

District Court, Saguache County, Colorado
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Saguache, CO 81149

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Plaintiffs: GAIL HOLBROOK and EDGAR CARPENTER,

v.

Defendants: JOAN L. SELVAGE, ROBERT L. SELVAGE, RICHARD T. WILLIAMS, BETH A. POOL, and the TOWN OF BONANZA, a Colorado municipality.

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Case Number: 06CV27

Div.: Ctrm:

DEFENDANTS' TRIAL BRIEF

Defendants, the Town of Bonanza, Joan L. Selvage, Robert L. Selvage, Richard T. Williams, and Beth A. Pool, by and through their attorney of record hereby submit the following Trial brief:

I. PRELIMINARY STATEMENT

The Town of Bonanza is a small mountain town located in Saguache County Colorado. In March 2006, the Saguache County Clerk and Recorder produced a voter registration list which, when corrected, certified that there were approximately 28 voters eligible to participate in the April 4, 2006 municipal election for Mayor and Town trustees. The names of all the parties to this action were contained on the certified list. There are no businesses (except a few "home" businesses) or employment opportunities located within or near the Town.

The April 2006 municipal election in Bonanza was conducted by mail ballot, as have been the majority of elections in the Town. Approval of conducting the election by mail ballot was provided by the Colorado Secretary of State's Office, as required by Statute. On the April 4, 2006 ballot, Defendant Joan Selvage ran unopposed for the office of Mayor. Defendants Robert Selvage, Richard Williams and Beth Pool, as well as

COUNTY/DISTRICT COURT
County of Saguache, Colorado
Certified to be a full, true and correct
copy of the original in my custody
Date: October 16, 2006
By: Brandie Taylor
BRANDIE TAYLOR
Clerk of the County/District Court
SEAL
COMMISSIONER OF COURTS SAGUACHE COUNTY
DISTRICT COURT

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EXHIBIT
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Kaaren Kaylon, Mary Osmond, Mark Perkovich and the Plaintiffs and appeared on the ballot as either listed or "write -in" candidates, for the positions of Town Trustees.

Robert L. Selvage, Richard Williams, Beth Pool and Kaaren Kaylon, were certified by the election judges as receiving the largest number of votes and were certified as Trustees of the Town of Bonanza. Joan Selvage was certified as the Mayor of the Town.

The Plaintiffs, in June 2006, filed the Amended Complaint that is the subject of this action.

II. STATEMENT OF THE CASE

Plaintiffs contend that the individual defendants are ineligible to hold office in the Town of Bonanza because they did not reside in the Town for twelve consecutive months immediately prior to the April 2006 election. The individual defendants contend that they are residents of the Town of Bonanza and eligible to hold elected office and that the Plaintiffs were untimely in filing their Complaint in this matter.

Plaintiffs further contend that the Town of Bonanza violated their civil rights by the manner in which the election was held. Defendant Bonanza contends that the elections was properly conducted in accordance with the laws of the State of Colorado and ordinances of the Town of Bonanza and that the Plaintiffs participated fully in the election and did not timely challenge the placement of the individual defendants on the April 4, 2006 ballot.

III. QUESTIONS PRESENTED

- 1. Did Defendants Joan Selvage, Robert Selvage, Richard Williams and Beth Pool meet the residency requirements of the Municipal election Code and the ordinances of the Town of Bonanza, and as such qualified to be elected to the Town Council.**
- 2. Did Defendant Town of Bonanza violated the civil rights of the Plaintiffs by permitting the individual defendants to participate in the municipal election.**
- 3. Are the Plaintiffs eligible to be appointed to the offices they seek if the Court determines that the defendants were not eligible to be elected to the Town council.**

IV. AGRUEMENTS

1. Defendants Joan Selvage, Robert Selvage, Richard Williams and Beth Pool meet the qualifications of residents of the Town of Bonanza, "resided" in the Town for twelve consecutive months prior to the April 6, 2006 election, and are eligible to hold the offices to which they were elected in April 2006.

