

COPY

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

Court of Appeals No. 29,376

BARBARA WAGGONER, FLOYD EUGENE WAGGONER,
JAMES H. TOOLEY, ANGELA TOOLEY, JAMES POE,
NOVA POE, GREGORY E. JOHNSON, PATRICIA JOHNSON,
JOHNATHON BOLDT, SITA BOLDT, DENNIS MUNCRIEF,
MARILYN MUNCRIEF, TONY SMITH, GLEN WILKINS,
CHERIE BLACK, JAMES BAUGH, MARY BAUGH,
JAMES R. DICKERSON, MICK VASKOV, LYNDA VASKOV,
ALDON PIERCE, CARMEN PIERCE, ROBERT H. THUNE,
JANET THUNE, JOSEPH LEE, JUNE LEE, CHARLES M. ANDREWS,

Appellants,

vs.

THE TOWN OF MESILLA, NEW MEXICO,
THE BOARD OF TRUSTEES OF THE TOWN OF
MESILLA, NEW MEXICO, and MICHAEL CADENA,
MAYOR OF THE TOWN OF MESILLA, NEW MEXICO,

Appellees.

APPEAL FROM THE THIRD JUDICIAL DISTRICT
COUNTY OF DONA ANA

Third Judicial District No. D 307 CV 2008-00626
THE HON. JERALD A VALENTINE

ANSWER BRIEF

K. Joseph Cervantes, Esq.
Cervantes Law Firm, P.C.
2610 South Espina
Las Cruces, NM 88001
(575) 526-5600

L. Helen Bennett
Attorney at Law
P.O. Box 25167
Albuquerque, NM 87125-5167
(505) 242-6300

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TABLE OF CONTENTS

Table of Contents	i
Table of Authorities.....	iii
Nature of the Case:	1
The Proper Standard of Review is Deferential to the Decision Reached by the Municipality:	1
The Scope of Review is Limited:.....	3
Response to Waggoner’s Presentation of Facts:	5
Proceedings Before and Disposition by the District Court:.....	10
ANSWERING ARGUMENT AND AUTHORITY:.....	12
Preservation of All Issues:.....	12
ISSUE 1: Mesilla substantially complied with the statutory requirements for annexation by the petition method.....	13
a. Mesilla substantially complied with the procedural requirements of Section 3-7-17.....	14
b. Mesilla properly complied with statutory notice requirements.	19
c. Mesilla substantially complied with the supplemental procedural requirements of Section 3-7-17.1.....	20
d. Mesilla did not improperly participate in the petition process.....	24
ISSUE 2: Mesilla did not improperly, unlawfully or illegally alter the boundary map following review by the County.....	25
ISSUE 3: Notice of the proposed annexation ordinance was properly given in accordance with New Mexico law and Town of Mesilla Code Provisions. .	27
ISSUE 4: Mesilla timely acted upon the annexation request.....	29

ISSUE 5: Required boundary roads were properly included in the
final annexation.32

Conclusion.....33

Signatures33

Certificate of Service.....

TABLE OF AUTHORITIES

New Mexico Case Authority:

Brown v. Trujillo, 2004-NMCA-040, 135 N.M. 365, 88 P.3d 881	13
City of Alamogordo v. McGee, 64 N.M. 253, 327 P.2d 321 (1958).....	4
Clayton v. City of Farmington, 102 N.M. 340, 695 P.2d 490 (Ct.App.1985)	2
Daugherty v. City of Carlsbad, 120 N.M. 716, 905 P.2d 1120 (Ct.App. 1995).....	1-4, 12
Dugger v. City of Santa Fe, 114 N.M. 47, 834 P.2d 424 (Ct.App. 1992).	2, 12
Hughes v. City of Carlsbad, 53 N.M. 150, 203 P.2d 995	2, 4, 19
Lane v. Lane, 1996-NMCA-023, 121 N.M. 414, 912 P.2d 290	14
Leavell v. Town of Texico, 63 N.M. 233, 316 P.2d 247 (1957).....	2
Lovelace Medical Center v. Mendez, 111 N.M. 336, 805 P.2d 603 (1991).....	23
Mutz v. County, 101 N.M. 701, 688 P.2d 19	20
Santa Fe County Bd. of County Com'rs v. Town of Edgewood, 2004-NMCA-111, 136 N.M. 301, 97 P.3d 633	1
State v. Javier M., 2001-NMSC-030, 131 N.M. 1, 33 P.3d 1	19
Strata Prod. Co. v. Mercury Exploration Co., 121 N.M. 622, 916 P.2d 822 (1996).....	4
Torres v. Village of Capitan, 92 N.M. 64, 582 P.2d 1277 (1978)	2, 3, 4
Vigil v. Thriftway Marketing Corp., 117 N.M. 176, 870 P.2d 138 (1994) ..	23
Youree v. Ellis, 58 N.M. 30, 265 P.2d 354 (1954)	3

Case Law Authority from Federal or Sister Jurisdictions:

Huyck Corp. v. Town of Wake Forest, 356 S.E.2d 599 (N.C.App. 1987) ... 13
Smith v. Granville Twp. Bd. of Trustees, 693 N.E.2d 219 (Ohio 1998)..... 20

New Mexico Rules and Statutory Authority:

Town of Mesilla Ordinance 2007-13 *Passim*
Rule 1-041(E) NMRA 23
NMSA 1978, § 3-1-2..... 6, 7
NMSA 1978, § 3-17-3 6
NMSA 1978, Sections 3-7-17 *Passim*
NMSA 1978, Sections 3-7-17.1 *Passim*

Other Authority:

2 McQuillan Municipal Corporations § 714 (3d Ed.) 2

Nature of the Case:

Plaintiffs-Appellants (collectively, Waggoner) challenge the District Court's Judgment in favor of Defendants-Appellees (collectively, Mesilla), following Waggoner's challenge of Ordinance 2007-13, which was adopted by the vote of the Town of Mesilla's Board of Trustees on December 26, 2007. Ordinance 2007-13 approved the annexation of approximately 788 acres within Mesilla's municipal boundaries, and was accomplished pursuant to New Mexico's statutory petition method of annexation. At issue is Mesilla's application of the procedures for petition annexation, which are set forth at NMSA 1978, Sections 3-7-17 and -17.1.

