NO. 03-19-00304-CV

IN THE COURT OF APPEALS FOR THE
THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

STATE OF TEXAS,

Appellant,

v.

CITY OF DOUBLE HORN, ET AL.,

Appellees

On Appeal from the
424th Judicial District Court, Burnet County

AMICUS CURIAE BRIEF OF TEXAS MUNICIPAL LEAGUE IN SUPPORT OF APPELLEES

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IDENTITY AND INTEREST AMICUS CURIE

The Texas Municipal League (TML) is a non-profit association of over 1,160 incorporated cities. TML provides legislative, legal, and educational services to its members. TML advocate for the interests common to all Texas cities.

The International Municipal Lawyer's Association (IMLA) is a non-profit, non-partisan professional organization consisting of more than 3,000 members. IMLA's membership is comprised of local government entities, including cities, counties, state municipal leagues, and individual attorneys representing governmental interests. Since its establishment in 1935, IMLA has advocated for the rights and privileges of local government.

TML's and IMLA's position is that the district court did not err in denying The State of Texas' Petition for Leave to File an Information in the Nature of *Quo Warranto* to dissolve the legally incorporated City of Double Horn, nullify a validly held election and oust Double Horn's mayor and aldermen from office. This issue before the Court is of great significance to all Texas cities, TML and IMLA ("Amici") respectfully submit this brief and urge this Court to deny the request for oral arguments and affirm the decision of the trial court.

The author of this brief is a salaried employee of TML who has received no fee, other than ordinary salary paid by the TML, for the preparation of this brief.

ISSUE PRESENTED

The State of Texas ("Appellant") is appealing from the District Court's denial of its Petition for Leave to File an Information in the Nature of *Quo Warranto*. Appellant argues the District Court abused its discretion in denying its leave because it failed to apply the correct standard of probable ground within Chapter 66 of the Texas Civil Practice & Remedies Code.

SUMMARY OF ARGUMENT[1]

Amici's position is the District Court did not err in denying Appellant's leave to file an information for the nature of *quo warranto*. The City of Double Horn ("Double Horn") has all the characteristics of a village, town, or city in accordance with section 7.001 of the Texas Local Government Code and incorporated for a municipal purpose in accordance with section 7.002(b) of the Texas Local Government Code. Cases presented by Appellant in an attempt to show Double Horn was not an unincorporated town or village are distinguishable from Double Horn's incorporation. Many cities have incorporated having similar characteristics of a village, town, or city as those possessed by Double Horn when it incorporated.

Double Horn incorporated strictly for municipal purposes in accordance with section 7.002(b) of the Texas Local Government Code. Since its incorporation,

[1] *Amici* adopts, and incorporates by reference, the statement of facts in the City of Double Horn's Brief.

Double Horn has engaged in various governmental functions, has provided and set in motion plans to provide various governmental services to the entire corporate limits of the city. These various governmental functions not only benefit the residents of Double Horn, but also Spicewood Crushed Stone, LLC ("SCS"), 281 acres of commercial property intended to be used for rock quarry operations, included in the municipal boundaries of Double Horn.

ARGUMENT

I. Background

In 2018, Burnet County Judge James Oakley entered an order allowing voters to decide whether to incorporate Double Horn into a Type B general law city. A special called election to incorporate was held on December 6, 2018. The voters passed the proposition and Double Horn was incorporated into a Type B general law city. The election results were canvassed, confirmed, and County Judge Oakley entered the municipal incorporation into the records of the Burnet County Court. On February 12, 2019, Double Horn elected its mayor and aldermen pursuant to state law. Since being incorporated, Double Horn has engaged in various governmental functions such as passing an ordinance setting the municipal boundaries and the boundaries of its extraterritorial jurisdiction; establishing procedural rules, which include setting forth the duties of city officials and determining when open meetings will occur; adopting a comprehensive plan for

the city, including SCS's property; and taking steps towards establishing a municipal budget and an estimated ad valorem tax rate, to name a few.

