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IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

BARBARA WAGGONER, FLOYD
EUGENE WAGGONER, ET AL.,

Plaintiffs / Appellants,

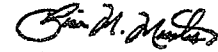
v.

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,

Defendants / Appellees.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

FEB 08 2010



Appeal No. 29,376

No. D 307 CV 2008-00626

PLAINTIFFS / APPELLANTS' REPLY BRIEF

CIVIL APPEAL FROM THE THIRD JUDICIAL DISTRICT

COUNTY OF DOÑA ANA

THE HONORABLE JUDGE JERALD A. VALENTINE

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I. ARGUMENT

A. UNDER NEW MEXICO ANNEXATION LAW, PETITIONERS MUST HAVE NOTICE OF THE EXTERNAL BOUNDARY OF THE TERRITORY PROPOSED FOR ANNEXATION WHEN THEY SIGN THE PETITION. BUT THIS DID NOT HAPPEN HERE.

Defendant-Appellee's ("Mesilla's") argument that limited judicial review should be applied in this case ignores *State ex rel. State Highway and Transportation Dep't v. City of Sunland Park*, 1999-NMCA-143, ¶17, 128 N.M. 371, 993 P.2d 85, *cert. quashed*, Sup. Ct. No. 25,976, 133 N.M. 31, 59 P.3d 1263 (2002). This Court in *Sunland Park* recognized that it is the essential function of a court to review an annexation proceeding to ensure that the statutory provisions for annexation have been followed. *Id.* This function is central to judicial review. In this case statutory procedures were blatantly ignored. This is not a political attack on the wisdom of annexation. Rather, Plaintiffs-Appellants ("Plaintiffs") base their attack on Mesilla's complete disregard of statutory law and procedure.

Mesilla does not dispute anywhere in its Answer Brief that, although the actual petition forms stated that a map was attached, no map was attached. Mesilla's community development director, Mr. Eckert, testified that the petitions did not have a boundary map attached when they were signed. Instead, he subsequently prepared various maps based on petition signatures. BIC 6. Thus, Mesilla collected signatures without the signatories knowing the external boundary

of the territory proposed to be annexed. This violates the plain intent of NMSA 1978, Section 3-7-17.1(A) (2003), as argued in the BIC.

Mesilla completely ignores the New Mexico Supreme Court's conclusion in *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). The *Hughes* court concluded that an attached map is a requirement when considering a petition for annexation because the map's purpose is "to give notice to interested parties of what land is involved and to render definite the corporate limits of the municipality . . ." 53 N.M. at 158, 203 P.2d at 1000. In sum, the annexation proceedings were fatally defective because the map that was ultimately approved for annexation was never submitted to any of the people for their review when they signed a petition for annexation. BIC 8.

B. THE MAP ACCOMPANYING THE PETITION FOR ANNEXATION CANNOT BE CHANGED ONCE IT IS SUBMITTED TO THE COUNTY FOR THE COUNTY'S REVIEW AND COMMENT.

Even if a map did not have to be presented to petitioners when they first signed the petition, Mesilla still loses this appeal. Mesilla's central argument is that there is "nothing" in the annexation statutes that "requires that petitions and a map depicting the proposed annexation boundaries remain static." AB 18. But this position is patently wrong. The annexation statutes are unequivocal and clear that once the petition and accompanying map are submitted to the municipality and

then to the county for the county's review and comment, the only option for the municipality is to approve or disapprove the territory proposed for annexation. There is no provision, inference, or suggestion in the annexation statutes that the area proposed for annexation may be changed after submission to the county, or that the municipality may approve only a part of the proposed annexed territory.

Mesilla cannot dispute and does not dispute that the map submitted to the county was later changed as the city collected more signatures for annexation. It is *completely* undisputed that certain land that was included in the map submitted to the county was not included in the final boundary map approved for annexation by Mesilla. BIC 7. Moreover, some land that was not included in the map submitted to the county was included in the final boundary map. Mr. Eckert testified that the difference in acreage between the maps totaled forty-eight acres. He also testified that the final map that was approved by Mesilla was never submitted to any of the people that signed the petition for approval, and was never submitted to the county for its review. BIC 7-8. It is also undisputed that there were forty-eight petitioners who were not annexed even though they signed the petition for annexation. BIC 10. But Mesilla glides over all of these statutory violations in its effort to show that the process is an ever-expanding and ever-changing one, without regard to statutory requirements.

The petition method for annexation prohibits the result advocated by Mesilla. Once the petition and map were received and submitted to the county, Mesilla's only option was to approve or disapprove the annexation of the territory represented by the map. NMSA 1978, §3-7-17.1(B) (2003). It was not free to subsequently alter that boundary map in any fashion. And, if it is to exclude anyone who has requested annexation, it must exclude all of those who have requested it. *Id.* But Mesilla did not do so in this case. While some people who wanted annexation were annexed, a significant number of people who wanted annexation were not annexed. This type of selection is illegal under Section 3-7-17.1 (B) and under *Sunland Park*. See BIC 19-20.

Mesilla argues that the map submitted to the city and county cannot be "immutable," because, if it is, the statutory provisions requiring county review and comment would be "superfluous." AB 18. But this argument is baseless. The county is to review and comment on the proposed map, but neither the county nor the city has the power under the petition method to expand or change the boundary of that map. §3-7-17.1(B). It is true that the county reviews and comments on the proposed annexed territory, but it does so with a focus on whether the territory as a whole should be annexed or not annexed.