The Plaintiffs and Defendants agree that the municipal election of April 2006 is governed by §31-4-301, C.R.S.. This section provides that the "authority of towns shall be vested in a board of trustees, consisting of one mayor and six trustees, "who shall have resided within the limits of the town for a period of at least twelve consecutive months immediately preceding the date of the election." The Term "resided" does not appear to be defined in either the Colorado Municipal Election Code nor the Statues governing State elections. However, the term "residence" is defined at §31-10-102(8.5) as "Residence" means the principal or primary home or place of abode of a person as set forth in section 31-10-201(3), which states at (3)(a), "The residence of a person is the principal or primary home or place of abode of a person. Principal or primary home or place of abode is that home or place in which his habitation is fixed and to which a person, whenever he is absent, has the present intention of returning after a departure or absence therefrom, regardless of the duration. (Emphasis added). §31-10-201(3)(b) further states that "a person shall not be considered to have lost his residence if he leaves his home and goes into another state or territory or another county or municipality of this state merely for temporary purposes with an intention of returning." The municipal election code does not define the word "temporary" nor does it place a limitation on the time that a voter may be absent from his or her residence.

The four individual defendants contend that their primary residences are located in the Town of Bonanza and that it is their intention that the property they own in Bonanza is considered to be their primary home to which each intends to return. The Plaintiffs have contended that since the defendants own other property located outside Bonanza and are absent from the Town for extended periods, they are not residents of the town. In *Zivian v. Brooke-Hitching*, 28 P.3d 970 (Colo.App. 2001), the Colorado Court of Appeals refused to overturn a District court's finding that the voter had not abandoned her principal or primary home in Colorado despite the fact that she had been continuously absent from the state for one year and that she had voted in New York and registered her vehicle in that State. The Court of Appeals recognized, as held in *Gordon v. Blackburn*, 618 P.2d 668 (Colo. 1980), "All circumstances must be considered before reaching a decision regarding a person's intention to establish a new principal or primary home. The intent of an individual is an important element that cannot be ignored."

The intent of the individual defendants to consider Bonanza to be their primary residence is further bolstered by the fact that three of them, Joan Selvage, Robert Selvage and Richard Williams had previously been elected to and served as Town Trustees. Defendant Richard Williams has served as either mayor or Trustee for eight years. Defendant Joan Selvage has served as either Mayor or Trustee for a period of seven years. Defendant Robert Selvage has served as Trustee for four years, and Beth Pool had served as Town Clerk for a one year period prior to her election to the Town Council.

The Plaintiffs apparently have requested that the 12th Judicial District Attorney's Office investigate their complaints regarding the status of registered voters in the Town in both 1996 and 1997, and again in 2006, and it is reported that the District Attorney did not find any illegality with the voter registration roles.

The individual defendants contend that they are residents of the Town of Bonanza based on several factors. Each of the individual defendants own property within the corporate limits of the Town of Bonanza and have owned that property for at least twelve consecutive months prior to the April 2006 election.

Each individual defendant is listed on the voting roles of Saguache County as a registered voter in the Town of Bonanza. Joan Selvage has been registered to vote in the Town of Bonanza since March 8, 1999; Robert Selvage has been registered to vote in the Town of Bonanza since June 28, 1999. Richard Williams has been registered to vote in the Town of Bonanza since November 3, 1997; and, Beth Pool has been registered to vote in the Town of Bonanza since March 4, 2004. The individual defendants have not voted at any other location since their registration to vote in the Town of Bonanza.

Each individual defendant has stated that they consider Bonanza to be their residence. Their absence from the Town is primarily for purposes related to employment and earning a living, which cannot be done with the limited opportunities available in the Town of Bonanza. The Defendants have admitted that they have significant ties with a community other than Bonanza, however, as stated in Zivian v. Brooke-Hitching, *supra* "all circumstances must be considered before reaching a decision regarding a person's intention to establish a new or primary home. The individual defendants contend that their absence from the Town of Bonanza is for legitimate and necessary purposes that do not affect their intent that Bonanza is their primary residence.

II. The Town of Bonanza did not violate any right of the Plaintiffs by the manner in which the April 2006 election was conducted.

