ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Provisional Government of Santa Teresa and Mary Gonzales,

Plaintiff-Appellant,

v.

COA No. 35,927
Doña Ana County
D-307-CV-2015-02653

Doña Ana County Board of County Commissioners,

Defendant-Appellee.

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
THE HONORABLE MARY ROSNER PRESIDING

Defendant-Appellee's Answer Brief

SUBMITTED BY:

Doña Ana County Attorney's Office
Thomas R. Figart, Esq., and
Nelson J. Goodin, County Attorney
Attorneys for Defendant-Appellee
P.O. Box 2528
Las Cruces, NM 88004
(575)647-7225
(575) 525-5925 (Fax)
tomf@donaanacounty.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases:

New Mexico Statutes and Rules

REFERENCE DESIGNATIONS

Throughout this Appellee Answer Brief, the Doña Ana County Board of County Commissioners will be referred to as the "BOCC"; the Appellants Provisional Government of Santa Teresa will be referred-to as "Appellants"; and the Intervenor-Appellee the City of Sunland Park will be referred-to as "Sunland Park."

I. SUMMARY OF PROCEEDINGS

A. The Appellants' Summary of Proceedings Varies from the Rule "Rule 12-213"

NMRA 12-318 (a recent re-enactment of Rule 12-213) provides at subsection A (3) for "a summary of the proceedings, briefly describing the nature of the case, the course of proceedings, and the disposition in the court below, and including a summary of the facts relevant to the issues presented for review." As to that admonition, the New Mexico Court of Appeals, in *Hartman v. Texaco, Inc.* 1997-NMCA-032, ¶27, 123 N.M. 120 wrote that:

> The appellate rules are designed, among other things, to obtain briefs that provide this Court with an organized, accurate statement of the material necessary to consider the issues raised on appeal without reference to extraneous matters. A one-sided statement of the facts is no help to this Court.

As the BOCC reads the Appellants' "Summary of Proceedings" (pp. 2-3) and "Summary of Facts and Course of Proceedings" (pp. 2-7) they present a

substantially new rendering of the case with many extraneous facts, information and positions not introduced, raised and argued below before either the BOCC or the District Court and not relevant and material to our issue.

Much of what appears in the Appellants' narrative of the facts and proceedings is taken from parts of the voluminous petition for incorporation filed by the Appellants with the BOCC that were not specifically introduced, raised and argued to the BOCC. See, e.g., the historical narration, intent and notions of Appellants, the municipal services provisions included on pages 2 through 5 of the Appellants' Summary; the history of the prior proceedings in the 1986 prior case between the Appellants and Sunland Park included on page 6 of the Appellants' Summary.

In short, as the BOCC reads it, the Appellants' Summary consists in significant part of a one-sided narrative containing in large part extraneous matters.

A review of the Transcript of the hearing and the Record before the BOCC reveals that the argument presented to the BOCC by both the Appellants and Sunland Park was limited to whether or not the Appellants met the requirement of § 3-2-3 B (1) by seeking Sunland Park's consent to incorporate; and more on point, whether or not the Appellants met the requirement of § 3-2-3 B (2) by petitioning Sunland Park for annexation; and the finally statutory interpretation of the

language of § 3-2-3 B (3) as it interplayed with § 3-2-3 B (2). See the Summary of the Hearing Transcript in the Record Proper (000073-000076) and the minutes of the BOCC meeting where the hearing was held (R.P. 000337-000340). See also the BOCC's "Order" regarding the Petition for Incorporation of the City of Santa Teresa, New Mexico, particularly the seven (7) findings, which recites the issues presented at the hearing. (R.P. 000343-000344).

Since the review by the District Court, sitting as an Administrative Appellate Court, is on the Record, *Rio Grande Chapter of Sierra Club v. New Mexico Mining Commission*, 2003-NMSC-005, ¶17, 133 N.M. 97, the proceedings before the District Court are limited to those same issues and arguments. The Appellants acknowledged that procedure (R.P. 000361).

A review of the Record before the District Court reveals that the arguments and issues raised by the Appellants before the District Court were limited to those raised and argued to the BOCC. (R.P. 000001-000002; 000366-000373; and 000394-000408).

B. BOCC's Summary of Proceedings and Statement of Material Facts

Rather than attempt a time-consuming re-writing of the "Appellants Summary" to separate the extraneous from the relevant and material, the BOCC presents below its own succinct "Statement of Proceedings and Statement of

Relevant and Material Facts" that reflect the case as presented at the BOCC and the District Court levels.

"The BOCC Statement"

1. The Appellants filed a petition with the BOCC to incorporate as a new municipality pursuant to the municipal incorporation statutory scheme (§§ 3-2-1 through 3-2-9). (R.P. 000082-000328).

2. The territory proposed to be incorporated is located in the Santa Teresa area of Southern Doña Ana County and within five (5) miles of the boundary of the Sunland Park, an existing municipality in Doña Ana County. (R.P. 000073-000338). As such, it lies within an "urbanized territory."

