IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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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.

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# APPELLEE/DEFENDANT-PLAINTIFF/PETITIONER CITY OF SUNLAND PARK'S REPLY TO THE ANSWER BRIEFS OF PGOST AND THE DOÑA ANA COUNTY BOARD OF COUNTY COMMISSIONERS

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**ORAL ARGUMENT IS REQUESTED**

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## ARGUMENT

The Answer Briefs submitted by the Provisional Government of Santa Teresa and eleven named residents of Santa Teresa (collectively "PGOST") and Doña Ana County Board of County Commissioners ("BOCC") both argue for a version of prior jurisdiction that, once attached to a proceeding, remains attached throughout the appellate process, remand, and any subsequent appeals that may occur, regardless of how long it may take. Such a rigid approach to the doctrine of prior jurisdiction in the context of competing annexation and incorporation disputes is inconsistent with this Court's own interpretation of state policy. Over thirty years ago, while considering the statutes governing incorporation, this Court observed that

> the legislature, in effect, declared the public policy of this state to be that the growth of municipalities and of their contiguous and urbanized areas shall take place in a planned and orderly matter. Further it is the state's policy to discourage splinter communities are a proliferation of neighboring, independent municipal bodies, whose competing needs would divide tax revenues, multiply services, create confusion and factionalism among our citizens, and destroy the harmony that should exist between peoples of diverse backgrounds and socioeconomic strata within our state.

*City of Sunland Park v. Santa Teresa Concerned Citizens Ass'n*, 1990-NMSC-050, ¶ 20, 110 N.M. 95. A version of prior jurisdiction that indefinitely hinders municipal growth and encourages endless litigation by proposed splinter communities within existing cities' urbanized territory runs directly contrary to public policy.

The City of Sunland Park ("the City"), by contrast, proposes an understanding of prior jurisdiction that is not only consistent with state policy, but also the common law, and New Mexico's foundational case on prior jurisdiction, *Amrep Southwest, Inc. v. Town of Bernalillo*, 1991-NMCA-110, 113 N.M. 19. This formulation of prior jurisdiction provides that, as between incorporation and annexation proceedings, the first commenced proceeding gains jurisdiction over the latter, but that upon the issuance of a final decision by an administrative body, jurisdiction ends. The New Mexico Supreme Court should adopt this understanding of prior jurisdiction and reverse the Court of Appeals' decision below ("*Provisional II*"). That decision (1) failed to address when, if ever, prior jurisdiction is lost; (2) was inconsistent with public policy favoring municipal growth; (3) elevated the court's understanding of prior jurisdiction over cities' statutory obligation to entertain voluntary annexation petitions; (4) misconstrued *Provisional Gov't of Santa Teresa v. Doña Ana County Board of County Comm'rs*, 2018-NMCA-070 ("*Provisional I*"); and, (5) failed to address BOCC and PGOST's lack of standing in this matter.

## I. *Provisional II* should be reversed because prior jurisdiction is lost when a final decision is made by an administrative body.

In the Brief in Chief, the City points out that, though prior jurisdiction may have attached to the July 2015 incorporation proceeding before the BOCC ("Incorporation Proceeding"), it only lasted until the BOCC issued its final decision. [*See* BIC at 6-15]. Both BOCC and PGOST appear to concede that the issue of

whether the Incorporation Proceeding lost prior jurisdiction has been properly preserved. They could hardly argue otherwise, given that the decision below specifically states "Sunland Park argues…that 'prior jurisdiction in the incident cases was lost when DABOCC made its determination on the incorporation petition.'". *See Provisional II*, 2022 N.M. at Unpub. LEXIS 286*11. Notwithstanding that this argument is clearly preserved, BOCC and PGOST contend that the City has raised a new issue on appeal that a "stay was necessary for BOCC to maintain its prior jurisdiction." [*See* BOCC's Answer Brief at 2; *see also* PGOST's Answer Brief at 13-16].