The Proper Standard of Review is Deferential to the Decision Reached by the Municipality:

Waggoner inaccurately states that this appeal concerns the interpretation of the relevant statute in conjunction with "an undisputed factual record", and insists that the proper standard of review is therefore *de novo*. BIC at 13, *citing Santa Fe County Bd. of County Com'rs v. Town of Edgewood*, 2004-NMCA-111, 136 N.M. 301, 97 P.3d 633 ("*Town of Edgewood*"). However, *Town of Edgewood* involved questions of standing, a matter not at issue in the instant appeal. Examination of the transcript of proceedings in the instant case reveals that the factual record was vigorously disputed, and that the District Court had to resolve factual disputes or defer to the factual determinations made by the elected body in reaching a decision. *See, e.g., Daugherty v. City of Carlsbad*, 120 N.M. 716, 717, 905 P.2d

1120, 1121 (Ct.App. 1995) (noting courts "limit judicial review of an ordinance passed pursuant to express legislative authority to the constitutional validity of the statute or its application.")

Annexation is a legislative act. *Torres v. Village of Capitan*, 92 N.M. 64, 69, 582 P.2d 1277, 1282 (1978). The power to enlarge or diminish the boundaries of municipal corporations – such as through annexation -- is universally held to be solely and exclusively the exercise of legislative power. *See Leavell v. Town of Texico*, 63 N.M. 233, 235, 316 P.2d 247, 248 (1957). Annexation statutes are to be liberally construed in favor of the municipality. *Id.*, citing 2 *McQuillan Municipal Corporations* § 714 (3d Ed.), p. 290, and every reasonable presumption is given to the validity of the municipality's action. *Hughes v. City of Carlsbad*, 53 N.M. 150, 203 P.2d 995 (holding review is deferential to the determination made by the municipality); *Clayton v. City of Farmington*, 102 N.M. 340, 342, 695 P.2d 490, 492 (Ct.App.1985) (affirming that a city council's function in creating an assessment district is legislative and applying a standard of review that is deferential to the legislative body).

The limited judicial review applied to ordinances passed pursuant to express legislative authority is outcome determinative in this case. *See Daugherty, supra* at 717, 905 P.2d at 1121, citing *Dugger v. City of Santa Fe*, 114 N.M. 47, 53, 834 P.2d 424, 430 (Ct.App.), writ quashed, 113 N.M. 744, 832 P.2d 1223 (1992).

Daugherty established the standard of review for the District Court and this Court, noting that the New Mexico Legislature "has delegated its authority of annexation" to citizens under the petition method. *Id.* at 717, 905 P.2d at 1121, *citing* NMSA 1978, Section 3-7-17. The procedure under Section 3-7-17 is "primarily political". *Daugherty* at 717, 905 P.2d at 1121.

Daugherty expressly noted the presumption that legislative acts are legal, valid, and constitutional, and explained that this principle extends to municipal [annexation] ordinances." *Id.* Contrary to Waggoner's contention, a reviewing Court must show great deference to the decision of the municipal authority. *Id.*, *citing* *Torres*, 92 N.M. at 69, 582 P.2d at 1282; *Youree v. Ellis*, 58 N.M. 30, 37, 265 P.2d 354, 359 (1954) (affirming the trial court's judgment upon finding substantial evidence to support the trial court's resolution of the decisive facts on the question of annexation).

The Scope of Review is Limited:

In reviewing an annexation made under the petition method, the Court determines only whether the municipality has substantially complied with the plain meaning of legislation, and whether the legislation itself is constitutional.

Daugherty at 719, 905 P.2d at 1123; *see also* *Dugger*, 114 N.M. at 54, 834 P.2d at 431 (district court's review of annexation is limited to determining whether the city's action was constitutional, and was within its legislatively delegated

authority). Judicial review is limited to the constitutional validity of the enabling statute, and its application. *Daugherty*, 120 N.M. at 717-718, 905 P.2d at 1121-22 (recognizing judicial review appropriate for an annexation by the petition method is fundamentally different from the judicial review to be applied under either of the two alternative administrative annexation methods).

There can be no independent inquiry by a Court into the wisdom, policy or justness of the legislative action by annexation. *Daugherty*, 120 N.M. at 719, 905 P.2d at 1123. The Court must not address the merits of the annexation decision. *Dugger*, 114 N.M. at 53, 834 P.2d at 430. Every reasonable presumption for validity of an annexation approved by a governing body must be indulged. *Id.*

Waggoner does not challenge the constitutionality of the statutory framework for the petition method of annexation. *See Torres*, 92 N.M. 64, 582 P.2d 1277 (1978) (holding annexation statute does not violate equal protection nor infringe on the right to vote). At issue, then, is solely whether the actions taken by Mesilla – which are presumed valid -- substantially complied with the procedures established by the applicable statutes. New Mexico holds that substantial compliance with the statutory requirements for annexation is sufficient. *City of Alamogordo v. McGee*, 64 N.M. 253, 256, 327 P.2d 321, 324 (1958) (noting the presumption of regularity and validity of the acts of officers of a municipal corporation); *Hughes v. City of Carlsbad*, 53 N.M. 150, 158, 203 P.2d 995, 1000

(1949). The District Court recognized the limited scope of review applicable, and deference to the determination of Mesilla likewise controls the outcome before this Court.

Response to Waggoner's Presentation of Facts:

Consistent with the proper standard and scope of review, Mesilla presents the evidence in the light most favorable to upholding the decision of the District Court, which appropriately deferred to Mesilla's annexation. *See Strata Prod. Co. v. Mercury Exploration Co.*, 121 N.M. 622, 627, 916 P.2d 822, 827 (1996) (noting an appellate court defers to the facts found by the trial court).

