In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-17-00054-CV

CITY OF JUSTIN, Appellant

V.

TOWN OF NORTHLAKE, Appellee

On Appeal from the 367th District Court
Denton County, Texas
Trial Court No. 15-08170-367

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

In this extraterritorial jurisdiction (ETJ) case,[1] Appellee Town of Northlake (Northlake) filed suit against Appellant City of Justin (Justin) asking for, among other things, (1) a declaratory judgment (a) that a 1997 "Joint Resolution and Agreement" (1997 Agreement) between Fort Worth and Northlake relating to both municipalities' ETJ was legal and valid, (b) that the resulting ETJ boundaries were legal and valid, (c) that a certain Justin ordinance that added property to its ETJ was void *ab initio* and invalid; and (2) a permanent injunction regarding Justin's development of the disputed property.[2] Justin counterclaimed asking for a declaratory judgment (1) that the 1997 Agreement between Fort Worth and Northlake was void *ab initio* and (2) that Northlake's resolution purporting to transfer the disputed property into Northlake's ETJ was void *ab initio* and invalid.

Both parties filed summary judgment motions, and the trial court granted the motion filed by Northlake. Justin appeals, contending that the trial court erred in granting Northlake's motion for summary judgment and denying its motion for summary judgment. Justin also contends that because the trial court erred in granting Northlake's motion for summary judgment, it also erred in awarding attorney fees in favor of Northlake.

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[1]Extraterritorial jurisdiction is "the unincorporated area that is contiguous to the corporate boundaries of the municipality" and is located within a specified distance of those boundaries, depending on the number of inhabitants within the municipality. TEX. LOC. GOV'T CODE ANN. § 42.021 (West Supp. 2017). The purpose of ETJ is "to promote and protect the general health, safety, and welfare of persons residing in and adjacent to the municipalities. TEX. LOC. GOV'T CODE ANN. § 42.001 (West 2008).

[2]Originally appealed to the Second Court of Appeals in Fort Worth, Northlake's case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013). Because this is a transfer case, we apply the precedent of the Fort Worth Court of Appeals to the extent it differs from our own. *See* TEX. R. APP. P. 41.3.

Because Northlake failed to establish that it was entitled to judgment as a matter of law, we remand this case to the trial court for further proceedings consistent with this opinion.

I. Background

In 1996, Fort Worth began developing the Texas Motor Speedway complex. The following year, the City of Fort Worth determined that it was in need of additional property to further the development of the complex. As a result, on August 6, 1997, Fort Worth and Northlake entered into an interlocal agreement (1997 ILA) wherein Fort Worth would relinquish to Northlake its rights to certain land located in its ETJ, and Northlake purported to relinquish to Fort Worth its ETJ rights to certain land located within its ETJ. In addition, the 1997 ILA also contained a uniform wholesale water contract, a sanitary sewer service agreement, and a municipal services and revenue sharing agreement. The agreement stated,

> [R]epresentatives from the Town of Northlake (a General Law City) and the City of Fort Worth, through discussions and negotiations have reached agreement(s) which once approved will provide for a more efficient, safe and orderly provision of municipal services in and around the Texas Motor Speedway complex[.]

Based on this agreement, on October 2, 1997, Fort Worth and Northlake approved a joint resolution wherein Fort Worth "relinquish[ed] and release[d] to Northlake" 2,262 acres of land in its ETJ (1997 Joint Resolution). In addition, Northlake would "relinquish and release to Fort Worth" 393.85 acres of land in its ETJ. Among other things, the agreement stated, "[T]his Joint Resolution and Agreement shall become effective and shall become a binding agreement upon the City of Fort Worth and the Town of Northlake by the adoption of same in regular open city council meetings of the City of Fort Worth and the Town of Northlake."

On September 20, 1999, Northlake approved Ordinance 99-0920C, and on November 11, 1999, Northlake approved Ordinance 99-1111A. Both ordinances adopted "the [revised] Official Map[s] of the Town of Northlake"[3] and stated,

> [T]he Town Council desires to officially approve and adopt the revised official map of the Town so that both the Town and all those that reside within the Town or have business with the town, can rely on the map as the current Town's corporate boundaries (subject to future changes through annexations and disannexations)[.]

