

CAUSE NO. _____

CITY OF SAN MARCOS, TEXAS

Plaintiff

v.

SAM BRANNON, COMMUNITIES FOR
THRIVING WATER-FLUORIDE FREE
SAN MARCOS, MORGAN KNECHT, AND
KATHLEEN O'CONNELL

Defendants

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IN THE DISTRICT COURT

OF HAYS COUNTY, TEXAS

____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION FOR DECLARATORY JUDGMENT

TO THE HONORABLE JUDGE OF THE COURT:

Plaintiff CITY OF SAN MARCOS, TEXAS files this Original Petition For Declaratory Judgment and for cause of action would respectfully show the Court the following:

I. STATEMENT OF THE CASE

1. This case concerns a pending dispute regarding the validity of a petition filed by Defendants with the San Marcos City Clerk on April 2, 2015 to place a proposed amendment to the San Marcos City Charter on the ballot in a special election on November 2015. Plaintiff seeks a declaratory judgment that: a. the petition does not comply with the applicable provisions of state law and the San Marcos City Charter; b. the applicable state law and city charter requirements are constitutional and valid; c. the petition is void; and d. the San Marcos City Council has no legal duty to place the proposed charter amendment on the ballot.

II. DISCOVERY CONTROL PLAN

2. Plaintiff intends to conduct discovery under Level 1 of Texas Rule of Civil Procedure 190.

III. PARTIES

3. Plaintiff CITY OF SAN MARCOS, TEXAS is a home rule municipal corporation located in Hays County, Texas.

4. Defendant SAM BRANNON is an individual who resides at and may be served with process at 2600 Hunter Road, Apartment 4210, San Marcos, Texas 78666.

5. Defendant COMMUNITIES FOR THRIVING WATER-FLUORIDE FREE SAN MARCOS is an unincorporated association of individuals including residents of the City of San Marcos and Hays County, Texas and may be served with process by serving Kathleen O'Connell – who serves as the association's organizer, representative, and political action committee treasurer - at 1501 Montell Road, Wimberley, Texas 78676.

6. Defendant KATHLEEN O'CONNELL is an individual who resides at and may be served with process at 1501 Montell Road, Wimberley, Texas 78676.

7. Defendant MORGAN KNECHT is an individual who resides at and may be served with process at 235 Craddock Avenue, Unit B, San Marcos, Texas 78666.

IV. JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction pursuant to §37.003 of the Texas Civil Practice and Remedies Code to enter a final judgment to determine that Plaintiff has no legal duty to

adopt an ordinance calling a special election to place Defendants' proposed charter amendment before the voters and to further determine that presenting Defendant's proposed amendment to the voters in the form it was submitted in Defendants' petition would violate the San Marcos City Charter, Chapter 277 of the Texas Election Code, and §9.004 of the Texas Local Government Code.

9. Venue is mandatory in Hays County, Texas under §15.002 of the Texas Civil Practice and Remedies Code because all of the events giving rise to the current dispute occurred in Hays County and all parties reside or have their principal offices in Hays County, Texas.

V. FACTS

10. The City of San Marcos is a municipal corporation and has been continuously operating under a home rule city charter adopted on February 24, 1967.

11. At all times since its original adoption in 1967, Section 6.01 of the San Marcos City Charter has provided that, “The people of the city reserve the power of direct legislation by initiative, and in the exercise of such power may propose any ordinance or repeal any ordinance not in conflict with this Charter, the State Constitution, or the state laws.”

12. At all times since its original adoption in 1967, Section 6.03 of the San Marcos City Charter has clearly provided that, “Initiative petition papers shall contain the full text of the proposed legislation in the form of an ordinance including a descriptive caption.”

13. At all times since its original adoption in 1967, including September 1, 1985, Section 6.03 of the San Marcos City Charter has plainly stated that: “Before signatures on any petition paper may be counted, one of the signers of such petition papers, a qualified voter, shall make oath or affirmation before the city clerk or any other officer competent to administer oaths or affirmations, that each signature to the paper appended is the genuine signature of the person whose name purports to be signed thereto, and that such signatures were placed thereon in that person’s presence.”

14. Defendants are vocal advocates against fluoridation of the public water supply and have spoken against fluoridation at meetings of the San Marcos City Council beginning in September of 2013.