3. Section 3-2-3 NMSA 1978, of the incorporation statutory scheme ("Urbanized Territory; Incorporation Limited within Urbanized Territory") provides in subsection A. in pertinent part:

> "A. Urbanized territory is that territory within the same county and within five miles of the boundary of any municipality having a population of five thousand or more persons…"

4. Subsection B of § 3-2-3 reads in full that:

> "B. No territory within an urbanized territory shall be incorporated as a municipality unless the:
>
> (1) municipality or municipalities causing the urbanized territory approve, by resolution, the incorporation of the territory as a municipality;

(2) residents of the territory **proposed to be incorporated** have filed with the municipality a valid petition to annex the territory **proposed to be incorporated** and the municipality fails, within one hundred twenty days after the filing of the annexation petition, to annex the territory **proposed to be incorporated**; or

(3) residents of the territory **proposed to be annexed** conclusively prove that the municipality is unable to provide municipal services within the territory **proposed to be incorporated** within the same period of time that the proposed municipality could provide municipal service."
(emphasis supplied).

5. As part of the municipal incorporation process as set-out in NMSA 1978 § 3-2-5 of the statutory scheme, where the territory to be incorporated is within an urbanized area, the BOCC is to make the determination that the Appellants have complied with the aforementioned requirements of § 3-2-3 B.

6. On November 24, 2015, the BOCC held a hearing on the Appellants' compliance with § 3-2-3 B. Both the Appellants and the City of Sunland Park appeared (Sunland Park opposing the incorporation), and offered evidence and orally argued concerning the statutory interpretation of § 3-2-3 B. (R.P. 000329-000341).

7. As admitted by the Appellants, they had not secured a resolution from Sunland Park approving the incorporation (§ 3-2-3 B (1)). (R.P. 000002; 000003; and 000338).

8. As admitted by the Appellants, they had not filed a petition with Sunland Park seeking annexation by Sunland Park of the territory proposed to be incorporated (§ 3-2-3 B (2)). (R.P. 000003 and 000338).

9. The Appellants argued that they did not need to satisfy the requirements of subsections 3-2-3 B (1) or (2); that they could directly proceed to subsection 3-2-3 B (3) for incorporation approval by establishing that Sunland Park "is unable to provide municipal services within the territory proposed to be incorporated within the same period of time that the proposed (new) municipality could provide municipal services." (R.P. 000074).

10. Sunland Park argued that subsection B (3) was not available to the Appellants without them having first filed the petition to Sunland Park for annexation and await Sunland Park's action or inaction; that it was a mandatory pre-requisite to the availability to Sunland Park of the subsection (3) option. (R.P. 000074).

11. After having heard the facts and the statutory interpretation arguments of the Appellants and of Sunland Park, and after due consideration of the arguments and its own interpretation of § 3-2-3 B, the BOCC found and determined that the observance of subsection (2) by the Appellants was a mandatory pre-requisite of the availability of the subsection (3) option. (R.P. 000340 and 000344).

12. No § 3-2-3 B (3) hearing was held.

13. On December 30, 2015, the Appellants filed its Notice of Appeal of the Board of County Commission's decision. (R.P. 000001-000025).

14. On May 20, 2016, after briefing of the issues by the Parties, the District Court issued a "Final Appellate Order from Administrative Hearing" containing Findings of Fact and Conclusions of Law and ruling that:

> The Appellant, Provisional Government of Santa Teresa should be allowed by Appellee Doña Ana County Board of County Commissioners to present its proof, by clear and convincing evidence, that Sunland Park cannot provide municipal services for Santa Teresa within the next 4 months. If Appellant meets its burden of proof, then Santa Teresa cannot be annexed by Sunland Park under Section 3-2-3 (B) NMSA 1978. (R.P. 000412-000418).

15. On June 6, 2016, Sunland Park filed a Motion for Rehearing. The BOCC filed a Joinder to that Motion on that same date. (R.P. 000419-000465 and 000468-000469).

16. On June 19, 2016, the District Court heard oral arguments on the Motion for a Rehearing, granted the Motion and directed the Parties to simultaneously submit Supplemental Briefs on the issues on or before August 1, 2016. (R.P. 000475-000477).

17. Supplemental Briefs were filed by the Appellants (R.P. 000478-000516); the County (R.P. 000517-000532); and by Sunland Park (R.P. 000533-000545).

18. On September 19, 2016, the District Court entered an "Amended Final Appellate Order from an Administrative Hearing" reversing her earlier decision and ruling that the BOCC's interpretation was correct that NMSA § 3-2-3 (B) (2) "requires a condition of incorporation, for Santa Teresa (the "Appellants") to deliver to the City of Sunland Park, a valid petition for annexation." (R.P. 000550-000559).

19. On October 19, 2016, the Appellants filed with the District Court a Petition for Writ of Certiorari (R.P. 000560-000571).

20. On December 18, 2016, an Order granting Certiorari was filed by the New Mexico Court of Appeals (R.P. 000574-000575), and the case was assigned to the General Calendar (R.P. 000573-000574).

