

ORAL ARGUMENT – 09/18/02
01-1054
CITY OF SAN ANTONIO V. BOERNE

HARDY: The state constitution and decisions of this court interpreting it are dispositive of this case. It's just that simple.

 The CA ignored the constitution and case law of this court. The state constitution, art. 5, §18b, second sentence reads in most part as follows: The county commissioners shall exercise such powers and jurisdiction over all county business as is conferred by this constitution and the laws of the State.

 Now it boggles the mind in my opinion to consider the commissioner's helping a city add to its city ETJ county business. It did not relieve the county of any burden with respect to those roads at the _____ between the unbuffers who did petition and those who did not. It did not relieve the county of any burden. And it created an area probably less than 100 ft. wide and the state legislature by law has decreed that no annexations shall be less than 1,000 feet wide. But we do not rely chiefly on that point, although it's a good one.

 The leading case by this court is Mills County v. Lampassas County, 40 S.W. 403, by CJ Gaines, 1897. He's speaking on page 404 on the second column. He said in most part, it is not true that the constitution confers upon the commissioner's court any general authority over county business, but merely gives them such special power as is conferred by the constitution itself and the laws of the state.

 Well, we're not talking in this case about constitutional powers. And it's a given that there is not a law of the state specially committing to the commissioner's court the power that they undertook to exercise in this case. No general authority. That's the fulcrum of our argument. And the bottom line is that there is no specific statute or express statute conferring anything like this power over them.

 I _____ Mills county and I found 57 entries. There were a number of duplications. The Texas Report citations to the cases by this court and others. But there are some 30 or more cases citing and quoting favorably Mills county. I will only mention two of these at this time. The last one was a 1989 case, which I cite because of its modernity. You will see that over a period of almost 100 years, this court has been resolute and single minded about the law on this subject. But the most powerful case for us because the facts more clearly resemble the facts here, although not the same, is Canales v. Laughlin, 214 S.W.2d 451, 1948. It cites Mills county. And it is most in point because there the commissioners were exercising county business and road business and general authority over road business. They created the position of a countywide road administrator. And this court quoting CJ Gaines struck that down emphasizing that they had no general authority to do this. Also pointing out there was an express law on the books that counties

could with a vote of the people adopt a countywide road engineer system. And incidentally, my county, Bexar county, has had a very good experience with a road engineer for many years.

In Vincent v. Burgess, 773 S.W.2d 263 cites both Canales and Mills county with approval. It was a tax case but it's the latest in a long list of cases by this court. There have been others probably by CA since then. I think the CJ was a member of this court in 1989. I don't believe any of the rest of you were. J. Spears wrote the decision in that case. And it followed the law of Mills county right down the line.

Now the CA ignored the constitution and all the case law. To maintain my credibility, I am going to qualify this in this way. Their opinion does mention the number of the constitutional provision but it doesn't quote it, it doesn't discuss it, it doesn't attempt to apply it or distinguish it or interpret it. And it did cite without quotation or discussion one of the progeny of Mills: Anderson v. Wood to a different issue. The issue at which they cited it was the one where the commissioners court has jurisdiction. They had broad powers to fulfill that objective.

I think that the CA showed an incredible neglect of the law of the state in this case. In fact that murky opinion, the only clear thing about it to me was that it was result driven and not precedent driven.

Now CJ Gaines in Mills also stated a familiar old rule. The cardinal rule of construction is the intent of the legislature. I think that kind of begs the question, a lot of questions, but that's the cardinal rule. The interesting thing here is that the original version of the statutes involved here, which in its modern version of Loc. Gov't Code 81.28, was enacted by the 15th legislature in 1876. Bear in mind that our present constitution was adopted effective as of 1876, post-reconstruction. And the legislature had the onerous task of enacting legislation to provide for the system of government. And this original statute which is ch. LV was a laundry list of the powers and duties of the commissioners court. And the significance of that is that it's been reenacted enumerable times, which you will find listed in the historical notes under art. 2351, or Loc. Gov't Code 81.28, and it has been maintained by the legislature in the exact wording of that original enactment.

Now to maintain credibility, I will point out a couple of I think immaterial differences. The original one in 1876 had the superfluous word "superintend(?)" after general control. That was quickly dropped out. This surplusage. These powers were under §4 and had 5 subsections. And they preface each subsection with the preposition "to." The stuffy grammarians of the 20th century dropped the preposition in front of those sentences.

Actually some of the most trenchant phraseology in the language begins with 'to.' To forgive and to forget, to boldly go. Well you get the idea. Anyway these are the only changes not only in wording but in arrangement and sequence.

