

## CITATION – Personal Service: TRC 99

THE STATE OF TEXAS

COUNTY OF MCCULLOCH

CAUSE NO. 2012072

TO: THE CITY OF BRADY, 201 EAST MAIN, BRADY, TX 76825 (or wherever he/she may be found)

Notice to defendant: You have been sued. You may employ an attorney. If you, or your attorney, do not file a written answer with the clerk who issued this citation by 10:00 A.M. on the first Monday following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you.

Court:	198TH DISTRICT COURT BRADY, TX 76825
Cause No.:	2012072
Date of Filing:	25th day of June, 2012
Document:	AMENDED AND SUPPLEMENTAL PETITION AND PETITION FOR WRIT OF CERTIORARI
Style of Suit:	JON CHASE KADHRANN J. HALLMARK FREDERICA BANKER JO KELLY RUTHERFORD L.W. MCINTOSH STEPHANIE WIESEN BLISS COLLIER VIRGINIA NAPPER ROBERT HERNANDEZ CONNIE HERNANDEZ PAMELA CANTRELL EVERETTE ROHR -VS- CITY OF BRADY, TEXAS, GAIL LOHN, IN HER OFFICIAL CAPACITY AS MAYOR OF THE CITY OF BRADY, MARY BRADSHAW, BRENDAN WEATHERMAN, MISSI DAVIS, LINDA LOTT, AND JAMES STEWART, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE CITY COUNCIL OF THE CITY OF BRADY, JAMES MINOR, IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF THE CITY OF BRADY, AND MUDUALISTIC, L.L.C. AND ZONING BOARD OF ADJUSTMENT OF THE CITY OF BRADY, TEXAS ZONING BOARD OF ADJUSTMENT OF L.L.C. MUDUALISTIC
Clerk:	Michelle Pitcox, District Clerk Brady, Texas 76825
Party or Party's Attorney:	RENEA HICKS 101 WEST 6TH STREET AUSTIN, TX 78701

Issued under my hand and seal of this said court on this the 26th day of June, 2012.


**COPY**


Michelle Pitcox, District Clerk  
198TH DISTRICT COURT  
McCulloch County, Texas

By \_\_\_\_\_  
MICHELLE PITCOX, DISTRICT CLERK

**OFFICER'S RETURN**

**CAUSE #2012072**

**JON CHASE  
KADHRANN J. HALLMARK  
FREDERICA BANKER  
JO KELLY RUTHERFORD  
L.W. MCINTOSH  
STEPHANIE WIESEN  
BLISS COLLIER  
VIRGINIA NAPPER  
ROBERT HERNANDEZ  
CONNIE HERNANDEZ  
PAMELA CANTRELL  
EVERETTE ROHR**

**IN THE 198TH DISTRICT COURT  
OF  
MCCULLOCH COUNTY, TEXAS**

**-VS-**

**CITY OF BRADY, TEXAS,  
GAIL LOHN, IN HER OFFICIAL CAPACITY AS  
MAYOR OF THE CITY OF BRADY,  
MARY BRADSHAW, BRENDAN WEATHERMAN,  
MISSI DAVIS, LINDA LOTT, AND JAMES  
STEWART, IN THEIR OFFICIAL CAPACITIES AS  
MEMBERS OF THE CITY COUNCIL OF THE CITY  
OF BRADY, JAMES MINOR, IN HIS OFFICIAL  
CAPACITY AS CITY MANAGER OF THE CITY OF  
BRADY, AND MUDUALISTIC, L.L.C. AND  
ZONING BOARD OF ADJUSTMENT OF THE  
CITY OF BRADY, TEXAS  
ZONING BOARD OF ADJUSTMENT OF  
L.L.C. MUDUALISTIC**

**NAME AND ADDRESS FOR SERVICE:**

**THE CITY OF BRADY  
201 EAST MAIN  
BRADY, TX 76825**

Came to hand on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_, o'clock \_\_\_\_m., and executed in \_\_\_\_\_ County, Texas by delivering to each of the within named defendants, in person, a true copy of this Citation with the date of delivery endorsed thereon, together with the accompanying copy of the AMENDED AND SUPPLEMENTAL PETITION AND PETITION FOR WRIT OF CERTIORARI at the following times and places, to-wit:

<b>Name</b>	<b>Date/Time</b>	<b>Place, Course and Distance from Courthouse</b>
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And not executed as to the defendant(s), \_\_\_\_\_

The diligence used in finding said defendant(s) being:

\_\_\_\_\_ and the cause or failure to execute this process is:

