



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; VICKY STANFIELD;
JOHNNY STANFIELD; PAUL MAXWELL;
STEPHEN D. WATSON; KRAIG L. CARPENTER;
and EDWINA SEISS,**

Appellants/Plaintiffs-Respondents/Defendants,

v.

**No. S-1-SC-39541
CoA Nos.: A-1-CA-36279; A-1-CA-36363
Dist. Ct. No.: D-307-CV-2016-02087**

CITY OF SUNLAND PARK,

Appellee/Defendant-Plaintiff/Petitioner,

v.

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

Intervenor Party Defendant/Appellee,

v.

**DOÑA ANA COUNTY BOARD OF COUNTY
COMMISSIONERS,**

Intervenor-Appellant.

**ANSWER BRIEF OF RESPONDENTS
PROVISIONAL GOVERNMENT OF SANTA TERESA, et al.**

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

The matter pending in this Court is procedurally complex. Before delving into the Summary of Proceedings, it will be useful to identify the parties and the various cases involved in the matter. This case is the second of two cases involving the same subject matter and is referred to as the “Annexation Proceeding.” The opinion of the Court of Appeals in this case is referred to as “*Provisional II*.” The first case is referred to as the “Incorporation Proceeding” and the opinion of the Court of Appeals is referred to as “*Provisional I*.”

The Petitioner in this Court is the City of Sunland Park (“City” or “Sunland Park”). It was the Appellee-Defendant in the District Court and the Appellee in the Court of Appeals.

The Respondents in this Court are the Provisional Government of Santa Teresa, a New Mexico Non-Profit Corporation, (“PGOST”) along with eleven named residents of Santa Teresa. They were the Appellants-Plaintiffs in the District Court and the Appellants in the Court of Appeals. For convenience, they will be referred to collectively as “Santa Teresa” or “Respondents.”

Socorro Partners (“Socorro Partners”) is a limited partnership that owns the land at issue in this case, that is, the Annexation Proceeding. It was identified in the District Court as Defendant-Interested Party and in the Court of Appeals as Appellee. It is identified in this Court as Intervenor Party Defendant-Appellee.

The Board of County Commissioners of Dona Ana County (“BOCC”) was an Intervenor in District Court, Appellant in the Court of Appeals, and Intervenor-Appellant in this Court. The following is a concise summary of the cases:

Annexation Proceeding: *Provisional II* (i.e., current case):

District Court Case Number: D-307-CV-2016-02087.

Court of Appeals Case Numbers (consolidated): A-1-CA-36279
A-1-CA-36363

Incorporation Proceeding: *Provisional I* (i.e., previous case):

District Court Number: D-307-CV-2015-02653

Court of Appeals Number: A-1-CA-35927

A third case pending in district court is the follow-up proceeding from the remand in *Provisional I*: D-307-CV-2021-01818.

SUMMARY OF FACTS AND COURSE OF PROCEEDINGS

Respondent Santa Teresa respectfully submits that the Statement of Proceedings submitted by Petitioner City of Sunland Park is overly simplistic and omits crucial details of this complex matter. The City is correct that the controversy extends back many years, and that the controversy involves the competing interests of the City and of Santa Teresa.

However, the City’s recital tends to focus on the lapse of time and its concurrent impact on the parties, including the impact on Socorro Partners, and implicitly blames the judicial process for the extended time frame. The

City notes that the Court of Appeals' decision in this case occurred "a full seven years" after the preceding Incorporation Proceeding began. (BIC at 4). The City then complains that the Incorporation Proceeding will continue indefinitely, that the City will be indefinitely barred from future growth of the relevant territory, and that "a few county residents will have successfully controlled the destiny of an entire, fully incorporated municipality." (BIC at 5). This statement dismisses the rights of the residents of Santa Teresa, who have an absolute statutory right to pursue incorporation as a municipality. The statement also diminishes the importance of the rule of law in deciding competing governmental interests. And more to the point, the City fails to present a clear and accurate summary of the proceedings that have led to the current consideration by this Court. Accordingly, Santa Teresa respectfully submits the following Summary of Proceedings.

Respondent Provisional Government of Santa Teresa (PGOST) is a non-profit corporation formed by residents in the urbanized territory of Doña Ana County known as Santa Teresa, and the individually named Respondents are residents of Santa Teresa. Petitioner City of Sunland Park is a city in Doña Ana County immediately adjacent to the Santa Teresa community. Socorro Partners is an El Paso-based developer and owner of the three parcels in question

(“Parcels”). The Doña Ana County Board of County Commissioners (“BOCC”) is the governing body of Dona Ana County and has the authority to hear and determine municipal incorporation proceedings.

There has been a total of 30 years of dispute between the City and Santa Teresa residents that derives primarily from Sunland Park’s annexation attempts of unwilling County residents. Beginning in June of 1986, Sunland Park sought agreement from Santa Teresa residents on its proposed annexation of their community, and the BOCC opposed the annexation. In response, Santa Teresa residents formed an association to petition for incorporation under NMSA 1978, Section 3-2-3(B)(3) (1995).¹

The case before this Court today, and the related, pending case described below, concern the efforts of Santa Teresa in 2015 to incorporate as a municipality and the competing efforts of Sunland Park to annex property within the proposed incorporation territory. The current case involves the Annexation Proceeding initiated by Socorro Partners. The other case, initiated prior to the Annexation Proceeding and pending now before the District Court (D-307-CV-2021-01818), involves the Incorporation Proceeding and is the continuation of the original Incorporation Proceeding described in the

¹ *City of Sunland Park v. Santa Teresa Concerned Citizens Ass'n Inc.*, 1990-NMSC-050, 110 N.M. 95, 792 P.2d 1138