The effect of a stay is not a new issue on appeal[1]. The issue on appeal remains whether the prior jurisdiction of the Incorporation Proceeding was lost when BOCC issued its final decision. All Sunland Park has done is introduced additional, pertinent authority to support its argument by pointing out that both Rule 1-074 NMRA (which governs appeals from incorporation decisions) and *Amrep Southwest*, the controlling law on prior jurisdiction, treat administrative decisions as final decisions, absent the existence of a stay. [*See* BIC at 10-11]. The introduction

[1] Sunland Park has always contended that some intervening act was necessary to prevent jurisdiction from shifting from the Incorporation Proceeding to the annexation. *See* Sunland Park Answer Brief at 26, *Provisional Gov't of Santa Teresa v. Sunland Park*, A-1-CA-36279 (Feb. 26, 2018); Answer Brief at 13, *Provisional Gov't of Santa Teresa v. Sunland Park*, A-1-CA-363 (April 30, 2018) (both contending that some form of injunctive relief was necessary to prevent the City from obtaining or exercising jurisdiction).

of significant or pertinent authority is always appropriate prior to the issuance of a decision. *See* Rule 12-318(D)(2) NMRA.

Even if this were a new issue on appeal, it should still be considered by this Court. Under Rule 12-321 NMRA, which governs preservation, a party may raise an issue involving "general public interest" for the first time on appeal. *See* Rule 12-321(B)(2)(a). As both BOCC and PGOST acknowledge, this case is undoubtedly a matter of general public interest. [*See* PGOST AB at 34; BOCC AB at 19]. By extension the "issue" of whether PGOST should have requested a stay in order to prevent the BOCC's decision from becoming final is also of great public interest and import. As such, any discussion of the effect of a stay on prior jurisdiction easily falls into the public interest exception to the preservation rule. What's more, consideration of the role a stay plays in prior jurisdiction in no way prejudices BOCC or PGOST as both those parties have had an opportunity to review and address this matter in their Answers.

Turning to the primary issue of when prior jurisdiction is lost, PGOST has argued that prior jurisdiction remains with an incorporation proceeding "until all remedies have been exhausted." [*See* PGOST AB at 18]. BOCC appears to agree. [*See* BOCC AB at 6]. PGOST, however, makes no attempt to explain why the New Mexico case adopting the doctrine of prior jurisdiction, *Amrep Southwest*, suggests that an administrative body's issuance of a final decision could result in a loss of

jurisdiction. *See* 1991-NMCA-110, ¶ 9. Indeed, PGOST does not even cite to this foundational case in its answer brief, presumably because it undermines PGOST's core contention of indefinite prior jurisdiction. [*See* PGOST AB at ii].

BOCC contends that *Amrep Southwest* is distinct from the present case and inapposite because in *Amrep Southwest*, the administrative body to first obtain jurisdiction stayed the effect of its determination pending judicial review. [*See* BOCC AB at 6]. While the City agrees that this is precisely the difference between the current case and *Amrep Southwest*, it disagrees that this makes *Amrep Southwest* inapposite. Rather, the differences between this case and *Amrep Southwest* illustrate why this Court should find the Incorporation Proceeding lost prior jurisdiction.

The administrative body in *Amrep Southwest* that obtained prior jurisdiction prevented its decision from becoming final by staying the decisions' effect pending judicial review. *Amrep Southwest*, 1991-NMCA-110, ¶ 9. By doing so, it retained its prior jurisdiction. *Id.* Here, the BOCC issued a final decision–a contention with which BOCC agrees [*see* BOCC AB at 3]–and there was no mitigating circumstance, such as a stay or injunction, that would have prevented this final decision from taking effect. Thus, where prior jurisdiction remained in *Amrep Southwest* because the decision was inherently not final, here, the decision made by the BOCC was final and prior jurisdiction for the Incorporation Proceeding ceased to exist.

