ORIGINAL

IN THE COURT OF APPEALS

FOR THE STATE OF NEW MEXICO

PROVISIONAL GOVERNMENT OF SANTA TERESA, and MARY GONZALEZ,

Plaintiffs-Petitioners,

v.

DOÑA ANA COUNTY BOARD OF COUNTY COMMISSIONERS,

Defendant-Respondent,

and

THE CITY OF SUNLAND PARK,

Intervenor-Respondent.

No. 35,927
Doña Ana County
D-307-CV-2015-02653

INTERVENOR-RESPONDENT'S ANSWER BRIEF

On Certiorari to the Third Judicial District Court, Doña Ana County
Honorable Mary Rosner

By: BRADLEY A. SPRINGER
CASEY B. FITCH
HOLT MYNATT MARTÍNEZ P.C.
P.O. Box 2699
Las Cruces, NM 88004-2699
Telephone: (575) 524-8812
Fax: (575) 524-0726

ORAL ARGUMENT IS REQUESTED


ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

New Mexico Supreme Court

New Mexico Court of Appeals

STATUTES

RULES

SUMMARY OF THE PROCEEDINGS

I. NATURE OF THE CASE

Our Legislature foresaw the need for the orderly and equitable development of local communities in a way that unites the very aspect of what makes New Mexico great—its diverse people. So while it may appear counterintuitive that a group of residents that wants to become its own town must first ask an adjacent city to become part of that city, it ultimately makes perfect sense. Unless the city has some say in the future of its urbanized territory, there is a real concern that diversity may be destroyed—from separation along race lines to the formation of socio-economic enclaves and division of tax bases. In other words, the only reasonable way to read Section 3-2-3(B) of the New Mexico Statutes is as including this common sense prerequisite for incorporation.

For decades, certain residents of Santa Teresa, an affluent community[1] in Doña Ana County ("the County") next to the City of Sunland Park ("Sunland Park"), have repeatedly attempted to incorporate as a municipality. It is undisputed, however, that these residents (collectively called PGOST[2] in this appeal) never met the commonsense prerequisite by filing a valid petition for annexation to Sunland

[1] In its petition for incorporation, PGOST boasts Santa Teresa has a median household income of $53,963 and median home value of $216,571. [RP 103].

[2] "PGOST" stands for Petitioner-Plaintiff "Provisional Government of Santa Teresa." For ease of reference, the individual Petitioner, Mary Gonzales is included as a part of PGOST in this appeal. Together, the entity and member purport to represent those in Santa Teresa in favor of becoming a municipality.

Park as Section 3-2-3(B)(2) requires. Instead, through a curious reading of the statute, PGOST asks this Court to ignore Section 3-2-3(B)(2)'s safeguard and allow PGOST to prove Sunland Park is incapable of meeting Santa Teresa's municipal needs, a step solely reserved for the circumstance where an existing city approves an application for annexation, which has never occurred. Accordingly, this Court must reject PGOST's construction and affirm the County and District Court's decisions.

II. COURSE OF PROCEEDINGS.

On July 14, 2015, PGOST filed a petition for the incorporation of Santa Teresa. Included with the application was: (1) a proposed map and legal description of the boundaries of the proposed new town; (2) a history of Santa Teresa; (3) a municipal plan relying in large part on the County for assistance in providing services; (4) an "economic plan" mostly criticizing Sunland Park's past difficulties; (5) letters from the same utilities that serve Sunland Park indicating they would service Santa Teresa; (6) letters from an HOA within Santa Teresa supporting incorporation without providing any reasons why; (7) a document entitled "local issues" identifying how PGOST plans to deal with Santa Teresa's declining infrastructure; (8) signatures in support of the petition; (9) an action plan consisting of correspondence to the mayor of Sunland Park promising collaboration; and (10) contact information. [RP 82-300].

Significantly, PGOST's application did not recite any attempt to submit a valid petition for annexation to Sunland Park.[3] In fact, in its "municipal plan," PGOST conceded "Sunland Park has not yet adopted a resolution to specifically annex the area known as Santa Teresa." [RP 119]. Instead, PGOST insisted that Section 3-2-3(B)'s three methods of incorporation—(1) obtaining a resolution from Sunland Park allowing incorporation; (2) filing a valid petition for annexation to Sunland Park; (3) proving by clear and convincing evidence that Sunland Park cannot meet Santa Teresa's municipal needs—are entirely disjunctive and that PGOST could and would proceed with incorporation without Sunland Park's consent. [RP 119].

