

July 7, 2005

The Supreme Court of Texas
201 West 14th Street, Room 104
Austin, Texas 78701

**RE: Letter of Amici Curiae TML and TCAA in Cause No. 05-0126;
The City of Rockwall, Texas v. Vester T. Hughes, Jr., As Sole
Independent Executor of the Estate of W.W. Caruth, Jr.,
Deceased.**

To the Honorable Supreme Court:

The Texas Municipal League (TML) is a non-profit association of over 1,070 incorporated cities. TML provides legislative, legal, and educational services to its members. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of over 400 attorneys who represent Texas cities and city officials in the performance of their duties. Believing that the issue before this Court is of great significance to all Texas cities that annex property, TML and TCAA respectfully submit this letter of amici curiae in the above-mentioned cause.

The principal issue before this Court is whether Texas Local Government Code Section 43.052(i) is procedural or substantive in nature. Section 43.052(i) is clearly procedural. If a city has the authority to annex, but fails to follow the proper annexation procedures, the only manner of challenging the annexation is through a quo warranto proceeding. Only the state can challenge an annexation for procedural irregularities because such irregularities merely result in voidable ordinances.¹

The issue in this case arises from the enactment of Senate Bill 89 in 1999. S.B. 89 was enacted to address a few situations in which cities annexed highly-populated residential areas. The end result of the bill is a piecemeal, sometimes

¹ *May v. City of McKinney*, 479 S.W.2d 114, 120 (Tex. App.--Dallas 1972, writ ref'd n.r.e.); *City of Houston v. Harris County Eastex Oaks Water & Sewer Dist.*, 438 S.W.2d 941, 944 (Tex. App.--Houston [1st Dist.] 1969, writ ref'd n.r.e.); *City of Irving v. Callaway*, 363 S.W.2d 832, 834-35 (Tex. App.--Dallas 1962, writ ref'd n.r.e.); *Lefler v. City of Dallas*, 177 S.W.2d 231, 233-34 (Tex. App.--Dallas 1943, no writ); *Werthmann v. City of Fort Worth*, 121 S.W.3d 803, 807 (Tex. App.--Fort Worth 2003)(holding that the annexation plan requirement of Section 43.052 is procedural).

difficult to understand, rewrite of Chapter 43. Unless one is very familiar with the bill's provisions, including Section 17, confusion is the norm.

Under S.B. 89, there are two basic procedural schemes. Both schemes are based on the inclusion or exclusion of an area in a city's annexation plan. They are:

1. annexation of area that is *exempt* from the annexation plan requirement, and
2. annexation of area *included in* an annexation plan.

To begin the annexation process, city officials must decide whether an area the city wishes to annex falls under one of the exemptions from the annexation plan requirement found in Local Government Code Section 43.052(h). If an area is exempt from the plan requirement, a city should use Local Government Code Chapter 43, Subchapter C-1 procedures. The Subchapter C-1 procedures are almost identical to the pre-S.B. 89 procedures, with the exception of certain more stringent notice requirements.

If an area is not exempt, a city must place it in an annexation plan and wait three years to annex the area under the more complicated Subchapter C procedures. Contrary to popular belief, the Section 43.052(h)(1) exemption is routinely used by most home rule cities. Only a handful of cities annex under an annexation plan because only a few cities have the occasion to annex large, built-out, residential subdivisions.

The as-filed version of S.B. 89 would have significantly, and inappropriately, restricted the annexation authority of all cities. The version that ultimately became law addresses the annexation of populous areas. Thus, the fact that the City of Rockwall, or any other city for that matter, has never annexed pursuant to an annexation plan is not unusual. The Section 43.052(h)(1) exception is clear: cities that annex undeveloped or sparsely-occupied land are not subject to the more stringent Subchapter C requirements. The statute is clear on its face:

[the more stringent Subchapter C-1 provisions do not apply if] the area contains fewer than 100 separate tracts of land on which one or more residential dwellings are located on each tract.

