DA 13-0439

IN THE SUPREME COURT OF THE STATE OF MONTANA

DANIEL K. O'CONNELL & VALERY A. O'CONNELL,
Plaintiffs/Appellants,

v.

GLASTONBURY LANDOWNERS ASSOCIATION, INC.,
BOARD OF DIRECTORS,
Defendants/Appellees.

DEFENDANTS/APPELLEES ANSWER BRIEF

On Appeal from the Montana Sixth Judicial District Court,
Park County
Honorable Brenda R. Gilbert

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An APPENDIX OF EXHIBITS is attached as a separate volume for the convenience of the Court.

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GLASTONBURY LANDOWNER'S ASSOCIATION BOARD OF DIRECTORS STATEMENT OF THE ISSUES

Plaintiffs and Appellants Daniel and Valery O'Connell (O'Connells) present six issues on appeal. Defendants and Appellees Glastonbury Landowner's Association Board of Directors (GLA) understand the issues on appeal to be:

1) Did the District Court err in granting GLA's Cross-Motion for Summary Judgment and did the O'Connells have the opportunity to conduct discovery and have a hearing?

2) Did the District Court err in determining the GLA Board properly granted the Erickson variance?

3) Did the District Court err in determining the GLA may collect assessments on guest houses?

4) Did the District Court err in determining the GLA voting procedures are proper, and the O'Connells' objections are barred by equitable estoppel?

5) Did the District Court err in applying the doctrine of equitable estoppel in the O'Connells' election claims but not in the guest house claims?

6) Did the District Court err in determining the Minnick Contract was valid?

GLA'S STATEMENT OF THE CASE

This appeal is the result of the O'Connells' filing two Complaints; numerous meritless motions for restraining orders, sanctions, and to strike; and a Motion for Summary Judgment. The GLA filed a Cross-Motion for Summary Judgment in response. After hearing oral arguments, Judge Gilbert ruled in favor of the GLA on all issues—prompting the O'Connells to appeal to this Court.

At the heart of this case are two landowners, the O'Connells, of over 360 landowners at a residential development just South of Livingston, Montana in Paradise Valley who are litigious in the extreme and repeatedly file lawsuits in an attempt to use the courts to run the homeowner's association in the way they see fit.

Daniel O'Connell was elected to the GLA Board in 2009, but removed in a special recall election before his term expired. Since then, both O'Connells have run for the Board each election, but their neighbors decline to the elect them. The O'Connells have filed five lawsuits in the past two years in an attempt to bully their neighbors into submission. At oral arguments on June 5, 2013, Valery O'Connell stated:

> I have never, ever put something in litigation before warning them [the GLA] several times. The problem is they never listened to me, and they don't believe me, and they get it in their head that they're right.
> So, I think it's time that they realize that, you know, some of the things I say have to be right. I can't be wrong all the time....And it's a pity that we're here, again, and that I – every time they do something, I have to file a

lawsuit, because the lawsuit I filed is too old to amend. (See page14 of transcript attached as Exhibit C).

While Plaintiffs may disagree with a Board decision, that does not automatically make the decision illegal and subject to judicial review. The remedy for disagreeing with the Board is to change the Board through the corporation's election procedures. However, it is a democratic organization, and the vast majority of members obviously approve of the Board's actions and have repeatedly declined to give the O'Connells power.

As a result the O'Connells have resorted to repeatedly suing the GLA. The issues complained of in the O'Connell's Complaints are meritless and brought solely for the purpose of harassing the GLA and causing it to bear great cost in defending these actions. Judge Gilbert properly ruled in the GLA's favor on its Cross-Motion for Summary Judgment. The GLA acted within its authority found within its governing documents and Montana statutes. It properly exercised its discretionary powers and its interpretations of its governing documents are reasonable. The only objection to the GLA's actions came from two of over 360 landowners who want total control of the GLA and now are using the court to attempt to gain control. The GLA respectfully requests this Court to affirm the District Court on all issues and provide it relief from the litigious onslaught by the O'Connells.

STATEMENT OF THE FACTS

The GLA is a nonprofit corporation formed for the mutual benefit of landowners within two developments self-named North and South Glastonbury near Emigrant, Montana in Park County, Montana. (Aff. of Richard Bolen ¶2 attached as Exhibit D and Aff. of Alyssa Allen ¶2 attached as Exhibit E). The GLA is governed by its Articles of Incorporation (Exhibit G), the Bylaws of the Glastonbury Landowners Association, Inc. (Exhibit H and hereinafter "Bylaws"), the Restated Declaration of Covenants for the Community of Glastonbury (Exhibit I and hereinafter "Covenants"), and the Glastonbury Land Use Master Plan (Exhibit J and hereinafter "Master Plan"). Exhibit K-1 is a map of the Emigrant area and the North and South Glastonbury areas outlines roughly drawn in. Exhibits K-2 through K-5 are zoomed-in maps of North and South Glastonbury respectively which show the individual lots. There are nearly 400 membership interests held by about 360 landowners in the two developments. Parcels within the developments are primarily used as residences. (Exhibits D and E at ¶2).

The GLA board consists of 12 volunteer directors, six each from North and South Glastonbury. Directors serve a two year term, and six directors (three each from North and South Glastonbury) are elected every year (occasionally there are more vacancies if a director has left before the end of the term). (Exhibits D and E at ¶3). The GLA, through its board, maintains the roads and common areas,

collects assessments, approves building proposals, evaluates variance requests, enforces the restrictive covenants, and has a myriad of other tasks much like any landowners association. (Exhibits D and E at ¶3).

The O'Connells have resided in North Glastonbury for over seven years. (See lot 5 on Ex. K-4). (Exhibits D and E at ¶4). As the O'Connells have noted in their Brief, they have filed five lawsuits against the GLA in less than two years. (Exhibits D and E at ¶4). The O'Connels complain these suits have cost the GLA over $50,000 in legal fees but fail to acknowledge this is a result of their own litigious behavior. The O'Connells have threatened to continue to file lawsuits until the current GLA board resigns. (Exhibits D and E at ¶4). Lawsuits DV-12-220 and DV-12-164 are just the latest meritless suits designed to harass and cost their neighbors in the GLA time and money to defend.

