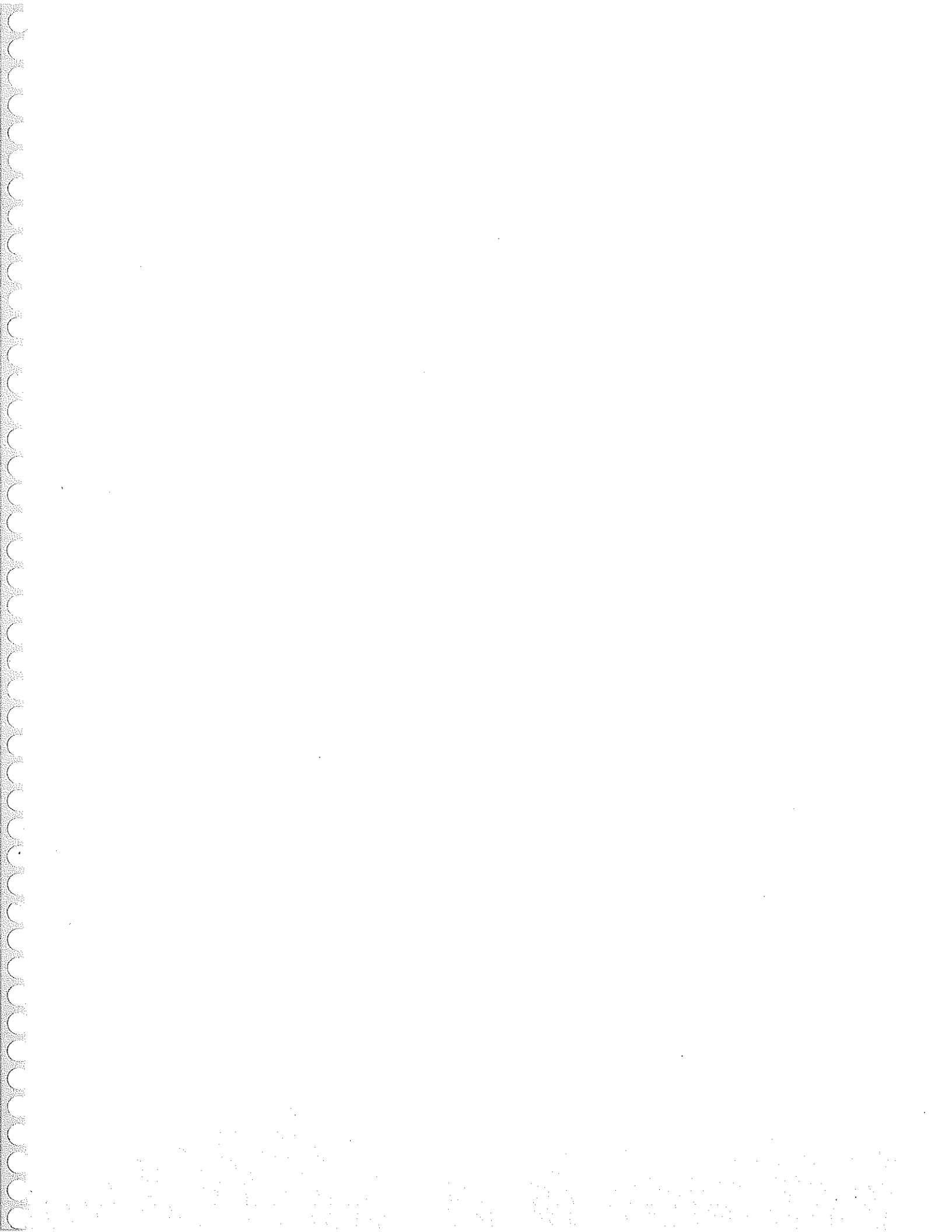
P.O. Box 77

Valery O'Connell (Appellant)



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APPENDIX I



Sincerely,

*As a reminder, one can follow this case online through the Clerk of the Supreme Court's Public View Docket at <http://supremecourtclerk.mt.gov/>.*

NOTE: If the above-described record constitutes the complete record on appeal, the Appellant's opening brief is due 30 days from July 26, 2013. Parties are responsible for calendaring their own due dates.

The DISTRICT COURT RECORD was received and filed on July 26, 2013. As received the record consists of 3 file folders, 1 original condensed transcript w/DVD of 6/5/13 hearing.

Defendants and Appellees,

GLASTONBURY LANDOWNERS  
ASSOCIATION, INC., BOARD OF  
DIRECTORS,

v.