BOCC also contends that the case of *In re Appeal of Lenexa to Bd. of Cty. Comm'rs*, 232 Kan. 568, 657 P.2d 47, (which the Court of Appeals cites to in *Amrep Southwest*) suggests that prior jurisdiction persists through the appellate process. While *Lenexa*'s meaning has some ambiguity[2], the Court of Appeals did not cite it for BOCC's proposition. The Court cited *Lenexa* for the idea that "once [a] board of county commissioners denies [a] city's petition, [the] city's efforts at annexation lose any priority." *Amrep Southwest*, 1991-NMCA-110, ¶ 9. Thus, at the time prior jurisdiction was adopted by *Amrep Southwest*, so was the idea that prior jurisdiction could be extinguished once an administrative body issue a final decision.

PGOST has suggested that jurisdiction remained with the Incorporation Proceeding because Doña Ana County's Code of Ordinances contains an automatic stay of proceedings. [*See* PGOST AB at 18-19]. This ordinance is located in Doña Ana County's Unified Development Code which does not relate to or govern incorporation proceedings. *See* Doña Ana County Code of Ordinances, §§ 350, 201-216. Rather, this ordinance governs traditional planning and zoning hearings, such as zone changes, special use permits, variances, and plat approval. *See id.* There is

[2] *Lenexa* states in relevant part, "when the Board denied *Lenexa*'s petition [for annexation] (and the trial court and this court affirmed) both the City and the territory returned to their former positions." 657 P.2d at 58. The placement of the appellate proceedings into parenthesis here calls into question the role those proceedings played relative to prior jurisdiction.

nothing in the record to suggest that the BOCC's final decision rejecting Petitioner's attempt to incorporate was stayed or did not otherwise take effect.

The City has observed that in the absence of a stay, parties are normally permitted to act in accordance with agency decisions, which is what it did here by entertaining a petition for annexation *after* the BOCC denied Petitioner's attempt to incorporate. [*See* BIC at 11]. BOCC correctly points out that the case supporting this legal principle indicates that parties acting on agency decisions while an appeal is pending do so at their own risk, because the decision upon which they rely could be reversed. [*See* BOCC AB at 7-8 (citing *Zuni Indian Tribe v. McKinley County Board of County Commissioners*, 2013-NMCA-041, ¶ 21, 300 P.3d 133)]. The City sees no issue with this truism. First, the City cited *Zuni Indian Tribe* for the limited purpose of showing that traditionally parties are allowed to act consistent with final agency decisions, even when there is an appeal (so long as no stay is in place). Second, while normally parties act at their own risk, *Zuni Indian Tribe* did not involve a situation like this where jurisdiction shifted from one proceeding to a competing proceeding. In short, *Zuni Indian Tribe* shows the reasonableness of Sunland Park's actions but should not be read as the determinative case in this matter.

## II. Reversal of *Provisional II* is proper because it unreasonably grants incorporation petitioners power over a city's growth, contrary to public policy.

The City contends that New Mexico law favors reasonableness in annexation disputes and that it would be unreasonable to bar a city's ability to grow for eight years simply because residents of the city's urbanized territory continue to appeal dismissals of their petition. PGOST does not dispute that the reasonableness standard applies but argues that it was unreasonable for Sunland Park to approve a petition for annexation while PGOST's appeal from BOCC's dismissal was pending. [*See* PGOST AB at 23]. PGOST unironically states that "Sunland Park and the developer…were aware of the law when they went forward with an annexation," and proceeds to quote the following line from *Provisional II*: "[w]e [the Court of Appeals] can only now appreciate that the continuing annexation proceedings at issue in the instant cases should never have been initiated." [*See* PGOST AB at 22 (quoting *Provisional II* at *11)]. If the Court of Appeals could not appreciate that annexation proceedings were inappropriate until the time that it issued its decision, it is absurd to suggest that the City, which relied upon BOCC's final decision denying incorporation, somehow acted unreasonably.