15. In August of 2013, Defendants began seeking information and assistance from San Marcos City Clerk, Jamie Lee Pettijohn, through a series of meetings and e-mail exchanges, regarding their efforts to prepare a petition for a local election regarding fluoridation.

16. Defendants O’CONNELL and KNECHT submitted a first draft of their local election petition to Ms. Pettijohn on August 16, 2013 for her review. At that time their draft petition contained the full text of an ordinance with a descriptive caption but did not contain a circulator’s affidavit as required for any petition paper under Section 6.03 of the San Marcos City Charter.

17. Ms. Pettijohn advised Defendant O’CONNELL in person and in writing on August 16, 2013 that the petition must contain a circulator’s affidavit as required under Section 6.03 of the San Marcos City Charter and she provided Defendants with a sample petition with language meeting the charter’s requirement for verification of petition signatures.

18. On September 10, 2013 Defendants O'CONNELL and KNECHT submitted a second draft of the petition for Ms. Pettijohn's review.

19. On September 16, 2013 Ms. Pettijohn advised Defendants O'CONNELL and KNECHT once again, by reply e-mail, that the petition must contain a circulator's affidavit and she furnished another sample affidavit for Defendants' use.

20. On October 4, 2013 Defendant O'CONNELL notified the Ms. Pettijohn that Defendants' petition drive was underway, but Defendants did not submit a final draft of their petition to the CITY OF SAN MARCOS for review or approval before embarking on their campaign to obtain petition signature.

21. One year later, on October 17, 2014, Ms. Pettijohn became aware that Defendants had left copies of their local option petition at various businesses in San Marcos and she notified Defendant O'CONNELL, in writing, that the petition needed to be signed in the presence of a circulator and all signatures needed to be verified by a circulator's affidavit. Ms. Pettijohn expressed her concern regarding the validity of Defendants' petition.

22. On October 20, 2014 Defendant O'CONNELL replied: "Our lawyer has reviewed our petition and said it is in good order."

23. On April 2, 2015 Defendants submitted their signed petition to City Clerk Jamie Lee Pettijohn with 1,634 signatures. A copy of the first page of the petition is attached as Exhibit "A."

24. None of the signatures on the petition were verified by the oath or affirmation of a circulator as required by Section 6.03 of the San Marcos City Charter.

25. All municipal elections are called by the adoption of an ordinance. Section 9.004(b) of the Texas Local Government Code specifically provides that charter amendment elections are

ordered by the adoption of an ordinance. Defendants' petition should have contained the full text of an ordinance, with a descriptive caption, calling a special election to place their proposed charter amendment on the ballot as required by Section 6.03 of the San Marcos City Charter. No ordinance was attached.

26. Defendants' petition proposes an amendment to the city charter that contains more than one subject in violation of §9.004(d) of the Texas Local Government Code. The proposed amendment actually contains three separate propositions within it. First, it would prohibit the City of San Marcos from fluoridating the public water supply. Secondly, it would prohibit the City of San Marcos from accepting water containing any fluoride derivative – including naturally fluoridated surface water and ground water - for use in the San Marcos Water System. This second proposition, if adopted, would force the City to find, finance, and develop a new raw water supply to sustain the life and health of its citizens or to design and install equipment at its surface water treatment plant and ground water wells in an attempt to remove all fluoride derivatives from the raw water supply before it enters the city's water distribution system. Finally, Defendants' proposed charter amendment would prohibit the City of San Marcos from purchasing or installing any fluoridation equipment for use in the city's water supply or distribution system.

27. Defendants have insisted that Plaintiff place their proposed amendment on the ballot in exactly the form in which it was submitted, as a single amendment, which would require a voter to either approve or disapprove all three of the propositions contained within it by casting a single vote. Forcing voters to do this would violate §9.004(e) of the Texas Local Government Code.

28. Defendants failed to provide an estimate of the anticipated fiscal impact to the City of San Marcos that would result from approval of their proposed charter amendment.

§9.004(c)(2) of the Texas Local Government Code requires an estimate of the fiscal impact of a proposed charter amendment to be included in a published notice of the election. Each of the three propositions contained within Defendant's proposed charter amendment would have a different fiscal impact, if adopted. For example, the second proposition – requiring removal of all fluoride derivatives from the city's surface and ground water supplies – has been estimated by the City's consulting engineering firm to cost over \$97,000,000.