Introduction above following remand by the Court of Appeals in *Provisional*

I. However, with various administrative and judicial actions, some overlapping others, the cases present a confusing procedural array. The chronological order is as follows:

- 1) Incorporation Proceeding (July, 2015);
- 2) Annexation Proceeding (May, 2016);
- 3) District Court order on incorporation proceeding (D-307-CV-2015-02653) (September 2016);
- 4) PGOST appeal to Court of Appeals on Incorporation Proceeding (A-1-CA-35927) (October 2016);
- 5) District Court order, Annexation Proceeding (D-307-CV-2016-02087) (February 2017);
- 6) PGOST appeal to Court of Appeals on Annexation Proceeding (A-1-CA-36279) (March 2017);
- 7) Court of Appeals opinion on Incorporation Proceeding (“*Provisional I*”), remanding to district court and from there to BOCC (August, 2018);
- 8) BOCC order on remanded Incorporation Proceeding (July 2021);
- 9) PGOST appeal to district court of remanded Incorporation Proceeding (No. D-307-CV-2021-01818)(pending) (August 2021);
- 10) Court of Appeals opinion on Annexation Proceeding (“*Provisional II*”) (July, 2022);
- 11) Sunland Park petition for certiorari from *Provisional II*, i.e., the current Supreme Court case (August 2022).

The chronology is important as the entirety of both proceedings, and of the two opinions of the Court of Appeals, involves the doctrine of “prior jurisdiction”

(used interchangeably with “priority jurisdiction”). Respondent Santa Teresa will refer to these proceedings by the chronological number at times in this response.

Three types of petitions are referred to herein: an incorporation petition pursuant to NMSA 1978, Section 3-2-3(B)(3) (1995), an annexation petition related to the incorporation pursuant to Section 3-2-3(B)(2), and an annexation petition over the Parcels pursuant to NMSA 1978, Section 3-7-17 (1998). The factual background relevant to the current appeal is as follows:

On August 19, 2014, a Sunland Park city councilor introduced a resolution to annex unspecified areas contiguous to the City, despite the fact that city council members conceded the City could not assist contiguous areas with repairing streets, installing streetlights, or implementing infrastructure improvements. **[RP 605]**. On September 16, 2014, Sunland Park adopted Resolution No. 2014-40 authorizing “the Mayor and Council to establish a dialogue with the residents of the homeowners’ associations of Santa Theresa [sic] and its residents concerning the possible methods of annexation.” **[RP 605]**. On October 7, 2014, the City passed Resolution No. 2014-44 agreeing “that the governing body will use the methods available under the New Mexico States [sic]

[Statutes] to annex any and all territories it perceives are in its best interest.” **[RP 605]**.

On July 14, 2015, prior to any annexation petition by Sunland Park or Socorro Partners, and in response to Sunland Park’s Resolutions, Santa Teresa filed an incorporation petition with the BOCC for the incorporation of the Municipality of Santa Teresa, which Santa Teresa believed met the requirements of NMSA 1978, Sections 3-2-1 (2013) and 3-2-3(B) (1995) (No. 1 in above Chronology). The BOCC accepted the petition under Section 3-2-1 and proceeded to a hearing for factual determinations. After finding the petition proper under Section 3-2-1, the BOCC Chairman specifically stated, “since there has been no petition of annexation it seems the legal requirements for incorporation have not been met and *we can’t go any further with this process today.*” (emphasis added) **[RP 79 in Case No. A-1-CA-35927]**. As explained in more detail below, the Chair’s seeming confusion of the incorporation and annexation procedures was a reference to the BOCC’s understanding that an annexation petition, presented to Sunland Park, was a prerequisite to an incorporation petition. Santa Teresa appealed that determination to the district court, which upheld the BOCC’s interpretation of Section 3-2-3. (No. 3 from Chronology). Santa Teresa then petitioned the Court of Appeals for certiorari. The Court of Appeals granted certiorari and the case has since been decided in favor of Santa Teresa, remanding

the matter back to the Board of County Commissioners. *See Provisional Gov't of Santa Teresa v. Doña Ana Cty. Bd. Of Cty. Comm'rs*, 2018-NMCA-070, or “*Provisional I*”. (No. 7 from Chronology). Sunland Park filed a Petition for Writ of Certiorari in this Court on September 21, 2018. On October 19, 2018, this Court granted the Petition. Briefing commenced, but on December 18, 2020, the Court issued an Order Quashing the Writ. It was not until February 23, 2021, that the District Court issued its order remanding the matter of rehearing the Incorporation Petition back to the BOCC, even though the matter had been decided by the Court of Appeals in 2018. (No. 7 from Chronology).

The hearing to determine Santa Teresa’s ability to provide municipal services pursuant to §3-2-3(B)(3) was held on June 25, 2021. This was not a new Incorporation Petition, but rather was the original petition from 2015 being reconsidered on remand from the Court of Appeals. By the time of the Incorporation remand hearing, the Annexation Petition (No. 2 from Chronology) had been acted on by Sunland Park, appealed to and decided by the district court (No. 5 from Chronology), and appealed by PGOST to the Court of Appeals where it remained pending. (No. 6 from Chronology). For clarification purposes, it must be remembered here that the Annexation Proceeding was initiated by Socorro Partners for the purpose of annexing the 229 acres of the Subject Parcels into Sunland Park, acreage which was included in PGOST’s earlier Incorporation

Petition. Since the annexation proceeding remained pending in the Court of Appeals (No. 6 from Chronology), the matter of territorial boundaries remained in dispute because of the attempted annexation of 229 acres of the incorporated area by Socorro Partners. PGOST therefore requested a stay from the BOCC on its Incorporation Petition. The BOCC could not determine the boundaries of the area to be incorporated pending the resolution by the Court of Appeals in *Provisional II* (No. 10 from the Chronology). Also, PGOST requested leave of the BOCC to update its municipal services plan to reflect its ability to provide services in 2021 rather than rely upon the original services plan which had not been updated since the BOCC first considered it in 2015. The BOCC denied the request, asserting that the boundaries of Santa Teresa were not contingent upon a decision by the Court of Appeals in *Provisional II*, that is, the current Annexation Proceeding appeal.² The BOCC then ruled against the Incorporation Petition and Santa Teresa appealed it to District Court, where it remains pending in case number D-307-CV-2021-01818.

