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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

PROVISIONAL GOVERNMENT OF SANTA TERESA, a New Mexico Non-Profit Corporation; MARY GONZALEZ; WILFREDO SANTIAGO-VALIENTO; SONIA SANTIAGO; TOMMY HIGGINS; SACH SUE COCHRAN; EVELIA CHAPARRO; RALPH ENCIAS; PAUL MAXWELL; STEPHEN WATSON; KRAIG CARPENTER; EDWINA SEISS,

Appellants/Plaintiffs-Respondents/Defendants,

v.

CITY OF SUNLAND PARK,

No. S-1-SC-39541
CoA Nos.: A-1-CA-36279; A-1-CA-36363,
District Court No.: D-307-CV-2016-02087

Appellee/Defendant-Plaintiff/Petitioner,

v.

SOCORRO PARTNERS I, LP, aka SOCORRO PARTNERS LP, d/b/a SOCORRO PARTNERS 1, LTD,

Defendant-Interested Party,

v.

DOÑA ANA COUNTY BOARD OF COUNTY COMMISSIONERS,

Intervenor-Appellant.

APPELLEE/DEFENDANT-PLAINTIFF/PETITIONER CITY OF SUNLAND PARK'S BRIEF IN CHIEF

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ORAL ARGUMENT IS REQUESTED

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SUMMARY OF PROCEEDINGS

This case is the most recent iteration of a decades-long controversy between the residents of the unincorporated area of southern Doña Ana County commonly known as Santa Teresa and their neighbor, the City of Sunland Park (the "City"). This tale of two communities began in 1986, not long after the incorporation of the City, when Santa Teresa residents organized themselves into the "Santa Teresa Concerned Citizens Association" and petitioned to incorporate their own city. *See City of Sunland Park v. Santa Teresa Concerned Citizens Ass'n*, 1990-NMSC-050, ¶ 2 110 N.M. 95. That first incorporation effort was challenged by the City and the ensuing dispute climbed all the way up to this Court, which denied the incorporation attempt. *See id.*, ¶ 27.

Since then, matters appear to have lain dormant until 2014 when the City adopted a resolution expressing interest in "extend[ing] a hand to the residents of Santa Teresa and open[ing] a discussion regarding the possible annexation of the Santa Teresa, New Mexico area." *See Provisional Gov't of Santa Teresa v. Doña Ana Cty. Bd. of Cty. Comm'rs*, 2018-NMCA-070, ¶ 9, 429 P.3d 981 (hereinafter "*Provisional I*"). On July 14, 2015, Santa Teresa residents, who had organized themselves into the Provisional Government of Santa Teresa (these petitioners are hereafter collectively referred to as "PGOST"), once again filed a petition with the Doña Ana County Board of County Commissioners ("BOCC") to incorporate (the

"Incorporation Proceeding"). **[*See* RP 774]**. The proposed City of Santa Teresa borders the Northwestern side of the City and is wholly located within the City's urbanized territory (i.e., within five miles of City limits).[1] **[See RP 128]**; *see also Provisional I*, 2018-NMCA-070, ¶ 5.

On November 24, 2015, the BOCC met to consider the petition and found that PGOST had not satisfied the statutory prerequisites necessary to incorporate as outlined in NMSA 1978 § 3-2-3 (1995). **[RP 2, 601, 774]**. In light of this, the BOCC determined not to take any further action, functionally dismissing the matter. **[RP 2, 601, 774]**.

PGOST appealed the BOCC's order to the Third Judicial District Court **[RP 3, 774]** and, on September 19, 2016, District Judge Mary Rosner affirmed the BOCC's denial. *See Provisional I*, 2018-NMCA-070, ¶ 11; **[*see* RP 599-607]**. Six months after the BOCC rejected the incorporation petition and three months before Judge Rosner's affirmance, on May 6, 2016, Socorro Partners I, LP ("Socorro Partners") voluntarily petitioned to have 229 acres of its own property annexed into the City. **[RP 1-10, and 774]**. Socorro Partners' property was situated within the 3,984 acres identified in the PGOST's petition to incorporate. **[RP 3, 774]**. The City

[1] "Urbanized Territory" refers to territory located "within the same county and within five miles of the boundary of any municipality having a population of five thousand or more persons." NMSA 1978, § 3-2-3(A). Understanding that Santa Teresa is located within the City's urbanized territory is important because areas within urbanized territory cannot be incorporated except pursuant to the limited exceptions outlined in NMSA 1978, §3-2-3(B).

consented to the annexation by ordinance on July 19, 2016 (the "Annexation"). **[RP, 4, 223-226, 774]**.

PGOST, despite having no ownership interest in the annexed territory, appealed the Annexation to the Third Judicial District Court on September 7, 2016. **[RP, 1, 3, 774]**. PGOST sought appellate review of the Annexation pursuant to Rules 1-074 and 1-075 NMRA and requested a stay of the City's decision, declaratory judgment and injunctive relief, asserting that the Incorporation Proceeding had prior jurisdiction over the later-initiated Annexation, making the Annexation invalid. **[RP 4-6].** The BOCC also challenged the Annexation on the same grounds. **[RP 342-345].** Socorro Partners and the City sought dismissal of PGOST's appeal and the BOCC's complaint. **[*See* RP 773-774].**

On February 23, 2017, District Judge Manuel Arrieta issued a final order granting the motions to dismiss PGOST's appeal and the BOCC's complaint. **[*See* RP 773-784]**. He observed that the existence of prior jurisdiction was the issue upon which the case turned. **[*See* RP 778]**. He held that the BOCC's determination that PGOST had not complied with the statutory requirements in Section 3-2-3 rendered the incorporation petition null and void and, therefore, prior jurisdiction did not bar the Annexation. **[RP 780]**.

