

<p>DISTRICT COURT, SAGUACHE COUN1Y, COLORADO COURT ADDRESS 501 4th Street SAGUACHE, COLORADO</p> <p>IN THE MATTER OF:</p> <p>CITIZENS FOR THE PROPOSED INCORPORATION OF THE TOWN OF BACA GRANDE</p>	<p>COURT USE ONLY</p>
<p>Petitioners: Citizens for the Proposed Town of Baca Grande P.O. Box 365 Crestone, CO 81131</p>	<p>Case Number: 2022CV5D55</p> <p>Division: C</p> <p>Courtroom:</p>
<p>PETITIONER'S RESPONSE IN OPPOSITION TO INTERVENOR'S MOTION TO DISMISS</p>	

COMES NOW, Petitioners and Citizens for the Proposed Incorporation of the Town of Baca Grande, hereby opposes Intervenor Baca Grande Property Owners' Association Motion to Dismiss pursuant to Rule 12(b)(1) of the Colorado rules of Civil Procedure.

I. INTRODUCTION

The Petitioner's Motion satisfies the requirements of the Incorporation Statute (C.R.S. §§ 31-2- 101 through 109). Intervenor's Motion must fail under C.R.C.P 12(b)(1), because the Intervenor fundamentally misunderstands the nature of the incorporation statute and the Citizens filed a well-pleaded Petition that does not contain fatal defects.

II. STANDARD OF REVIEW

A. Pro Se Plaintiff

Petitioners are proceeding pro se. The court, therefore, "review[s] his pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." Trackwell v. United States, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted). See also Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (holding allegations of a pro se complaint "to less stringent standards than formal pleadings drafted by lawyers").

B. Standard of Review not specified by the General Assembly

The General Assembly did not specify what level of compliance it envisioned in C.R.S. § 31-2-101. "Not all directives and requirements declared in statute law should be understood to have equal force." Colorow Health Care, LLC v. Fischer, 2018 CO 52M, ¶ 15 (quoting 3 Norman Singer & Shambie Singer, Sutherland Statutory Construction § 57:1 (7th ed. 2017). "To be sure, all statutes demand compliance, but the term "[c]ompliance' ...without further modification, connotes an element of degree." Woodsmall v. Reg'l Transp. Dist., 800 P.2d 63, 67 (Colo. 1990). While some statutes require strict compliance, others demand only substantial compliance. Id.

The Citizen's Petition does not have fatal defects. The Intervenors argue that the decision in Taylor v. Pile, 391 P.2d 670 (1964) should control the analysis and that it infers strict compliance. In Taylor, the court did not determine the standard of review because it ruled that the petition which included a hand drawn map was fatally defective, therefore conferring no jurisdiction on the court. Id. 673-674. There is no fatal defect in the Petition.

A motion to dismiss under C.R.C.P. 12(b)(1) may be granted only if supported by uncontroverted, "competent evidence pertaining to the motion." Trinity Broad. of Denver, Inc. v. City of Westminster, 848 P.2d 916, 924 (Colo. 1993); Medina v. State, 35 P.3d 443, 452 (Colo. 2001). A trial court therefore commits reversible error if it grants a motion to dismiss under C.R.C.P. 12(b)(1) based on mere conclusory statements of counsel as opposed to competent and admissible evidence. See *id.*

Petitioners have proceeded with the petition for incorporation, relying on the statutes Colorado Title 31 – Municipal, CRS § 31-2-101 through 109, not as legal professionals, but as citizens, proceeding *pro se*, desiring to create a government for themselves that is accessible and participatory.

III. ARGUMENT

A. The INTERVENOR'S MOTION MUST FAIL UNDER C.R.C.P 12(b)(1) BECAUSE THE COLORADO CONSTITUTION VESTS POLITICAL POWER IS VESTED AND DERIVED FROM THE PEOPLE

The Colorado Constitution, Article II Bill of Rights asserts that all political power is vested and derived from the people. The Baca Grande Property Owners Association is a nonprofit corporation organized under the IRS Code as a 501(c)(4) membership organization. The Baca Grande Property Owners Association board of directors are elected representatives of the membership, not an executive position without accountability to the membership.

