# Cause No. 05-15-01108-CV

# IN THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

**ARCH RESORTS, LLC,**
*Appellant/Cross-Appellee,*

v.

**CITY OF MCKINNEY, TEXAS,**
*Appellee/Cross-Appellant.*

*On Appeal from the 219th Judicial District Court*
*Collin County, Texas*

*Trial Court Cause No. 219-01855-2015,*
*Honorable Scott J. Becker*

# BRIEF OF *AMICUS CURIAE* TEXAS PUBLIC POLICY FOUNDATION

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## STATEMENT OF INTEREST OF *AMICUS*

The Texas Public Policy Foundation (the "Foundation") is a non-profit, non-partisan research organization dedicated to promoting liberty, personal responsibility, and free enterprise through academically-sound research and outreach.

Since its inception in 1989, the Foundation has emphasized the importance of limited government, private property rights, and freedom from regulation. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of government on Texans.

It is with this background and experience that the Foundation files this Brief in support of Appellant/Cross-Appellee Arch Resorts, LLC ("Arch Resorts"). The Foundation's Brief supplements Arch Resort's legal arguments and contextualizes the case within the larger policy framework. The Foundation requests that this Court strictly construe the Legislature's grant of enumerated municipal powers and deny the City of McKinney's attempt to enact broad "health, safety, and welfare" regulations in areas outside its corporate limits.

The Foundation has paid all of the costs and fees incurred in the preparation of this brief.

## I. SUMMARY OF ARGUMENT

Cities — whether home rule or general law — do not have inherent authority to govern outside their city limits. Grants of authority to regulate in a city's extraterritorial jurisdiction ("ETJ") are thus strictly construed against the government and in favor of the landowner. Here, the Legislature granted limited, enumerated powers to cities to regulate subdivision plats within their ETJ — explicitly stating that such grant did not permit the regulation of land use. Yet, the City of McKinney claims that the Legislature has charged it with ensuring the general "health, safety, and welfare" of citizens in the ETJ and conveyed the implicit police power necessary to execute broad safety regulations. This allegation is not only untrue but contrary to the public policy of this State. Texas promotes *self-*governance and emphasizes "the consent of the governed." It does not encourage tyranny over neighboring communities. This Court should affirm this statewide policy and uphold the importance of private property rights by strictly construing the Legislature's narrow grant of power to cities over their ETJ and by rejecting Appellee's argument that cities can enact broad "health, safety, and welfare" regulations in their ETJ.

## II. ARGUMENT

### A. MUNICIPAL AUTHORITY OUTSIDE CITY LIMITS IS NOT INHERENT AND MUST BE STRICTLY CONSTRUED.

#### 1. Generally, Municipal Power Ends at the City's Corporate Boundaries.

Although home rule cities are typically characterized by their unenumerated powers, such broad authority ends at the city limits. Tex. Const. art. XI, § 5. Home rule municipalities may use their imaginations to enact rules that further the "health, safety, and welfare" of their own communities, but they do not have the inherent power to reach beyond their jurisdictions.[1] *See, e.g., FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868, 890, 902 (Tex. 2000) (Abbott, J., dissenting) ("[A] city's authority to regulate land development in its ETJ is wholly derived from a legislative grant of authority"); *City of College Station v. Turtle Rock Corp*., 680 S.W.2d 802, 805 (Tex. 1984) ("A city may enact reasonable regulations to promote the health, safety, and general welfare of its people"). Municipal authority itself implicitly relies on the restriction of other cities to their territorial limits, and is "necessarily local." *See Ex parte Ernest*, 136 S.W.2d 595, 597 (Tex. Crim. App. 1939) ("The jurisdiction or power exercised by a municipal corporation is and must be confined to the territory of its situs (except where authorized for purely local

[1] It should be noted, however, that even home rule cities may not enact "any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Tex. Const. art. XI, § 5.

purposes), to its inhabitants, and to its corporate entity, and cannot be divorced therefrom either in fact, thought, or law. Municipal ordinances are, therefore, necessarily local in their application, operating usually only in the territory of the municipality in which they are enacted and without force beyond it.") (internal quotations omitted).