Both PGOST and the BOCC appealed the District Court decision to the New Mexico Court of Appeals. The Court of Appeals consolidated the actions and

focused on answering a single question: "whether prior jurisdiction attached to [PGOST]'s 2015 incorporation petition upon its filing with DABOCC." *Provisional Gov't of Santa Teresa v. City of Sunland Park,* 2022 N.M. App. Unpub. LEXIS 286, *12 (Ct. App. July 25, 2022).

Relying upon its 2018 decision in *Provisional Gov't of Santa Teresa v. Doña Ana Cty. Bd. of Cty. Comm'rs*, 2018-NMCA-070—now known as "*Provisional I*"—which found that PGOST's 2015 petition to incorporate met the statutory prerequisites, the Court of Appeals issued the unpublished decision of *Provisional Gov't of Santa Teresa v. City of Sunland Park*, (hereafter "*Provisional II*") on July 25, 2022, finding that (1) prior jurisdiction had attached to the 2015 incorporation proceedings and (2) the prior jurisdiction remained with those proceedings as they were not yet complete. *See Provisional II*, 2022 N.M. App. Unpub. LEXIS 286, **14-15 (hereafter "*Provisional II*"). Stated otherwise, the court found that the Annexation could not be affirmed because the earlier Incorporation Proceeding was ongoing—despite having begun a full seven years earlier. *See id.*

Of course, it has now been more than seven years since the Incorporation Proceeding began and it is still being litigated. After Judge Rosner issued her May 6, 2016 decision affirming the BOCC's denial of incorporation, PGOST appealed the decision to the New Mexico Court of Appeals. **[*See* RP, 3, 599-607, 774]**. On August 22, 2018, the Court of Appeals issued its decision reversing the BOCC's

denial and ordering it to hold a hearing on PGOST's ability to provide municipal services to the proposed territory faster than the City. *Provisional I,* 2018-NMCA-070, ¶ 32. The municipal services hearing was held on June 25, 2021, and BOCC found that PGOST failed to meet its evidentiary burden and *again* denied the attempt to incorporate. *Provisional II,* 2022 N.M. App. Unpub. LEXIS 286, *11 n.3 (taking judicial notice that PGOST "failed to conclusively prove that...Sunland Park is unable to provide municipal services within the same period of time the proposed municipality could provide services."). That decision has been appealed to the Third Judicial District Court and is currently pending as Case No. D-307-CV-2021-01818.

We cannot know how the district court will rule in Case No. D-307-CV-2021-01818. However, if history is any indicator, whatever decision the district court makes will be appealed and the litigation concerning the Incorporation Proceeding will continue indefinitely. Consequently, if the Court of Appeals' decision below is allowed to stand, then the City will be indefinitely barred from any future growth implicating the large, 3,984-acre region claimed by PGOST. Simply put, a few county residents will have successfully controlled the destiny of an entire, fully incorporated municipality.

QUESTION PRESENTED

Whether the doctrine of prior jurisdiction barred the City from accepting a voluntary petition for annexation where the property involved had been implicated in an earlier petition to incorporate that had been dismissed by the BOCC.

STANDARD OF REVIEW

Whether the doctrine of prior jurisdiction barred the Annexation is a jurisdictional issue and, therefore, a question of law to be reviewed *de novo*. *See In re Proposed Merger of Qwest Communications International v. New Mexico Public Regulation Commission*, 2002-NMSC-006 ¶ 3, 131 N.M. 770.

ARGUMENT

Provisional II's holding that the Incorporation Proceeding retains prior jurisdiction over the Annexation is fatally flawed and must be reversed. First, it fails to recognize that the Incorporation Proceeding lost any prior jurisdiction it had once the BOCC denied PGOST's bid to incorporate. Second, its rigid and overly-simplistic approach to prior jurisdiction ignores and undermines statutorily-established public policy concerning urban growth. Third, it overlooks the City's statutory obligation as a non-home rule municipality to entertain voluntary petitions for annexation. Fourth, it is based on an overbroad reading of *Provisional I*, which itself is a highly problematic opinion that warrants this Court's scrutiny. Finally,

Provisional II, fails to address a fundamental problem: PGOST and BOCC never had standing to challenge the Annexation in the first place.

1. *Provisional II* must be reversed because the Incorporation Proceeding lost any prior jurisdiction it once had when the Doña Ana County Board of County Commissioners issued a final decision that was never stayed. [2]

Prior jurisdiction did not bar the voluntary annexation of Socorro Partners' land by the City. The Annexation took place after the BOCC had already made a final decision in the Incorporation Proceeding and PGOST did not obtain a stay of that decision. A petition's prior jurisdiction only lasts until the body hearing the matter rules upon it. *See Amrep Sw., Inc. v. Town of Bernalillo*, 1991-NMCA-110, ¶ 9, 113 N.M. 19; 2 McQuillin, *The Law of Municipal Corporations* § 7.39.3 (3d ed.). Once the administrative body's decision is made, the prior jurisdiction is lost. *See Amrep Southwest,* 1991-NMCA-110, ¶ 9; 2 McQuillin, *supra*, § 7.39.3.

Prior jurisdiction is a common law doctrine which provides that "the court first obtaining jurisdiction retains it as against a court of concurrent jurisdiction in which a similar action is subsequently instituted between the same parties seeking similar remedies, involving the same subject matter." *In re Doe*, 1982-NMCA-115, ¶ 13, 98 N.M. 442, *overruled on other grounds by State v. Roper*, 1996-NMCA-073, ¶ 12 n.3, 122 N.M. 126. In *Amrep Southwest, Inc. v. Town of Bernalillo*, the New Mexico Court of Appeals held that this doctrine extends outside court proceedings

[2] This issue was preserved as noted in *Provisional II*, 2022 N.M. App. Unpub. LEXIS 286, *13 (2022).

to competing annexation proceedings. *See* 1991-NMCA-110, ¶¶ 8, 11. While not explicitly addressed in that opinion, it is generally held that the doctrine of prior jurisdiction also extends to competing annexation and incorporation proceedings relating to the same territory. *See id.*; *see* 2 McQuillin, *supra*, § 7.39.3.