The O'Connells' first Complaint (titled "Writ of Prohibition and Writ of Mandamus") was filed in Park County on September 24, 2012 under cause number DV-12-164 and alleged the GLA Board entered into an illegal administration contract with a property management company, Minnick Management. It also alleged the GLA Board wrongly granted a variance to landowners allowing the landowners to cluster four residences on one side of their two adjoining parcels.

The O'Connells' second Complaint (titled Petition for Temporary & Permanent Restraining Order) was filed in Gallatin County on October 22, 2012

under cause number DV-12-220 and asked for temporary and permanent injunctions against the GLA to prohibit it from collecting homeowner's association assessments on guest houses and requests injunctive relief to order new elections because they allege the GLA has conducted its elections wrong.

DV-12-220 was moved to Park County after the GLA moved to change venue, and both cases were set before Judge Brenda Gilbert in the Montana Sixth Judicial District Court, Park County. The O'Connells filed for summary judgment on their claims regarding Minnick Management, guest house assessments, and the elections on January 18, 2013. The GLA responded with a Cross-Motion for Summary Judgment on all of the O'Connells' claims on February 11, 2013. The District Court held oral arguments on June 5, 2013, and granted the GLA's Cross-Motion for Summary Judgment in its entirety on June 19, 2013. (Order attached as Exhibit A). The O'Connells filed a Rule 60 Motion on June 24, 2013 which the District Court properly denied on June 26, 2013. (Order attached as Exhibit B).

A brief background of the issues decided is warranted:

1. Erickson Variance

This claim stems from a variance request by Pete and Cyrese Erickson, landowners within the South Glastonbury development. The Ericksons own two adjacent lots (See lots 90 and 91 on Exhibit K-5, and they wanted to build 5 homes on these lots to be used by them and their children. (Exhibits D and E at ¶8). The

GLA covenants and master plan allow only two homes per lot. The Ericksons requested a variance from the GLA board. After discussions and input from other landowners, the Ericksons and the GLA board came to an agreement that the Ericksons could build 4 homes on lot 90. (Exhibits D and E at ¶8 and Exhibit L). The Ericksons agreed to pay for improvements to the road leading to their lot. This road also leads to common land adjacent to Forest Service land which GLA members use for recreation meaning the road improvements would benefit all GLA members. (Exhibits D and E at ¶8). The Ericksons also agreed to never construct anything on lot 90 and to only sell lots 90 and 91 together. The lots were big enough and remote enough that the GLA board did not think the "clustering" of the 4 homes would be an issue. Both the Ericksons and the board viewed this as a "win-win" situation. (Exhibits D and E at ¶8).

The proposed variance underwent a stringent review process, included several special meetings, and solicited input from other landowners. (Exhibits D and E at ¶9). During the review process, various members of the GLA raised concerns with the proposed variance. (Exhibits D and E at ¶9). However, after the proposed agreement with the Ericksons was fully presented to the GLA, everyone was satisfied with the end result, except the O'Connells. The O'Connells, who live in North Glastonbury approximately four miles from the Erickson property (Exhibit K-4), are the only ones who still object to this variance. (Exhibits D and E

at ¶9). They maintain it is illegal due to their misconstruing of Montana law, and to their own, unique interpretations of the governing documents. They allege only a vote of all members of the GLA could grant the variance. These allegations are without merit, and are made simply to vex the GLA board and attempt to exercise power within the association.

2. Guest House Assessments

The O'Connells brought suit seeking to stop collecting assessments on guest houses by the GLA. Assessments are based on bare land and increase according to the number of "dwelling units" on the parcels covered by the GLA. Section 11.03 of the Covenants states:

> "Each Landowner shall pay an annual community assessment ... to the Association for the uses and purposes described above. ... The amount of the annual assessment may be increased or decreased from year to year, at the option of the Association, based upon the amount of work to be done and the estimated or anticipated cost of labor, equipment and materials involved. ... The amount of the annual assessment beginning January 1, 1998 shall be as follows:
>
> a. $120 land assessment for each parcel, plus an additional $120 for each undivided tenancy-in-common interests in excess of one per parcel; plus
> b. $120 dwelling assessment for each dwelling unit located on each parcel or owned in association with each undivided tenancy-in-common interest in a parcel;"

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

> A structure or portion of a structure, normally consisting of living area, bathroom and cooking facilities, designed for occupancy by a single family.

> The term includes a boarding house but not the individual rooms within a boarding house that do not contain a bathroom and cooking facilities.

Assessments are to be used for operation, maintenance, repair, and improvement of the roads, trails, easements, common areas, etc. See Section 11.02 of the Covenants. (Exhibit I).

Section 1.1 of the Master Plan, which was adopted in 2007, currently allows one single-family residence and one guest house per lot. (Exhibit J). There are exceptions for larger parcels and for homes existing before the adoption of the Master Plan. There are lots with multiple residences on them already. Each of those residences adds a dwelling assessment to the yearly assessment. This caused some confusion about whether a guest house was a "dwelling unit" and if it should have a separate assessment. (Exhibits D and E at ¶10). The board ultimately decided that if a guest house (living area, bathroom and cooking facilities, designed for occupancy by a single family) met the definition of "dwelling unit" as defined by the Covenants, then it should be assessed. (Exhibits D and E at ¶11). The O'Connells objected to these assessments (they are the only ones) and argue that guest houses are not "dwelling units" within the meaning of the Covenants. (Exhibits D and E at ¶12). This argument ignores the plain language of the Covenants.

