

CH
03/13/19
12:36pm

CAUSE NO. 49209

STATE OF TEXAS,	§	IN THE DISTRICT COURT OF
	§	
<i>Plaintiff,</i>	§	
v.	§	
	§	
CITY OF DOUBLE HORN, TEXAS,	§	
CATHY SERENO; R.G. CARVER;	§	BURNET COUNTY, TEXAS
BOB LINK; JAMES E. MILLARD;	§	
LARRY TROWBRIDGE; GLENN	§	
LEISEY; and JOHN OSBORNE,	§	
	§	
<i>Defendants.</i>	§	____ JUDICIAL DISTRICT

INFORMATION IN THE NATURE OF QUO WARRANTO

TO THE HONORABLE DISTRICT JUDGE:

The State of Texas, with leave of the Court, acting by and through its Attorney General, Ken Paxton, files this Information to declare the incorporation of the City of Double Horn, Texas, invalid and void for failure to comply with statutory requirements for incorporation, and to remove the officers of the City of Double Horn from office. In support of this Information, the State shows:

I. Parties and Jurisdiction

1. Plaintiff is the State of Texas (the "State") and is represented by its Attorney General, Ken Paxton. Tex. Civ. Prac. & Rem. Code § 66.002. The State brings this action under Tex. Civ. Prac. & Rem. Code §§ 66.001, *et seq.* The Court has jurisdiction to declare the proposed incorporation of the City of Double Horn invalid through quo warranto, Tex. Civ. Prac. & Rem. Code § 66.001(3), to remove persons from office unlawfully holding said office, *id.*, and to award costs for the prosecution

Delivered
03/14/19
Page 1 of 1
B. Smith
BCU/8/

of this Information, *id.* § 66.003(2). The State intends to conduct discovery under a Level 2 Discovery Control Plan. Tex. R. Civ. P. 190.1, 190.3.

2. Defendant City of Double Horn may be served via its Mayor, Cathy Sereno, who may be personally served at 109 Creekside Trail, Spicewood, Texas 78669.

3. Defendant Cathy Sereno is the Mayor of the City of Double Horn, and is sued in her official capacity.

4. Defendants R.G. Carver, Bob Link, James E. Millard, Larry Trowbridge, and Glenn Leisey are Aldermen and members of the City Council of the City of Double Horn, and are sued in their official capacities.

5. Defendant John Osborne is the City Marshall for the City of Double Horn, and is sued in his official capacity.

6. The city officials may be personally served at the following addresses:

Cathy Sereno, 109 Creekside Trail, Spicewood, Texas 78669;

R.G. Carver, 402 Vista View Trail, Spicewood, Texas 78669;

Bob Link, 106 Flowing Spring Trail, Spicewood, Texas 78669;

James E. Millard, 115 Oak Meadow Trail, Spicewood, Texas 78669;

Larry Trowbridge, 315 Vista View Trail, Spicewood, Texas 78669;

Glenn Leisey, 120 Oak Meadow Trail, Spicewood, Texas 78669; and

John Osborne, 106 Double Horn Trail, Spicewood, Texas 78669.

II. Facts and Grounds for Relief

7. Prior to incorporation, the City of Double Horn was a subdivision of approximately 92 homes in Burnet County west of Spicewood, Texas on the north side of Texas State Highway 71. The subdivision consists of homesites and a single common area that includes a community pool and covered outdoor pavilion. The subdivision has no wastewater utility; the homes rely on septic. The subdivision obtains its water from wells and the water is delivered by the Double Horn Creek Water Supply Corporation, but water is not provided to the property owned by Spicewood Crushed Stone LLC ("SCS"). *See generally* www.dhwsc.org.

8. SCS owns approximately 281 acres of rural undeveloped land adjacent to the eastern boundary of Double Horn. SCS plans to use the tract for quarry operations after obtaining all required permits. *See* SCS LCRA Highland Lakes Watershed Ordinance Permit Application attached as Exhibit A and incorporated by reference.

9. Upon learning of the proposed use for the SCS tract, some residents of the Double Horn subdivision began considering incorporation as a means to stop SCS from operating a quarry on its land. *See* Double Horn Improvement Association Board Meeting Minutes of September 20, 2018 attached as Exhibit B and incorporated by reference.

10. On or about September 25, 2018, some of the residents of Double Horn organized a petition to make application to the Burnet County Judge to order an election for the municipal incorporation of Double Horn. *See* Petition to Incorporate

Double Horn as a Type B General Law City attached as Exhibit C and incorporated by reference.

11. Additionally, some residents of Double Horn organized the Spicewood Environmental Protection Alliance to oppose the SCS development. *See generally* www.sepatx.com.