Plaintiffs and Appellants,

DANIEL K. O'CONNELL & VALERIE  
A. O'CONNELL and for and on behalf  
of MEMBERS of the GLASTONBURY  
LANDOWNERS ASSOCIATION,

Supreme Court No.  
DA 13-0439

**NOTICE OF FILING**

July 26, 2013

IN THE SUPREME COURT OF THE STATE OF MONTANA  
THE OFFICE OF THE CLERK OF SUPREME COURT  
HELENA, MONTANA 59620-3003



FILED  
July 26 2013  
Ed Smith  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA



DISTRICT COURT ORDERS  
April 16th, June 19th, June 26th

## APPENDIX II





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HON. BRENDA R. GILBERT  
District Judge  
Sixth Judicial District  
414 East Callender  
Livingston, Montana 59047  
(406) 222-4130

PARK COUNTY CLERK  
OF DISTRICT COURT  
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BY *[Signature]*  
DEPUTY

DANIEL K. O'CONNELL and VALERY A.  
Landowners,  
Plaintiffs,  
vs.  
GLASTONBURY LANDOWNERS  
ASSOCIATION, INC. Board of Directors,  
Defendants.

Cause No. DV-12-220  
ORDER SETTING  
ORAL ARGUMENTS

THE COURT, having reviewed the file in this cause, now makes the following Order:  
1. The Court will hear Oral arguments on the following motions on Tuesday, May 28, 2013

at 10:30 a.m.

A. Plaintiffs' Motion for Summary Judgment;

B. Plaintiff's Motion to Enjoin Cases; and

C. Defendant's Cross-Motion for Summary Judgment

Each side shall be limited to one-half (1/2) hour total in which to present argument on the

three motions.

DATED this 16th day of April, 2013.

*[Signature]*  
Brenda R. Gilbert, District Judge

cc: Valery A. and Daniel K. O'Connell  
Michael P. Heringer/ Seth M. Cunningham

*msc*  
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The Plaintiffs filed their Petition for a Temporary and Permanent Restraining Order on October 22, 2012. On September 24, 2012, Plaintiffs filed their Cause No. DV 12-164, requesting a Writ of Mandamus directing the GLA to perform the duties otherwise delegated to Minnick Management Corporation, to cancel the Minnick Management contract and to cancel two allegedly illegal contracts with the Ericksons regarding a variance issue. In DV 2012-164, the Petitioners therein, the Plaintiffs herein, also requested a Writ of Prohibition arresting the proceedings listed within the Minnick and Erickson contracts until such time as a hearing could be held.

On December 4, 2012, the Plaintiffs filed their Motion for Declaratory Judgment and Notice to Join TRO. On January 22, 2013, the Plaintiffs filed their Motion for Summary Judgment and Motion to Enjoin Cases. The Defendants filed its Cross-Motion for Summary Judgment, requesting that summary

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| <p>ORDER ON PLAINTIFFS' RULE 60 RELIEF<br/>FROM JUDGMENT &amp; MOTION<br/>FOR JURY TRIAL</p> <p>Cause No.: DV-2012-220<br/>DV-2012-164</p> | <p>DANIEL and VALERY O'CONNELL (for and<br/>on behalf of GLA landowners),<br/>Plaintiffs,<br/>v.<br/>GLASTONBURY LANDOWNERS<br/>ASSOCIATION, INC. Board of Directors,<br/>Defendants.</p> |
|--|---|

MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

HON. BRENDA R. GILBERT  
District Judge  
Sixth Judicial District  
414 East Callender Street  
Livingston, Montana 59047  
406-222-4130

PARK COUNTY CLERK  
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BY *Jamie Little*  
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judgment be entered in its favor with regard to all issues raised in actions DV 12-220 and DV 12-164.

Both parties assert an absence of genuine issue of material facts. The Motions have been fully briefed

by the parties.

The Court conducted a hearing on Wednesday, June 5, 2013 and heard oral arguments with

respect to the pending Motions. On June 19, 2013, the Court entered an Order Denying the Plaintiffs'

Motion for Summary Judgment, Granting the Defendant's Cross-Motion for Summary Judgment and

Denying any and all further claims, motions and Writs in Cause Numbers DV 12-220 and DV 12-164.

The Plaintiffs thereafter filed a Rule 60 Relief from Judgment & Motion for Jury Trial in which

they claim that the Court erred in its June 19 Order because the claims in the DV 12-164 cause were not

properly before the Court at the June 5, 2013 hearing. The Court now makes the following order:

1. The Plaintiffs' Rule 60 Relief from Judgment & Motion for Jury Trial are

DENIED for the following reasons:

a.

The Plaintiffs were the first parties to argue during the hearing on June

5, 2013 and did, in fact argue the very points which they now claim the

Court erred in deciding from DV 12-164. If Plaintiffs truly believed

that the issues in DV 12-164 were not ripe or ready to be argued before

the Court, there would have been no reason for them to make the

arguments.

b.

