

Cause No. GN 402045

SAVE OUR SPRINGS ALLIANCE,	§	IN THE DISTRICT COURT
INC.	§	
Plaintiff,	§	
	§	
V.	§	
	§	
LAZY NINE MUNICIPAL UTILITY	§	OF TRAVIS COUNTY, TEXAS
DISTRICT, by and through its Board	§	
of Directors, and C.A. ELDER,	§	
VINCENT	§	
HUEBINGER, BILL SIMPSON, and	§	
CORD SHIFLET IN THEIR	§	
OFFICIAL	§	
CAPACITIES AS LAZY NINE	§	250 th JUDICIAL DISTRICT
MUD BOARD OF DIRECTORS	§	
Defendants,	§	

SECOND AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THE COURT:

COMES NOW Save Our Springs Alliance, Inc. (“SOS Alliance”), Plaintiff herein, complaining of the Lazy 9 Municipal Utility District, and for cause of action sets forth its Second Amended Original Petition below:

DISCOVERY LEVEL

1. SOS Alliance intends that discovery be conducted under Level 2 and affirmatively pleads that it seeks injunctive relief.

JURISDICTION

2. Jurisdiction is proper in this Court pursuant to Texas Constitution article V, section 8, Texas Civil Practice and Remedies Code section 65.021 and Texas Government Code section 24.007. Venue is proper in this Court pursuant to Texas Civil Practice and Remedies Code section 65.023(a).

JURY REQUEST

3. Plaintiff requests a jury trial pursuant to Texas Rule of Civil Procedure 216 and, with its first amended pleading, paid its jury fee. By order and agreement of the parties, a jury trial is currently set for November 15, 2004.

PARTIES

4. Plaintiff SOS Alliance is a non-profit, public interest corporation formed for the purpose of protecting the Edwards Aquifer, Barton Springs and the Texas Hill Country. In this role, SOS Alliance conducts research, public education, and conservation advocacy, serving as a watchdog over local governments, working to secure full compliance with local, state and federal environmental protection laws, opposing the use of public tax monies to subsidize development of our vulnerable Hill Country watersheds, supporting efforts to steer new urban and suburban development to the east and downstream of these water supply watersheds, encouraging and engaging in enjoyment, study, and conservation of the land, air, water, and wildlife of the Texas Hill Country.
5. SOS Alliance represents more than 3000 members who live primarily in Travis County. The members of SOS Alliance appreciate and enjoy Barton Springs, which is fed and sustained by the Barton Springs segment of the Edwards Aquifer. SOS Alliance members enjoy and appreciate the Texas Hill Country and frequently take drives on Highway 71 to enjoy the views of ashe juniper and oak woodlands and the wildlife that live there. SOS members also

enjoy swimming in Lake Travis, which is located downstream from the Lazy 9 MUD.

6. One or more SOS Alliance members live downstream of the Lazy 9 MUD on Bee Creek. One or more SOS Alliance members own land downstream from the Lazy 9 MUD on Bee Creek. One or more SOS Alliance members is an adjacent landowner to the Lazy 9 MUD. One or more SOS Alliance members has observed and enjoyed the presence of the endangered Golden-cheeked warbler and other birds near and along the property boundary between SOS Alliance member property and property owned by the developers of Lazy 9 MUD land. One or more SOS Alliance members also presently enjoy from their property an unbroken view of scenic Hill Country forests and scrub on land within the Lazy 9 MUD. SOS Alliance brings this action on its own and on behalf of its members adversely affected by the pollution and increased threat of pollution of Bee Creek, Lake Travis, and Little Barton Creek, that would result from the operations of and development to be served by the Lazy 9 MUD. SOS Alliance brings this action on its own and on behalf of its members adversely affected by disruption of scenic vistas and wildlife habitats that would result from the operations being planned by and development to be served by the Lazy 9 MUD. SOS members will also suffer injury to their conservation and public health and safety interests caused by destruction of scenic Hill Country woodlands (including habitat for the endangered native songbird, the Golden-cheeked warbler) and by increased traffic, light and noise that will result from the Lazy 9 MUD development

activities. Further, the Lazy 9 MUD is currently planning the construction of a water line, intake facilities, and water treatment plant on lands outside the MUD district boundaries, from Highway 71 West down to and into Lake Travis. The MUD has been empowered to exercise eminent domain and undertake other actions to secure land for and build these facilities. These plans also directly threaten the property, conservation, recreation, and public safety interests of SOS Alliance members. SOS Alliance brings this action on its own behalf and on behalf of its members that will be injured by the environmental impacts resulting from development that is not financially feasible and would not be undertaken without the creation of the Lazy 9 MUD.