On appeal, Northlake maintains that the revised maps reflect the town limits, along with the new ETJ boundaries resulting from the 1997 exchange between Fort Worth and Northlake.

In July 2014, Justin's city council met in an executive session to discuss the possibility of annexation and an ETJ expansion of land. The property was made up of a northern tract of land consisting of 64.732 acres (the Northern Tract), and a southern tract of land consisting of 74.174 acres (the Disputed Property). Believing that the Disputed Property was within Northlake's ETJ,[4] Northlake sent a letter to Justin's mayor, stating, in part,

> Please be advised that the Tracts lie within Northlake's ETJ pursuant to a joint resolution and interlocal agreement between Northlake and the City of Fort Worth . . . in which certain areas of ETJ were exchanged between the two municipalities. The agreement was authorized under Section 42.022 of the Texas Local Government Code permitting ETJ territorial apportionments consistent with the municipalities' charter and applicable procedural rules.
>
> Because the Tracts lie within Northlake's ETJ, Section 42.022 of the Local Government Code prohibits Justin from annexing the Tracts without Northlake's

[3]The maps were attached as exhibits to both ordinances.

[4]Northlake concedes that the Northern Tract is located in Justin's ETJ.

> prior written consent. We welcome the opportunity to discuss the issue with Justin's attorney.

Justin did not respond to Northlake's letter.[5]

On August 10, 2015, Justin held a city council meeting in order to, among other things, (1) "[r]eceive, consider and act on a Petition to expand the City of Justin's extraterritorial jurisdiction to cover approximately 74.174 acres of Legacy Ranch" and (2) "[c]onsider and act on an Ordinance expanding the City of Justin's extraterritorial jurisdiction to cover approximately 74.174 acres of Legacy Ranch[.]"[6] During the meeting, the public was given the opportunity to make comments in regard to the development of "Legacy Ranch," which was to be located, in part, on the Disputed Property. Following the hearing, Ordinance 592-12 was approved, resulting in what Justin contends was the expansion of its ETJ to include the Disputed Property. That same day, Justin entered into a development agreement with a third party and also approved a preliminary plat for the development of "Legacy Ranch."

[5]The record contains the affidavit of Shirley Rogers, Northlake's town secretary, wherein she states,

> I conducted a diligent search of the Town of Northlake's records and the records do not reflect that the City of Justin, its officials or employees contacted the Town of Northlake, its officials or employees to discuss, object or complain regarding the 1997 extraterritorial jurisdiction area exchange between Northlake and Fort Worth, the 1997 Joint Resolution exchanging this extraterritorial jurisdiction, Northlake's corporate boundaries, or Northlake's extraterritorial jurisdiction. Further, the records do not show, that Justin, its officials or employees ever responded to the August 14, 2014, letter from Northlake to the City of Justin warning that Justin's proposed annexation and extraterritorial jurisdiction expansion included property that was located within Northlake's extraterritorial jurisdiction . . . .

[6]Justin states that an owner of land that abutted Justin's southern city limit and was partially within one-half mile of Justin's city limits, but which extended further south than the one-half-mile boundary, asked Justin to recognize all of the land as being located in Justin's ETJ. The southern tract of land is the Disputed Property in this case.

On September 17, 2015, Northlake filed a lawsuit against Justin claiming that the Disputed Property was located in Northlake's ETJ and that Justin had illegally encroached upon the land when it extended its ETJ. Northlake challenged, among other things, the validity of Ordinance 592-12 and sought "a declaration that the City of Justin's ordinance adding 74.174 acres to its ETJ [was] void *ab initio* and invalid." Northlake also maintained that it was entitled to the recovery of attorney fees.[7] On October 26, 2015, Justin responded by filing a counterclaim seeking a "declaration that the Joint Resolution and Agreement, approved by the City of Fort Worth's City Council and Northlake's Resolution No. 4012-07-1011, purporting to transfer the Property into Northlake's ETJ [was] void *ab initio* and invalid; thus the property is not, and never has been relinquished and not in whole, in Northlake's ETJ."