Pursuant to M.R.Civ.P. Rule 56 (c)(2)(a), the right to a hearing on

summary judgment is waived unless a party requests a hearing within

14 days after the time for filing a reply brief has expired. The Plaintiffs

filed no reply brief in DV 12-164, but the time to do so expired on

February 28, 2013 and neither party requested a hearing within 14 days

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after that. Therefore, the Court could rule on the issues in the Motion for summary judgment in DV 12-164 on the basis of the briefs, the file and the law. That the Court had oral arguments to listen to, provided chiefly by the Plaintiffs, was also welcome and useful.

The Plaintiffs' relief and motion are denied.

DATED this 26<sup>th</sup> day of June, 2013.

  
BRENDA R. GILBERT, District Judge

CC: Daniel K. O'Connell/Valery A. O'Connell  
Michael P. Herringer / Seth M. Cunningham  
6/26/13 mailed

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The Plaintiffs filed their Petition for a Temporary and Permanent Restraining Order on October 22, 2012. On September 24, 2012, Plaintiffs filed their Cause No. DV 12-164, requesting a Writ of Mandamus directing the GLA to perform the duties otherwise delegated to Minnick Management Corporation, to cancel the Minnick Management contract and to cancel two allegedly illegal contracts with the Ericksons regarding a variance issue. In DV 2012-164, the Petitioners therein, the Plaintiffs herein, also requested a Writ of Prohibition arresting the proceedings listed within the Minnick and Erickson contracts until such time as a hearing could be held.

On December 4, 2012, the Plaintiffs filed their Motion for Declaratory Judgment and Notice to Join TRO. On January 22, 2013, the Plaintiffs filed their Motion for Summary Judgment and Motion to Enjoin Cases. The Defendants filed its Cross-Motion for Summary Judgment, requesting that summary

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

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

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|--|--|
| <b>ORDER ON PLAINTIFFS' MOTION FOR<br/>SUMMARY JUDGMENT AND<br/>DEFENDANTS' CROSS MOTIONS FOR<br/>SUMMARY JUDGMENT</b> | Plaintiffs,<br><br>DANIEL and VALERY O'CONNELL (for and<br>on behalf of GLA landowners),<br><br>v.<br><br>GLASTONBURY LANDOWNERS<br>ASSOCIATION, INC. Board of Directors,<br><br>Defendants. |
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HON. BRENDA R. GILBERT  
 District Judge  
 Sixth Judicial District  
 414 East Callender Street  
 Livingston, Montana 59047  
 406-222-4130

judgment be entered in its favor with regard to all issues raised in actions DV 12-220 and DV 12-164. Both parties assert an absence of genuine issue of material facts. The Motions have been fully briefed by the parties. The Court conducted a hearing on Wednesday, June 5, 2013 and heard oral arguments with respect to the pending Motions. The Court having considered the Motions, the Briefs and Affidavits filed with respect to such Motions, the oral argument presented, and all of the records and files herein, whether specifically mentioned or not, now enters the following Orders:

IT IS HEREBY ORDERED AS FOLLOWS:

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

EXPLANATORY COMMENTS

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

SUMMARY JUDGMENT STANDARD

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

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

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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. *Vincelle 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 THE ERICKSON VARIANCE

13 Generally, the Defendant GLA's Covenants and Master Plan allow only two homes per lot. The

14 Ericksons own two lots, Lots numbered 90 and 91, in South Glastonbury, which lots are adjacent to

15 one another. The Ericksons requested a variance from the GLA Board that would permit them to

16 construct 5 houses on their two combined lots. The GLA board discussed the matter and sought input

17 from other landowners. The requested variance was made known to the other members of the

18 subdivision and input and comment were sought. Some members voiced concern. The terms of the

19 variance that were reached precluded any building in the future on Lot 91. The GLA Board then

20 granted the Ericksons permission to build four homes on Lot 90. The ultimate result was that the only

21 individuals objecting to the terms of the variance were the Plaintiffs.

22 The Covenants, at Section 12.01, provide that, "The Association reserves the right to waive or

23 grant variances to any of the provisions in this Declaration, where, in its discretion, it believes the same

24 to be necessary and where the same will not be injurious to the rest of the Community". The

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*Mr. ...*

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

THE GUEST HOUSE ASSESSMENT CLAIM

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

The GLA Board approved the variance under Section 4.2 of the Master Plan. The Board has discretion to approve or deny variance requests in accordance with Section 12.01 of the Covenants. 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 must be always sold together in the future, the Board believed that the principle of two homes per lot was effectively served. The factors cited in approving the variance were that it was not materially detrimental to neighboring properties, the topography on the lots justified the variance, and the Ericksons would be making road improvements leading to their lot and to the GLA common land and Forest Service Land.