In reaching its decision in *Amrep Southwest*, the Court of Appeals relied, in part, on McQuillin's treatise *The Law of Municipal Corporations*. *See Amrep Southwest*, 1991-NMCA-110, ¶ 8. That authoritative text describes the operation of the doctrine of prior jurisdiction in the context of annexation and incorporation proceedings as follows:

> The general rules governing the acquisition of jurisdiction are usually applied where there are competing incorporation and annexation proceedings. A proceeding for the annexation of territory to a municipal corporation is ineffectual when instituted after the institution of a proceeding for the organization of the territory into a village or city, and while that proceeding is pending and undetermined. Conversely, if annexation proceedings were instituted before municipal organization proceedings, the latter are ineffectual.

2 McQuillin, *supra*, § 7.39.3. Simply, as between a competing annexation and incorporation proceeding, the principal of "first-in time, first-in-right" governs.

While the mechanics of how prior jurisdiction is conferred are simple, the more difficult question before the Court is how and when that jurisdiction is lost. McQuillin makes clear that prior jurisdiction only continues while the "proceeding is pending and undetermined." Similarly, the Court in *Amrep Southwest* suggested

that prior jurisdiction may be lost once the administrative body with that jurisdiction makes a final decision. *See Amrep Southwest*, 1991-NMCA-110, ¶ 9 (citing *Landis v. City of Roseburg*, 243 Or. 44, 411 P.2d 282 (1966); *Town of Clive v. Colby*, 255 Iowa 483, 496, 121 N.W.2d 115 (1963); *In re Appeal of Lenexa to Decision of Bd. of Cty. Comm'rs*, 232 Kan. 568, 657 P.2d 47). In *In re Appeal of Lenexa to Decision of Bd. of Cty. Comm'rs*—a case cited favorably in *Amrep Southwest*—the Supreme Court of Kansas observed that any prior jurisdiction a proceeding may possess vanishes "once the proceeding is terminated adversely to the first [petitioner]." 232 Kan. 568, 657 P.2d 47, 57 (1983).

This raises a question yet to be addressed by this Court: when is a decision final versus "pending and undetermined" for purposes of prior jurisdiction in an incorporation dispute? Fortunately, State statute and the rules of civil procedure provide clear guidance on not only when an administrative decision on incorporation is final, but what a party must do to prevent that decision from taking effect.

NMSA 1978, Section 3-2-5—one of the statutes governing incorporation proceedings—provides that, "The signers of the petition or a municipality within whose urbanized area the territory proposed to be incorporated is located may appeal any determination of the board of county commissioners to the district court *pursuant to the provisions of Section 39-3-1.1 NMSA 1978*." NMSA 1978,

§ 3-2-5(F) (2021)[3] (emphasis added). Section 39-3-1.1, in turn, defines a "final decision" as "an agency ruling that as a practical matter resolves all issues arising from a dispute within the jurisdiction of the agency." NMSA 1978, § 39-3-1.1(H)(2) (1999). The statute further states that "[t]he determination of whether there is a final decision by an agency shall be governed by the law regarding the finality of decisions by district courts." *Id.* Rule 1-054 NMRA, which governs judgments by district courts, indicates that final judgments are those judgments that grant the relief sought by the party in whose favor judgment is rendered and from which an appeal lies. *See* Rule 1-054 NMRA (A), (C).

Appeals taken under Section 39-3-1.1 are governed by the procedures found in Rule 1-074 NMRA. *See* NMSA 1978, § 39-3-1.1(G) (1999); Rule 1-074(A) NMRA. Rule 1-074 provides that, where permitted by law, "an aggrieved party may appeal a final decision or order of an agency" to the district court which may remand, reverse, or affirm the administrative decision. Rule 1-074 (C),(T) NMRA. Importantly, Rule 1-074 does not, as a matter of right, stay the effect of an administrative body's decision. *See* Rule 1-074(Q). Rather, Rule 1-074(Q) allows for appellants to seek a stay of the order or decision under review, but only upon a motion (1) showing that the appellant already sought a stay from the agency, (2) summarizing the agency proceedings, and (3) providing the reasons for granting a

[3] The version of Section 3-2-5 in effect in 2015 had this same language, but it was found in subsection (G).

