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IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

BARBARA WAGGONER, FLOYD
EUGENE WAGGONER, ET AL.,

Plaintiffs / Appellants,

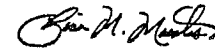
v.

Appeal No. 29,376
No. D 307 CV 2008-00626

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,

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

SEP 28 2009



Defendants / Appellees.

PLAINTIFFS / APPELLANTS' BRIEF IN CHIEF

CIVIL APPEAL FROM THE THIRD JUDICIAL DISTRICT

COUNTY OF DOÑA ANA

THE HONORABLE JUDGE JERALD A. VALENTINE

KERRY KIERNAN
C. SHANNON BACON
SUTIN, THAYER & BROWNE
A Professional Corporation
Post Office Box 1945
Albuquerque, NM 87103
Telephone (505) 883-2500
Facsimile (505) 888-6565

ROBERT R. FEUILLE
SCOTT HULSE PC
P.O. Box 99123
El Paso, TX 79999-9123
Telephone (915) 533-2493
Facsimile (915) 546-8333

APPELLATE COUNSEL FOR PLAINTIFFS /
APPELLANTS

TRIAL COUNSEL FOR PLAINTIFFS /
APPELLANTS

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I. SUMMARY OF PROCEEDINGS

A. INTRODUCTION

This is an appeal from the district court's ratification of the Town of Mesilla's ("Mesilla") illegal annexation proceedings. Plaintiffs-Appellants ("Plaintiffs") are owners of property within the territory annexed who oppose the annexation. [RP 37-39] Mesilla was without legal authority in passing Ordinance 2007-13 ("Ordinance") which annexed the property. This illegality manifested itself in a variety of ways. First, Mesilla solicited citizens to sign annexation petitions without an attached and required boundary map, even though New Mexico law required that citizens requesting annexation present a map to Mesilla. The citizens signed petitions without knowing what land would ultimately be annexed. Second, rather than permitting citizens to present a map, as it was required to do, Mesilla drew its own boundary maps based on signatures it was receiving on petitions. But Mesilla never sought citizen approval of any of the maps, including the final boundary map it approved. Third, Mesilla improperly altered the boundary map it had submitted to the County of Doña Ana ("County") for review. Fourth, to compound its legal mistakes, Mesilla issued defective notice of the proposed Ordinance. Fifth, Mesilla passed the Ordinance after the expiration of the statutory period for passage. Sixth, Mesilla failed to include in

the annexed territory a portion of a street located along the boundary of the territory. It was required to include this portion of the street as a matter of law.

Mesilla's actions and the district court's ratification of those actions should be reversed. Reversal is required in order to uphold the plain meaning of the annexation statutes and the legislative intent behind them. When citizens petition for annexation under New Mexico law, those citizens must be aware of and must approve the boundary of the area they seek to annex. It is illegal to base annexation on petitions without an attached map. The citizens must choose the area to be annexed, not the municipality. The municipality must at all times act in accordance with the annexation statutes. None of this happened here.

B. THE METHODS OF ANNEXATION UNDER NEW MEXICO LAW

The annexation at issue involves the petition method for annexation. This Court has recognized there are "three separate methods" of annexation under New Mexico Law. *Daugherty v. City of Carlsbad*, 120 N.M. 716, 717, 905 P.2d 1120, 1121 (Ct. App.), *cert. denied*, Sup. Ct. No. 23,234, 120 N.M. 636, 904 P.2d 1061 (1995). The first two methods, the arbitration method and the boundary commission method, "rely on administrative bodies to make the annexation decisions." *Id.*; NMSA 1978, §3-7-1(A)(1) and (2) (1995). Under the arbitration method an elected board of arbitration makes the ultimate determination as to whether the land shall be annexed. Under the municipal boundary commission

method an independent commission known as the “municipal boundary commission” determines whether to annex territory to a municipality. NMSA 1978, §3-7-10 (1981); NMSA 1978, §3-7-11 (1995). “Both the methods of annexation may be initiated by the municipal government desiring the annexation.” *Daugherty*, 120 N.M. at 718, 905 P.2d at 1122; NMSA 1978, §3-7-5 (1965); NMSA 1978, §3-7-11(A)(1).