The District Court heard evidence that the Mesilla Board of Trustees was presented with petitions signed by owners of properties proposed for annexation, and who requested annexation of their respective properties. [Tr. 321; 327] The petition process was started by persons seeking annexation by Mesilla. [Tr. 107, 132-135, 321; 326-7]¹ Wayne Stout testified about his actions to promote the annexation and his motivations, which did not include coercion, control or direction by Mesilla. [Tr. 321-322] Sandra Geiger also testified about how the annexation process began and was conducted. [Tr. 289, 298, 302] Ms. Geiger testified that she actively promoted the annexation [Tr. 289, 291] and did not act at

¹ Citations to the transcript ("Tr.") are to the page in the volume of the evidentiary hearing held on November 11, 2007, unless otherwise noted.

the behest of the Town Mayor, Town employees, or any other Town officials. [Tr. 289-90, 297-98]

Mesilla organized a series of workshops on the proposed annexation, beginning on July 16, 2007. [Tr. 59; 326-7] The workshops discussing the annexation process were presented by Mesilla staff. [Tr. 59-63; 99] Additional workshops allowing public participation were held August 6, 2007, September 13, 2007, and October 4, 2007. [Tr. 63-65]

On October 10, 2007, in compliance with NMSA 1978, Section 3-7-7.1(B)(1), Mesilla submitted to the Doña Ana County Commission the petitions received. [Tr. 137-38, 201-202; Mesilla Exhibit 4] Mesilla's proposed annexation was presented to the Doña Ana County Commissioners at a properly noticed public meeting on October 23, 2007, where the Commissioners also received public comment on the proposed annexation. [Tr. 203-205] Following this public meeting, the County Commissioners comments were reported by correspondence that Mesilla received November 1, 2007. [Tr. 138; Mesilla Exhibit 5] The County Commission's comments reflected support for the proposed annexation. [Tr. 139-40; Mesilla Exhibit 5]

All notices of meetings in this case were posted in accordance with NMSA 1978, § 3-1-2(J), NMSA 1978, § 3-17-3(B) (providing that notice of a proposed ordinance shall be published one time as a legal advertisement in a newspaper of

general circulation in the municipality), and with Town Code. [Tr. 67-70; 79-80; 94-98] No newspaper “maintains an office in [Mesilla] and is of general circulation within [Mesilla]. Section 3-1-2(J). One of the complainants – James H. Tooley – testified that he had notice of and attended all of the workshops concerning annexation, and made his objections known at each opportunity. [Tr. 250-256]

Alternative maps of the proposed annexation, and relation of properties to Mesilla’s then-existing municipal boundaries, were created based upon the petitions received from citizens. [Tr. 107-108] Tentative, “working” maps were available for public viewing at Mesilla’s town offices and at the public work sessions. [Tr. 109-110] Throughout the process, Mesilla continued receiving petitions. Petition signatures came in throughout the process, and as of the vote at the December 26, 2007 meeting, more than sixty percent (60%) of the acreage annexed was owned by people who had petitioned for annexation. [Tr. 137; 250; *and see* 332]

On December 5, 2007 the Town of Mesilla published notice of the proposed adoption of Ordinance 2007-13, and notified the public that the Ordinance would be considered at the regularly scheduled meeting of Mesilla’s Board of Trustees on December 10, 2007. [Mesilla Exhibit 6, 7] As previously, Mesilla published notice of the proposed adoption of Ordinance 2007-13 in the same manner and at

the same locations that all proposed municipal ordinances are published by Mesilla and in accordance with the Mesilla Town Code. [Tr. 79-84; 95-8, 335-337; Mesilla Exhibit 6, 7, 8, 13] A notice was posted November 26, 2007 for a December 10, 2007 meeting of the Mesilla Board of Trustees to consider adoption of the annexation ordinance at issue. [Tr. 65; 79]

Based upon the petitions requesting annexation that had been received by Mesilla, alternative maps were prepared by Mesilla Community Development Officer Nick Eckert, and were presented at Mesilla's regularly scheduled public Board of Trustees meeting on December 10, 2007. [Tr. 330; 363-368] The Mesilla Board of Trustees was presented with these alternative maps, each of which depicted certain territory proposed for annexation, and the relationship of that proposed territory to Mesilla's then-existing municipal boundaries. [Tr. 341-345]

At its public December 10 meeting, the Board of Trustees received public input and comments, discussed and debated the proposed annexation and Ordinance, and then voted to postpone a final vote on Ordinance 2007-13 until the next regularly scheduled meeting of the Board of Trustees on December 26, 2007, to allow for an additional public workshop to further discuss annexation considerations. [Tr. 338-339; Mesilla Exhibit 8]

On December 20, 2007 the Town of Mesilla published the notice of the regularly scheduled December 26, 2007 meeting of Mesilla's Board of Trustees, and identified the consideration of Ordinance 2007-13 under "Old Business" on the meeting agenda. [Mesilla Exhibit 9] The agenda for the December 26 meeting was published by the Town of Mesilla in the same manner and at the same locations as are all other such agendas and notices for meetings of the Board of Trustees. [Tr. 335-336]

At the December 26 public meeting, map alternatives were presented to Mesilla's Board of Trustees for final vote. [Tr. 143-47] Each map showed territory proposed for annexation, and showed that the majority of the acreage within the proposed territory for annexation was owned by persons who had signed petitions requesting annexation. [Tr. 143-47] At the December 26 meeting, the Mesilla Board of Trustees voted to adopt Ordinance 2007-13, and approved annexation of approximately 788 acres of territory contiguous to the then-existing municipal boundaries. [Tr. 252-256; Mesilla Exhibits 1, 10].