This restriction of municipal power is cemented in Texas law and statutes. *See, e.g, City of College Station v. Turtle Rock Corp*., 680 S.W.2d 802, 805 (Tex. 1984); *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868, 890, 902 (Tex. 2000) (Abbott, J., dissenting, joined by Justices Hecht and Owen); *Bizios v. Town of Lakewood Vill*., 453 S.W.3d 598, 600 n.5 (Tex. App.—Fort Worth 2014, pet. granted) (citing Justice Abbott's dissent, and stating, "[a] municipality's power normally ends at the city limit and does not automatically include the ETJ; rather, a city may only extend its authority to the ETJ if authorized by the State."); *Town of Annetta S. v. Seadrift Dev., L.P.,* 446 S.W.3d 823, 826 (Tex. App.—Fort Worth 2014, pet. denied)(citing and quoting Justice Abbott's dissent); *City of Lubbock v. Phillips Petroleum Co.,* 41 S.W.3d 149, 159 (Tex. App.—Amarillo 2000, no pet.) ("[a] city may only exercise its powers within its corporate limits unless its authority is expressly extended."); *City of W. Lake Hills v. Westwood Legal Def. Fund*, 598 S.W.2d 681, 686 (Tex. Civ. App.—Waco 1980, no writ) ("All powers granted to a

city can only be exercised within the corporate limits of a city unless the power is expressly extended to apply to areas outside these limits.").

Indeed, nearly a century ago, the Fort Worth Court of Appeals recognized that:

> [M]unicipal corporation cannot exercise its powers outside its limits, except when granted express legislative authority so to do, for all power and privileges conferred by the Constitution and statutes on municipal corporations must be held to be limited in their exercise to the territory embraced in the municipal boundaries, and for the benefit of the inhabitants of the municipality, unless the Constitution or statute expressly provides that such power and privilege may be exercised beyond the corporate boundaries and for the benefit of nonresidents.

*City of Sweetwater v. Hamner*, 259 S.W. 191, 195 (Tex. Civ. App.—Fort Worth 1923), *writ dismissed* (Feb. 1, 1924).

Even the City of McKinney admits that "a city can exercise its powers only within the city's corporate limits unless power is expressly or impliedly extended by the Texas Constitution or by statute to apply to areas outside the limits." Brief for Appellee/Cross-Appellant at 18. To put it simply, home rule cities have the power of *self*-governance; not tyranny over neighboring areas. *See, e.g., City of Carrollton v. Texas Commn. Envtl. Quality*, 170 S.W.3d 204, 208 (Tex. App.—Austin 2005, no pet.) ("Cities adopting a home rule charter have the full power of *self-government* except that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws

enacted by the Legislature of this State") (emphasis added); *Ex parte Ernest*, 136 S.W.2d 595, 597 (1939) ("As a general rule a municipal corporation's powers cease at municipal boundaries.").[2]

### 2. Enumerated Grants of Municipal Power are to be Strictly Construed Against the Government and In Favor of the Landowner.

As home rule municipalities generally have no power outside their corporate boundaries, they must rely on specific grants of authority from the Texas Legislature to regulate land in their ETJ. *See supra,* Section I(A). Such limited grants of power must "be strictly construed, [and] the power should not be enlarged by liberal construction." *Hammond v. City of Dallas*, 712 S.W.2d 496, 498 (Tex. 1986) (interpreting the grant of power given by the people to the city under the city's charter); *Ex parte Ernest*, 136 S.W.2d at 597 ("a municipal corporation's powers cease at municipal boundaries and cannot, without plain manifestation of legislative intention, be exercised beyond its limits."); *Texas River Barges v. City of San Antonio*, 21 S.W.3d 347, 354-55 (Tex. App.—San Antonio 2000, pet. denied) ("It has been held that where the power of a municipal corporation is in question, the

[2] Although *Ex parte Ernest* is a criminal case, the Court's discussion of the geographic reach of municipal authority is applicable to civil matters as well. *See, e.g., Town of Annetta S. v. Seadrift Dev., L.P.*, 446 S.W.3d 823, 826 (Tex. App.—Fort Worth 2014, pet. denied) (quoting *Ex parte Ernest*'s rule that "a municipal corporation's powers cease at municipal boundaries," in its analysis of a town regulation on minimum lot size in its ETJ); *City of W. Lake Hills v. Westwood Legal Def. Fund*, 598 S.W.2d 681, 686 (Tex. Civ. App.—Waco 1980, no writ)(citing *Ex parte Ernest* for the same rule in its analysis of city regulations on private sewage facilities in the ETJ).