The Colorado Constitution, Article II Bill of Rights also grants the people the sole and exclusive right to govern themselves, and the right to alter their form of governance when they

deem it necessary to their safety and happiness.

A Property Owners Association or a Homeowners Association is typically a membership organization formed by a real estate developer to own and maintain common green areas, streets, and sidewalks and to enforce covenants to preserve the appearance of the development. The Baca Grande Property Owners Association is a 501(c)(4) nonprofit corporation that by definition is organized to be operated exclusively for the promotion of social welfare of its membership. By filing a Motion to Dismiss a petition to hold an Election, the Baca Grande Property Owners Association is interfering with the political power vested in the people - the right to govern themselves and the right to determine their form of government. By its very nature, the Association does not have the right to vote but the citizens it represents do have the right to vote **without interference in their right of suffrage**. The BGPOA's interference is interference with the political power vested in the people. The Colorado Constitution, Article II Bill of Rights in Section 5. *Freedom of elections*: "All elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

**B. THE INTERVENOR'S MOTION MUST FAIL UNDER C.R.C.P 12(b)(1) BECAUSE
THE BOARD HAS NO AUTHORITY TO CONTINUE TO OPPOSE THE ELECTION
AND PREVENT THE PEOPLE FROM VOTING ON THE QUESTION OF
INCORPORATION**

The five volunteer board members do not have the authority to block an election by the residents by use of litigation. By contrast the Incorporation Statute in Title 31 is clear that the district court has jurisdiction. First, the title of C.R.S. § 31-2-101 - *Petition to district court*.

Second, C.R.S. § 31-2-102: (1) *If the district court finds and determines that the territory described in the petition and the petition itself meet the requirements of this part 1, it shall appoint not less than five nor more than nine commissioners, who shall be registered electors residing within the territory described in the petition.*

By attempting to stop this election through litigation, the board of directors is usurping the authority of the district court to rule on the sufficiency of the petition and authorize an election. See CRS § 31-2-101 "(1) *Whenever the inhabitants of any territory not embraced within the limits of any existing municipality desire to be organized into a city or town, they shall file a petition for incorporation of such city or town with the district court of the county within which such territory, or any part thereof, is situate.*"

**C. THE INTERVENOR'S MOTION MUST FAIL UNDER C.R.C.P 12(b)(1) BECAUSE
THE PETITION WAS SIGNED BY MORE THAN FORTY REGISTERED
ELECTORS**

In cases where the territory involved is situated in a county having a population of twenty-five thousand or less, C.R.S. § 31-2-1-1(1) requires to be signed by *not less* than forty registered electors who are landowners and residents. Even if Intervenor's claim that at least 6 unnamed signatories of the 73 signatories are not property owners, this claim is irrelevant because there would be 67 signatories remaining. More than forty registered electors who are landowners and residents signed the petition, therefore, the petition is valid. People ex rel. Saunier v. Stratton, 33 Colo. 464, 81 P. 245 (1905).

**D. THE CITIZENS PETITION IS SUFFICIENT BECAUSE THE UNDIVIDED
TRACKS OF LAND BELONG TO THE PROPERTY OWNERS OF THE
PROPOSED TOWN**

The tracts of land that are forty or more acres included in the petition to incorporate the Town of Baca Grande are held by the Baca Grande Property Owners' Association in common for the benefit of the members. Article 14.2 of the Baca Grande Property Owners Association 2001 Amended and Restated Bylaws states: "In the event a municipality is formed which includes the Development, the Members in Good Standing shall have the authority to vote at any membership meeting to transfer any and all Common Facilities, property and equipment to the municipality." **Exhibit 8.** The vote in favor of Incorporation of the Town of Baca Grande would be the consent of the property owners.

The 3 parcels of 40+ acres, as well as another 94 properties held in common for the benefit of the members would be included in the entirety of the assets (referred to in Article 14.2 of the Baca Grande Property Owners Association 2001 Amended and Restated Bylaws).