3. GLA Elections

As mentioned above, there are six vacancies on the GLA board each year, three each from North and South Glastonbury. (Exhibits D and E at ¶13). Voting is based on a "membership interest." Section 3.20 of the Covenants defines "membership interest" as the following:

> A membership interest consists of the rights, privileges, duties and responsibilities of membership in the Association and runs with the title to the property in the Community owned by every Landowner. Each of the following separate units of property, whether held by one or more than one Landowner, shall constitute a separate and distinct Membership Interest that is entitled to one (1) vote and with such voting and other rights and privileges and with such duties and responsibilities as are set forth herein and in the bylaws and rules of the Association:
>
> a. A parcel;
>
> b. An undivided tenancy-in-common interest in a parcel existing as of the effective date hereof, whether owned individually or in joint tenancy; and
>
> c. A condominium unit.

Articles IV.B. and V.F. of the Bylaws also states that each membership interest is entitled to one vote. (Exhibit H). A member who holds more than one membership interest has a separate vote for each interest.

The board is elected from qualifying candidates from North and South Glastonbury on separate ballots for North and South Glastonbury. (Article VI.A. of the Bylaws attached as Exhibit H). Only membership interests in North Glastonbury can vote for the board positions from North Glastonbury and vice versa for South Glastonbury. (Exhibits D and E at ¶13).

Since its inception, the GLA has sent out separate ballots to each membership interest for North and South Glastonbury. (Exhibit M). The ballots list all candidates for the three vacancies and instruct the membership interest to vote for three separate candidates to fill the three separate vacancies. Each membership interest is voting one time per vacancy. The three candidates with the most votes win a seat on the board. (Exhibits D and E at ¶14). The Bylaws are not specific in how elections are to be carried out. Article XII.A. of the Bylaws states: "The Board shall have the power to interpret all the provisions of these Bylaws and such interpretation shall be binding on all persons." (Exhibit H).

The O'Connells have not objected to these voting procedures until 2012. (Exhibits D and E at ¶15). Further, the O'Connells have run for election, and Daniel O'Connell was elected to the GLA board in 2009 under these election procedures. (Exhibits D and E at ¶15). The GLA members removed him from the board in a special meeting on August 7, 2011. (Exhibits D and E at ¶15). Only now do they object to these procedures. They argue that each membership interest is given only one vote for a director regardless of the number of vacancies on the board or the number of candidates.

Since Daniel O'Connell was removed from the board, both of the O'Connells have run for the GLA board in 2011 and 2012 and have been defeated both times. (Exhibits D and E at ¶15). Presumably, by limiting each membership

interest to one vote per election regardless of the number of board vacancies there are, the O'Connells hope they can garner enough votes to be elected to the board. However, the O'Connells' interpretation of the Covenants and Bylaws goes against the plain language of the documents and contradicts long-standing practice.

4. The Minnick Management Contract

The GLA board entered into a six-month trial management agreement with a property management company, Minnick Management, in June of 2012. (Exhibits D and E at ¶5). Since then, the GLA and the Minnick have continued to contract on a month-to-month basis. (See Minnick Contract attached as Exhibit N). The contract hires Minnick to do the administrative functions for the association such as mailings, bookkeeping, taking meeting minutes, collecting assessments, paying bills, and other support functions. (Exhibits D and E at ¶5). Before Minnick, the GLA used various independent contractors, usually on a part-time basis, to handle the administrative functions. (Exhibits D and E at ¶6). As the development has grown, so has the scope and complexity of these tasks. Therefore, the GLA board decided to contract out administrative tasks to a professional property management company which handles all of these tasks and ensures they are properly completed. (Exhibits D and E at ¶6). Rather than relying on various independent contractors and volunteers who may or may not be available, the board contracted a reliable and professional organization. In addition, this helps the board to better focus on

their management functions. (Exhibits D and E at ¶6). Of the approximate 360 landowners within the GLA, only the O'Connells objected to the Minnick contract. (Exhibits D and E at ¶6). The O'Connells argue this contract divests the board of its powers under the By-Laws and therefore is illegal, but this argument is fundamentally flawed because the GLA governing documents clearly allow the GLA board to enter into this contract.

STANDARD OF REVIEW

A District Court's order granting summary judgment is reviewed de novo. *Goettel v. Estate of Ballard*, 2010 MT 140, ¶ 10, 356 Mont. 527, ¶ 10, 234 P.3d 99, ¶ 10 (citing *Waters v. Blagg*, 2008 MT 451, ¶ 8, 348 Mont. 48, ¶ 8, 202 P.3d 110, ¶ 8; *Bowyer v. Loftus*, 2008 MT 332, ¶ 6, 346 Mont. 182, ¶ 6, 194 P.3d 92, ¶ 6). The criteria contained in M.R.Civ.P. 56 are applied to determine whether the moving party has established both the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Goettel*, ¶ 10 (citing *Watson v. Dundas*, 2006 MT 104, ¶ 16, 332 Mont. 164, ¶ 16, 136 P.3d 973, ¶ 16. *Grimsrud v. Hagel*, 2005 MT 194, ¶ 14, 328 Mont. 142, ¶ 14, 119 P.3d 47, ¶ 14).

In addition, a District Court's findings of fact are reviewed to determine if those findings are clearly erroneous. *Goettel*, ¶ 11 (citing *Watson*, ¶ 17; *Ramsey v. Yellowstone Neurosurgical Assocs.*, 2005 MT 317, ¶ 13, 329 Mont. 489, ¶ 13, 125 P.3d 1091, ¶ 13). A District Court's conclusions of law are reviewed for

correctness. *Goettel*, ¶ 11 (citing *Watson*, ¶ 17; *Galassi v. Lincoln County Bd. of Com'rs*, 2003 MT 319, ¶ 7, 318 Mont. 288, ¶ 17, 80 P.3d 84, ¶ 17).