Following the adoption of Ordinance 2007-13, the Town of Mesilla directed its consulting engineers, Molzen-Corbin, in conjunction with Mr. Eckert, to prepare a recordable survey of the territory approved for annexation by Mesilla's Board of Trustees. [Tr. 150-151; Mesilla Exhibit 11]

On or about February 20, 2008, Molzen-Corbin completed the survey plat of the territory approved by Ordinance 2007-13. [Mesilla Exhibits 11, 12; Tr. 151] The survey of Mesilla's annexed territory was filed with the Clerk of Doña Ana County on February 20, 2008, along with a copy of Mesilla Ordinance 2007-13, as required by Section 3-7-17(B). [Tr. 152; Mesilla Exhibit 12] Evidence was adduced that the boundary streets required by state law were included in the municipal plat prepared by Molzen-Corbin. [Tr. 316]

The territory in the filed plat was the same as had been presented to and voted upon by Mesilla. [Tr. 150-151] Molzen-Corbin was never directed to delay the preparation or completion of the survey of the territory approved for annexation by Mesilla's Board of Trustees. [Tr. 151-153; 311-12, 336-339; 354] To the contrary, the testimony was that Mesilla encouraged Molzen-Corbin to expeditiously complete the plat of the annexed territory as quickly as possible. [Tr. 340; 353-54]

Proceedings Before and Disposition by the District Court:

On March 21, 2008, Waggoner filed a complaint for appeal of Mesilla's annexation ordinance and for declaratory judgment. [RP 1] On November 17, 2008, this matter came before the District Court on an evidentiary hearing on Waggoner's challenge to and appeal of the adoption of Ordinance 2007-13. [See generally, Tr. 11/17/08] The Court heard argument and took evidence from

parties, and the transcript reveals conflicting evidence on a number of points. [*See generally, id.*] On November 20, 2008, the Court heard oral argument and closing statements, and invited the parties to submit findings of fact and conclusions of law. [*See Transcript November 20, 2008*]

On January 28, 2009, the District Court entered its Findings of Fact and Conclusions of Law, and found that Mesilla properly noticed the proposed annexation ordinance and properly noticed the subsequent meetings of the Board of Trustees. [RP 1997-99] The Court found that the proposed Ordinance was accompanied by a map showing the proposed boundary of the territory to be annexed and its relationship to Mesilla's then-existing boundary, as required by Sections 3-7-17 and -17.1. [*Id.*] Finally, the Court found that the owners of the majority of the acreage within the area annexed had signed the petitions requesting annexation, pursuant to Section 3-7-17. [*Id.*]

The District Court noted the limited scope of judicial review, acknowledged the governing statutes, and held that Mesilla acted legally and constitutionally in enacting Ordinance 2007-13, the annexation ordinance. [*Id.*] The District Court dismissed Waggoner's complaint appealing Mesilla's actions by Judgment and Order filed January 28, 2009. [RP 2000-2001] This appeal followed.

ANSWERING ARGUMENT AND AUTHORITY:

In the adoption of Ordinance 2007-13, Mesilla substantially complied with all statutory procedures for annexation under NMSA 1978, Section 3-7-17, and also with the supplemental procedural requirements of NMSA 1978, Section 3-7-17.1. *See Daugherty*, 120 N.M. at 719, 905 P.2d at 1123; *Dugger*, 114 N.M. at 54, 834 P.2d at 431 (holding review of annexation is limited to determining whether the city's action was constitutional, and was within its legislatively delegated authority). The District Court was presented with conflicting interpretations of the statutes, and with some conflicting evidence regarding the actions taken. The District Court resolved the conflicting evidence in favor of Mesilla.

This Court must reject Waggoner's attempts to impose additional procedural requirements, other than those set forth by statute for annexation by the petition method, and must resist any efforts by Waggoner to have the Court exceed the proper scope of appellate review of Mesilla's annexation.

Preservation of All Issues:

Mesilla raised, briefed and preserved its arguments made below in motions and responses to motions filed in the District Court, especially Mesilla's Motion to Dismiss Complaint [RP 95-108], Mesilla's Motion and Memorandum in Support of Summary Judgment [RP 326-363], Mesilla's First Amended Findings of Fact and Conclusions of Law [RP 1833 – 1840], Mesilla's Response to Appellant's

Memorandum on Appeal [RP 1909 -1932] and Mesilla's Findings of Fact and Conclusions of Law Following Evidentiary Hearing [RP 1952 -1960]

Mesilla further raised and preserved the following arguments and the evidence supporting the District Court's decision at the evidentiary hearing held November 17, 2008, and in oral arguments to the District Court on November 20, 2008.

ISSUE 1: Mesilla substantially complied with the statutory requirements for annexation by the petition method.

Applying the limited and correct standard of review, Waggoner's burden on appeal was to present evidence that Mesilla did not substantially comply with the statutory procedural requirements for the petition method of annexation. *See Huyck Corp. v. Town of Wake Forest*, 356 S.E.2d 599, 601 (N.C.App. 1987) (holding when the record of annexation by municipal corporation demonstrates substantial compliance with the applicable statutes, the burden falls on the petitioners to show by competent and substantial evidence that the statutory requirements were in fact not met or that procedural irregularities occurred which materially prejudiced their substantive rights) (citations omitted).

"Substantial compliance" is a doctrine of statutory interpretation that examines whether an actor follows a statute sufficiently so as to carry out the intent for which the statute was adopted and in a manner that accomplishes the reasonable objectives of the statute. *Brown v. Trujillo*, 2004-NMCA-040, ¶ 13, 135

N.M. 365, 88 P.3d 881, *citing Lane v. Lane*, 1996-NMCA-023, ¶ 17, 121 N.M. 414, 912 P.2d 290 (internal quotation marks and citation omitted). The doctrine is premised on the concept that the Legislature “cannot anticipate every contingency.” *Id.*

This Court’s review examines the nature and purpose of the statute, and the acts purporting to achieve compliance in light of “the purposes served by strict compliance with the letter of the statute.” *Id.* ¶ 18. Again, in New Mexico, every reasonable presumption is given to the validity of the municipality's action.

