

District Court, Saguache County, Colorado	
Court Address: 501 4th Street, Saguache, CO 81149	
In the Matter of: CITIZENS FOR PROPOSED TOWN OF BACA GRANDE	
<i>Attorneys for Intervenor Baca Grande Property Owners Association</i> MOELLER GRAF, P.C. K. Christian Webert, #43739 385 Inverness Parkway, Suite 200 Englewood, Colorado 80112 Office: (720) 279-2568 FAX: (720) 279-2569	<b>Δ COURT USE ONLY Δ</b>
	Case No.: 2022CV000005 Division: C
<b>MOTION TO DISMISS</b>	

Intervenor Baca Grande Property Owners Association (“Association”), by and through its counsel, Moeller Graf, P.C., hereby moves this Court to dismiss the Petition filed in this case for lack of subject matter jurisdiction, pursuant to C.R.C.P. 12(b)(1), and as grounds therefore, states as follows:

### I. CERTIFICATE OF CONSULTATION

Undersigned counsel conferred with petitioner Desiree Marceau, one of 73 petitioners, in an attempt to comply with C.R.C.P. Rule 121, § 1-15(8). Undersigned counsel conferred with Ms. Marceau because she signed the Petition and provided her phone number on the Petition. During the conferral, Ms. Marceau’s position was that conferral would be better by conferring with all petitioners. Given the number of petitioners and the logistical difficulties, undersigned counsel has decided not to undertake an attempt to confer with all petitioners. Further, doing so appears to be beyond the requirement of the rule. That said, based on the conversation with Ms. Marceau, it appears safe to say that this Motion is opposed.

### II. INTRODUCTION

On August 8, 2022, the petitioners filed their Petition for Incorporation of the Town of

Baca Grande (“Petition”) seeking to incorporate the Town of Baca Grande. However, the Petition is fatally defective in five ways related to the express requirements of C.R.S. § 31-2-101. Therefore, Intervenor requests that the Court dismiss the Petition for lack of jurisdiction over the subject matter, pursuant to C.R.C.P. 12(b)(1).

### **III. FACTUAL BACKGROUND**

#### **1. The Petition**

On August 8, 2022, the petitioners filed their Petition seeking to incorporate the Town of Baca Grande. The Petition appears to be signed by 73 people. *Petition*, pg. 4-10. It appears that at least 6 signatories are not landowners. *Petition*, pg. 10. The Petition lists the following exhibits: Exhibit A: Legal Description; Exhibit B: Map Data; Exhibit C: Census Information; and Exhibit D: List of volunteer commissioners.

Exhibit A appears to be a metes and bounds description. *Petition Exhibit A*, pg. 1-4. The Petition and Exhibit A identify two parcels (Parcel 1 of 9,2301.18 acres and Parcel 2 of 1,240 acres) as “the territory proposed to be embraced in” the proposed town. *Petition*, ¶ 1; *Exhibit A*. Eleven parcels, identified only by parcel numbers, are identified as “exceptions.” *Exhibit A*, Pg. 3.

Exhibit B is identified as “an accurate map of the territory proposed to be embraced in such Town on a scale of no less than one inch to one thousand feet.” *Petition*, ¶ 3. The map’s legend in the bottom-right corner provides the following scale: “1 inch equals 0.2 miles.” *Petition Exhibit B*. Notably absent from Exhibit B is any identification of Parcels 1 and 2 mentioned in Exhibit A and any identification of the parcels identified as “exceptions” in Exhibit A. Additionally, of note is that the Casita Park Insert in Exhibit B is not the actual location of Casita Park, which is further northwest.

