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VILLAGE INCORPORATION: A SOLUTION TO UNDESIRABLE LAND USES?

West Columbia and Brazoria, Texas, jointly purchased a 100-acre tract of land in a rural residential area known as Wild Peach,[1] to be used as a land-fill garbage disposal site. The inhabitants of Wild Peach, learning of the intended use of the land, incorporated and passed an ordinance, the effect of which prohibited West Columbia and Brazoria from dumping garbage in that area. West Columbia and Brazoria challenged the validity of this incorporation, alleging that it failed to comply with relevant statutory provisions[2] in that (1) the area allegedly incorporated contained fewer than 200 inhabitants; (2) even if there were more than 200 inhabitants, parts of the existing village were arbitrarily excluded; and (3) part of the allegedly incorporated area was not intended to be used strictly for town purposes. Texas statutes governing incorporation limit the amount of area that can be included in a village,[3] set a population minimum[4] and stipulate that the area included must be "intended strictly for town purposes."[5]

The Texas Court of Civil Appeals in *Harang v. State ex rel. City of West Columbia*[6] held the incorporation void. The *Harang* court, in part, based its decision on its determination that Wild Peach was not a village "in fact" and, therefore, could not meet statutory popu-

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1. The inhabitants of Wild Peach each owned from one to 25 acres of land. The population within the village boundaries was 374 while that of the whole community was approximately 1500 to 2000.

2. TEX. REV. CIV. STAT. arts. 971, 1133-53(a) (1963). The court based its opinion on articles 1133-34. Article 1134 provides, in part:

> If the inhabitants of such town or village desire to be so incorporated, at least twenty residents thereof, who would be qualified voters under the provisions of this chapter shall file an application for that purpose in the office of the county judge of the county in which the town or village is situated, stating the boundaries of the proposed town or village, the name by which it is to be known when incorporated, and accompany the same with a plat of the proposed town or village including therein no territory except that which is intended to be used for strictly town purposes. . . .

3. TEX. REV. CIV. STAT. art. 971 (1963).

4. *Id.* art. 1133.

5. *Id.* art. 1134.

6. 466 S.W.2d 8 (Tex. Civ. App. 1971).

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lation requirements. The court cited the unusual shape of the "village"[7] and the fact that the residences within the community were widely dispersed, often with a mile or more between them. These two factors drew into question the susceptibility of the area for the receipt of municipal services. Without such susceptibility, a question arose whether the territory included was "intended strictly for town purposes"[8] and whether there was a need for incorporation. The court also found no apparent justification for the exclusion of that part of the whole Wild Peach community which was not included within the "village" boundaries. No judgment was made as to the problems and equities raised by the action which precipitated the incorporation, *i.e.*, the purchase of land to be used as a garbage disposal site for two neighboring towns.

Generally, the Texas incorporation statutes seem to be in accord with standards codified in other states. Many statutes do nothing more than set minimum limits in population and population density.[9] Those states which do have additional requirements often embody them in such ambiguous terms as "reasonable"[10] or "proper,"[11] and thus leave considerable room for court interpretation. Several statutes also contain requirements of a certain level of assessed property values (to insure the area to be incorporated has a sufficient tax base to support incorporation purposes)[12] and prohibitions of new municipalities within a certain distance of existing ones.[13] A few states, recognizing the problems that appear with "incorporation-made-easy" statutes, have enacted more restrictive statutes which set

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7. In attempting to meet statutory area and population requirements, the incorporators included strips of land adjacent to 15 miles of county roads and the land-fill site. There was only one bulk area and it only contained seven homes.

8. TEX. REV. CIV. STAT. art. 1134 (1963).

9. Mandelker, *Standards for Municipal Corporations on the Urban Fringe*, 36 TEXAS L. REV. 269, 277 (1958). *See, e.g.*, ARK. STAT. ANN. § 19-101 (1968); FLA. STAT. ANN. § 165.01 (Supp. 1970), *amending* FLA. STAT. ANN. § 165.01 (1966); MICH. STAT. ANN. § 5.1202 (1961); N.J. REV. STAT. § 40:123-1 (1967); UTAH CODE ANN. § 10-2-1 (1953); VT. STAT. ANN. tit. 24 § 1301 (1967).