29. The City of San Marcos owns a regional surface water treatment plant that is operated by the Guadalupe Blanco River Authority (GBRA). The operating contract between the City of San Marcos and the GBRA requires the addition of fluoride to achieve a level of 0.7 mg/L in the finished water for the intended purpose of preventing or reducing tooth decay.

30. The regional surface water treatment plant supplies fluoridated water to customers in the central Texas region along the IH 35 corridor. These customers include San Marcos residents who would be qualified to vote in a special city charter amendment election. But these customers also include thousands of residents and voters in the City of Kyle, the City of Buda, and in unincorporated areas of Hays County served by Goforth Water Supply Corporation, Sunfield Municipal Utility District, and Monarch Utilities I, L.P. Those voters, who reside outside of the corporate limits of San Marcos, would not have an opportunity to vote on Defendants' proposed charter amendment even though it would directly impact their health and their pocketbooks, if adopted.

31. On May 5, 2015, San Marcos City Clerk, Jamie Lee Pettijohn, delivered her certification regarding Defendant's petition to the San Marcos City Council at a regular council meeting as follows:

"I, Jamie Lee Pettijohn, City Clerk of the City of San Marcos, Texas do hereby certify that the petition submitted to my office on April 2, 2015 by the Communities for Thriving Water – Fluoride Free San Marcos for a charter amendment election is invalid. It does not comply with the requirements for the validity and verification of petition signatures in Section 6.03 of the San Marcos City Charter because none of the petition papers contains an oath or affirmation that each signature was the genuine signature of the person who signed it and that each signature was placed thereon in the presence of a person making such oath or affirmation. Therefore, none of the signatures may be counted."

32. The San Marcos City Council has not refused to place Defendants' petition on the ballot. No governing body has a duty to act in violation of state law or its own charter. Plaintiff therefore asks the Court to resolve each of the legal issues presented in this Original Petition For Declaratory Judgment before taking any action in response to Defendants' petition.

33. August 24, 2015 is the last day to adopt an ordinance ordering a special charter amendment election if one is to be held in November of 2015.

VI. PLAINTIFF'S CLAIMS FOR RELIEF

Count 1: Declaratory Judgment

34. The allegations in Paragraphs 1 through 33 above are incorporated herein by reference as if set forth in this Count.

35. Chapter 277 of the Texas Election Code applies to any petition authorized or required to be filed under a law outside of that code in connection with an election. See, Texas Election Code, §277.001.

36. Texas Local Government Code, §9.004, pertaining to city charter amendment elections, is a law outside of the Texas Election Code that authorizes a charter amendment petition to be filed.

37. Texas Election Code, §277.004 provides that any requirements for the validity or verification of petition signatures that are prescribed by a home rule charter are effective only if the provision was in effect on September 1, 1985. Section 6.03 of the San Marcos City Charter, requiring an oath or affirmation of a circulator to verify petition signatures before any signature on a petition paper may be counted, was in effect on September 1, 1985.

38. Article 11, §5 of the Texas Constitution pertaining to home rule charters provides, in pertinent part, that, “The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or city ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State or the general laws enacted by the Constitution of the State.” Under the plain language of the constitution, a home rule city charter may contain provisions that govern the process for adopting ordinances and charter amendments unless those provisions are inconsistent with the constitution or have been specifically limited by statute.

39. Defendants’ attorney has contended that §277.004 of the Texas Election Code is unconstitutional under Article 11, §5 of the Texas Constitution because it impermissibly delegates the state’s governmental power to prescribe requirements for the validity or verification of petition signatures to home rule cities. This contention is based upon a mistaken

reading or a fundamental misunderstanding of both the statute and the home rule amendment to the Texas constitution.

“It was the purpose of the Home Rule Amendment, Art. XI, Sec. 5 . . . to bestow on accepting cities and towns of more than 5,000 population the full power of self-government, that is, full authority to do anything the legislature could theretofore have authorized them to do. The result is that now it is necessary to look to the acts of the legislature not for grants of power to such cities but only for limitations on their powers.”

Forwood v. City of Taylor, 214 S.W.2d 282, 286 (Tex. 1948).

The only limitation contained in §277.004 of the Texas Election Code is that any charter or ordinance requirements for validity or verification of petition signatures, to be effective, must have been in effect on September 1, 1985.