The third method is the petition method at issue here. The petition method “may only be initiated by the owners of property contiguous to the municipality, and not by the city itself.” *Daugherty*, 120 N.M. at 718, 905 P.2d at 1122. Under the petition method “there is less danger that the municipality will use its governmental power arbitrarily to obtain what it wants.” *Id.* The Legislature establishes the city “as the arbitrator of what is essentially a political dispute between competing groups of citizens.” *Id.*

The statutes governing the petition method are NMSA 1978, Section 3-7-17 (1998) and NMSA 1978, Section 3-7-17.1 (2003). Section 3-7-17 sets forth general requirements for the petition method, while Section 3-7-17.1 incorporates many of the same requirements as Section 3-7-17, but adds additional requirements. Section 3-7-17.1 controls here. It governs the annexation of territory contiguous to a municipality – such as Mesilla – which is located in a Class A county – such as Doña Ana – with a population of less than 300,000.

Under Section 3-7-17.1, a petition for annexation must in relevant part: 1) seek the annexation of territory contiguous to an above-described municipality; 2) be signed by the owners of a majority of the number of acres in the contiguous territory; 3) be 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;” and 4) be presented to the city council for its consideration. Section 3-7-17.1(A) and (B). The city council must then submit the petition and map to the county in which the city is located for the county’s review and comments. Section 3-7-17.1(B)(1). The county must then submit its comments to the city within thirty days. *Id.* Not more than sixty days after receiving the petition from the citizens, the city council “shall by ordinance approve or disapprove the annexation” after considering any comments from the county. Section 3-7-17.1(B)(2).

The appreciation of these three methods and the differences between them will aid the Court in analyzing the legal significance of the following facts.

C. SUMMARY OF FACTS

Mesilla adopted a comprehensive plan in 2004 which proposed annexation west of Mesilla. [Tr., 11/17/08, 354-55]¹ Mesilla began conducting a series of workshops publicizing the benefits of annexation throughout the summer and fall

¹ Unless otherwise noted, all references to the Transcript are to the November 17, 2008 transcript.

of 2007.² No less than nine workshops were held between July 2007 and December 2007 to discuss annexation. [Plaintiff's Ex. 37 (Bates Nos. 00103-05; 00118-19; 00129-30; 00142-43; 00179-80; 00191-92; 00203-04; 00220-21; and 00244)]³ Notice of the first workshop held on July 16, 2007 announced that Mesilla wished to explore "annexation into Mesilla with interested property owners living north and west of town." [Id. (Bates No. 00103)]. The community development director for Mesilla, Nicholas Eckert, was instructed by the mayor to prepare presentations for the workshops on annexation. [Tr. 98-99] PowerPoint presentations were compiled by Mesilla which detailed the benefits of annexation. [Id. 99-100; Plaintiff's Ex. 33] These were discussed at the workshops. [Id.] During these presentations, petition forms for the signatures of those in favor of annexation were available. [Tr. 104-05] These forms were prepared by Mesilla. [Id.]

The actual petition forms read that: "[we] the undersigned, being the owners of a majority of the number of acres in the contiguous territory to the town of Mesilla *as shown by the attached map*, hereby petition for annexation" [Plaintiff's Ex. 31 (Bates Nos. 00004-65)] (emphasis added). Mesilla collected

² Although the mayor of Mesilla testified that a citizen came into his office in June 2007 and asked to sign a petition for annexation [Tr. 321-322], the evidence demonstrates that Mesilla took the lead in the annexation process.

³ Plaintiff's Exhibit 37 constitutes Mesilla's municipal records. The Bates Numbers from those records refer to the number in the lower right corner of the pages.

signatures on those forms between September and December of 2007. [Tr. 107-10; Plaintiff's Ex. 38]

But Mr. Eckert admitted that the petitions did not have any boundary maps attached when they were signed. [Id. 109] Instead, various maps were prepared by him based on the petition signatures. [Id. 107] Maps were prepared that would "match" the acreage represented by the ever-changing number of signers. [Id. 108] No less than six possible boundary maps were ultimately prepared by Mesilla. [Id.] Those different boundary maps may be found in Plaintiff's Exhibit 1 (Bates Nos. 00066-71). The working maps were kept in Mesilla's offices or at the workshop sessions. [Tr. 109]

