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ATTORNEY GENERAL OF TEXAS

October 21, 2019

The Honorable Bill Moore
Johnson County Attorney
Guinn Justice Center
204 South Buffalo Avenue, Suite 410
Cleburne, Texas 76033-5404

Opinion No. KP-0276

Re: Whether section 43.106 of the Local Government Code, requiring municipal annexation of county roads adjacent to annexed property, applies to voluntary annexations initiated pursuant to former section 43.028 of the Local Government Code (RQ-0289-KP)

Dear Mr. Moore:

You ask whether section 43.106 of the Local Government Code, requiring municipal annexation of county roads adjacent to annexed property, applies to voluntary annexations initiated pursuant to former section 43.028 of the Local Government Code.¹ After you submitted your question, the Legislature enacted House Bill 347, substantially revising chapter 43 and repealing section 43.028. *See* Act of May 13, 2019, 86th Leg., R.S., ch. 155, art. 1, § 1.01(3), 2019 Tex. Sess. Law Serv. 278 (“H.B. 347”) (repealing subchapter B of chapter 43, including section 43.028). The bill took effect immediately upon passage but generally applies only to annexations that were not final on the effective date. *See* H.B. 347, art. 4, §§ 4.01–.02. Thus, we will address your question under the law as it existed prior to the adoption of H.B. 347.² For background, the major organizing principle of former chapter 43 is its division of counties and municipalities into two categories—“Tier 1” and “Tier 2.” *See* Former Chapter 43 § 43.001(2)–(5).³ Generally, a Tier 1 county is a county with a population of less than 500,000, and a Tier 2 county is a county that either does not qualify as a Tier 1 county or votes to be treated as a Tier 2 county. *Id.* § 43.001(2), (3). A Tier 1 municipality is a municipality that is located in one or more Tier 1 counties and that proposes to annex an area located in one or more Tier 1 counties. *Id.* § 43.001(4). A Tier 2 municipality is a municipality that is located wholly or partly in a Tier 2 county or proposes to annex area in a Tier 2 county. *Id.* § 43.001(5). Under former chapter 43, a Tier 1 municipality could annex adjacent areas without the consent of voters or landowners of the area in

¹*See* Letter from Honorable Bill Moore, Johnson Cty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (May 13, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

²Applicable sections repealed by H.B. 347 are cited as “Former Chapter 43.” References to applicable sections that H.B. 347 did not repeal are cited to the current Local Government Code.

³*See* Act of Aug. 13, 2017, 85th Leg., 1st C.S., ch. 6, §§ 1–43, 2017 Tex. Gen. Laws 4505, 4504–21, repealed by H.B. 347, art. 1, § 1.01(1).

certain circumstances. *See, e.g., id.* § 43.033⁴ (certain general-law municipalities); TEX. LOC. GOV'T CODE §§ 43.003 (home-rule municipality by its charter), 43.0115 (certain municipalities annexing enclaves). A Tier 2 municipality, on the other hand, generally could annex an area only with the consent of voters or landowners in the area. Former Chapter 43 §§ 43.067, .068, .069;⁵ TEX. LOC. GOV'T CODE §§ 43.0671–.0673, 43.0681–.0688, 43.0691–.0698.

Section 43.106(a) of the Local Government Code provides:

A municipality that proposes to annex any portion of a county road or territory that abuts a county road must also annex the entire width of the county road and the adjacent right-of-way on both sides of the county road.

TEX. LOC. GOV'T CODE § 43.106(a). You assert that section 43.106 requires any municipality annexing property that abuts a county road to annex the entire width of the road and the adjacent right-of-way. Request Letter at 1. You inform us, however, that a city contends that the section does not apply to voluntary annexations initiated by landowners under section 43.106. *Id.* at 2.

Courts construing a statute attempt to ascertain the Legislature's intent from the plain meaning of the statute's words. *Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 404 (Tex. 2016). They “consider the statute as a whole, giving effect to each provision so that none is rendered meaningless or mere surplusage.” *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016). A statute's words and phrases are “read in context and construed according to the rules of grammar and common usage.” TEX. GOV'T CODE § 311.011(a). Courts “presume that a definition of a common word accords with and does not conflict with the ordinary meaning unless the language clearly indicates otherwise.” *In re Ford Motor Co.*, 442 S.W.3d 265, 271 (Tex. 2014).