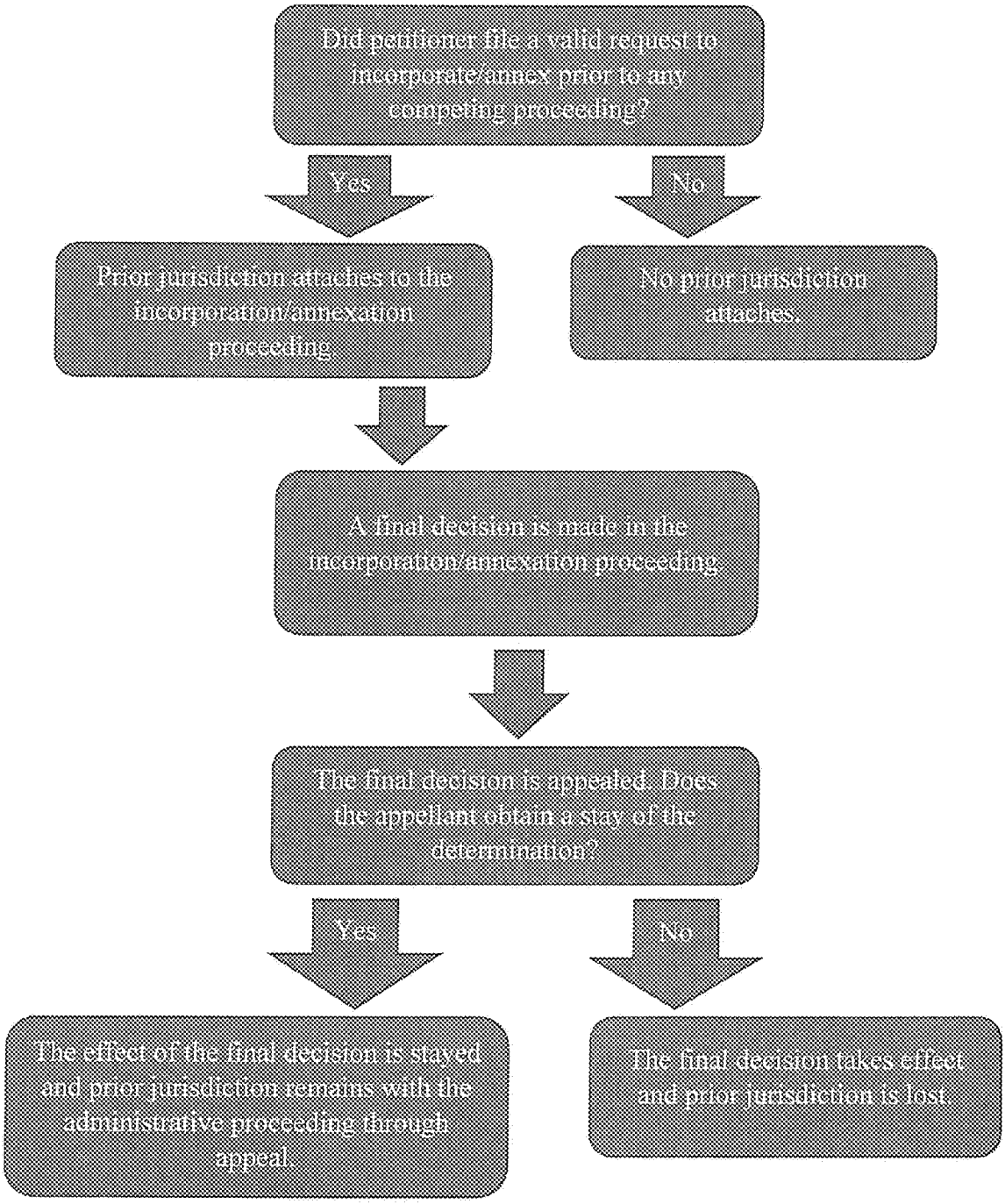
stay. Rule 1-074(Q)(1). Additionally, Rule 1-074 allows the district court to require a bond or other form of security prior to granting a stay. Rule 1-074(Q)(3). Naturally, if no stay is sought or given under Rule 1-074, it follows that the prevailing party from the lower proceeding may rely upon and act in accordance with the administrative decision. *See cf. Zuni Indian Tribe v. McKinley Cty. Bd. of Cty. Comm'rs*, 2013-NMCA-041, ¶ 21, 300 P.3d 133 (indicating that absent a stay, a party may act in accordance with an agency's final decision, notwithstanding the existence of an appeal).

The *Amrep Southwest* opinion supports the idea that a stay is necessary in order for a proceeding to retain prior jurisdiction after a final decision has already been issued. There, Bernalillo County and Rio Rancho both sought to annex overlapping territory, with Rio Rancho having made the first move by submitting a petition to the Municipal Boundary Commission. *Amrep Southwest*, 1991-NMCA-110, ¶¶ 1-3. Bernalillo County contended that Rio Rancho lost prior jurisdiction once the Boundary Commission declined to order the disputed territory to be annexed (i.e., after it made a final decision). *Id.*, ¶ 9. The Court of Appeals acknowledged that prior jurisdiction could potentially be lost following an administrative ruling but held that the Boundary Commission had "stayed the annexation of the disputed area pending a judicial determination" on appeal. *Id.* This confirms that, absent a stay,

the decision of the adjudicative body takes effect, ending the "pending and undetermined" stage of the proceeding.

Visually, this process of obtaining and retaining prior jurisdiction functions as follows:

FIGURE 1: ATTACHMENT AND RETENTION OF PRIOR JURISDICTION



Turning to the present case, the Incorporation Proceeding lost its prior jurisdiction when the BOCC determined that PGOST's petition did not meet statutory requirements imposed by Section 3-2-3. **[RP 2, 601, 774]**. This denial of PGOST's request to incorporate was a final decision as defined in Section 39-3-1.1 and Rule 1-054: it granted relief to the City, which opposed incorporation; it fully resolved the issue pending before the BOCC; and it was subject to appeal. Once this final decision was issued, the petition to incorporate was no longer "pending and undecided" before the BOCC.

PGOST and BOCC have claimed that the decision was not final and prior jurisdiction was not lost because there was a subsequent appeal of the decision. The suggestion that prior jurisdiction simply continues by virtue of the appeal not only flies in the face of the plain language of Section 39-3-1.1's definition of a "final decision," it also ignores the stay provision of Rule 1-074 and renders it (at least in the context of jurisdictional disputes) as mere surplusage. *See Katz v. N.M. Dep't of Human Servs., Income Support Div.*, 1981-NMSC-012, ¶ 18, 95 N.M. 530 ("A statute must be construed so that no part of the statute is rendered surplusage or superfluous.").

If PGOST intended for the Incorporation Proceeding to retain prior jurisdiction, then it was obligated to obtain a stay of the effect of the BOCC's decision either from the BOCC itself or from the district court on appeal. It did

neither. The final decision of the BOCC, therefore took immediate effect and the Incorporation Proceeding's prior jurisdiction vanished.

In light of the BOCC's final decision and the absence of a stay, it was entirely reasonable for the City to entertain Socorro Partners' petition for annexation. Just as a party to a lawsuit could seek to enforce a judgment in the absence of a stay and supersedeas bond, here the City acted in accordance with the controlling decision in effect at the time it received the petition for annexation.