The party opposing summary judgment cannot rely on mere allegations in the pleadings, but must present its evidence raising genuine issues of material fact in the form of affidavits or other sworn testimony. … mere denial, speculation, or conclusory statements" are insufficient to raise a genuine issue of material fact. *Schumacker v. Meridian Oil Co.*, 1998 MT 79, ¶¶ 14-15, 288 Mont. 217, ¶¶14- 15, 956 P.2d 1370, ¶¶ 14-15.

ARGUMENT

I. SUMMARY

The District Court's findings of fact are not erroneous and its conclusions of law are correct, and this Court should affirm the District Court. There are no material facts in dispute here despite the O'Connells protestations to the contrary. Every one of these issues can be resolved by reviewing and interpreting the governing documents of the GLA.

The O'Connells chief argument on appeal is that the GLA Board has misinterpreted the GLA's governing documents. However, the GLA Board is the entity with "the power to interpret all the provisions of these Bylaws and such interpretation shall be binding on all persons." (Exhibit H at 16). Interpretation is a discretionary act of the Board. Further, the Board has the power to "Do any and all

things necessary to carry into effect these Bylaws and to implement the purposes and exercise the powers…" (Exhibit H at 6). The GLA Board has exercised its powers of interpretation and implementation where necessary.

The O'Connells consistently disagree with the Board's interpretation and implementation, and have filed numerous lawsuits asking the courts to administer the GLA on behalf of the O'Connells. Here, the District Court agreed that the GLA Board's interpretation and implementation of its powers and duties was reasonable and proper, and the O'Connells offer no valid reasons to reverse the District Court.

As the undisputed facts show, the Board followed the variance procedures properly in its review and decision to grant the Ericksons a variance. Also, the Board's interpretation of its governing documents and determination that guest houses could be assessed as dwelling units was correct. Further, the GLA's historic election practices are proper interpretations and procedures allowed by its governing documents. Additionally, the O'Connells claims regarding elections are barred by their participation in the elections. Finally, the GLA's governing documents allow it to contract with Minnick Management.

The O'Connells have not shown the GLA's interpretation and implementation of its governing documents was illegal or improper. Neither have they shown there were material issues of fact precluding the District Court's granting summary judgment in favor of the GLA.

II. THE DISTRICT COURT DID NOT ERR IN GRANTING GLA'S CROSS-MOTION FOR SUMMARY JUDGMENT AND THE O'CONNELLS WERE AFFORDED THE OPPORTUNITY TO CONDUCT DISCOVERY AND WERE GRANTED A HEARING.

The O'Connells argue the District Court granted the GLA summary judgment without affording them the opportunity to conduct discovery or to have a hearing. This is not true. Litigation has been ongoing since the O'Connells filed their first Complaint on September 24, 2012. The District Court did not grant summary judgment until June 19, 2013. The O'Connells had nearly nine months to conduct discovery which they neglected to do. The O'Connells were first to file their Motion for Summary Judgment—apparently satisfied there were no material facts at issue and deciding there was no need for discovery. To claim now they needed time to conduct discovery is disingenuous.

The O'Connells filed documents asking "if the Court for any part can not grant summary judgment in Plaintiffs favor, then this motion hereby requests a hearing and discovery in support of that hearing." (Pl.'s "Summary Judgment Motion Replies, & Motion for Hearing & Discovery," Feb. 25, 2013). The O'Connells ask for discovery in the alternative. However, they failed to show under Mont. R. Civ. P. 56(f) with affidavits why they could not present facts essential to justify their opposition and completely failed to refute the factual assertions within the Affidavits of Richard Bolen and Alyssa Allen. (Exhibits D and E).

Further, there can be no doubt the District Court held oral arguments on the pending Motions for Summary Judgment on June 5, 2013. Why the O'Connells believe this hearing was not sufficient is unclear, and they cite no law in support of their claim. The District Court held a hearing where the O'Connells were given a full opportunity to argue their case.

The O'Connells also argue new claims here not raised in their initial pleadings such as breach of contract, tortious interference, and abuse of authority against the GLA Directors personally. These claims were not alleged in either of the O'Connells' two Complaints, the O'Connells never tried to amend their Complaints to include them, the summary judgment briefing did not raise them, and the O'Connells did not raise them at the summary judgment oral arguments. These issues were not timely raised in the District Court, and this Court should not address them. *In Re Marriage of Gerhart*, 2003 MT 292, ¶ 31, 318 Mont. 94, ¶ 31, 78 P.3d 1219, ¶ 31.

The O'Connells also claim the District Court did not read one of their briefs and missed critical parts of their arguments. However, this is mere speculation as there is no evidence the District Court did not read the O'Connells' filings, and the O'Connells were given a full hearing to further argue their Motion. The O'Connells base their argument on the District Court's Order on June 26, 2013 which states "The Plaintiffs filed no reply brief in DV 12-164...." (See Exhibit B

at 2-3). The "reply brief" which the O'Connells claim the Court did not read was titled "Summary Judgment Motion Replies, & Motion for Hearing & Discovery" and dated February 25, 2013. It lists cause number DV 12-220 in the caption. So the District Court was correct because this document's caption reflected it was for DV 12-220, not DV 12-164.

Nevertheless, this document contained arguments regarding DV 12-164, and it is clear in the District Court's June 19, 2013 Order that it "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 mentions or not...." (See Exhibit A at 2). The District Court's Order goes on to summarize the arguments made by Plaintiffs in the brief and at the hearing demonstrating the O'Connells were given a full opportunity to argue the case.

After the District Court granted summary judgment for the GLA, the O'Connells filed a "Rule 60 Relief from Judgment & motion for Jury Trial."

III. THE DISTRICT COURT DID NOT ERR IN DETERMINING THE GLA'S DISCRETIONARY ACT OF GRANTING THE ERICKSON VARIANCE WAS PROPER.