Section 43.106 does not specifically distinguish between voluntary and involuntary annexation. TEX. LOC. GOV'T CODE § 43.106(a). The statute restricts its application to a proposed annexation of a “portion of a county road or territory that abuts a county road.” *Id.* The word “propose” commonly means “to form or declare a plan or intention” or “to offer for consideration, discussion, acceptance, or adoption.” WEBSTER'S THIRD NEW INT'L DICTIONARY 1819 (2002). Thus, the issue is whether the phrase “municipality that proposes to annex” includes only municipality-initiated annexation and excludes owner-initiated annexation under former section 43.028.

Former section 43.028 authorizes a municipality to annex “sparsely occupied” land that is (1) a half mile or less wide, (2) contiguous to the annexing municipality, and (3) vacant or on

⁴See Act of May 26, 1991, 72d Leg., R.S., ch. 904, § 1, sec. 43.033, 1991 Tex. Gen. Laws 3239, 3239–40 (amended 1993, 2005, 2015), *repealed* by H.B. 347, art. 1, § 1.01(3).

⁵See Act of Aug. 13, 2017, 85th Leg., 1st C.S., ch. 6, § 26, 2017 Tex. Gen. Laws 4505, 4512–13, 4515 *repealed* by H.B. 347, art. 1, § 1.01(14)–(16).

which fewer than three voters reside.⁶ Former Chapter 43 § 43.028(a). Under that section, owners of the area initiate annexation by written petition to the governing body of the municipality. *Id.* § 43.028(b), (c). The governing body must hear the petition and either grant or refuse the petition. *Id.* § 43.028(d). If granted, the governing body must then enact an annexation ordinance, and the area becomes a part of the municipality on the ordinance's effective date. *Id.* § 43.028(e).

While the owners may initiate annexation under former section 43.028, that does not resolve whether a municipality proposes the annexation under section 43.106. Former section 43.028 is located in former subchapter B, which grants annexation authority only to Tier 1 municipalities. *Id.* § 43.0205.⁷ But former chapter 43 defines a "Tier 1 municipality" as "a municipality wholly located in one or more tier 1 counties *that proposes to annex* an area wholly located in one or more tier 1 counties." *Id.* § 43.001(4) (emphasis added). Courts generally construe a word used throughout a statute to have consistent meaning. *Town of Lakewood Vill. v. Bizios*, 493 S.W.3d 527, 532 (Tex. 2016). Thus, a municipality may annex under former section 43.028 only if it is a Tier 1 municipality that, in some sense, "proposes to annex" the designated area. Former Chapter 43 §§ 43.001(4), .0205, .028(a). When a municipality approves a petition under former section 43.028, introduces an ordinance for annexation, and adopts the ordinance, it declares its intention to proceed with annexation; therefore, it proposes the annexation for purposes of section 43.106. *See id.* § 43.028(b); TEX. LOC. GOV'T CODE § 43.106. Thus, section 43.106 requires a municipality that annexes any portion of a county road or an area abutting a county road by granting a petition under former section 43.028 to also annex the full width of the road and adjacent right-of-way.

You also ask about remedies to enforce section 43.106 against a municipality that has annexed under former section 43.028. Request Letter at 1. Generally, an action in quo warranto is the primary mechanism for challenging annexation. *Laidlaw Waste Sys., Inc. v. City of Wilmer*, 904 S.W.2d 656, 658 (Tex. 1995). However, an annexation may be challenged in a declaratory judgment action on the grounds that the annexation is void because the governing body acted outside of its statutory authority. *Id.* at 657–58; *see also City of Clute v. City of Lake Jackson*, 559 S.W.2d 391, 394 (Tex. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.). Thus, depending on the relief sought, a county could challenge a municipality's annexation under section 43.106 in an action in quo warranto, declaratory judgment, or both.

⁶The contiguity requirement may be satisfied if a public right-of-way of a road or highway designated by the municipality located entirely in the municipality's extraterritorial jurisdiction, when added to the area, makes the area contiguous. Former Chapter 43 § 43.028(g), (h). In that instance, area including the right-of-way may be annexed regardless of whether the owners of the right-of-way sought annexation. *Id.* § 43.028(h).

⁷*See* Act of Aug. 13, 2017, 85th Leg., 1st C.S., ch. 6, § 12, 2017 Tex. Gen. Laws 4505, 4508, *repealed by* H.B. 347, art. 1, § 1.01(3).

S U M M A R Y

Section 43.106 of the Local Government Code requires a municipality that annexed any portion of a county road or an area abutting a county road by granting a petition under former section 43.028 to also annex the full width of the road and adjacent right-of-way.

Depending on the relief sought, a county could challenge a municipality's annexation under section 43.106 of the Local Government Code in an action in quo warranto, declaratory judgment, or both.

Very truly yours,



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