The Baca Grande Property Owners Association Board of Directors does not have the authority to determine exclusion or inclusion of the three 40+ parcels in the municipal boundary. While the Baca Grande Property Owners Association holds title to the properties, the properties named in the Motion to Intervene are held in common for the benefit of all members and cannot be conveyed or used for a security interest without the consent of at least 67% of property owners. "*'Common elements' means: (b) in a planned community, any real estate within a planned community owned or leased by the association.*" and "*In a condominium or planned community, portions of the common elements may be conveyed or subjected to a*

security interest by the association if persons entitled to cast at least sixty-seven percent of the votes in the association, including sixty-seven percent of the votes allocated to units not owned by a declarant,except that all owners of units to which any limited common element is allocated must agree in order to convey that limited element or subject it to a security interest.” (See CCIOA C.R.S. § 38-33.3-103. Definitions, specifically 5.b. and CCIOA C.R.S. § 38-33.3-312 (1).

D. THE CITIZEN’S PETITION IS SUFFICIENT IN THAT NOTICE HAS BEEN SENT AND RECEIVED BY THE INTERVENOR FOR THE 3 PARCELS EXCEEDING 40 ACRES

On November 22, 2022, the Petitioners sent a certified letter to the Baca Grande Property Owners Association in response to their complaint of not having received proper notification. The Petitioners intent in sending the letter was to give the association the same notice other owners of 40+ lots received and address the longstanding argument by the Intervenor’s end that they had not received proper notification. The petitioners maintain that these three (3) parcels along with 94 other smaller parcels held by the BGPOA are part the assets held for the benefit of the membership the transfer of which would be voted on after the formation of the municipality by the members in good standing per article 14.2. Therefore, we only sent notification but are not amending the petition.

E. THE CITIZEN'S PETITION SATISFIES THE INCORPORATION STATUTE BECAUSE THE MAP BOUNDARIES ARE ACCURATE

The map boundaries are accurate and satisfy the statutory requirements. The map is for court's use, all property owners who are included in the proposed town were notified as such in

writing via USPS per C.R.S. § 32-1-101 (2.5) (a). The map was drafted by a professional licensed company: The San Luis Valley GIS GPS Authority, 419 San Juan Avenue, Alamosa, CO. 81101 #719-587-0286, and bears the stamp of their office in the bottom left corner. See **Exhibit 1 in court files.**

The legal description is the standard, legal description used by the Saguache County Assessor's office and is the exact legal description which was submitted to the Assessor's office when the original plat of the Development was filed on (May 12, 1971). See **Exhibit 2 in court files.** A list of exempted parcels included with the legal description is a standard practice.

The legal description serves as the written description of the boundaries of the town. The map is the visual representation of the town boundaries. See **Exhibit 3 in court files.** The map indicates the approximate location of the excluded parcels.

The size of the area (10,470 acres) is recorded on the original Plat filed in the Saguache County Assessor's office May 12th, 1971. The land was surveyed and the Plat drafted by a professional licensed surveyor; Coe & Van Coe Consulting Engineers Inc. The Intervenor's claim the actual size to 14,000 acres which is what the Baca Grande Property Owners Association Website now lists. However, there is no evidence backing up this claim. For the purposes of the petition, we must adhere to actual legal documents in reference to the size of the area included within the proposed boundaries of the town.

In the petition to Incorporate the Town of Foxfield in Arapahoe County, the surveyor described the territory of the proposed Town of Foxfield as being "800 acres, more or less". The Court accepted this degree of specificity: "the proposed area of incorporation contains

approximately one and one-third square miles and has four hundred and seven (407) electors residing in the area.” (Arapahoe District Court, Oct. 13, 1994.) **Exhibit 5B.**

F. THE INTERVENOR'S MOTION MUST FAIL UNDER C.R.C.P 12(b)(1) BECAUSE THE MAP SCALE IS NOT LESS THAN ONE INCH TO ONE THOUSAND FEET.

The map scale satisfies C.R.S. § 32-1-101 which requires a map or plat scale *no less than one inch to one thousand feet.* (Emphasis added). The scale of the map is 1 inch to 0.2 miles which translates to 1 inch to 1056 feet which is slightly larger than the minimum C.R.S. § 31-2-101 requires of 1 inch to 1000 feet. The Intervenors math is incorrect.

