ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

PROVISIONAL GOVERNMENT OF SANTA TERESA, and MARY GONZALEZ,

Plaintiffs/Appellants,

v.

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

DOÑA ANA COUNTY BOARD OF COUNTY COMMISSIONERS,

Defendant/Appellee,

and

THE CITY OF SUNLAND PARK,

Intervenor/Appellee.

APPELLANTS' REPLY BRIEF TO THE DOÑA ANA COUNTY BOARD OF COUNTY COMMISSIONERS

Civil Appeal from the Third Judicial District Court, Doña Ana County
The Honorable Mary Rosner, District Court Judge

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I. ARGUMENT

The Answer Brief from the Doña Ana County Board of County Commissioners (*hereinafter* "BOCC") is not persuasive for several reasons. First, there is no merit to the argument that certain facts in the Appellants' Summary of Proceedings cannot be considered, even though the facts are in the record proper. Second, there is no merit to the BOCC's position that Appellants have introduced new arguments and legal theories on appeal because the Appellants use the same arguments but only develop them further. Next, the BOCC's interpretation of the Legislature's amendments to NMSA 1978, Section 3-2-3 in 1965 and the BOCC's "timing argument" both require reading additional language into the statute. Finally, the BOCC ignores how subsection (B)(3) is designed to preserve the public policy of deterring the splintering of communities.

A. All facts in the Appellants' Summary of Proceedings are from the record proper, and therefore, are reviewable because this Court must conduct a whole record review of an administrative decision.

Appellants' Summary of Proceedings in their Brief-in-Chief is well within the scope of information reviewable by the New Mexico Court of Appeals. Just this year, this Court clearly explained that "[o]ur appellate courts apply a whole record standard of review to administrative decisions. . . . This standard requires that [this Court] independently review the entire record of the administrative hearing to determine whether the . . . decision was arbitrary and capricious, not supported by

substantial evidence, or otherwise not in accordance with law." 2727 San Pedro LLC v. Bernalillo County Assessor, 2017-NMCA-008, ¶ 15, 389 P.3d 287 (internal quotations and citations omitted); see also Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd., 1984-NMSC-042, ¶ 13, 101 N.M. 291, 681 P.2d 717. All the facts that the BOCC contests in its Answer Brief were before the BOCC when making its decision and are within the record proper before this Court. All background information was provided to the BOCC for review before and during the hearing. **[RP 000082 – 000300; 11/24/15 Tr. 11:18:20 – 11:18:37]**. Appellants' Brief-in-Chief clearly includes citations to the record proper for all information that the BOCC contests. Moreover, most of the facts in Appellants' Brief-in-Chief are directly in the Appellants' briefing in district court. **[RP 000028 – 000032, 000480 – 000487]**. The BOCC contends in its Answer Brief that information submitted to it and part of the record proper is not subject to review by this Court because this information was "not specifically introduced, raised and argued to the BOCC." **[BOCC AB 2]**. Under this approach, any evidence or briefing submitted to an administrative agency but not specifically discussed in a hearing is not part of a decision. The BOCC would prefer that this court only review the transcript summary of the administrative hearing and NMSA 1978, Section 3-2-3 (1995).

The BOCC's position is incorrect because this information, such as the documents included with Appellants' petition for incorporation, was in the record

before the BOCC in the administrative hearing; and therefore, was in the record under review by the district court, and is now part of the record proper before this Court. Moreover, the BOCC's argument is clearly erroneous because the BOCC considered the Appellants' materials in assessing the validity of Appellants' petition for annexation and its alleged insufficiency.

The BOCC cannot exclude information in the record proper by simply stating we did not discuss it in oral argument. This Court can, and in fact must, at least consider all facts in the Appellants' Summary of Proceedings and the record itself because it must conduct a whole record review when determining whether an administrative decision is in accordance with law.

B. Appellants' have not introduced new legal theories or arguments before this Court because its arguments were presented and discussed below.