On November 8, 2015, the County published notice in the *Las Cruces Sun News* that it would hold a public hearing on November 24, 2015 "pursuant to NMSA 1978, §§3-2-3 and 3-2-5 to determine if the statutory incorporation requirements as set out in [those sections] have been met by the Incorporators in order that the Board may authorize and cause a census to be taken of the Territory proposed to be incorporated." [RP 301]. The County also placed the hearing in its "Amended Agenda" for the regular meeting of the Board of Commissioners. [RP 305].

[3] To be fair, Sunland Park's city council has discussed annexation of Santa Teresa in the past, but PGOST never filed a petition, nor did Sunland Park take formal action to actually annex. On August 19, 2014, the council contemplated, but did not pass a resolution "authorizing the mayor and City Council to establish dialogue with the Santa Theresa[sic] residents and HOA's regarding annexation." [RP 427-38]. On September 16, 2014, the council did pass a resolution to "open a dialogue" about annexation, but did not annex anything. [RP 439-57]. Finally, on October 7, 2014, the Council passed a resolution to "promulgate a policy concerning annexation of unincorporated areas surrounding the City." [RP 458-65].

The County held the hearing as noticed. The Commissioner's took sworn testimony, and ultimately concluded that PGOST "failed to petition for annexation and therefore have failed to comply with the requirements of [NMSA 1978, §] 3.2.3B 2 & 3, therefore, the Board is unable to take evidence as to whether Sunland Park is unable to provide municipal services within the same period of time that the proposed municipality could provide municipal services." [RP 340]. The County issued a formal, written order on December 2, 2015. [RP 343-45].

In relevant part, the County concluded (1) Sunland Park did not approve of Santa Teresa's incorporation under Section 3-2-3(B)(1); (2) PGOST did not "file[] a valid petition with the City of Sunland Park asking to be annexed" under Section 3-2-3(B)(2); and (3) Section 3-2-3(B)(3)'s reference to "residents of the territory to be annexed" meant Section 3-2-3(B)(2)'s obligation to file a petition for annexation necessarily served a prerequisite. [RP 343-44]. Because PGOST "failed to petition for annexation . . . they have failed to comply with . . . Sections 3-2-3(B)(2) & 3" and "lacking this prerequisite, the BOCC is unable to take evidence and determine whether Sunland Park is unable to provide municipal services[.]" [RP 344]. The County therefore declined to order the taking of a census and directed that the amount deposited for that purpose be returned. [RP 344].

III. DISPOSITION BELOW.

On December 30, 2015, PGOST filed a timely notice of appeal in the Third Judicial District Court for Doña Ana County of the County's adverse determination pursuant to NMSA 1978, Section 39-3-1.1 and Rule 1-074 NMRA. [RP 1-25]. Curiously, PGOST did not name Sunland Park as a party to the appeal and filed its statement of appellate issues without waiting for the filing of the administrative record. [RP 1-43]. Ultimately, after motion practice, the District Court permitted Sunland Park to intervene and set a briefing schedule.[4] [RP 358-59]. It also denied the County's request to certify the matter to this Court. [RP 358-59].

On March 22, 2016, PGOST filed its statement of appellate issues, urging the District Court to view the subparts of Section 3-2-3(B) entirely in the disjunctive, allowing PGOST to proceed with incorporation by conclusively proving Sunland Park could not meet its municipal needs. [RP 360-74]. The County and Sunland Park filed responses to the statement on April 11 and 12, 2016, respectively, taking the position that (B)(2) served a prerequisite to (B)(3) and must be read together. [RP 375-93]. PGOST replied on April 26, 2016. [RP 394-409].

[4] The novelty of the case presented some procedural wrinkles in the District Court that are not necessary for determination of the issues before this Court, but likely should be pointed out for the sake of completeness. For example, at the hearing on Sunland Park's motion to intervene, the District Court appeared ready to and did actually render a merits determination: that PGOST did not follow the statute, and to correct the problem, the District Court would stay the matter, allow PGOST to petition for annexation, and allow the parties to return to the District Court to have a trial on whether PGOST could offer conclusive proof of Sunland Park's inability to provide municipal services to Santa Teresa under Section 3-2-3(B)(3). The parties persuaded the District Court to reconsider and brief the issue of the propriety of the County's construction of 3-2-3(B).

