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| **District Court, Saguache County, Colorado**<br>501 4th Street, Saguache, CO 81149 | DATE FILED: January 30, 2023 11:29 AM<br>CASE NUMBER: 2022CV5<br><br>▲ COURT USE ONLY ▲ |
| IN THE MATTER OF: **CITIZENS FOR PROPOSED TOWN OF BACA GRANDE** | Case No. **2022CV5**<br><br>Division: **C** |

**ORDER GRANTING INTERVENOR'S MOTION TO DISMISS**

THIS MATTER comes before the Court on the Motion to Dismiss filed by Intervenor Baca Grande Property Owners Association ("Association") on November 30, 2022 ("Motion"); the Petitioners' Response In Opposition To Intervenor's Motion To Dismiss filed December 21, 2022 ("Response"); and the Reply To Petitioners' Response In Opposition To Intervenor's Motion To Dismiss filed December 27, 2022 ("Reply"). Having reviewed those filings, the applicable law, and pertinent matters of record, the Court enters this order **GRANTING** the Motion for the reasons set forth below.

**JURISDICTION**

Under Section 13 of Article 14 of the Colorado Constitution, "[t]he general assembly shall provide, by general laws, for the organization and classification of cities and towns." Further, the Supreme Court has held that "in the absence of express constitutional provisions to the contrary, the power of a state legislature over the boundaries of the municipalities of the state is plenary."[1] *Rogers v. City and County of Denver*, 419 P.2d 648, 649 (Colo. 1966). The laws passed by the Colorado Legislature governing the organization and incorporation of cities and

[1] The word "plenary" is defined as "Full; complete; entire." *Black's Law Dictionary* 1398 (11th ed. 2019).

towns are found at Part 1 of Article 2 of Title 31, specifically C.R.S. §§ 31-2-101 through 31-2-109. Under C.R.S. §§ 31-2-101(1), the first step in the incorporation of a new town is the filing of a "petition for incorporation . . . with the district court of the county within which such territory, or any part thereof is situate." The district court is also charged with determining whether "the territory described in the petition and the petition itself meet the requirements of this part 1." C.R.S. §§ 31-2-102(1). Consequently, this court has explicit subject matter jurisdiction over this determination. [2]

Further, the Supreme Court has held that a petition that does not meet the requirements of the incorporation statutes (1) is defective, (2) would not confer upon the court jurisdiction to proceed further, and (3) should be dismissed. *Incorporation of North Boulder v. Sission*, 448 P.2d 308, 309 (Colo. 1969); *see also Taylor v. Pile*, 391 P.2d 670, 674 (Colo. 1964); *Malmgren v. Copper Mountain, Inc.*, 873 P.2d 44, 47 (Colo.App. 1994). Because the requirements of C.R.S. § 31-2-101 are jurisdictional, and because the legislature and not the judicial branch has been accorded plenary power over the incorporation of new towns, the Court can act only in strict accordance with the powers delegated to it by the legislature.

In *People ex rel. Dunbar v. South Platte Water Conservancy Dist.,* the Supreme Court held the following in the context of the formation of a water conservancy district.

> These cases are merely an application of the general rule that where the legislature prescribes a statutory procedure, it must be substantially adhered to, and any departure therefrom renders a resulting decree a nullity.
>
> A water conservancy district is a quasi-municipal corporation. The formation of such districts is a legislative function. For this purpose, the statute has set up certain standards and requirements and has delegated to the district court the ministerial and judicial task of determining whether these standards have been met in a given case. The court does not have and could not constitutionally have been invested with a general discretion for the formation of whatever districts the court deemed to be in the public interest. The court has jurisdiction only if the statutory requirements are met and it can act only in strict accordance with the powers delegated to it by the language of the statute. This is a statutory proceeding and the powers conferred may not be expanded by inference or construction beyond the language of the statute.
>
> The statute controlling the formation of water conservancy districts embodies a procedure much like that involved in many states in incorporating villages and cities or annexing or

[2] Further, a court always has jurisdiction to determine its jurisdiction. *Keystone, a Div. of Ralston Purina Co. v. Flynn*, 769 P.2d 484, 488 n.6 (Colo. 1989)("[E]very tribunal has jurisdiction to determine the facts on which its own jurisdiction depends and to make a jurisdictional ruling based on the facts.").

