ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE.
FILED
APR 05 2017

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 CITY OF SUNLAND PARK

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

ROBLES, RAEL & ANAYA, P.C.

Robert M. White, Esq.
Randy M. Autio, Esq.
Lance D. Hough, Esq.
500 Marquette Ave., NW, Suite 700
Albuquerque, New Mexico 87102
(505) 242-2228 (telephone)
(505) 242-1106 (facsimile)

Attorneys for Plaintiffs/Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEW MEXICO CASES

NEW MEXICO STATUTES AND RULES

OTHER AUTHORITIES

I. ARGUMENT

The Answer Brief from the City of Sunland Park (*hereinafter* "Sunland Park") is unpersuasive for several reasons. First, Sunland Park argues "the only way to give effect to the Legislature's words in [NMSA 1978] Section 3-2-3(B)(3) [(1995)] is to read them as antecedent to Section 3-2-3(B)(2) requirement to seek annexation (sic)." It is important to note that Sunland Park argues this immediately after stating that Section 3-2-3 is unambiguous, and the Court must give effect to unambiguous language and refrain from further statutory interpretation. To be clear, Sunland Park states that statutory interpretation is not necessary then claims that subsection (B)(3) needs to be read before subsection (B)(2), contrary to their order. Not only does this argument collapse on itself, it is incorrect.

In its antecedent approach, Sunland Parks seeks substantial departures from the plain meaning of an admittedly unambiguous statute. Sunland Park suggests that "proposed to be annexed" in subsection (B)(3) means "petition to be annexed" and the word "or" is "not entirely" disjunctive. **[SP RB 12]**.[1] These departures are to support Sunland Park's theory that Section 3-2-3 provides the municipality a first right of refusal under subsections (B)(2) and (B)(3). This approach would make

[1] Although Sunland Park repeatedly misquotes subsection (B)(3) by omitting "proposed" and citing only "residents of the territory to be annexed," it appears it seeks an interpretation that "proposed" means "petitioned". **[SP AB 11]**.

sense if subsection (B)(3) required a petition for annexation, but that is not so. In addition, Sunland Park's attempt to avoid the BOCC's prior interpretation of Section 3-2-3 ignores the role agencies play in interpreting statutes throughout New Mexico.

A. Subsection 3-2-3(B)(3) includes "proposed to be annexed", not "petitioned to be annexed", because a petition for annexation is not required.

The Legislature drafted subsection (B)(3) to specifically include the language "proposed to be annexed". The term "proposed" does not mean petitioned, "proposed" is much broader. "Proposed" includes all forms of proposals, which include letters of intent and municipal resolutions. The Legislature used a word much broader than "petitioned" to allow for citizens to seek incorporation without having to jump through additional "petition" hoops. After all, Sunland Park's argument here is that the Appellants' need to complete another step to reach subsection (B)(3), even though it would not make any difference for the (B)(3) hearing if Appellants proceeded without a petition for annexation. Of course, a petition for annexation would fit into "proposed to be annexed", but "proposed to be annexed" is not limited to petitions. Sunland Park's argument is a logical fallacy.

If the Legislature intended subsection (B)(2) to be a condition precedent to (B)(3), it would have included "petitioned to be annexed" or "subject to an annexation petition" in subsection (B)(3). Alternatively, under Sunland Park's "first right of refusal" theory, (B)(3) would have included "residents of the territory which

was not annexed". The reality is, the Legislature would have included significantly more obvious language if it intended to link (B)(2) and (B)(3). However, the Legislature included "proposed to be annexed" to relieve communities like Santa Teresa in situations like this. Subsection (B)(3) does not require a petition for annexation.

B. The Legislature intended a normal disjunctive application of "or" in Section 3-2-3 to provide an avenue when annexation is futile, and maintained its public policy by including the conclusively prove burden.

Sunland Park argues the "or" between subsections (B)(2) and (B)(3) is not entirely disjunctive because of public policy. The Court in City of Sunland Park v. Santa Teresa Concerned Citizens Ass'n, Inc., 1990-NMSC-050, 110 N.M. 95, explained that the Legislature intends to deter the splintering of communities, and that the "conclusive proof" burden *within* subsection (B)(3) is designed to deter the splintering of communities. Id. ¶ 20. The burden preserves the policy. The use of "or" in Section 3-2-3 is completely disjunctive because that is the plain use which fulfills the Legislature's intent in this context. It is consistent with the intent of Section 3-2-3 to conclude that the Legislature intentionally drafted subsection (B)(3) as a *process* to incorporate when annexation would be futile and included the high "conclusively prove" burden to preserve the policy of deterring the splintering of communities. For the remainder of Appellants' discussion on the use of "or", see Brief-in-Chief at pages 18-20. In short, the Appellants' position preserves the

language of Section 3-2-3 and the Legislature's public policy, while Sunland Park's position dismantles the language of Section 3-2-3 to meet a stricter public policy.

In addition, Sunland Park relies on slanderous conjecture and innuendo not supported in the record to support its policy argument. Sunland Park's Answer Brief steps outside the record proper with its conjectural allegations that the incorporation of Santa Teresa would remove diversity from the area by separating the affluent English speakers from the poorer predominantly Spanish speakers and divide the tax base. **[SP AB 15]**. Sunland Park, in conduct bordering on Rule 1-011 NMRA territory, makes the factually unsupported allegation that Appellants' motivation for incorporating was based on racial prejudice. **[SP AB 15].** It is difficult to imagine a more offensive accusation to both the Caucasian and Hispanic members of the Santa Teresa Community, which began as a Spanish Land Grant.