The case at hand began on May 6, 2016, when Socorro Partners submitted an Annexation Petition to Sunland Park for annexation of the Parcels (No. 2 from

² Santa Teresa requested a stay of the hearing on their municipal services plan, as in June of 2021, the Court of Appeals had not yet determined the validity of the City's annexation, which took place in 2016, after the original filing of the Incorporation Petition and during the pendency of the appeal regarding the petition. Consequently, Santa Teresa's municipal boundary could deviate by as much as 229 acres.

Chronology), which were also included within the territory of Santa Teresa's Incorporation Petition. **[RP 774]**. This occurred subsequent to the initiation of the Incorporation Petition in 2015. (No. 1 from Chronology). The 2016 Annexation Petition was subject to review and comment by the BOCC pursuant to NMSA 1978, Section 3-7-17.1 (2003). **[RP 109-110]**. The BOCC submitted its comments to Sunland Park, stating that the City lacked jurisdiction over the Parcels based on the doctrine of prior jurisdiction because Santa Tresa's prior incorporation petition remained pending under the jurisdiction of the BOCC. **[RP 126]**. The annexation was also opposed by Santa Teresa before the Sunland Park City Council on the same grounds. **[RP 216-219]**. Sunland Park nevertheless proceeded to annex the Parcels despite the pending Incorporation Proceeding. On July 19, 2016, the City adopted Annexation Ordinance 2016-5, approving annexation, and purportedly zoning the Parcels of the Santa Del Sol Development. **[RP 222-226]**.

On September 7, 2016, PGOST filed a Notice of Appeal From Annexation and Zoning Decision in the Third Judicial District Court, thereby appealing the City's annexation ordinance, and consolidated it with a Complaint for Injunctive and Declaratory Relief, seeking review of Ordinance 2016-5. **[RP 1-10]**. The Notice of Appeal invoked the court's appellate jurisdiction pursuant to the provisions of Rule 1-074, NMRA and, in the alternative, Rule 1-075, NMRA. The

Complaint invoked the Court's original jurisdiction. The district court docket number is D-307-CV-2016-02087, assigned to Judge Arrieta. This is the case that resulted in *Provisional II* from the Court of Appeals and that is currently on Writ of Certiorari in this Court. Chronologically, it stems from No. 5 in the Chronology.

Both Sunland Park and Socorro Partners filed motions to dismiss in District Court. Sunland Park based its motion on a lack of jurisdiction over the Rule 1-074 and Rule 1-075 appeals. The court stayed the appeals, the Declaratory Judgment claim and other pending pleadings and responses, and as a result, Santa Teresa did not have an opportunity to file a Statement of Appellate Issues on either the Rule 1-074 or Rule 1-075 appeal. **[RP 307-308]**. Two hearings were conducted on January 31, 2017, and February 16, 2017. On February 23, 2017, following the two hearings and supplemental briefing, the District Court entered its Final Order dismissing all claims. **[RP 676]**. On March 24, 2017, the BOCC filed its Notice of Appeal of the Final Order. **[RP 689]**. On March 27, 2017, Santa Teresa concurrently filed a Notice of Appeal from the dismissal of the original action and a Petition for Writ of Certiorari from the denial of the administrative appeal. **[RP 705, 721]**. The Court of Appeals granted certiorari and consolidated it with the appeal on the original action.

On July 25, 2022, the Court of Appeals issued the decision now on Writ

of Certiorari before this Court. (No. 10 from list, “*Provisional II*”). In its opinion in *Provisional II*, the Court of Appeals referred specifically to its opinion in *Provisional I*, stating:

[W]e next addressed the implications of the doctrine of prior jurisdiction as a basis for our statutory interpretation. . . . We stated unequivocally that the contentions of the DABOCC [Board of County Commissioners] and Sunland Park – which would require PGST [PGOST] to petition for annexation prior to availing themselves of the opportunity to petition for incorporation – were incompatible with the doctrine of prior jurisdiction *given the existence and ongoing proceedings of both PGST’s 2015 incorporation petition as well as Socorro Partner’s 2016 annexation petition.*”

Provisional II, at 6, citing *Provisional I* (emphasis added).

This matter now rests with the Supreme Court to determine if the rule of law established by the doctrine of prior jurisdiction controls the outcome of these interrelated cases.

STANDARD OF REVIEW

Santa Teresa concurs with Sunland Park that the question presented is a question of law and therefore the standard is a *de novo* review.

ARGUMENT

I. Petitioner has partially failed to preserve this issue for review, and the Court of Appeals correctly found that the Incorporation Proceeding obtained and retained continuing prior jurisdiction over the Annexation Proceeding.

A. Petitioner has failed to preserve this issue for review by this Court.

Sunland Park's first issue involves the issue that has been at the heart of this matter all along, namely, whether the prior jurisdiction of the Incorporation Proceeding ended when the BOCC issued its decision in 2015. However, Sunland Park now adds a requirement that Santa Teresa would have to have obtained a stay of that decision. This added issue has never been raised and has not been preserved.