II. THE ISSUE ON APPEAL

There is only one issue before the Court of Appeals which involves the interplay between §§ 3-2-3 B (2) and 3-2-3 B (3) of the New Mexico statutory incorporation scheme. The issue posed can be framed as:

> Whether or not the Appellants (Incorporators) can seek to satisfy the requirements of § 3-2-3 B by moving directly to a

subpart (3) hearing on the merits and, thus, by-passing the provisions of subpart B (2)

III. STANDARD OF REVIEW

The BOCC agrees with the position of the Appellants that the standard of review is a *de novo* review of the statutory interpretations of the BOCC, and, then, of the District Court of NMSA § 3-2-3 (B) and that statutory interpretation is a question of law.

However, the review by the Appellate Court depends upon the nature of the review undertaken by the District Court. *Clayton v. The Farmington City Council*, 1995-NMCA-079, ¶14, 120 N.M. 448. Given that this case at the District Court level was an administrative appeal under NMRA 1-074, the review there and here before the Court of Appeals is limited to the Record (NMRA 1-074 H.). And in our case to determine a question of law under NMRA 1-074 R (4).

IV. APPELLATE REVIEW IS LIMITED TO THE RECORD BELOW

Matters not of record are not before the Appellate Courts on appeal. *Macnair v. Stueber*, 1972-NMSC-059, ¶4, 84 N.M. 93, and will not be considered upon appeal. *Adams v. Loffland Brothers Drilling Company*, 1970-NMCA-114, ¶22, 82 N.M. 72.

Further, an Appellate Court will not search the Record to see if an issue was preserved or to find support for an appellant's claims. *Young v. Van Duyne*, 2004-NMCA-074, ¶9, 135 N.M. 695.

V. ON RAISING A NEW ARGUMENT OR THEORY

It is well-settled that Appellate Courts will not review and consider arguments or theories not raised before the Court (or tribunal) below. See, for example, *Harden* v. *Eaves*, 1950-NMSC-050, ¶12, 55 N.M. 40; *Koran v. White*, 1961-NMSC-102, ¶8, 69 N.M. 46; *Maryland Casualty Company v. Foster*, 1966-NMSC-098, ¶10, 76 N.M. 310; *Village of Angel Fire*, 2010-NMCA-038, ¶15, 148 N.M. 804; and *Lopez v. Las Cruces Police Department*, 2006-NMCA-074, ¶24, 139 N.M. 730,

In *Village of Angel Fire, Id.*, the Court of Appeals wrote:

> We will not review arguments that were not preserved in the district court. This rule serves two purposes. First, it allows the district court an opportunity to cure errors, thereby dispensing with the need for an appeal, and second, it creates a reviewable record. In order to properly preserve an issue, "it must appear that [the party] fairly invoked a ruling of the [district] court on the same grounds argued in the appellate court.

In *Lopez Id.*, the Court added that the preservation rule:

> Also serves the purpose of allowing the opponent of an objection to meet the objection with either evidence or argument.

In other words, for the opponent to be heard.

"Change of Theory"

A party cannot change his theory on appeal. *America Bank of Commerce v. United States Fidelity and Guaranty Company*, 1973-NMSC-078, ¶2, 85 N.M. 478. The precedent and stand-alone arguments are changes of theory from the theories raised and argues below. For this additional reason, they should not be considered.

"As Applied"

As more fully discussed in Section VI through X of this Answer Brief, the BOCC submits that the Appellants' precedent and stand-alone arguments/theories it includes in their Brief were not specifically raised and argued below and should be considered as impermissible changes of theory. Accordingly, they should not be considered by this Court.

VI. ON THE APPELLANTS' PRECEDENT ARGUMENT

In several points of their Brief argument (see pp. 14, 15, 26, and 27) the BOCC submits that the Appellants raise for the first time a theory of prior precedent. The Appellants refer to the 1986 petition for incorporation, filed by a prior Santa Teresa landowners Association to a 1986 BOCC (similarly opposed by Sunland Park as herein) where the Appellants claim that the 1986 BOCC, interpreted § 3-2-3, to mean that there was no need for the Incorporators (at that

time) to trigger § 3-2-3 B (2) by petitioning Sunland Park for annexation in order to exercise the B (3) option for a hearing on the municipal services question. The present Appellants argue that they relied on that 1986 decision in filing its incorporation petition and that this Court should hold the BOCC to that 1986 interpretation.

To repeat, this argument was not raised and argued below. Indeed, there are no specific record references in the Appellants' Brief pointing to where it was specifically raised, argued and decided by either the BOCC or the District Court.

In addition, there are no specific record references in the Appellants' Brief to the record before the BOCC in 1986 to evidence that the interplay between § 3-2-3 B (2) and B (3) was raised and argued and considered and specifically decided by the 1986 BOCC.