There were no signatures prior to September 5, 2007. [Id. 111] Mr. Eckert admits that there were no maps generated at that time. [Id. 110-11] A map was generated sometime between September 5 and October 10, 2007 based on the petition signatures received up to that point. Mr. Eckert "presented" the petition and his map to the Mesilla Board of Trustees ("BOT") on October 9, 2007. [Plaintiff's Ex. 37 (Bates Nos. 00247-51)] Then, with the approval of Mesilla's mayor, on October 10, Mr. Eckert submitted his map to the County along with the petition signatures. [Tr. 111; Plaintiff's Ex. 37 (Bates Nos. 00100-01)] There is a dispute as to whether the number of acres represented at the time of this submission was 782.87 acres or 739.2 acres [Plaintiff's Ex. 23; Tr. 205-07]. But

what is clear is that the map submitted to the County was different than the final annexation map approved by Mesilla's BOT on December 26, 2007. [Tr. 111-12] Mr. Eckert admitted this difference. [Id.] Certain land that was included in the map submitted to the County ultimately was not included in the final boundary map approved for annexation. Some land that was not included in the map submitted to the County was included in the final boundary map. [Tr. 111-13] The map submitted to the County is at Plaintiff's Exhibit 37 (Bates No. 00101). The final boundary map approved by Mesilla is at Plaintiff's Exhibit 37 (Bates No. 00071), as well as at Plaintiff's Exhibit 26. [Tr. 112-14] Mr. Eckert's testimony reveals that the difference in acreage between the maps is forty-eight acres. [Tr. 138-39] Additionally, petitions that were signed on or after October 10 were never submitted to the County. [Tr. 118]

After the County reviewed the annexation, it recommended expanding the annexation territory. [Plaintiff's Ex. 36] While Mesilla ultimately did not accept that recommendation, it never sent another boundary map to the County after October 10. [Tr. 119]

Mesilla's conduct of the annexation process concerned Nora Barraza, one of Mesilla's Trustees. She was concerned about how many maps were being considered for approval. She was also concerned that the residents in the area did not know what area was ultimately being considered. [Tr. 162-64] Another

Trustee, John Nelson, expressed his concern that Mesilla should have sent the annexation request to the County after it had conducted work sessions that had decided upon a final annexation map. According to Mr. Nelson, the “work session process we are going through now [December 17, 2007] should have been accomplished prior to submitting the proposed annexation to the County.” [Plaintiff’s Ex. 37 (Bates Nos. 00358-59)]

The map that was ultimately approved by Mesilla on December 26 was not actually selected until that very date. [Tr. 124; 162]⁴ At that time there were still six optional maps floating in existence. [Tr. 124-25] At least one witness recalled that there was no map displayed to the public at that meeting. [Id. 265] In any event, as Mr. Eckert testified:

Q: In relation to the option map that was approved on December 26 of 2007, when did the people who signed the petition get a chance to approve that map?

A: The Board of Trustees approved that map.

Q: It was never submitted to any of the people that signed the petitions for approval, was it?

A: No

[Tr. 130-31]

⁴ By the time the final boundary map was approved, Mesilla had independently collected signatures representing a majority of acres in the territory it wanted to annex. [Tr. 229]

On November 26, 2007, Mesilla posted at six places within its borders a “Notice of Intent to Adopt Two Ordinances” [Plaintiff’s Ex. 37 (Bates No. 00383)] The Notice referred to the title of the first ordinance as “An Ordinance annexing certain lands into the Town of Mesilla located generally west of Mesilla.” [Id.] The Notice described the territory as approximately 780 acres of territory contiguous to Mesilla’s existing boundary. [Id.] The Notice stated that Mesilla was intending to adopt the Ordinance at its meeting of December 10, 2007. [Id.; *and see* Tr. 64-5] This notice was not published as legal advertisement in any newspaper of general circulation in Mesilla. [Id. 64-66]

The December 10 meeting ultimately resulted in Mesilla postponing consideration of the annexation ordinance until December 26, 2007. [Id. 68] There was never a second notice of intent to adopt ordinance posted anytime between December 10 and December 26.

The Las Cruces Sun-News (“Sun-News”) is a daily paper based in Las Cruces, New Mexico, has subscribers in Mesilla and in a neighboring zip code to whom the newspaper is delivered daily, is sold in stores and machines in Mesilla, has advertisers in Mesilla, and reports on news and events in Mesilla. The Sun-News is the newspaper of general circulation in Mesilla. Mesilla had published notices in the Sun-News before. [Plaintiff’s Ex. 55] The notice of intent to adopt ordinance was not published in the Sun-News, or any other newspaper. [Tr. 68, 91]