\_\_\_\_\_ and the information received as to the whereabouts of said defendant(s) being:

**FEES:**

Serving Petition and Copy \$ \_\_\_\_\_  
Total \$ \_\_\_\_\_

\_\_\_\_\_, Officer  
\_\_\_\_\_, County, Texas  
By: \_\_\_\_\_, Deputy

\_\_\_\_\_  
Affiant

**COMPLETE IF YOU ARE A PERSON OTHER THAN A SHERIFF, CONSTABLE, OR CLERK OF THE COURT.**

In accordance with Rule 107: The officer or authorized person who serves, or attempts to serve, a citation shall sign the return. The return must either be verified or be signed under penalty of perjury. A return signed under penalty of perjury must contain the statement below in substantially the following form:

"My name is \_\_\_\_\_, my date of birth is \_\_\_\_\_, and my address is \_\_\_\_\_  
(First, Middle, Last)

\_\_\_\_\_  
(Street, City, Zip)

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed in \_\_\_\_\_ County, State of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
Declarant/Authorized Process Server

\_\_\_\_\_  
(Id # & expiration of certification)

**RETURN TO:**

Michelle Pitcox McCulloch County District Clerk  
199 Courthouse Square Rm 103, 199 Courthouse Square Rm 103  
Brady, Texas 76825

No. 2012072

JON CHASE,  
KADHRANN J. HALLMARK,  
FREDERICA BANKER,  
JO KELLY RUTHERFORD,  
L. W. McINTOSH,  
STEPHANIE WIESEN,  
BLISS COLLIER,  
VIRGINIA NAPPER,  
ROBERT HERNANDEZ,  
CONNIE HERNANDEZ,  
PAMELA CANTRELL, and  
EVERETTE ROHR,  
*Plaintiffs and Petitioners,*

vs.

CITY OF BRADY, TEXAS,  
GAIL LOHN, in her official capacity as  
Mayor of the City of Brady,  
MARY BRADSHAW, BRENDAN  
WEATHERMAN, MISSI DAVIS, LINDA  
LOTT, and JAMES STEWART, in their  
official capacities as Members of the  
City Council of the City of Brady,  
JAMES MINOR, in his official capacity  
as City Manager of the City of Brady, and  
MUDUALISTIC, L.L.C.,  
*Defendants,*

and

ZONING BOARD OF ADJUSTMENT OF THE  
CITY OF BRADY, TEXAS,  
*Respondent.*

IN THE DISTRICT COURT

**FILED**  
TIME: 1:57 P M

JUN 25 2012

CLERK DISTRICT COURT  
McCULLOCH COUNTY, TEXAS  
MICHELLE PITCOX

McCULLOCH COUNTY

198<sup>th</sup> JUDICIAL DISTRICT

**AMENDED AND SUPPLEMENTAL PETITION  
AND PETITION FOR WRIT OF CERTIORARI**

Plaintiffs (and, as to the protective Zoning Board of Adjustment appeal, Petitioners) file this amended and supplemental petition and petition for writ of certiorari and would show the Court as follows:

### **Nature of suit**

1. This suit for declaratory and injunctive relief arises from the failure of the City of Brady, its elected officials, and its City Manager to adhere to state statutory requirements and its own charter and municipal code in connection with zoning for more than six hundred acres adjacent to Brady Lake and the residential area known as the Simpson Lake Club Subdivision. The City leased the disputed land to a private company—MUDualistic, L.L.C.—for operation of a private recreational facility for all-terrain vehicles. The use of the property under the lease is inconsistent with zoning for the leased area. Also, the term of the lease for the property violates the City Charter of Brady.

### **Parties**

#### ***Plaintiffs***

2. The Plaintiffs and Petitioners are Jon Chase, Kadhrann J. Hallmark, Frederica Banker, Jo Kelly Rutherford, Everette Rohr, L. W. McIntosh, Stephanie Wiesen, Bliss Collier, Virginia Napper, Robert Hernandez, Connie Hernandez, and Pamela Cantrell (collectively, the “Brady Lake Plaintiffs”). Each of the Brady Lake Plaintiffs owns, leases, or otherwise regularly uses single-family residential property in the Simpson Lake Club Subdivision, in the City of Brady, located as indicated in the following list:

- a. Jon Chase, at 214 North Shore Drive;
- b. Kadhrann J. Hallmark, at 200 North Shore Drive;
- c. Frederica Banker, at 200 North Shore Drive;

- d. Jo Kelly Rutherford, at 118 North Shore Drive;
- e. L. W. McIntosh, at 111 North Loop Drive and contiguous lot;
- f. Stephanie Wiesen, 102 South Loop Drive and contiguous lot;
- g. Bliss Collier, 102 South Loop Drive and contiguous lot;
- h. Virginia Napper, 200 North Loop Drive;
- i. Robert Hernandez, 103 South Shore Drive;
- j. Connie Hernandez, 103 South Shore Drive;
- k. Pamela Cantrell, 107 West Loop Drive; and
- l. Everette Rohr, 216 South Loop Drive.