Exhibit C is identified as a copy of census data. *Petition*, ¶ 5. The *Petition* states that “the territory described has approximately 1,236 inhabitants” and states that this calculated is based on census data set forth on Exhibit C. *Petition*, ¶ 5. Nowhere in Exhibit C does it appear to explicitly state that 1,236 inhabitants reside in the proposed area, though there are documents that identify totals of 1,196 and 1,022, though the data that is being totaled is not entirely clear. *Petition Exhibit C*, pg. 2 and 4. Exhibit C appears to be based on “the active and inactive voter counts for Precinct 5 as of April 27, 2022.” *Petition Exhibit C*, pg. 1. Exhibit C appears to be missing pages, as the fourth page is identified as “Page: 129.” *Petition Exhibit C*, pg. 4.

## 2. Parcels Over 40 Acres

Based on Exhibit B to the *Petition*, there appear to be at least three parcels owned by the Association in excess of 40 acres that are within “the territory proposed to be embraced in such Town”, as follows:

<b>Parcel No.</b>	<b>Acres</b>	<b>Owner</b>	<b>Attached As</b>
460210400089	65.04	Baca Grande Property Owners Association	Report and Map from Saguache County Assessor website attached as <b>Exhibit 1</b> <sup>1</sup>
460210300275	128.80	Baca Grande Property Owners Association	Report and Map from Saguache County Assessor website attached as <b>Exhibit 2</b>
460519400188	145.86	Baca Grande Property Owners Association	Report and Map from Saguache County Assessor

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<sup>1</sup> CRE Rule 902(5); *Shook v. Pitkin Cty. Bd. of Cty. Comm'rs*, 2015 COA 84, ¶ 12 n.4, 411 P.3d 158, 161 (“The contents of a webpage on a specific date and time are not subject to reasonable dispute, see CRE 201(b), and *Shook* complied with the requirements of CRE 201(d). Moreover, as an official publication, the county attorney's website is self-authenticating, see CRE 902(5), and its statements setting forth the activities of the office fall within an exception to the hearsay rule, see CRE 803(8).”)

			website attached as <b>Exhibit 3</b>
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### 3. Baca Grande in Precinct 3 and Precinct 5

Exhibit C to the Petition appears to be based on “the active and inactive voter counts for Precinct 5 as of April 27, 2022.” *Petition Exhibit C*, pg. 1. However, “the territory proposed to be embraced in such Town” is in Precincts 3 and 5. The precinct map provided by Saguache County shows the locations of the precincts, attached hereto as **Exhibit 4**.<sup>2</sup>

### 4. Character of the Baca Grande

Created in 1971, the Baca Grande is a common interest community separated into several areas: Chalet 1, Chalet 2, Chalet 3, Grants, and Mobile Home Estates (Casita Park). Map of Baca Grande, attached hereto as **Exhibit 5**.<sup>3</sup> The Baca Grande comprises approximately 14,000 acres. *Saguache County Master Plan*, pg. 7 attached as **Exhibit 6**. As of 2020, the Association calculated the total number of Lots in the Baca Grande at approximately 3,700. *Association Design Guidelines*, pg. 4 attached as **Exhibit 7**.<sup>4</sup> Lots in the Grants do not have water and sewer services. *Association Design Guidelines*, pg. 10. Rather, Lots must obtain well and septic permits. *Id.*

However, note that the Association’s Amended and Restated Bylaws, dated May 20, 2001, contemplates the formation of a municipality that includes the Baca Grande. *Amended and Restated Bylaws*, Art. XIV attached as **Exhibit 8**. According to the Bylaws, in such circumstances,

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2 <https://saguachecoclerk.colorado.gov/elections-27> and <https://drive.google.com/file/d/liwnicefvSeeNlCj8-JoEJlasqOccN4fL/view>. Exhibit 4 is the map provided by Saguache County, but the PDF file size has been reduced for purposes of filing with CCEF.

3 Exhibit 5 appears to be the same as Petition Exhibit B, but Exhibit 5 is more legible and allows for zooming in.

4 There have been numerous Lots consolidated since the creation of the community in 1971, resulting in fewer Lots.

the Members in Good Standing of the Association may, but are not required, “to transfer any and all Common Facilities, property and equipment to the municipality.”