On March 1, 2019, Appellant filed a petition, asking the District Court to grant leave to allow the Appellant to file an information to pursue a *quo warranto* action to ultimately declare Double Horn's incorporation invalid and nullify a validly held election installing Double Horn's mayor and aldermen in office. Appellee filed a response in opposition to Appellant's motion and the District Court held a hearing on April 3, 2019. The Honorable Evan Stubbs denied Appellant's petition, refused the information, and dismissed the case with prejudice.

II. The District Court Did Not Err When It Found That the State Has Not Met the "Probable Ground" Standard to Show That Double Horn Failed to Constitute a Town or Village Prior to Incorporation.

For a community in the State of Texas to incorporate as a Type B general law city, section 7.001 of the Texas Local Government Code states:

> A community may incorporate under this chapter as a Type B general law municipality if it:
>
> (1) constitutes an unincorporated town or village;
>
> (2) contains 201 to 9,999 inhabitants; and
>
> (3) meets the territorial requirements prescribed by Section 5.901.

The Texas Local Government Code does not have a definition for "town" or "village." However, case law has defined town or village as:

> 'A town or a village is an assemblage of habitations. A town is larger than a village and smaller than a city. A village is larger than a hamlet. Both have, to some degree, an urban character as distinguished from a rural character. There should be some degree of unity and proximity between the habitations so assembled to constitute a town or village. To be entitled to incorporate, the area of the town or village should be susceptible of receiving some municipal services.'

Rogers v. Raines, 512 S.W.2d 725, 729 (Tex. Civ. App.-Tyler 1974, writ ref'd n.r.e.), citing *Harang v. State ex rel. City of West Columbia,* 466 S.W.2d 8 (Tex. Civ. App.-Houston [14th Dist.] 1971, no writ).

A "town" has been further defined as "a collection of inhabited houses" and its population is distinguished from a rural population of "people scattered over the country, and engaged in agricultural pursuits, or some similar avocations, requiring a considerable area of territory for its support." *Rogers,* at 729, *citing State ex rel. Taylor v. Edison,* 13 S.W. 263, 264 (Tex. 1890). Further, a "'town' designates an aggregation of houses so near one another that the inhabitants may fairly be said to dwell together." *Rogers,* at 729, *citing* 87 C.J.S. Towns, Sec. 2, p. 7.

A "village" is less restrictive than a "town" and is "urban or semi-urban in its character." *Rogers,* at 729, *citing* Antieau, Municipal Corporation Law, Vol 1, Sec. 104. A "town" is therefore more urban in character than a "village."

To satisfy the town or village requirement, the district court was to consider the following:

(1) Whether Double Horn has an urban character as distinguished from a rural population of "people scattered over the country, and engaged in agricultural pursuits, or some similar avocations, requiring a considerable area of territory for its support";

(2) If there some degree of unity and proximity between the habitations; and

(3) Whether the area should be susceptible to receiving some municipal service.

Rogers, at 729 (citations omitted). Also, in evaluating factors (1) and (2), the district court was to consider whether there is a "compact center or a nucleus or population around which the town has developed." *Rogers*, at 730.

Using this test and various definitions, Double Horn meets the criteria of being an unincorporated town or village. As a subdivision before its incorporation, Double Horn consisted of 1,226.63 acres, under two square miles of property which contains approximately 105 residences and approximately 238 residents within its city limits. The residential area, which was known as "Double Horn Creek", makes up approximately 1,226 acres and constitutes a compact center and the nucleus of the town, with average lot sizes in the subdivision being in the range of residential medium density or estate lots – not large tracts used for agricultural purposes. Furthermore, there are many streets within the incorporated area. Factors (1) and (2) are definitely satisfied because Double Horn consists of "a collection of inhabited houses" and is not a rural population of "people scattered over the country."