> detaching territory, or in establishing various kinds of special improvement districts, school districts, and other municipal or quasi-municipal corporations.

343 P.2d 812, 820 (Colo. 1959); *see also, e.g., Tyler v. McKenzie*, 95 P. 943, 944 (Colo. 1908) (holding in regard to statutes conferring jurisdiction, "when the jurisdiction given by statute is clearly a summary one, and the manner of obtaining such jurisdiction is prescribed by the statute, such provisions are mandatory and must be strictly followed, and the record must affirmatively show a compliance therewith."). Subsequently, in *Taylor v. Pile*, which was a case concerning the incorporation of a town, the Supreme Court cited to *Dunbar* with approval before holding:

> The statute requires that the description of lands to be included and the maps appended to the petition shall be 'accurate.' The 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 670, 674 (Colo. 1964).

Consequently, unless the petition strictly meets the statutory requirements of C.R.S. § 31-2-101, it must be dismissed as this Court would have no jurisdiction to proceed further. A petition that is almost in compliance does not suffice.

**ANALYSIS**

Looking solely at the face of the Amended Petition and the accompanying exhibits thereto, the Court agrees with four of the Association's arguments as to how the Amended Petition fails to fulfill the requirements of C.R.S. § 31-2-101.[3]

Before turning to those arguments, the Court will first address two arguments of Petitioners' that attack the authority of the Association to file the Motion in the first place. The first of these arguments is that "[t]he five volunteer board members do not have the authority to block an election by the residents by use of litigation." Response at 4. They argue that C.R.S. § 31-2-102(1) provides that an election will be held after "the district court finds and determines that the territory described in the petition and the petition itself meet the requirements of this part 1," and argue that "[b]y 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." *Id*. at 5. It is unclear whether this is a request that the Court reconsider its order granting intervention by the Association but, either way, there is no usurpation of the district court's authority. The decision still lies with the court.

[3] The Association raises other arguments, some of which would require a hearing to resolve. In light of the deficiencies that are apparent from the Amended Petition itself, the Court declines to address these arguments.

For example, as discussed more fully below, C.R.S. § 31-2-101(1)(d) provides that "[i]n no case shall there be incorporated in such city or town 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." In their original petition, Petitioners asserted that "the undivided tracts of land consisting of forty (40) or more acres lying within the proposed town boundaries have been excepted." Petition at ¶6. In their amended petition, Petitioners again asserted that "the undivided tracts of land privately held consisting of forty (40) or more acres lying within the proposed town boundaries have been excepted." Motion to Amend at 4. Now, Petitioners are essentially arguing that the owner of an undivided tract of land that is greater than 40 acres, and that lies within the proposed limits of the town, cannot notify the court that the petition is defective because the owner has not consented to the incorporation of such a tract into the proposed town. This is not usurpation of the Court's authority. It is merely provision of information that the Court needs to exercise that authority.

The Petitioners further make the general argument that the Association is violating the constitutional rights of the members of the Association by "filing a Motion to Dismiss a petition to hold an Election." Response at 4. They note that Section 5 of Article II of the Colorado Constitution provides: "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." They argue that the citizens who are members of the Association "have the right to vote **without interference in their right of suffrage**." Response at 4 (emphasis in original). Even if the Petitioners had standing in this context to complain about a claimed violation of the constitutional rights of the members of the Association, it is not the Association who passed the laws regarding the incorporation of towns; it is the legislature. And C.R.S. § 31-2-102(1) provides that an election will be held only after, as noted above, "the district court finds and determines that the territory described in the petition and the petition itself meet the requirements of this part 1." Petitioners have presented no argument that the Colorado legislature does not have the constitutional right to pass laws setting the requirements to incorporate towns within the state. *See* Colo. Const. Art. 14, § 13 ("The general assembly shall provide, by general laws, for the organization and classification of cities and towns.); *People v. Fleming*, 16 P. 298, 300-301 (Colo. 1887) (holding that Colorado statutes respecting organization and incorporation of cities and towns were not unconstitutional); *Rogers v. City and County of Denver*, 419 P.2d 648, 649 (Colo. 1966) ("[I]n

the absence of express constitutional provisions to the contrary, the power of a state legislature over the boundaries of the municipalities of the state is plenary.").