12. Despite some irregularities in holding the incorporation election, the measure passed on December 6, 2018. *See* Canvass & Summary of Precinct Returns attached as Exhibit E and incorporated by reference.

13. The incorporated City of Double Horn includes within its boundaries the Double Horn subdivision and SCS's property.

14. The mayor and aldermen for the City of Double Horn were selected at a later election on February 12, 2019. *See* Report of City of Double Horn Special Election February 12, 2019 attached as Exhibit F and incorporated by reference.

15. The statutory requirements for eligibility to incorporate as a Type B general law municipality are found in Chapter 7 of the Local Government Code. *See* Tex. Loc. Gov't Code §§ 7.001–7.008. Two of these requirements are (1) that the community intending to incorporate constitute an unincorporated town or village, and (2) the proposed boundaries include only the territory to be used strictly for municipal purposes. *Id.* §§ 7.001(1) & 7.002(b). The application for incorporation for the City of Double Horn was defective as it did not meet either of these requirements.

16. “The purpose of the incorporation statutes is not to create towns and villages, but to allow those already in existence to incorporate. Incorporation

contemplates the existence of an actual village, town, or city.” *State v. Wilbanks*, 595 S.W.2d 849, 852 (Tex. 1980). See Tex. Loc. Gov’t Code § 7.001 (declaring in order to incorporate, community must constitute unincorporated town or village). A town or village is a “considerable aggregation of people living in close proximity.” *Wilbanks*, 595 S.W.2d at 852 (quoting *State ex rel. Taylor v. Eidson*, 13 S.W. 263, 264 (Tex. 1890)). A town population is distinct from a rural population. A rural population “cannot be called a town, *nor treated as part of a town*, without doing violence to the meaning ordinarily attached to that word.” *Id.* (emphasis added). There must be some degree of unity between the habitations so as to constitute a town or village. *Id.* (quoting *Harang v. State ex rel. City of West Columbia*, 466 S.W.2d 8, 11 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ)). There must exist a compact center or nucleus of population around which a town has developed. *Id.* (quoting *Rogers v. Raines*, 512 S.W.2d 725, 728 (Tex. Civ. App.—Tyler 1974, writ ref’d n.r.e.)).

17. The Double Horn subdivision was just that: it was a residential subdivision, not a “town” or “village.” It has no stores. The only businesses include a process service company and a storage building located along State Highway 71. It has no churches. It lacks a school. It lacks a gas station with a convenience store. It even lacks a public building that the residents can use for city business. To conduct city business, officials are left to the choice of the open-air pavilion, the pool area, or someone’s living room.

18. Even if the subdivision could have been considered an existing town or village, SCS’s property was not part of it. SCS’s property is rural in character. It is

agricultural land, not urban land. There is no unity between SCS's land and the Double Horn subdivision. SCS's land is not part of a compact center or nucleus of population.

19. Moreover, land within the town must be susceptible of receiving some municipal services. Tex. Att'y Gen. Op. No. JM-750 at 4 (1987) (citing *Harang*, 466 S.W.2d at 11). "An area which, because of its geographical or population characteristics and development, is not capable of receiving municipal services on any reasonable basis does not constitute a 'city' or 'town' authorized to be incorporated." *Id.* (citing *Wilbanks*, 595 S.W.2d 849). There is no evidence whatsoever that the City of Double Horn (or the residents of the prior subdivision) intends to provide its commercial residents any services typically provided by cities. There is no central wastewater facility to connect to SCS property. There is no stated plan to connect water service to SCS property. There is no stated plan to allow SCS to partake in the road improvement projects available to the subdivision or connect the property to the rest of the community. See generally Fall Newsletter of Double Horn Creek attached as Exhibit D, available at <http://hoasites.goodwintx.com/Portals/42/Newsletters/DHC-Newsletter-201809.pdf>, and incorporated by reference. There is no stated plan to create and provide police, fire, or other emergency services to the city or to SCS. In fact, there is no evidence that any changes will be made to reflect a municipal form of government other than the exercise of regulatory authority over SCS with the goal of preventing SCS from using its property for a lawful purpose.

20. Land cannot be included within a town solely for tax purposes. *Gray Cty. Prod. Co. v. Christian*, 231 S.W.2d 901, 904 (Tex. Civ. App.—Amarillo 1950, no writ). If the city remains incorporated, and assuming the city will exercise its authority to tax the property within its boundaries, SCS will be subject to city taxes without receiving any corresponding public benefit. SCS will be the largest landowner (and taxpayer) in town. In fact, it will be in the position of funding the city's effort to block SCS's project. No one has any expectation that SCS's property will be developed as part of the city. In fact, the only apparent purpose of the city's incorporation is to prevent the development of the SCS property.