Now this court ruled in a case, and this one is not in my briefs, Stevens

County v. Hefner, 16 S.W.2d 806, that where a law is reenacted and reenacted it will retain its original construction. When the 15th legislature passed this original and now unchanged laundry list of commissioner's duties, we know it did not have any intent to authorize them to petition for inclusion of land of county roads in a city ETJ, because ETJ's were not created till the passage of the municipal annexation act in 1963. Some 80 odd years after they enacted this original laundry list. So they had no idea that any such thing would ever happen. But that doesn't mean they weren't foreseeing the county roads of 1876 were terrible dirt roads for the most part. And the transportation was by horse and mule and wagon and buggy. But they did know that in the future, they didn't know when or how or what, but they knew there would be great improvements in time in both the roads and in the means of transportation. Their enactment has been sufficiently flexible to take care of every innovation and improvement in that direction.

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RESPONDENT

RICHARDS: I want to give you four reasons why this court should affirm the judgments of the lower court in favor of Boerne. First, these commissioners' courts had the express power of the owner of the roads in questions to do what they did. And that is, submit the request to have such roads included within the extraterritorial jurisdiction of the city of Boerne. Secondly, they had reasonably implied power to accomplish the purposes intended by this express grant of authority given to them by the state legislature. Third, they had broad discretion to exercise these express and implied powers. And four, San Antonio has stipulated to all the facts necessary to support the judgments in favor of Boerne.

They had the power of the owner under §42.022 of the local gov't code. There is this process for an owner of the area that is contiguous to the then existing extraterritorial jurisdiction of a city to request that his area be included within that ETJ.

HECHT: What does contiguous mean?

RICHARDS: It's adjacent to.

HECHT: You mean touching at any point or does there have to be a line touching?

RICHARDS: Touching at any point. And it can be long, short, but touching contiguous at any point.

HECHT: Are the principled areas involved here that are not roadways, do any of them touch the ETJ of the City of Boerne before all of this happened?

RICHARDS: There's quite a large number that did. The roads were put in to try to meet the wishes of the people who would have had a problem getting in quickly to the ETJ of the City of Boerne, because they weren't contiguous. And by allowing the roads to be put in all the way to the

county line, this created a means for those people that were say on the other side of these roads to have a means to then be contiguous to the ETJ and petition to come in with their properties.

ENOCH: If I'm literally across the street from the ETJ, I'm not contiguous?

RICHARDS: You're not if you're on the other side of the road. That's correct.

ENOCH: So I could be right at the limit of ETJ, that there's a road that borders that. Arguably the ETJ could extend for miles beyond my property. Who authorizes the road to be contiguous?

RICHARDS: The county commissioners in this case.

ENOCH: For all of this stuff that's been happening has it always been commissioners that do this, or has anybody thought about it until this case?

RICHARDS: I know of no reported case where this means of allowing properties to come into the ETJ of a city was used. I am aware of examples of matters that did not end up with a final judgment or where there was litigation that was not appealed where that happened. But not where there is a reported case discussing this.

ENOCH: Did you find any case where someone was deprived of being in an ETJ because they lived across the street and the street had not been originally a part of the ETJ?

RICHARDS: There are cases where people are not adjacent. And it was determined through the litigations that they were not adjacent as the court has defined contiguous to be. And that's a question of law whether it's adjacent or not. Where they were not adjacent, and then that was held to be invalid principally in an annexation context where a city tried to unilaterally annex a piece of property. So in this case with those roads being in an area that was not within the ETJ of the city the commissioner's courts in attempting to help their citizens who wanted to be in the ETJ of the City of Boerne put in those portions of the road.

And there's an important point right there that I would make. With all due respect to Mr. Hardy, he argues that somehow these roads have missing links in them, and they were not all put in, that it's not continuous. That's not what happened in this case. In this case, the request submitted by the commissioners court had attached to it a center line description prepared by a surveyor from the point on the existing ETJ boundary of the City of Boerne from that point all the way to the county line. So it is a continuous sequence for that road that was offered in the ETJ for Boerne.

JEFFERSON: Your first point was that the commissioners court had the express power of the owner of the road to do what it did. My question has to do with, say you're acting on behalf of the state. The first question is did anyone request the views of the State of Texas on whether or not

the road owner would make the request to be in the ETJ _____ ?

RICHARDS: That's prior to my involvement, but to my knowledge no.