Hughes, 53 N.M. 150, 203 P.2d 995. Waggoner thus had the burden to overcome this presumption.

New Mexico’s statutory requirements for annexation by the petition method are set forth at NMSA 1978, Sections 3-7-17 and -17.1. Section 3-7-17 applies to all annexations by the petition method. Section 3-7-17.1 adds additional requirements for an annexation which is initiated in a Class A county with a population of less than 300,000 residents. The requirements of these two sections are discussed in turn.

a. Mesilla substantially complied with the procedural requirements of Section 3-7-17.

Section 3-7-17 NMSA 1978 requires that a governing body either consent to, or reject, a petition for annexation which is presented to the governing body, and which:

- 1) seeks the annexation of territory contiguous to a municipality; and
- 2) is signed by the owners of a majority of the number of acres in the contiguous territory; and
- 3) is accompanied by a map that shows the external boundary of the territory proposed to be annexed, and the relationship of the territory proposed to be annexed to the existing boundary of the municipality.

The first requirement (contiguity) was never at issue in this matter.

Regarding the second requirement, the District Court heard testimony that Mesilla received petitions signed by owners of over 50% of the territory annexed. [*E.g.* Tr. 250] In fact, Mesilla received petition signatures from property owners requesting annexation and who were ultimately not included within the annexed territory. [Tr. 303-304; 327; 333; 337] On December 26, 2007, when approving Ordinance 2007-13, Mesilla's Trustees were presented with petition signatures representing owners of over 50 percent of the acres annexed by the Ordinance. [Tr. 250; 332]

Notwithstanding this evidence, Waggoner argues for the imposition of an additional procedural requirement, one found nowhere in the statutory scheme established by the Legislature. Waggoner argues that the number of petitions received by Mesilla were inadequate as of certain dates in September, October and November of 2007, the months preceding the annexation vote. Waggoner now insists that because the petitions came in to Mesilla over a period of months in late

2007, that the required petitions and the acreage represented, did not meet the 50% requirement as of those dates identified by Waggoner.

Section 3-7-17 contains no such limitation or requirement. The statute requires only that the municipality be presented with petition signatures from owners of over 50% of the acres proposed for annexation. Section 3-7-17 has no time limitations or deadlines during which signatures may be submitted. The statutory scheme contemplates that the process is just that, a process. That Mesilla may have set targeted deadlines and dates, and perhaps modified any such dates during the process to accommodate additional input from affected citizens, is not contrary to the annexation statute. Any time limitations were set by Mesilla as an accommodation to the process, not a statutorily required part of it. [See Tr. 360]

Section 3-7-17 required that Mesilla be presented with petitions signed by owners of the majority of the acres proposed for annexation, and this occurred on December 26, 2007 when Ordinance 2007-13 was approved. This Court should reject Waggoner's attempt to create and impose additional procedural requirements and deadlines.

The third requirement of Section 3-7-17(A) is that a petition be accompanied by a map that shows the external boundary of the territory proposed for annexation and the relationship of that territory to the existing boundary of the municipality. Throughout the political process of this annexation decision, petitions were

submitted to Mesilla by citizens requesting they be annexed. Mesilla also heard objections from citizens who did not want their property annexed. In an effort to educate and inform the public about the implications and ramifications of annexation, multiple public “workshops” were held. This is entirely consistent with the democratic process of petitioning.

Section 3-7-17 requires maps and later a plat at different points in the process. Initially, the statute requires a map indicating the boundary of territory under consideration in relation to existing municipal boundaries. Following approval of a proposed annexation, the statute requires a “plat”, to be prepared and filed with the county clerk. This Court should note the qualitative difference between the maps discussed as part of the petition process, and the boundary plat required to be filed under Section 3-7-17(B). The mapping process is necessarily informal, because during the process of collecting petitions, as citizens indicate a desire to be included, the boundaries change. [Tr. 328-331] Once the vote is taken, however, a plat, delineating precisely the annexed territory can be prepared, for purposes of recordation. *Compare* Sections 3-7-17(A)(3) and (4) (discussing the map to accompany the petition to the governing body) *with* Section 3-7-17(B) (requiring a copy of the plat of the territory annexed to be filed with the county clerk); *see also* Black’s Law Dictionary, 6th Ed., page 797 (describing a “plat” as “a map of a specific land area such as a town, . . . showing the location and

boundaries of individual parcels of land . . . usually drawn to scale”; and a “plat map” as a “plat which gives legal descriptions of pieces of property by lot, street, and block numbers”).

Section 3-7-17 establishes a petitioning process without limiting or restricting that process. A process, almost definitionally, is subject to change as the process continues. The statutory annexation process requires a recordable plat only at the point it becomes necessary, following the final annexation decision.

Up to the final decision by the municipality, nothing in the statute requires that petitions and a map depicting the proposed annexation boundaries remain static. To impose a requirement that each map and petition be considered in isolation without reference to other petitions, and without allowing for coordination and redrafting, would effectively nullify the provisions for a petition method of annexation, since individual citizens cannot be expected to prepare formalized documents in presentation of an annexation petitions. Such a requirement would impose onerous coordination obligations among citizens before a petition for annexation could even be submitted to the governing body.

Adopting Waggoner’s proposed addenda to the statute that a map – once submitted – is immutable would also render superfluous the provisions of Section 3-7-17.1(B)(1) requiring review and comment by the county commission. The Legislature clearly required such review and comment anticipating that proposed

boundaries might change following a comment period. Our Supreme Court has noted that courts “will not interpret statutes so that terms are rendered mere surplusage”. See *State v. Javier M.*, 2001-NMSC-030, ¶ 32, 131 N.M. 1, 33 P.3d 1 (holding a statute must be construed so that no part of the statute is rendered surplusage or superfluous).