40. Plaintiff asks the Court to enter a final judgment declaring that §277.004 of the Texas Election Code is constitutional and that the requirement in Section 6.03 of the San Marcos City Charter of an oath or affirmation of a circulator before any signature on any petition paper may be counted is effective, valid, and mandatory.

41. Defendants’ attorney has contended that the verification requirement in Section 6.03 of the San Marcos City Charter does not apply to a petition to amend the city charter because Section 6.03 is contained within an article of the charter that bears a caption labeled “Initiative, Referendum and Recall.” This argument elevates form over substance and ignores the plain language of Section 6.03 requiring verification of signatures on any petition paper. It further ignores the fact that municipal elections are ordered by the adoption of an ordinance. It ignores the specific provisions of §9.004(b) stating that charter amendment elections are ordered by adoption of an ordinance. There is no inconsistency or conflict between the verification

provisions in Section 6.03 of the San Marcos City Charter and any provision within §9.004 of the Texas Election Code. The requirements in Section 6.03 are mandatory and Defendants' failure to comply with them renders their petition void. See *City of Sherman v. Hudman*, 996 S.W.2d 904 (Tex. App. - Dallas 1999, pet. granted, judgment vacated w.r.m.)

42. Plaintiff asks the Court to enter a final judgment declaring that the verification requirements in Section 6.03 of the San Marcos City Charter apply to any petition paper including a petition to call a charter amendment election.

43. Plaintiff asks the Court to enter a final judgment declaring that Defendant's petition is void because none of the signatures on the petition paper were verified by oath or affirmation of a circulator as required by Section 6.03 of the San Marcos City Charter.

44. Plaintiff asks the Court to enter a final judgment declaring that Defendant's petition is void because it does not contain the full text of an ordinance calling a charter amendment election as required by Section 6.03 of the San Marcos City Charter. See *City of Sherman v. Hudman*, 996 S.W.2d 904 (Tex. App. - Dallas 1999, pet. granted, judgment vacated w.r.m.)

45. Plaintiff asks the Court to enter a final judgment declaring that placing Defendants' proposed amendment on the ballot, in the manner Defendants have demanded, would violate §9.004(d) of the Texas Local Government Code because the amendment contains more than one subject.

46. Plaintiff asks the Court to enter a final judgment declaring that placing Defendants' proposed charter amendment on the ballot, in the manner Defendants have demanded, would violate §9.004(e) of the Texas Local Government Code because it would force voters to approve

or disapprove all three of the propositions contained within the amendment by casting a single vote.

47. Plaintiff asks the Court to enter a final judgment declaring that Defendants' proposed charter amendment has been withdrawn from the field of permissible citizen initiated amendments because it would, if adopted, require the City of San Marcos to immediately cease and desist from accepting ground water and surface water containing naturally occurring fluoride derivatives for use in the city's water distribution system, thus leaving San Marcos residents without any source of potable water.

48. Plaintiff asks the Court to enter a final judgment declaring that the San Marcos City Council has no legal duty to adopt an ordinance calling a special charter election to place Defendants' proposed charter amendment before the voters.

COUNT 2 – Attorney's Fees

49. Under the authority of §37.008 of the Texas Civil Practice and Remedies Code, Plaintiff hereby sues to recover its costs and reasonable and necessary attorney's fees in both the trial of this case and in connection with any subsequent appeal.

WHEREFORE, PREMISES CONSIDERED, Plaintiff asks that the Court issue citation for Defendants SAM BRANNON, COMMUNITIES FOR THRIVING WATER – FLUORIDE FREE SAN MARCOS, MORGAN KNECHT and KATHLEEN O'CONNELL to appear and answer, and that Plaintiff be awarded final judgment against Defendant that:

- a. Declares that Section 277.004 of the Texas Election Code is constitutional.