## 5. Petitioners’ Website

The petitioners maintain a website in support of their attempt to incorporate the proposed town of Baca Grande: <https://townofbacagrande.info/>. Relevant to the Petition, particularly Exhibits A and B related to the scope of the territory, the website states as follows:

The POA Plat map was used for determining the proposed town boundaries. So, if you live within the territory currently managed by the POA you will be included within the town boundaries. The exceptions are 40+ acres lots which have been excepted from the town boundaries per the notice that was sent to those specific property owners. These comprise of mostly non- profit spiritual centers; therefore, they would not contribute to the tax base of the proposed town.

...

The Baca Grande is a very large territory consisting of around 10, 500 acres (16.1 square miles).

A PDF of the website is attached hereto as **Exhibit 9**.<sup>5</sup>

## III. STANDARD OF REVIEW

### 1. Incorporation Statute

The incorporation statute for towns and cities (C.R.S. §§ 31-2-101 — 31-2-109) sets forth several requirements that must be satisfied before a court may grant a petition to hold an incorporation election. In ruling on a petition for an incorporation election, the court’s duty “is to respect and carry out the statutes of the General Assembly that prescribe procedures for incorporation.” *City of Greenwood Village*, 3 P.3d 427, 434 (Colo. 2000).

When carrying out the statutes of the General Assembly, the court must determine whether a particular statute requires substantial compliance or strict compliance. *Colorow*

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<sup>5</sup> The contents of the petitioners’ website are an admission by a party-opponent, per CRE 801(d)(2).

*Health Care, LLC v. Fischer*, 2018 CO 52M, ¶ 27. "Strict compliance leaves no margin for error and even technical deficiencies may be unacceptable. Substantial compliance is less than absolute, but still requires a significant level of conformity." *Colorow Health Care, LLC v. Fischer*, 2018 CO 52M, ¶ 15 (quoting *The Grp., Inc. v. Spanier*, 940 P.2d 1120, 1122 (Colo. App. 1997)). In general, jurisdictional statutes require strict compliance. *Colorow Health Care, LLC v. Fischer*, 2018 CO 52M, ¶ 21. Related to a petition to hold an incorporation vote, a petition that is fatally defective confers no jurisdiction on the court. *Taylor v. Pile*, 391 P.2d 670, 673-674 (Colo. 1964).

## **2. Lack of Subject Matter Jurisdiction Pursuant to C.R.C.P. 12(b)(1)**

If a petition fails to comply with the statutory requirements for incorporation such that the petition is fatally defective, then the Court does not have jurisdiction over the petition. *Taylor v. Pile*, 391 P.2d 670, 674 (Colo 1964); *In the Matter of the Incorporation of North Boulder*, 448 P.2d 308, 309 (Colo. 1969). Moreover, a plaintiff bears the burden of establishing the court's subject matter jurisdiction under Rule 12(b)(1). *Medina v. State*, 35 P.3d 443 (Colo. 2001).

When ruling on a motion to dismiss for lack of subject matter jurisdiction, the Court cannot resolve the matter by the presumptive truthfulness of the complaint, as in a motion to dismiss for failure to state a claim. *See Exchner v. VanVleet*, 870 P.2d 486, 491 (Colo. Ct. App. 1993) (addressing whether a contractual arbitration clause divested the court of jurisdiction). Rather, the Court may receive any competent evidence relating to the issue of subject matter jurisdiction, including holding a factual hearing. *See Id.*; *DiCocco v. National General Insurance Company*, 140 P.3d 314, 316 (Colo. App. 2006).

## **III. ARGUMENT**

This Court should dismiss the Petition for lack of subject matter jurisdiction arising from

the following fatal defects of the Petition:

1. The Petition is fatally defective because at least three undivided tracts of land consisting of more than forty acres are within the proposed town;
2. The Petition is fatally defective because it does not accurately describe the boundaries of the proposed town;
3. The Petition is fatally defective because it did not have attached an accurate map no less than one inch to one thousand feet;
4. The Petition is fatally defective because it is not accompanied with satisfactory proofs of the number of inhabitants of the proposed town; and
5. The Petition is fatally defective because (a) the proposed area is not “urban in character” and (b) the Petition has not established that the “proposed area of incorporation has an average of at least fifty registered electors residing within the boundaries of the proposed area of incorporation for each square mile of area.”