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

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Plaintiffs claim that the GLA's undisputed actions of "collecting new guest house assessments exceed its contract authority, rewrite and/or misinterpret its contracts, and/or violate its covenant/bylaw contracts, and breach their duty to members and the Association pursuant to GLA Art. VIII." The

Plaintiffs contend that a guest house is determined by its intended design and use as defined in GLA Covenant/Masterplan 6.0 which says a guest house is "intended for occasional guest use and not as a permanent residence, not to exceed 1,200 square feet." Such a guest house, is, according to Plaintiffs, not a dwelling unit. Plaintiffs base this contention upon the definition of dwelling units found in Covenant 3.12 that states it is intended "for occupancy by a single family" and is not restricted in size or use.

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

A structure or portion of a structure, normally consisting of living area, bathroom and cooling 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 cooling facilities.

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

variance.

The GLA responds that its Board determined guest houses were "dwelling units" because they

had living areas, bathroom and cooking facilities, and were designed for occupancy by a single

family. GLA points out that some residents in the GLA reside full time in guest houses. It contends

that 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.

The stated justification for assessing the guest houses as "dwelling units", according to GLA,

ensures that those receiving the benefit of GLA services such as snow removal and road maintenance,

are contributing like their neighbors. Thus the GLA Board has determined that if a structure has

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

No disputed material facts exist with respect to this issue. Both parties so have alleged and

have requested summary judgment be entered. Covenants are construed under ordinary principles of

contract law. When interpreting a contract, "the words of a contract are to be understood in their

ordinary and popular sense..." Section 28-3-501, MCA.

The GLA Board's determination that a guest house is a dwelling unit because it has living areas,

a bathroom, and cooking facilities, and is designed for occupancy by a single family, is a

straightforward interpretation of the Covenants. The fact that the Master Plan restricts the size of the

guest house to 1200 square feet and states that they structures not intended to be permanent residences

does not change the fact that a guest house fits within the definition of a dwelling unit.

GLA's cross-motion for summary judgment is granted as to this issue and the Plaintiffs' motion

for summary judgment as to the guest house assessment issue is denied.

Further, the Plaintiffs' argument that they are entitled to judgment on this issue because the GLA

did not address this claim in its initial Motion to Dismiss is not well taken. The Defendant's Motion

altered the time to respond to all of the causes of action. Plaintiffs did not seek to default GLA on this

claim, nor would such a request have been appropriate. When the Court denied the Motion to Dismiss

by its Order of January 9, 2013, the GLA filed its Answer on January 17, 2013, well within the time

allotted by Mont. R. Civ. P. 12(a)(4)(A).

### THE MINNICK CONTRACT

On June 1, 2012, the GLA entered into a contract with Minnick Management Corporation.

(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 Section 35-2-118(1), MCA allows nonprofit corporations to enter into contracts and to hire

7 employees and appoint agents. The GLA Bylaws give the GLA the power to enter into contracts, hire

8 employees and agents and to "Do any and all things necessary to carry into effect these bylaws and to

9 implement the purposes and exercise the powers as stated in the Articles of Incorporation, Covenants,

10 Bylaws, Rules and any Land Use Master Plan adopted pursuant to the Covenants Section VI.B.14

11 (Bylaws, Article VI.B.14)

12 With statutory authority and authority granted by the bylaws, the Board has hired Minnick to

13 carry out administrative functions. This does not constitute an abrogation of the Board's authority to

14 Minnick. Indeed, if the GLA Board were tasked with performing all of the administrative tasks being

15 performed by Minnick at this time, it would probably find it very difficult to fill the Board positions.\*

16 The Affidavit of Richard Bolen is instructive as to the nature of the responsibilities that have

17 been delegated to Minnick, and the Plaintiffs have not disputed the assertions therein. According to the

18 Bolen Affidavit, Minnick collects assessments, files liens, processes accounts payable and receivable,

19 maintains GLA accounts, obtains approval for payment of bills from the GLA Board, produces

20 monthly financial statements, maintains employment and contractor records, maintains membership

21 records, takes minutes at meetings, makes copies of agendas and handouts, completes mailings, helps

22 collect and tally ballots, serves as a point of contact for inquiries, mails out newsletters and quarterly

23 reports and responds to service requests.

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By way of contrast, Minnick does not oversee contracts for road and building maintenance, work

with utilities, handle insurance matters, handle covenant enforcement, approve or deny variance

requests, approve building designs, designate committees, approve expenditures of funds, promulgate

rules and regulations, hire or fire employees, or set assessments. The GLA board reserved its decision-

making powers and Minnick has been contracted to complete administrative functions.