Preservation of error is required in an appeal to the Court of Appeals. The rules of appellate procedure specifically provide that each issue must contain a statement "explaining how the issue was preserved in the court below . . ." Rule 12-318(A)(4); *see Helena Chemical Co. v. Uribe*, 2013-NMCA-017, ¶ 19, 293 P.3d 888 (record reflected no preservation and issue not raised to trial court).

Both Sunland Park and Socorro Partners had ample opportunity to raise the issue in their dispositive motions in district court, but failed to do so. Both had ample opportunity in the Court of Appeals where, after full briefing, the court requested additional briefing on the effect of *Provisional I* on this case. Both parties filed the supplemental briefs, but neither of them raised the issue. The Court of Appeals, accordingly, had no occasion to address it.

In its Brief in Chief filed in this Court, Sunland Park states that the issue was preserved in the Court of Appeals. (BIC at 7, n. 2). The statement is

misleading, since the issue referred to is the primary issue of whether the prior jurisdiction was lost upon the BOCC issuing its 2015 decision. There is no reference to any requirement of obtaining a stay. Nevertheless, that has become the primary aspect for Sunland Park in its argument on Issue No. I. (BIC at 9-15).

A Petition for Writ of Certiorari to this Court from a decision of the Court of Appeals is governed by Rule 12-502, NMRA. The basis for granting review that the petition must show is specified as either a conflict with prior decisions of the Supreme Court or the Court of Appeals, a significant question of law under the Constitution, or an issue of substantial public interest that should be determined by the Supreme Court. *Id.* Rule 12-502(C)(2)(d). The petitioner must specify the questions presented for review, and the Court will only consider the questions set forth in the petition. *Id.* Rule 12-502(C)(2)(b); *Fikes v. Furst*, 2003-NMSC-33, ¶ 8, 134 N.M. 602, 81 P.3d 545.

In this case, Sunland Park's petition for writ of certiorari raised a single question:

Whether the doctrine of prior jurisdiction barred the City of Sunland Park 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 Dona Ana County Board of County Commissioners.

(Cert. Petition at 6). The requirement of a stay is not mentioned. The petition

then lists three bases for granting the writ, none of which includes any reference to Sunland Park's current phrasing of the issue. The petition also contains four listed arguments. The principal argument is that "[t]he Court of Appeals' Decision Erroneously Assumes that Prior Jurisdiction, Once Attached, Cannot be Lost." (Cert. Petition at 10). This is the heart of Sunland Park's position, i.e., that the prior jurisdiction was lost when the BOCC ruled against Santa Teresa. The Court of Appeals squarely addressed the issue and held that the prior jurisdiction, once obtained, continued throughout the appellate proceedings, with no mention of any requirement of a stay.

Petitioner similarly failed in the petition to argue any requirement of a stay. The only mention of a stay, which is not assigned as error, is in the statement that the Court of Appeals "adopted a version of the [prior jurisdiction] doctrine that imposed on the City or Socorro Partners an obligation to hold off on all action—despite the absence of a stay or injunction—on the mere possibility that the BOCC could be reversed years later." (Cert. Petition at 12). The petition cites to the Court of Appeals' Memorandum Opinion at page 11, which makes no mention of any requirement of a stay. And as noted above, Petitioner provides no accurate citation to preservation of the issue.

The fact is that any requirement of a stay was never raised or argued to the Court of Appeals and formed no part of that court's opinion. Yet the bulk

of Sunland Park’s first issue in its Brief in Chief is devoted to an argument that prior jurisdiction was lost upon Santa Teresa’s not obtaining a stay of the BOCC decision. (BIC at 9-15). In fact, the Brief in Chief attempts to raise an entirely new issue:

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.*

(BIC at 9)(emphasis added). Sunland Park’s purported answer to that question proceeds immediately to an extensive argument that the governing statutes and rules of court require that a stay be obtained. (BIC 9-10).

Having failed to raise the issue of a stay in the District Court, the Court of Appeals, and the Petition for Writ of Certiorari, Sunland Park and Socorro Partners have failed to preserve the issue for review.

B. The Court of Appeals correctly found that the Incorporation Proceeding obtained and retained continuing prior jurisdiction over the Annexation Proceeding.

Petitioners Sunland Park and Socorro Partners, complaining that the Court of Appeals’ decision in this case is unduly rigid, characterize the decision as holding that “once jurisdiction attaches to an incorporation petition, it does not detach even when it is dismissed by the public body...and thereby continues

indefinitely.” (Socorro Partners’ Reply Brief at 13). This is a broad oversimplification of the facts and proceedings at issue. Rather, the Court of Appeals established in *Provisional I* that “[t]he common law prior jurisdiction doctrine 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, 649 P.2d 510, *overruled on other grounds by State v. Roper*, 1996-NMCA-073, ¶ 12 n.3, 122 N.M. 126, 921 P.2d 322.” *Provisional I* at ¶ 23. The doctrine of prior jurisdiction indisputably extends to proceedings beyond the court, including “conflicting municipal annexation and incorporation disputes.” *Id.* ¶ 23. In Sunland Park’s own words, “as between a competing annexation and incorporation proceeding, the principal of ‘first-in time, first-in-right’ governs.” (BIC at 8). “The reason for the rule is that it “is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons.” *State ex rel. Parsons Mining Co. v. McClure*, 1913-NMSA-34, ¶ 17, 17 N.M. 694, 707, 133 P. 1063, 1067 (1913).

Critically, in this case, the petition for incorporation has not yet ceded prior jurisdiction. Where prior jurisdiction attaches, it cannot detach until all issues

involving the same parties and seeking similar remedies have been resolved. *See In re Doe*, 98 N.M. 442. Santa Teresa does not allege that the resolution need be in its favor, only that all avenues must be exhausted in the matter before prior jurisdiction is lost. “It is a fundamental rule of law...that as between courts of concurrent jurisdiction, the first acquiring jurisdiction of a subject matter of an action is permitted to retain it to the end.” *State ex. rel. Parsons*, at 16. That is to say, until all remedies have been exhausted by Santa Teresa, prior jurisdiction necessarily remains vested in the petition for incorporation.