***Defendants and Respondent***

3. The City of Brady (“Brady” or “City”), one of the defendants, is an incorporated, home rule city in Texas. It is in McCulloch County and, under Tex. Civ. Prac. & Rem. Code § 17.024(b), may be served with citation by serving the City Secretary, whose office is at 201 East Main, Brady, Texas 76825.

4. The members of the Brady City Council are Gail Lohn (who is Mayor) and Mary Bradshaw, Brendan Weatherman, Missi Davis, Linda Lott, and James Stewart (replaced by Marilyn Gendusa upon her due qualification, *cf.* Tex.R.App.Proc. 7.2(a)). They are defendants in their official capacities only, not in their personal capacities. They be served with citation at 201 East Main, Brady, Texas 76825. (Collectively, they will be termed here the “Brady City Council members.”). Alternatively, they may be served with process at the following addresses in Brady, Texas: Lohn, at 1208 S. Pine; Bradshaw, at 1913 S. Cypress; Weatherman, at 2100 Stanton Street; Davis, at 1200 S. Bridge; Lott, at 806 A. L. Reed Street; and Stewart, at 2104 Stanton Street.

5. James Minor is the City Manager of Brady (“Brady City Manager” or “City Manager”). He is a defendant in his official capacity only, not in his personal capacity. He may be served with citation at 201 East Main, Brady, Texas 76825.

6. The Zoning Board of Adjustment of the City of Brady (“ZBA” or “Brady ZBA”), the respondent, is a governmental body, created under the Brady City Charter. It is in McCulloch County and, under Tex. Civ. Prac. & Rem. Code § 17.024(b), may be served with citation by serving the City Secretary, whose office is at 201 East Main, Brady, Texas 76825.

7. MUDualistic, L.L.C. (“Mudualistic”), another defendant, is a Texas limited liability company. Its registered agent for service of process is Bennett Siebert, at 444 Julieanne Cove, Dripping Springs, Texas 78620, who also may be served with process at 6000 West 17<sup>th</sup> Street, Brady, Texas 76825.

### **Venue**

8. Venue is proper in McCulloch County under Tex. Civ. Prac. & Rem. Code §§ 15.002(a)(1)-(3), 15.005, and 15.0151(a).

### **Discovery track**

9. This case should proceed on the Level 3 discovery track, under Tex. R. Civ. Proc. 190.4.

### **Factual background to claims**

10. The Simpson Lake Club Subdivision is a long-time residential area at Brady’s northwestern edge. The City annexed the subdivision in 1968. Its zoning category at this point is somewhat uncertain, in light of the City’s approach—as expressed thus far in connection with this litigation—to interpretation of its zoning ordinance. Those who have bought houses, reside, and visit there value the area for its small-town, secluded atmosphere and its proximity to Brady

Lake and the scenic and recreational opportunities it offers. The Brady Lake Plaintiffs count themselves among this group of people.

11. In 2011, substantial public controversy had arisen in the City over the efforts of Mudualistic to locate an ATV park in Brady. In the midst of this controversy, the City posted the city council agenda for a special session for Friday, August 19, 2011. Item 3 of the posted agenda stated: “Lease of Property for development of ATV park.” The notice contained no further details concerning Item 3. The minutes of the ensuing August 19 city council session reflect that a motion to “approve the contract” carried unanimously. The archived agenda postings for Brady city council sessions reveal that, until June 4, 2012, the vague agenda posting and minutes for the August 19 council session are the closest the City came to providing formal public notice of its intent to consider and act on a lease agreement with Mudualistic or any other party for use of City-owned property as an ATV park.

12. On August 22, 2011, the City and Mudualistic entered into a lease agreement for “maintenance and operation of recreational facilities and ATV park” on 636.841 acres of City property within city limits. “ATV” refers to all-terrain-vehicles. This leased property—termed here the “Mudualistic property”—is directly adjacent to the Simpson Lake Club Subdivision. It also adjoins Brady Lake. The initial term of the lease is ten years, but Mudualistic is given “the right to renew” for an additional ten years at the end of the initial term. There is no provision for council review or approval in the event Mudualistic exercises this option. Section 12.16 of the Brady city charter limits contracts for use of City property to ten years, and they cannot be extended or renewed without review and approval by the city council.