Even PGOST has inadvertently acknowledged the importance of seeking a stay on final administrative decisions pursuant to Rule 1-074. It requested a stay in its Notice of Appeal following the City's final decision on annexation. **[*See* RP 4 ("Count I: Notice of Appeal on Annexation and Motion to Stay")]**. PGOST would not have sought a stay unless it recognized that without the stay the City's annexation decision would take effect.

PGOST has argued below that the BOCC's decision did not cede prior jurisdiction because it was only a decision to take no further action rather than a decision "on the merits" of PGOST's incorporation petition. This distinction arises from the Court of Appeal's statement in *Amrep Southwest* that the Municipal Boundary Commission's prior jurisdiction in that case could have been lost if it "had ruled on the merits" against annexation. *Amrep Southwest*, 1991-NMCA-110, ¶ 9. Even if prior jurisdiction could only be lost after a full hearing on the merits, just

such a hearing has already taken place in this case. The BOCC held an evidentiary hearing on June 25, 2021 and determined, on the merits, that PGOST did not conclusively prove that the City was unable to provide municipal services in the same period of time that the proposed municipality could. That decision is now on appeal (without a stay) before the district court as D-307-CV-2021-01818.

The existence of the BOCC's June 2021 evidentiary hearing is significant because when an earlier-initiated proceeding loses its prior jurisdiction, non-conflicting decisions made in a concurrent proceeding without prior jurisdiction can take effect. *See Landis v. Roseburg*, 243 Or. 44, 52-53, 411 P.2d 282 (1966) (finding that an annexation which took place while an incorporation proceeding was pending was valid since the incorporation effort failed). Thus, even if the Incorporation Proceeding had prior jurisdiction when the Annexation took place, once the June 2021 hearing resulted in a second denial for PGOST, the Annexation was automatically validated.

While the Incorporation Proceeding may have had prior jurisdiction, it did not have it indefinitely. The common law rule of prior jurisdiction, when read in conjunction with the State statute and court rules, makes clear that such jurisdiction, absent a stay, only lasts until a final decision is made. When the BOCC issued its decision denying incorporation, any prior jurisdiction was lost and there was nothing to prevent the City from annexing Socorro Partners' territory.

2. *Provisional II* must be reversed because State law and policy do not permit a small group of residents in an unincorporated area to indefinitely prevent the growth of a neighboring city.[4]

Provisional II permits a small group of petitioners to prevent a city from engaging in annexation proceedings so long as (1) they petition for incorporation first, (2) the area they petition to incorporate surrounds an existing city, and (3) the incorporation proceedings are still being appealed. In this case, that means obstructing a City's ability to annex for 8 years. This is anathema to the State law and policy favoring the provision of municipal services, fostering orderly growth within a city's urbanized territory and reasonableness in annexation disputes.

An overarching goal of the State's municipal annexation statutes (NMSA 1978, §§ 3-7-1 through -18) is to assure the provision of municipal services to the residents who request them. *See City of Albuquerque v. State Mun. Boundary Comm'n*, 2002-NMCA-024, ¶ 14, 131 N.M. 665. Socorro Partners voluntarily petitioned for, and was granted, annexation of its own property into the City. **[RP 677]**. The City and Socorro Partners, however, have to be forced to stand by and put a multi-million dollar development agreement aside **[*see* RP 252-263]** while PGOST attempts to revive its incorporation through the repeated appeals. Even if PGOST could prevail on its appeals, it would still have to complete the incorporation process,

[4] This issue was preserved below in Appellee/Defendant-Appellee's Answer Brief to Intervenor/Appellant's Brief in Chief at 9-13, *Provisional Gov't of Santa Teresa v. City of Sunland Park*, A-1-CA-36363 (N.M. Ct. App. April 30, 2018).

including a successful election. Thereafter, the new city would need to organize, appoint officials, elect a governing body and mayor, and adopt comprehensive development and zoning ordinances that govern the provision of municipal services to the disputed territory. This process has already taken nearly eight years and promises to take even longer. Socorro Partners' land was ready for municipal services years ago but faces the prospect of additional delays on account of PGOST and the Court of Appeal's decision. If the Legislature intended to assure the provision of municipal services upon request, the Court of Appeals' interpretation of prior jurisdiction nullifying the Annexation has undermined that goal.

Next, New Mexico law favors reasonableness in annexation disputes. *See Mutz v. Municipal Boundary Commission*, 1984-NMSC-070, 101 N.M. 694; *City of Albuquerque*, 2002-NMCA-024, ¶¶ 21–23; *Cox v. Mun. Boundary Comm'n*, 1995-NMCA-120, ¶ 17 ("*Cox I*"). It is far from reasonable to bar a voluntary annexation based on the speculative existence of a new municipality, especially when that new municipality's incorporation was dismissed not once, but twice. **[RP, 678];** *Provisional Gov't of Santa Teresa*, 2022 N.M. App. Unpub. LEXIS 286, *11 n.3. It would, however, be reasonable to hold prior jurisdiction inapplicable to the Annexation based on the BOCC's two prior denials of the incorporation petition. It would also be reasonable to defer to the City's legislative judgment in determining its own ability to annex the disputed territory and for the provision of municipal

services to the planned development. *See Hughes v. City of Carlsbad*, 1949-NMSC-018, ¶ 10, 53 N.M. 150 ("the power to annex being a legislative function, in exercising that power great latitude must necessarily be accorded the legislative discretion, and every reasonable presumption in favor of the validity of its action must be indulged.")(quotations omitted); *Mutz*, 1984-NMSC-070 ¶¶ 17, 22; *City of Albuquerque*, 2002-NMCA-024, ¶ 18.