On September 23, 2016, Northlake filed with the trial court a traditional and no-evidence motion for summary judgment arguing, in part, that the exchange of ETJ between Northlake and Fort Worth was valid and that Justin was barred from challenging it based upon limitations, estoppel, laches, and waiver. On October 7, 2016, Justin filed, in a single pleading, its response, a cross-motion for summary judgment, and a motion for no-evidence summary judgment. Justin maintained that there was no legal authority for the purported exchange between Northlake and Fort Worth, that it was void *ab initio*, and that the limitations and equitable remedies asserted by Northlake did not estop Justin from challenging an action which was void *ab initio*. On

[7]On October 15, 2015, the trial court entered a temporary restraining order and order setting hearing for temporary injunction, ordering Justin to "immediately cease and desist any enforcement, exercise or application of jurisdiction involving the [Disputed Property]." On October 28, 2015, following a hearing, the trial court granted Northlake a temporary injunction containing the same restrictions.

October 10, 2016, Northlake filed its "Objections and Response to [Justin]'s Cross-Motion for Summary Judgment."

On October 26, 2016, the trial court issued its summary judgment order finding (among other things) that the 1997 exchange of ETJ between Fort Worth and Northlake was valid, that Justin's ordinance 592-15 was void *ab initio* and was invalid, that Justin's development agreement as to the subject property and preliminary plat was void *ab initio* and invalid, and that Justin was estopped and barred by limitations, laches, and waiver from challenging the validity of the 1997 ETJ exchange between Fort Worth and Northlake.[8] This appeal followed.

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[8]Specifically, the trial court held that:

1. Northlake's Traditional and No-Evidence Motion for Summary Judgment was granted;

2. Northlake's Plea to the Jurisdiction and Traditional and No-Evidence Motion for Summary Judgment on Defendant's Contract Claim were granted;

3. Northlake's objections in its summary judgment responses were sustained;

4. Justin's objections in its summary judgment responses were overruled;

5. Justin's Motion for Summary Judgment on Northlake's Breach of Contract Claim was denied;

6. Justin's Traditional and No-Evidence Cross-Motion for Summary Judgment was denied;

7. All of Justin's claims against Northlake were dismissed with prejudice;

8. Justin and its officials, agents, contractors, and employees, were permanently enjoined from enforcing, exercising, or applying any jurisdiction involving the Disputed Property;

9. The trial court entered a declaration that:

   (a) the 1997 City of Fort Worth/Town of Northlake resolution number 2341, and 1997 extraterritorial jurisdiction ("ETJ") boundaries were valid;

   (b) Justin's Ordinance 592-15 adding the disputed property to its ETJ was void *ab initio* and invalid and the Development Agreement as to the Disputed Property and the preliminary plat as to the Disputed Property were void *ab initio* and invalid;

II. Standard of Review

"The purpose of summary judgment is to eliminate patently unmeritorious claims or untenable defenses; it is not intended to deprive litigants of the right to a full hearing on the merits of any real issue of fact." *City of Missouri City v. State ex rel. City of Alvin*, 123 S.W.3d 606, 613 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (citing *Gulbenkian v. Penn*, 252 S.W.2d 929, 931 (Tex. 1952)). The grant of a trial court's summary judgment is subject to de novo review by appellate courts. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). In making the required review, we deem as true all evidence which is favorable to the nonmovant, we indulge every reasonable inference to be drawn from the evidence, and we resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

"A plaintiff moving for summary judgment must conclusively prove all essential elements of its claim." *Missouri City*, 123 S.W.3d at 613 (citing *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986)). To be entitled to traditional summary judgment, a movant must establish that there is no genuine issue of material fact so that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). Once the movant produces evidence entitling it to summary judgment, the burden

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(c) Justin was barred by limitations from contesting Northlake's 1999 ordinances and boundaries;

(d) Northlake's 1997 joint resolution ETJ area exchange and the 1997 ETJ boundary were validated; and

(e) Justin was estopped and barred by the doctrines of laches and waiver from denying the validity of the 1997 ETJ boundary between Northlake and Justin.

shifts to the nonmovant to present evidence raising a genuine issue of material fact. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996).[9]

III. Discussion

A. Evidence Considered by the Trial Court

Justin filed a single pleading on October 7, 2010, entitled "Response to [Northlake]'s Motion for Summary Judgment, Cross-Motion for Summary Judgment, and Motion for No-Evidence Summary Judgment." On October 10, 2016, Northlake filed its objections and a response to Justin's cross-motion for summary judgment.[10] In doing so, Northlake objected to