13. The lease with Mudualistic requires Mudualistic, among other things, to “conform to all laws, orders and regulations . . . of city government.” The City expressly did “not represent that the premises are suitable to the use described.”

14. Shortly after the City and Mudualistic executed the lease for the Mudualistic property, the two parties also entered into an “Economic Development Chapter 380 Agreement.” Under the agreement, in exchange for Mudualistic building and operating an ATV park at the Mudualistic property, the City agreed to provide the materials for construction of the facilities at the ATV facility, capped at \$100,000. The City also agreed to either purchase \$55,000 in equipment and give it to Mudualistic or to simply provide the money for such purchases to Mudualistic. The agreement contains provisions which obligate Mudualistic to reimburse the City for “the amount it expended” if certain employment levels are not maintained at the ATV park.

15. In the early spring of 2012, Mudualistic began operations at the Mudualistic property, advertising on-line through a website, <http://mudualistic.com/>. It represents that it has 34 miles of trails, wheelie pits, rock crawling, and a motocross track, providing space for ATV enthusiasts to “open up” the throttle in a location said to be open around the clock every day of the week. Outdoor music concerts also are advertised for the coming months. Grand opening was April 27<sup>th</sup> through April 29<sup>th</sup> of this year. Mudualistic has been in continuous operation since then, and the City has taken no steps to enforce its zoning ordinance against Mudualistic, nor even to compel Mudualistic to cease activities—such as the music concernts—that also are inconsistent with the terms of the lease.

16. Brady’s city charter, in Section 5.04, required the City to develop and follow a “Comprehensive City Plan.” The city charter further instructs the City, in Section 5.05, that, once

this comprehensive plan is adopted by the city council, “no action” affecting development is permitted that is “in conflict with the” plan unless a variance has been granted by the City.

17. Brady’s city council adopted a “Comprehensive Plan” under Section 5.04 in 1978. This plan (“1978 Plan”) has remained in place, unchanged, continuously since then.

18. Section III of the 1978 Plan identifies future land uses for various areas of the City. The future land use designated for the area now encompassed by the Mudualistic property is specified in the second map following page 46 of the plan. There, the Mudualistic acreage is categorized as “13.” (*This “13” refers to Statistical Area 13, which is described beginning at the bottom of page 27 of the plan.*) The legend to the map plainly depicts the plan-designated usage for the Mudualistic area to be either “public, semi-public” or single family residential.

19. The City zoning ordinance, in Section 1, provides that the use districts it establishes are “in accordance with” the 1978 Plan. Under Section 6.2 of the City zoning ordinance, any city zoning action changing the Mudualistic property zoning must be “in conformance with” the 1978 Plan. This consistency requirement is directly derived from the state law requirement in Section 211.004(a) of the Texas Local Government Code that “[z]oning regulations must be adopted in accordance with a comprehensive plan . . .”

20. The area now comprising the Mudualistic property was annexed into the City in 1968, before adoption of the 1978 Plan.

21. Since the City’s 1968 annexation of the Simpson Lake Club Subdivision and the area now comprising the Mudualistic property, the area embraced by these two properties has been governed by two zoning ordinances. The first ordinance, enacted in 1965 (“1965 zoning ordinance”), provided in Section 13 that all territory annexed into the City is classified as “A, Dwelling District” until and unless permanently zoned by the Brady City Council. Section 3 of

the 1965 zoning ordinance established the permitted uses for such a district, providing that no land and no buildings in such districts could be used or erected except those expressly listed. The ATV park at the Mudualistic property is not an authorized use under the 1965 zoning ordinance in the area where it is operating.

22. The second ordinance, enacted in 2003 ("2003 zoning ordinance"), provides in the first line of Section 1 that it "amend[s]" the 1965 zoning ordinance and, later in that section, that the 1965 zoning ordinance is "amended, repealed and replaced." Section 14.1 of the 2003 zoning ordinance provides that newly annexed territory is zoned "Agriculture" until assigned another more permanent zoning district "in accordance with" the 1978 Plan. Section 4.1.I of the 2003 zoning ordinance provides that, in the event of an open question about "how or whether" any given parcel of property is zoned, such property is treated the same as newly annexed territory and is zoned "Agriculture." The ATV and related operations for which the Mudualistic property is being used are not permitted uses for property zoned "Agricultural." Permitted uses for such "Agriculture Districts" are listed in Section 14.2 of the 2003 zoning ordinance. A private, commercial venture, operating as an ATV park, is not among those permitted uses.