As explained above, the GLA board entered into an agreement with the Ericksons regarding a variance request. The GLA governing documents vest power within the board to grant variances and enter into contracts. There are several governing documents at play here: the Declaration of Covenants

(Covenants), the By-Laws, and the Master Plan. Section 5.01 of the Covenants states:

> **Association's Approval.** A site plan and building plans satisfactory to the Association must be submitted by the Landowner to the Association for review and approval prior to beginning construction of any structure, the placing of any mobile home on a parcel or the carrying out of any other project for which review is required by the Master Plan, these covenants or any rule or regulation adopted in accordance therewith.

Section 12.01 of the Covenants states:

> **Variances, Waivers.** The Association reserves the right to waive or grant variances to any of the provisions of this Declaration, where, in its discretion, it believes the same to be necessary and where the same will not be injurious to the rest of the Community.

Section 3.17 of the Covenants defines the Master Plan as: "**Master Plan.** The Glastonbury Land Use Master Plan which is intended to direct the future growth and development of the Community, including all amendments thereto." (Exhibit I). Section 4.1 of the Master Plan contains procedure and criteria for granting variances. (Exhibit J). Those procedures were followed in this case.

Because this request was to change the allowable number of residences on a lot, a neighborhood review was necessary pursuant to Section 4.1 of the Master Plan. Exhibit L is a detailed Project Review Application regarding the Erickson variance request including Findings of Fact by the GLA Board which show the due diligence performed and the factors considered in granting the variance. The GLA Board discussed the proposal at several meetings and solicited input from other

landowners. (Exhibits D and E at ¶ 9). The variance request was altered to allow 4 homes on lot 91. (Exhibits D and E at ¶ 9 and Exhibit L). The Ericksons would pay for improvements to the road leading to their lot and to the GLA common land and Forest Service land. The Ericksons also agreed to never construct anything on lot 90 and to only sell lots 90 and 91 together. Essentially, they were still complying with the spirit of the Master Plan because there would only be 4 residences on two contiguous lots. The lots are large enough (45 acres total) that it would not appear overcrowded. After these alterations, which resolved concerns raised by GLA members, only the O'Connells still objected. (Exhibits D and E at ¶ 9).

The GLA board approved the variance under Section 4.2 of the Master Plan because it was not materially detrimental to neighboring properties, the unusual topography on lots 90 and 91 justified the variance, and because of the road improvements the Ericksons would bring to the community. (Exhibits D and E at ¶ 9 and Exhibit L). Notably, the O'Connells live in North Glastonbury, nowhere near the Ericksons' property in South Glastonbury. Their objection was simply an objection for sake of objection.

The variance process and decision to grant a variance is a discretionary act by the GLA Board. The District Court found no reason to invalidate the Board's decision, and the O'Connells attack this claiming there are facts in dispute about the variance request. The O'Connells claimed and continue to claim the Erickson

issue was not ripe for summary judgment despite bringing the claim in their Complaint in the first place.

The O'Connells argue the variance needed the approval of all GLA members, but this is clearly not the case as Section 4.1 of the Master Plan vests power within the Project Review Committee to conduct the variance process. (See Exhibit L at 13). Further, it would not be practical to require a full vote of all 400 member interests to grant a variance.

The O'Connells also argue their affidavit claiming the four "department store size" buildings would not be for the benefit of the landowners. While this is a gross exaggeration as to the size of the homes, it does not create issues of fact as it is merely speculative and conclusory. The GLA Board conducted extensive fact finding on the variance request (See Exhibit L) finding that the arrangement would not be materially detrimental to neighboring property much less to the O'Connells' property which is 4 miles away.

The O'Connells disagreement with the granting of the variance is not grounds for judicial administration of the GLA. The GLA Board followed the processes dictated in its governing documents. This Court should affirm the District Court's dismissal of this claim.

IV. THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT GUEST HOUSES FALL WITHIN THE DEFINITION OF "DWELLING" AND ARE SUBJECT TO ASSESSMENTS AS A RESULT.

The District Court examined the GLA's governing documents concerning assessments within the association. Section 11.03 of the Covenants states:

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

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

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

Section 1.1 of the Master Plan allows one single-family residence and one guest house per lot. (Exhibit I).

Mont. Code Ann. § 28-3-501 requires words of a contract to be understood in their ordinary and popular sense. The District Court reiterated the GLA's determination that if guest houses contained living areas, a bathroom, cooking facilities, and was designed for occupancy by a single family then it is subject to

the "dwelling unit" assessment[1]. The District Court found this was a "straightforward interpretation of the Covenants." (Exhibit A at 6). Indeed, the GLA's determination that guest houses may also be "dwelling units" comports with the ordinary and popular sense of the words used by the Covenants and the Master Plan.

The O'Connells first attack the District Court by claiming the terms "dwelling unit" and "guest house" are mutually exclusive because guest houses are limited to 1,200 square feet and are not intended for permanent residences. The District Court specifically determined these restrictions did not conflict with the definition of "dwelling unit." (Exhibit A at 6). Indeed, the above definition of "dwelling unit" has no time requirement for qualification as a "dwelling unit," and the definition obviously contemplates non-permanent housing as boarding houses are also defined as dwelling units. The O'Connells attempt to insert limitating language that is not there.

The fact that a parcel may have a main house and a guest house does not diminish the fact that both are "dwelling units" as defined by the Covenants. If a guest house contains a living area, bathroom, cooking facilities, and is designed for occupancy by a single family then it is clearly a "dwelling unit." Whether or not the owner uses to quarter guests, lives in it from time to time, or rents it out is

[1] The O'Connells' property contains one house for which they pay an assessment. The guest house assessment did not cause them to pay any additional assessment.

immaterial. The term "dwelling unit" contains no requirement for time of occupancy. The fact that a "dwelling unit" exists on the lot is all that is required to assess it. Assessing guest houses as "dwelling units" ensures that those receiving the benefit of GLA services (snow removal, road maintenance, etc.) are contributing like their neighbors. (Exhibits D and E at ¶ 12).