I. Incorporation of Undivided Tracts Without Consent

In its first point, the Association argues that the Amended Petition violates the requirement of C.R.S. § 31-2-101(1)(d) that "[i]n no case shall there be incorporated in such city or town 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." The Association argues that "there are at least three undivided tracts owned by the Association consisting of more than forty acres lying within the proposed limits of the town," and that the Association has not consented to such an incorporation. Motion at 9.

In their Response, the Petitioners admit they have not received approval of the Association but note that the bylaws of the Association provide that: "'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.'" Response at 6 (quoting Exhibit 10 to Motion). Petitioners argue that because of this provision, the board of the Association "does not have the authority to determine exclusion or inclusion of the three 40-plus acre undivided tracts of land in the municipal boundary." *Id*. at 6. They assert that "[t]he vote in favor of Incorporation of the Town of Baca Grande would be the consent of the property owners." *Id*. They therefore have admitted that they have not, at this point, obtained any consent of the property owners.

The Petitioners also direct the Court's attention to C.R.S. § 38-33.3-312(1) of the Colorado Common Interest Ownership Act, that reads:

> (1) In a condominium or planned community, portions of the common elements may be conveyed . . . 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, or any larger percentage the declaration specifies, agree to that action; except that all owners of units to which any limited common element is allocated must agree in order to convey that limited common element . . . . The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential uses. Proceeds of the sale are an asset of the association.

Here, neither the statute nor the bylaw referenced by the Petitioners are applicable. The quoted bylaw concerns a vote by members of the Association to transfer ownership of "Common Facilities" to a municipality *after* it has been formed. Here, no municipality has been formed and

C.R.S. § 31-2-101(1)(d) concerns obtaining consent of owners of undivided tracts of land within the *proposed* town *prior to* incorporation. Further, C.R.S. § 38-33.3-312(1) concerns voting for (or against) conveyance of the common elements of a planned community. It does not concern voting on whether to agree that the common elements owned by an association may be incorporated into the proposed boundaries of new town prior to the filing of a petition.

In the end, Petitioners have not shown that the Association, as owner of the undivided tracts of land in question, has given its consent in *any* form. Consequently, since the Petitioners admit they have not obtained that consent, the Amended Petition violates C.R.S. § 31-2-101(1)(d), and is, therefore, defective.

II. Accurate Description of Boundaries

The Association also argues that the Amended Petition does not accurately describe the boundaries of the proposed town. Under C.R.S. § 31-2-101(1)(a), a petition for incorporation must: "[d]escribe the territory proposed to be embraced in such city or town, which description shall determine the boundaries thereof." Further, under C.R.S. § 31-2-101(1)(b), the petition must "[h]ave attached thereto an accurate map or plat thereof on a scale no less than one inch to one thousand feet."

The Association argues that "the Amended Petition does not provide an accurate map." Motion at 10. The assertion is that the map is inaccurate because it only shows the outer boundaries of the and does not show the parcels that are excluded. Exhibit A to the amended petition contains legal descriptions for "Parcel 1" and "Parcel 2." It then contains a section entitled "Exceptions" following the legal description for Parcel 2 that lists 12 "parcel number[s]." The map of the proposed town—located at Exhibit B—shows four areas outlined in thick black lines. Those areas are labeled "The Grants," "Chalet One," "Chalet Two," Chalet Three." There is also a box marked "Casita Park Insert." The words "Baca Grande" are not to be found on the map. There is also no indication on the map of a "Parcel 1" or "Parcel 2," or way to tell which portions of the map depict the legal descriptions contained in Exhibit A. Further, there is no depiction of the location of the excepted parcels.