[9]Ordinarily, "[w]hen a party moves for traditional and no-evidence summary judgments, we first consider the no-evidence motion." *First United Pentecostal Church of Beaumont, d/b/a/ the Anchor of Beaumont v. Parker*, 514 S.W.3d 214, 219 (Tex. 2017) (citing *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004)). "If the non-movant fails to meet its burden under the no-evidence motion, there is no need to address the challenge to the traditional motion as it necessarily fails." *Id*. (citing *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013)). "Thus, we first review each claim under the no-evidence standard." *Id*. "A no-evidence summary judgment is essentially a pretrial directed verdict. We therefore apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict." *Allen v. A & T Transp. Co.*, 79 S.W.3d 65, 69 (Tex. App.—Texarkana 2002, pet. denied) (citing *McCombs v. Children's Med. Ctr. v. Dallas*, 1 S.W.3d 256, 258–59 (Tex. App.—Texarkana 1999, pet. denied)).

In this case, we are unable to consider Justin's cross-motion for summary judgment and its no-evidence motion for summary judgment because the trial court found that the motions had been untimely filed.

In addition, we find it unnecessary to consider the merits of Northlake's no-evidence motion for summary judgment in which Northlake argued, and the trial court agreed, that Justin's ordinance was invalid. A determination of the validity of Justin's ordinance is premature. This is so because the issue of whether Justin's ordinance is invalid depends upon the validity of Northlake's asserted ETJ boundary.

[10]Under the heading "Summary Judgment Evidence," Justin stated that it was relying upon the following summary judgment evidence:

A. City of Fort Worth, Ordinance No. 9914
B. City of Fort Worth, Ordinance No. 10116
C. City of Fort Worth, Resolution No. 4012-07-2011
D. City of Fort Worth, Contract No. 23202
E. City of Fort Worth, Contract No. 19304
F. City of Fort Worth & Town of Northlake Joint Resolution 23202 & 2341
G. City of Fort Worth Planning Department Map
H. City of Fort Worth, Ordinance No. 13577
I. City of Justin Incorporation Papers, Ordinance No. 49, Ordinance No. 80, Resolution No. 189, Ordinance No. 512
J. City of Justin Incorporation Papers

Justin's cross-motion for summary judgment and notice of hearing as being untimely filed for the purposes of consideration at the hearing. In support of its position, Northlake maintained that Justin filed its response and cross-motion for summary judgment after business hours on Friday, October 7, 2016, and gave notice of hearing on October 10, 2016, seeking to have a hearing on its cross-motion on Monday, October 17, 2016.[11] The trial court determined that Justin's cross-motion for summary judgment was filed in an untimely manner and sustained Northlake's objections.[12] It, therefore, did not consider Justin's cross-motion and no-evidence motion.

On appeal, Justin does not maintain that the trial court erred when it sustained Northlake's objections to Justin's cross-motion and no-evidence motion for summary judgment and the attached exhibits. Consequently, we may not consider Justin's exhibits on appeal.[13] *See*

K-1. Affidavit of WM Coleman, including exhibits
K-2. Affidavit of WM Coleman, concerning Plaintiff's exhibits
L. Deposition of Peter Dewing
M. Deposition of Shirley Rogers
N. Reporters Record of Temporary Restraining Order Hearing 26 October 2015.

[11]The record reflects that the trial court did, in fact, conduct the hearing on October 17, 2016.

[12]Rule 166a of the Texas Rules of Civil Procedure provides, in relevant part,

> The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the hearing may file and serve opposing affidavits or other written response.

TEX. R. CIV. P. 166a(c).

[13]While Justin's cross-motion for summary judgment was untimely, the response, which was contained in the same pleading, was filed in a timely manner. However, the exhibits attached to the pleading were set forth specifically under the heading "SUMMARY JUDGMENT EVIDENCE." Justin stated, "In support of its Motion for Summary Judgment, Justin incorporates by reference the exhibits submitted during the hearing concerning the Plaintiff's Motion for Temporary Injunction, held before this Court on October 26, 2015, and the exhibits attached to Plaintiff's Motion for Summary Judgment to which Justin has not objected." Clearly, Justin considered the documents attached to its pleading to be evidence in support of its cross-motion for summary judgment. As stated above, because Justin's cross-

Benchmark Bank v. Crowder, 919 S.W.2d 657, 663 (Tex. 1996). Northlake was nevertheless required to establish its entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of its cause of action as a matter of law. *See Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972). Because the second issue is dispositive, we need not address the first issue.