Mesilla's approval of the Ordinance on December 26, 2007 was more than sixty days after Mr. Eckert had submitted the petition and boundary maps to the Mesilla BOT (October 9), and more than sixty days after these had been presented to the County (October 10). [Plaintiff's Ex. 37 (Bates Nos. 00247-51; Bates Nos. 00100-01)] The Ordinance was subsequently filed with the County Clerk on February 20, 2008. [Plaintiff's Ex. 49]

One area was left out of the annexation territory that should have been included. According to the civil engineer who prepared the municipal boundary plat for annexation, a portion of Dulcinea Drive that actually bordered the annexation territory was not included within the annexation territory. [Tr. 314-15]

It is undisputed that there were forty-eight petitioners that were not annexed even though they had signed petitions. [Tr. 245-46; Plaintiff's Ex. 48] Mr. Eckert admitted that such people would not have known that they were not going to be included until the final decision of the Mesilla BOT on December 26, 2007. [Tr. 157]

II. ALL OF THE ISSUES HAVE BEEN FULLY PRESERVED

A timely appeal by Plaintiffs was taken to the district court on March 21, 2008. NMSA 1978, §3-7-17(C) (1998) [RP 37-44] After a full evidentiary hearing, the district court affirmed Mesilla's actions. The district court entered

Judgment on January 28, 2009. [RP 2000] Plaintiffs filed a timely Notice of Appeal to this Court on February 24, 2009. [RP 2039]

With the exception of the non-inclusion of Dulcinea Drive, all of the issues raised on appeal were raised in the Complaint filed by Plaintiffs in the district court [RP 37-44], in the initial proposed findings of fact and conclusions of law [RP 1801-17; FOF 25-101; COL 7-35], and in the proposed findings and conclusions submitted after the evidentiary hearing. [RP 1961-78; FOF 29-114; COL 7-35] The issues were also preserved in the opening statement [Tr. 21-30] and in the closing arguments. [Tr., 11/20/08, 4-40] The non-inclusion of Dulcinea Drive was argued in closing [Id. 20-27], and also in supplemental proposed findings and conclusions. [RP 1981-82] All of Plaintiffs' findings, which were not consistent with the court's proposed findings and conclusions, were denied by the court. [RP 1998-99]

III. THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS ARE LEGALLY DEFICIENT

The district court's FOF 2 [RP 1998] recites that no newspaper of general circulation maintains an office in Mesilla, and that the town provided notice of the proposed annexation ordinance by posting a notice of title and subject matter in six public locations within Mesilla. FOF 2 is challenged. While there was no newspaper of general circulation which maintained an office in Mesilla, there was a newspaper of general circulation in Mesilla [Plaintiff's Ex. 55]. The existence of

this newspaper necessitated that a notice be published in it, as argued herein. But this was never done. [Tr. 64-66; 68; 91] Moreover, Mesilla posted a notice of the proposed annexation Ordinance *only* before the December 10 meeting. It did not post a similar notice before the December 26 meeting. [Tr. 88-91]

FOF 3 [RP 1998] recites that Mesilla adopted the Ordinance at a public meeting on December 26, 2007, and that the Ordinance was accompanied by a map showing the proposed boundary of the area to be annexed and its relationship to the existing Mesilla boundary. FOF 3 is challenged. It is true that the proposed annexation Ordinance was adopted at a public meeting on December 26, and that it was accompanied by a map. But these facts are legally insufficient to satisfy the statute. FOF 3 ignores: 1) that the map was never presented to petitioners when they signed their petitions in the months preceding the meeting [Tr. 109; 111-12]; 2) that they did not approve the map that was approved by Mesilla [Id., 130-31]; 3) that Mesilla altered the boundary map it had submitted to the County without statutory authority to do so [Id., 111-12]; 4) that Mesilla gave defective notice of the adoption of the proposed Ordinance [Id., 64-66]; and 5) that Mesilla, without legal authority, passed the Ordinance after the expiration of the statutory period for passage. [Tr. 124; 162; Plaintiff's Ex. 37 (Bates Nos. 00247-51; 00100-01)]

FOF 4 [RP 1998] states that the owners of the majority of the number of acres within the annexed territory signed petitions requesting annexation. FOF 4 is

challenged. It is true that the owners of a majority of the number of acres within the area ultimately annexed had signed petitions as of December 26. [Tr. 229] However, this fact is legally insufficient. It implies that these individuals knew what area was proposed to be annexed when they signed the petitions. They did not. [Tr. 109, 11-12] They also did not approve the final boundary map which Mesilla approved because the final boundary map was never submitted to them for their approval. [Id., 130-31]

The district court also committed error by not adopting Plaintiffs' findings and conclusions, which had the support of the evidence. [See RP 1961-78; FOF 29-114; COL 7-35; RP 1981-82]

The district court's Conclusions of Law recite that Mesilla provided adequate public notice of the Ordinance, that the petition for annexation and the proposed Ordinance met the requirements under New Mexico law, and that Mesilla acted legally and constitutionally when it adopted the Ordinance. [RP 1998-99; COL 4,5] Plaintiffs dispute all of these conclusions. They are not supported by the evidence and the legal arguments set forth herein.