23. When the Mudualistic property was annexed into the City in 1968, the City took no affirmative zoning action concerning it. Therefore, under Section 13 of the 1965 zoning ordinance, the consequence was that the Mudualistic property was automatically assigned the zoning category of "Dwelling District." It remained in this zoning category at least until the 2003 zoning ordinance was passed.

24. Passage of the 2003 zoning ordinance had one of two consequences, depending on whether the 2003 ordinance carried forward by amendment the Dwelling District zoning category for the Mudualistic land set up by Section 13 of the 1965 zoning ordinance or, instead,

repealed this zoning category, replacing it with a new zoning category under the 2003 ordinance. If the latter is what happened, then the Mudualistic land is zoned “Agricultural” under either Section 4.1.I or Section 14.1, or both, of the 2003 ordinance. Since the 2003 zoning ordinance, the Brady city council has taken no further zoning actions concerning the Mudualistic property. Nor has the Brady city council or any other Brady governmental body ever granted a variance or a special use permit for the Mudualistic property, authorizing its use as an ATV park.

25. Regardless of whether, as discussed in paragraph 24, above, the Mudualistic property is still in the “Dwelling District” zone from the 1965 zoning ordinance or has been moved into the “Agriculture” district zone under the 2003 zoning ordinance, the fact is that neither the uses authorized under the City’s lease with Mudualistic nor the uses to which Mudualistic is actually putting the Mudualistic property are in compliance with the City’s zoning ordinance and the use restrictions it imposes on the Mudualistic property. The operations at the Mudualistic property violate the City’s zoning ordinance and, therefore, are illegal.

26. In disregard of the zoning rules governing the City in general and the Mudualistic property in particular, the City Manager, James Minor, announced for the first time at a Brady City Council meeting on March 20, 2012, that there is “no zoning” governing the Mudualistic property. This “no zoning” pronouncement (“Manager’s ‘no zoning’ decision”) is reported as Item 12 of the minutes of the March 20<sup>th</sup> City Council meeting, along with the city council’s related approval, reflected in the minutes’ Item 14, of the building sites for the Mudualistic property. These minutes were first approved in published written, or rendered, form by the Brady City Council on April 3, 2012.

27. On April 10, 2012, acting under Section 9.7A of the Brady zoning ordinance and Section 211.009(a) of the Texas Local Government Code, the Brady Lake Plaintiffs and other

individuals filed a challenge to the Manager's "no zoning" decision, lodging their 6-page appeal with the City Secretary for delivery to the members of the Brady ZBA and copying the City Manager at the same time. Out of an abundance of caution, the appeal challenged both the Manager's "no zoning" decision and the failure of the City to conform to the 1978 Plan, even though the latter city action is not subject to ZBA action.

28. Subsequent to the filing of the ZBA appeal, the Brady Lake Plaintiffs discovered that the Brady ZBA was non-functional and, as a result, non-existent. It had no board members, a fact the City orally acknowledged at its public city council meeting of April 17, 2012.

29. In fact, the ZBA had been non-existent and non-functioning for quite some time due to its having no members. Under Sections 9.2A and 9.2C of the City Zoning Ordinance (which have been unchanged for at least the last nine years and probably longer), the ZBA is to be composed of five regular members, each serving a two year term. Alternates, who could fill vacancies left by regular ZBA members' departure, could have been appointed but never were. There is no holdover provision in the Brady City Charter, and no other law that would put Brady ZBA members in holdover status after their regular terms expire. The publicly available, on-line archives of Brady city council agendas and minutes go back only to July 1, 2009. These archived agendas and minutes reflect that, running from at least July 1, 2009, until May 15, 2012, the Brady city council made no appointments to the ZBA. Therefore, from at least July 1, 2011 (which is two years after the earliest on-line agendas and minutes of Brady council sessions), until May 15, 2012, the ZBA was non-functional. It could not meet, it could not accept appeals, and it could take no action because it had no members at all, much less enough members to constitute a quorum. Consistent with these facts, there are no published notices during that period under the Texas Open Meetings Act which reflect meetings of the ZBA, notices which would be

necessary if the ZBA were to convene itself in a quorum to act on anything within its jurisdictional purview.