Even, assuming *arguendo*, if it had been raised and argued and specifically interpreted by the 1986 BOCC, it is not precedent required to be followed by the 2015 BOCC. The Legislature's policy on municipal incorporations, as announced by the New Mexico Supreme Court in the *City of Sunland Park* case (in 1990) was not published at the time of the 1986 proceeding. But it was in 2015 and was raised and argued to the 2015 BOCC by both the Appellants and Sunland Park. (R.P. 000004). It is quite likely that the Legislature's policy position "to discourage splinter communities or a proliferation of neighboring independent municipal

bodies, whose competing needs would divide tax revenue, multiply services, create confusion and factionalism..." was an important factor in the 2015 BOCC decision. The 2015 BOCC may very well have reasoned that the requirement of a B (2) annexation request furthered that legislative purpose.

Not having been raised and argued and otherwise not legal precedent, the Appellants' precedence argument should fail.

VII. ON THE APPELLANTS' STANDALONE (SIC) ARGUMENT

In its Brief (at pp. 15-18) Appellants make the argument that "subsection 3-2-3 B (3) is a standalone option..." They argue that the absence of the use of the conjunction "or" between subparts B (1) and B (2) and the use of "or" between B (2) and B (3) indicates the Legislature's intent to keep B (3) as a totally separate go to from either B (1) and B (2).

To begin with, this argument was not raised and argued below to either the BOCC or the District Court and should not be considered. The Appellants provide us with no specific cites to the record where it was raised, argued and decided. It should not be considered by the Court. It is a departure from the Appellants' central thesis in their argument below.

In their initial Brief to the District Court (see the Appellants' Statement of Appellant Issues" (R.P. 000371) and in their final Brief to the District Court (see "Appellants' Supplemental Brief" (R.P. 000489)) the Appellants took the position

that the word "or" was understood to be present between B (1) and B (2) to create "three discrete methods" of incorporation. In their Briefs, Appellants linked B (2) to B (3) with the following language:

> Finally, they could incorporate upon (a) the Sunland Park City Council expressing an intention to annex adjacent areas, (b) not less than two hundred qualified electors of Santa Teresa presenting a petition for incorporation to Doña Ana County, and (c) petitions conclusively proving that municipal services can be provided by Santa Teresa before the City of Sunland Park. (R.P. 000371 and 000489).

In that language, Appellants were acknowledging the link, the condition precedent in B (2) to the exercise of B (3) incorporation option. The Appellants argued below to the BOCC and to the District Court that the Resolution (No. 2014-40) passed by Sunland Park to start a dialogue with the Appellants about annexation (R.P. 000455) and the subsequent Resolution (No. 2014-44) of Sunland Park to establish a policy regarding annexation (R.P. 000465) satisfied the B-2 condition precedent. The Appellants wrote:

> Santa Teresa maintains these overt acts by the Sunland Park City Council **triggered** Section 3-2-3 (B)(3) NMSA 1978, which affords the "residents of the territory *proposed to be annexed*" the opportunity to proceed with a petition for incorporation with the county and "conclusively prove that the municipality is unable to provide municipal services within the territory proposed to be incorporated within the same period of time that the proposed municipality could provide municipal service." (R.P. 000490). **(emphasis supplied)**.

The District Court found and ruled that those two actions by Sunland Park did not satisfy the express condition of § 3-2-3 (B) (2). (R.P. 000556-000558).

And indeed they did not.

VIII. ON APPELLANTS' FOREIGN JURISDICTION COMPARISON ARGUMENT

In Section I (pp. 12-13) of their Brief, Appellants attempt to support their position with reference to incorporation statutes of a few foreign jurisdictions.

This comparison to foreign jurisdiction statutes argument by the Appellants in this part of the Brief should be disregarded by the Court. It was not specifically raised and argued and or relied upon below either at the BOCC hearing or in the proceedings before the District Court. The Court will note the absence of any specific record references in the Appellants' Brief where it was raised.

Even if considered, and as admitted by the Appellants, New Mexico Statute § 3-2-3 (B) is uniquely phrased. The meaning and intent of § 3-2-3 (B) is to be determined by examining its particular language in light of principles of statutory construction applied in New Mexico. The statutory language of the foreign jurisdictions cited to by Appellants is substantially dissimilar from New Mexico's language and offers no assistance for the interpretation of § 3-2-3.

IX. IN RESPONSE TO SECTION II. OF THE APPELLANTS' BRIEF

A. Appellants' Subsection a. Unique Facts Argument

In subsection a. of this part of their Brief (pp. 14-15), the Appellants language consists of a one-sided historical view of a previous incorporation proceeding between the Appellants and Sunland Park that occurred between 1986 and 1990 in an attempt to raise and argue to this Court the concept of prior precedence or, in the alternative, some sort of an estoppel argument. The Appellants write at page 15: "Here, Appellants are simply asking this Court to follow this prior interpretation which were (sic) reasonably relied upon."