B. Analysis

On appeal, among other things, Justin contends that the trial court erred in granting Northlake's motion for summary judgment and that it should have either: (1) declared the 1997 Joint Resolution void because Fort Worth's charter failed to include language giving it the authority to enter into such agreement; or (2) found the 1997 Joint Resolution violated various sections of the Local Government Code.[14] We will address these issues in the order in which they were presented.

1. Did the Fort Worth/Northlake Transfer of ETJ Exceed Northlake's Statutory Boundary?

Former Section 43.021 of the Texas Government Code, which Northlake maintains is the relevant statute in this case, provided,

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motion for summary judgment was filed in an untimely manner, neither the cross-motion nor the exhibits attached thereto were considered by the trial court, and they likewise may not be considered by this Court.

[14]In addition, Justin contends that the trial court "could have, consistent with the intent of Fort Worth and Northlake, understood the 1997 Joint Resolution as releasing ETJ but authorizing transfers only when the requirements of the Local Government Code were met." In other words, Justin contends that the trial court had the option of finding "the portion of the 1997 Joint Resolution that *transfer[red]* territory" to be invalid, "while the portion *releasing* ETJ [to be] enforce[able]." (Emphasis added). For the reasons stated herein, we decline to address Justin's contention.

> A home-rule municipality[15] may take the following actions according to rules as may be provided by the charter of the municipality and not inconsistent with the procedural rules prescribed by this chapter:
>
> (1) fix the boundaries of the municipality;
>
> (2) extend the boundaries of the municipality and annex area adjacent to the municipality; and
>
> (3) exchange area with other municipalities.

Act of May 1, 1987, 70th Leg., R.S., ch. 149, § 1, sec. 43.021, 1987 Tex. Gen. Laws 707, 747 (amended and re-designated 2017) (current version at TEX. LOC. GOV'T CODE § 43.003). Specifically, Northlake states, "In fact, Texas Local Government Code § 43.021(3) provides that a home rule municipality like Fort Worth can 'exchange area with other municipalities,' which includes general law municipalities such as Northlake."

Northlake continues,

> The plain language of the statute allows a home rule municipality to exchange area, including ETJ, with any other municipality. Case law confirms that cities have the power to adjust their boundaries and exchange area. Fort Worth and Northlake relied on the plain language in 1997 and Northlake did not hear a word in opposition until 2015 after it was forced to bring suit to stop Justin's illegal encroachment.

Northlake then concludes, "Thus, § 43.021 applies to *both Fort Worth and Northlake*." (Emphasis added). We disagree. Former Section 43.021 specifically addressed the authority given to home-

[15]In Texas, there are three types of municipalities: (1) home-rule municipalities; (2) general-law municipalities; and (3) special-law municipalities. *Forwood v. City of Taylor*, 214 S.W.2d 282 (Tex. 1948). The Texas Supreme Court has held that "[t]he nature and source of a municipality's power depends on the type of municipality." *Town of Lakewood Vill. v. Bizios*, 493 S.W.3d 527, 531 (Tex. 2016). The parties agree that Fort Worth is a home-rule municipality and that Northlake and Justin are general-law municipalities.

rule municipalities. It did not, however, address a general-law municipality's authority in regard to adjusting its boundaries or exchanging its ETJ.

Moreover, it is well settled that a general-law municipality, such as Northlake, only "possess[es] those powers and privileges that the State expressly confers upon [it]." *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 645 (Tex. 2004). As a general-law municipality, Northlake "cannot exercise its powers outside its corporate limits unless the Legislature expressly or necessarily grants it such authority." *See Bizios*, 493 S.W.3d at 538. Moreover, a general-law municipality has "only such implied powers as are reasonably necessary to make effective the powers expressly granted. That is to say, such as are *indispensable* to the declared objects of the [municipalities] and the accomplishment of the purposes of [their] creation." *Id*. at 536 (quoting *Tri-City Fresh Water Supply Dist. No. 2 of Harris Cty. v. Mann*, 142 S.W.2d 945, 947 (Tex. 1940); *see also Foster v. City of Waco*, 255 S.W. 1104, 1106 (Tex. 1923) ("A municipal power will be implied only when without its exercise the expressed duty or authority would be rendered nugatory.))." Therefore, we must "strictly construe general-law municipal authority and '[a]ny fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the [municipality], and the power is denied.'" *Id.* (citing *Foster*, 255 S.W. at 1106).

