

District Court, Saguache County, Colorado  Court Address: 501 4th Street, Saguache, CO 81149	DATE FILED: October 28, 2022
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	Δ COURT USE ONLY Δ  Case No.: 2022CV000005 Division: C
<b>REPLY TO PETITIONER'S RESPONSE IN OPPOSITION TO INTERVENER'S MOTION TO DISMISS</b>	

Intervenor Baca Grande Property Owners Association (“Association”), by and through its counsel, Moeller Graf, P.C., hereby files this Reply to Petitioner's Response in Opposition to Intervener's Motion to Dismiss, pursuant to C.R.C.P. 12(b)(1), and as grounds therefore, states as follows:

### I. INTRODUCTION

On August 8, 2022, the petitioners filed their Petitioner's Response in Opposition to Intervener's Motion to Dismiss (“Response”) that sets forth seven arguments (listed as A through F) in support of the petitioners’ position that the Motion to Dismiss should be denied. In general, the petitioners’ arguments seek to rebut the argument in the Motion to Dismiss that the District Court lacks jurisdiction because the Petition is fatally defective in five ways related to the express requirements of C.R.S. § 31-2-101. None of the arguments in the Response show that the petitioners have satisfied their burden related to the five defects identified in the Motion to Dismiss.

## II. FACTUAL BACKGROUND - SUPPLEMENT

This section supplements the factual background included in the Motion to Dismiss. For purposes of clarity, the numbering of paragraphs and exhibits will continue from the Motion to Dismiss.

### 6. Additional Maps

In 2021 and 2022, the Association hired Integrated Land Services to prepare maps of the Baca Grande with relevant data, including the acreage and estimated population. A copy of these maps, as of February and March 2022, are attached hereto as **Exhibit 10**.<sup>1</sup> Relevant to this action, the maps provide the following information<sup>2</sup>:

Subdivision	Acreage (with roads)	# Housing Units	Total Pop
Chalet I	2,629.17	516	765
Chalet II	1844.67	144	216
Chalet III	82.00	14	24
The Grants	6267.67	159	231
Mobile Home Estates	277.00		
Total	11,100.51	833	1,236

Notably, for the Mobile Home Estates, the # Housing Units and Total Pop categories are marked with a question mark.

Undersigned counsel draws the court to the following facts that conflict both with the Petition and the Motion to Dismiss. First, the acreage of the area is uncertain. The petition and Response allege that the area is 10,470 acres, based on the plat of the Baca Grande recorded

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1 Undersigned counsel became aware of these maps on October 27, 2022.

2 Undersigned counsel represents that he conferred with Pete Magee of Integrated Land Services. Dr. Magee represented that the map data was approximate and that the maps do not nor are intended to meet surveying standards.

with Saguache County on May 12, 1971 at Reception No. 199438. The Motion to Dismiss alleges that the area is approximately 14,000 acres, based on the 2010 Saguache County Master Plan. The maps prepared by Integrated Land Services conclude that the area is 11,100.51 acres.

Second, the maps prepared by Integrated Land Services and the Petition both conclude that the area has 1,236 inhabitants. However, the maps prepared by Integrated Land Services do not include any inhabitants of the Mobile Home Estates, noting that this is unknown. The Petition makes no such acknowledgment.

## II. ARGUMENT

None of the arguments in the Response show that the petitioners have satisfied their burden related to the five defects identified in the Motion to Dismiss. Moreover, the Response itself supports the conclusion that the Petition is fatally defective, as follows:

1. In argument C(1)<sup>3</sup> of the Response, the petitioners concede that they have not obtained the consent of the Association, though the Association owns three undivided parcels in excess of 40 acres.
2. In argument E of the Response, the petitioners acknowledge that the basis for the determination of inhabitants is not satisfactory.

**1. In argument C of the Response, the petitioners concede that they have not obtained the consent of the Association, though the Association owns three undivided parcels in excess of 40 acres**

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

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<sup>3</sup> There are two arguments identified by the letter C, so this Reply distinguishes between the two.

consent of the owners thereof.” C.R.S. § 31-2-101(1)(d). This requirement is among the requirements governing the petition to be filed with a court seeking an order for an incorporation election. Petitioners contend that “[t]he vote in favor of Incorporation of the Town of Baca Grande would be the consent of the property owners.” *Response*, pg. 5.

A vote in favor of incorporation of the Town of Baca Grande does not implicitly include the consent of the Association, the owner of three parcels in excess of 40 acres that are within “the territory proposed to be embraced in such Town.” There are three reasons.

First, C.R.S. § 31-2-101(1)(d) contemplates that consent will be obtained, if at all, in advance of a petition being filed. As noted above, the consent requirement is included with the requirements of the petition. Thus, here, petitioners must first obtain the consent of the Association and file proof of such consent with the petition. The petitioners cannot first obtain approval from the Court and then seek consent. The Court cannot grant the petition until the petitioners have obtained such consent.