To repeat, this position was neither specifically argued nor relied upon below either at the BOCC hearing or in the proceeding before the District Court. This precedent argument is addressed, as well, in Section VI of this BOCC Answer Brief. The fact is that there were no interpretations of § 3-2-3 (B) of precedential value in those 1986-90 proceedings. The New Mexico Court of Appeals and the New Mexico Supreme Court declined to consider the issue of the interplay between the subparts of § 3-2-3 B. See *City of Sunland Park v. Santa Teresa Concerned Citizens Association, Inc.*, 1990-NMSC-050, ¶11 and 26, 110 N.M. 95.

B. "On the 1965 Amendment to § 3-2-3 (in response to the Appellants' Subsection b.)"

Most of the Appellants' language in this subsection (pp. 15-18) reads like a one-sided narrative of why Appellants believe that the Court should rule in their favor separate and apart from a legal analysis perspective of the statutory language of § 3-2-3 B. It can be considered, at best, as a suggested policy argument. There

are no specific citations by the Appellants to the record where this argument was specifically raised and argued before the BOCC and/or the District Court. As such, it should not be considered by this Court.

Even if considered, it is simply a pitch that the Court should ignore the language that requires a B (2) request for annexation as a condition for a B (3) hearing on municipal services because it does not make sense and because they do not want to be annexed. In effect, Appellants are asking the Court to rewrite the statutory language of § 3-2-3 B. Courts must construe statutes as they find them and may not amend or change them under the guise of construction. *Jones* v. *Holiday Inn Express,* 2014-NMCA-082, ¶19, 331 P.3d 992, citing to a line of cases.

However, there is one point raised that speaks to a statutory analysis having to do with the Legislature's removal of the word "or" between §§ 3-2-3 B (1) and B (2) in its 1965 Amendment. The Appellants find the removal of the word "or" in the 1965 Amendment as significant and argue that the removal of the word "or" was indicative of the Legislature's intent to have subsection B (3) as a separate option distinct from B (1) and B (2). Not so. The Court can take judicial notice of the rule of grammar that holds that in a series separated by semicolons, the use of the conjunction (in our case "or") between the last two items of the series applies equally as well to appear between the prior items in the series.

Further, the Appellants overlook two relevant and significant changes in the 1965 Amendment. In addition to the burden of proof factor, significant changes in the 1965 version are the inclusion of the language "residents of the territory proposed to be annexed" and "the territory proposed to be incorporated" both changes made to subsection (3) of the statute. As the County reads those changes, the legislature was firming-up with more clarity the link between B (2) and B (3). It was linking up B (3) language "residents of the territory proposed to be annexed" with the B (2) language "a valid petition to annex the territory proposed to be incorporated." The legislature was saying that if the B (2) petition to annex is accepted by the municipality, the right to B (3) hearing is triggered.

X. MORE ON APPELLANTS' STAND-ALONE ARGUMENT (IN RESPONSE TO SECTION III. OF THE APPELLANTS' BRIEF)[1]

In Section III of its Brief (pp. 18-27), Appellants present four (4) statutory principle arguments to support its § 3-2-3 B (3) stand-alone theory. To begin with, the Court is referred-back to Section VI of this Answer brief (pp. 18-20) where the BOCC points-out that this stand-alone argument of the Appellants was not raised and argued below and that it represents an impermissible change of theory by the Appellants from the theory presented to the BOCC and to the District Court. The BOCC incorporates into this response to Appellants' Section III the discussion and

[1] Some of the BOCC response upon the Appellants' Section III is a repeat of the BOCC's response to the Appellants' Section II b. "Standalone (sic) argument. However, it bears repeating for it is significant and addresses the Appellants' positions there and here.

argument included in Section VII (pp. 19-22) of the BOCC's Brief to the Appellants' standalone (sic) theory.

"Appellants' Subsection a."

As to subsection a. of Section III of Appellants' Brief, and the plain meaning of § 3-2-3 (B), the Appellants acknowledged below that there must be some annexation action taken by Sunland Park under B (2) as condition precedent to trigger a B (3) hearing on the provision of municipal services. In the Appellants' "Appellate Statement of Issues," filed with the District Court on March 22, 2016 (R.P. 000360-000347), the Appellants (at page 12 thereof) argued that § 3-2-3 should be interpreted under the "plain meaning rule" and then the Appellants go onto discuss the "three discrete methods" in § 3-2-3 B. to incorporate in an urbanized territory. We see this language at page 12 of their Statement of Issues describing the third method under B (3):

> Finally, they (the Appellants) could proceed with incorporation upon (a) the Sunland Park City Council expressing an intention to annex adjacent areas… and (c) Petitioners conclusively proving that municipal services can be provided by Santa Teresa before the City of Sunland Park. (R.P. 000371).

While acknowledging a B (2) condition precedent, the Appellants view the plain meaning of B (2) as expressing that a mere intention to annex is sufficient to **trigger** a B (3) hearing. **(emphasis supplied)**. Under the plain meaning rule of statutory interpretation, when the statute contains language that is clear and

unambiguous, Courts must give effect to that language and refrain from further statutory interpretation. *Sims* v. *Sims*, 1996-NMSC-078, ¶17, 122 N.M. 618.