The O'Connells also make the nonsensical argument that the GLA is barred by the contract statute of limitations in Mont. Code Ann. § 27-2-202 from assessing guest houses because the GLA did not assess guest houses in the 17 years before it began to do so. Clearly, that statute applies to actions brought in court on contracts, not a determination by a homeowners association board of how to collect yearly assessments. It simply does not apply.

However, the O'Connells try to muddy the waters claiming these assessments never happened before which is omitting the whole truth from the Court. The term "guest house" had never been used until the adoption of the Master Plan in 2007. Until then, lots with multiple dwelling units have been assessed multiple dwelling unit assessments. There was no distinction for guest houses. All assessments for dwelling units were made based on whether the structure contained living areas, a bathroom, cooking facilities, and was designed for occupancy by a single family.

The Board determined that guest houses built under the Master Plan which contain living areas, bathrooms, cooking facilities, and are designed for occupancy by a single family are assessed on the same basis as all the other pre-existing "dwelling units." It would be unfair and contrary to the written documents to allow "dwelling units" built after 2007 and designated guest houses to avoid paying for the benefits the GLA provides while their neighbors with additional "dwelling units" built before 2007 had to pay assessments. Guest house assessments simply make sure everyone pays equally.

Simply put, a guest house is a "dwelling unit." Certainly, the reverse may not be true, but here, it is immaterial as assessments are based on "dwelling units" not the particular type of "dwelling unit." The District Court agreed, and the O'Connells have not shown why that was a mistake. GLA respectfully requests that the Court affirm the District Court's ruling on guest house assessments.

V. THE DISTRICT COURT DID NOT ERR IN DETERMINING THE GLA ELECTION PROCEDURES ARE PROPER AND THE O'CONNELLS' CLAIMS ARE BARRED BY EQUITABLE ESTOPPEL.

There are six vacancies on the GLA board each year, three each from North and South Glastonbury. (Exhibits D and E at ¶13). Voting is based on a "membership interest." Section 3.20 of the Covenants defines "membership interest" as the following:

> A membership interest consists of the rights, privileges, duties and responsibilities of membership in the Association and runs with the title to

the property in the Community owned by every Landowner. Each of the following separate units of property, whether held by one or more than one Landowner, shall constitute a separate and distinct Membership Interest that is and with such voting and other rights and privileges and with such duties and responsibilities as are set forth herein and in the bylaws and rules of the Association:

a. A parcel;
b. An undivided tenancy-in-common interest in a parcel existing as of the effective date hereof, whether owned individually or in joint tenancy; and
c. A condominium unit.

Articles IV.B. and V.F. of the Bylaws also state that each membership interest is entitled to one vote. (Exhibit H). A member who holds more than one membership interest has a separate vote for each interest. Mont. Code Ann. § 35-2-536(1) provides: "Unless the articles or bylaws provide otherwise, each member is entitled to one vote on each matter voted on by the members."

The board is elected from qualifying candidates from North and South Glastonbury on separate ballots for North and South Glastonbury. (Article VI.A. of the Bylaws). Only membership interests in North Glastonbury can vote for the board positions from North Glastonbury and vice versa for South Glastonbury. (Exhibits D and E at ¶13).

Since its inception, the GLA has sent out separate ballots to each membership interest for North and South Glastonbury. (Exhibit M). The ballots list all candidates for the three vacancies and instruct the membership interest to vote

for three separate candidates to fill the three separate vacancies. The three candidates with the most votes win a seat on the board. (Exhibits D and E at ¶14).

The Bylaws do not have specific election procedures, but Article XII.A. of the Bylaws states: "The Board shall have the power to interpret all the provisions of these Bylaws and such interpretation shall be binding on all persons." (Exhibit H). Article VI.B.16 of the Bylaws also empowers the Board to "Adopt Rules from time to time for the conduct of any meeting, election or vote in a manner that is not inconsistent with any provision of the Covenants, Articles of Incorporation or these Bylaws." Since the first election, the GLA has interpreted its Bylaws and implemented elections rules that allow each membership interest one per vacancy on the Board.

The District Court concluded the GLA acted properly in holding elections in this matter noting the GLA's power to interpret the Bylaws and that the ballots used allowed one vote per issue or vacancy. (Exhibit A at 9). The O'Connells maintain this was wrong arguing each membership is entitled to one vote no matter the number issues or Board vacancies. This argument ignores Mont. Code Ann. § 35-2-536(1) which allows one per matter—or vacancy.

A member is entitled to one vote on each matter. Are three vacancies on the GLA Board one matter or three separate matters? Logically it is three separate matters. There are three seats to be filled, and a membership interest votes for three

candidates to fill them. The GLA's long standing practice is logical and practical. Further, the O'Connells ignore the powers granted to the Board to interpret the Bylaws and creates rules for elections and voting—which it has done here.

The O'Connells also urge the Court to support their interpretation of Bylaws supporting fractional voting—i.e. a membership can split its vote among three candidates if desired. This is nonsensical—the O'Connells argue members cannot vote for multiple candidates then offer a way of doing so. Further, The O'Connells claim the GLA Board cannot interpret and create rules as allowed by its Bylaws to establish election procedures yet propose to do the same here. Again, this is simply the O'Connells' wanting to run the GLA and trying to use the courts to do so.

The O'Connells further argue that the 12 seats on the board do not need to be filled. This is correct. There are 12 potential seats on the board. They are filled by those who have been nominated and elected. (See Article VI.A of the Bylaws—Exhibit H). If there were a situation where there were fewer candidates nominated than seats available then the board would consist of fewer than 12 members. For example, if there were three vacancies and two nominated candidates then a membership interest would only get two votes because that is all that would be possible. However, that has not been the case. As the previously filed election ballots going back to the first election in 1997 show, there have always been a number of nominated candidates equal to or greater than the number of vacancies.