The cases cited by the Appellant to prove that Double Horn was not an unincorporated town or village are quite distinguishable from Double Horn's incorporation. In *State ex rel. Needham v. Wilbanks*, 595 S.W.2d 849 (Tex. 1980), the Texas Supreme Court evaluated whether the community of Hallsburg's incorporation was valid. In doing so, the Court noted at the time of incorporation, Hallsburg had only three residences in the corporate city limits and the city's configuration was made up of 200 to 500-foot strips along 31 miles of roadway. *Id*. at 850. The Court found it was impossible to drive from the northern part of the city to the southern part without leaving the city limits. *Id*. Moreover, the Court noted the distance between residences, many over one mile and two over 3 ¼ miles apart, suggested the lack of a common nucleus. *Id*. at 851. In reaching its conclusion, the Court observed that "residences are wildly scattered, with only occasional clusters." *Id*. at 853.

In *Harang v. State ex rel. City of West Columbia*, *supra*, the court of appeals found Wild Peach's incorporation was invalid because the community did not constitute a town or village. The court reasoned that because the incorporation included only land adjacent to a roadway over a 15 mile stretch with clusters of homes separated by distances as much as one mile, the incorporation did not meet the compact center or a nucleus of population test. 466 S.W.2d at 11. Further, only

7 of the 100 habitations were included in an area that did not constitute a roadway strip. *Id*.

Double Horn is distinguishable from the aforementioned cases. The evidence showed Double Horn has a compact center or a nucleus of population around which the town has developed. Adopting Appellant's argument would require this court to believe the characteristic of being a town, village, or city requires the unincorporated area have gas stations, convenience stores, shops, schools, or churches within its boundaries. However, Appellant cites no statutes or case law that requires stores, business, or a public building for municipal incorporation. There is no requirement that a municipality has businesses or own or rent a city hall.

There have been several incorporations that were subdivisions which did not contain businesses, churches, or schools, much like Double Horn. Double Horn's incorporation is typical of the latest incorporations of cities that have happened in the State of Texas over the past 10 years. Most residential areas within the State of Texas began as subdivisions. These subdivisions contain from 25 to 500 homes generally situated outside the city limits of the respective city. Usually, these subdivisions provide a common area, such as a community center and/or parks. The utilities are provided either by the neighboring city or special districts, like a municipal utility district. Generally, these subdivisions have a property owners

association or home owners association that enforce the restrictive covenants of the subdivision, govern the business of the community, and hear and resolve complaints. These subdivisions are built to have a degree of unity and proximity between its inhabitants, Double Horn was no exception. In recent years, similarly-situated areas considered to be unincorporated towns or villages have incorporated.[2] Also, with the Texas Legislature limiting a city's ability to unilaterally annex areas within its extraterritorial jurisdiction, there will be many subdivisions that will decide to incorporate rather than request to be annexed or have to go through an annexation election.[3] As such, the Court did not err in denying The State of Texas' Petition for Leave to File an information in the Nature of *Quo Warranto* to dissolve the legally incorporated City of Double Horn.

The third factor in determining if an area is an unincorporated town or village is if the area is susceptible to receiving municipal services. Double Horn is distinguishable from the cases of incorporation that were found invalid because of their inability to receive municipal services.

In *Rogers v. Raines, supra*, the court found that the town of Tucker did not provide, and was unable to provide, any municipal services, other than possibly

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[2] Within the last ten years, the following cities have incorporated that were subdivisions and had little to no commercial business when they incorporated: Ivanhoe (2009), Coyote Flats (2010), Providence Village (2010), Coupland (2012), San Elizario (2013); Sandy Oaks (2014), Brock (2017), Dennis (2017), Road Runner (2017), and Gloster (2019).