Mesilla’s Board of Trustees was presented on December 26, 2007 with alternative maps showing the territory proposed for annexation, and the relationship of that proposed territory to Mesilla’s then-existing boundaries, as required by Section 3-7-17(A)(3). The minutes of the December 26 meeting record a motion was made by Mesilla Trustee Williamson for annexation with reference to a specified map among those options proposed for consideration. [Mesilla Exhibit 10]. Option 6, referenced by the motion, was adopted by vote of the Trustees, and showed the territory annexed, and its relationship to then-existing municipal boundaries. [Mesilla Exhibit 3, 14] The third procedural requirement of Section 3-7-17 was satisfied in the Trustees’ adoption of Ordinance 2007-13.

b. Mesilla properly complied with statutory notice requirements.

The clear intent of the notice requirements of the annexation statutes are designed to advise the public what land is proposed for annexation. The District Court received the alternative maps into evidence and concluded that all interested parties received the required notice of the area sought to be annexed. *Hughes v.*

City of Carlsbad, 53 N.M. 150, 203 P.2d 995 (1949). Indeed, there was no testimony of insufficient notice of the intent to annex by any landowner affected by the adoption of Ordinance 2007-13. *Mutz*, 101 N.M. at 701, 688 P.2d at 19; *see also Dugger*, 114 N.M. at 56, 834 P.2d at 433 (noting petitioners received all procedural due process they were entitled to receive in that they received all notices of hearings provided for in city ordinances governing annexation by petition); *see also Smith v. Granville Twp. Bd. of Trustees*, 693 N.E.2d 219 (Ohio 1998) (holding that “the spirit and purpose of the annexation laws of Ohio are to encourage annexation to municipalities and to give weight to the requests of property owners relative to the governmental subdivision in which they desire their property to be located.”) The trial court correctly found that Mesilla substantially complied with the conditions enumerated in § 3-7-17.

c. Mesilla substantially complied with the supplemental procedural requirements of Section 3-7-17.1.

New Mexico statutes include a specific procedure in the case of an annexation by petition, and for a Class A county, with a population of less than three hundred residents. NMSA 1978, Section 3-7-17.1 requires that in such cases a proposed annexation by petition be submitted for review and comment by the county commission of the county in which the territory is located, and prior to approval or disapproval of the annexation by ordinance. This procedural requirement is mandatory, and is not discretionary. *See* Section 3-7-17.1(B)(1)

(providing the municipality “shall” submit the petition to the board of county commissioners). After confirming an adequate representation of acreage by petitioning landowners, the municipality must submit the proposed annexation petitions to the county commission. Section 3-7-17.1 (B)(2) then allows the county commission at least 30 days for review and comment on the proposed annexation.

The Town of Mesilla is located in Doña Ana County, a class A county, with a population of less than three hundred thousand persons. Mesilla therefore complied with the procedural requirements of Section 3-7-17.1. After Mesilla received petitions requesting annexation, and confirmed that these petitions represented a majority of the territory then-proposed for annexation, Mesilla submitted the proposed annexation petitions to Doña Ana County as required by Section 3-7-17.1(B)(1).

Although Waggoner insists that this Court should rewrite the statute, Section 3-7-17.1 does not require a vote of the municipality prior to the submission of the petitions and map the county commission. Section 3-7-17.1(B)(1) requires no ordinance, resolution or other vote of the governing body as a precondition to the submittal of petitions to the county commission; under the statutory procedure this submittal is mandatory.

Doña Ana County was allowed the minimum 30 days allowed by state statute for review and comment on the proposed annexation, as required by Section 3-7-17.1(B)(1). The Doña Ana County Commission met and discussed the proposed annexation at a public meeting, and the County Commission Chairwoman then provided the Commission's response to the proposed annexation by correspondence delivered to Mesilla on November 1, 2007.

Waggoner insists that Mesilla failed to act on the annexation within the 60 days specified in Section 3-7-17.1, and that therefore Ordinance 2007-13 was automatically disapproved. The 60 day requirement of Section 3-7-17.1(B)(2) is ambiguous as to the triggering event for the computation of time. Mesilla computed the 60 day requirement as being triggered "after receiving the petition", and thus interpreted this language as requiring action within 60 days from receiving the petition back from the County Commission. This logical construction of the statute allows adequate time for due consideration of the county's comments by the municipality. The Mesilla Trustees acted on the proposed annexation December 26, 2007, which was within 60 days of November 1, 2007, the date the petitions and comments were received back from the Doña Ana County Commission.

Waggoner's contention that the annexation was automatically denied as of a date certain is without any basis under state statute. Section 3-7-17.1(B)(2)

expressly requires either the approval or disapproval of the proposed annexation. There is no automatic denial provision or language indicating the annexation is “deemed denied” if the governing body does not act within 60 days of “receiving the petition” from the petitioning citizens. Compare Section 3-7-17.1(B)(2) with NMSA 1978, § 34-5-14 (providing if an petition to the Supreme Court for certiorari has not been acted upon within thirty days, “it shall be deemed denied”); *Vigil v. Thriftway Marketing Corp.*, 1994, 117 N.M. 176, 870 P.2d 138 (noting lack of express denial provision in Rule 1-041(E) NMRA meant motion to reinstate case was not deemed denied by operation of law).

Without statutory language so providing, failure of a municipality to act within 60 days cannot constitute an automatic rejection or disapproval of the annexation. If the Legislature had intended such a consequence, it would have included this by statute, but did not do so. This Court should reject Waggoner’s attempt to graft a procedural default provision onto existing statutory language. Because the statute explicitly requires that the municipality must either approve or disapprove, even if Mesilla had not approved the annexation within 60 days, the statute does not support a determination that such a failure resulted in an automatic denial or disapproval of the annexation; see also *Lovelace Medical Center v. Mendez*, 111 N.M. 336, 805 P.2d 603 (1991) (holding “deemed denied” provision

in interlocutory appeal statute did not limit appellate court's jurisdiction, but was waivable housekeeping rule to assist courts with management of their cases).