TEX. LOC. GOV'T CODE § 43.052(h)(1). In other words, an area is exempt if it contains any number of tracts so long as no more than 99 of the tracts contain residential dwellings. S.B. 89 was enacted to curb perceived abuses of unilateral annexation authority by a few cities, and is designed to prevent cities from annexing very large residential subdivisions without providing adequate notice and services. At any rate, the decision of whether to place an area in an

annexation plan is up to the city council in the first instance, and is challengeable only by a quo warranto proceeding.²

Section 43.052(c) required every city to prepare an annexation plan before December 31, 1999. That provision applies regardless of whether a city ever intends to annex. Thus, TML advises its member cities to comply with the letter of the statute. However, even if a city has never adopted an annexation plan, it may nonetheless conduct exempt annexations under Section 43.052(h). *See City of San Antonio v. Hardee*, 70 S.W.3d 207 (Tex. App.--San Antonio 2001, no pet.).

The provision at issue in this case, Section 43.052(i), provides that:

A municipality may not circumvent the requirements of this section by proposing to separately annex two or more areas described by Subsection (h)(1) if no reason exists under generally accepted municipal planning principles and practices for separately annexing the areas. If a municipality proposes to separately annex areas in violation of this section, a person residing or owning land in the area may petition the municipality to include the area in the municipality's annexation plan. If the municipality *fails to take action* on the petition, the petitioner may request arbitration of the dispute.

TEX. LOC. GOV'T CODE § 43.052(i) (emphasis added). In this case, the city did not “fail to take action.” The city council rejected the petition as without merit, thus disallowing the petitioner the right to request arbitration. A landowner who seeks to challenge the propriety of that action is left with a suit in quo warranto as his remedy. *Alexander Oil Co. v. City of Seguin*, 825 S.W.2d 434, 436 (Tex. 1991). The state must bring an action in quo warranto to question the city's authority. *May. v. City of McKinney*, 479 S.W.2d 114, 120 (Tex. Civ. App. – Dallas 1972, writ ref'd n.r.e.); TEX. CIV. PRAC. & REM. CODE §§ 66.001 & 66.003. The case law is clear:

In reviewing a private party's standing to challenge an annexation, an appellate court must decide whether the challenge attacks the city's authority to annex the area in question or simply complains of some violation of statutory procedure. *City of San Antonio v. Hardee*, 70 S.W.3d 207, 210 (Tex.App.--San Antonio 2001, no

² *Werthmann v. City of Fort Worth*, 121 S.W.3d 803, 807 (Tex. App.--Fort Worth 2003)(holding that the requirements of Section 43.052 are procedural); *See also City of Balch Springs v. Lucas*, 101 S.W.3d 116 (Tex. App.--Dallas 2002).

pet.). Merely showing an irregularity in a city's exercise of its annexation authority is not enough. *Alexander Oil*, 825 S.W.2d at 438; *May v. City of McKinney*, 479 S.W.2d 114, 120 (Tex.Civ.App.--Dallas 1972, writ ref'd n.r.e.). Private parties have standing to challenge an annexation only when the annexation is void because a municipality exceeds its authority to annex. *Alexander Oil*, 825 S.W.2d at 438; *City of Wichita Falls v. Pearce*, 33 S.W.3d 415, 417 (Tex.App.--Fort Worth 2000, no pet.)

Werthmann v. City of Fort Worth, 121 S.W.3d 803, 806 (Tex. App.--Fort Worth 2003, no pet.). Along with the Fort Worth Court of Appeals, two other Texas courts have addressed whether the restrictions in Section 43.052 are procedural or substantive. See *City of San Antonio v. Hardee*, 70 S.W.3d 207 (Tex. App.--San Antonio 2001, no pet.); *City of Balch Springs v. Lucas*, 101 S.W.3d 116 (Tex. App.--Dallas 2002). In *Hardee*, the plaintiffs argued that they had standing to sue because the City of San Antonio acted outside its annexation authority by failing to adopt a required annexation plan on or before December 31, 1999, as required by Section 43.052. *Hardee*, 70 S.W.3d at 211-212. The San Antonio Court of Appeals treated the changes to Section 43.052 as an amendment to the prior notice and hearing requirements in Chapter 43 and held that the landowners had no standing to challenge the annexation. *Id.* at 212. The court concluded that Section 43.052 is a procedural requirement for annexation rather than a limit on a city's authority to annex. In *Lucas*, the landowners claimed that they had standing to challenge an annexation because the City of Balch Springs violated Section 43.052 by not complying with its own annexation plan. *Lucas*, 101 S.W.3d at 119. Concurring with the *Hardee* court and holding that the landowners lacked standing to challenge the annexation, the *Lucas* court stated that:

We agree with that court's characterization of the provisions of Section 43.052 as being procedural, rather than limitations on the City's inherent authority to annex. Appellees' complaints about the City's lack of compliance with Section 43.052 address procedure. As such, even if the alleged improprieties were proven by appellees, the proposed annexation would be voidable, not void.