[3] *See* TEX. LOCAL GOV'T CODE §§ 43.001 *et al*. *And see* Act of May 24, 2019, 86th Leg., R.S., H.B. 347 (to be codified as amendment to Tex. Local Gov't Code §§ 43.001 *et al*.).

providing garbage collection (and the court found even that was not feasible). *Id*. at 730. In *Needham v. Wilbanks, supra*, the court noted that Hallsburg was "not capable of furnishing municipal services on any reasonable basis" and that the narrow strip configuration of the incorporated area precluded the provision of municipal services. *Id*. at 852. As noted above, Hallsburg's configuration consisted of 200 to 500-foot strips along 31 miles of highway. *Id.* at 850. Further, the court noted that it was not possible to drive from the northern part of the city to the southern part without leaving the city limits, thus further inhibiting the provision of municipal services. *Id*.

Also, in *Harang v. State, supra*, the municipal functions the village of Wild Peach performed after its incorporation consisted of enacting a single ordinance regulating the disposal of garbage at a landfill site, which affected only those inhabitants that lived near the landfill. 466 S.W.2d at 12-13. Further, because the territory included strips of area tracking 15 miles of county roads, there was no ability to offer public works or public safety functions. *Id*. at 13.

Double Horn can be distinguished from these cases. Double Horn is not an irregularly shaped city nor is there a dispute concerning the concentration of residences within the city limits especially since Double Horn was a residential subdivision when it incorporated. Since its incorporation, Double Horn has provided municipal services such as interlocal government cooperation for the

provision of law enforcement and emergency services, garbage and recycling pickup, monitoring and reporting of air quality and seismic activity, and controlling traffic through monitoring and potential reduction of speed on roadways directly adjacent to SCS's property, among other things. These actions and future actions, such as establishing zoning, show that Double Horn is susceptible to municipal services as required by the third factor to determine if a community is an unincorporated town or village.

Presented with the information that Double Horn has a semi-urban character and unity and proximity between habitations within the incorporated area, as well as that the property within the city limits is not only susceptible, but is receiving, or in the process of receiving, many municipal services, the district court did not abuse its discretion when it found that the Appellant did not have "probable ground" and denied the Appellant's motion for leave to file an information to pursue a *quo warranto* action since the evidence proved that Double Horn satisfied the "town or village" requirement of section 7.001 of the Texas Local Government Code.

III. The District Court Did Not Abuse Its Discretion in Finding that the State Had Not Established a Probable Ground on its Argument that SCS's Property Was Not Included for Municipal Purposes.

Section 7.002(b) of the Texas Local Government Code requires an application to incorporate state the proposed boundaries and name of the municipality, and be accompanied by a plat of the proposed municipality containing only the territory to be used strictly for municipal purposes. The Appellant argues the district court erred when it denied its motion for leave to file the information because Double Horn's incorporation included SCS's property, approximately 281 acres, which was not to be "used strictly for municipal purposes."

Section 7.002 sets forth the requirements for an application to be presented to a county judge for an election to proceed. The county judge determines whether an application is satisfactory under section 7.002. If the application is satisfactory, the county judge orders an election. *See* TEX. LOCAL GOV'T CODE § 7.003. The county judge determined that Double Horn's application was sufficient to satisfy the requirements of section 7.002 of the Texas Local Government Code and ordered the incorporation election.

It should be noted that the voters approved the incorporation of Double Horn which included the municipal boundaries. The Texas Supreme Court, in *State ex rel. Wilkie v. Stien*, 36 S.W.2d 698 (1931), stated:

> The law gives to the qualified voters of the inhabitants of a town or village the right to fix the boundaries of the territory sought to be embraced in the proposed incorporated town or village. What territory shall, or shall not, be included is a question of fact to be determined by the people immediately interested… If the corporate limits of a town or village are adjusted in the reasonable exercise of the judgement of the voters, and the exclusion or inclusion of lands, belonging to those who might object thereto, was not arbitrarily done, … then in such a case the courts would be without power to interfere.

Id. at 699. In this case, the voters made it clear that they agreed with the municipal boundaries that were presented to them on the ballot. Appellant only alleged the SCS property was not included for municipal purposes. It seems Appellant wants the Court to ignore the voters' decision even though Appellant did not allege any capricious or unreasonable voter involvement.