7. Defendant Lazy 9 MUD (herein “MUD” or “District”) is a legislatively created entity authorized by HB 3565, 78th Regular Session of the Texas Legislature. The Lazy 9 MUD may sue and be sued in the courts of this state in the name of the District by and through its Board of Directors, as listed below. The MUD and the members of its temporary Board of Directors have been served in this suit and have filed an answer.
8. Defendant C.A. Elder is sued in his official capacity as a temporary member of the Board of Directors of the Lazy 9 MUD.
9. Defendant Vincent Huebinger is sued in his official capacity as a member of the temporary Board of Directors of the Lazy 9 MUD.
10. Defendant Bill Simpson is sued in his official capacity as a member of the temporary Board of Directors of the Lazy 9 MUD.

11. Defendant Cord Shiflet is sued in his official capacity as a member of the temporary Board of Directors of the Lazy 9 MUD.
12. Pursuant to Civil Practices and Remedies Code Section 37.006, Plaintiff will give notice by service of process on the Texas Attorney General, the Honorable Greg Abbott, at 300 West 15th Street, Austin, Texas 78701.

FACTS COMMON TO ALL CLAIMS

13. On April 4, 2003 HB 3565 (herein “the bill”) was introduced to the 78th Regular Session of Texas Legislature as “AN ACT relating to the creation, administration, powers, duties, operation and financing of the Lazy Nine Municipal Utility District.”
14. The District’s original jurisdiction is a 1, 719 acre tract on Highway 71 West in Travis County. The Lazy 9 MUD is intended to aid in the development of a subdivision to be constructed by a group of private developers and to be known as Davenport or, more recently, Sweetwater Ranch.
15. Prior to introduction of the bill, on or about March 3, 2003 public notice of the bill was published in the Austin American-Statesman. This notice, however, was not sufficient to give the public notice as required by the Texas constitution and state law.
16. On or about March 18, 2003—approximately two weeks after the public notice was published—the private developer sponsors of the bill gave Travis County and the Texas Governor notice of the introduction in the Legislature of the bill creating the District. This notice, however, failed to meet constitutional standards in that it was not provided at the same time the

newspaper notice was published and was not provided at least thirty days before the bill creating the District was introduced in the Legislature.

17. The bill authorizes the MUD to be governed by a Board of Directors. The bill names five temporary members of the board of directors. The temporary board of directors will serve until there is an election confirming the District's existence and an initial directors election. HB 3565 purports to give the Board of Directors broad power and authority to maintain the district, including but not limited to: rights and powers of eminent domain within five miles of its boundaries to acquire property for sewer, water, storm drainage, and flood drainage; the power to levy *ad valorem* taxes for debt service and operation and maintenance taxes on voter approval; the ability to annex land; the ability to divide the territory of the district, including any annexed territory, into two or more new districts provided that any new district created by division of the district must be at least 100 acres. Further, the bill incorporates and provides to the District those conservation and reclamation district powers set out in Texas Water Code Chapters 30, 49, 50 and 54.
18. On June 20, 2003 the bill was signed by the Governor of Texas and passed into law.

FIRST CAUSE OF ACTION
INSUFFICIENT PUBLIC NOTICE

19. The published notice of intention to introduce HB 3565 was insufficient to give the general purpose and substance of the intended law as required by chapter 313.002 of the Texas Government Code.

20. Notice of intention to introduce HB 3565 was insufficient to provide the general substance of the law as required by article XVI, section 59 (d) of the Texas Constitution.
21. The notice was insufficient under the Texas statutes and constitution because, among other reasons, it failed to give a location of the proposed District other than Travis County and the name “Lazy Nine” did not suggest a location; the notice did not give a size or boundary description or identify the development purposes of the district; the notice referred only to a single district and made no mention that the District would be empowered to expand and/or divide into multiple districts; the notice did not identify the temporary Board of Directors; the notice failed to state that the District would have powers of eminent domain outside its boundaries as well as the power to annex; the notice failed to state that the District would have powers granted well beyond the provision of municipal utilities as those terms are generally understood and would include all such powers of conservation and reclamation districts and of road districts; and the notice failed to state that the District would be granted powers beyond the constitutional powers of conservation and reclamation districts.
22. Because the public notice failed to meet the specific standards set out in the Texas Constitution, Art. 16, Section 59, the bill is unconstitutional.