Id. at 122. As such, the exclusive remedy is a *quo warranto* proceeding. Even assuming *arguendo* that an arbitrator ordered land to be placed in an annexation plan, that action in-and-of-itself is insufficient to void a city's annexation.

Respondent, in its briefs below, often cites the "clear legislative intent" of S.B. 89. It is difficult to ascertain legislative intent when the final version of a bill is

crafted in conference committee. Further, the House floor debate on the bill favors the city's position. In the debate, Representative Fred Bosse clarified that most of the provisions of the bill are not meant to affect annexations that are subject to the 100 tracts exemption: "[T]hey [those that are annexed pursuant to the 100 tracts exemption] have the ability to go to court and test in a meaningful manner through the courts, the sufficiency of those plans." House floor debate on S.B. 89 (1999).

The legislature later showed its intent to avoid unreasonably restrictive changes to Chapter 43 in 2003. H.B. 568, introduced during the Seventy-Eighth Legislative Session, would have required voter approval of all annexations in Texas, including voluntary annexations. TML, to show that such a requirement is unreasonable, commissioned a study on the effects of annexation, not only on cities, but on the state as a whole. A report issued by The Perryman Group on April 14, 2003, shows that overly restrictive annexation policies would harm the Texas economy by reducing gross state product, personal income, sales, employment, and population. The study identified H.B. 568 as a bill that would have drastically reduced or eliminated annexations and thus damaged the state's economy.

The Perryman report (available from TML) concludes that the H.B. 568 restrictions on annexation would have meant that "the entire character of the Texas economy will be changed in a way which notably limits its capacity to support future growth and prosperity." Restricting annexation would result in a loss of more than \$300 billion in gross state product over the next 30 years, according to the report. In addition, the state would lose 1.2 million jobs and 2.3 million in population. Without annexation authority, the report concludes, core urban areas would deteriorate, thus eroding the viability of central cities, diminishing support networks, and imposing future costs on the entire metropolitan region. As a result, prospects for business locations, expansions, and retentions would be negatively affected.

Annexation is the foundation upon which the system of intergovernmental finance in Texas is built. The reality of intergovernmental relations mandates that cities maintain this authority. That is why the only way to challenge a procedural irregularity, as appellant claims in this case, is through a quo warranto proceeding brought on behalf of the state. A decision that allows individual landowners to repeatedly attack a city's decision to place their land in an annexation plan would subvert the long-held tenet that a suit in quo warranto is necessary to challenge alleged procedural irregularities.

TML and TCAA, as amici curiae, respectfully submit this our brief on the merits and request this Court to grant the City of Rockwall's Petition for Review.

Respectfully Submitted,

Scott N. Houston
Director of Legal Services
Texas Municipal League
State Bar No. 24012858
Attorney for Amici Curiae
Texas Municipal League
Texas City Attorneys Association

cc: Terry Morgan
Terry Morgan and Associates, P.C.
1700 Commerce Street
Suite 1670
Dallas, Texas 75201-5365

Pete Eckert
City Attorney
City of Rockwall, Texas
Caso, Egleston, and Eckert, L.L.P.
10246 Midway Road, Suite 202
Dallas, Texas 75220

James W. Morris
Goins, Underkofler, Crawford, and Langdon, L.L.P.
1201 Elm Street, Suite 4800
Dallas, Texas 75270

R. Matthew Molash
Hughes and Luce, L.L.P.
1717 Main Street, Suite 2800
Dallas, Texas 75201

Julie Couch
City of Rockwall
385 S. Goliad Street
Rockwall, Texas 75087