As pointed out in the BIC, where the legislature intends that the territory originally proposed for annexation can be changed, it has so provided. NMSA

1978, §3-7-10(B) (1981); NMSA 1978, §3-7-15(C) (1965); *see also Sunland Park*, 1999-NMCA-143, ¶23. Under the petition method of annexation, Mesilla's actions are illegal.¹

C. THE FAILURE TO PUBLISH NOTICE IN THE LAS CRUCES SUN-NEWS RENDERED THE ANNEXATION ORDINANCE VOID.

Mesilla completely ignores – or refuses to face – Plaintiffs' argument that the specific notice requirements of NMSA 1978, Section 3-17-3 (1973) apply to this case rather than general notice provisions. Mesilla fails to consider this specific statute and also this Court's holding in *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). This Court in *Cox* held that specific notice requirements controlled over general notice provisions. This Court concluded that the specific should control especially where there may be a need, as there was here, to reach interested persons located outside the boundaries of Mesilla. *Cox*, 1998-NMCA-025, ¶20.

¹ Mesilla's argument that the proceedings require a "map" at one part of the process and a "plat" at another part of the process is legally irrelevant. As Mesilla also admitted, the annexation statutes require "a map indicating the boundary of territory under consideration in relation to existing municipal boundaries." AB 17. Plaintiffs' argument is that this map cannot change after it is submitted to the County. The fact that a "plat" – which gives a specific legal description of the pieces of property included within the map – is to be subsequently filed is irrelevant.

Moreover, it is legally irrelevant that some Plaintiffs may have had actual notice of the proposed ordinance. As this Court stated in *Martinez v. Maggiore*, 2003-NMCA-043, ¶12, 133 N.M. 472, 64 P.3d 499, the claim of “actual notice” is “a legally insufficient substitute” for statutorily-required notice to the public. In discussing notice, *Martinez* cited to the earlier case of *Nesbit v. City of Albuquerque*, 91 N.M. 455, 575 P.2d 1340 (1977). In *Nesbit*, the Supreme Court held that inadequate notice to the public at a zoning hearing invalidated that hearing and all subsequent zoning proceedings, even if the complaining parties to that lawsuit had notice of the hearing.

Mesilla also ignores the specific portions of its own Town Code which make it mandatory to publish notice of an ordinance “one time as a legal advertisement in a newspaper of general circulation in the municipality.” [Plaintiff’s Ex. 8 (Town of Mesilla Code §1.10.040)] Instead, Mesilla refers to the general portions of its code. But these cannot nullify the specific requirements related to ordinances.

The language of Section 3-17-3(A) specifically provides that it is “sufficient defense to any suit or prosecution to show that no notice by publication [of the ordinance] was made.” Additionally, the holdings of *Martinez* and *Nesbit* compel the conclusion that the annexation ordinance was void because the statutory requirements for notice were not met.

D. THE VIOLATION OF THE SIXTY-DAY REQUIREMENT UNDER THE ANNEXATION STATUTE RENDERED MESILLA'S PASSAGE OF THE ORDINANCE INVALID.

Contrary to Mesilla's argument, the sixty-day requirement of Section 3-7-17.1(B)(2) is not ambiguous as to the triggering event. The statute provides that "not less than thirty days nor more than sixty days after receiving the petition," the city council shall by ordinance approve or disapprove the annexation. §3-7-17.1(B)(2). The phrase "after receiving the petition" is a clear reference to when the city is *first* "presented" with the petition and map under Section 3-7-17.1(A). When the city is presented with the petition, it must submit the petition to the board of county commissioners. The board, in turn, must submit its comments to the city within thirty days of the board's receipt of the petition. Section 3-7-17.1(B)(2) provides that the city cannot act "less than thirty days" after it receives the petition because the law requires that the petition be in the possession of the county during this thirty-day period.

Mesilla does not contest that the petition was actually submitted to Mesilla by Mr. Eckert on October 9, 2007. Mesilla also does not dispute that no ordinance had been approved sixty days after that date. Instead, the ordinance was not approved until December 26, 2007, over two weeks after the sixty-day period had elapsed on December 10, 2007.

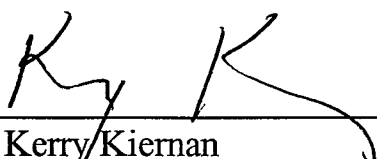
Although Mesilla argues there is no automatic denial provision in the statute, Mesilla ignores an axiom of statutory construction. Where legislative authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode, and all other modes are excluded. *Bettini v. City of Las Cruces*, 82 N.M. 633, 635, 485 P.2d 967, 969 (1971) (citations omitted); see BIC at 24. Under *Bettini*, the ordinance was invalid because Mesilla had no authority to act outside of the sixty-day period.

II. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court reverse the decision of the district and remand to the district court with directions to enter an order invalidating and voiding the annexation proceedings and ordinance.

Respectfully submitted,

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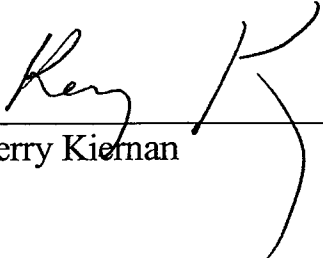
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