SECOND CAUSE OF ACTION
INSUFFICIENT NOTICE TO TRAVIS COUNTY

AND THE TEXAS GOVERNOR

23. The records of the District make clear that the notice to Travis County and the Governor of Texas of the intent to introduce the bill creating the District violated Article 16, section 59(e) of the Texas constitution in that such notice was neither made at the time notice was given by newspaper publication nor was such notice given at least thirty days before the bill was introduced into the Texas Legislature.
24. While Section 20 of HB 3565 declares that all required procedures for introducing and passing the bill pursuant to the Texas Constitution were followed, such Legislative declaration is directly contradicted by indisputable facts and evidence, is wholly without merit or rational basis, and is contrary to public policy and the Texas Constitution.
25. The bill creating the District is thus unconstitutional in that the notice provisions required by Article 16, Section 59 were clearly and unequivocally violated.

THIRD CAUSE OF ACTION
UNLAWFUL DELEGATION OF LEGISLATIVE POWERS

26. On information and belief, at the time HB 3565 was passed, the entire District encompassed land under contract by one private, for profit development entity and control of, and service of, the Lazy 9 MUD is for the benefit of this private development.
27. The purported Lazy Nine MUD boundaries do not follow any watershed or other lines relevant to conservation and reclamation of the state's natural resources. To the contrary they encompass land which was under the sole

control of a group of developers led by William Gunn, Brad Whittington and Ed Horne (hereinafter “MUD developer”). The boundaries follow the MUD developer’s property boundaries, circumscribed on one side to avoid the extra-territorial jurisdiction of nearby municipalities. The bill creating the District and defining its boundaries was drafted by attorneys hired by the MUD developer.

28. The MUD developer chose the boundaries, the powers to be included, and the persons to be named as the five members of the “temporary Board of Directors” of the District. All five such members were friends and/or business relations of the MUD developers. At least three of the five temporary directors have direct and substantial pecuniary business interests with the MUD developers, some of which involve development within the District.
29. The MUD developer chose the attorneys for the District. The MUD’s General Counsel served at the behest of the MUD developer on MUD business and on MUD development business both before and after the initial meeting of the MUD’s temporary board of directors. The MUD’s attorney, who provides the temporary Directors with instructions and information on which they base their voting, has engaged in a pattern of behavior which makes clear that the MUD is under the control of, and serves the interests of the MUD developer. Under such control the MUD Board of Directors does not distinguish or consider any independent or separate public interests.
30. The MUD developer chose the MUD’s engineer. The MUD’s engineer worked for and at the behest of the MUD developer both before and after the

initial meeting of the temporary MUD Board of Directors. The MUD engineer's practices have similarly shown that the MUD is under the control of, and serves the interests of the MUD developer and without distinguishing or considering any independent or separate public interest.

31. The MUD temporary Board of Directors has taken substantial actions to commit future MUD tax and utility revenues to reimburse MUD developer expenditures for large-scale utility investments. These expenditures and reimbursements will be under taken over a period of years pursuant to contracts approved by the temporary Board of Directors. These contracts were negotiated by the MUD's attorney, who represented both parties to the contract (the MUD and the MUD developer) in such negotiations. The MUD attorney failed to disclose such dual representation to the MUD Board. The reimbursement contracts were rubber stamped by the MUD Board without a dissenting vote and with only a few minutes of introduction and discussion of the contracts during the meeting.

32. The MUD developer directed the conveyance of interests in real property located within the District from the previous owners of the property to the members of the temporary MUD Board for the sole purpose that such members could qualify for the initial Directors election and remain on the Board after the District is confirmed. However, such transactions were sham transactions in that they conveyed no viable lot for a home, the MUD Board members did not actually pay for such interest and had no knowledge of the actual value, location, or usefulness of the property. None of the temporary

Board members have any intention of living within the District and becoming a qualified voter within the District. The temporary Board members have never visited any property within the MUD, including that which they purport to own, and have only “driven by” the District on Highway 71. The only exception is when a temporary Board member who was also the MUD developer’s subdivision planner visited the property on development business.

33. All of the MUD Board meetings are held in the offices of the MUD developer.

34. The temporary Board of Directors has acted ultra vires in appointing new members to its own body when legislatively appointed members have resigned, rather than holding a confirmation election and allowing the voters of the District to vote.

35. Although the MUD temporary Board has been meeting for a year and undertaking substantial business that will have direct effects on future residents of the District as well as Travis County residents outside the District, the MUD Board members demonstrate little knowledge of their role and duties as MUD Board members, have shown a general disregard for actual and potential conflicts of interest between their public duties as Board members and their private business interests, and have failed to adopt a code of ethics as required by the Texas Water Code. The MUD temporary Board serves simply as a rubber stamp for decisions made by the MUD developer for the developer’s private business interests.