IV. THE STANDARD OF REVIEW IS *DE NOVO*

This appeal involves the interpretation of the annexation statute in conjunction with an undisputed factual record. As such, the district court is entitled to no deference in its decision. Rather, a complete *de novo* standard of

review is used. *Santa Fe County Bd. of County Comm'rs v. Town of Edgewood*, 2004-NMCA-111, ¶4, 136 N.M. 301, 97 P.3d 633.

In utilizing this standard, this Court will at all times focus on whether Mesilla complied with the plain meaning of the legislation and whether the ordinance was enacted in accordance with the governing statute. *Daugherty*, 120 N.M. at 719, 905 P.2d at 1123.

V. ARGUMENT

A. CITIZENS IMPROPERLY SIGNED A PETITION FOR ANNEXATION WITHOUT AN ATTACHED AND REQUIRED BOUNDARY MAP. THOSE SAME CITIZENS NEVER EVEN APPROVED THE BOUNDARY MAP DRAWN BY MESILLA WHICH WAS USED FOR THE ANNEXATION. THEREFORE, THE ANNEXATION PROCEEDINGS AND ORDINANCE WERE ILLEGAL.

Section 3-7-17.1 (A) makes clear that the annexation petition “*shall be presented to the city council and be 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.*” (Emphasis added) The map is an essential part of the petition, without which the petition is incomplete.

This Court will, in order to give effect to the intent of the legislature, employ the plain meaning rule to determine if language unambiguously sets forth the legislative intent. *Town of Edgewood*, 2004-NMCA-111, ¶5. The plain import is

clear. The legislature intended that petitioners know of, and approve, the map of the proposed annexation territory when they sign a petition for annexation. The petition method “may only be initiated by the owners of property and not by the city itself.” *Daugherty*, 120 N.M. at 718, 905 P.2d at 1122. Therefore, when petitioners do not know of, or approve, a boundary map, their signatures have no legal effect. If they sign a petition without a boundary map, then logically there can be no “territory proposed to be annexed” presented to the city council. In short, the citizens are not “initiating” anything.

The petition forms collected by Mesilla affirmed that petitioners had seen a map. The form stated that the undersigned petitioners “being the owners of a majority of the number of acres in the contiguous territory to the town of Mesilla *as shown by the attached map*, hereby petition for annexation” (Emphasis added) The language of the form, apparently, recognized the statutory mandate. But no map was ever attached to any of the petitions. The petition forms were false. Mesilla independently created the maps as petitions circulated into its offices. The map Mesilla ultimately approved was never submitted to any of the citizens that signed petitions. Moreover, the citizens that signed the petitions did not approve the map Mesilla ultimately decided upon. Only one conclusion is possible: that Mesilla violated the plain meaning and the fundamental purpose of the petition statute. It, not the citizens, impermissibly controlled the process.

[Plaintiff's Ex. 31 (Bates Nos. 00004-65), Ex. 33, Ex. 37 (Bates No. 00103); Tr. 98-100, 104-5, 107-8, 109, 124, 130-31, 162]

The petition method as described in reported New Mexico cases confirms that the petition is accompanied by a map and both are presented to the governing body. *See, e.g., Hughes v. City of Carlsbad*, 53 N.M. 150, 157, 203 P.2d 995, 1002 (1949), *partially overruled on other grounds, Mutz v. Municipal Boundary Comm'n*, 101 N.M. 694, 688 P.2d 12 (1984) (plat accurately designating the area sought to be annexed “accompanied” the petition and was presented to city); *State ex rel. State Highway and Transportation Dep't v. City of Sunland Park*, 1999-NMCA-143, ¶5, 128 N.M. 371, 993 P.2d 85, *cert. quashed*, Sup. Ct. No. 25,976, 133 N.M. 31, 59 P.3d 1263 (2002) (petitioner “showed the city council members a map of the area to be annexed . . .”). In *Hughes*, the Supreme Court underscored the importance of a boundary map:

The purpose of attaching a survey or plat is, of course, to give notice to interested parties of what land is involved and to render definite the corporate limits of the municipality for division into wards; to enable the governing authorities to say who are residents of the city for voting and taxation purposes, and to ascertain whether the petition bears the requisite number of signatures by owners of land within the area to be annexed.