Initially, the District Court reversed the County in a written decision dated May 20, 2016. [RP 412-18]. Ultimately, upon Sunland Park's motion, the District Court reconsidered and required the parties to file supplemental briefs, which they did. [RP 419-465; 474-76; 478-545]. On September 19, 2016, the District Court issued an amended final order, which included its initial determination, but added "reconsideration findings." [RP 550-58]. Concluding that Sunland Park had "an initial right of refusal," the District Court ruled "[t]he statutory language of NMSA 1978, 3-2-3(B) (2) requires, as a condition of incorporation, for Santa Teresa to deliver a valid petition to the City of Sunland Park." [RP 557]. As a result, "[w]hen the Doña Ana County Board of County Commissioners dismissed Santa Teresa's motion to become incorporated, it correctly interpreted the law." [RP 558].

On October 19, 2016, PGOST timely petitioned this Court to review the District Court's amended final order. [RP 559-71]. This Court granted certiorari on December 6, 2016 and assigned the matter to the General Calendar. [RP 572-74].

STATEMENT OF ISSUES ON APPEAL

I. DID THE DISTRICT COURT PROPERLY AFFIRM THE COUNTY'S DETERMINATION THAT PGOST DID NOT MEET THE STATUTORY REQUIREMENTS FOR INCORPORATION BECAUSE IT DID NOT FIRST FILE A VALID PETITION WITH SUNLAND PARK FOR ANNEXATION PURSUANT TO SECTION 3-2-3(B)(2)?

STANDARD OF REVIEW

This Court analyzes the County's order "under the same standard of review used by the district court while also determining whether the district court erred in its review." *Paule v. Santa Fe County Bd. of County Comm'rs*, 2005-NMSC-021, ¶26, 138 N.M. 82, 117 P.3d 240 (citation omitted). Because the District Court reviewed the matter pursuant Rule 1-074 NMRA as a decision of an administrative agency, this Court is likewise "limited to determining whether [the County] acted fraudulently, arbitrarily or capriciously; whether the [County's] decision is supported by substantial evidence; or whether the [County] acted in accordance with the law." *Id.* (citing NMSA 1978, §39-3-1.1(D); Rule 1-074(Q); *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶17, 133 N.M. 97, 61 P.3d 806). This appeal presents a pure issue of law, the statutory construction of Section 3-2-3(B), and is therefore reviewed *de novo*. *See Cadena v. Bernalillo County Bd. of County Comm'rs*, 2006-NMCA-036, ¶ 7, 139 N.M. 300, 131 P.3d 687 (reviewing statutory construction issues presented in a Rule 1-074 appeal *de novo*).

ARGUMENT

The District Court correctly affirmed the decision of the County. First, notwithstanding the Legislature's use of "or" between Section 3-2-3(B)(2) and (B)(3), the plain language of the statute requires PGOST to file a valid petition for annexation before moving forward with incorporation under the circumstances of

this case. Second, even if this construction were not apparent from the unambiguous provisions, the policy behind them confirm that Section 3-2-3(B)(2) acts as prerequisite to Section 3-2-3(B)(3) to ensure equitable and controlled growth in and around Sunland Park. Finally, the arguments PGOST advance do not alter the analysis; they are either rebutted by the statute itself or waived.

I. THE DISTRICT COURT AND THE COUNTY PROPERLY DETERMINED THAT SECTION 3-2-3(B)(3) IS NOT A STANDALONE, INDEPENDENT OPTION FOR INCORPORATION. THIS COURT MUST THEREFORE AFFIRM.

Section 3-2-3(B) 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.

§ 3-2-3(b)(1)-(3).

Sunland Park did not "approve by resolution, the incorporation of the territory [Santa Teresa] as a municipality." § 3-2-3(b)(1)-(3). [RP 82-300]. Moreover, although Sunland Park discussed the annexation of Santa Teresa in 2014, Sunland

Park never approved (or failed to act on) PGOST's valid petition for annexation. *See* § 3-2-3(b)(2); [RP 427-65]. The sole issue before the Court is whether the "or" between subsections (B)(2) and (3) allows PGOST to proceed with incorporation by attempting to conclusively prove Sunland Park is incapable of providing municipal services to Santa Teresa without having first filed a valid petition for annexation with Sunland Park. The answer is no.

A. Section 3-2-3(B)(2) and B(3)'s Unambiguous Language Requires PGOST to File a Valid Petition for Annexation as a Precondition to Incorporation.

