

ORAL ARGUMENT - 9/6/95
95-0086
CITY OF MURPHY V. CITY OF PARKER

BROWN: May it please the court. My name is Robert Brown of the Dallas law firm of Vial, Hamilton, Koch & Knox. I am here on behalf of the petitioner, the City of Murphy, Texas.

The facts in this case are undisputed. I assume the court is familiar with them. Unless the court requests otherwise I will not spend extensive time on those facts, other than to state that back in 1989, the City of Parker, the respondent annexed some territory; approximately 14 acres of that territory was contained within the City of Murphy's extraterritorial jurisdiction, which I will refer to shorthand as "ETJ".

The TC and the CA upheld a summary judgment granted on behalf of the City of Parker under the sole bases that §43.901 of the Texas Local Gov't Code acted as a 2-year statute of limitations, that would prohibit the City of Murphy from bringing its declaratory judgment action to try to set aside that annexation.

I think this is a case of first impression, and it is a case of statutory construction this court must undertake today. In order to do that I believe it is important to go back historically to look at not only the current law but the predecessor law. And that takes us back to 1949, the source law. For the current section that we are looking at is article 974(C-4). And a copy of that is set out in our brief. And that basically was a validating act. It validated annexations of territory that were annexed with the consent of a majority of the inhabitants of the annexed territory. That's set out in §1 of that article.

Section 2 of that article provided a 2-year presumed consent provision that says that, "consent to that annexation and the inclusion of such territory in the city shall be conclusively presumed if a lawsuit is not brought within 2 years."

CORNYN: Your contention is that that does not apply to municipality like your client?

BROWN: That's correct.

CORNYN: Who does it apply to?

BROWN: It applies to those individuals in adjoining property who would have to consent to the annexation. You have to look at the article in its entirety to determine to whom the consent provision is referring. Section 1 talks about ratification of annexations with the consent of a majority of the inhabitants of annexed territory, §2.

CORNYN: Why did the legislature not bar suits by municipalities; let them bring them I guess in perpetuity but wouldn't bar suits brought by citizens?

BROWN: Well there has historically been a public policy distinction between statute of limitations as applied to individuals and typical corporations and municipal corporations. The Texas Civ. Prac. & Rem. Code in Ch. 16, which sets out our general statute of limitations has a section that expressly prohibits most statute of limitations as applying to cities. And the public policy for that as set out in the cases is that the citizen should not be penalized because of the neglect of the governing body, the negligence of the governing body, or even perhaps the wilful disregard of the governing body. Because it's fundamentally unfair at least from public policy viewpoint to allow a city council by its inaction to allow the

rights of the citizens to be barred by statute of limitations.

CORNYN: And because of that policy that you argue in favor of limitations never runs? And no matter what sort of investment the annexing municipality makes in terms of improvements: fire protection; sewage; whatever, 20 years, 30 years, 40 years later suit can be brought to set aside that annexation?

BROWN: Well under traditional limitations I would say no. Now conceivably, and argument would have to be made in a 40, 50 year period for some kind of latches(?) or estoppel, but as a general rule those doctrines also do not apply to governmental entities. Basically for the same public policy reasons.

HECHT: So there would be no limitations?

BROWN: Well I don't want to mislead the court. There are certain statute of limitations that do apply to cities. The Civ. Prac. & Rem. Code sets out those that cities are exempt from, and those that do apply. For example: 16.005 is a 2 year statute of limitations for road closing; cities have to abide by that; 16.008, 10 year statute for architects and engineers; 10 year statutes for those people repairing real property; 10 year statute to bring a cause of action against surveyors.

HECHT: But in this case if this is not a limitation period there wouldn't be one?

BROWN: That is correct. This would fall within the category of those types of cause of action where the legislature has seen fit to allow a city never to be barred by limitations.

HECHT: Your argument that cities are exempt from limitations statutes because their inhabitants ought not to be punished as a result of the inattention of city officials cuts both ways though doesn't it? In this case the inhabitants of one of these two cities are going to be adversely affected by the result of this case?