53 N.M. at 158, 203 P.2d at 1000.

Here, petitioners did not have notice of what territory was proposed for annexation, other than a general description of territory west of Mesilla. Moreover, the world at large had no notice.

The end result of Mesilla's engineering is instructive. The annexation resulted in a "significant" number of petitioners who were not annexed even though they signed petitions requesting annexation. Moreover, those people would not have known they were not going to be annexed until the decision made by Mesilla at the December 26, 2007 meeting. [Tr. 157; 245-46] Nothing in the petition statute authorizes such a result. The statute requires that citizens who petition for annexation will either have their petition and map approved or disapproved. They are either all in or all out. There should never be a case where some of those who petition for annexation are not included therein. As this Court concluded in *Daugherty*, the petition method was instituted so that there would be "less danger that the municipality will use its governmental power arbitrarily to obtain what it wants." *Daugherty*, 120 N.M. at 718, 905 P.2d at 1122. By controlling the process here, Mesilla achieved what it wanted without regard to the expectations of the citizens.

This Court in *Sunland Park* stated that judicial review of the annexation ordinance "is limited to consideration of whether it was an act in accordance with the governing statute." *Sunland Park*, 1999-NMCA-143, ¶17. This Court

reaffirmed that it would “focus on whether the ordinance was invalid” because of a failure to comply with the governing statute. *Id.* Mesilla failed to comply with the petition statute. Petitioners never saw a boundary map when they signed the petition, nor did they approve the boundary map ultimately chosen by Mesilla. Under these circumstances, the annexation proceedings and Ordinance are invalid.

Id.

B. MESILLA ILLEGALLY ALTERED THE BOUNDARY MAP AFTER IT HAD SUBMITTED THE MAP TO THE COUNTY FOR THE COUNTY’S REVIEW.

Mesilla collected petitions in this case. It drafted no less than six different maps to be considered for annexation during the latter half of 2007. As new signatures came in, Mesilla would reconfigure maps based on the location of the property of the new signers. There is no dispute that the map that Mesilla presented to the County was completely different than the annexation map Mesilla finally approved. The final map excluded certain territory that the first map had included, and included certain territory that the first map had excluded. [Tr. 107-10, 111-13; Plaintiff’s Ex. 1 (Bates Nos. 00066-71), Ex. 37 (Bates Nos. 00071, 00101), Ex. 38]

There is no authority for reconfiguring the boundary map after it has been presented to the County. The statute is clear that, once a petition is presented to the city council, the council shall submit that petition to the county for its review

and comment. NMSA 1978, §3-7-17.1(B)(1). After comments are received from the county, the city council “shall by ordinance approve or disapprove the annexation” after considering those comments. *Id.* Mesilla could not change the external boundary of the territory after that boundary had been presented to the County for review.

Where the legislature has intended that the territory originally proposed for annexation may be changed, it has so provided. In the arbitration method of annexation, the board of arbitration has the power to determine that only a part of the territory originally proposed for annexation should be annexed. NMSA 1978, §3-7-10(B). Similarly, in the municipal boundary commission method, the municipal boundary commission has the power to determine that only a portion of the territory petitioned to be annexed should be annexed. NMSA 1978, §3-7-15(C) (1965). But the power of the municipality under the petition method extends only to consenting to or rejecting the proposed annexation map as presented by the citizens and as delivered to the County. NMSA 1978, §3-7-17(A)(4); Section 3-7-17.1(B)(2).

In *Sunland Park* this Court held that the petition method “gives the [municipality] only two choices – consent to the annexation or reject it. There is no language permitting any modification.” *Sunland Park*, 1999-NMCA-143, ¶23. This Court explained that “permitting modification would undermine the notice

requirements of the annexation statute, which are designed to advise the public what land is proposed for annexation.” *Id.* The Court concluded that there was “no authority authorizing a municipality to modify the boundaries set forth in a petition for annexation.” *Id.* Under *Sunland Park*, such a modification invalidates an annexation. The same result should apply here to invalidate the annexation proceedings and Ordinance.