30. Since at least July 1, 2011 (and nearly certainly since even before that), the first time that the ZBA could possibly have had a legal quorum to meet would have been at some point after the Brady council session of May 22, 2012. This is because it was not until that date (May 22, 2012), that the Brady city council records indicate that the city council had appointed sufficient numbers of people to the ZBA to constitute a legal quorum. The Brady Lake Plaintiffs do not know from public records currently available at what point the recently-appointed members of the ZBA officially took office or whether any of them, in fact, have officially taken a ZBA seat.

31. Consequently, from the first express pronouncement by the City Manager on the “no zoning” issue—even if such pronouncement is assumed to have first been made at the August 19, 2011, Brady city council session during which the Mutualistic lease was publicly discussed—until at least May 22, 2012, and likely even later, there was no Brady ZBA in place to which to take an appeal of such decision, nor any Brady ZBA in place to consider such appeal, nor any Brady ZBA in place to decide such an appeal. Neither Chapter 211 of the Local Government Code, nor the Brady City Charter, requires the Brady city council to establish a functioning Brady ZBA. Doing so is permissive. And during the timeframe for appealing the Manager’s “no zoning” decision, the Brady city council—which itself cannot serve as its own ZBA—had exercised (by action or inaction) the option of not having a Brady ZBA in place and in functioning order.

32. In spite of the non-existence of a functioning Brady ZBA, the City, acting through its City Attorney, Susan Horton, wrote the attorney for the Brady Lake Plaintiffs on April 16, 2012, informing him that the ZBA appeal of the Brady Lake Plaintiffs and the other appellants would

not be considered by the ZBA. Specifically, the City's attorney wrote that "[s]ince the appeal was not filed timely, the Zoning Board of Adjustment will not consider it."

33. This April 16 letter from the City is not a decision of the Brady ZBA. It could not be inasmuch as the Brady ZBA was non-functional when the letter was written and delivered—or, for that matter, several years before that. Furthermore, since the Brady ZBA is a governmental body subject to the Texas Open Meetings Act, Tex. Gov't Code ch. 551 ("TOMA"), and since the Brady ZBA neither posted nor conducted a public meeting on the Brady Lake Plaintiffs' appeal consistent with TOMA, this letter could not constitute a decision of the Brady ZBA.

34. On June 4, 2012, in order to try to repair the TOMA flaws attending its Mudualistic lease vote of August 19, 2011, the Brady city council voted to ratify the city council's action of August 19, 2011, approving execution of a lease between the City and Mudualistic for use of the Mudualistic property as an ATV park. This so-called "ratification" action on June 4, 2012, is effective to authorize the Mudualistic lease only from the date of the ratification. As long as the agenda posting for the August 19, 2011, council meeting is in violation of TOMA's requirements, the June 4, 2012, lease approval is not retroactively effective, starting on August 19, 2011. Hence, the lease with Mudualistic was ineffective from its execution on August 22, 2011, until June 4, 2012. Furthermore, since June 4, 2012, the City has not executed a new lease with Mudualistic.

35. After the June 4, 2012, council approval of the Mudualistic lease, the Brady Lake Plaintiffs and other individuals attempted to file another, precautionary challenge to the Manager's "no zoning" decision ("June 13 ZBA appeal"). This action was taken on June 13, 2012, with the submission of an appeal by these individuals to the five persons who had been publicly identified as the new members of the Brady ZBA, as well as with the City Manager.

36. The City did not permit the June 13 ZBA appeal to even reach the Brady ZBA. Instead, the Brady City Attorney, Susan Horton, faxed a letter on June 15, 2012, to Renea Hicks, counsel for the Brady Lake Plaintiffs (and the other individuals on the June 13 ZBA appeal), concluding that “the ZBA will not consider it.” So, as with the earlier appeal effort of April 10, 2012, the City has not permitted the Brady Lake Plaintiffs (and other individuals) to present an appeal to the Brady ZBA, which has not been allowed to consider or decide any appeals to it concerning the Manager’s “no zoning” decision.

37. At whatever date it occurred—and June 4, 2012, is that date as far as TOMA is concerned—the members of the Brady city council acted *ultra vires* in authorizing the City’s entry into a lease with Mudualistic for operation of an ATV park. The uses authorized in the lease are in violation of the City zoning ordinance, and the Brady city council members had no authority to authorize activities at the Mudualistic property that violate the zoning ordinance. In addition, the Manager’s “no zoning” decision, and his execution of the lease on the City’s behalf, also were *ultra vires* because his decision—which the City has said was nothing but a reflection of the decision already made by the Brady city council—and his signature were inconsistent with the zoning ordinance governing the Mudualistic property.