BROWN: That is potentially true. And that's potentially true in any case where someone asserts that an estoppel should not apply against a city.

HECHT: So how does that policy cancel against limitations as opposed to in favor of it? It looks to me like it cuts both ways.

BROWN: Well I don't believe it does Judge, because I think that the fact that there are two cities involved, or the fact that there are some perhaps some equities on the other side does not in my opinion change that basic rule. Because once again the public policy should be the city who would be bringing the lawsuit its citizens should not be made to suffer because those in power either did not bring a lawsuit in time, or as in this case are just not aware that an action had been taken in violation of extraterritorial jurisdiction, and brought the lawsuit in time. So while there are public policy arguments I believe that can be made in the manner in which you are suggesting, the paramount public policy that I believe that these cases tend to address is that the citizens in a fundamental area such as extraterritorial jurisdiction should not have that territory and the rights associated with the territory taken away from them simply because two years have passed.

CORNYN: Well doesn't that...don't constituents of any representative body whether it is city council or anybody else who suffered to use your phrase because of the acts of their representatives on a regular basis, and the recourse is to toss them out the next election isn't it?

BROWN: Well I agree, the recourse is at the ballot box. The problem is if you construe

§43.901 as a 2 year statute of limitations, that does not necessarily give a citizenry time to replace the governing body in its totality to undue a situation. You take a hypothetical: assume you have a city council that knew that another city had come in and taken part of its ETJ, but that city council says: well we are not going to sue; we are just going to you know we don't care what the people want, we are not going to sue for either neglect, fraud, corruption, whatever the parade of horrors you want to put out there, the people would be forever barred from correcting that error under the TC and the CA's construction of §43.901, because they've viewed that as a 2 year statute of limitations. These other statute of limitations that the legislature has held applied to cities, such as I mentioned the 10 year statute of limitations for architects; 15 years for product liability, these are much longer statutes of limitation. And quite frankly these are also in areas that are not as fundamentally governmental. When you are talking about suing an architect or an engineer, you are not talking about actions that comprise the body of a city, the boundaries of a city, and the potential boundaries of a city.

HECHT: If a city does build a substantial infrastructure in wrongly a next territory, what happens?

BROWN: That would be something that would have to be resolved after the annexation is voided. I don't think the law has addressed that.

HECHT: How is it resolved?

BROWN: Once there has been a legal determination...for example in this case assuming that this court reverses the CA and the TC and the TC sees fit then to declare the annexation void, this territory would then once again become part of the county, and be within Murphy's ETJ. At that point, then Murphy would have the option to annex that territory, or quite frankly just to sit down at the table with the other municipality to work out some compromise. But while those are the realities that would fall after the court's decision, with all due respect, I believe that the decision today should be limited to what did the legislature intend when it passed that ordinance? And I don't believe that equitable weighing of the benefits or burdens in this particular situation should sway the court because you are going to make a decision of those applications statewide to all cities.

HECHT: In am trying to decide what it means though it is useful to know if it makes sense. And it doesn't seem to me to make much sense if for the one city to have to either choose to maintain the infrastructure, or abandon it without it having it in its tax base. You say they will negotiate, but if they can't negotiate that's going to be the situation isn't it?

BROWN: Well that is something that has to be looked at. But I would submit that you look at other statutes, take the validating acts that the legislature passes every 2 years, in every instance they have validated practically everything under the sun with the exception of constitutional infirmities, and annexation to property into another city's ETJ without compliance from municipal annexation act. So there could be a number of situations that are similar to this that could have been validated, that have not been validated.

HECHT: Do you know of any?

BROWN: No I don't know any factual situations where that has occurred.

ENOCH: But isn't your argument that the validating act did not validate this predicated on your statement that the consent of the persons does not cover municipalities?

BROWN: That is correct.

ENOCH: That is the basis of your argument is it not?