Second, a vote to incorporate the Town of Baca Grande and a decision by the Association to consent to incorporation of the Town of Baca Grande are decisions made by separate groups of people. A vote on incorporation of the Town of Baca Grande is a vote “of all the registered electors residing within the territory embraced within said territory.” C.R.S. § 31-2-102(1). A decision of the Association to consent to incorporation of the Town of Baca Grande is likely a vote of the Board of Directors of the Association. In relevant part, Section 10.1 of the Association’s Bylaws state that “[t]he Board may act in all instances on behalf of the Association, except as provided in the Declaration, these Bylaws, the Colorado Common Interest Ownership Act or the Colorado

Revised Nonprofit Corporations Act.”<sup>4</sup> To the best of undersigned counsel’s knowledge, there is no applicable exception related to consent to incorporation of a town. The petitioners appear to argue that the Members in Good Standing, not the Board, have the authority to consent to incorporation. However, the Member in Good Standing are only empowered to vote to transfer property, not consent to incorporation.

Third, even if the Court accepts the petitioners’ contention, a vote to incorporate the Town of Baca Grande of registered electors is not the same as a vote of Members in Good Standing. A “registered elector” is “a qualified elector who has registered to vote in the manner required by law. C.R.S. § 31-1-101(9). A qualified elector is “a person who is qualified under the provisions of the ‘Colorado Municipal Election Code of 1965’ to register to vote in elections of the municipality or who, with respect to a proposed city or town or the creation of an improvement district, is qualified to register to vote in the territory involved in the proposed incorporation or district.” C.R.S. § 31-1-101(7). In contrast, a Member in Good Standing “is any Owner whose dues, interest, liens, fines, collection fees, late charges, attorney fees and any other assessments are paid up and current.” *Bylaws*, Sec. 2.1(o). These are not the same. Some Members in Good Standing may be registered electors, but there are a significant number of Members in Good Standing who are not (e.g. Members owning Lots within the Baca Grande who either are not registered electors or are registered elsewhere). Beyond this substantive difference, there is a procedural difference between how decisions are made by registered electors and members of a nonprofit corporation.

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<sup>4</sup> A copy of the entirety of the Association’s Amended and Restated Bylaws is attached as **Exhibit 11**. The Motion to Dismiss included a single page of said Bylaws.

On this single defect, the petition must be dismissed. The petitioners have admitted that they have not received the Association's consent. Furthermore, the petitioners cannot obtain such consent through an incorporation election.

**2. In argument E of the Response, the petitioners acknowledge that the basis for the determination of inhabitants is not satisfactory.**

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 petitioners concede that “[n]either the US Census or the Colorado State Demography office track the numbers from the Baca Grande subdivision separately.” *Response*, pg. 8. This aligns with the conclusions of Integrated Land Services related to the number of inhabitants in the Mobile Home Estates. However, the Petition makes no qualifications about the number of inhabitants, based on this uncertainty, and states that the number is 1,236. *Petition*, ¶ 5. All that can be said is that the number of inhabitants is at least 1,236 plus inhabitants in the Mobile Home Estates. Because the Petition has not satisfactorily accounted for the number of inhabitants in the Mobile Home Estates, the Petition must be dismissed.

**3. Beyond the substance, the Reply is not signed by a natural person, in violation of C.R.C.P. 10 and 121(1)(a).**

The Court should require the petitioners to either hire an attorney or designate one to three petitioners who are responsible for signing filings on behalf of all petitioners. The Reply is signed by “Citizens of the Proposed Town of Baca Grande.” No phone number or email address is provided in the caption.

Colorado law requires that “any document filed with the court” be signed by a person. C.R.C.P. 10(a) (The clause “the person signing it” implies that a natural person must sign documents filed with the court.). Furthermore, Rule 10 requires that a filing include a signature block. C.R.C.P. 10(d)(4). Last, Rule 121 states that “[a]ll motions and briefs shall comply with C.R.C.P. 10 (d).” Colorado law contemplates the use of a pseudonym but not merely to avoid embarrassment, humiliation, or economic loss. *Doe v. Heitler*, 26 P.3d 539 (Colo. App. 2001).

Here, the petitioners have attempted to shield themselves from public disclosures. There is no way to know who drafted or filed the Response. It is unclear why the petitioners have attempted to shield themselves. A charitable speculation is that wrangling the petitioners is difficult and it is more efficient to use “Citizens of the Proposed Town of Baca Grande.” A less charitable view is that the petitioners wish to avoid the criticism that naturally accompanies the politically-charged action of filing a petition to incorporate a town. While understandable, such secrecy is not in keeping with our tradition of open and public courts.

While the Association does not wish to cause unnecessary delay on non-substantive issues such as this, the Association requests that the Court require the petitioners to identify which of the petitioners signed the Response and how they may be contacted (i.e. email and/or phone) by the Association.

#### **IV. CLOSING**

None of the arguments in the Response show that the petitioners have satisfied their burden related to the five defects identified in the Motion to Dismiss.

WHEREFORE, Intervenor Baca Grande Property Owners Association requests the Court dismiss the Petition with prejudice.

Date signed: October 28, 2022.

MOELLER GRAF, P.C.

/s/ K. Christian Webert

K. Christian Webert



**CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of October 2022, a true and correct copy of the foregoing **REPLY TO PETITIONER'S RESPONSE IN OPPOSITION TO INTERVENER'S MOTION TO DISMISS** was served via U.S. Mail, postage prepaid through CCEF and addressed as follows:

Citizens of Proposed  
Town of Baca Grande  
P.O. Box 365  
Crestone, CO 81131

MOELLER GRAF, P.C.

/s/ K. Christian Webert