38. Even if the City were correct that the Mudualistic area is not zoned, its actions and the actions of its council members and manager concerning the Mudualistic property would be *ultra vires* and illegal. Cities such as Brady are required to zone in accordance with their comprehensive plan. Not zoning an area of the city, when other areas are zoned, is called piecemeal zoning, and piecemeal zoning is illegal. If the Mudualistic property is considered not zoned—and that would be an incorrect conclusion—then the City, its city council members, and



its City Manager are acting illegally in authorizing Mudualistic to operate its ATV park in an unzoned area of the City.

39. Since it began operation, the uses to which the Mudualistic property is being put have had major adverse impacts on the use and enjoyment by the Brady Lake Plaintiffs of the homes and property in the Simpson Lake Club Subdivision. The noise, traffic, dust, and other human activity associated with use of the Mudualistic property for the purposes for which the City leased it to Mudualistic, as well as the uses Mudualistic is making of the property beyond the terms of the lease, disrupts the use of Simpson Lake Club Subdivision properties for the purposes associated with the zoning for the area. It also creates associated safety hazards and related dangers for the Brady Lake Plaintiffs, their families, and their friends who come to visit. All these effects also have an adverse impact on the property values in the Simpson Lake Subdivision. Based on what Mudualistic has indicated its future plans for the area to be, these harms will continue and can be reasonably anticipated to grow worse as time passes.

40. The Brady Lake Plaintiffs, who are taxpayers to the City, are aggrieved under Section 211.011(a) of the Local Government Code. They also are interested persons under Section 551.142(a) of the Government Code. In addition, the Brady Lake Plaintiffs who own property in the zoning district where the Mudualistic property is located are authorized to bring this suit under Section 39.1 of the 2003 zoning ordinance.

## **Claims**

41. The factual allegations in paragraphs 1-40, above, are re-alleged as to each count below.

### ***Count 1—violation of City zoning ordinance***

42. The City, the City Council Members, and the City Manager have authorized Mudualistic to use the Mudualistic property in violation of the zoning for the property in question. The uses

authorized under the City's lease with Mudualistic, and the uses to which Mudualistic is putting the Mudualistic property are not uses permitted for a "Dwelling District" under the 1965 zoning ordinance or for an "Agriculture" district under the 2003 zoning ordinance.

***Count 2—inconsistency with comprehensive city plan***

43. The uses the City, its City Council Members, and the City Manager have authorized for the Mudualistic property and the uses Mudualistic is making and intends to make of that property are inconsistent with the 1978 Plan and are in violation of Section 5.05 of the Brady City Charter and Section 211.003(a) of the Local Government Code. Also, to the extent that the Mudualistic property is not zoned at all by a City zoning ordinance, the City, its Council Members, and the City Manager are in violation of Section 5.05 of the Brady City Charter and Section 211.003(a) of the Local Government Code because not zoning an area of a City which is otherwise zoned is acting inconsistently with a comprehensive plan and, therefore, is impermissible.

***Count 3—violation of Section 12.16 of Brady city charter***

44. The City lease with Mudualistic is illegal because it violates Section 12.16 of the Brady City Charter.

***Count 4—TOMA violation***

45. The City violated Tex. Gov't Code § 551.002 by giving insufficient notice, within the meaning of Tex. Gov't Code § 551.041, of the action taken at the city council special session of August 19, 2011, authorizing the City to enter into a lease with Mudualistic for the Mudualistic property's use as an ATV park.

### ***Count 5—writ of certiorari to Brady ZBA and reversal of its decision***

46. As provided in Section 211.011 of the Local Government Code, a writ of certiorari should issue to the Brady ZBA, and a subsequent judicial determination should be made, reversing the City Manager's "no zoning" decision and determining that the Mudualistic property is being used in violation of the city zoning ordinance. The claim in this count is a protective one, made only in the event a determination is made that the actions of the City Attorney in rejecting the appeals to the Brady ZBA constitute the actions of the ZBA.

### ***Count 6—TOMA violation (ZBA)***

47. To the extent the City Attorney's letters of April 16, 2012, and June 15, 2012, are deemed to constitute determinations by the Brady ZBA, the City, the City Manager (by authorizing the City Attorney's action), and the ZBA violated Tex. Gov't Code § 551.002 by failing to provide any notice as required under Tex. Gov't Code § 551.041.