BROWN: The basis of the argument is that in 1949 when the prior article was passed, it is important to remember there was no such thing as extraterritorial jurisdiction. That concept did not come about until the Municipal Annexation Act was passed in 1963. So back in 1949 there was no consent that a city could give for annexation. You did not need consent of another city to annex because you could quite frankly annex all the way up to another city's property line. There was no extraterritorial jurisdiction. So in 1949 I don't believe you can cogently argue that in 1949 the legislature intended the consent provisions to apply to cities for 2 reasons: 1) there was nothing for a city to consent to in 1949; and 2) the only persons to which the consent provisions appear to be referring to are the consent of inhabitants in other areas that would consent to an annexation. So then when you jump forward in time to the codification to the local gov't code in 1987, which is supposed to be a completely nonsubstantive change in the law you quite frankly have to look to the old law and say would the old law have applied to a city? If it would not have applied to a city to bar this lawsuit, then you really cannot say the new law bars the lawsuit against a city. Because if that is the case then that means the Texas legislative council has improperly broaden the scope of that law through its codification.

I don't deny the legislature has the power to do that. But according to the Code construction act and the preamble to the Texas Local Gov't Code it was supposed to have been a nonsubstantive change. And that basically is the gist of the argument.

ENOCH: But the logic of your argument is since cities before 1949 didn't have ETJs, they could not have objected to this annexation correct?

BROWN: That's correct.

ENOCH: So if to follow the reasoning of your logic, since they couldn't have objected then and this codification wasn't supposed to change the law, then Murphy shouldn't be able to object now?

BROWN: It's not so much being able to object - it's being able to consent. In 1949 had this annexation taken place there would be nothing wrong with it because Murphy would not have had an extraterritorial jurisdiction. There is nothing to consent to.

ENOCH: But after '49, then Murphy obtains this right as citizens did of consenting to this ETJ. And so in the codification it simply recognizes that Murphy could lose its consent just like other citizens could lose its consent?

BROWN: Well the problem there is we are talking about consent to two different items. Murphy could consent to give up part of its ETJ. That's not the same thing as consenting to an annexation. There really is no requirement that a city consent to another city's annexation. You can consent to give up part of your ETJ, which then brings us to another fundamental problem. Even then once one city gives up part of its ETJ, the other city does not necessarily have the right to come in and annex that territory unless the other city's ETJ expands to fill that void, that area that has been relinquished. And the Local Gov't Code places severe restrictions on that too. A city can only annex property that it owns, or that is within its ETJ. And its ETJ is determined by its population. These two limitations were expressly pointed out by this court in its recent Laidlaw decision.

CORNYN: Let me just ask you quickly about what would you have us do with the gov't code which says that the term "person" includes governmental subdivisions or agencies?

BROWN: By definition the Code Construction Act says that definition of "person" shall apply

unless the context suggests otherwise or demands otherwise. So it's not a conclusive definition. And it is our contention in this case exactly that the context in light of public policy, in light of prior law that the context of person should not be deemed to include municipality even though the definition on its face would include that.

* * * * *

RESPONDENT

RAPIER: Good morning. I am John Rapier from Allen, Texas, the City Attorney for Parker, Texas. Parker would like to address three issues relating to the case before you this morning. And those issues are one we have already covered to some extent this morning, and is well briefed and covered by the CA: Is, did the legislature intend for municipalities to be amongst those group of persons known as a "_____ person" in 43.901? The second issue is is the conclusive presumption found in 43.901 a statute of limitation; is it on the other hand a presumed consent? is it a validating statute? or as Parker will suggest today, that it is simply a rule of law, adopted by the legislature in its public policy duties to guides this state in the manners which are discussed. And finally, is Parker required to provide summary judgment proof in this case that it had the fundamental right on power to annex the subject of disputed territory in the first instance?

As to issue No. 1, I think it is clear and undisputed that for Parker to annex the disputed territory in January, 1989, the written consent of Murphy was required as a necessary step in the annexation process.