The Appellants go on to say that they chose to go the third method route "only after the Council for the City of Sunland Park expressed its intention to annex contiguous territory." (R.P. 000371). Such a notion should be dispelled for two unassailable reasons. In reverse order, first because the Sunland Park City Council never attempted to annex nor officially expressed an intention to annex the contiguous territory the Appellants are seeking to incorporate. Second, the plain and clear language of B (2) reads that the "residents of the territory proposed to be incorporated have filed with the municipality, a valid petition to annex." It is this latter, actual language that the New Mexico Legislature required as the condition precedent to a B (3) hearing. If the B (2) language is to be given a plain reading, as the Appellants assert, how does "a mere intention" to annex satisfy the plain and clear Legislative language of filing a petition to annex?

The answer is that it does not under the plain and clear statutory interpretation. The Appellants have not satisfied the requirements of § 3-2-3 B.

XI. THE BOCC'S STATUTORY ANALYSIS

"Preservation Below of Issues and BOCC's Analysis"

> The Appellee BOCC preserved the question of the interpretation of § 3-2-3 (B) in responding to the Appellants' Appeal of the BOCC's decision to the 3rd Judicial District Court. The BOCC presented to the District Court the argument and discussion it presents to the Court

of Appeals in this Brief. See the BOCC's Statement of Appellate Issues filed with the District Court on April 11, 2016 (RP 000360-000374); the BOCC's Supplemental Brief filed with the District Court on August 1, 2016 (R.P. 000517-000532); and at oral argument before the District Court on June 29, 2016. (T.R. 2:25:30; 2:26:44; 2:45:28 and 2:46:17).

"If Not Entirely Clear"

If the Court is of the opinion that there is some ambiguity in the language of the interplay between § 3-2-3 B (2) and B (3), it should resort to statutory constructions principles for interpretation. See *State* v. *Behavioral Home Care, Inc.*, 2015-NMCA-035, ¶12, 346 P.3d 377. The BOCC submits that the application of some well-established statutory construction principles applied by New Mexico Courts to our question/issue in this appeal (See A, B C and D, *infra*) clears up any ambiguity and discloses that the BOCC's interpretation of B (2) and B (3) comports with the language of the statute and the intent of the New Mexico Legislature.

A. "The Legislature's Choice of Words"
(preserved at: R.P. 000380 and 000525)

In interpreting Legislative enactments, the New Mexico Courts have consistently held that courts must assume that the Legislature chose its words advisedly to express its meaning unless the contrary intent clearly appears. See, e.g., *Diamond v. Diamond*, 2012-NMSC-022, ¶29, 283 P.3d 260; *State v. Maestas*, 2007-NMSC-001, ¶12, 140 N.M. 836. Additionally, the courts have consistently

held that in interpreting statutes, courts presume that the Legislature intends the application of the words it uses. See, e.g. *Progressive Northwestern Insurance Company v. Weed Warrior Services*, 2010-NMSC-050, ¶11, 149 N.M. 157; *State v. Davis*, 2003-NMSC-022, ¶6, 134 N.M. 172. All sections of a statute must be read together so that all parts are given effect. *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMCA-050, ¶5, 126 N.M. 413. The provisions of §3-2-3 B (2) and B (3) are interconnected. They must be read and considered together to understand and discover when and how the B (3) method of incorporation becomes an option where an urbanized territory is involved. As the County reads B (2) and B (3), the B (3) option is not triggered until the Appellants petition the urbanized municipality for annexation, and the municipality accepts the petition and begins the process of annexation. It is, then, upon a request from the Appellants, that the County is required to hold a hearing to determine, under B (3), whether "the municipality is unable to provide municipal services within the territory proposed to be incorporated within the same period of time that the proposed municipality could provide municipal service." Any other reading fails to comport with the well-settled statutory constructions principles cited above.

In B (3), the New Mexico Legislature deliberately chose to limit that B (3) option to "residents of the territory proposed to be annexed." In other words, only after a petition for annexation has been filed by the Appellants. To return to the

applicable statutory construction principles, it must be assumed that the Legislature chose its words advisedly to express its meaning and that it intended the application of the words it used. Had the Legislature intended the B (3) option language to read "residents of the territory to be incorporated" rather than "residents of the territory to be annexed", it would have so-written B (3). The Legislature knows how to include language in a statute if it so desires. *Chatterjee v. King*, 2011-NMCA-012, ¶15, 149 N.M. 625, 253 P.3d 915 rev'd o.g. 2012-NMSC-019, 280 P.3d 283.

B. "Surplusage/Superfluous" (preserved at: RP 000381 and 000526)

New Mexico Courts have also consistently held that statutes must be construed so that no part of the statute is rendered surplusage or superfluous. See, e.g., *Cobb v. State Canvassing Board*, 2006-NMSC-034, ¶11, 140 N.M. 77; *Whitely v. New Mexico State Personnel Board*, 1993-NMSC-019, ¶5, 115 N.M. 308. In order to achieve internal consistency, statutes are to be interpreted in such a way that no parts are rendered superfluous. *Clayton v. Farmington City Council*, 1995-NMCA-079, ¶19, 120 N.M. 448.