The Citizens map is accurate and has not been changed. In *Taylor v. Pile*, 391 P.2d 670, 673-674 (Colo. 1964), the court ruled that the petition was fatally defective because changes to the map were drawn in red ink and that is why the court ruled their map was not an accurate description and that failure of the petition to properly set out the boundary to be incorporated was held to make void the whole proceeding. In this current instance, the Petitioners of the proposed town of Baca Grande have not make any changes to the boundaries after circulating the petition for signing. Also, Taylor v. Pile noted that ‘[a]ccurate maps... of the territory are frequently required...’ but does not say always required. The map is accurate and Intervenors’ quote of this case law is irrelevant to the petition. Of further note, the Intervenors use of Taylor v. Pile, 391 P2d 670, 673-674 (Colo. 1964) there is reference to possible confusion on the part of property owners as to whether or not their property is included within the proposed town boundaries. Taylor v. Pile is a case that originated in Arapahoe County which is one of the largest counties in the state of Colorado. Even in 1964 there were likely more than two thousand five hundred

registered voters within the proposed town boundaries which means written notice of the petition to incorporate likely was not required by the statute and by court order. However, in the petition to incorporate as the Town of Baca Grande, the number of registered voters within the proposed town boundaries fell below two thousand five hundred therefore per C.R.S. § 31-2-101 (2.5)(a). The petitioners were required to mail a notice of the petition to incorporate via first class mail to all owners of real property within the proposed town boundaries. This was a court order dated August 24th 2022. The petitioners filed a motion to include additional documentation which was the certificate of service on the mailing of the notice of petition on August 26th, 2022. The petitioners understood they would be required to perform the mailing and had already begun the mailing process prior to the court order. Because all owners of real property within the proposed town boundaries were notified by mail about the petition to incorporate there can be no claim made by the Intervenors that there could be confusion as to whether or not a property owner is included within the town boundaries.

G. THE CITIZEN'S PETITION PROVIDED SATISFACTORY PROOFS OF NUMBER OF INHABITANTS

The Citizen's purchased a list of registered voters from the Saguache County Clerk's office that contain the names of registered voters in Precinct 3 and Precinct 5 who also reside within the proposed town boundary. After editing for any duplication the lists total 1,106 registered voters. The act of registration itself ensures that the people listed as active voters are residents. On the voter registration form, the Registrant signs a Self-Affirmation "that the residence address I provided is my sole legal place of residence." See **Exhibit C, Exhibit C2, and Exhibit C3.**

The documentation provided satisfies the requirements of the statutes C.R.S. § 31-2-101 (2.5). Addresses were obtained from the Saguache County Assessors' office. The election records were obtained from the Saguache County Clerk's office.

NOTE: Neither the US Census or the Colorado State Demography office track the numbers from the Baca Grande subdivision separately. The subdivision is lumped in with Unincorporated Saguache County in its entirety. Voter registration and student population records from the schools is a conservative estimate of the population as there is no accounting for residents who are not registered to vote.

H. THE INTERVENOR'S MOTION MUST FAIL UNDER C.R.C.P 12(b)(1) BECAUSE THE AREA IS URBAN IN CHARACTER

The definition of "Urban in character " is a human settlement or community with built environment meaning buildings and roads. (*Source Wikipedia.*) The proposed town of Baca Grande fits that minimum description of "Urban in character " plus goes well above and beyond with appropriately 102 miles of road, in excess of 888 homes (the number of homes quoted by the Baca Grande Property Owners Association Land Use Administrator at the March 17th board of directors meeting), a golf course, horse stables, administrative buildings, fire station and EMS service, office buildings, schools – public and private, three parks with public restrooms, library, greenbelts with mixed use trails, over twenty religious centers, and about 100 short term vacation rentals.

The Baca Grande subdivision meets the definition of “urban development” as found in the related municipal annexation statute. C.R.S. § 31-12-103(13), especially, “*The term [urban*

development] 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 sewer lines, construction of access streets, etc.”

Urban in character also refers to population density and our current population including registered voters at 1,106 plus appropriately 85 children and teens who attend the Crestone Charter school (**Exhibit #C3**), and unspecified number of children and teens who attend the Moffat School plus unregistered voter residents would put the population over 1,200 which exceeds the population of the most recently formed town 1994, the Town of Foxfield which had 584 inhabitants and fell within the definition of urban in character at the time of their petition to incorporate. See **Exhibit 5**.