Petitioner Sunland Park’s central argument in the Certiorari Petition to this Court is that prior jurisdiction was lost when Santa Teresa “failed to stay” the decision rendered by the Board of County Commissioners. It is important to note that the argument refers to the original decision of the BOCC in December, 2015, of PGOST’s 2015 Incorporation Petition, the same petition that remains pending to this day in district court. (No. 9 from the Chronology). Petitioner not only ignores the entire basis of the Court of Appeals’ opinion in *Provisional I*, it also ignores the procedural laws of the County, which govern appeals from administrative proceedings. The Doña Ana County Code of Ordinances states:

Stay of proceedings. An appeal shall stay all proceedings in furtherance of the action appealed unless the appellant certifies that by reasons therein stated, a stay would cause imminent peril of life and property. Upon certification, the proceedings shall not be stayed except by order

of a District Court after a notice is provided to the appellant.

§350-216(C). Santa Teresa was not obligated to request a stay of the proceedings since under the county's own code an appeal results in an automatic stay *unless* the appellant requests the alternative. In the Incorporation Proceeding, the BOCC denied the Incorporation Petition. Sunland Park now takes the position that "[i]f 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." (BIC at 13). But the BOCC had denied the incorporation petition, and nothing else was pending other than the appeal. What would a stay mean? That the incorporation petition was granted pending appeal? Santa Teresa certainly would not have a problem with that, but Sunland Park would. It must be remembered that the Annexation Proceeding had not commenced and was not pending at the time of the BOCC decision nor at the time that PGOST appealed that decision to district court. The Court of Appeals clearly understood this and articulated the importance of the continuing priority jurisdiction once it attached in 2015:

Put simply, *we can only now appreciate that the continuing annexation proceedings at issue in the instant cases should never have been initiated*, and certainly should not have proceeded to the extent they have, given our previous holding in *Provisional I* that PGST's incorporation petition complied with pertinent statutory requirements and that prior jurisdiction attached in its favor.

Provisional II, at ¶ 11 (emphasis added). Prior jurisdiction was not a concern at the time of the original BOCC decision because no other proceeding was then pending, and as the Court of Appeals said, it could only be appreciated later when Sunland Park pursued annexation. By then, the appeal was well underway and the Incorporation Proceeding was definitely still pending. Sunland Park’s citations to authorities discussing “abandonment” or “lapse of time” have no relevance here: the incorporation proceeding was one continuous proceeding with no interruptions and with no loss of prior jurisdiction.

Finally, it should be noted that by Petitioner’s own flow chart in Figure 1, “Attachment and Retention of Prior Jurisdiction,” (BIC at 12), Santa Teresa has retained prior jurisdiction over the incorporation proceedings, merely by having appealed the decision of the BOCC pursuant to the County’s own code. It should also be noted, as argued above, that Petitioner’s addition of the final two blocks in the illustration regarding a stay of the BOCC’s present an entirely new argument that Petitioner has never raised before.

For all of the foregoing reasons, it is clear that the District Court erred in approving the Annexation Petition after prior jurisdiction had attached to the Incorporation Petition, and that the prior jurisdiction was not lost while the appeal was pending. The Court of Appeals correctly reversed the Final Order of the District

Court and Santa Teresa respectfully requests that this Court affirms the Order of the Court of Appeals.

II. *Provisional II* properly recognizes the significance of prior jurisdiction and identifies Sunland Park's flawed interpretation of the law, rather than a legal doctrine being a bar to municipal growth.

Sunland Park presents an odd issue in claiming that a city's future plans and a developer's private investment are sufficient to override an entire body of law regarding incorporation. It certainly is worth noting that the City and the developer could have started the Annexation Proceeding at any time prior to the start of the Incorporation Proceeding. By their own admission, they wanted to do so at least as early as 2014 when the City adopted its annexation resolution, and they would have obtained prior jurisdiction simply by following through. As noted by the Court of Appeals, a voluntary annexation takes only 60 days. In this case, the annexation that they later pursued in fact took less than that amount of time. Yet they waited 10 months after the Incorporation Proceeding had begun to even begin the Annexation Proceeding, and now blame Santa Teresa for the delay, a delay which was occasioned by the BOCC, the Sunland Park City Council, and two district courts making erroneous decisions.

Sunland Park attempts to cite the ongoing litigation which surrounds Santa Teresa's petition for incorporation as a barrier to reasonableness. They argue "*Provisional II* permits a small group of petitioners to prevent a city from engaging

in annexation proceedings...[i]n this case, that means obstructing a City's ability to annex for 8 years.” (BIC 16). Sunland Park and the developer complain too loudly when they were aware of the law when they went forward with an annexation. Under the doctrine of invited error “[i]t is well established that a party may not invite error and then proceed to complain about it on appeal.” *State v. Jim*, 2014-NMCA-089, ¶ 22, 332 P.3d 870. *Provisional II* stated “we can only now appreciate that the continuing annexation proceedings at issue in the instant cases should never have been initiated, and certainly should not have proceeded to the extent they have[.]” *Id.* at 11. That is to say, Sunland Park had every opportunity to decline Socorro Partner's voluntary annexation proceeding and table the matter until the underlying appeal regarding Santa Teresa's incorporation petition (item 4 in the chronological table above) was resolved. Simply put, but for the unlawful annexation proceeding, upon remand in 2018, Santa Teresa would have been able to present its incorporation petition with boundaries certain. At such time, the matter of determining municipal services could have been conclusively settled, rather than prolonged based upon the uncertainty created by Sunland Park's annexation of 229 acres within Santa Teresa's proposed municipal boundaries.