Each of these fatal defects are addressed below.

**1. The Petition is fatally defective because at least three undivided tracts of land consisting of more than forty acres are within the proposed town**

Colorado law prohibits any proposed town from incorporating “any undivided tract of land consisting of forty or more acres lying within the proposed limits of such city or town without the consent of the owners thereof.” C.R.S. § 31-2-101(1)(d). Here, there are at least three undivided tracts owned by the Association consisting of more than forty acres lying within the proposed limits of the proposed town. According to the legal description and map attached to the Petition along with the representations in the petitioners’ website, all of the Baca Grande is within the proposed limits of the town of Baca Grande except for eleven parcels identified by parcel numbers.

The Association's three tracts over forty acres are not among the eleven parcels listed. Thus, the Petition seeks to incorporate these three parcels without the Association's consent.

**2. The Petition is fatally defective because it does not accurately describe the boundaries of the proposed town**

Colorado law requires that the Petition “[d]escribe the territory proposed to be embraced in such city or town, which description shall determine the boundaries thereof.” C.R.S. § 31-2-101(1)(a). Furthermore, the Colorado Supreme Court has stated that a petition to incorporate a town must be “sufficiently clear to accurately advise substantial numbers of voters as to whether they were to be included or excluded from the proposed [town].” *Taylor v. Pile*, 391 P.2d 670, 674 (Colo. 1964). To satisfy this requirement, the Colorado Supreme Court noted the following requirements and consequences for failure to meet the requirement:

The petition must contain an accurate description of the boundaries of the proposed municipal corporation. Failure of the petition for incorporation to properly set out the boundary to be incorporated has been held to make void the whole proceeding. *Id.*

Additionally, the *Taylor* court noted that “[a]ccurate maps...of the territory are frequently required to be attached to or filed with the petition, and this requirement has been held to be jurisdictional.” *Id.*

Here, the Petition does not accurately describe the boundaries of the proposed Town of Baca Grande. There are at least three reasons.

First, the legal description (Exhibit A) is not sufficiently clear to advise voters whether they are to be included or not included in the proposed Town of Baca Grande. Exhibit A is a metes and bounds description that excepts eleven parcels identified only by parcel numbers. For



a voter to understand whether they are in the proposed town, the voter would have to research the parcel number to determine if the voter's property was to be in the proposed town or not.

Second, the map (Exhibit B) does not identify which parcels are excluded per Exhibit A. If Exhibit A excludes 11 parcels, those parcels should be identified on the map, so that a voter may clearly understand whether their land is in the area of the proposed town.

Third, the size of the Baca Grande appears to be inaccurate. While the Petition states that the size is 10,470 acres, the actual size is approximately 14,000 acres.

**3. The Petition is fatally defective because it did not have attached an accurate map no less than one inch to one thousand feet**

Colorado law requires that the Petition “[h]ave attached thereto an accurate map or plat thereof on a scale no less than one inch to one thousand feet.” C.R.S. § 31-2-101(1)(b). The Petition attached a map (Exhibit B) that is on a scale less than one inch to one thousand feet. Though difficult to read, it appears that the map provides the following scale: “1 inch equals 0.2 miles.” 0.2 miles equals 1,056 feet. Viewing the scales as representative fractions (the ratio of distance on the map to distance on the ground), Exhibit B's scale is 1 inch / 1,056 feet (0.000947), but Colorado law requires that the scale be 1 inch / 1,000 feet (0.001). Thus, the scale is “less than” that required by Colorado, admittedly by only a very small amount (0.000053).