- b. Declares that the signature verification requirements in Section 6.03 of the San Marcos City Charter apply to any petition paper including a petition to call charter amendment election and that those requirements are valid, effective, and mandatory.
- c. Declares that Defendants' petition is void because none of the signatures were verified as required by Section 6.03 of the San Marcos City Charter;
- d. Declares that Defendants' petition is void because Defendants failed to attach the full text of an ordinance ordering a special charter amendment election to place Defendant's proposed charter amendment on the ballot as required by Section 6.03 of the San Marcos City Charter;
- e. Declares that the San Marcos City Council has no duty to adopt an ordinance to place Defendant's proposed charter amendment on the ballot;
- f. Declares that placing Defendants' proposed charter amendment on the ballot in the form demanded by Defendants would violate §9.004(d) of the Texas Local Government Code because the amendment contains more than one subject;
- g. Declares that placing Defendants' proposed charter amendment on the ballot in the form demanded by Defendants would violate §9.004(e) of the Texas Local Government Code because it would force voters to approve or disapprove all three propositions contained within the amendment by casting a single vote;
- h. Declares that Defendants' proposed charter amendment has been withdrawn from the field of permissible citizen-initiated amendments because it would, if adopted, require the city to immediately cease and desist from accepting ground water and surface water containing naturally occurring fluoride derivatives for use in the city's water distribution system, thus leaving San Marcos residents without any source of potable water.

- i. Awards Plaintiff its costs and reasonable and necessary attorneys as are equitable and just under §37.009 of the Texas Civil Practice and Remedies Code; and
- j. Grants Plaintiff such other and further relief to which it may be justly entitled.

Respectfully submitted,

SAN MARCOS CITY ATTORNEY'S OFFICE
630 East Hopkins
San Marcos, Texas 78666
Telephone: (512) 393-8151
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ATTORNEYS FOR PLAINTIFF

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EXHIBIT A



PETITION to BAN FLUORIDATION in CITY OF SAN MARCOS WATER

Citizen's Petition Pursuant to Texas Local Government Code - Section 9.004. CHARTER AMENDMENTS

To the Mayor and City Council of the City of San Marcos, Texas: We the undersigned voters of the City of San Marcos, Texas under Section 9.004 of the Local Government Code, hereby petition for an election to amend the Charter of the City of San Marcos to add the following as a separate section to our Charter to read as follows:

THE CITY OF SAN MARCOS including its departments, agents, and contractors,
SHALL NOT FLUORIDATE THE PUBLIC WATER SUPPLY

or accept any fluoridated water for use in the San Marcos water system, including but not limited to the addition of Hydrofluorosilicic Acid, Hexafluorosilicic Acid, Sodium Silicofluoride, or any other fluoride derivative. The City of San Marcos shall not purchase, install, or allow the installation of fluoridation equipment to be used in relation to the San Marcos municipal water supply or its distribution system.

*****PLEASE SIGN IF YOU ARE REGISTERED TO VOTE IN THE CITY OF SAN MARCOS, TEXAS. THANK YOU!!!**

Date Signed	Printed Name <u>(Please Print Clearly!)</u> ----- Signature (Required)	Street Address: ----- City, State, County: Zip:	Date of Birth or Voter Reg #	E-mail (optional) ----- Phone Number (optional)
___/___/201___	Printed Name ----- Signature	Street: ----- San Marcos, TX Zip: Circle County: Hays, Caldwell, Guadalupe	___/___/19___ or No. _____	Email: ----- Tele: _____
___/___/201___	Printed Name ----- Signature	Street: ----- San Marcos, TX Zip: Circle County: Hays, Caldwell, Guadalupe	___/___/19___ or No. _____	Email: ----- Tele: _____
___/___/201___	Printed Name ----- Signature	Street: ----- San Marcos, TX Zip: Circle County: Hays, Caldwell, Guadalupe	___/___/19___ or No. _____	Email: ----- Tele: _____
___/___/201___	Printed Name ----- Signature	Street: ----- San Marcos, TX Zip: Circle County: Hays, Caldwell, Guadalupe	___/___/19___ or No. _____	Email: ----- Tele: _____
___/___/201___	Printed Name ----- Signature	Street: ----- San Marcos, TX Zip: Circle County: Hays, Caldwell, Guadalupe	___/___/19___ or No. _____	Email: ----- Tele: _____

Please call Morgan Knecht tele: 512-665-3306 to pick up signed petitions or mail original signed (FAX'S and copies not allowed) to:
 Morgan Knecht, 235 Craddock Unit B, San Marcos TX 78666 by December 31, 2014. For more info about **communities for thriving water FLUORIDE-FREE SAN MARCOS**, contact Morgan via email: knecht.morgan@gmail.com or tele: 512-665-3306. **Thank You! We Love You!**