36. The District is not a real District, “essential to the accomplishment of the purposes” of article 16, section 59 of the Texas Constitution in that it encompasses only one development project and has no voters.
37. The delegation of legislative powers is unconstitutional because, as the facts alleged above and others reveal, the delegation is to a private, for profit entity with interests different from and adverse to the public interest; to persons and/or an entity with substantial pecuniary interests that conflict with the public interest; with powers that are extremely broad and of potentially perpetual duration, such powers exceeding those powers authorized by Article 16, Section 59 Texas Constitution and including, for example, to enforce property restrictions unrelated to conservation of natural resources, to hire peace officers and enforce penal laws unrelated to conservation of natural resources; to adopt rules and levee fines; to make long term financial commitments that have the effect of dictating the imposition and collection of taxes and utility rates without any representation by or accounting to the voters and residents of the District who will be forced to pay the taxes and utility rates. These facts demonstrate that the MUD and the MUD developer are a single business enterprise.
38. Section 12 of HB 3565, purporting to grant the Lazy 9 MUD authority to annex land is an unlawful delegation of legislative powers to private landowners because it gives them legislative duties and powers the exercise of which may adversely affect public interests.

39. Section 13 of HB 3565, providing that either before or after annexing land the board may divide the territory of the district, including any annexed territory into two or more districts, is an unlawful delegation of legislative powers. This provision is an unlawful delegation of legislative powers because it gives the Board of Directors legislative duties and powers the exercise of which may adversely affect public interests.
40. The delegation of powers of annexation, subdividing and replication, and eminent domain lack adequate standards to guard against the arbitrary exercise of such powers and to guide the exercise of such powers in the public interest. The delegation of these powers makes the bill facially unconstitutional. Alternatively, such grants of power are unconstitutional as applied.
41. Alternatively, HB 3565 in its entirety, and including but not limited to, its granting the district all of the rights, powers, privileges, authority, functions, and duties provided by the general laws of this state, including Chapters 30, 49, 50, and 54 of the Water Code applicable to municipal utility districts created under section 59, Article XVI of the Texas Constitution, as well as its grant of powers to subdivide, replicate, annex and deannex, and exercise eminent domain powers outside its boundaries are unlawful delegations of legislative powers and thus HB 3565 is unconstitutional on its face. Alternatively, Plaintiff claims that HB 3565, as applied, constitutes an unconstitutional delegation of legislative powers to a public entity and/or to a private entity and in excess of those powers granted to conservation and

reclamation districts under Art. 16, Section 59 of the Texas Constitution. These delegations give the Board of Directors, operating on behalf of private developer interests, legislative duties and powers, the exercise of which adversely affects public interests and which are unconstitutional delegations of public police powers to private interests.

FOURTH CAUSE OF ACTION
INJUNCTIVE RELIEF

42. Plaintiff SOS Alliance seeks injunctive relief pursuant to the rules of equity and Tex. Civ. Prac. & Remedies Code section 65.011 barring the Lazy 9 MUD Board of Directors from taking any actions to further the creation, administration, powers, duties, operation, and financing of the MUD. To allow the Board of Directors to continue to operate under authorization that was insufficiently noticed and unlawful would threaten significant and irreparable harm to Plaintiff.

FIFTH CAUSE OF ACTION
DECLARATORY RELIEF

43. Plaintiff's rights, status, and other legal relations are affected by the Lazy 9 MUD. Plaintiff seeks declaratory relief pursuant to chapter 37 of the Texas Civil Practice and Remedies Code and specifically asks the Court to rule that due to insufficient public notice the Lazy 9 MUD is void *ab initio*.

44. Plaintiffs seek declaration that HB 3565 authorizing creation of the Lazy 9 MUD is unconstitutional and void because it provides an unlawful delegation of legislative duties to private entities. Alternatively, Plaintiff seeks a

declaration that those portions of HB 3565 that grant Lazy MUD the power to annex land, to exercise eminent domain powers outside its boundaries, and/or to divide itself into multiple districts be stricken from the bill as unconstitutional delegations of legislative power.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff Save Our Springs Alliance requests that Defendants be cited to appear and answer in this cause, and that upon final trial of its claims, Plaintiff have judgment for declaratory and injunctive relief as specified above and all other relief to which Plaintiff may show itself entitled.

Respectfully Submitted,

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Certificate of Service

I, the undersigned, hereby certify that a true and correct copy of the foregoing Second Amended Original Petition was delivered by hand delivery on this 1st day of October, 2004, to counsel of record listed below.

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[VIA HAND DELIVERY]

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