Appellants' do not present a different legal theory in this Court. All legal theories raised in Appellants' Brief-in-Chief have been raised before the BOCC and the district court. "Generally, arguments relating to theories, defenses, or other objections will not be considered when raised for the first time on appeal." Paule v. Santa Fe Cty. Bd. of Cty. Comm'rs, 2005-NMSC-021, ¶ 29, 138 N.M. 82, 117 P.3d 240. Here, the theories and argument remain the same. Indeed, Appellants' have explained its legal theories in further depth before this Court, but this does not preclude these more in-depth arguments. It appears, under the BOCC's

interpretation of appellate procedure, Appellants can only copy and paste prior briefing into its Brief-in-Chief. This is clearly not appellate procedure.

1. Review of and reliance upon City of Sunland Park v. Santa Teresa Concerned Citizens Ass'n Inc. is appropriately before this Court.

The BOCC improperly contends that Appellants' introduce a new legal theory by identifying Appellants' reasonable reliance upon City of Sunland Park v. Santa Teresa Concerned Citizens Ass'n Inc., 1990-NMSC-050, 110 N.M. 95, 792 P.2d 1138. This case has been previously raised and is part of the record proper before this Court. City of Sunland Park was included in the records provided to the BOCC, and discussed at length during the BOCC hearing **[RP 000320 – 000326, 000480; 11/24/15 Tr. 11:35:30 – 11:37:00]**. City of Sunland Park was briefed and argued before the District Court **[RP 000368 – 000369, 000381, 000388 – 000390, 000480 – 000481, 000487 – 000490]**. Appellants' trial counsel argued that the present BOCC interpretation is inconsistent with its City of Sunland Park interpretation, and therefore the present BOCC interpretation of Section 3-2-3 should not receive deference and should be overturned. **[RP 000487 – 000490]**. Appellants' primary legal theory is that Section 3-2-3(B)(3) does not require compliance with (B)(1) or (B)(2), which was the BOCC's interpretation in City of Sunland Park. The Appellants have clearly relied upon City of Sunland Park.

The BOCC contends that City of Sunland Park is of no precedential value and Appellants' cannot argue it was relied upon. A review of the parties and opinion

indicates that the Section 3-2-3 interplay was considered by several parties although not ultimately decided by the Supreme Court.[1] Its precedential value can be weighed by this Court, but that does not mean Appellants' did not rely on it below.

In their Brief-in-Chief, Appellants have argued that the BOCC's present interpretation should not receive deference and should be overturned because 3-2-3(B)(3) is a standalone option. Appellants have raised, again after being raised in district court, that the interpretation should not receive deference and should be overturned because the procedure previously used by the Santa Teresa incorporators was reasonably used again by Appellants before the BOCC in the present case. The fact that Appellants relied upon the City of Sunland Park interpretation in proceeding as if 3-2-3(B)(3) does not require a petition for annexation does not change the legal theory, it only highlights the BOCC's prior interpretation and the reasonableness of Appellants' interpretation. The BOCC has not been prevented from responding or presenting evidence. See State v. Gomez, 1997–NMSC–006, ¶ 29, 122 N.M. 777, 932 P.2d 1 (indicating that one of the purposes of the preservation rule is to give the opposing party a fair opportunity to respond to the objection). The City of Sunland

[1] It is important to note that while the issue was ultimately not decided because Appellants did not include it in their docketing statement, the district court and court of appeals in City of Sunland Park both initially concluded that the BOCC's interpretation of Section 3-2-3(B) was correct in that subsection (B)(3) did not require compliance with subsection (B)(2). Id. ¶¶ 4 – 11.

Park was discussed at length below because of its clear role in this case, especially considering it involves practically the same parties disputing the same issue.

Thus, Appellants do not present a different legal theory by reasonably relying upon the BOCC's prior interpretation of Section 3-2-3 in City of Sunland Park. The legal theory remains that 3-2-3(B) must be read in the disjunctive, making 3-2-3(B)(3) a stand-alone option of three. Again, this only supports such theory by highlighting the role of precedent that was provided to the BOCC and discussed in the lower court.

2. The Appellants' stand-alone legal theory has always been the primary legal theory at issue.

Appellants' argued before the BOCC and the district court that the Legislature made express use of the disjunctive word "or" in order to separate the three subparts of Section 3-2-3, **[11/24/15 Tr. 11:37:00 – 11:38:45; 000370 – 000371, 000400]**, and because there were three sub-parts, subsection (B)(3) is a stand-alone option. In the Brief-in-Chief, Appellants further argued the legislature's intent in using one "or" between the subsections of Section 3-2-3. The argument over the legislature's intent in using an "or" is well preserved before the BOCC and in district court. **[11/24/15 Tr. 11:37:00 – 11:38:45; RP 000370 – 000371]** The stand-alone legal theory is without question a legal theory preserved before the BOCC and district court.