The 1997 Joint Resolution between Fort Worth and Northlake reads, in part,

> That Fort Worth does hereby relinquish and release to Northlake all extraterritorial jurisdiction rights it has or may have in that certain 2,049 acre tract of land identified as Parcel 3 in this Joint Resolution and Agreement. Parcel 3 is described by metes and bounds on pages 1 and 2 and reflected on the map depicted on page 3 of Exhibit "C" hereof, which exhibit is attached hereto and expressly made a part hereof.

While we have agreed that Fort Worth had the statutory authority pursuant to former Section 43.021 to adjust its boundaries and exchange ETJ area with other municipalities (including general-law municipalities), such authority may not be applied in a vacuum, nor should the remainder of the Texas Local Government Code be disregarded.

Section 42.021 states, "The extraterritorial jurisdiction of a municipality is the unincorporated area that is contiguous to the corporate boundaries of the municipality and that is located: (1) within one-half mile of those boundaries, in the case of a municipality with fewer than 5,000 inhabitants[, such as Northlake.]" TEX. LOC. GOV'T CODE ANN. § 42.021 (West Supp. 2017). Justin contends that at least a portion of the ETJ that Fort Worth "relinquished and released" *to Northlake* violated the Texas Local Government Code because it expanded Northlake's ETJ beyond the one-half mile boundary.[16]

In response, Northlake directs us to *City of The Colony v. City of Frisco*, 686 S.W.2d 379 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.). The background is as follows: In 1966, Frisco passed Ordinance 179, which annexed strips of land ten feet in width along the center line of highways surrounding Frisco.[17] *Id.* at 379. In 1977, real estate developers and builders requested that Frisco release property in the southwest section of the area encompassed by Ordinance 179

[16]To the extent Justin contends it provided summary judgment evidence in support of its assertion that the Disputed Property exceeds the one-half mile boundary, the trial court sustained Northlake's objection that Justin filed its cross-motion for summary judgment in an untimely manner and, therefore, did not consider the summary judgment evidence attached to Justin's cross-motion. This Court, likewise, may not consider that evidence.

[17]The annexed ten-foot strip amounted to approximately eighty-seven square miles. *City of The Colony*, 686 S.W.2d at 379–80. It "ran along the center of Farm-to-Market Road 720 west to Farm-to-Market Road 423; then north to U.S. Highway 380; then east to Farm-to-Market Road 2478; then south to State Highway 121; then southwesterly to Farm-to-Market Road 423; then north to Farm-to-Market Road 720." *Id* at 380.

for the purpose of developing and incorporating The Colony. *Id.* at 380. Frisco released the requested area; however, it retained its boundary along State Highway 121 and Farm-to-Market Road 423. Frisco also retained a five-foot strip of ETJ along the east and north boundaries of The Colony.[18]

In 1978, The Colony and Frisco agreed, on multiple occasions, that Frisco would release its annexation bordering The Colony along State Highway 121 and Farm-to Market Road 423. Frisco also adjusted its five-foot strip of ETJ. *Id.* In 1982, The Colony passed Ordinance 228, annexing fifty acres north of its northern boundary. *Id.* The Colony's attempted annexation encroached upon land, which by Frisco Ordinance 179, was part of its ETJ. *Id.* Frisco then brought suit against The Colony seeking a declaratory judgment that The Colony's Ordinance 228 was void because it encroached upon Frisco's ETJ and that the earlier boundary line agreements between the two municipalities were valid. *Id.* After a non-jury trial, the court ruled, among other things, that Frisco's Ordinance 179 had been validated pursuant to a subsequent validation statute. *Id.*

The Colony appealed, maintaining that Frisco's Ordinance 179 could not have been validated by the (now-repealed) Article 974d-28 of the Texas Revised Civil Statutes because annexations that extended beyond the annexing city's ETJ could not be validated.[19] *Id.* The relevant portions of Article 974d-28 were as follows:

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[18]At the time of Ordinance 179's enactment, Frisco had an ETJ of one-half mile and could only annex property within its own ETJ.