Santa Teresa agrees that the standard of reasonableness is what should be applied in reviewing an annexation decision. “[T]he Commission is subject to a

standard of reasonableness. ‘Reasonableness is an inherent requirement in the Commission's determination because of the scope of review to which we are directed in appeals of administrative decisions... The Mutz majority therefore concluded that ‘although the statute does not specifically direct the Commission to act reasonably, it is an implicit requirement because the element of reason in its decision, or its absence, is a basis for our review.’ *Cox v. Municipal Boundary Comm'n*, 1995-NMCA-120, 120 N.M. 703, 905 P.2d 741 (Ct. App. 1995), citing *Mutz v. Municipal Boundary Commission*, 101 N.M. 694, 688 P.2d 12 (1984). (Internal citations and quotations omitted). Contrary to Sunland Park’s contention, however, it is not reasonable to approve a petition for annexation when, by the governing body’s own admission, the only goal is to avoid delay which would be caused by waiting for the incorporation proceedings to reach their natural conclusion. **[RP 216-219]**. Significantly, Sunland Park was fully aware of the appeal of the incorporation petition pending before the Court of Appeals, as evidenced by the letter from the BOCC and subsequent attestation from the City that such comments were reviewed and taken into consideration. **[RP 126, RP 80]**. Sunland Park and Socorro Partners annexation was arbitrarily approved despite them being on notice of its illegality. “‘Arbitrary and capricious’ conduct has been defined as that which is ‘unreasonable’ or without a rational basis and which is a

product of ‘an unconsidered, willful and irrational choice of conduct[.]’” *Mutz* citing *Garcia v. New Mexico Human Services Dept.*, 94 N.M. 178, 179, 608 P.2d 154, 155 (Ct. App.1979). The loud complaints of Sunland Park and Socorro Partners simply cannot be seen as arising out of any sort of injustice. They were on notice prior to the annexation that they were acting outside the law.

III. The Court of Appeals correctly held that the City is not obligated to entertain an annexation petition while a separate Incorporation Petition has prior jurisdiction.

Sunland Park argues 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.” (BIC pp. 20). This strained interpretation ignores the plain language of §3-7-17. The City claims that “[t]o require the City to have 20/20 foresight and veer outside the statutory process is patently unfair.” (BIC pp 21).³ The City characterizes itself as a victim in a statutory framework, obligated to approve any annexation petition before it and helpless in the face of the BOCC’s commentary that prior jurisdiction precluded their approval of such annexation.

The plain language of §3-7-17 and §3-7-17.1 and of case law, as well as the hearing record before the Court, clearly disproves such absurd assertions. Section

³ It is interesting to observe that the City’s concern about unfairly requiring it to have 20/20 foresight is exactly contrary to its position in Issue I that Santa Teresa should have had 20/20 foresight and should have requested a stay of the BOCC’s Incorporation Order *10 months prior to the Annexation Petition even being filed*.

3-7-17, the voluntary annexation statute, provides:

A. Except as provided in Sections 3-7-17.1 and 3-57-4 NMSA 1978, whenever a petition:

- (1) seeks the annexation of territory contiguous to a municipality;
- (2) is signed by the owners of a majority of the number of acres in the contiguous territory;
- (3) is accompanied by a map that shows the external boundary of the territory proposed to be annexed and the relationship of the territory proposed to be annexed to the existing boundary of the municipality; and
- (4) is presented to the governing body, the governing body shall by ordinance express its consent or rejection to the annexation of such contiguous territory.

NMSA 1978, § 3-17-7(A)(1)-(4). To begin with, subsection (A)(4), if read literally, entitles the governing body to “express its consent *or* rejection to the annexation.” (emphasis added). Moreover, subsection (A) plainly states that these provisions apply, “[e]xcept as provided in Sections 3-7-17.1 and 3-57-4.” Section 3-7-17.1 states, in relevant part:

- (1) the city council shall submit the petition to the board of county commissioners of the county in which the municipality is located for its review and comment. Any comments shall be submitted by the board of county commissioners to the city council within thirty days of receipt; and
- (2) 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 after considering any comments submitted by the board of county commissioners.

Id. § 3-7-17.1(B)(1)&(2). Here again, the statute clearly authorizes a municipality

the latitude to *disapprove* an annexation.

Significantly, the City *did* submit this petition to the BOCC for its review. The BOCC issued its comments, including the statement that “the City of Sunland Park lacks jurisdiction over part of the proposed annexation based on the doctrine of prior jurisdiction” and that “Sunland Park will need to address this issue at the time it considers formal approval of the annexation petition.” **[RP 126-127]**. The City ignored the BOCC’s comments. The City’s meeting minutes show that City Manager Robert Gallagher, responding to a question from Councilor Nunez about the County’s response, stated: “The County Commission wrote on some findings; but those findings are ‘their opinion’ and the City of Sunland Park respects their opinion . . . [and] the City of Sunland Park’s attorney is confident of the City’s position and that the County Commission does not have the authority to say ‘yes’ or ‘no.’” **[RP 217]**.

At the same public hearing, members of the public from both the City and Santa Teresa expressed concerns about rushing into the annexation , with one person stating that the decision was “premature action” and another stating that “the council should not take action until the courts have made a decision on the annexation and the incorporation of Santa Teresa.” **[RP 217]**. In response to a councilor’s question as to whether there was any time sensitivity that would preclude “waiting for after the litigation,” the City Manager replied that “the

developer requested it and the other side is the litigation could go on for years.”

[RP 218]. There was no mention of the City’s statutory option of denying the annexation petition.

Most important, the City simply misstates the law, arguing:

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 might be subject to a challenge of priority jurisdiction.