The BOCC attempts to confuse Appellants' arguments preserved below as some sort of argument that the stand-alone theory was never preserved. To be clear, by using the term "stand-alone", the Appellants still acknowledge that some form of a prior proposal for annexation is required; Appellants use "stand-alone" to describe subsections (B)(3)'s relationship to subsections (B)(1) and (B)(2). The BOCC contends the Appellants admitted that subsection (B)(2) is a condition precedent to (B)(3) by citing Appellants' argument that Sunland Park's resolutions indicated that Santa Teresa was proposed to be annexed. **[BOCC AB 14]**. The BOCC's argument is blatantly inaccurate because clearly the Appellants have opposed the condition precedent interpretation. Rather, the Appellants argued that the Sunland Park's resolutions trigger the "proposed to be annexed" language that is *only* within Section 3-2-3(B)(3); the Appellants *never* made any representation or acknowledgment that Section 3-2-3(B)(3) is *not* a stand-alone option. The BOCC took Appellants' argument that Sunland Park's resolutions triggered Section 3-2-3(B)(3) and tried to confuse this as some acceptance that (B)(3) is not a third discrete method of incorporation.

Let it be abundantly clear that Appellants have always argued that while subsection (B)(2) requires a petition for annexation, subsection (B)(3) requires only some type of proposal—such as a resolution—for annexation. The BOCC has misrepresented the record in an apparent attempt to confuse the preservation of

Appellant's key argument. The theory that the Legislature intended subsection (B)(3) to be a stand-alone option not requiring compliance with (B)(2) has been preserved all along. **[RP 000370 – 000371; 11/24/15 Tr. 11:37:00 – 11:38:45]**.

3. Appellants preserved its argument that the Legislature intended Subsection (B)(3) to be a stand-alone option, and have provided foreign statutes and legislative amendments to assist this Court in assessing the Legislature's intent.

The inclusion of new or foreign law does not require preservation below. Under the BOCC's approach, parties could never include any statutes, case law, or legislative history that was not provided in the administrative hearing. Parties would only be able to copy and paste sources from the administrative hearing into appellate briefing. Clearly, this would be absurd. Parties are allowed to include additional law to support a legal theory or argument raised below. Again, the Appellants' legal theory is that Subsection (B)(3) is a stand-alone option, and one of Appellants' arguments is that the New Mexico Legislature intended Subsection (B)(3) to be a stand-alone option not limited by subsection (B)(2). Appellants have included foreign statutes and case law to assist this Court in determining what the Legislature intended by using select language when drafting Section 3-2-3. There is no new legal theory or argument.

The Appellants' have also included the Legislature's amendments to Section 3-2-3 from 1965 to assist this Court in assessing the Legislature's intent. Again, these are provided to support the same legislative intent argument preserved below.

C. The BOCC's additional interpretation of the Legislature's amendment to Section 3-2-3 in 1965 attempts to read in new language to the statute.

The BOCC properly identified additional changes to Section 3-2-3 in 1965, but these do not change the fact that Subsection (B)(3) is a stand-alone option. The BOCC argues that the Legislature's inclusion of "residents of the territory proposed to be annexed" and "the territory proposed to be incorporated" tend to "firm up" the condition precedent link between Subsections (B)(2) and (B)(3). In other words, the BOCC is perceiving the Legislature's use of "*proposed* to be annexed" as "*petitioned* to be annexed." However, that is not what the Legislature said. The Legislature specifically used the word "proposed", which is significantly broader than "petitioned". If the Legislature wanted to require a petition for annexation it would have said "petitioned to be annexed." As mentioned by the BOCC, courts must give effect to the language and refrain from further statutory interpretation. Sims v. Sims, 1996-NMSC-078, ¶ 17, 122 N.M. 618. "[Courts] will not read into a statute or ordinance language which is not there, particularly if it makes sense as written." High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (internal quotations omitted). Here, reading in the word "petitioned" is a blatant change in the language which was not intended by the Legislature. This Court should refrain from changing the Legislature's terms because Section 3-2-3 makes sense as written.