C. NOTICE OF THE PROPOSED ORDINANCE WAS DEFECTIVE AS A MATTER OF LAW. THEREFORE, THE ORDINANCE IS VOID.

Mesilla did not publish notice of the proposed ordinance as a legal advertisement in a newspaper of general circulation within Mesilla. It did not publish such notice for either the December 10 or the December 26 meetings of the Mesilla BOT. Rather, relying on the general notice provisions of the Municipal Code, NMSA 1978, Section 3-1-2(J) (1993), Mesilla posted notice that a proposed ordinance would be considered at the December 10 meeting. It posted in six public places within Mesilla. Mesilla never posted a second notice of intent to adopt ordinance anytime between December 10 and December 26. [Tr. 64-66, 68, 91; Plaintiff’s Ex. 37 (Bates No. 00383)]

Under the general notice provision, if there is no newspaper “that maintains an office in a municipality and is of general circulation within the municipality,” then the term “publish” can mean posting. NMSA 1978, Section 3-1-2(J) (1993) However, the more specific notice requirements set forth in NMSA 1978, §3-17-3

(1973) apply to this case. Section 3-17-3(A) requires that notice by publication of the title and subject matter of any ordinance proposed for adoption must take place two weeks prior to consideration of final action upon the ordinance. Additionally, “[n]otice of the proposed ordinance shall be published one time as a legal advertisement in a newspaper of general circulation in the municipality.” §3-17-3(B) (emphasis added). The Town of Mesilla Code tracks this notice requirement for ordinances. [Plaintiff’s Ex. 8 (Town of Mesilla Code §1.10.040)]

It is axiomatic that when two statutes are directed toward the same subject, one general and one specific, the specific statute controls. *Cox v. Municipal Boundary Comm’n*, 1998-NMCA-025, ¶21, 124 N.M. 709, 954 P.2d 1186, *cert. denied*, Sup. Ct. No. 25,011, 125 N.M. 145, 958 P.2d 103 (1998). Thus, in *Cox*, this Court held that the specific notice requirement applicable to annexation decisions of the municipal boundary commission, as contained in NMSA 1978, Section 3-7-14(B) (1965), controlled over the general notice provision in Section 3-1-2(J). This Court concluded that Section 3-7-14(B) required publication in a newspaper, which was accomplished in that case. This Court also recognized that “throughout the Municipal Code it is common for specific statutes to define methods of publication different from the general prefatory definitions in Section 3-1-2(J), particularly where there may be a need to reach interested persons located outside the boundaries of the municipality.” *Cox*, 1998-NMCA-025, ¶20. The

Court found it “particularly appropriate” for publication in a newspaper to apply to decisions of the municipal boundary commission because those living outside the boundaries of the municipality would likely have a keen interest in the proposed annexation. *Id.* ¶18.

Here, too, those located outside Mesilla would have a keen interest in the adoption of the proposed ordinance which purported to incorporate their lands within Mesilla. The specific statute applicable to ordinances – Section 3-17-3 – controlled. It required publication in a newspaper of general circulation in Mesilla. No publication occurred.

There was such a newspaper available: the Sun-News. The parties agreed that the Sun-News is a daily newspaper having an office in Las Cruces, which has subscribers in Mesilla to whom the newspaper is delivered daily, is sold in stores and machines throughout Mesilla, has advertisers in Mesilla, and reports on news and events in Mesilla. It was further stipulated that the town of Mesilla had published notices in the Sun-News before. [Plaintiff’s Ex. 55] But Mesilla chose not to publish notice of the annexation ordinance in the Sun-News, even though it was proposing to annex territory outside Mesilla.

The legal effect of defective notice is spelled out in Section 3-17-3(A). The statute commands that it is “sufficient defense to any suit or prosecution to show that no notice by publication [of the ordinance] was made.” Thus, an ordinance

based upon defective notice, as here, is of no legal force and effect. Plaintiffs may rightfully challenge that Ordinance. *See also Nesbit v. City of Albuquerque*, 91 N.M. 455, 575 P.2d 1340 (1977) (Supreme Court held that inadequate public notice of zoning hearing was jurisdictional defect which rendered proceedings void and subsequent decisions of city planning department legally ineffective). In short, the Ordinance is void because of defective notice.

D. THE ANNEXATION STATUTE REQUIRES THAT MESILLA ACT WITHIN SIXTY DAYS AFTER RECEIVING THE PETITION AND BOUNDARY MAP. MESILLA DID NOT DO SO. THEREFORE, MESILLA WAS WITHOUT AUTHORITY AND THE ORDINANCE IS INVALID.