The Plaintiffs' position that the GLA board can only delegate its powers to a committee, rather

than a corporation, under Article VI.B.8, does not take into consideration the principle of reading the

Bylaws as a whole. The Bylaws give the GLA Board the authority to hire employees and appoint

agents in order to do any and all things necessary to conduct the business and affairs of the

Association.

The Minnick contract is allowed by the Bylaws and by statute. It appears to be a necessary

delegation of administrative duties, particularly given the large number of GLA members. The

Plaintiffs' Motion for Summary Judgment on this issue is denied and the Defendant's Motion for

Summary Judgment on this issue is granted.

### THE ELECTION PROCEDURES

The GLA has six vacancies on its board each year, three positions from North Glastonbury and

three positions from South Glastonbury. Voting is based upon a "membership interest", which is

derived from ownership of a parcel, (including an undivided tenancy-in-common interest or a joint

tenancy), or a condominium unit. Articles IV.B and V.F. of the Bylaws provide that each membership

interest is entitled to one vote.

The Plaintiffs complain that the GLA November newsletter states that the GLA Board allows its

members to cast "up to 3 votes" per membership/parcel or "one vote per position" instead of one vote.

The Plaintiffs contend that this newsletter, the GLA Ballots and GLA Bylaw/Covenants attached to

their Complaint are prima facie evidence that all 12 Board seats will get votes this way and never be

eliminated.

The GLA responds by noting that, since its inception, the GLA has sent separate ballots to each

membership interest for North and South Glastonbury. The ballots list all candidates for the three

vacancies and instruct the holder of the membership interest to vote for three separate candidates to fill

the three separate vacancies. Each membership interest has one vote per vacancy. The three

candidates with the most votes win seats on the board. The GLA submits that each membership

interest has one vote per issue. When there are three vacancies on the board, a membership gets to vote

for one candidate per vacancy.

The elections have been conducted this way since the GLA was formed in 1997. The Plaintiffs

have not objected to these procedures until 2012. The Plaintiffs have run for election and Plaintiff

Daniel O'Connell was elected to the GLA Board in 2009 under these election procedures. The GLA

claims that the Plaintiffs' complaints about the election procedures are barred by equitable estoppel.

acquiescence, and waiver.

The Court concludes that the GLA Board has the authority to administer the elections as it has

done historically and is currently doing. Although the Bylaws do not specify election procedures,

Article XII.A of the Bylaws provides that, "The Board shall have the power to interpret all the

provision of these Bylaws and such interpretation shall be binding on all persons."

The ballots complained of by the Plaintiffs clearly allow each membership one vote, per issue-

that is per board vacancy. Moreover, Plaintiffs have acquiesced in the election procedures. Plaintiff

Daniel O'Connell ran for director and won under these procedures. The Court concludes that the

Plaintiffs' objections to the procedure after the last two elections have not gone their way can not be

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sanctioned under the doctrine of equitable estoppel. Plaintiffs' consent to and active participation in the

current election process in prior years constitutes a waiver of the right to challenge it. *Kelly v. Lovejoy*,

172 Mont. 516, 520, 565 P.2d 321, 324 (1977). Finally, Plaintiffs' claim regarding the GLA's election

procedures is barred by the doctrine of laches. The Plaintiffs' Motion for Summary Judgment on this

issue is denied and the Defendant's Motion for Summary Judgment on this issue is granted.