Courts have repeatedly concluded the inclusion of vacant and uninhabited land, such as the SCS's property in this case, does not invalidate a municipal incorporation. The only requirement is property "included in a municipality must be physically constituted so that it can be made subject to municipal government." *See* 52 Tex. Jur. 3d Municipal Corporations § 36, citing *State v. Stein*, 36 S.W.2d 698 (Tex. Comm'n App 1931). "Although the territory sought to be incorporated must be capable of being used strictly for municipal purposes and must be likely to be so used within a reasonable time, the prospective expansion of the city or town may be taken into account." *Id*., citing *Stein* and *Merritt v. State*, 94 S.W. 372

(1906). Moreover, "the intention of present or immediate future use of all the included area for municipal purposes is not required." *Id*.

The Beaumont Court of Appeals in *State v. Masterson*, 228 S.W. 623 (Tex. Civ. App.—Beaumont 1921, writ ref'd) reasoned the inclusion of vacant and unoccupied land does not automatically invalidate a municipal incorporation. Rather, the court set forth factors to be used when evaluating the circumstances of the property at issue to determine whether it has the potential to be used for municipal purposes. In *Masterson*, the State brought a *quo warranto* proceeding to invalidate Sour Lake's incorporation because it included uninhabited property consisting of 76 acres of land used as an oil field. The 76 acres was covered by 93 standing oil derricks, as well as "pump stations, power plants, underground tanks, slush pits, saltwater drains and ditches, and other paraphernalia used in oil development." *Id*. Based on these factors, the court held Sour Lake could have no reasonable expectation or intention to do anything with the 76 acres to make the property suitable for municipal purposes. *Id*.

Unlike the City of Sour Lake, Double Horn intends and expects to govern SCS's property for municipal purposes. Double Horn has already passed a comprehensive plan, created a zoning ordinance, and began controlling traffic through monitoring and potential reduction on roadways directly adjacent to SCS's property. These factors alone indicate Double Horn has demonstrated its municipal

purpose for all property within its city limits. As such, the Court did not err in denying the Appellant's Petition for Leave to File an Information in the Nature of *Quo Warranto* to dissolve the legally incorporated City of Double Horn.

Additionally, several appellate courts have held that vacant, uninhabited, or agricultural land may be included in, and not invalidate, municipal incorporation. *See State v. Hoard*, 62 S.W. 1054 (Tex. 1901) (inclusion of 205 acres of uninhabited, cultivated land did not render incorporation invalid); *State v. Hellman*, 36 S.W.2d 1002 (Tex. Comm. App. 1931) (permissible to include unused land within corporate limits for future growth); *State v. Larkin*, 90 S.W. 912 (Tex. Civ. App. 1905, writ ref'd) (incorporation should not include an unreasonable amount of pasture, agricultural, and wood land therein); *State v. Town of Baird*, 15 S.W. 98 (1890) (115 acres of purely agricultural land did not invalidate incorporation, as the potential to expand is proper). The issue before this court is whether a reasonable amount of uninhabited land is property included for municipal purposes in the future. *See* 52 Tex, Jur. 2d Municipal Corporations § 36, *citing Merritt v State*, 94 S.W. 372 (1906).

Double Horn's incorporation of SCS's property is not excessive or unreasonable because Double Horn only included property within its municipal boundaries that fit within its overarching municipal purpose. SCS's property accounts for only 22.9% of the square acreage of Double Horn. This is

distinguishable from several court cases that have found the incorporation of uninhabited land excessive to be for a municipal purpose. *See Judd v. State*, 62 S.W. 543 (Tex. Civ. App. 1901) (an incorporation was invalid where seventy-five percent of property was uninhabited, agricultural land); *State ex rel. Brauer v. City of Del Ri*o, 92 S.W.2d 287, 290 (Tex. Civ. App.—Eastland, 1936) (inclusion of 2,500 acres of "non-urban agriculture land, never part of the city, and never intended to be such" was improper); *Merritt v. State*, 94 S.W. 372 (Tex. Civ. App. 1906) (inclusion of eighty percent of the incorporated area improper since it was not occupied by residences or other buildings nor is or was same suitable for use or ever intended or likely to be used for town purposes).