grant of power will be strictly construed, and that such power should not be enlarged by a liberal construction"); *Willman v. City of Corsicana*, 213 S.W.2d 155, 157 (Tex. Civ. App.—Waco 1948), *aff'd sub nom. City of Corsicana v. Willmann*, 147 Tex. 377, 216 S.W.2d 175 (1949) ("where the power of a municipal corporation is in question, the grant of power will be strictly construed"); *City of Paris v. Sturgeon*, 50 Tex. Civ. App. 519, 523 (1908, no writ) ("A municipal corporation can exercise only such powers as are expressly or impliedly conferred upon it by its charter or other legislative act when strictly construed."); *see also Town of Annetta South v. Seadrift Development, L.P.,* 446 S.W.3d 823, 825 (Tex. App.—Fort Worth, 2014, pet. filed) ("Because a municipality possesses authority to regulate land development in its ETJ only to the extent it is legislatively granted that authority, legislatively-created express limitations to that grant of authority are construed strictly against the authority of the municipality and in favor of the land owner."); *Bizios v. Town of Lakewood Village*, 453 S.W.3d 598, 600 (Tex. App.—Fort Worth 2014), *review granted* (Jan. 22, 2016). Thus, the Legislature's narrow grant of power to cities in Texas Local Government Code Chapter 112 must be strictly construed.

### 3. Strict Construction of Section 212.003 Does Not Allow the City to Regulate Land Use in the ETJ.

Strict construction requires "a limited, narrow, or inflexible reading and application of [the statute]." *Cain v. State*, 882 S.W.2d 515, 519 (Tex. App.—Austin

1994, no writ); *In re Hecht*, 213 S.W.3d 547, 572 (Tex. Spec. Ct. Rev. 2006). Any doubts are resolved "against the authority of the municipality and in favor of the landowner." *Bizios v. Town of Lakewood Village*, 453 S.W.3d 598, 600 (Tex. App.—Fort Worth 2014), *review granted* (Jan. 22, 2016); *Texas River Barges v. City of San Antonio*, 21 S.W.3d 347, 354-55 (Tex. App.—San Antonio 2000, pet. denied).

Under a strict construction of Texas Local Government Code Chapter 212, Texas law does not authorize the extension of municipal building and zoning regulations to land outside city limits. The only grant of authority relevant to the case at hand allows the city to regulate "plats and subdivisions of land." Tex. Loc. Gov't Code §§ 212.002-.003; *See* Brief for Appellee/Cross-Appellant at 20. Not only is the grant of municipal authority over ETJ land use notably absent in this section, but the Legislature explicitly prohibits cities from regulating "the use" of buildings or land in the ETJ. Tex. Loc. Gov't Code § 212.003. Thus, Chapter 212 gives the City of McKinney the authority to do exactly what the statute says: regulate the subdivision of land. *Id.* A "limited, narrow, or inflexible reading" of this language does not allow the City to extend its building codes to the ETJ. *See* Brief for Appellant/Cross-Appellee at 29-36.

## B. STATE POLICY DOES NOT ALLOW CITIES FULL GOVERNING POWER OVER CITIZENS OUTSIDE CITY LIMITS.

In addition to disputing the strict construction of its explicit ETJ powers in Chapter 212, the City also alleges that it has substantial unspoken, incidental

authority to govern land in the ETJ. Brief for Appellee/Cross-Appellant at 19-20, 28-29. In fact, McKinney claims that the State has given municipal governments sufficient unspoken incidental powers as are necessary to "promote and protect the general health, safety, and welfare of persons residing in and adjacent to a municipality." *Id.* The State has done no such thing.