D. The BOCC's "timing argument" fails because it requires reading into the statutory scheme substantially more language than is present.

The BOCC argues that the Appellant's construction on timing is not reasonable, but the reality is, it is the BOCC's improper interpretation that makes the timing unreasonable. Under a reading of the language *within* Section 3-2-3, nothing is provided that would stop or suspend the annexation process. That is because the Legislature did not intend for subsection (B)(3) to require a prior petition for annexation. Without adding additional language to the statute, one cannot make a petition for annexation fit into the Legislature's intended use of subsection (B)(3). Again, our courts must refrain from reading in additional language into a statute that is not there. High Ridge Hinkle Joint Venture, 1998-NMSC-050, ¶ 5. This protection of the incorporation that the BOCC reads in does not exist within the statutory language. Indeed, the Legislature did not intend to play a hoax on would be incorporators by requiring a petition for annexation not mentioned. Rather, the Legislature intended for and drafted subsection (B)(3) to not require a petition for annexation.

E. Appellants' interpretation of Section 3-2-3(B)(3) preserves New Mexico's public policy towards urban growth because the conclusive proof burden sufficiently discourages the potential for splintering communities.

City of Sunland Park does not support the BOCC's argument that public policy requires Appellants to petition Sunland Park for annexation as a condition precedent to submitting a petition to the BOCC for incorporation. The BOCC

identified a crucial public policy that the New Mexico Supreme Court discussed in City of Sunland Park, 1990-NMSC-050, ¶ 20, but the BOCC also overlooked how this policy applies to Section 3-2-3(B)(3). Although the BOCC properly quoted the public policy, it failed to include the first line of that paragraph identifying how subsection (B)(3) preserves the policy. The complete paragraph, rather than the partial quote by the BOCC, reads as follows:

> *The policy reasons for this requirement are easy to discern.* 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.

Id. (emphasis added). "This requirement" is the "conclusively prove" burden within subsection (B)(3).

It would appear the Legislature intended for this policy to apply to all potential incorporations, and this policy is adequately protected in subsection (B)(3) with the conclusively prove burden. The Legislature intended subsection (B)(3) to provide a third option to avoid futile annexations, and inserted this high standard of proof for the provision of services as a means to prevent the formation of a new municipality in the event that such territory is not ripe for incorporation. In sum, subsection (B)(3) adequately preserves this public policy as written by the Legislature.

F. The remainder of the BOCC's arguments are addressed in the Appellants' Brief-in-Chief, and therefore, the Appellants refer this Court back rather than providing duplicative briefing.

As to the remainder of the BOCC's Answer Brief that is not addressed above, the Appellants refer this Court back to the Brief-in-Chief rather than repeating the Appellants positions and arguments. For examining the Legislature's choice of words, see Brief-in-Chief at pages 15-18, 24-26. For examining whether the BOCC's creates surplus language in Section 3-2-3, see Brief-in-Chief at pages 21-24. For an examination of public policy, see Brief-in-Chief at pages 26-27. For the Appellants' position on the use of "or", see Brief-in-Chief at pages 18-20. For the proposition that the BOCC's argument that Sunland Park never expressed intent to annex Santa Teresa fails because Sunland Park passed two resolutions to propose annexing adjacent unincorporated areas and open a dialogue with the Santa Teresa community about annexation, see Brief-in-Chief at pages 1, 17-18.

II. CONCLUSION

This case does present a narrow issue involving the interplay between Sections 3-2-3(B)(2) and (B)(3), but this Court must conduct a whole record review to determine whether the BOCC's decision was in accordance with law. In determine what is the proper interpretation of the Section 3-2-3, this Court should consider the role subsection (B)(3) is intended to play in situations where annexation is unwanted by the would be incorporators. This Court should find that the Legislature used

"proposed to be annexed" instead of "petitioned to be annexed" in subsection (B)(3) because it intended to exercise a much broader meaning that does not require an actual petition to be annexed. A proposal to annex through resolutions will suffice. Accordingly, this Court should reverse the BOCC's and district court's decision, and remand this matter back to the BOCC to complete the incorporation hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April 2017, the foregoing Reply was sent via email to the following counsel of record:

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