As previously discussed, Double Horn had a municipal purpose when it included SCS's property in its city limits. Moreover, this purpose was displayed as an exercise of its police power when it established a comprehensive plan and created a zoning ordinance.[4] Under Chapter 211 of the Texas Local Government Code, cities have the power to create zoning within their city limits. Zoning is a

[4] TEX. LOCAL GOV'T CODE § 211.004 requires zoning regulations must be adopted in accordance with a comprehensive plan and must be designed to:
(1) Lessen congestion in the streets;
(2) Secure safety from fire, panic, and other dangers;
(3) Promote health and the general welfare;
(4) Provide adequate light and air;
(5) Prevent the overcrowding of land;
(6) Avoid undue concentration of population; or
(7) Facilitate the adequate provision of transportation, water, sewers, schools parks, and other public requirements.

quintessential governmental function with "the purpose of promoting the public health, safety, morals, or general welfare". TEX. LOCAL GOV'T CODE § 211.001. Specifically, a city can regulate:

> (1) The height, number of stories, and sizes of buildings and other structures;
> (2) The percentage of a lot that may be occupied;
> (3) The size of yards, courts, and other open spaces;
> (4) Population density;
> (5) The location and use of buildings, other structures, and land for business, industrial, residential, or other purposes; and
> (6) The pumping, extraction, and use of groundwater by persons other than retail public utilities for the purpose of preventing the use or contact with groundwater that present and actual potential threat to human health.

TEX. LOCAL GOV'T CODE § 211.003.

The United States Supreme Court finds that "[t]he zoning function is traditionally a governmental task requiring the 'balancing [of] numerous competing considerations,' and courts should properly 'refrain from reviewing the merits of [such] decisions, absent a showing of arbitrariness or irrationality.'" *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977). The Texas Supreme Court finds that "[z]oning is a governmental function that allows 'a municipality, in exercise of its legislative discretion, to restrict the use of private property.'" *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 792 (Tex. 1982); *see Mayhew v.*

Town of Sunnyvale, 964 S.W.2d 922, 933 (Tex. 1998) ("Zoning decisions are vested in the discretion of municipal authorities; courts should not assume the role of a super zoning board."). Consequently, Double Horn validly exercised its municipal police power over all the property within its city limits, including SCS's property.

In accordance with section 211.001 of the Texas Local Government Code, all cities have a duty to protect the public health, safety and welfare of all of its inhabitants through zoning. Further, given the amount of uninhabited property within the city limits, Double Horn has demonstrated the ability and desire to continue to provide municipal services. Through the exercise of its police powers in the form of zoning, Double Horn has demonstrated it did and does have a municipal purpose in the incorporation of the SCS's property and therefore has not violated section 7.002(b) of the Texas Local Government Code. The district court did not err in finding the Appellant failed to establish "probable ground" for leave to file an information in the nature of *quo warranto* under Chapter 66 of the Texas Civil Practice & Remedies Code.

PRAYER

TML and IMLA respectfully request that this Court affirm the district court in all respects.

Respectfully submitted,

/s/ *Zindia T. Thomas*

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief of Amici Curiae has been served upon the following individuals this 6 day of August, 2019:

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4, I hereby certify that this brief contains 4,998 words. This is a computer-generated document created in Microsoft Word, using a minimum 14-point typeface for all text, except footnotes which are 12-point typeface. In making this certificate of compliance, I have relied on the word count provided by the software used to prepare the document.

/s/ *Zindia T. Thomas*
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