GONZALEZ: And you concede that that was not done?

RAPIER: That was not done. It is undisputed. The issue before you today is though is whether by operation of law, that is by operation of 43.901 that Murphy's consent is a fact that is conclusively presumed.

GONZALEZ: Mr. Rapier were you the City Attorney at the time of this annexation?

RAPIER: Yes, I was.

GONZALEZ: Were you trying to pull a fast one on the City of Murphy, or was it just an error made?

RAPIER: I wasn't present at that meeting, and I looked at the ordinance. I generally sign all ordinances as proved as to form. But I didn't sign this one. I think it was just an error, an oversight. These both are small towns, less than 2,000, and they occasionally do not submit their annexation requests. This was a request by the owners through their city engineer to review all things such as ETJ. They now do that.

HECHT: Part of this area is in Parker's ETJ?

RAPIER: Yes.

HECHT: About 1/2 of it?

RAPIER: About 27 some odd acres, and the disputed territory is 14 acres. It's a long narrow, as you can see from the record, strip of land.

SPECTOR: Once this ordinance is adopted what type of public notice is given, or how would

Murphy know that some of their property is being annexed?

RAPIER: As the record shows, and of course chapter 43 in the procedure section shows that there must be 2 public hearings. Those public hearings were published in the plaintiff's Star Carrier, which is distributed in Murphy and Parker, they are next door neighbors in Collin County. Both of them neighbors of the plaintiff.

SPECTOR: There's legal descriptions in the property?

RAPIER: Yes.

CORNYN: And the record shows those were held?

RAPIER: Those were held. The publication of notices were the publisher's affidavit in the record as part of Parker's Motion for Summary Judgment. The public hearings were held. There was then a subsequent time after that that the ordinance was adopted at a meeting that was complied with the Open Record's Act. And then the ordinances subsequently a certified copy of that ordinance is filed in the deed records of the county, in this case _____.

OWEN: As a practical matter how would a city like Murphy keep track of what Parker is up to? Wouldn't they have to assign someone to read the papers weekly and check the meets and bounds descriptions to see if someone was invading their ETJ?

RAPIER: Well they could do that. Most of these towns are very aware of what surveys they are in, and what abstracts they are in. There are not that many because they are pretty small. Secondly, there is also...you can see development. There are roads being built, water lines being laid, that's evident. New development is clearly there on the land.

CORNYN: What evidence is there in the summary judgment record of the development of the infrastructure by the City of Parker in this annexed area?

RAPIER: Well there certainly is the affidavit of Betty McMinnie(?), and I cannot recall whether she has it in there. I know that fact is asserted in our motion for summary judgment. Whether or not it is supported by the summary judgment evidence I can't recall. In the evidence of the exhibits if you will attached to the plaintiff's deal they show certain maps. And among those maps are the platting the lots where the roads go and things of that nature.

GONZALEZ: The bottom line how much had City of Parker invested in this territory?

RAPIER: I don't know your honor.

GONZALEZ: None? Zero?

RAPIER: The city has an investment. There are streets and there are water lines, and there is drainage ditches, and all of these things. It is part of the tax base and they have provided those services. But how much investment there is I do not know.

HECHT: Whatever there is if there is no limitations statute what are Parker's legal options?

RAPIER: Well I think in this case that 14 acres would be back out in the county. That 14 acres is taken out of the tax base, and that may or may not cause a raise in ad valorem taxes to balance

the town to service the bonded indebtedness in which are general obligation bonds, which have been issued and sold by Parker.

CORNYN: In the meantime Parker is assessed taxes on these folks; and if the property is deannexed what do they have to show for their tax expenditure?