(BIC at 20). On the contrary, the statute does provide explicitly for denial of an annexation petition, stating that the governing body shall “express its consent *or rejection* to the annexation of such contiguous territory.” NMSA (1978), § 3-17-7(A)(4). Referring to this precise type of annexation petition, the Court of Appeals found:

Additionally, unlike the two administrative methods, the petition method does not expressly include criteria that, if met, require a municipality to approve an annexation petition.

Dugger v. City of Santa Fe, 1992-NMCA-022, ¶ 14, 114 N.M. 47, 834 P.2d 424.

The City has attempted to stretch the statutory requirement of considering an annexation petition into a requirement of approving it. There is no basis for the assertion. Perhaps most concerning, the City states that it “should not be punished through an affirmation of the Court of Appeals’ erroneous decision.” The “erroneous decision” is the City’s opinion; the “punishment” is the City’s way of characterizing the judicial system as unfair. As it has done throughout its Brief in

Chief, the City has once again cast itself as a victim of proper judicial procedure.

The premise is without substance and should be rejected.

IV. *Provisional II* faithfully applies *Provisional I*, which appropriately identified the flaws in Sunland Park’s strained effort to require landowners to first submit a petition for annexation before establishing their own municipality.

The City makes two arguments under this issue. First, it argues that even if Santa Teresa obtained prior jurisdiction in its Incorporation Application, it lost that jurisdiction when the BOCC issued its determination, and that the Court of Appeals did not adequately address the loss of the prior jurisdiction. This is essentially a repeat of the argument made by the City in Issue I. Santa Teresa has answered this argument above under its response to Issue I and will not belabor the point here. However, it should be noted that the opinion of the Court of Appeals in this case clearly embraced the continuing effect of prior jurisdiction pending the appeal of the BOCC’s initial erroneous decision. Referring to its holding in *Provisional I*, the court stated in the current opinion:

We stated unequivocally that the contentions of DABOCC [i.e., BOCC] and Sunland Park—which would require PGST to petition for annexation prior to availing themselves of the opportunity to petition for incorporation—were incompatible with the doctrine of prior jurisdiction *given the existence and ongoing proceedings of both PGST’s 2015 incorporation petition as well as Socorro Partner’s 2016 annexation petition*. See *id.* [*Provisional I*] ¶¶ 22-23.

(Memorandum Opinion ¶ 6)(emphasis added). Indeed, the entire basis of both opinions was that the annexation proceeding could not proceed even after the

BOCC's decision so long as the case was pending appeal. The Court of Appeals made this clear in stating that "the continuing annexation proceedings at issue in the instant cases should never have been initiated, and certainly should not have proceeded to the extent they have, given our previous holding in *Provisional I* that PGST's incorporation petition complied with pertinent statutory requirements and that prior jurisdiction attached in its favor. See *Provisional I*, 2018-NMCA-070, ¶¶ 24-26, 31-32." (Memorandum Opinion ¶ 11).

The court further noted that acceptance of Sunland Park's and Socorro Partners' positions would render the entirety of the Incorporation Proceeding, "— which has travelled between DABOCC, the district court, this Court, and our Supreme Court—" a nullity. (Memorandum Opinion ¶ 11). Finally, the court specifically based its holding on the fact that "prior jurisdiction attached in favor of the ongoing incorporation petition proceedings *and those proceedings were not complete.*" (Memorandum Opinion ¶ 11)(emphasis added). Sunland Park's premise that the opinion did not address continuing prior jurisdiction is, accordingly, in error.

The City's second argument is that the Court of Appeals was wrong from the beginning in *Provisional I* and that this Court should overrule *Provisional I*. This argument has been exhaustively briefed, argued and considered in both of these appeals, and Sunland Park is really simply asking for a second bite at the apple.

When the Court of Appeals ruled against Sunland Park in *Provisional I*, the

City petitioned this Court for a Writ of Certiorari. The petition challenged various aspects of the opinion of the Court of Appeals, but did not challenge the court's extensive analysis of the priority jurisdiction issue. (Petition for Writ of Certiorari, No. S-1-SC-37373, September 21, 2018). The petition addressed priority jurisdiction in only one paragraph, which did not challenge the Court of Appeals' opinion but only suggested that the doctrine was already reconciled with the incorporation statute. (Id. at 18). That was the time for the City to challenge the court's holding, and it failed to do so. The City should not now be heard to collaterally attack that holding.

Santa Teresa would only add here that the holding in Provisional I is sound in any event. The City contends that *Provisional I* is untenable and that a territory adjacent to existing urbanized territory must first submit a petition for annexation to the City in order to later petition for incorporation pursuant to §3-2-3(C). By the City's own logic, a petition for annexation *must* be approved, even if the BOCC recommends denial. Therefore, §3-2-3(C) would be moot and a proposed municipality within five miles of any municipality could never incorporate. "[O]ne of our guiding principles in determining legislative intent; we do not interpret a statute to render statutory language meaningless." *Santa Fe Cnty. Bd. Cnty.'Comm'rs v. Town of Edgewood*, 2004-NMCA-111, 136 N.M. 301, 97 P.3d 633.

The Court in *Provisional I*, and again in *Provisional II*, addressed this absurd interpretation of statute. “

As a practical matter it likely would be impossible for PGST to complete the incorporation process—or even get to the point of obtaining DABOCC’s decision whether Sunland Park or the proposed new Santa Teresa municipality can deliver services more quickly—within Section 3-7-17.1(B)’s sixty-day period for Sunland Park to act on the annexation petition. Either Sunland Park would fail to comply with the sixty-day deadline (and arguably Section 3-2-3(B)(2)’s 120-day deadline as well), or it would simply approve PGST’s annexation petition and thereby moot the incorporation petition. DABOCC and Sunland Park’s construction of Section 3-2-3(B)(3) effectively would nullify any meaningful opportunity for residents of unincorporated territory to utilize Section 3-2-3(B)(3) to avoid unwanted annexation, which opportunity seems to be the basic purpose of the statute.”