C. Sunland Park's argument on timing does not sufficiently address the shortcomings of its interpretation of Section 3-2-3.

Sunland Park argues that the 120 day time limit in Section 3-2-3(B)(2) to complete an annexation applies, rather than the 30 day period from NMSA 1978, Section 3-7-17.1 (2003). Even if Section 3-2-3(B)(2) trumps Section 3-7-17.1 on the time limit to complete an annexation, this does not resolve the issue of timing. Again, as discussed in the Brief-in-Chief, requiring a petition for annexation first gives prior jurisdiction to the annexation proceeding. **[BIC 22]**. "[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). Even if some additional limit is read into the statute that would prevent such prior jurisdiction, the 120 days may prove insufficient for the incorporation process. Appellants will refrain from again listing the many steps laid out in the Brief-in-Chief that begin with drafting a petition and end with a decision by the BOCC after a hearing. **[BIC 22-23]**. This lengthy process is unlikely to fit within the 120 day period for Sunland Park to complete an annexation. Thus, even with a 120 day period, it is likely under Sunland Park's interpretation that Appellants are left without a legitimate opportunity to incorporate.

Lastly, as mentioned in the Brief-in-Chief, holding that a petitioner must meet both the annexation and incorporation requirements would amount to changing the incorporation requirements—requiring well in excess of 200 signatures to petition for incorporation—and thus precluding an ability to incorporate under NMSA 1978, Section 3-2-1 (2013) and Section 3-2-3(B)(3). **[BIC 23]**.

D. Sunland Park's argument regarding agency precedent ignores the reality of agency decisions and seeks to disregard precedent.

What Sunland Park argues for is unpredictability. Sunland Park effectively argues that what agencies do, particularly county commissions interpreting statutes, cannot be relied upon or provide guidance for citizens. Sunland Park attempts to defeat the role of the BOCC's prior decision by claiming "agency precedent" has no

roots in New Mexico. The term precedent speaks for itself. "Precedent" means "an earlier occurrence of something similar . . . [or] something done or said that may serve as an example or rule to authorize or justify a subsequent act of the same or analogous kind. . . ." *Precedent Definition*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/precedent (last visited April 1, 2017). Thus, Sunland Park contends no agency in New Mexico can take an action that serves as an example to justify a subsequent act. Nonetheless, prior agency interpretations can be relied upon in New Mexico. See, e.g., High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶¶ 5-9, 126 N.M. 413, 970 P.2d 599; Molycorp, Inc. v. State Corp. Comm'n, 1981-NMSC-033, ¶¶ 5-7, 95 N.M. 613, 624 P.2d 1010; TBCH, Inc. v. City of Albuquerque, 1994-NMCA-048, ¶ 11, 117 N.M. 569, 874 P.2d 30.

What High Ridge Hinkle Joint Venture, 1998-NMSC-050, ¶¶ 5-9, stands for is the notion that citizens should be able to rely upon the interpretation of a rule or statute by the primary agency with authority to administer that rule or statute. Boards of County Commissioners in are in fact the only agencies in New Mexico to interpret and apply the incorporation process established in subsection 3-2-3(B)(3). Although the statute was written by the Legislature, it is the County Commission who interprets the statute administratively.

In this case, citizens are doing their best to comply with a statute in order to seek municipal incorporation. Clearly, the Appellants did not avoid petitioning for annexation because they sought to change the law or create turmoil. The Appellants sought to follow the guidance they received in the best way possible to achieve a goal—incorporation. What Appellants had before them was Section 3-2-3, City of Sunland Park, and a meeting with several officials, including some from Sunland Park, who informed them that subsection (B)(2) is not a condition precedent to subsection (B)(3). **[RP 000119; 11/24/15 Tr. 13:21:55-13:23:38]**. The Appellants considered the BOCC's prior interpretation of Section 3-2-3 in City of Sunland Park when determining how to proceed with their incorporation of Santa Teresa. Clearly, Appellants should be able to rely upon the case that is most analogous to the current situation and involves the same agency. At a minimum, the BOCC's decision in City of Sunland Park defeats any deference to the BOCC's decision in this case.

II. CONCLUSION

For the above stated reasons, this Court should find that the Legislature used "proposed to be annexed" in subsection (B)(3) to provide citizens an avenue for incorporating when faced with a clear intention to annex from a neighboring municipality. 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,

ROBLES, RAEL & ANAYA, P.C.

By: _____

Robert M. White, Esq.
Randy M. Autio, Esq.
Lance D. Hough, Esq.
Attorneys for Appellants
500 Marquette Ave., NW, Suite 700
Albuquerque, New Mexico 87102
(505) 242-2228
(505) 242-1106 (facsimile)
Robert@roblesrael.com
Randy@roblesrael.com
Lance@roblesrael.com

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:

Tom Figart
Nelson J. Goodwin
845 N. Motel Blvd
Las Cruces, NM 88007
nelsong@donaanacounty.org
tomf@donaanacounty.org
Attorneys for Doña Ana County
Bradley A. Springer
Holt Mynatt Martinez, PC
P.O. Box 2699
Las Cruces, NM 88004
bas@hmm-law.com
Attorney for City of Sunland Park

Enrique Palomares
7362 Remcon Circle
El Paso, TX 79912
Txatty2001@yahoo.com
Attorney for Provisional Government of Santa Teresa in the District Court

Lance D. Hough, Esq.