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

*Brenda R. Gilbert*

BRENDA R. GILBERT, District Judge

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

Mld  
6-19-13  
SB

MINNICK / GLA ASSESSMENT BILLING ADDRESS  
MINNICK CONTRACT &

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**APPENDIX III**





**MINNICK MANAGEMENT, INC**  
**HOME OWNERS ASSOCIATION MANAGEMENT AGREEMENT**

|    |   |
|----|---|
| 1  |   |
| 2  |   |
| 3  | This Property Management Agreement is made and entered into on December 1, 2012 between                         |
| 4  | <u>Minnick Management, Inc. and Glasstonbury Landowners Association, Inc.</u> , hereinafter called <u>GIA</u> , |
| 5  | GIA hereby appoints and grants Minnick Management Inc. the exclusive right to conduct the activities            |
| 6  | defined below for the Glasstonbury Landowners Association in Emigrant, Montana and appoints                     |
| 7  | Minnick Management, Inc. as its agent to carry out such activities.   |
| 8  |   |
| 9  | Minnick Management Inc. accepts the appointment and grants, and agrees to use due diligence in the              |
| 10 | performance of this Agreement and to furnish the services of its firm for the operation and                     |
| 11 | management of the Property.   |
| 12 |   |
| 13 | The term of this Agreement shall continue until terminated by one of the parties, which may be carried          |
| 14 | out by either party to this contract by way of written notice provided at least 60 days in advance              |
| 15 | of such termination.  |
| 16 |   |
| 17 | GIA hereby grants Minnick Management Inc. the authority and power to perform any and all lawful                 |
| 18 | actions necessary for the accomplishment of services outlined below.  |
| 19 |   |
| 20 | <b>Financial Management</b>   |
| 21 | Accounts will remain in separate bank accounts, managed through QuickBooks.                                     |
| 22 |   |
| 23 | <b>Collection/Disbursement of Monies</b>  |
| 24 | • Collect GIA assessments (produce & mail annual and/or quarterly statements for                                |
| 25 | assessments; warning, collection, and lien letters using GIA templates, etc).                                   |
| 26 | • Coordinate with the companies for collection of assessments at closing.                                       |
| 27 | • File liens on delinquent landowners as directed by the board.   |
| 28 | • Process accounts payable and accounts receivable on a monthly basis.  |
| 29 | • Maintain and reconcile GIA operating and reserve accounts under board supervision.                            |
| 30 | • Prepare checks for designated director to sign and/or forward bills to get approval to                        |
| 31 | pay.  |
| 32 |   |
| 33 | <b>Reporting</b>  |
| 34 | • Produce monthly financial statements, PDFs by e-mail & hard copies for Board meetings.                        |
| 35 | • Produce year-end financial reports  |
| 36 | • Assist in the preparation of annual operating budgets as the board directs.                                   |
| 37 | • Coordinate the annual tax return with the GIA accountant.   |
| 38 | • Coordinate and assist in any audits.  |
| 39 | • Once prepared by accountant, submit the annual corporation tax filing with the State.                         |
| 40 | • Provide to the Board additional information such as custom reports, lists or other                            |
| 41 | particular information as requested by the Board  |
| 42 |   |
| 43 | <b>Employee/Independent Contractor Accounting &amp; Reporting</b>   |
| 44 | • Maintain Employee and Independent Contractor records  |
| 45 | • Request Independent Contractor Exemption Certificate, SSN, EIN# or other required                             |
| 46 | information for proper administration.  |



|    |   |    |                           |
|----|---|----|---------------------------|
| 47 | • Receive invoices approved to pay from designated director(s) and prepare checks for designated director to sign.  |    |                           |
| 48 | • Handle payroll processing including checks, pay stubs and reporting.  |    |                           |
| 49 | • File all required tax forms for both Employees and Independent Contractors according to good business practices and legal compliance.   |    |                           |
| 50 | 51  | 52 | Administrative Management |
| 53 | 54  | 55 | Association Records       |
| 56 | • Hard copy storage & scan to upload on SharePoint as appropriate.  |    |                           |
| 57 | • Maintain landowner membership records in QuickBooks.  |    |                           |
| 58 | • Maintain landowner hard copy correspondence records for financial management matters listed above.  |    |                           |
| 59 | • Maintain landowner hard copy record of correspondence mailed out and/or received on matters other than financial management.  |    |                           |
| 60 | • Project review status and covenant violation resolution.  |    |                           |
| 61 | • Only previous year's financial records needed for GLA management, but can store other necessary GLA hard copy records (all boxes should be clearly labeled with contents & dates included in each box).   |    |                           |
| 62 | 63  | 64 | Meetings                  |
| 65 | • Prepare for and attend 1 monthly board meeting and the annual meeting and election advise concerning streamlined, consistent policies & procedures, offer examples or templates. Not included: research or creating the policies, forms and procedures.   |    |                           |
| 66 | • Two representatives at meetings when possible one to assist with minutes.   |    |                           |
| 67 | • Provide copies of agenda & hand-outs for board and annual meetings.   |    |                           |
| 68 | • Provide copies of materials to be included in landowner binders for meetings.   |    |                           |
| 69 | • Assist in agenda development by handling agenda item requests from Board and landowners which are then given to designated director to incorporate into agenda.   |    |                           |
| 70 | • Produce meeting minutes for board meetings with designated director.  |    |                           |
| 71 | • Annual meeting and election mailings: assist in producing and mailing out appropriate materials for Nomination mailing in September, and Candidate mailing with ballots in October. Receive mail from nominees and compile information for Board/Committees to handle in creating content of Candidate mailing. |    |                           |
| 72 | • Annual meeting and election process: oversee election process; volunteer crew and ballot collection; tally and reporting, including absentee & proxy.   |    |                           |
| 73 | 74  | 75 | Communications            |
| 76 | • Maintain records of all Board and landowner meetings.   |    |                           |
| 77 | • Serve as a point of contact for landowners via phone, e-mail, U.S. Mail, delivery service, or in person, and provide answers to basic landowner inquiries such as general association information or account questions.   |    |                           |
| 78 | • As appropriate, forward communication or information received to designated board contact, or to other directors/committees as agreed upon, in a timely fashion via phone, e-mail, fax, or other means, depending on the nature of the item or communication received.  |    |                           |
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139 3. To provide liability and property damage insurance adequate to protect the property and to name  
138 Minnick Management Inc. as additional insured if requested.  
137 Inc's firm.