In their response, the petitioners argue state that "[t]he legal description serves as the written description of the boundaries of the town. The map is the visual representation of the town boundaries. . . . The map indicates the approximate location of the excluded parcels." Response at 6. But the map with the "approximate location of the excluded parcels" that has

been submitted by petitioners is simply a google map that has a scale of much less than one inch to 1000 feet, and the excepted parcels are depicted by symbols that are all overlapping and each bigger than the depictions of any of the towns on the map, making it impossible to know exactly where the parcels are located.

In *Taylor v. Pile*, the Supreme Court considered a petition with an attached map that had admittedly been changed after the petition "was fully prepared and signatures affixed thereto." 391 P.2d 670, 674 (Colo. 1964). The Supreme Court held:

> The petition as presented to the court was not sufficiently clear to accurately advise substantial numbers of voters as to whether they were to be included or excluded from the proposed village. The map attached to the petition was not an "accurate" map of the area and the description of the area contained in the petition could not be reconciled with the map.

*Id*. Here, the amended petition and the exhibits to the amended petition are also "not sufficiently clear to accurately advise substantial numbers of voters as to whether they were to be included or excluded from the proposed village." Consequently, this is another deficiency.

III. Map Scale

The Association also argues that the Amended Petition is fatally defective because the map attached to the petition is not a map "on a scale no less than one inch to one thousand feet" as required by C.R.S. § 31-2-101(1)(b). Motion at 11. In their response, Petitioners assert that scale of the map that they have attached is 1 inch to .2 miles, which is equivalent to 1 inch to 1056 feet. Response at 9. They argue that, therefore, the Association's "math is incorrect" and the map is in compliance with the statute because it is "slightly larger than the minimum" required by the statute. *Id*.

The parties both agree that the scale of the map is 1 inch to 1056 feet. But the question is whether the scale of 1 inch to 1056 feet is *less* or *more* than the scale of 1 inch to 1000 feet? The answer is "less." This is because both scales need to be converted to 1000 feet. When that conversion is made, the scale of Petitioners' map is .947 inch to 1000 feet, which is less than the required scale of at least 1 inch to 1000 feet. Although the difference may seem slight, strict compliance is required, and the Petition violates this portion of C.R.S. § 31-2-101(1)(b).

IV. Satisfactory Proofs of Inhabitants

The Association further argues that the Amended Petition is defective because it is not accompanied by satisfactory proofs of the number of inhabitants of the proposed town. Under § 31-2-102(1)(d), in pertinent part:

> The petition . . . shall:
>
> . . . .
>
> (d) Be 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.

(emphasis added). The Association points out that the proofs contain no federal census data. Petitioners assert no census data was included because:

> 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.

Response at 11. In its Reply, the Association states that it

> Acknowledges that the petitioners likely will have some difficulty obtaining and presenting census data for such a rural area, but such an undertaking is required by law and necessary before an incorporation election may take place.

Reply at 5.

The Court agrees that the statute makes inclusion of federal census data a requirement. Under the statute, the required proofs of the number of inhabitants "*shall* be based upon the last preceding federal census." § 31-2-102(1)(d) (emphasis added). "It is axiomatic that the term 'shall' is usually interpreted to make the provision in which it is contained mandatory." *Estate of Guido v. Exempla, Inc.*, 292 P.3d 996, 1003 (Colo.App. 2012); *see also Hillebrand Constr. Co. v. Worf*, 780 P.2d 24, 25 (Colo. App. 1989) (the term "shall" connotes a mandatory requirement). Subsequently, that federal census data is "adjusted according to the records of the county planning office or other county records." But the federal data must be the starting point.

**ORDER**

**IT IS THEREFORE ORDERED THAT,** in light of the Petition's deficiencies discussed above, the Motion to Dismiss filed by the Intervenor Baca Grande Property Owners Association is **GRANTED** and the Amended Petition to Incorporate is **DISMISSED**.

Dated this 30th day of January 2023

**BY THE COURT:**

**Crista L. Newmyer-Olsen**
**District Court Judge**