10. *See, e.g.*, MO. ANN. STAT. § 80.020 (1953).

11. *See, e.g.*, PA. STAT. ANN. tit. 53, § 45206 (Purdon 1957).

12. *See, e.g.*, MISS. CODE ANN. § 3374-03 (1956); N.C. GEN. STAT. § 160A-9.1 (1972); OHIO REV. CODE ANN. § 707.02 (Page Supp. 1970); TENN. CODE ANN. § 6-1803 (Supp. 1970).

13. *See, e.g.*, ALA. CODE tit. 37, § 10 (Supp. 1969); ARIZ. REV. STAT. ANN. § 9-101.01 (Supp. 1972); IOWA CODE ANN. § 362.1 (Supp. 1972); NEB. REV. STAT. § 17-201 (1970); WASH. REV. CODE ANN. § 35.02.010 (Supp. 1970).

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out explicit requirements and guidelines.[14] One such example is Virginia,[15] whose statute is so restrictive that it seems to have made it all but impossible for any governmental unit below the county level to incorporate.[16] The Virginia example is not typical, however, and most statutes give only general guidelines for courts to follow in judging the validity of incorporation.[17]

Because of the generality of the statutes, many standards have been formulated by courts to give greater insight into legislative intent.[18] The standards applied by most courts are similar to those relied upon in *Harang*. The court-made criteria for judging incorporations fall roughly into two general categories. One set of considerations involves whether or not a "village" actually exists (including the question of whether or not the natural boundaries of the community coincide with the proposed incorporation boundaries); the other involves the court's objective determination of the need for incorporation.

The existence of some sort of urban area is generally a definite prerequisite to village incorporation.[19] Courts often look to the con-

14. *See, e.g.*, CAL. GOV'T CODE § 54774 (Deering Supp. 1972); KAN. GEN. STAT. ANN. § 15-116 (1964); MINN. STAT. ANN. § 414.02 (Supp. 1972).

15. VA. CODE ANN. § 15.1-967 (1950). A portion of the statute says:
(1) It will be to the interest of the inhabitants within the proposed town;
(2) The prayer of the petition is reasonable;
(3) The general good of the community will be promoted;
(4) The number of inhabitants of the proposed town exceeds 1000;
(5) The area of land designated to be embraced within the town is not excessive;
(6) The population density of the county in which such community is located does not exceed 125 persons per square mile according to the last preceding United States census, or other census directed by the court; and
(7) That the services required by the community cannot be provided by the establishment of a sanitary district, or under other arrangements provided by law, or through extension of existing services provided by the county in which such community is located.

16. D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 298 (2d ed. 1971).

17. *See* notes 9-13 *supra*.

18. Some courts adhere strictly to the statutes. If the procedural requirements have been met, they will not upset an incorporation however absurd it may be. *See, e.g.*, People *ex rel.* Russell v. Town of Loyalton, 147 Cal. 774, 82 P. 620 (1905); State *ex rel.* Cole v. City of Hendersonville, 223 Tenn. 365, 445 S.W.2d 652 (1969). *But cf.* State *ex rel.* Holland v. Lammers, 113 Wis. 398, 89 N.W. 501 (1902).

19. *See, e.g.*, Larkin v. Bontatibus, 145 Conn. 570, 145 A.2d 133 (1958); Town of Enterprise v. State, 29 Fla. 128, 10 So. 740 (1892); People *ex rel.* Shumway v. Bennett, 29 Mich. 451 (1874); Pyne Borough Incorporation, 6 Pa. Dist. 353 (1897); State *ex rel.* Town of Holland v. Lammers, 113 Wis. 398, 89 N.W. 501 (1902).