Provisional II ¶ 25.

Sunland Park’s assertion—that the City is required to approve an annexation petition while a preceding incorporation petition regarding the same territory is still pending—presents exactly the type of situation that could result in conflicting orders. The Court of Appeals correctly found that the doctrine of prior jurisdiction was developed to prevent that type of untenable result, and correctly applied the doctrine in this case.

V. Santa Teresa and its citizens have standing to challenge the annexation proceeding.

Petitioners rely upon § 3-7-17 to base their claim that *only* land owners within the annexed territory have the authority to appeal an approved

annexation. To the contrary, “where no provision is made for appeal, the only review available is by certiorari.” *Dugger v. City of Santa Fe* ¶ 10. Rule 1-075 plainly authorizes “writs of certiorari to administrative officers and agencies pursuant to the New Mexico Constitution when there is no statutory right to an appeal or other statutory right of review.” Rule 1-075(A) goes on to state that, “an ‘agency’ means any state or local government administrative or quasi-judicial entity.” *Dugger* attempts to delineate between a “quasi-judicial proceeding” and a “legislative action” for review purposes under State statute. It concludes that “the legislature demonstrated its intent that the municipality make a legislative decision by requiring the municipality to pass an ordinance [and]...review of the municipality’s decision be by direct appeal[.]” *Id.* at 22. *Dugger* decides this in light of the successful annexation proceeding being challenged by landowners within the annexed territory. Whether Santa Teresa’s ownership of roads within the annexed territory is sufficient to establish “ownership of land” pursuant to §3-7-17 is a question which dictates *which* process to be followed, rather than conclusively proving that Santa Teresa has no vehicle for appeal at all.

A statute authorizing appeal does not dictate that an unlawful act is immune from appeal or challenge before the Court, merely because the

statutory right of appeal applies only to landowners within the annexed territory. Rather, “the presumption that the municipality’s decision is valid is qualified by the fact that the courts will always interfere to keep the municipal authorities within the law, and to prevent municipal action that is ultra vires by reason of constitutional provisions or lack of authority, or by reason of clear abuse of discretion or power.” *State ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, at 23, 119 N.M. 150, 889 P.2d 185,. (Internal quotations omitted). The district court in this matter below decided unequivocally that “Santa Teresa may still protest the *process* of annexation through its claim of priority jurisdiction,” **[RP 679]** because “Santa Teresa has already shown standing through a particularized injury and interest in their claim that priority jurisdiction preempts the annexation process.” **[RP 684]**

“[T]he general rule is that, absent a constitutional prohibition, municipal acts are always reviewable by the courts. This applies whether it is an act of the executive branch of the municipal government or a legislative act delegated to the municipality by the state legislature. The reviewability of executive and legislative acts is implicit and inherent in the common law and in the division of powers between the three branches of government.” *State ex rel. Village of*

Los Ranchos de Albuquerque, at 15.

If this Court determines that Rule 1-074 or Rule 1-075 are not applicable, Santa Teresa has plead in the alternative for a declaratory judgment. (Notice of Appeal in D-307-CV-2016-02087 at 6-7). Pursuant to §44-6-1 through §44-6-15 NMSA 1978, this Court is empowered to resolve the controversy between the parties. More generally, standing can be evaluated under the common law principal of standing, which states “in order to have standing, a plaintiff must establish that there is (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision.” *ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, 144 N.M. 471, 188 P.3d 1222 at 7.

Even where the District Court had not already arrived at the conclusion that Santa Teresa demonstrated common law standing, this Court “has exercised its discretion to confer standing and reach the merits in cases where the traditional standing requirements were not met due to the public importance of the issues involved.” *Id.* at 9. Santa Teresa concurs with Sunland Park that this matter is of “great import to the public interest” (Sunland Park Petition for Writ of Cert, at 9) because this issue affects the entirety of the proposed municipality to be incorporated, potentially hamstringing any incorporation

attempt now or in the future by the residents of Santa Teresa.

Sunland Park has, in the past, attempted to remove the Provisional Government of Santa Teresa based upon its lack of standing as a non-profit organization. Such an argument ignores the length history of Organizational Standing, whereby “organization’s standing to sue is premised on the standing of its individual members. Thus, “an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Id.* at 30, citing *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 21.

Santa Teresa respectfully asserts that Sunland Park and Socorro Partner’s claim of lack of standing is based solely upon a narrow construction of §3-7-17(C). Based upon the reasons above, Santa Teresa requests this Court confer standing to decide this issue of significant public interest.

PRAYER FOR RELIEF

For the foregoing reasons, Respondents Provisional Government of Santa Teresa and the individually named residents request that this Court affirm the opinion of the Court of Appeals.

Respectfully Submitted,
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STATEMENT ON SUPPORT OF ORAL ARGUMENT

The undersigned believe that oral argument may assist the Court's understanding of this matter, which is procedurally complex and of significant public importance for municipalities, counties, those petitioning for incorporation, and landowners seeking annexation into existing municipalities.

/s/ Randy M. Autio
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STATEMENT OF COMPLIANCE

As required by Rule 12-318(G), undersigned counsel hereby certifies that this brief was prepared in 14-point Times New Roman typeface using Microsoft Word for Microsoft 365 version 2205, and that the body of the brief contains 8,249 words.

/s/ Randy M. Autio
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2023, the foregoing was filed through The Odyssey File & Serve system, which caused a copy to be served by electronic means on all counsel of record as follows:

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