136 negligent or intentional acts of Minnick Management Inc. or any person in Minnick Management  
135 authorities herein or hereafter granted to Minnick Management Inc., except to the extent due to the  
134 Minnick Management Inc. or the performance or exercise of any of the duties, power, or  
133 management or operation of the property by Minnick Management Inc. or any person employed by  
132 of Directors and those arising out of injury or death of any person(s), in any way relating to the  
131 and claims asserted against Minnick Management Inc. in carrying out legal duties of the Board  
130 damages, and claims of every type, including but not limited to any such suits, liabilities, damages,  
129 indemnify and hold Minnick Management Inc. harmless from all costs, expenses, suits, liability,  
128 Management Inc. will automatically use such letter unless otherwise instructed by Board.  
127 appropriate previously created notice of letter accepted by Board is available, Minnick  
126 other written correspondence to be sent to owners. In cases where precedent has been set and the  
125 duties described herein, Board of Directors will supply or create requested notices, newsletters, or  
124 1. Provide all documentation and records required by Minnick Management Inc. to carry out the

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121 OLA agrees to abide by the following:

- 120  
119 subject to additional costs as described under Minnick Management Inc. fee structure.  
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117 • Variances and or other projects that require extra time to process and prepare are  
116 information and necessary fees have been provided prior to board review.  
115 • Perform basic administrative duties for project review applications, ensuring that all  
114 Project Reviews:

- 113 enforcement correspondence signed by the Board.  
112 • Board/Committees will handle covenant enforcement. Management will administrate  
111 • Board/Committees to handle drive-throughs and on-site services.  
110 • Board/Committees to handle insurance claims.  
109 • Board/Committees to handle working with utility services, etc.  
108 maintenance, snow removal, etc.  
107 • Board/Committees to handle oversight or contacts for landscape or building  
106 • Establish open communication with all homeowners to help respond to service requests.  
105 Site Management:

- 104 when service details are agreed upon.  
103  
102 in addition to regular fees, with cap on total hours set beforehand, rate to be worked out  
101 • Handling emergency communications such as wildfire, natural disasters would be done  
100 • Keep track of mailing lists used for mailings for possible future reference.  
99 • Duplicate newsletter and mail out with quarterly statements or as directed by the Board.  
98 • Website updates on SharePoint.  
97 • Mail out Welcome Packet for new landowners as directed by the Board.  
96 landowners as directed by the Board and signed by the Board.  
95 • For issues relating to covenant violations or other particular matters, correspond with

General Terms:

143 Minnick Management Inc. must provide Worker's Compensation insurance for all employees utilized for labor services provided to GLA.

144 Minnick Management Inc. will provide the Board of Directors a proof of their own general liability and other operating insurance as well as a copy of their Property Management License upon request.

145 The Minnick Management Inc. fee structure:

146 GLA agrees to pay Minnick Management Inc. as follows:

- 1. Management Fee in the amount of \$4.75/land division per month.
- 2. Reimbursement for postage, printing & reproduction copy, office supply & like office incidental expenditures incurred directly from the administration of the association. All copies are tracked for the month and billed at ten cents each, and postage at cost; no other office supply fees unless mutually agreed upon.
- 3. Project review clerical administration of variances and/or projects requiring additional time to process will be billed by Minnick Management Inc. to the GLA at the rate of \$20/hour.
- 4. Full membership mailings, charge for envelopes, copies & postage but not for stuffing and mailing. The GLA generally has 6 full membership mailings/yr (4 quarterly statements & newsletter 2 annual meeting/election materials).
- 5. In the event that GLA requests Minnick Management Inc. to take on work exceeding the scope of this agreement or usual and normal management responsibilities, then a fee shall be agreed upon for such services before the work begins. Standard management does not include the coordination of construction and/or repairs, additional mileage, modernization, restorations, rehabilitations, insurance claim repair supervision, or obtaining tax & legal advice on behalf of the association.

- 6. For consideration of the additional administrative work required, 50% of all collected late fees from delinquent homeowners become property of Minnick Management Inc. For accounts that have been delinquent prior to Minnick Management Inc. being involved, only those late fees which accrue to the account beginning February 1<sup>st</sup>, 2012 will be eligible for the 50% disbursement to Minnick Management Inc. when such fees are collected.
- 7. \$50 per lien filing plus clerk and recorders filing fees shall be collected by Minnick Management Inc. for any liens filed on delinquent homeowners. \$50 per lien release filing plus clerk and recorders filing fees. Lien filing and Release fees are charged back to the homeowner.