21. This is not a case where the proposed town residents anticipate commercial development to serve the community. On the contrary, the residents have included land that they know will *not* be developed as part of the city. Texas case law since 1891 has stated that residents cannot include undeveloped land that they know will not eventually be developed for municipal purposes. The leading case is *Ewing v. State*, 16 S.W. 872 (Tex. 1891). It was cited approvingly by the Texas Supreme Court as recently as 1980 in *Wilbanks*, 595 S.W.2d 849. Other pertinent cases include *State v. City of Del Rio*, 92 S.W.2d 287 (Tex. Civ. App.—Eastland 1936, no writ), and *State v. Masterson*, 228 S.W. 623 (Tex. Civ. App.—Beaumont 1921, writ ref'd). In *Del Rio*, the court held that a large tract of nonurban agricultural land could not have been included within city limits because it was “never a part of the city, and never intended to be such[.]” *Del Rio*, 92 S.W.2d at 290. In *Masterson*, the court invalidated the incorporation of a town because the town limits included oil fields and vacant land

that was not suitable to be used for town purposes. If the incorporation of the City of Double Horn is allowed to stand, SCS will not be welcomed as a member of the community, it will be rejected and regulated out of existence.

III. Requested Relief

22. The State seeks judgment declaring the incorporation of the City of Double Horn invalid and ordering the dissolution of the City of Double Horn.

23. The State also seeks judgment declaring Defendants Cathy Sereno, R.G. Carver, Bob Link, James E. Millard, Larry Trowbridge, Glenn Leisey, and John Osborne are persons acting as a corporation without being legally incorporated and are unlawfully holding office.

24. The State also seeks against all Defendants acting without legal authority an award of its costs in prosecuting this Information and any other relief permitted under Tex. Civ. Prac. & Rem Code § 66.003.

IV. Request for Disclosure

25. Under Texas Rule of Civil Procedure 194, Texas requests that Defendants disclose, within 50 days of the service of this request, the information or material described in Rule 194.2

V. Prayer

26. The State prays that Defendants be cited to appear and answer, and that upon final trial or other resolution hereof, judgment be entered declaring the incorporation of the City of Double Horn invalid and void, for an order that the City of Double Horn be dissolved, for judgment declaring Defendants Cathy Sereno, R.G.

Carver, Bob Link, James E. Millard, Larry Trowbridge, Glenn Leisey, and John Osborne are persons acting as a corporation without being legally incorporated and are unlawfully holding office, awarding the State its costs of prosecution, and awarding the State such other relief to which it may be justly entitled.

Respectfully submitted this 1st day of March, 2019.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

RYAN L. BANGERT
Deputy Attorney General for Legal Counsel

/s/ David J. Hacker
DAVID J. HACKER
Special Counsel for Civil Litigation
Texas Bar No. 24103323
david.hacker@oag.texas.gov

KENT RICHARDSON
Assistant Attorney General
Texas Bar No. 24006262
kent.richardson@oag.texas.gov

OFFICE OF THE ATTORNEY GENERAL
209 W. 14th Street, Mail Code 001
Austin, Texas 78701
(512) 936-2330

***Attorneys for Plaintiff
State of Texas***

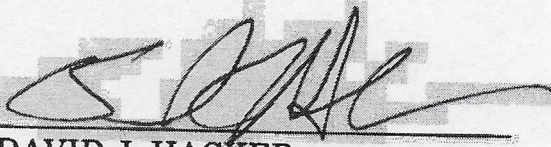
VERIFICATION

STATE OF TEXAS

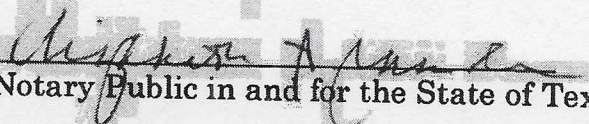
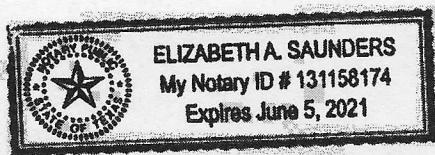
§
§
§

COUNTY OF TRAVIS

BEFORE ME, the undersigned authority, on this day personally appeared David J. Hacker, Special Counsel for Civil Litigation, known to me to be the person whose name is subscribed below, and upon first being duly sworn, on his oath deposed and stated that he has read the foregoing document and that based on knowledge gathered from the identified documents and websites the statements of fact contained therein are true and correct.


DAVID J. HACKER

SWORN TO AND SUBSCRIBED BEFORE ME this 1st day of March, 2019, to certify which witness my hand and seal of office.


Notary Public in and for the State of Texas