### **Relief requested**

48. Based upon the foregoing matters, facts, and claims, the Brady Lake Plaintiffs pray for the following:

- a. a declaratory judgment under Tex. Civ. Prac. & Rem. Code § 37.004(a) that the authorizations and actions of the City, the City Council Members, and the City Manager, allowing Mudualistic's use of the Mudualistic property, violate the City zoning ordinance;
- b. a declaratory judgment under Tex. Civ. Prac. & Rem. Code § 37.004(a) that the authorizations and actions of the City, the City Council Members, and the City Manager, allowing Mudualistic's use of the Mudualistic property, violate Section 5.05 of the Brady City Charter and Tex. Loc. Gov't Code § 211.003(a);
- c. a declaratory judgment that the City lease with Mudualistic violates Section 12.16 of the Brady City Charter;
- d. alternatively only as to ¶ 48.b, issuance of a writ of certiorari and an order reversing the City's actions concerning use of the Mudualistic property as inconsistent with the 1978 Plan, under Tex. Loc. Gov't Code § 211.011(c) and (f);

- e. alternatively only, issuance of a writ of certiorari to the Brady ZBA and an order reversing the Manager's "no zoning" decision, under Tex. Loc. Gov't Code § 211.011(c) and (f);
- f. an injunction, including temporary injunctive relief as appropriate, stopping all further operation of the Mudualistic property as an ATV park;
- g. an injunction invalidating the City lease with Mudualistic;
- h. an injunction, including temporary injunctive relief as appropriate, requiring that the actions of the City, the City Council Members, and the City Manager, as well as Mudualistic, which are inconsistent with the determinations and declarations in ¶¶ 48.a-48.c stop;
- i. a writ mandamus and injunction to the City, under Tex. Gov't Code § 551.142(a), voiding the City's action authorizing a lease between the City and Mudualistic for operation of an ATV park at the Mudualistic property and forbidding any further actions by the City inconsistent with the Court's injunction and mandamus;
- j. a writ mandamus and injunction to the City and its ZBA, under Tex. Gov't Code § 551.142(a), voiding the City or ZBA's determinations concerning the ZBA appeal of the Brady Lake Plaintiffs and forbidding any further actions by the City and ZBA inconsistent with the Court's injunction and mandamus;
- k. such reasonable and necessary attorney fees as may be equitable and just under Tex. Civ. Prac. & Rem. Code § 37.009 and Tex. Gov't Code § 551.142(b); and
- l. such other and further relief as may be appropriate.\*

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\* The last twelve pages (verifications) of the Original Petition and Petition for Writ of Certiorari, filed April 24, 2012, are incorporated by reference.

Respectfully submitted,



Renea Hicks  
Attorney at Law  
Texas Bar No. 09580400

Law Office of Max Renea Hicks  
101 West 6th Street  
Austin, Texas 78701  
(512) 480-8231  
fax (512) 480-9105  
[rhicks@renea-hicks.com](mailto:rhicks@renea-hicks.com)

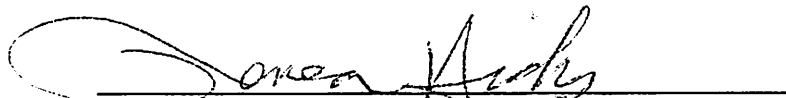
ATTORNEY FOR BRADY LAKE PLAINTIFFS  
(JON CHASE, KADHRANN J. HALLMARK,  
FREDERICA BANKER, JO KELLY  
RUTHERFORD, EVERETTE ROHR, L. W.  
MCINTOSH, STEPHANIE WIESEN, BLISS  
COLLIER, VIRGINIA NAPPER, ROBERT  
HERNANDEZ, CONNIE HERNANDEZ, AND  
PAMELA CANTRELL)

### **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing document has been sent by electronic mail and first class U.S. mail on the 25<sup>th</sup> day of June, 2012, to each of the following attorneys:

Bradley Young  
BICKERSTAFF HEATH DELGADO ACOSTA LLP  
3711 South MoPac Expressway  
Building One, Suite 3000  
Austin, Texas 78746  
[BYoung@bickerstaff.com](mailto:BYoung@bickerstaff.com)  
*Attorney for Defendants City of Brady and Zoning Board of Adjustment of City of Brady*

Rebekah Whitworth  
GEISTWEIDT & WHITWORTH, P.C.  
P.O. Box 1909  
Mason, Texas 76856  
[rw@masonlegal.com](mailto:rw@masonlegal.com)  
*Attorney for MUDualistic, L.L.C.*



Renea Hicks