JEFFERSON: My second question has to do with the statute. If you're acting on behalf of the state, the gov't code talks about the ownership, general control over the roads, highways, ferries and bridges in their counties. Those are activities that the state would have an interest in the county as its agent performing. You want the roads maintained throughout the state. Does the state have a similar interest in being ETJ of one city verses another city? Is it a statewide interest that you're promoting here, or is it a provincial interest?

RICHARDS: It's a local issue. And I think that the governing body of the county is better situated to address that local interest.

JEFFERSON: How are the commissioner courts then furthering a state purpose?

RICHARDS: Because they have been delegated this power of general control over the roads. The statute, 2351 set out specific duties over these roads. Basically setting them up as for as being constructed, by putting bridges on them, things such as installing traffic regulations and so forth.

JEFFERSON: What I'm saying is all of those are important to this state as a whole. The state needs the counties to exercise those functions so that you and I can drive through counties and not be worried about the maintenance of them. But you or I are not concerned about driving through a county far West of here whether or not that road is within the ETJ of one city verses another. Where's the state interest that the county was promoting?

RICHARDS: The state interest would be in the counties which have long in Texas, in fact I understand from the treatise by David Brooks, that the roads was one of the original _____ functions of county government, which this state gave the responsibility for taking care of. What I was getting to awhile ago talking about the specific duties, basically the state has said here's how you set these roads up and what you do with them, and then someone has to control those roads after that has happened. In my interpretation, I believe that the power of general control was given to the counties to regulate and control what happened with those roads after they were established.

Now there is a state interest involved there because the state legislature would have an increased burden to come in and have to be responsible for local issues involving individual county roads in the State of Texas. Out of curiosity one of the things I did, my office contacted TSDOT and I understand there is in excess of 142,000 miles of center line milage for these roads. That's if you took all the county roads and put them end to end, so you have a tremendous potentially amount of roads that could have all kinds of local issues associated with them and it's in the state's interest to allow the governing body of the county to address those local issues and not have that become a burden of the state.

HANKINSON: How does all of that tie in to the statute relating to extraterritorial jurisdiction?

RICHARDS: It ties in because any owner has a right to submit that area which it owns into the ETJ. In this case, the county did that on behalf of the state. And the county did it on behalf of the state because these residents in Kendall and Comal counties wanted to have their future welfare subject to regulation by the City of Boerne rather than the city of San Antonio.

HECHT: If folks up in the Panhandle wanted it and they could get the intervening counties to go along, they could do that too I take it.

RICHARDS: There's no limitation on it but practicality I would suggest. There's no reason to have something going way away from your county because the other people in other counties would not have an interest in it. So it comes to a logical conclusion at some point.

HECHT: Well this goes two counties away. Right?

RICHARDS: This goes to two counties but the area, the residents, the people that are living there, they are all in close proximity when you look at the map. This is generally an area of residents and it just happens to be that there is a county line. We do not go that far into Comal county. But there's a county line where these people predominantly live. This was all a voluntary choice on their part. This is not something like a unilateral annexation. This is something that they wanted to do and the county simply assisted them in doing that.

HECHT: Can this area be annexed?

RICHARDS: Yes.

HECHT: By Boerne?

RICHARDS: Not all at one time. There is a limitation on how much you can annex in any one year. And there's been the argument made that because it's only 100 ft. wide, maybe a road that it can't ever be annexed. That forgets about when most annexations occur you're taking in an area. You're taking in a number of properties and the roads and that certainly can be more than 1000 ft. Cities in Texas annex area all the time, that as a result of those annexations county roads become within the city limits or formerly county roads become in the city limits.

OWEN: But if all the land around it is in San Antonio's ETJ they can't annex.

RICHARDS: We cannot annex inside their ETJ. What has happened now there is a line where the two ETJs have abutted each other. Boerne cannot under the amount that's attached to the final judgment in this case annex within their ETJ. They cannot annex within our ETJ.

HANKINSON: If we were to decide this case in favor of the city of San Antonio, what would

be the effect on the extraterritorial jurisdiction statute and the legislature's intent behind enacting that statute around the state? What would be the practical effect?

RICHARDS: Would be if the authority relied upon by Boerne to do what happened here - by the commissioners court to do what happened here. If that was not available people under 42.022 would still be able to submit applications or requests to be included, but you would not have perhaps this means to move as quickly as happened in this case. And that's by putting in county roads. What you've done as you've extended areas that allowed more properties to be contiguous at an earlier point in time than otherwise might have happened.

HANKINSON: So the legislature's intent behind the ETJ statute could still be fulfilled even though the city of San Antonio's interpretation of the power it goes to limiting the power of the county commissioners?

RICHARDS: Yes.