However, this point has no bearing on the issue which the O'Connells complain about which is that each membership interest is allowed one vote for each vacancy. This long-standing and legal voting process should be upheld, and the District Court affirmed.

VI. THE DISTRICT COURT DID NOT ERR IN APPLYING THE DOCTRINE OF EQUITABLE ESTOPPEL TO THE O'CONNELLS ELECTION CLAIM BUT NOT THE GUEST HOUSE CLAIM.

The District Court also held the O'Connells' objection to the GLA's long standing election procedures were barred by the doctrines of equitable estoppel and laches. (Exhibit A at 10). The O'Connells claim they did not knowingly consent to the GLA's election procedures. They also argue the eight year statute of limitations in Mont. Code Ann. § 27-2-202 did not begin to run on their claim until they became members of the GLA in 2005.

However, the facts show differently. The O'Connells do not dispute they voted, ran for office, and that Daniel O'Connell served on the GLA Board under these same election procedures. (Exhibits D and E at ¶15). The GLA members removed Daniel O'Connell from the board in a special meeting on August 7, 2011. (Exhibits D and E at ¶15). Only now do they object to these procedures. Since Daniel O'Connell was removed from the board, both Plaintiffs have run for the GLA board in 2011 and 2012 and have been defeated both times. (Exhibits D and E at ¶15).

The O'Connells cannot genuinely make the argument that they did not know how elections were carried out in the GLA. Like every member, they received a ballot each year. (See Exhibit M). The ballots clearly instruct the recipients to vote for a number of candidates equal to the number of Board vacancies.

"The doctrine of equitable estoppel is frequently invoked where, as here, it would be unconscionable to permit a party to maintain a position inconsistent with one in which it, or those by whose acts it is bound, has acquiesced." *Selley v. Liberty Northwest Ins. Corp.*, 2000 MT 76, ¶ 17, 299 Mont. 127, ¶ 17, 998 P.2d 156, ¶ 17. The O'Connells acquiesced to the election procedures, ran for director, and won. To object now that the last two elections have not gone their way is what the doctrine of equitable estoppel is designed to prevent. "Acquiescence in error takes away the right of objecting to it." Mont. Code Ann. § 1-3-207. Further, "[a] person who consents to an act is not wronged by it." Mont. Code Ann. § 1-3-206. The O'Connells' consent and active participation in the current election process constitutes a waiver of their right to challenge it. *Kelly v. Lovejoy*, 172 Mont. 516, 520, 565 P.2d 321, 324 (1977).

Further, the O'Connells have waited nearly ten years before challenging GLA's election procedures. Laches bars a claim where the person asserting it has been negligent in asserting it. *Cole v. State ex rel Brown*, 2002 MT 32, ¶ 24, 308 Mont. 265, ¶ 24, 42 P.3d 760, ¶ 24. The O'Connells waited until they were

dissatisfied with the election results to assert this claim. When the election went in their favor, they made no move to correct this supposed mistake. The length and character of Plaintiffs' delay in asserting this claim would render enforcing their assertions inequitable. *Id.*

The O'Connells argument that the statute of limitations in Mont. Code Ann. § 27-2-202 prevents the GLA from asserting the affirmative defenses of estoppel, acquiescence, waiver, and laches is not supported by the law. Statutes of limitations limit the bringing of actions; they do not limit what affirmative defenses may be asserted. GLA requests this Court affirm the District Court's decision that the O'Connells' claims are barred by the doctrine of equitable estoppel and laches.

Finally, the O'Connells also argue that the statute of limitations in Mont. Code Ann. § 27-2-202, equitable estoppel, laches, and waiver bar the GLA from assessing guest houses. As explained in section IV above, the statute of limitations is not applicable here. Further, the O'Connells never made the argument in the District Court that equitable estoppel, laches, or waiver applied to the GLA's assessing guest houses, and it should not be addressed here. *Gerhart* at ¶ 31.

Even if timely raised, none of those doctrines would apply here. Guest houses were not addressed in the GLA until the Master Plan was adopted in 2007. Before that, every structure that met the definition of "dwelling unit" was assessed

equally. Until the Master Plan was adopted, the issue as to whether or not guest houses were "dwelling units" subject to assessment did not arise. When it did arise, the GLA Board acted on it reasonably by deciding that if a guest house met the definition of a "dwelling unit" then it would be assessed.

VII. THE DISTRICT COURT DID NOT ERR IN DETERMINING THE MINNICK CONTRACT IS ALLOWABLE UNDER THE GLA BYLAWS AND MONTANA LAW.

The District Court held the Minnick contract is allowed by the Bylaws and by statute as "a necessary delegation of administrative duties, particularly given the large number of GLA members." (Exhibit A at 8). The O'Connells maintain the GLA Board has no power to delegate administrative functions to Minnick and that the Board must do every GLA task itself. The O'Connells ignore the Bylaws and Montana law which clearly allow the Minnick contract.

Mont. Code Ann. § 35-2-118(1) grants nonprofit corporations the power to enter into contracts and to hire employees and appoint agents. The GLA Bylaws do not limit these statutory powers but complement them by reiterating the GLA's power to enter into contracts, hire employees and agents, and by including a catch-all: "Do any and all things necessary to carry into effect these Bylaws and to implement the purposes and exercise the powers as stated in the Articles of Incorporation, Covenants, Bylaws, Rules and any Land Use Master Plan adopted pursuant to the Covenants Section VI.B." (Exhibit H at 6).

The Minnick contract appoints Minnick to act on behalf of the GLA by collection of assessments, filing liens, process accounts payable and receivable, maintain GLA accounts, and obtain approval for payment of bills from the GLA board. Minnick is also to produce monthly financial reports, maintain employment and contractor records, maintain membership records, take minutes at meetings, make copies of agendas and hand-outs, complete mailings, help collect and tally ballots, serve as a point of contact for inquiries, mail out newsletters and quarterly reports, and respond to service requests. (Exhibit N).