The Town of Bonanza, through the Town Clerk and Mayor, acted properly and legally in conducting the April 2006 mail ballot election. The Plaintiffs contend that their due process rights were violated by permitting the individual defendants to appear on the ballot when they did not meet the residency requirements. The Town contends that it received a certified copy of the voter registration roll before the ballot was developed and that it could reasonably rely on the official records in determining that the individual defendants were eligible to stand for election for the offices that they currently hold. The Town was not placed on notice prior to the election that any action it was taking was illegal or violated the Plaintiffs' constitutional rights. The conductance of the election was reviewed and authorized by the Colorado Secretary of State's office.

The Plaintiffs were listed as candidates for the position of Town Trustee on the April 4, 2006 ballot and were permitted to fully participate in the election process, and in accordance with the election certification sheet did receive some votes in the election. They were not deprived of any due process rights in the April 4, 2006 election.

The Town contends that the individual defendants were permitted to submit an "Official Affidavit of Intent for Write in Candidate" as was outlined in the election procedure provided by the Town Clerk on February 4, 2006. There was no objection to or questioning of those procedures by the Plaintiffs, who now complain of those very same procedures. Additionally, the fact that "write-in" candidates would be listed on the official ballot was provided to the Plaintiffs in the letter from the Town clerk dated February 4, 2006.

The Plaintiffs did file a Certificate of Challenged Voter on April 4, 2006, challenging the placement of the individual defendants on the April 4, 2006 ballot. However, §31-10-305, C.R.S. provides that any objection to a nomination petition and affidavits that the clerk has determined to be in conformity with §31-10-302, must be filed within three (3) days of the filing of the petition or affidavit. The Plaintiffs were present at the March 4, 2006 Board meeting at which the names of the candidates were announced and the draw for the order of their placement on the ballot conducted. The Plaintiffs failed to file an objection within the statutory time requirement and instead waited to the day of the vote to file a challenge. The Plaintiffs cannot now complain that their civil rights were violated when they failed to follow proper procedure to prevent any alleged violation from occurring.

Defendant Bonanza contends that in the event the Court finds that it violated the Plaintiffs' civil rights, such violation was inadvertent and unintentional, as the election was conducted in good faith, and therefore the Plaintiffs are not entitled to an award of attorney fees.

III. The Plaintiffs are not eligible to be placed in the offices which they are requesting under the QUO WARRANTO claim.

The Town of Bonanza contends that in the event the Court determines that the individual defendants were not eligible voters and entitled to hold office in the Town of Bonanza, the plaintiffs are not eligible due to the fact that their nomination petitions were signed by registered voters who would be disqualified under the same circumstances that the individual defendants would be, and that the only remedied available to the Court would be to order a new certification of registered voters and a new election. The sufficiency of the nominating petition was not previously challenged due to the fact that the Town Clerk, and individual defendants, believed, at the time it was submitted, that the individuals signing the petitions were eligible voters. In the event that the individual defendants are determined not to be eligible voters, the Town contends that this would in fact disqualify the majority of individuals who were certifies as eligible voters and result in a situation where there would not be a sufficient number of registered voters to meet the petition requirements set forth in §31-10-302, C.R.S., and therefore the Town of Bonanza would be placed in a situation of not being able to elect a governing body at the next election.

CONCLUSION:

The individual defendants intend that the Town of Bonanza is their primary home and this is a factor which must be given great weight by the Court. The individual defendants qualify as "residents" of the Town under current Colorado case and statutory law and are qualified to hold the offices to which they were elected on April 4, 2006.

The Town of Bonanza acted properly in conducting the April 4, 2006 election did not violate either the due process or equal protection rights of the Plaintiffs.

The Plaintiffs are not entitled to relief in the form of Quo Warranto since the individual defendants were properly elected to the Town offices and in the event that they were not eligible to be elected, at least some of the nominating signatures on the Plaintiffs' petitions would be invalid under the same reasoning disqualifying the individual defendants.

RESPECTFULLY SUBMITTED this 7th day of December, 2006.

GIBBONS & ASSOCIATES, P.C.

/s/ Benjamin F. Gibbons

By: Benjamin F. Gibbons
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2006, this office served a true and correct copy of this Trial Brief, via Lexisnexis File and Serve to the following individual:

Matthew K. Hobbs, Esq.