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tiguity of the land included, the proximity of the residences and the degree of common interest among the inhabitants[20] for clues as to the presence of a "village." The court, in *In re Incorporation of Village of Oconomowac Lake*,[21] spoke to this issue:

> If an area is not a village, as conceived by the framers of the constitution, then area and density of population *per se* do not make it so. The verb "to incorporate" in itself implies a blending into a consistent, harmonious whole. A village is a political, sociological, and geographic unit.[22]

This is a fairly comprehensive statement of what factors courts have considered in testing the validity of new incorporations. More specifically, they have looked to such facts as the physical shape of the "village,"[23] the means for and presence of social intercourse within the boundaries,[24] the likelihood of future growth,[25] the presence of a business or commercial center[26] and the character of any unplatted

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20. The court, in State *ex rel.* Township of Copley v. Village of Webb, 250 Minn. 22, 83 N.W.2d 788 (1957), in attempting to gauge the amount of community feeling present, cited the presence of civic groups and organizations, and stated that it could find no more tangible evidence of an existing community spirit or interest.

21. 270 Wis. 530, 72 N.W.2d 544 (1955).

22. *Id.* at 536, 72 N.W.2d at 547. *See* Cutler, *Characteristics of Land Required for Incorporation or Expansion of a Municipality*, 1958 WIS. L. REV. 6, 22 indicating that *In re Village of Oconomowac Lake* restricted the doctrine announced in State *ex rel.* Town of Holland v. Lammers, 113 Wis. 398, 89 N.W. 501 (1902), which had governed Wisconsin incorporations for over 50 years.

23. *See, e.g.*, Western Nat'l Bank v. Village of Kildeer, 19 Ill. 2d 342, 167 N.E.2d 169 (1960); State *ex rel.* Loy v. Mote, 48 Neb. 683, 67 N.W. 810 (1896); Hoye v. Schaefer, 109 Ohio App. 489, 157 N.E.2d 140 (1959); Scharping v. Johnson, 32 Wis. 2d 383, 145 N.W.2d 691 (1966). *But see* People v. Kramer, 21 Ill. 2d 392, 172 N.E.2d 757 (1961) where the court stated: "Although there may be problems arising in the administration of such an irregular territory, such matters are a function of the legislature and not the courts."

24. This consideration has been found especially in Wisconsin. *See, e.g., In re* Village of Oconomowac Lake, 270 Wis. 530, 72 N.W.2d 544 (1955); *In re* Village of St. Francis, 209 Wis. 645, 245 N.W. 840 (1932); *In re* Village of Chenequa, 197 Wis. 163, 221 N.W. 856 (1928).

25. *See, e.g.*, State *ex rel.* Ervin v. City of Oakland Park, 42 So. 2d 270 (Fla. 1949); State *ex rel.* Burnquist v. Village of St. Anthony, 223 Minn. 149, 26 N.W.2d 193 (1947); *In re* Borough of Churchill, 111 Pa. Super. 380, 170 A. 319 (1934); Fenton v. Ryan, 140 Wis. 353, 122 N.W. 756 (1909).

26. *See, e.g.*, State *ex rel.* Township of Copley v. Village of Webb, 250 Minn. 22, 83 N.W.2d 788 (1957); State *ex rel.* Burnquist v. Village of St. Anthony, 223 Minn. 149, 26 N.W.2d 193 (1947).

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land within the "village" limits.[27] Because Wild Peach did not fulfill even the minimum statutory requirements, the *Harang* court did not find it necessary to reach these questions. It did consider, however, the exclusion of part of the existing community from the new municipality and found it to be suspect. Unless such an exclusion is due to natural, social or economic factors, many courts have rejected such incorporation plans.[28] However, in a recent case,[29] the Tennessee Supreme Court held contrary to this view and allowed a municipality which was eighteen one-hundredths of a square mile in size to incorporate in a densely populated area which was much larger.

The need to incorporate is often judged by the need for municipal services.[30] Unless there is a need to change the existing situation, courts have held that the area has no justifiable reason for seeking incorporation and the requisite powers that accompany it.[31] The already existing availability of municipal services outside the "village" limits has also been a factor in the determination of the presence of a need.[32] In *Harang*, the court doubted the need or feasibility of providing municipal services for the inhabitants of Wild Peach. The fact that Wild Peach had taken only one action as a village since incorporation—passage of the ordinance regulating use of the land-fill site—also raised doubts as to its need for such facilities.