RAPIER: Well not much. It puts the land back out in the county. Both of these cities are general law municipalities. The only way that Murphy can annex and serve the area is under 43.033, which they have to show they provide the water service, and things of this nature. This territory is in Parker CCN. It's hooked up to Parker water system, etc. Parker would still be required under the Texas Water Code to provide water. They could charge for that water. I don't know who's fire district it's in. Parker has a police dept; fire dept. and water system, and the service of that would obviously have to be worked out. I guess the sheriff would have first call. Whoever the fire district is has first call on fire trucks. The only way you can get to this property is through Parker. You have to come into Parker, and then go down the state lane or whatever it is to get to part of this subdivision now that would be out in the county.

The resolution of the problem of what the legislature intended is always kind of _____. There is analysis that the CA uses is kind of the plain language analysis that y'all used in Laidlaw v. Wilmer. And that was pretty simple in this case, that in order for Parker to annex it Murphy had to consent under 43.023. And Ch. 311 of the Gov't Code as we have already discussed defines persons to be political subdivisions. Political subdivisions include municipalities. Parker is a municipality and that's the end of the case. It's not ambiguous. It's clear, it's plain. It works nicely with...

CORNYN: Counsel claims there was a substant...if you are right there has been a substantive change upon codification of this statute, which the legislature disclaimed any intention to do.

RAPIER: I don't think that's necessarily true because if you look at the history in 1949 when 974c-4 was adopted, the only persons that could consent to annexation were the inhabitants and that had been the law in this state since 1875. Inhabitants were subsequently changed to registered voters. That worked better under the election code. But 4 years later in 1953 in 974G, the legislature decided well maybe owners can consent to request annexation. Owners of sparsely populated areas of less than 3 registered voters. Then 10 years later we have article 978, the municipal annexation act, and it creates yet another type of person that a municipality could consent to the reduction of their ETJ in the annexation process. And then in 1987 of course we had the local gov't code. And the stated purpose of the codification is to gather these things together to reorder them, rearrange them in order to make them supposedly more understandable, and more accessible.

OWEN: What happened to 978a? Where is it recodified?

RAPIER: 978 is now Ch. 43 of the Local Gov't Code.

OWEN: Which specific...

RAPIER: Well the whole chapter. 978a is a pretty long involved piece of legislation and is essentially contained almost in total, divided up in different parts of Ch. 43. Now the legislature whether we believe it or not is presumed to have complete knowledge of all prior legislation. So when we get to 87, we have inhabitants - now registered voters. We have owners of sparsely territory who can consent. We have municipalities. We submit to you that is a fair and correct construction that they took all these groups and put them into a group known as those persons required in law rather than name them out, because if you accept the construction of Murphy you exclude owners. And you also exclude municipalities. So I don't think that we have to say that the legislature's knowledge of this stopped in 1949.

It continued to further development in this area in 1953, 1963, and finally cumulated in 1987 with the Local Gov't code.

Issue No. 3 is one that after I read all of the briefs, and of course read the opinions below getting ready for today, it came to me that this conclusive presumption in 43.901 is what manner of being is this statute? Is it really a statute of limitation? It's a implied consent? is it a validating statute or is it something else? I think a practical view that it kind of works like as results and kind of looks like perhaps all three. However, if you look at Ch. 16 of the Civil Prac. & Rem. Code the statute doesn't use any standard language there. Where we find it says: A person must bring a suit for. And that's in almost everyone of those sections coming down through ch. 16. It says for a certain cause of action. It says not later than...so many years - 1, 2, 4, etc. None of that's found in 43.901. If it's not that what is it?

I think that perhaps what we have here is what we've known in law was a true presumption; statutory conclusive presumption. Example: penal code - hot check, bad check. The state has to prove the defendant issued the check, it wasn't any good, he got the notice, 10 days later he didn't pay, conclusive presumption of intent to defraud.

The same thing was covered in this court in 1971 in Texas Water Rights Commission v. Wright in which we had a conclusive presumption of the abandonment or the relinquishment of water rights. And this court talked about...wrote on conclusive presumptions there. What we believe it really is is simply a rule of law, that the legislature had the power to enact for its own public policy reasons in which we sitting here today really don't have the business of trying to decide whether those public policy reasons were good or bad.