If *Provisional II* is left in place, the City will be effectively barred from all future growth and development. As Judge Black noted in *Cox I*, "[t]he City is bordered to the north and east by the State of Texas, and on the south by the Republic of Mexico." 1995-NMCA-120, ¶ 5. This means the City will naturally grow into the unincorporated territory of Doña Ana County, part of which is commonly known as Santa Teresa. *Mark D. v. Mun. Boundary Comm'n*, 1998-NMCA-025, ¶ 1, 124 N.M. 709 ("*Cox II*"). The incorporation effort, however, lays claim to a large amount of that unincorporated territory, including the City's urbanized territory. **[RP 128]**. Allowing a small group of county residents to indefinitely box-in an entire, fully-incorporated City circumvents a municipality's first right of refusal to incorporation of its urbanized territory. *See Citizens for Incorporation v. Bd. of County Comm'n*, 1993-NMCA-069, ¶ 26, 115 N.M. 710; *see also* § 3-2-3(B)(1-2).

The reality is the entire "Borderland" is growing, and Socorro Partners is not alone in wanting land annexed into the City. In light of the circumstances of this

case, to force the City and private landowners, who want to be a part of the City, to hold-off for an unknown number of years, pending the appellate process and speculative formation of a new city, would be a tragic lost opportunity.

Such a result is also contrary to New Mexico's public policy favoring planned and orderly growth and discouraging the creations of splinter communities and neighboring independent municipalities. *City of Sunland Park,* 1990-NMSC-050, ¶ 20. Such a result ignores the purpose of Section 3-2-3, which is to make it more difficult for residents to incorporate the urbanized territory of an existing municipality, not less. *Id.* Accepting the Court of Appeals' reading of prior jurisdiction is unreasonable as it gives petitioners for incorporation unrestrained control over the future growth of cities in whose urbanized territory they reside and does not provide the deference that the law requires be given to New Mexico municipal annexations. *See Mutz,* 1984-NMSC-070, ¶¶ 17 and 22, *Cox I,* 1995-NMCA-120, ¶ 17, and *City of Albuquerque*, 2002-NMCA-024, ¶ 18.

Allowing PGOST to prevent the City from annexing property within its own urbanized territory for the last eight years runs contrary to the State's interests in ensuring the provision of municipal services, reasonableness in annexation disputes, deference to municipal annexation decisions, and planned and orderly growth. For these reasons the Court of Appeals' decision must be reversed.

3. *Provisional II* must be reversed because the City had an obligation to entertain the voluntary annexation petition, notwithstanding the potential presence of prior jurisdiction.[5]

A key issue that the Court of Appeals failed to address in *Provisional II* is that the State's annexation statutes do not provide the City a means for rejecting a voluntary annexation petition, even where it may be subject to a challenge of priority jurisdiction. *See* NMSA 1978, §§ 3-7-1 through -18. In New Mexico, a non-home rule municipality, like the City, is only authorized to act within the confines permitted it by New Mexico statute. *See e.g., State ex rel. Haynes v. Bonem*, 1992-NMSC-062 ¶ 10, 114 N.M. 627. Further, when a common-law principle—such as prior jurisdiction—conflicts with statute—such as the statutory obligation to entertain annexation petitions found in NMSA 1978, Section 3-7-17 (1998)—the statute must prevail. *See Belen Consol. Sch. Dist. v. Cty. of Valencia*, 2019-NMCA-044, ¶ 10.

The City was presented a voluntary petition for annexation pursuant to Section 3-7-17. Even if the doctrine of prior jurisdiction were operative at that point, the City had a statutory obligation to follow. The City Council properly considered the BOCC comments, and through its statutorily authorized process, consented to the annexation by ordinance. **[RP, 677]**.

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[5] This issue was preserved below in Appellee/Defendant-Appellee's Answer Brief to Intervenor/Appellant's Brief in Chief at 12, *Provisional Gov't of Santa Teresa v. City of Sunland Park*, A-1-CA-36363 (N.M. Ct. App. April 30, 2018).

To require the City to have 20/20 foresight and veer outside of the statutory process is patently unfair. It is also contrary to New Mexico law, which affords deference to municipalities in its annexation proceedings. *City of Albuquerque*, 2002-NMCA-024, ¶¶ 14–15. The very fact that there is a reasonable debate before this Court now, is evidence enough that the City's legislative action in consenting to annexation was reasonable and should be upheld.

To be certain, it would have been unreasonable for the City to put off its statutory obligation based upon the uncertain possibility of reversal of the BOCC's decision. After all, at the time of the annexation, the only decision "on the books" was the BOCC's denial of the attempt to incorporate **[RP 677]** and PGOST had neither sought nor obtained a stay of the effect of that decision. As discussed above, in any other proceeding, absent a stay, the prevailing party would have been permitted to rely on the decision then in effect. The City, therefore, acted properly in entertaining the voluntary petition for annexation and should not be punished through an affirmation of the Court of Appeals' erroneous decision.

4. *Provisional II* should be reversed because it, at best, misapplied *Provisional I*. To the extent it did not misapply *Provisional I*, *Provisional I* should be overturned.[6]

Provisional II should be reversed because it applied *Provisional I* in a manner that only considered when prior jurisdiction attached and not whether it could be lost. Further, even if the Court of Appeals faithfully applied *Provisional I*, that decision misinterprets the statute governing incorporation of municipalities within urbanized territory and should be overturned.

Provisional II indicated that the issue before it was "whether prior jurisdiction attached to PG[O]ST's 2015 incorporation petition upon its filing with DABOCC." *Provisional II*, 2022 N.M. App. Unpub. LEXIS 286, *12. This was only half true. While the issue of whether prior jurisdiction attached in the first place was certainly in play, an equally salient issue was whether prior jurisdiction was lost after one or both of the BOCC's decisions denying incorporation. The Court did not attempt to grapple with this issue even though it acknowledged that, following issuance of *Provisional I*, the BOCC determined that PGOST failed to carry its burden of proof at the incorporation hearing. *See id.* at *11, n.3. Instead, the court applied *Provisional I*'s holdings that (1) prior jurisdiction attaches to the first-initiated annexation or incorporation proceeding and that (2) PGOST was not required to petition for

[6] This issue was preserved in Appellee/Defendant-Appellee's City of Sunland Park's Supplemental Brief Discussing 2018-NMCA-070 at 6-7, *Provisional Gov't of Santa Teresa v. City of Sunland Park*, A-1-CA-36279 (N.M. Ct. App. Sept. 7, 2021).

annexation prior to petitioning for incorporation to reach the conclusion that the Incorporation Proceeding had prior jurisdiction. *See Provisional Gov't of Santa Teresa*, 2022 N.M. App. Unpub. LEXIS 286, *15; *Provisional I*, 2018-NMCA-070, ¶ 31.