A factor which courts are increasingly considering is the effect of

27. *See, e.g.*, Arnold v. McCarroll, 200 Ark. 1094, 143 S.W.2d 35 (1940); McKeon v. City of Council Bluffs, 206 Iowa 556, 221 N.W. 351 (1928); State *ex rel.* Childs v. Village of Minnetonka, 57 Minn. 526, 59 N.W. 972 (1894); State *ex rel.* Hammond v. Dimond, 44 Neb. 154, 62 N.W. 498 (1895); State *ex rel.* Rushing v. Town of Baird, 79 Tex. 63, 15 S.W. 98 (1890).

28. *See, e.g.*, Raucher v. Frost, 53 S.W. 318 (Ct. Ch. App. Tenn. 1899); State v. Perkins, 360 S.W.2d 555 (Tex. Civ. App. 1962), *rev'd on other grounds*, 367 S.W.2d 140 (Tex. Sup. Ct. 1963); Bennett v. Garrett, 132 Va. 397, 112 S.E. 772 (1922).

29. State *ex rel.* Cole v. City of Hendersonville, 223 Tenn. 365, 445 S.W.2d 652 (1969).

30. Municipal services usually include such things as police and fire protection, sewage systems, health protection, education, recreation, zoning, pollution control and utility services. Probably a combination of these and similar services would be necessary to constitute sufficient need.

31. *See, e.g.*, State *ex rel.* Pickrell v. Downey, 102 Ariz. 360, 430 P.2d 122 (1967); State *ex rel.* Simpson v. Village of Alice, 112 Minn. 330, 127 N.W. 1118 (1910).

32. *See, e.g.*, State *ex rel.* Burnquist v. Village of North Pole, 213 Minn. 289, 6 N.W.2d 458 (1942); *In re* Village of St. Francis, 209 Wis. 645, 245 N.W. 840 (1932). For a codification of such a standard *see* ALASKA STAT. § 29.10.019(c) (Supp. 1971).

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an incorporation on surrounding areas.[33] One commentator calls this the "broad community" test.[34] This consideration is intended to prevent a heavily populated area from being indefinitely subdivided at the whim of a limited group of people, thereby causing problems for the region as a whole. Since this test is secondary to the determination of the existence of a "village," the *Harang* court did not find it necessary to consider it.

Some states have moved away from the traditional judicial review of incorporations to review by administrative agencies, feeling that while court regulation of incorporation is better than no regulation, an expert administrative body is preferable.[35] The result in *Harang* probably would not change under such a system, however, as such agencies still follow the same incorporation statutes and apply many

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33. This approach has been codified in VA. CODE ANN. § 15.1-967 (1950). *See also* State *ex rel.* Township of Copley v. Village of Webb, 250 Minn. 22, 83 N.W.2d 788 (1957); Bennett v. Garrett, 132 Va. 397, 112 S.E. 772 (1922); Board of Supervisors v. Duke, 113 Va. 94, 73 S.E. 456 (1912); Scharping v. Johnson, 32 Wis. 2d 383, 145 N.W.2d 691 (1966).

It is clear that excessive suburban incorporation often creates governmental duplication and rivalry which can increase the cost and lower the efficiency of municipal services in the area. Although suburban incorporation is historically respectable and literally carries out the principle of home rule, the fragmentation of a metropolitan area into too many tiny municipalities is against the public interest of the larger metropolitan area and indirectly impedes truly effective home rule in such areas. *See* Cutler, *supra* note 22.

34. Mandelker, *supra* note 9, at 289.

35. *See* Gorlick, *Control of Urban Sprawl, California Style*, 2 URBAN LAW. 95 (1970); Note, *The Minnesota Municipal Commission—Statewide Administrative Review of Municipal Annexations and Incorporations*, 50 MINN. L. REV. 911 (1966). *See also* Johnson, *The Wisconsin Experience with State-Level Review of Municipal Incorporations, Consolidations, and Annexations*, 1965 WIS. L. REV. 462, which states that some of the purposes and intent of the legislature enacting the administrative review bill were:

> (1) to provide more comprehensive state-wide control over development of new municipalities to assure the creation of such units is in the public interest;
> (2) to establish different standards for review of proposed incorporations in urban and rural areas;
> (3) to develop a "public interest" test which is separate from judicial review;
> (4) to require that a state level review officer must find that the incorporation will not substantially hinder the solution of governmental problems in a metropolitan area before he can approve it.