HECHT: Why would it do it and not include this problem in the validation statutes?

RAPIER: Good question. In the validation statute you can have a time that's much more compressed than 2 years. I think the current one this time you can have a validation statute that would validate in annexation in 68 days, and it's happened. We have this particular one that may have validated this one and was something short of 1 year. At least there is a 2 year statute out here that can go the full 720 days or whatever it is, which is considered at least twice to three, four times longer...

HECHT: So the legislature would leave it out of the validation statute and put it in a general two year statute to give the injured, the invaded city if you will, the full benefit of 2 years?

RAPIER: That's the only reason I can come up with your honor.

HECHT: If this is a 2 year statute wouldn't that encourage cities to surreptitiously pirate other city's ETJs and hope they didn't find out?

RAPIER: Well I hope now. I think we can't presume that cities are going to be in bad faith. Most of the cities I know have their plates full. They have all they can do to serve the people they have. Especially these general cities except for one small little area where they are already serving somebody water and all these services. They can't annex by fiat anyway. They have to annex by the request of somebody; either a majority of the voters, or...

HECHT: There was a request here?

RAPIER: Yes. The summary judgment proof has a copy of the petition of the owners of the property to become a part of Parker, Texas. So this rule of law that establishes...what it really does I think your honors is it establishes a judicial fact by means of conclusive presumption. One who wants to take

advantage of that has to establish the prerequisite facts such as the check case in the penal code. In this case that's exactly what Parker did. It established that it was an annexation ordinance, that it required the consent of Murphy to stipulate it that it was in their ETJ at the time. There was no consent. Established that the lawsuit brought by Parker was done so more than 2 years after the annexation ordinance was adopted. Having established it is undisputed those what I call prerequisite facts, then you are entitled to the establishment or the judicial fact by conclusive presumption that consent was given, whether or not it was given or not. Just like the check case, whether the defendant actually intended to defraud anybody was not relevant. The fact is these prerequisite facts have been proved by the state.

The last issue I want to address is the allegation...maybe allegation is too strong of a word, but the argument in Murphy's brief and in good Judge Morse's dissent is that there was another problem with Parker's position is that Parker did not prove that it had fundamental right to annex this territory in the first instance. For instance, in Murphy's brief it is stated that sec. 43.901 does not address Parker's fundamental lack of statutory power to annex the property located within its own ETJ. Well I submit to you if the whole reason we are here is because that annexation encroached on Murphy's ETJ, if it did not encroach on Murphy's ETJ, then Murphy doesn't have standing to bring any kind of lawsuit. They don't have a cause of action. The only cause of action they've pled in this case and argued is it required a consent; we didn't give that consent; and that statute 43.901 doesn't apply to us.

GONZALEZ: You still have not answered the question. Under what authority has the city of Parker annexed land that it had no authority to annex? What gave you the authority to annex land that's outside your ETJ? What's the answer to that question?

RAPIER: To me it's just not relevant and not necessary in this case. Because Murphy does not have standing. We don't have to prove that.

GONZALEZ: You don't have to prove that you have authority to annex territory outside of your ETJ?

RAPIER: Not as visa vis Murphy. If the plaintiff included the landowners, or if the plaintiff included the inhabitants or the voters in the area, I think that would be true.

GONZALEZ: So you can't hypothetically annex land several counties down and sleep at the wheel, and it's a small county, and they don't file a lawsuit within 2 years somehow magically that's part of your territory. Is that your argument?

RAPIER: No, your honor it's not.

GONZALEZ: Well under the rule of this case is that not possible?

RAPIER: No, sir. I don't think so.

GONZALEZ: What keeps it from happening

RAPIER: Because we had other plaintiffs who can bring that argument. We have the State of Texas through _____.

GONZALEZ: What if they don't?