Had Mesilla failed to act within the 60 days, the remedy of the petitioning landowners would have been a writ of mandamus to compel either approval or disapproval of the annexation in accordance with Section 3-7-17.1(B)(2). Clearly, the Legislature included the 60 day requirement to avoid unreasonable delay by a municipality. Nothing in the statute governing annexation supports Waggoner's argument that a failure to approve or disapprove the annexation within 60 days of receipt results in an automatic disapproval. Again, this Court should reject the imposition of additional procedural requirements not provided in the express statutory language.

d. Mesilla did not improperly participate in the petition process.

Waggoner charges that "the evidence demonstrates that Mesilla took the lead in the annexation process". BIC, page 5, footnote 2. This was one of Waggoner's theories throughout the proceedings below. Waggoner repeatedly claimed that Mesilla's employees, staff, or elected officials instigated the annexation process and improperly participated in collecting petition signatures. Mesilla denied this allegation, and evidence was presented that Mesilla staff and employees in fact cooperated with and assisted citizens who were both for, and against, the annexation.

Even assuming, *arguendo*, that Waggoner's allegations that Mesilla assisted in the annexation process, neither Section 3-7-17 nor 3-7-17.1 prohibits such assistance or advocacy by elected officials. No language or provision precludes elected officials, a municipal government, or staff or employees, from copying or reviewing petitions, or making petitions or publications available at public meetings. Section 3-7-17 does not prohibit municipal staff from creating and re-creating various mapping options and alternatives. Neither Section 3-7-17 nor 17.1 precludes elected officials, a municipal government, or its staff from conducting workshops to assist and inform the public, as was done here, to discuss alternatives for the proposed annexation.

Again, Waggoner's challenge is unsupported by any failure of Mesilla to comply with statutes. Instead Waggoner's appeal reduces to an effort to overturn the legislative act of Mesilla by having this Court interpose additional procedural requirements not contained in the statute, and to second-guess the propriety and advisability of the political decision made to annex the lands in this case.

ISSUE 2: Mesilla did not improperly, unlawfully or illegally alter the boundary map following review by the County.

The evidence presented to the District Court was that, as petitions circulated among the citizenry, maps were generated that showed different annexation possibilities. [Tr. 133-135] This is to be expected in a political process, which, by definition, is not static, with the outcome a foregone conclusion. As envisioned by

Section 3-7-17 and -17.1, until the final vote of the Mesilla Trustees on December 26, there were no guarantees that there would be an annexation of any territory, much less which territory would comprise the final boundaries. This is precisely why the preparation of a recordable quality of plat is not required until after a municipality approves an annexation. *See* Section 3-7-17(B).

Eventually, mapping options were presented to the Board of Trustees, but there were multiple versions as the process went along. [Tr. 135] Mr. Eckert understood that 51 percent of the owners of the acreage ultimately approved for annexation had to approve the annexation. [Tr. 136] Mr. Eckert generated the map that was submitted to the County for review and approval [Tr. 136] and he calculated the acreage of owners that had petitioned for annexation along with a map showing the proposed territory for annexation. [Tr. 136-137] The majority of owners of the acreage within the boundary proposed for annexation had petitioned for annexation. [Tr. 137; Mesilla exhibit 4]

The map submitted to the County showed the boundaries of the territory being presented for annexation, and the relationship of the boundaries to Mesilla's then-existing municipal boundaries. [Tr. 141] The County approved Mesilla's proposed annexation, and in fact recommended expanding the proposed annexation territory. [Tr. 140, Mesilla Exhibit 5] Following receipt of the County's approval

of Mesilla's proposed annexation, Mr. Eckert modified the proposed annexation maps to include some of the land recommended by Dona Ana County. [Tr. 141]

At the December 26, 2007 Mesilla Board of Trustees meeting, maps showing alternatives for annexation were presented. [Tr. 145] The alternative ultimately approved by the Board at the December 26 meeting had been in the Board packets for referral prior to the meeting. [Tr. 145-146; 154-155] Mr. Eckert explained how he went about creating the maps so as to calculate the acreages for petition signatories and non-signatories. [Tr. 150]

After the vote of the Board of Trustees on December 26, a recordable plat was professionally prepared by an engineering firm, in accordance with Section 3-7-17(B). [Tr. 150-151] Mr. Eckert worked with the engineering firm of Molzen-Corbin to complete a boundary plat of the annexation area. [Tr. 151-152] This plat was filed and recorded with Doña Ana County on February 20, 2008. [Tr. 152] The foregoing process was entirely consistent with the provisions of Sections 3-7-17 and -17.1, and took into account the political realities confronting a municipality that enlarges its boundaries through the petition process.

ISSUE 3: Notice of the proposed annexation ordinance was properly given in accordance with New Mexico law and Town of Mesilla Code Provisions.

Waggoner insists that Ordinance 2007-13 was approved without a properly noticed public meeting. The District Court heard testimony that notice of the proposed annexation was published in accordance with Mesilla Town Code. [Tr.

79-81] The Town Code requires that notice of any proposed Mesilla ordinance be published by posting it at six public locations within the Town, and at least two weeks before adoption. Town of Mesilla Municipal Code Section 1.05.030. The Mesilla Town Clerk testified that the notice of the December 10, 2007 meeting was published at the same six identified public places on December 5, 2007, consistent with the requirements of the Mesilla Town Code and with NMSA 1978, § 3-1-2(J). [Tr. 82-84] Notice of the December 26, 2007 meeting was published on December 20, 2007, again consistent with the Code requirements. [Tr. 84] Waggoner never disputed the publicly posted meeting and agenda notices.