Section 3-7-17.1(B) provides that “not less than thirty days nor more than sixty days after receiving a petition, the city council shall by ordinance approve or disapprove the annexation after considering any comments submitted by the board of county commissioners.” On October 9, 2007, Mr. Eckert presented to the Mesilla BOT the petitions collected by Mesilla along with a boundary map he had drafted. Then, on the next day, Mesilla through its mayor submitted the petitions and map to the County. Sixty days from October 9 is December 9. Sixty days from October 10 is December 10. No ordinance was approved by either of these dates. At the December 10 meeting Mesilla voted to postpone consideration of the Ordinance until a later time. The Ordinance was not approved until December 26,

well beyond the mandatory sixty day period. [Ex. 37 (Bates Nos. 00100-01, 00247-51, 00256-261); Tr. 68, 111, 124, 162]

Section 3-7-17.1(B) uses the word “shall” to describe the obligation of the municipality to approve or disapprove an ordinance within the sixty day period. “Shall” is a “mandatory” requirement, not a permissive one. *Team Specialty Products, Inc. v. New Mexico Taxation and Revenue Dept.*, 2005-NMCA-020, ¶10, 137 N.M. 50, 107 P.3d 4. The legislature directed the municipality to act within this time or not at all. Thus, Mesilla had no authority to act outside of this time period.

It is an axiom of statutory construction that, “[w]here authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded.” *Bettini v. City of Las Cruces*, 82 N.M. 633, 635, 485 P.2d 967, 969 (1971) (citations omitted). Under this principle, approval or disapproval of the Ordinance had to be done within sixty days or not at all.

Where the legislature intends to ameliorate the effect of a mandatory time period, it does so expressly. For example, in NMSA 1978, §3-20-7(E) (1999), the legislature directed that the “planning authority of the municipality shall approve or disapprove a plat within thirty-five days of the date of the final submission of the plat.” But then the legislature also provided that: “[i]f the planning authority

does not act within thirty-five days, the plat is deemed to be approved . . .” Id. (emphasis added). But Section 3-7-17.1(B) does not evince any legislative intent to modify the mandatory duty of a municipality to act within sixty days. Under *Bettini*, the legislature excluded any other method for approval or disapproval of an annexation ordinance. Therefore, Mesilla was without authority to act as it did. The Ordinance is invalid on this basis as well.

E. MESILLA FAILED TO INCLUDE A PORTION OF DULCINEA DRIVE IN THE ANNEXED TERRITORY, AS REQUIRED BY LAW. ITS FAILURE TO DO SO RENDERS THE ANNEXATION ORDINANCE INVALID.

The engineer that Mesilla hired to complete a plat admitted that a portion of Dulcinea Drive that actually bordered the annexation area was not included within the area, even though he included the street in the plat he prepared. [Tr. 314-15; *and see* Mesilla’s Ex. 14]. This failure alone invalidates the annexation. NMSA 1978, Section 3-7-18 (1965) requires that any municipality annexing any territory “shall include in the annexation any street located along the boundary of the territory being annexed.” Moreover, in *Sunland Park* this Court expressly invalidated an annexation precisely because it did not include a bordering street. *Sunland Park*, 1999-NMCA-142, ¶26. The same result should apply here.


VI. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court reverse the decision of the district court, and remand to the district court with

directions to enter an order invalidating and voiding the annexation proceedings and Ordinance. They were illegal.

Respectfully submitted,

SUTIN, THAYER & BROWNE
A Professional Corporation

By 
Kerry Kiernan
C. Shannon Bacon

P.O. Box 1945
Albuquerque, NM 87103-1945
(505) 883-2500
(505) 888-6565 - facsimile
Appellate Counsel for Plaintiffs / Appellants

Robert R. Feuille
SCOTT HULSE PC
P.O. Box 99123
El Paso, TX 79999-9123
(915) 533-2493
(915) 546-8333 Telecopier
Trial Counsel for Plaintiffs / Appellants

We hereby certify that a copy of the foregoing paper was mailed to:

Joseph Cervantes, Esq.
Cervantes Law Firm
2610 South Espina
Las Cruces, New Mexico 88001

this 28th day of September 2009.

SUTIN, THAYER & BROWNE
A Professional Corporation

By: 
Kerry Kiernan

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