This well-settled statutory construction principle is also applicable in our case and supports the BOCC's and the District Court's interpretation of the interplay between B (2) and B (3). To interpret B (3) as providing the Appellants with the B (3) hearing option without having first petitioned the municipality for

annexation is to ignore entirely the language of B (2) and the "residents of the territory proposed to be annexed" language in B (3), to treat that language in B (2) and B (3) as surplusage and/or to render it as superfluous. The "proposed to be annexed" language in B (3) must be read together with and referred back to the petition for annexation language in B (2) in order to harmonize the two subsections, achieve internal consistency and to give effect to both subsections. Otherwise, why is that language there? A statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole. *In the Matter of MAHDJID*, 2015-NMSC-003, ¶26, 342 P.3d 698.

The BOCC and the District Court recognized the "proposed to be annexed" language as necessary to the interpretation of B (3), as interconnected with and referring back to B (2), as dependent upon the activation of B (2) and the result of that activation. The BOCC correctly reasoned that absent that B (2) activation by the Intervenors, B (3) does not come into play. It is submitted that such reasoning gives effect to the language as drafted by the Legislature, rather than ignoring it, and correctly comports with that statutory language.

C. "Public Policy" (preserved at: R.P. 000381 and 000527)

When a statute is ambiguous, the Court may consider the clear policy implications of its various constructions. *State v. Smith*, 2004-NMSC-032, ¶10, 136 N.M. 372. The BOCC's interpretation of the interplay between B (2) and B (3)

is further buttressed by New Mexico's public policy on the incorporation of new municipalities, as identified in the New Mexico Supreme Court case of *City of Sunland Park v. Santa Teresa Concerned Citizens Ass'n, Inc.*, 1990-NMSC-050, ¶20, 110 N.M. 95, a similar incorporation case between the City of Sunland Park and a prior Santa Teresa incorporating entity. In discussing the public policy on the growth of cities in New Mexico, the New Mexico Supreme Court had this to say at paragraph 20 of the decision about New Mexico's public policy concerning new incorporations:

> The legislature has, in effect, declared the public policy of this state to be that the growth of municipalities and of their contiguous and urbanized areas shall take place in a planned and orderly manner. Further, it is the state's policy to discourage splinter communities or a proliferation of neighboring, independent municipal bodies, whose competing needs would divide tax revenues, multiply services, create confusion and factionalism among our citizens, and destroy the harmony that should exist between peoples of diverse backgrounds and socioeconomic strata within our state.

It is a broad statement of public policy that addresses the creation of a new municipal corporation in its entirety, pointing to the paramount considerations to be examined and that are decisive. It is not reasonable to argue, as did the Appellants, that this public policy is limited-to one aspect of one statute in the statutory incorporation process, (i.e. the burden of proof).

This policy, as identified by the New Mexico Supreme Court, applies to our B (2) and B (3) analysis.

Requiring the Appellants to petition the urbanized municipality for annexation into that municipality, thus affording the municipality the option to annex or not, before resort to a B (3) hearing, fosters the State's public policy as identified by the New Mexico Supreme Court. It provides the existing urbanized municipality with the opportunity to grow where it reasonably believes that it can provide for that growth, thus avoiding the splintering of communities, the proliferation of neighboring independent municipal bodies, the competition for tax revenues, the creation of confusion and factionalism. It encourages planned and orderly growth of municipalities in contiguous, urbanized territories.

New Mexico Public Policy favors the growth of existing, established municipalities. However, the Legislature did not want to foreclose entirely the creation of new municipalities where it can be shown that a new municipality better serves the interests of the area and its residents. Thus, the Legislature crafted B (2) and B (3) as it did, offering the existing municipality in the urbanized territory the option to annex or allow the incorporation to take place by choosing not to annex and, if the existing municipality chooses to annex, offering to the Appellants the ability to contest the annexation and to show that incorporation is the better choice of the area and for the well-being of the area and its residents.

D. "On the Use of *or* in § 3-2-3 B" (preserved at: R.P. 000382 and 000529)

The BOCC agrees with the Appellants that the use of the word "or" between B (2) and B (3) is in the disjunctive, but it is not a pure disjunctive. It is a conditional disjunctive. Ordinarily, the word "or" as used in a statute is given a disjunctive meaning unless the context and the main purpose of all the words demand otherwise. *First National Bank* v. *Bernalillo County Valuation Protest Board*, 1977-NMCA-005, ¶9, 90 N.M. 110. The BOCC agrees that there are three (3) separate methods available to the Appellants to comply with the § 3-2-3 B requirements. However, the BOCC disagrees with the Appellants on how and when the B (3) method becomes an option. Our case involves a statutory construction where the normal disjunctive meaning of "or" should not be given because the context of our statute in question demands otherwise. There is a condition to the use of the B (3) method as set-out in B (2) above. That condition is a petition by the Appellants to Sunland Park (in this case) for annexation.