The City has also highlighted that public policy contained in both state annexation and incorporation statutes favors municipal growth and the provision of municipal services to resident but disfavors the creation of competing splinter

communities. [*See* BIC at 16-19]. BOCC argues that cases reflecting this principle are irrelevant to the current litigation and attempt to "ignore the doctrine of prior jurisdiction established in *Amrep Southwest*." [*See* BOCC AB at 8-9]. The last thing the City wants is for this Court to ignore *Amrep Southwest*, as it is foundational to the idea that prior jurisdiction can be lost following a final administrative decision. Indeed, it is only by rejecting *Provisional II*'s finding that prior jurisdiction lasts indefinitely that this Court can honor the formulation of prior jurisdiction anticipated in *Amrep Southwest* while also protecting state policy favoring orderly municipal growth and disfavoring incorporation within urbanized territories.

## III. *Provisional II* should be reversed because it undermines the City's statutory obligation to entertain voluntary annexation petitions.

In its Brief in Chief, the City established that the common law doctrine of prior jurisdiction must give way to the City's statutory obligation to entertain voluntary annexation petitions. [*See* BIC at 20; NMSA 1978, § 3-7-17 through 17.1]. BOCC suggests that Sunland Park could have complied with its statutory obligation by entertaining the petition for annexation and then rejecting it due to the prior jurisdiction of the incorporation proceeding. [*See* BOCC AB at 11-12]. PGOST makes a similar argument. [*See* PGOST AB at 24-28]. The City could not reasonably honor its statutory obligation to consider a voluntary annexation petition if the only possible outcome for that petition were rejection. *See*, *Santa Fe County Bd. of Cnty. Comm'rs v. Town of Edgewood*, 2004-NMCA-111, ¶ 7, 136 N.M. 301 ("we do not

interpret a statute to render statutory language meaningless."). Such a suggestion is reminiscent of the famous quote by American industrialist Henry Ford that a "customer can have a car painted any color that he wants, so long as it is black." AZ Quotes, https://www.azquotes.com/quote/932401 (quoting Henry Ford and Samuel Crowther, My Life and Work 72 (1922)).

This argument makes even less sense when one considers that, at the time of the annexation, the Incorporation Petition had been rejected through a final decision by the County, and even the courts could not, "appreciate that the continuing annexation proceedings at issue in the instant cases should never have been initiated." *Provisional II* at *11. While the City disagrees with *Provisional II*'s ultimate conclusion, it does agree that the state of the law was such that it was reasonable to entertain the annexation petition in good faith, rather than accepting the petition for the sole purpose of rejecting it due to the unsettled issue of prior jurisdiction.

## IV. *Provisional II* should be reversed due to its failure to adequately address when prior jurisdiction is lost.

In *Provisional II*, the Court of Appeals abdicated its responsibility to engage the argument of whether prior jurisdiction was lost after BOCC issued its final decision. The BOCC has contended that the Court of Appeals' application of prior jurisdiction did "not add anything new...nor did it take anything away" from the doctrine. [*See* BOCC AB at 12]. The City begs to differ. The Court of Appeals

previously recognized in *Amrep Southwest* the potential for a more nuanced version of prior jurisdiction that attached to the first commenced proceeding, but which ended upon the issuance of a final decision by an administrative body. *Provisional II* seemingly rejects that possibility without discussion. In doing so, it has summarily deprived the doctrine of prior jurisdiction of an important element.

PGOST contends that, because the Court of Appeals indicated that prior jurisdiction attached and has continued since then, it adequately addressed the issue of whether prior jurisdiction can be lost. In support of this, PGOST quotes *Provisional II*'s statement: "prior jurisdiction attached in favor of the ongoing incorporation petition proceedings and those proceedings were not complete." [*See* PGOST AB at 29 (quoting *Provisional II*, ¶ 11)]. This conclusory statement proves the City's point: the Court of Appeals made no attempt to address whether the Incorporation Proceeding's prior jurisdiction could be lost notwithstanding the presence of an appeal. This Court now has an opportunity to correct the Court of Appeals' oversight and develop the case law on not just when prior jurisdiction attaches, but when it can be lost.