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. (Exhibits D and E at ¶7). The GLA Board reserved its decision-making powers and Minnick has been contracted to complete administrative functions. (Exhibits D and E at ¶7).

The O'Connells argue that Article VI.B.8 of the Bylaws only allows the GLA Board to delegate its powers to a committee, rather than to Minnick. Under this interpretation, the GLA Board would have to personally handle every task related to the GLA and could not hire a secretary to take minutes, an accountant to maintain financial records, or a plow operator for snow removal. Even assuming

the directors would have the skills necessary to complete these tasks, this is an absurd result and would make all the other provisions regarding forming contracts and hiring employees or agents void. "An interpretation which gives effect is preferred to one which makes void." Mont. Code Ann. § 1-3-232.

Certainly, the Board can delegate powers to committees, but that provision must be read in conjunction with the other powers of the board which include forming contracts, hiring employees, and appointing agents in order to "[d]o any and all things necessary . . ." to conduct "... the business and affairs of the Association..." "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other." Mont. Code Ann. § 28-3-202. "Interpretation must be reasonable." Mont. Code Ann. § 1-3-233. It is reasonable and apparent from the text of the Bylaws that the GLA has the power to contract with other parties to carry out its duties. A court should not isolate clauses or words but view an instrument as a whole and give meaning to all clauses. *K&R Partnership v. City of Whitefish*, 2008 MT 228, ¶ 26, 344 Mont. 336, ¶ 26, 189 P.3d 593, ¶ 26.

The District Court found the O'Connells arguments did "not take into consideration the principle of reading the Bylaws as a whole." (Exhibit A at 8). From reading the plain language of the Bylaws, the District Court found the GLA Board has "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." (Exhibit A at 8). These findings are correct and should be affirmed.

VIII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE O'CONNELLS' RULE 60 MOTION.

After the District Court granted the GLA's Cross-Motion for Summary Judgment, the O'Connells filed a document titled "Rule 60 Relief from Judgment & Motion for Jury Trial" on June 24, 2013 which the District Court properly denied on June 26, 2013. (Order attached as Exhibit B). The O'Connells do not specifically list this Order as one of their issues on appeal, but assert several times throughout their brief this Order was in error.

Mont. R. Civ. P. 60 provides relief from judgment or an order for clerical mistakes; for mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence; fraud; a void judgment; satisfaction; or any other reason that justifies relief. The O'Connells did not set out in their Motion under what grounds for Rule 60 they brought their Motion, and none of the above grounds would apply. Their Motion simply reargues the Summary Judgment Motion. Reconsideration of an earlier motion on its merits cannot be the subject of a Rule 60(b) motion. *Donovan v. Graff*, 248 Mont. 21, 24, 808 P.2d 491, 493 (1991). Further, a Rule 60 motion cannot be used as a substitute for an appeal. *Id.* at 25, 808 P.2d at 494.

The O'Connells claim to cite new law in support of their previous motion, but mere carelessness or ignorance of the law on the part of the litigant does not justify a motion under Rule 60(b)(1). *In re Marriage of Schoenthal*, 2005 MT 24, ¶ 33, 326 Mont. 15, ¶ 33, 106 P.3d 1162, ¶ 33. "It is well settled that there is no ground for a Rule 60(b) motion where the mistake is purely a mistake of law, as ignorance of the law is no excuse." *Donovan* at 25, 808 P.2d at 494. The authorities cited in their Rule 60 Motion were argued at the summary judgment hearing, but even if they were not, the fact the O'Connells did not use them are not grounds for relief. Even so, these same arguments are used in their appeal brief, and as shown above, they have no merit.

The O'Connells Rule 60 Motion also fails under Rule 60(b)(6)—any other reason that justifies relief which requires "extraordinary situations when circumstances go beyond those covered by the first five subsections or when a party in whose favor judgment was entered has acted improperly." *Schoenthal* at ¶ 33. The O'Connells did not show extraordinary circumstances which would have justified relief under Rule 60, and there are none.

Finally, the standard of review on appeal of a Rule 60 motion is whether the District Court abused its discretion. *Id.* at ¶ 9. A court abuses its discretion if it acts "arbitrarily without employment of conscientious judgment or exceed[s] the bounds of reason resulting in substantial injustice." *VonLutzow v. Leppek,* 2003

MT 214, ¶ 14, 317 Mont. 109, ¶ 14, 75 P.3d 782, ¶ 14. Clearly, the District's Court Order of June 26, 2013 does not show an abuse of discretion as Judge Gilbert carefully considered the O'Connells' original Motion for Summary Judgment and their Rule 60 Motion. The District Court noted the same arguments made by the O'Connells in the Rule 60 motion were made at oral arguments. (Exibit B at 2). The District Court exercised its discretion judicially and the O'Connells suffered no injustice as a result.

CONCLUSION

The O'Connells first brought a Motion for Summary Judgment, and now that they received a negative result, they claim there are issues of material fact. However, the O'Connells have failed to show there are issues of material fact which precluded the District Court's granting summary judgment to the GLA. Additionally, the O'Connells failed to show District Court's findings of fact are clearly erroneous or that its conclusions of law are incorrect. The District Court correctly granted the GLA summary judgment, and the GLA respectfully requests that this Court affirm the District Court.

DATED this 24th day of September, 2013.

BROWN LAW FIRM, P.C.

BY _____

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced and the word count is 8,982 words excluding the Certificate of Service and this Certificate of Compliance as calculated by Microsoft Word.

DATED this 24th day of September, 2013.

BROWN LAW FIRM, P.C.

BY _____

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CERTIFICATE OF SERVICE

This does certify that a true and correct copy of the foregoing was duly served on counsel of record by U.S. mail, postage prepaid, and addressed as follows, this 24th day of September, 2013:

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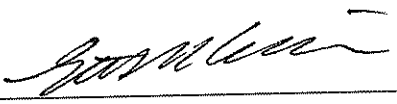
BY 

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