Our situation is analogous to option language in a contract where the contract language spells-out a condition precedent to the exercise of an option. Absent the occurrence of the condition precedent, the option cannot be exercised. See *United Properties Limited Company v. Walgreen Properties Incorporated*, 2003-NMCA-140, ¶16, 134 N.M. 725. On the matter of the condition precedent see also, analogously, the New Mexico Supreme Court case of *Phoenix Funding,*

LLC v. Aurora Loan Services LLC, et al., 2017 WL 372153, ---P.3d ----, where the Court wrote at ¶ 9 of the opinion:

> Where a cause of action is created by statute, the Legislature empowers the courts to adjudicate a new kind of claim and, thus, the Legislature may condition the exercise of that power on the plaintiff's satisfaction of certain prerequisites.

In *Phoenix Funding*, the Court was in that case referring to standing, but it is submitted that the legal principle obtains on our facts, the Petition to annex being the condition to exercise to reach a B (3) hearing.

Using the "or," as intended by the New Mexico Legislature, the Appellants can comply with § 3-2-3 B where:

(1) Sunland Park consents to an incorporation; or

(2) The Appellants petition Sunland Park for annexation and Sunland Park accepts and does not begin and/or complete an annexation process within one hundred twenty (120) days of the filing of the annexation petition; or

(3) The Appellants petition Sunland Park for annexation, Sunland Park begins the process and when that process is underway, the Appellants request the BOCC to hold a B (3) hearing, which is held, and the Appellants prevail on the provision of the municipal services issue.

In method number (3) above, a favorable B (3) hearing outcome for the Appellants would trump and displace the Sunland Park annexation process.

E. "On Appellants' Timing Argument" (preserved at: R.P. 000383 and 000530)

The BOCC's interpretation of B (3) above dispels the Appellants' argument (presented at pages 13 and 14 of its Statement of Appellate Issues) (R.P. 000372-000373) that B (3) would be rendered meaningless by Sunland Park's § 3-7-17.1 (B) (2) annexation process which would be completed before the County "could take final action on the petition for incorporation."

To begin with, it is not the final action on the petition for incorporation which would trump and displace Sunland Park's annexation proceedings, but rather a BOCC favorable decision on a B (3) hearing which takes place early-on in the incorporation process. In the ordinary course, this decision would precede and override an annexation process.

Surely, the new Mexico Legislature did not intend to play a hoax on would-be Incorporators with the § 3-2-3 B (2) language. That would have to be the conclusion if, as the Appellants argue, they petitioned Sunland Park for annexation and Sunland Park accepted, then "game over." No B (3) availability. The Appellants' construction is not reasonable.

Contrary to the suggestion of the Appellants, a petition for Incorporation can be filed by would-be Incorporators prior to addressing § 3-2-3 B where an urbanized territory is involved. The requirements of a Petition for Incorporation are set-out in § 3-2-1. They do not include the inclusion of a copy of a Petition to the urbanized municipality for annexation. In our case, the Petition filed by the Appellants met the § 3-2-1 requirements. That may very well have been what the Legislature contemplated in order to preserve the Incorporators' prior jurisdiction position over the municipality's election to annex so that the B (3) hearing option survived.

In such a case, the incorporation petition process, having been filed prior to a Sunland Park petition for annexation, would under the Doctrine of Prior Jurisdiction, trump and displace the annexation process. See *Amrep Southwest, Inc. v. The Town of Bernalillo*, 1991-NMCA-110, ¶7-9, 113 N.M. 19.

XII. CONCLUSION

Our case presents one narrow issue involving the interplay between § 3-2-3 B (2) and B (3). That was the issue raised, argued and decided below both before the BOCC and the District Court. It is a statutory construction issue, requiring only an examination of the statutory language in light of statutory construction principles. The Court's duty is to determine and give effect to the legislature's

intent. In *The City of Sunland Park v. Santa Teresa Concerned Citizens Association, Inc.* (discussed *supra)*, the New Mexico Supreme Court told us that the Legislature's intent in enacting the 1965 change to § 3-2-3 was to make it more difficult to incorporate; to discourage splinter communities or a proliferation of neighboring independent municipal bodies and its negative impacts on its people and the State. The BOCC's and the District Court's reading of the interplay between § 3-2-3 B (2) and B (3), as discussed in this Answer Brief, is consistent with and fosters the Legislature's intent.

This Court should affirm the BOCC's and District Court's decision.

Thomas R. Figart, Esq.
Nelson J. Goodin, Doña Ana County Attorney
Attorneys for Defendant/Appellee
P.O. Box 2528
Las Cruces, NM 88004
(575) 647-7225

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March 2017, a copy of the foregoing Answer Brief, filed with the New Mexico Court of Appeals, was forwarded via first-class mail to the following persons:

Randy M. Autio
Robles, Rael & Anaya, P.C.
500 Marquette Ave. NW, Ste. 700
Albuquerque, NM 87102

Bradley A. Springer
Holt Mynatt Martinez P.C.
P.O. Box 2699
Las Cruces, NM 88004-2699

Thomas R. Figart