## V. *Provisional II* should be reversed because both BOCC and PGOST lack standing to bring this action.

Both BOCC and PGOST lack standing because, in annexation appeals, standing is limited to "any person owning land within the territory annexed to the municipality." *See* NMSA 1978 § 3-7-17(C) (1998). BOCC contends that this statute

allows property owners to appeal but does not limit standing to property owners only. [*See* BOCC AB at 18]. If this statute were not intended to limit standing to property owners, then it loses all meaning. Indeed, if the intention of the legislature were to allow anyone to have standing under the common law standard, then there would have been no reason to draft the statute at all. This Court must avoid statutory interpretation that renders a statute meaningless. *See Town of Edgewood*, 2004-NMCA-111, ¶ 7.

PGOST, in turn, suggests that it should be allowed to appeal the Annexation under Rule 1-075, which allows appeals from agency decisions when there is no statutory right to appeal. Obviously, however, there was a statutory right to appeal the annexation proceedings, it just did not extend to PGOST. The Court of Appeals previously reviewed this standing statute in *Santa Fe County Board of County Commissioners v. Town of Edgewood*. There, the Town of Edgewood approved a petition for annexation that included land in Santa Fe County and the County attempted to appeal the annexation. *See id.* The Town contended that the County lacked standing under Section 3-7-17(C). *See id.* ¶ 3. The Court observed that legislature intended for the petition method of annexation to have a "narrow" standing requirement, rather than a flexible standing requirement, even if that meant hindering a non-landowner's ability to challenge an annexation ordinance. *See id.* ¶ 8. As such, the Court denied standing to the entity. *See id.* ¶ 14.

PGOST attempts to support its standing argument by citing to the case of *Dugger v. City of Santa Fe*. [*See* PGOST AB at 32]. *Dugger* has no relevance to the issue of standing. Instead, *Dugger* analyzed whether a district court could issue a writ of certiorari to assess a city's decision to reject an annexation petition and, if so, what standard of review applied to voluntary annexation petition proceedings. *See id*, ¶¶ 2-3, 6, 8. It most certainly did not assess the standing of non-landowners to challenge a voluntary annexation.

Both PGOST and BOCC contend that, in the absence of statutory standing, they should be allowed to proceed due to the presence of traditional standing. Again, this would undermine the legislative intent to narrowly limit standing where voluntary petitions for annexation are involved. The Court should follow the holding in *Town of Edgewood* and find that non-landowners cannot challenge annexation decisions.

Both PGOST and BOCC have also contended that standing should be conferred due to the great public importance of the questions raised in this litigation. The City does not dispute that this is indeed a case of great public importance. Nevertheless, not every case of great public importance warrants sidestepping standing requirements. This Court has previously held that it will grant standing under the "great public importance doctrine" in cases threatening the essential nature of the state government's division into three distinct departments: legislative,

executive, and judicial, *see State ex. rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 21, 128 N.M. 154, and in cases implicating the guarantee of free and open elections. *See Gunaji v. Macias*, 2001-NMSC-028, ¶ 20, 130 N.M. 734 (granting standing to political candidates to assert the rights of voters whose votes were incorrectly tabulated). Thus, while this case involves a matter of great public interest and importance that will impact Sunland Park's ability to expand in the future and could impact other cities' abilities to grow, it does not fall within the gambit of the "great public importance doctrine" as outlined by this Court and, therefore, standing should not be conferred to third parties.

## CONCLUSION

Since New Mexico's adoption of the common law doctrine of prior jurisdiction, the issue of whether that jurisdiction ends with the final decision of an administrative body or whether it continues indefinitely through the appellate process has remained undecided. The Supreme Court should adopt a nuanced, but ultimately intuitive, version of prior jurisdiction that ends upon the final decision of an administrative body absent the grant of the stay. This will ensure that the public policy favoring a city's availability to expand its borders and extend its municipal services would be protected.

Respectfully submitted,

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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 3412 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 16th day of May 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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