HANKINSON: They wouldn't be able to get in under the wire like they did here.

RICHARDS: Here, as you read the briefs you see that basically under _____ a race happened...

HANKINSON: Boerne would have lost the race under the other...

RICHARDS: We would not have lost because all of the properties are not dependent upon the county roads. Only a certain area in this ETJ in the map attached to the final judgment depend on the county roads. There is an exhibit PX 5 that has a black line on it, which is the area that does not depend on the county roads.

OWEN: Let's assume I own 1000 ft of frontage on a county road, and just across the other side of the county road is the city's ETJ. I'm not contiguous because of the intervening county road?

RICHARDS: It was our interpretation subsequently that you're not contiguous because the properties do have to touch. And there is this space that belongs to someone else. The owner being the state in this instance. And so the people who are across the road don't touch the people on the other side of the road. You can go down the roads as long as each one comes in contiguously but you can't go across the road. It becomes a bearer. So that was one of the things that the commissioner courts considered in trying to fulfill the wishes of these people who wanted to be in Boerne's ETJ. That this was a means to let them come in.

ENOCH: Now this process you say it just takes longer. But in this process you had several property owners and didn't they petition to have their property in the ETJ?

RICHARDS: That's correct. It was all voluntary.

ENOCH: And so that left some property owners who wanted to be in the ETJ not abutting other property owners.

RICHARDS: That's correct.

ENOCH: So it's entirely possible that under this pattern until the ETJ abutted them - I mean it's possible there could be property owners in an island out there that could never be brought in the ETJ that don't abut.

RICHARDS: If you look in the map attached to the petitioner response, the petition for review, we have a small scale map of the big one that's in the record of the court, and you will see some yellow areas. They were referred to as islands in the case. And those are areas where the people did not request to be included within the ETJ. But because of areas around them that were other properties that could have become contiguous, they actually as the processed developed were surrounded by these other properties that are within the ETJ. But because it's a voluntary procedure since they did not ask to come in, then they are not in the ETJ.

OWEN: Are they now part of San Antonio's ETJ?

RICHARDS: These are yellow holes, islands if you will, they are inside the kind of blue/green heavy line on the exhibit attached to the judgment that encircles these areas. They are inside.

HECHT: So they're not in anybody's ETJ?

RICHARDS: Not in anybody's ETJ. And they cannot become in San Antonio's ETJ in my opinion because of the principal that ETJ's cannot overlap. So San Antonio cannot overlap and come inside of Boerne's ETJ to capture these people if you will. They will basically be there till a point in time that either another owner of that property with voluntary request to come in, or if they were annexed. That's a possibility too.

PHILLIPS: But you have to get closer as the years allow.

RICHARDS: As the years allow. When this started we had ½ mile ETJ. We were a general _____ city. We are now a home rule city. We have 1 mile ETJ. And so we are a rapidly growing area too, and so these areas could become annexed at some time in the future.

HECHT: At the time this happened was the expansion of the San Antonio ETJ in this area by a petition or by growth?

RICHARDS: San Antonio, and this is how this whole dispute started, decided to annex a

strip 1000 ft wide that was located inside two federal military reservations along a county road, now a state highway. There would be no residents to serve. It extended like a long finger up from the last point of the city limits, up into the far reaches of Bexar county and along side the city of Fair Oaks Ranch, and came to the S.W. corner of an intersection of two roads there, being 1000 ft wide. No one can live there. There are no services to ever be provided. But what the effect of that annexation did and because of their population they have a 5 mile ETJ. And this would have created an arc from that point all the way across Bexar county up into Kendall county and up into Comal county. They would have captured an extremely large area, it's about 25,000 acres involved in this case, in which Boerne would have no right to regulate growth, subdivision, plat approvals, public utilities, things like that in this area. And this would be an area even over county lines into Comal and Kendall counties. But San Antonio with official sitting in San Antonio who would not have to answer in an election to these folks in the other counties would be making decisions regarding their properties in these counties. And I think that was one of the driving forces that the county commissioners felt were worthy to do what they did.

HECHT: And that's why you think the commissioners in Kendall and Comal counties went along with the request of some of their landowners, but also in cooperation with the City of Boerne?

RICHARDS: Yes. And Kendall county for instance has a long history of a working relationship with the City of Boerne. These roads that went into Boerne's ETJ there's some merit in the fact that these roads later could become subject to maintenance by the City of Boerne. There would be coordination between the remainder of the county road system and the city of Boerne with these roads. There were other things that could happen with these roads where the county already had a preexisting working relationship with the city of Boerne rather than say the City of San Antonio. It just made more sense for them to be in an ETJ of someone that they had such a relationship.