If the incorporation statute allowed for substantial compliance, the map scale likely would be sufficient. However, this requirement is part of a jurisdictional statute, thus requiring strict compliance. While the scale is only short of the requirement by 56 feet, that is not good enough. As noted in *Taylor*, “[t]he most that can be said for these instruments as filed in the instant controversy is that they were almost accurate. This does not suffice.” 391 P.2d at 674.

Additionally, the map is not accurate. As noted above, Exhibit A states that 11 parcels are excepted from the area to be the Town of Baca Grande. However, the map does not identify these 11 parcels. Thus, it appears that the map is not accurate. The map, as part of the Petition, must be “sufficiently clear to accurately advise substantial numbers of the voters as to whether they were to be included or excluded from the proposed” Town of Baca Grande. *Id.*

**4. The Petition is fatally defective because it is not accompanied with satisfactory proofs of the number of inhabitants of the proposed town**

Colorado law requires that the Petition “[b]e accompanied with satisfactory proofs of the number of inhabitants within the territory embraced within the limits of the proposed city or town, which proofs shall be based upon the last preceding federal census, as adjusted according to the records of the county planning office or other county records.” C.R.S. § 31-2-101(1)(d).

The Petition states that “the territory described has approximately 1,236 inhabitants” and states that this calculated is based on census date set forth on Exhibit C. However, Exhibit C does not appear to support the statement that the proposed town has approximately 1,236 inhabitants. There appear to be at least three problems with Exhibit C.

First, nowhere in Exhibit C does it appear to explicitly state that 1,236 inhabitants reside in the proposed area. The number “1,236” does not appear to be listed on Exhibit C. Second, Exhibit C appears to be based on “the active and inactive voter counts for Precinct 5 as of April 27, 2022.” Precinct 5 is significantly larger than the area identified on Exhibit B. Furthermore, it appears that portions of the proposed Town of Baca Grande (i.e. Casita Park) are in Precinct 3, based on the locations of Precincts 3 and 5 on attached Exhibit 4. Third, Exhibit C appears to be missing pages, making it impossible to determine whether the conclusion reached regarding the

number of inhabitants is accurate. Thus, Exhibit C does not provide satisfactory proof of the number of inhabitants within the proposed Town of Baca Grande.

**5. The Petition is fatally defective because (a) the proposed area is not “urban in character” and (b) the Petition has not established that “proposed area of incorporation has an average of at least fifty registered electors residing within the boundaries of the proposed area of incorporation for each square mile of area.”**

Colorado law prohibits an election on incorporation of the proposed Town of Baca Grande, “unless the court finds that the proposed area of incorporation is urban in character...” C.R.S. § 31-2-102(3)(a). Additionally, the Court must find that “[t]he proposed area of incorporation has an average of at least fifty registered electors residing within the boundaries of the proposed area of incorporation for each square mile of area.” C.R.S. § 31-2-102(3)(a)(I).

While the incorporation statute does not define “urban in character” and there is no case law clarifying this term, the related municipal annexation statute defines “urban development” as follows:

“Urban development” means the construction on land of improvements for residential, institutional, commercial, industrial, transportation, public flood control, and recreational and similar uses, in contrast to use of the land for growing crops, truck gardening, grazing of farm animals, and other agricultural pursuits. The term also applies to vacant ground which has been or is being prepared for urban development by such steps as subdivision into lots or plots and blocks, installation of water and sewer lines, construction of access streets, and construction of railroad spur or branch tracks.

C.R.S. § 31-12-103(13).

Similarly, the Park and Open Space Act defines “urban area” as follows:

“Urban area” means any land located within any incorporated city or municipality. The term also means any land located in the unincorporated areas of any county which is zoned as residential land and for which a final plat for subdivided land has been approved by the board of county commissioners pursuant to section 30-28-110 (3) and (4), C.R.S., and which is also included in a

local governmental entity which has a statutory authorization to provide for public parks, trails, or open spaces.

C.R.S. 29-7.5-103(5).