[19]At the time Frisco's Ordinance 179 was enacted, Frisco had an ETJ of one-half mile, and the ordinance was clearly invalid at the time it was enacted. Thus, the Fort Worth Court of Appeals was tasked with determining if such ordinance had been validated.

> Sec. 4. (a) The original boundary lines of each municipality covered by this Act and any extension of those boundaries adopted before January 1, 1975, are validated in all respects, even though the action adopting the original boundaries or an extension of them was not in accordance with law.
>
> (b) Without limiting the generality of Subsection (a) of this section, it is expressly provided that an attempted annexation that occurred before January 1, 1975, may not be held invalid because it did not comply with the Municipal Annexation Act, as amended . . ., or any other applicable law, or because the territory the municipality attempted to annex was not contiguous or adjacent to the then existing boundaries of the municipality, or because the municipality was not petitioned for annexation by the owners or residents of the annexed territory.

Act of May 25, 1979, 66th Leg., R.S., ch. 473, § 4, 1979 Tex. Gen. Laws 1043, 1043–44, *repealed by* Act of Apr. 30, 1987, 70th Leg., R.S., ch. 149, § 49(1), 1987 Tex. Gen. Laws 707, 1306. In affirming the trial court, the Fort Worth Court of Appeals determined that Frisco's Ordinance 179, which was clearly invalid at the time of its enactment for extending annexation beyond Frisco's one-half mile ETJ boundary, had been validated by Article 974d-28. *Id*. at 381.[20]

The trial court also denied The Colony's request for a declaration that the earlier boundary line agreements between the cities were invalid. The Colony argued that the five-foot strips of ETJ provided for in the agreements were not adjacent and contiguous to Frisco's corporate limits and were, therefore, invalid. *Id*. at 382. The Fort Worth Court of Appeals disagreed with The Colony's contention, stating,

> [A]djacent cities may accomplish mutually agreeable adjustments in their boundaries of areas that are less than 500 feet in width. The two cities to this suit entered into agreements adjusting their boundaries, Frisco taking care that future expansion of Colony would be subject to Frisco's approval. While the statute addressed changes in boundaries and does not specifically provide for agreements

[20]In finding that the validation statute applied to Frisco's Ordinance 179, the appellate court explained, "[W]e have examined the 1979 validation statute and have noted its precise words stating an annexation may not be held invalid because the land attempted to be annexed was not *contiguous or adjacent to the city's boundaries*." *City of The Colony*, 686 S.W.2d at 381 (emphasis added).

> as to E.T.J., sec. 8 of the Act[21] provides that no city may be incorporated within the area of the E.T.J. of any city without the written consent of the governing body of such city. *It necessarily follows that adjacent cities may enter into agreements with regard to their E.T.J.*

Id. (emphasis added).

In support of its assertion that the agreement between Northlake and Fort Worth was valid, Northlake highlights the appellate court's statement that "adjacent cities may enter into agreements with regard to their E.T.J." *See id.* While we concur that adjacent cities may enter into agreements with one another with regard to their respective ETJs, we find the remainder of the court's discussion in *City of The Colony* to be inapposite due to its dissimilar factual background and the resulting issues. *City of The Colony* stands, in large part, for the proposition that an annexation ordinance which was invalid at the time it was enacted was validated by a subsequent state validation statute. Regardless, we are not convinced (nor do we find) that *City of The Colony* supports a party's claim that an agreement made between two municipalities relating to annexation, boundaries, or ETJ should be held valid, despite the fact that the agreement violates other portions of the Local Government Code.[22, 23]

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[21]The appellate court was referring to the Municipal Annexation Act, which was repealed in 1987. Act of Apr. 29, 1963, 58th Leg., R.S., ch. 160, 1963 Tex. Gen. Laws 447, 447–54, *repealed by* Act of Apr. 30, 1987, 70th Leg., R.S., ch. 149, § 49(a), 1987 Tex. Gen. Laws 707, 1306 (adoption of Texas Local Government Code) (current provision codified at Chapter 43 of the Texas Local Government Code).

[22]We make no finding as to whether the agreement between Northlake and Fort Worth violated any portion of the Local Government Code.