Id. at 466. Statutory provisions which provide for some type of administrative review are: CAL. GOV'T CODE § 54774 (Deering Supp. 1972); MINN. STAT. ANN. § 414.02 (Supp. 1972); WIS. STAT. ANN. § 66.014 (Supp. 1971), *amending* WIS. STAT. ANN. § 66.014 (1965).

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of the same standards discussed above, though with possibly more flexibility.

However, such agencies would probably put more emphasis on the motives of the incorporators—something the *Harang* court and many other courts refuse to do. One court has gone so far as to say where the procedural requirements have been met, the motives of the incorporators are immaterial.[36] But a Texas court, shortly before the decision in *Harang*, was swayed by the fact that the incorporation was openly commenced for "private purposes."[37] If courts continue to ignore the real reasons behind an incorporation, any reason might become a legitimate municipal purpose; for example, incorporation to prevent the introduction of low-income housing.

From the above discussion, it is evident that Wild Peach would probably have had a difficult time incorporating in most other states. But whether this is an equitable result is another question. Should a city be allowed to remove an offensive municipal facility to an unincorporated community? This is not an easy question as there are several factors that must be considered. For example, in the *Harang* case, the type of facility installed, its effect on contiguous areas and the reasons of West Columbia and Brazoria for choosing that area are important factors. If there will be some undesirable effects, it would only seem proper that the inhabitants of that area should have some say in the matter. But it must be remembered that the purpose of incorporation is not to provide municipal powers to those who do not need or want them except for their own private purposes.

The residents of Wild Peach might have secured a solution to their problem through other means. Possibly they could have brought an action in public or private nuisance, or in trespass, although before the garbage dump began operating, they probably would have had difficulty proving injury. These actions all involve formidable prob-

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36. Raucher v. Frost, 53 S.W. 318, 321 (Ct. Ch. App. Tenn. 1899). Some cases, with admittedly less valid reasons for incorporation than Wild Peach had, are: State *ex rel.* Burnquist v. Village of North Pole, 213 Minn. 289, 6 N.W.2d 458 (1942) (to secure a liquor license); State *ex rel.* Eagleton v. Champ, 393 S.W.2d 516 (Mo. 1965) (to provide a base from which municipal bonds could be issued); State *ex rel.* Little v. Board of Comm'rs 182 Neb. 419, 155 N.W.2d 351 (1967) (to avoid annexation); Hoye v. Schaefer, 157 N.E.2d 140 (Ohio App. 1959) (to avoid annexation); Thompson v. City of West Lake Hills, 457 S.W.2d 398 (Tex. Civ. App. 1970) (to preserve a rural setting).

37. Thompson v. City of West Lake Hills, 457 S.W.2d 398 (Tex. Civ. App. 1970).

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lems,[38] especially in reaching the solution which the Wild Peach residents seemed to be seeking, *i.e.*, removal of the landfill site from their area. But at least these remedies seemed to be suited to their problem since they directly attacked the issue rather than hid the real question under the guise of need for incorporation. Probably the best solution for all concerned would be some form of county zoning or an agreement under an inter-local cooperation act. Such cooperative planning would best serve the region's interests over the long run.[39]

Although the *Harang* decision may have frustrated an attempt to solve a valid problem, the decision is well grounded in case and statutory law, and the court had little choice but to reach the conclusion it did. A holding in favor of incorporation would be setting a new and unwise precedent. The Wild Peach residents had other remedies that were more appropriate to their problem.

Patricia C. Armstrong

38. For example, to prove a private nuisance, the plaintiff ordinarily must have suffered material harm or substantial interference with the use and enjoyment of his property. With a public nuisance, it must be established that something is being done that injuriously affects the public safety, health or morals or effects some substantial annoyance, inconvenience or injury to the public. With trespass, the complaining party must show a direct physical entry by a person or an object (although the size of the object can be small). Also, in many cases, courts limit relief to money damages, which might be inadequate for the Wild Peach residents. *See* Comment, *Environmental Law: New Legal Concepts in the Anti-Pollution Fight*, 36 Mo. L. Rev. 78 (1971).

39. *See, e.g.*, Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. Pa. L. Rev. 515 (1957).

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