The Court of Appeals' myopic application of *Provisional I* is reversible error. As discussed above, New Mexico law favors a flexible formulation of prior jurisdiction that, absent a stay, only lasts until a final decision is issued. *See supra* pp. 7-15. Nothing in *Provisional I* suggests otherwise. To the degree the Court of Appeals did not err and *Provisional I* does somehow require a finding that the Incorporation Proceeding obtained and continues to retain prior jurisdiction, then *Provisional I* itself should be overturned.

In *Provisional I*, the Court of Appeals was asked to consider the proper interpretation of the State statute governing incorporation within a city's urbanized territory, NMSA 1978, § 3-2-3. Subsection (B) of that statute provides:

> No territory within an urbanized territory shall be incorporated as a municipality unless the:
>
> (1) municipality or municipalities causing the urbanized territory approve, by resolution, the incorporation of the territory as a municipality;
>
> (2) residents of the territory proposed to be incorporated have filed with the municipality a valid petition to annex the territory proposed to be incorporated and the municipality fails, within one hundred twenty days after the filing of the annexation petition, to annex the territory proposed to be incorporated; or

(3) residents of the territory proposed to be annexed conclusively prove that the municipality is unable to provide municipal services within the territory proposed to be incorporated within the same period of time that the proposed municipality could provide municipal service.

Both the City and BOCC contended that Subsection (B)(3)'s reference to territory "proposed to be annexed" referred to the territory included in a formal petition for annexation mentioned in (B)(2). *Provisional I*, 2018-NMCA-070, ¶ 13. This would require persons seeking incorporation within a city's urbanized territory to first submit a petition for annexation—in essence giving the city a first right of refusal. The Court of Appeals rejected this interpretation, and instead held that informal proposals or similar expressions of intent to annex urbanized territory are sufficient to satisfy the phrase "territory proposed to be annexed" in Section 3-2-3(B)(3). *Id.*, 2018-NMCA-070, ¶¶ 17, 31. Based on this reading, the Court concluded that because the City had adopted a resolution in 2014 indicating it wanted to "open a discussion regarding the possible annexation" of Santa Teresa, PGOST's bid at incorporation related to "territory proposed to be annexed" and should be allowed to proceed. *See id.*, ¶¶ 9, 17, 31-32.

The Court of Appeal's reading of the term "proposed to be annexed" is, frankly, unworkable. First, a resolution *to discuss* the mere possibility of annexation of an undefined area at a future date, is clearly not the same as a proposal to annex a territory contemplated by the Statute. Such an interpretation impermissibly rejects

the plain meaning of the Statute's language. *See Oldham v. Oldham*, 2011-NMSC-007, ¶ 10, 149 N.M. 215 (observing that statutes are to be construed in accordance with their plain meaning).

Second, *Provisional I*'s notion of informal proposals or expressions of intent to annex impermissibly introduced new and undefined criteria into Section 3-2-3(B). *See Cox v. Municipal Boundary Commission*, 1995-NMCA-120, ¶ 19 (rejecting the inclusion of criteria into an incorporation proceeding which are not laid out in statutory procedure); *see also Pub. Serv. Co. v. N.M. PUC*, 1999-NMSC-040, ¶ 18, 128 N.M. 309 ("The court will not read into a statute or ordinance language which is not there, particularly if it makes sense as written.") (internal quotations omitted).

Third, this interpretation conflicts with related municipal incorporation and annexation statutes, all of which contemplate a formal proposal process. *See* NMSA 1978, §§ 3-2-1(A), 3-7-5, 3-7-13(A), and 3-7-17(A) (1965 as amended through 2013); *see also, State v. Cleve*, 1999-NMSC-017, ¶ 13, 127 N.M. 240 ("Statutes on the same general subject should be construed by reference to each other, the theory being that the court can discern legislative intent behind an unclear statute by reference to similar statutes where legislative intent is more clear.") (citation omitted).

Ultimately, *Provision I*'s interpretation, which the Court of Appeals claimed was meant to avoid absurdity, is itself absurd. *See Provisional I*, 2018-NMCA-070,

¶ 27; *see also Trujillo v. Romero*, 1971-NMSC-020, ¶ 18, 82 N.M. 301, 481 P.2d 89 (prohibiting statutory construction that leads to absurd results). An informal proposal to annex, without a map or plat, will not allow residents considering incorporation to know if they, in fact, reside in territory proposed to be annexed. Likewise, county commissions will not know if an existing municipality's informal proposal to annex is the same as, or overlaps with, the territory identified in a petition for incorporation. As a result, county commissioners will be unable to determine if Section 3-2-3(B)(3) is satisfied. Municipalities will also not know what precise territory it may be exposing to possible incorporation by discussing or creating general policy concerning annexation.

The proper reading of Section 3-2-3(B) requires residents interested in incorporation, but located within another city's urbanized territory, to request annexation prior to any incorporation proceedings. This first right of refusal to the city ensures that growth of existing municipalities remains the rule and incorporation of urbanized territory is the exception. *See* Section 3-2-3(B). ("No territory within an urbanized territory shall be incorporated. . . ."); *City of Sunland Park*, 1990-NMSC-050, ¶18 ("[T]he 1965 revised statute made it much more difficult for residents of a given territory to incorporate than previously.").