Local Government Code Section 42.001 — which the City of McKinney points to as a grant of "health, safety, and welfare" authority — is just a purpose statement; a description of the intent behind the enumerated powers authorized in the subsequent chapter. *See* Tex. Loc. Gov't Code § 42.001 (titled "Purpose of Extraterritorial Jurisdiction.") "The legislature declares it the policy of the state to designate certain areas as the extraterritorial jurisdiction of municipalities," *Id.* No direct grant of power arises from this statement of purpose.

The Texas Legislature simply justified its desire to create the concept of extraterritorial jurisdiction by referencing the "health, safety, and welfare" of those living in such areas. Tex. Loc. Gov't § 42.001 ("Purpose of Extraterritorial Jurisdiction. The legislature declares it the policy of the state to designate certain areas as the extraterritorial jurisdiction of municipalities to promote and protect the general health, safety, and welfare of persons residing in and adjacent to the municipalities."). A purpose statement is not equivalent to a grant of broad authority, nor can it be used to create ambiguity so as to justify a broad interpretation of the

statute. Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 399 (2012); ("it must be clearly understood that these aspects of the statute [such as the preamble] are not an operative part of the statute itself"); *Woodruff v. City of Laredo*, 686 S.W.2d 692, 695 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) ("While the caption of an Act may be of assistance in ascertaining legislative intent, it is not a part of the statute in the sense that resort to it may be had to control the meaning of clear and unambiguous language which appears in the body of the Act."); *Winnebago Indus., Inc. v. Reneau*, 990 S.W.2d 292, 294 (Tex. App.—Austin 1998, pet. denied) ("The policy section like the preamble is available for the clarification of ambiguous provisions of the statute, but may not be used to create ambiguity.").

Furthermore, if the Legislature had granted cities broad authority over — and corresponding responsibility for — the "health, safety, and welfare" of the ETJ, municipalities would have full police powers in areas outside their borders. *See, e.g., John v. State,* 577 S.W.2d 483, 484-85 (Tex. Crim. App. 1979) ("A city's police powers extend to the reasonable protection of the public health, safety and welfare. Pursuant to its police power, a city is authorized to enact ordinances tending to promote the general welfare, health, or safety of the public.") (internal quotations omitted); *City of Allen v. Pub. Util. Com'n of Texas*, 161 S.W.3d 195, 202 (Tex. App.—Austin 2005, no pet.) (describing power used "to protect the health, safety,

and welfare" of citizens as "an exercise of police power"). If the City of McKinney were truly responsible for the "health, safety, and welfare" of those in the ETJ, it would not limit itself to the extension of simple building regulations and permits. Rather, such a grant of authority would justify — if not mandate — the extension of zoning regulations, criminal penalties, and other "safety" ordinances to the ETJ as well. *Compare id.*, *with* Tex. Loc. Gov't Code § 112.002 ("[I]n its extraterritorial jurisdiction a municipality shall not regulate. . . the use of any building or property for business, industrial, residential, or other purposes . . . . A fine or criminal penalty prescribed by the ordinance does not apply to a violation in the extraterritorial jurisdiction.").

This logical extension of the City's argument demonstrates its fallacy. The Legislature did not "charge" the City of McKinney with the responsibility to protect the "health, safety, and welfare" of ETJ residents in every facet of their existence, nor did it grant McKinney broad authority to do so. *Contra* Brief for Appellee/Cross-Appellant at 20. The purpose statement contained in Texas Local Government Code Section 42.001 simply explains the delegation of specific enumerated powers to municipalities over neighboring communities; it does not justify the blanket use of authority outside cities' corporate limits.

Ultimately then, municipalities can only regulate land outside city limits to the extent permitted by the Legislature's strictly-construed grants of power. Any

attempt to usurp additional authority thwarts the Legislature's intent, invades landowners' private property rights, and undermines the public policy of this State.

## III. CONCLUSION AND PRAYER

THEREFORE, the Texas Public Policy Foundation respectfully requests this Court reaffirm the State's public policy emphasis on private property rights, limited municipal powers, and *self*-governance by rejecting the City of McKinney's attempt to broadly interpret its power under state statute and govern exercise police power outside its municipal boundaries.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this document complies with the typeface requirements of Tex. R. App. P. 9.4(e), because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), because it contains 2,596 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

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## CERTIFICATE OF SERVICE

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