With regard to Waggoner's insistence that publication must be made in the Las Cruces Sun-News, Mesilla's Town Code for publication in a newspaper is permissive, not mandatory. [Tr. 97-98; Mesilla Exhibit 13] Mesilla's Town Clerk and Mayor both testified that Mesilla only publishes in the Sun-News when such publication is required by a funding source, and funds are available to do so. [Tr. 80, 93, 335-36]

The proposed annexation that came to be embodied in Ordinance 2007-13 was published by posting at the same six locations that all such public notices are published by Mesilla, and the publication was done at least two weeks prior to Mesilla's Board of Trustees' meeting on December 10, 2007, as required. [Tr. 335-336; Mesilla Exhibits 6, 13] At the December 10 meeting, and after public debate

and discussion on the proposed annexation, a final vote on Ordinance 2007-13 was postponed to a date certain, the next regularly scheduled meeting of the Board of Trustees, on December 26, 2007. [Mesilla Exhibit 8]. The agenda published by public posting for the December 26, 2007 meeting included as “Old Business” the adoption of Ordinance 2007-13. [Mesilla Exhibit 9].

Furthermore, Waggoner had actual notice of Ordinance 2007-13, in addition to the public notices published by Mesilla. Plaintiff-Appellant Mr. Tooley testified that he had notice of and attended all of the workshops concerning annexation, and made his objections known at each opportunity. [Tr. 250-256] Again, the facts of publication and notice were heard by the District Court and resolved against Waggoner. This Court should defer to the factual determination made by the District Court, and affirm the District Court’s Judgment in favor of Mesilla.

ISSUE 4: Mesilla timely acted upon the annexation request.

In the case of an annexation within a Class A county, with a population of less than three hundred residents, annexation requires compliance with additional steps. NMSA 1978, Section 3-7-17.1 requires that a proposed annexation first be submitted for comments by the county commissioner of the county in which the territory is located. Section 3-7-17.1 then allows the reviewing county government at least 30 days for review and comment on the proposed annexation.

Mesilla is located in a Class A county, with a population of less than three hundred thousand persons, and thus complied with the procedural requirements of Section 3-7-17.1. After Mesilla received petitions requesting annexation, and confirmed that the petitions represented over 50% of the territory proposed for annexation, Mesilla submitted the proposed annexation petitions to Doña Ana County. *See* Section 3-7-17.1(B)(1).

Waggoner does not dispute that Mesilla presented the proposed annexation to the Doña Ana County Commission, and does not dispute that the Doña Ana County had the requisite 30 days for review and comment. [Tr. 137-38, 201-205; Mesilla Exhibit 4] Following this public meeting, the County Commissioners reported comments to the Town of Mesilla by correspondence dated November 1, 2007, from County Commission Chair Karen Perez. [Tr. 138; Mesilla Exhibit 5]. The County Commissioner's comments reflected that the County supported the proposed annexation. [Tr. 139-40; Mesilla Exhibit 5].

Waggoner argues that Mesilla failed to act on the annexation within the 60 days set forth in Section 3-7-17.1, and that therefore the adoption of Ordinance 2007-13 was "illegal". Section 3-7-17.1 requires either the approval or disapproval by the municipality. There is no provision for default failure, even in the event that Mesilla did not act within 60 days of presentment. Nothing in the statute supports Waggoner's contention that a failure to act within 60 days acts as

an automatic rejection of the approved annexation. If the Legislature had intended such a consequence it would have included this by statute, but did not do so. This Court should reject Waggoner's attempt to interject additional procedural requirements.

The 60 day requirement does not have a prescribed triggering event for the computation of time. The timing requirement is triggered by "presentment", but Section 3-7-17.1 is unclear whether the presentment is from the municipality to the county commission, or from the county back to the municipality. The most logical construction is that the trigger operates from the presentment back from the county commission, so as to allow due consideration of the county's comments by the municipality. Mesilla commenced its action on the proposed annexation on December 10, 2007 by notice, public input and open debate by Mesilla's Trustees. Although the final vote was postponed until to December 26, the public hearing of the annexation ordinance was commenced December 10.

Ultimately the Court need not construe to legislative intent with regard to the triggering date for computation of a deadline for approval or disapproval. Section 3-7-17.1 is explicit that the municipality must approve or disapprove of the annexation. Imposition of a default automatic denial would conflict with the clear language of Section 3-7-17.1. Even if Mesilla did not approve the annexation

within 60 days, the language of Section 3-7-17.1 does not support Waggoner's argument that such a failure resulted in an automatic denial or disapproval.

ISSUE 5: Required boundary roads were properly included in the final annexation.

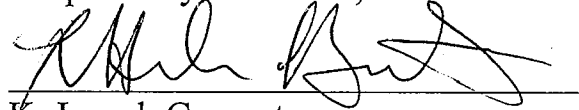
NMSA 1978, Section 3-7-18 requires that territory annexed include bordering streets. Waggoner argues that two bordering roadways were not included in the territory annexed. Contrary to Waggoner's contention, the evidence adduced at trial established that the required bordering roadways were included by Molzen-Corbin in the survey prepared for the territory annexed, and ultimately filed with the Doña Ana County Clerk on February 10, 2008. [Tr. 315-316] Section 3-7-18 defines those bordering roadways which must be annexed as those which have been dedicated and accepted as public roadways.

The District Court heard Waggoner's argument and evidence on the issues herein, and rejected the argument that roadways were not properly included as required. Again, this Court should defer to the factual findings of the District Court on this issue.

CONCLUSION:

The District Court's January 28, 2009 Judgment should be affirmed in all respects.

Respectfully submitted,



K. Joseph Cervantes
Cervantes Law Firm, P.C.
2610 South Espina
Las Cruces, NM 88001
(575) 526-5600

And

L. Helen Bennett
Attorney at Law
P.O. Box 25167
Albuquerque, NM 87125-5167
(505) 242-6300

I certify that a true copy of the foregoing was mailed via first class mail, postage prepaid, this 29th day of December 2009 as follows:

Kerry Kiernan
C. Shannon Bacon
Sutin Thayer & Browne, P.C.
P.O. Box 1945
Albuquerque, NM 87103

Robert R. Feuille
Scott Hulse, P.C.
P.O. Box 99123
El Paso TX 79999-9123