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Wanda Marie  
Minnick Management Inc.

Date

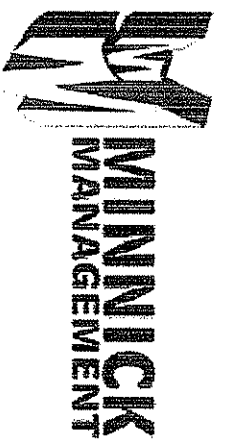
12/10/2012

CLA President

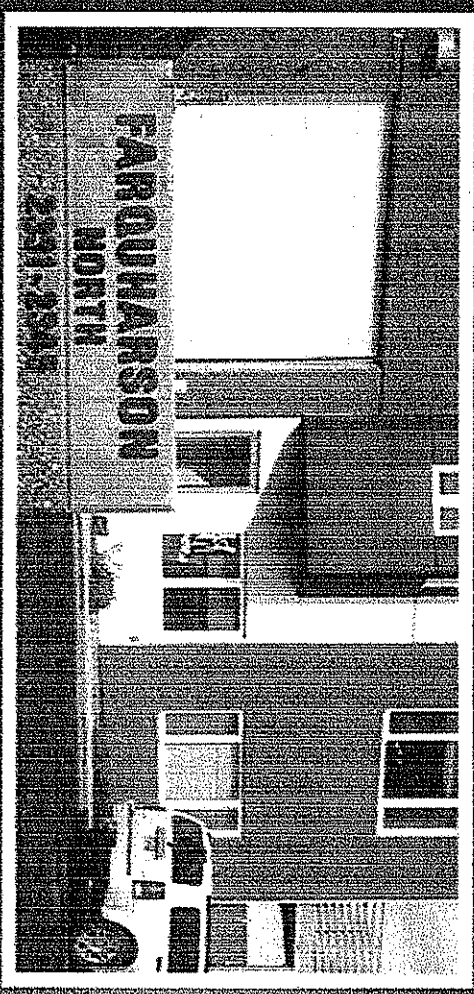
[Signature]

Date

12/17/2012



HOME ABOUT US OWNERS TENANTS HOAS COMMERCIAL FIND A HOME CONTACT US



## Property Management to Fit Your Lifestyle.

At Minnick Management Incorporated we do more than provide a service, we provide an environment of friendly service and expertise.

[View Rental Properties](#)

[or Learn More About Us](#)

### Client Testimonial

*I have been thrilled with the exceptional service I've received from Minnick Management. Nathan and his team have always been on top of things and I am happy to say that I've been with MMI for almost 5 years now. MMI has truly gone the extra mile for me and my properties.*

~ Sean Becker, Property Owner

### Contact Us

Minnick Management, Inc.  
2339 Birdle Drive  
Bozeman, MT 59715

Ph: (408) 556-7187  
Fax: (408) 556-7197

Mailing Address:  
PO Box 1862  
Bozeman, MT 59771



BBB Rating: A+  
As of 9/17/2013  
Click for Review

# Statement

1/15/2013

Web Site: [www.gla-mt.org](http://www.gla-mt.org)

[admin@GLA-MT.org](mailto:admin@GLA-MT.org)

Amount Due

\$542.00

To: Daniel & Valery O'Connell (NG 5-C)  
 P. O. Box 77  
 Emigrant, MT 59027-0144

Glastonbury Landowner's Association  
 P.O. Box 1862  
 Bozeman, MT 59771

| Date       | Description  | Amount | Balance |
|------------|--|--------|---------|
| 12/31/2012 | Balance forward  |        | -30.00  |
| 01/06/2013 | INV #11315   | 572.00 | 542.00  |
| 01/15/2013 | --- Dwelling 2013 NG \$191.00<br>--- Land 2013 NG \$191.00<br>--- ChipSeal-2009 \$190.00<br>Amount Due |        | 542.00  |

Please remember, it is the landowner's responsibility to inform the Glastonbury Landowners Association of any change of address. If you sell your property, please inform the Association of the name and address of the new owners. Thank you.

Per Glastonbury Covenants (11.03) The 2015 assessments are due by January 31, 2015. Please remember that unpaid balances prior to 2015 accrue late charges. (11.03) Annual Community Assessment: Each Landowner shall pay an annual community assessment to the Association... The annual assessment covers the period from January 1 to December 31 of each year... The annual assessment shall be payable either annually on or before January 31, or quarterly in four equal increments on or before January 31, April 30, July 31, and October 31 of each year. If the assessment notice is mailed after January 15, the annual payment or first quarterly installment shall not be payable until fifteen (15) days after the date postmarked... If you are unable to remit the amount by this date, you may contact the GLA Board at 406-451-0033 to make payment arrangements.