HECHT: The troublesome thing just to put it bluntly is when you look at the map the ETJ of Boerne is going after miles. And you think will it stop in Jefferson county. It just keeps going. And that seems a little bazaar.

RICHARDS: Well it can only grow because it's a voluntary request. This was not an annexation. This was not a unilateral annexation. These people wanted to be in Boerne's ETJ. The statute has no limitation on how far out these properties could go. To give you the contrary of that, if you look at the map of what San Antonio attempted to do, as an exhibit to our response to the petition for review, what was intending to be accomplished there but to lock up a very large area of land that you could control and not have to do anything for the folks there. So there is no limitation apparently in the statute of how far this could grow. As I said earlier, I think as a practical matter there's a logical conclusion where it stops at some point.

PHILLIPS: Would you briefly distinguish the Canales case?

RICHARDS: The Canales case, and that's interesting that the party pointed that case out to you in his remarks. And it speaks to art. 2351. But if you read that case carefully with respect to that statute, and they were talking about creating a unit road system, which is not mentioned in 2351. That part of the decision by the SC was upheld on 2351. The part they reversed the case on was talking about employing these other persons to have overseeing responsibilities that there were certain state statutes that the commissioners in hiring them and setting kind of their terms of employment didn't comply with. That's the reason the decision went against the county for that aspect of the case not with respect to 2351. In fact they actually found an implied power that this county could have this unit road system that it wanted from the express powers given in 2351.

HECHT: The CA was troubled by the argument that if the county commissioners can't do this nobody is left but the legislature, and surely the legislature didn't mean for this to only happen when they were in session. But how often does it happen, the county commissioners do petition cities for inclusion of roadways in the ETJ?

RICHARDS: I found no reported cases where this means was used other than our case. I am aware because of my research in the case of other cities where this process was carried out but it never reached the point where the litigation was appealed. There was an agreed judgment or other resolution of the litigation of the dispute.

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REBUTTAL

BAYNE: J. Hecht you asked whether or not how common it was to have this happen? The answer is, there's only been one other time. That was Bastrop v. The City of Austin, and that was apparently a tool that was devised and small cities were trying to figure out ways to thwart annexation by larger cities.

And so this is the first case in which this tool is being analyzed. That's one of the reasons why this case is so very important. If this case goes the way we think it should be with the City of San Antonio, someone's bright idea about this wonderful tool will be shot and that will be the end of it.

ENOCH: On that point, this reasonable and necessary _____ of roads. Suppose the county has a beautification policy that county roads will be lined with bluebonnets or county roads will have trees or will have bricks that demark the intersections, and San Antonio doesn't have that policy about roads. Couldn't the county literally sit there and say that we're in cooperation, a mutual enterprise with the City of Boerne on the implication of our roads, and we want our roads to all be in Boerne's ETJ to that. Would that be reasonably necessary to management of the roads?

BAYNE: I don't think so. I think _____ pretty far when we get that far. But there wouldn't be any need for the counties to be involved with the City of Boerne at all if they wanted to have a - I think that the counties themselves have the authority to maintain the roads, they have

the budget to maintain the roads. If they wanted a beautification, I think they can do beautification. If they want to contract with the City of Boerne or with BFI or anybody else to come in and help with them that's fine. They can do that. But they can't give away their ETJ. They can't give away the roads as part of the ETJ. That they can't do.

ENOCH: Of course they haven't given away the roads. They've just allowed the roads to be in the city's ETJ.

BAYNE: Well they haven't allowed the roads to be in. They did affirmative acts to partition. They had to have authority to do that, which we maintain it did not have authority to do. It isn't something that they just set back and let happen. Instead they actually had to go __ with petition.

OWEN: Well they had the authority to move a road into the ETJ if they chose to. They could close down one road and reroute it into the ETJ.

BAYNE: They could do that. But that is part of the management of the roads as to whether or not they close roads. When you're talking about closing roads there are very distinct rules that have to do with how you close them. They can't just do it. They have a statutory procedure that you have to follow.

HECHT: Did Kendall and Comal counties lose any control over the roadways when they became part of the ETJ of Boerne?

BAYNE: I don't think so. I think they maintain whatever control they had before. In fact as far as the county is concerned this had no affect on them.

HECHT: So as far as giving up state interest they didn't give up anything.

BAYNE: They didn't give up state interest but they didn't operate with state interest. And that I think is the question that J. Jefferson was asking about, is what is the state interest involved here? And our answer is, there isn't any. It's that simple.