I. THE PROPOSED AREA OF THE TOWN OF BACA GRANDE EXCEEDS THE AVERAGE OF 50 REGISTERED VOTERS PER SQUARE MILE

The correct acreage for the proposed town is 10,470 which is the size listed on the legal Plat filed with Saguache County Assessor's office and referenced earlier in this response. The most recent information on registered voters is 1106. Therefore $10,470 \text{ acres} \div 640 = 16.35$ square miles. $1,106 \text{ registered voters} \div 16.35 \text{ miles} = 67.64$ registered voters per square miles and so exceeds the average of 50 registered voters per square mile as required by C.R.S. § 31-2-101

IV. CONCLUSION

Intervenor's Motion should be denied as the arguments Intervenors' raise are meritless. Analysis of the Petition demonstrates that the Petition contains accurate and sufficient information

as required by C.R.S. § 31-2-101.

The discussion of incorporation or annexation for the Baca Grande Subdivision is not new. In fact, both options have been discussed and researched for the past 20 years. Those records are on file in the Colorado Department of Local Affairs, along with the current research and effort to form a town represented by this petition. Now that the population has increased to meet the statutory requirements, the Petitioners have drafted the petition submitted to the court along with the requisite signatures and meet the requirements outlined in CRS 31-2-101.

Typically, property owners' associations or homeowners' associations are not tasked with the duty to provide the level of infrastructure currently necessary to residents of the subdivision such as road maintenance, law enforcement and public safety needs such as fire protection and ambulance that towns typically provide. The Petitioners desire to create a more functional governance that can provide the level of service a growing community needs and which will have the professional vision to plan for the future of a growing community.

The Baca Grande Property Owners Association has limits to the resources it can generate to provide desired services; limits that do not apply to a municipal structure. The BGPOA relies almost exclusively on a dues structure for revenue – one lot, one due and is by its nature inequitable and often overburdens poorer residents. By contrast, a town, as a political subdivision of the state, is eligible to receive intergovernmental funding for roads, bridges, transportation development, apportionment of taxes from motor vehicle registrations, conservation trust funds, franchise fees from public utilities, revenue from building permits, license fees for retail operations, grants from the Colorado Department of Transportation and the Colorado Department of Local Affairs to assist with infrastructure.

The Association governing documents point to possibility of the formation of a municipality. Article XVI Dissolution or Transfer of Assets Section 14.2 Municipality. *“in the event a municipality is formed which includes the Development, the Members in Good Standing shall have the authority to vote at any membership meeting to transfer any and all Common Facilities, property and equipment to the municipality.”* (The Amended and Restated Bylaws of the Baca Grande Property Owners Association.) **See Exhibit 1.** Section 5.6 Amenities: *“The Association shall fund and support the basic Community amenities of road maintenance, emergency medical services and fire protection until and unless the maintenance of such services is assured by other entities, public or private.”* (The Amended and Restated Declaration of Covenants of the Baca Grande Property Owners Association.). **See Exhibit 9.**

The Colorado Constitution, Article II Bill of Rights grants the people the sole and exclusive right to govern themselves, and the right to alter their form of governance when they deem it necessary to their safety and happiness. The community members have a right under Title 31 of the Colorado State Statutes to petition to incorporate as a town.

We have satisfied all of the requirements to petition to incorporate. The court must grant us the permission to vote.

Respectfully submitted this 21st day of December, 2022.

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

CERTIFICATE OF SERVICE

I certify that on October 21, 2022 a true and accurate copy of this Response in Opposition to Motion to Dismiss was served on the other party by placing in the United States mail, postage pre-paid, and addressed to the following:

Christian Weibert
c/o Moeller Graf
385 Inverness Pkwy #200
Englewood, CO 80112

Citizens for the Proposed Town of Baca Grande



Desiree Marceau



Robert Donaldson



Lisa Cyriacks

EXHIBITS

Exhibit #8 Baca Grande POA Bylaws.

Exhibit #A Legal description of boundaries

Exhibit #5B Court Order to form Foxfield

Exhibit #C Registered Voters, Baca Grande.

Exhibit #C2 Registered Voters, Baca Grande.

Exhibit #C3 Crestone Charter School

Exhibit #5 Petition to form Foxfield

Exhibit #9 Baca Grande POA Covenants