[23]Northlake also cites *City of The Colony* for the proposition that the term "area" in former Section 43.021 of the Local Government Code included a municipality's ETJ and, therefore, that Fort Worth had the authority to release and relinquish to Northlake the ETJ at issue. As we have already stated, Section 43.021 related directly to the authority given to a *home-rule municipality*, *i.e.*, a home-rule municipality may exchange area (to include its ETJ) with other municipalities. It did not, however, address the authority given to the receiving city which, in this case, is a general-

Moreover, there are only three ways in which a municipality can increase its ETJ. Section 42.022, entitled "Expansion of Extraterritorial Jurisdiction," states,

> (a) When a municipality annexes an area, the extraterritorial jurisdiction of the municipality expands with the annexation to comprise, *consistent with Section 42.021*, the area around the new municipal boundaries.
>
> (b) The extraterritorial jurisdiction of the municipality may expand beyond the distance limitations imposed by Section 42.021 to include an area contiguous to the otherwise existing extraterritorial jurisdiction of the municipality if the owners of the area request the expansion.
>
> (c) The expansion of the extraterritorial jurisdiction of a municipality through annexation, request, or increase in the number of inhabitants may not include any area in the existing extraterritorial jurisdiction of another municipality, except as provided by Subsection (d).
>
> (d) The extraterritorial jurisdiction of a municipality may be expanded through annexation to include area that on the date of annexation is located in the extraterritorial jurisdiction of another municipality if a written agreement between the municipalities in effect on the date of annexation allocates the area to the extraterritorial jurisdiction of the annexing municipality.

See TEX. LOC. GOV'T CODE ANN. § 42.022 (West Supp. 2017) (emphasis added); *see also City of Alton v. City of Mission*, 164 S.W.3d 861, 868 (Tex. App.—Corpus Christi 2005, pet. denied) (explaining that the Legislature "allows for receipt of released ETJ only by annexation, population growth, or request"). Justin claims that because Northlake's ordinance included property outside of its ETJ, the ordinance went beyond its authority and is, therefore, void.

In its motion for summary judgment, Northlake asked for declaratory relief, "including a declaration that the Town of Northlake and City of Fort Worth 1997 Joint Resolution, 1997 ETJ

law municipality and not a home-rule municipality. Thus, Section 43.021 had little, if any, relevance regarding Northlake's authority to annex, relinquish, accept, or exchange ETJ.

exchange, and the 1997 ETJ boundary [were] legal and validated[.]" In order for the trial court to grant summary judgment in Northlake's favor, Northlake was required to prove that its agreement and the resulting ETJ boundaries complied with the statutory provisions of the Local Government Code, including Section 42.021. In support of its motion, Northlake provided the trial court with numerous exhibits, including various maps of Northlake's and Justin's ETJ boundaries. None of these exhibits sufficiently describe the area Fort Worth purportedly exchanged with Northlake to conclude that Northlake received area that was inside its one-half mile statutorily described boundary.[24] In fact, Northlake's proffered exhibits reveal varying distances between Northlake's corporate boundary and the disputed ETJ. There exists no competent summary judgment evidence, such as deposition testimony or sworn affidavits, to support Northlake's contention, and the trial court's ruling, that Northlake's agreement with Fort Worth resulted in an ETJ boundary that was legal or valid.

Because Northlake failed to establish that it was entitled to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of its cause of action, the trial court erred in granting summary judgment in Northlake's favor.[25]

[24]Justin contends that the record contains undisputed summary judgment evidence that the Fort Worth/Northlake exchange resulted in Northlake's ETJ boundary being extended in excess of the statutory one-half mile limitation. Whether Justin's assertion is well-founded or not, the record reflects that the trial court granted Northlake's objections to Justin's cross-motion for summary judgment, including Northlake's objection that Justin's cross-motion should not be considered due to its untimely filing. As we have previously stated, this Court is prevented from considering Justin's cross-motion for summary judgment, as well as the exhibits attached to it.

[25]Because the remainder of Justin's and Northlake's arguments and issues depend (at least in part) upon this dispositive legal sufficiency determination, we find it unnecessary, as well as premature, to address them at this time.

IV. Conclusion

We reverse the trial court's summary judgment in favor of Northlake and remand this case to the trial court for further proceedings consistent with this opinion.

Bailey C. Moseley
Justice

Date Submitted: January 31, 2018
Date Decided: May 2, 2018