RAPIER: Well if they don't, they don't. If this case would simply have been that Parker annexed outside of its 1/2 mile ETJ, but did not annex any of Murphy's ETJ, then Murphy does not have

standing to complain. That's not part of Parker's burden of proof in this case. And it wasn't part of this lawsuit until we got before this court. It could be, and probably should be part of another lawsuit with different plaintiffs. But Murphy simply doesn't have the standing to complain about that. And there is no proof in the record whether it was within Parker's ETJ or not.

* * * * *

REBUTTAL

BROWN: May it please the court. First I would like to respond to the standing argument. The first time we've heard that I was served at that _____ involved in the lower court. It's waived. It has been brought as a defense. But I believe that obviously Murphy does have standing to challenge any action that affects taking of its property within Murphy's ETJ. We are not complaining about Parker's annexation of land within Parker's ETJ. The argument is that even if the CA was right, which we don't believe they are, and that somehow §43.901 is some form of an implied consent, and it can be read to say that Murphy by not contesting it within 2 years, you consented to give up part of your ETJ. The question is then does Parker still have the power to annex that territory, because is it in Parker's ETJ? It would only be in Parker's ETJ if through other sections of local gov't code Parker's ETJ expands to fill that void. There is no summary judgment evidence as to Parker's population, or as to whether or not the area within Murphy's ETJ once relinquished would constitute part of Parker's ETJ. And I believe that's very important.

CORNYN: Why does that make any difference if the statute creates a conclusive presumption of the consent and thus the statute of repose saying nobody can challenge it. Why does that make any difference to the outcome?

BROWN: Well there is two different points of consent. There is the consent to give up ETJ, which the CA construed that 43.901 somehow was an alternative to those sections of the local gov't code that says that consent has to be in writing by ordinance or resolution, and then there is this other consent to consenting to the annexation. The point I am trying to make is there is no consent to an annexation. There is nothing in the local gov't code or the municipality annexation act that says that a city like Murphy says, "Parker, we consent to your annexation." What we have to do is if you want to annex something RETJ, we have to first give up that ETJ. And the local gov't code in §42 makes it very clear that that consent has to be in writing by ordinance or resolution. And I believe that's real important because there is a political accountability that's involved there. It's obvious at least to me that the legislature by requiring the governmental entity at a regularly convened council meeting, which is the only way they can pass their ordinance and resolution, subject to all the protections of open meetings and all the protections that the public is afforded, that is the only way a city can relinquish part of its extraterritorial jurisdiction by express writing. The legislature made one exception to that, and it is contained within the text of §42.023, and that says, "Except in situations of overlapping jurisdiction under the judicial apportionment cases. That's the one exception the legislature has already expressly put in the statute that says, "You don't have to have written consent."

HECHT: If Parker has not annexed this property will or can Murphy annex it?

BROWN: They can. Will they annex? I cannot...I can't bind them. I know there have been discussions that they are interested in that property. They would not be bringing a lawsuit if they were not interested in that property. Also to go back to the question that you raised earlier in terms of services, if we choose to annex it, the gov't code also provides in §43.056 does require that we would provide services, a service plan out to that area. The local gov't code envisions that you cannot annex property without bringing them appropriate services. So they are not going to be left out in limbo if they are annexed.

GONZALEZ: Could Murphy annex this piece of property without some of the owners petitioning Murphy?

BROWN: I believe now with the recent changes in the legislature...well we would have to provide either the water or sewer. Currently that water and sewer is coming from Parker. So I believe unless we provided water or sewer we cannot unilaterally annex it. It would probably take a petition at this point from that neighborhood to come into the City of Murphy. And whether they desire to do that I have no idea. That has not been something that we have looked at.

GONZALEZ: Some of the people say we don't want to be part of Murphy; we want to stay where we are, the city of Parker.

BROWN: If that is their will, and they are not within Parker's ETJ they will probably be in a difficult situation, and obviously be something that has to be worked out between the communities.

Just in closing I will say that based on the historical history of the articles, the case law which says that annexation to other ETJs is void, that both the TC and the CA simply misconstrued this statute on the statutory construction basis. We ask that the CA and the TC decisions to be reversed.