The use of the word “is” in the incorporation statute suggests that the determination of “urban in character” is related to a specific place and time. This is notably different from “urban development” and “urban area,” which conceive of future development.

Beyond Colorado, the Indiana Court of Appeals in considering the phrase “urban in character” concluded that “urban” generally meant that the area is mainly occupied by persons engaged in city pursuits. *Abell v. Seymour*, 150 Ind. App. 163, 167, 275 N.E.2d 547, 550 (Ind. App. 1971)

The Baca Grande currently is not “urban in character.” The residents are not engaged in city pursuits. Assuming the Petition’s number of residents, only approximately 33% of the Lots are occupied (1,236/3,650), with the remaining being vacant land. The largest area, the Grants, has no water or sewer services. These facts support a finding that the Baca Grande is not currently “urban in character.”

Based on the subdivision of the Baca Grande into thousands of Lots, it appears that the vision of the developers was to create a community that in the future might be considered “urban in character.” However, approximately fifty years have passed, and that vision has not come to pass. Perhaps, in the future, it will. The petitioners cannot rely on the unknowable future. They must take the Baca Grande as it currently exists. And, as the Baca Grande currently exists, it is not “urban in character.”

Furthermore, to the extent it is “urban in character,” the Petition has not established that the “proposed area of incorporation has an average of at least fifty registered electors residing within the boundaries of the proposed area of incorporation for each square mile of area.”

Regarding the “proposed area of incorporation,” the area is approximately 14,000 acres (i.e. 21.875 square miles), according to Saguache County. It is unclear how the petitioners calculated the alleged area of 16.35 square miles. Regarding the number of electors, for the same reasons that the Petition’s calculation of the number of residents is questionable, the calculation of registered electors is questionable. However, assuming that the number of registered electors of 1,043 is correct, the registered electors per square mile appears to have the following possibilities:

	<b>Number of Electors Residing Within the Boundaries of the Proposed Area of Incorporation</b>	<b>Size of Proposed Area of Incorporation (Square Miles)</b>	<b>Registered Electors Per Square Mile</b>
<b>Petition</b>	1043	16.35	64
<b>Area of Incorporation all of Baca Grande (14,000 acres = 21.875 square miles)</b>	1043	21.875	48

Perhaps neither of the calculations in this table are accurate. The petitioners have the burden of proof to satisfy the statutory requirements. In this regard, the petitioners have failed to show that the data used to calculate registered electors per square mile is accurate.

#### **IV. CLOSING**

The Petition fails to strictly or even substantially comply with the requirements of the incorporation statute necessary to move this issue to an incorporation vote. The petitioners clearly are dissatisfied with the Association and wish to explore an alternative form of community governance. Both Colorado law and the Association’s Bylaws contemplate this. However, there is a gulf between the petitioners’ desire and the Petition filed in this action. If the petitioners’ political argument is that incorporation of the Town of Baca Grande is a superior

form of governance, the Petition filed by the petitioners does not inspire confidence. The Petition either fails to meet objective requirements of the incorporation statute or fails to supply sufficient evidence to determine whether the requirements have been satisfied. For these reasons, as addressed above in detail, the Court should dismiss the Petition for lack of subject matter jurisdiction.

WHEREFORE, Intervenor Baca Grande Property Owners Association requests the Court dismiss the Petition with prejudice. A proposed order is attached for the court's consideration.

Date signed: September 30, 2022.

MOELLER GRAF, P.C.



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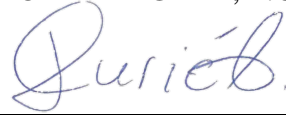
K. Christian Webert

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of September 2022, a true and correct copy of the foregoing **MOTION TO DISMISS** was placed in the U.S. Mail, postage prepaid and addressed as follows:

Citizens of Proposed  
Town of Baca Grande  
c/o Desiree Marceau  
P.O. Box 365  
Crestone, CO 81131

MOELLER GRAF, P.C.



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