In summary, nothing in *Provisional I* prevents this Court from finding that the Incorporation Proceeding lost prior jurisdiction following the BOCC's final

decisions. To the extent that *Provisional I* could be read to require a finding that prior jurisdiction not only attached but has remained with the Incorporation Proceeding—as the Court of Appeals appears to assume—it cannot stand. *Provisional I* was deeply flawed and should be overturned, if necessary, to protect the legislative intent in ensuring that cities retain a first right of refusal to annex would-be breakaway communities.

5. *Provisional II* must be reversed because PGOST lacks standing to challenge annexation.[7]

It would be an oversight if the Court did not address the fact that *Provisional II* is the result of PGOST and the BOCC appealing a municipal decision in which they had no standing *per statute*. This issue was all but ignored by the Court of Appeals. *See Provisional II*, 2022 N.M. App. Unpub. LEXIS 286, *13. This Court should remedy this oversight by finding that PGOST and BOCC lack standing in this matter.

"[T]he legislature has provided a specific, []restrictive test for standing in cases involving the petition method of annexation." *Santa Fe Cty. Bd. of Cty. Comm'rs v. Town of Edgewood*, 2004-NMCA-111, ¶ 4, 136 N.M. 301. Specifically, NMSA 1978, Section 3-7-17(C) provides that standing to appeal a petition for annexation is limited to "any person *owning land within the territory annexed to the*

[7] The issue of standing was preserved below. [*See* **RP 62-63**]; *Provisional II*, 2022 N.M. App. Unpub. LEXIS 286, *13. Moreover, standing is a jurisdictional question which can be raised at any time. *See Rio Grande Kennel Club v. City of Albuquerque*, 2008-NMCA-093, ¶ 7, 144 N.M. 636.

municipality." NMSA 1978, § 3-7-17(C) (1998) (emphasis added). "[T]he plain meaning of 'owning land' is to have equitable or legal fee title ownership of real estate within the annexed territory." *Town of Edgewood*, 2004-NMCA-111, ¶ 6. Merely having an interest in the land at issue, such as an easement, is insufficient to confer standing under such circumstances. *See id.*, ¶¶ 7, 12-13.

Applying the above principles, the Court of Appeals held in *Santa Fe County Board of County Commissioners v. Town of Edgewood*, that a county which maintained and had an interest in roads within an annexed area still had no standing to contest the annexation. *See id.*, ¶¶ 1, 8, 14. It observed that "the legislature intended a more narrow standing requirement for the petition method [of annexation] ...in order to streamline the appeal process."

Here, PGOST and BOCC did not own any of the land within the territory that was annexed. **[RP, 774].** As such, they had no statutory right to challenge the Annexation. What's more, they have undermined the entire purpose of Section 3-7-17(C). Instead of a streamlined appeal process, their challenge of the City's acceptance of a voluntary petition for annexation has led to seven years of litigation.

PGOST has suggested that its appeal from the Annexation does not only arise under Section 3-7-17(C) and Rule 1-074 (governing annexations brought under statute), but that it is also appealing under Rule 1-075. **[*See* RP 4]**. Review under Rule 1-075, however, is only available "when there is no statutory right to an

appeal." Rule 1-075(A) NMRA; *Masterman v. State Taxation & Revenue Dep't,* 1998-NMCA-126 ¶12. Rule 1-075 by its own terms does not create a right to appeal or review by writ of certiorari. *Id.* In this case, the right to appeal annexations by petition method is limited by the legislature to those who own land within the annexed territory. *See* § 3-7-17(C) and *Town of Edgewood*, 2004-NMCA-111, ¶ 4. Appellants do not qualify for the statutory right and, therefore, lack standing for alternate relief pursuant to Rule 1-075. *See e.g., Phoenix Funding v. Aurora Loan Servs., LLC,* 2017-NMSC-010, 390 P.3d 174 (noting where a cause of action created by the legislature applies to a specified class of persons the court lacks jurisdiction to adjudicate claims brought by those outside of that class). To hold otherwise would be contrary to the legislative intent to streamline and expedite appeals from the petition method of annexation. *Town of Edgewood*, 2004-NMCA-111 ¶ 7.

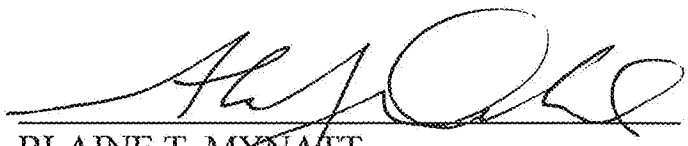
CONCLUSION

For eight years the City of Sunland Park's ability to grow has been stuck in limbo all because a small group of residents located outside of the City once filed a petition to incorporate. Notwithstanding that the petition to incorporate has now been denied twice by the BOCC, the Court of Appeals held that the Incorporation Proceeding has—and apparently will continue to have—prior jurisdiction over a landowner's petition to be annexed into the City. This is not only facially unjust; it is inconsistent with State statute, this Court's own rules, and public policy.

Moreover, it ignores that neither PGOST nor BOCC have the right to challenge a landowner's request for annexation. For the reasons described herein, this Court must reverse the Court of Appeals' decision in *Provisional II* and find that the City had jurisdiction to entertain the voluntary annexation of Socorro Partners' property.

Respectfully submitted,

MYNATT SPRINGER P.C.



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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The undersigned believe that oral argument may assist the Court's understanding of this matter which is not only procedurally complex but which is of significant public importance for municipalities, counties, those petitioning for incorporation, and landowners seeking annexation into existing municipalities.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-305 NMRA, I hereby certify that this Answer Brief was prepared using a proportionally-spaced typeface (Times New Roman, 14 point font), and contains 6910 words according to the word processing system used to prepare the application (Microsoft Word for Office 365).

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March 2023, I caused a true and correct copy of the foregoing pleading to be served upon counsel of record via the Odyssey File and Serve system and electronic mail:

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