Statutory construction allows courts to ascertain the intent of the Legislature. *See Baker v. Hedstrom,* 2012-NMCA-073, ¶ 10, 284 P.3d 400 ("The principal objective in the judicial construction of statutes is to determine and give effect to the intent of the legislature.") (citation omitted). Where the Legislature's motivations are apparent from a provision's plain language, the Court *may not* look further. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135 (Courts must first look "to the plain language of the statute, giving the words their ordinary meaning"; "[w]hen statutory language is clear and unambiguous, [this Court] must give effect to that language and refrain from further statutory interpretation.") (citations omitted). In this case, the Court need only focus on Section 3-2-3(B)(3) and (B)(3)'s unambiguous language to affirm the District Court.

1. ***The only way to give effect to the Legislature's words in Section 3-2-3(B)(3) is to read them as antecedent to Section 3-2-3(B)(2) requirement to seek annexation.***

Section 3-2-3(B) creates three methods for incorporation, one of which is entirely independent and two of which are mutually dependent. Under Section 3-2-3(B)(1) had Sunland Park simply passed a resolution allowing Santa Teresa to incorporate, Santa Teresa could have moved forward with incorporation. (A proposed municipality may further pursue incorporation *if* "the municipality . . . causing the urbanized territory, approve[s] by resolution, the incorporation of territory as a municipality."). Alternatively, PGOST could have filed a valid petition for annexation with Sunland Park. *See* 3-2-3(B)(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 . . .").

Under this second option, had Sunland Park not acted on the valid petition within 120 days, PGOST would be entitled to incorporate. *See id.* ("and the municipality fails, within one hundred twenty days after the filing of the annexation petition, to annex the territory proposed to be incorporated"). The only other question for this statutory provision to answer is what would happen *if* Sunland Park actually had granted the petition for annexation.

Keeping in mind that PGOST does not want Santa Teresa to be annexed, Section 3-2-3(B)(3) allows PGOST to *avoid* annexation only by conclusively

proving Sunland Park's inability to provide services. *See* § 3-2-3(B)(2)-(3) ("the municipality fails, within one hundred twenty days after the filing of the annexation petition, to annex the territory proposed to be incorporated; or . . . residents of the territory proposed to be annexed conclusively prove that the municipality is unable to provide municipal services [.]"). Thus, the Legislature has set up a system that allows Sunland Park what amounts to a first right of refusal with two caveats: *if* Sunland Park sleeps on its first-refusal right to annex, Santa Teresa may move forward with incorporation; if Sunland Park decides to annex, but it is proven Sunland Park is incapable of serving residents, then Santa Teresa may move forward with incorporation.

Contrary to PGOST's position, this reading is correct. In Section 3-2-3(B)(3), our Legislature *chose* the phrase the "residents of the territory to be annexed" and made them "conclusively prove" Sunland Park's inability to provide services. If the Court gives the quoted words meaning—as it must under the law and the Court analyzes the statute as a whole, which also the Court is required to do, *see Stang v. Hertz Corp.*, 1969-NMCA-118, ¶17, 81 N.M. 69, 463 P.2d 45 (explaining "we must consider the language of the Act as a whole" and "[t]he statute must be construed so that no word and no part of the statute is rendered surplusage or superfluous")—there exists no "residents of the territory to be annexed" unless there was "a petition to annex" as the second method requires. In other words, the second method is a

necessary condition precedent to the third because to read the third method as completely independent from the second would mean the Court would have to ignore the phrase "territory to be annexed," rendering it "superfluous" or "surplusage," which this Court may not do. *See id.*

Similarly, to read the "or" between subsection (B)(2) and (B)(3) as PGOST urges, as entirely disjunctive, renders the 120-day requirement for an existing municipality to act on a valid petition for annexation nugatory. If PGOST could simply move forward with attempting to prove Sunland Park's inability to provide services to Santa Teresa residents within the same time as Santa Teresa could, the carefully crafted first-right of refusal would be eviscerated. That the word "or" is located between (B)(2) and (B)(3) is not dispositive. As the New Mexico Supreme Court—and even PGOST recognizes—the rules of construction are not so rigid as to prevent "or" from being read differently so that entire clauses lose meaning or absurdity results. *See Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶9, 110 N.M. 314, 795 P.2d 1006.

Although "or" normally "should be given its . . . disjunctive meaning" the "context of statute [may] demand[] otherwise." *Id.* This statute presents precisely that context, especially under the last-antecedent doctrine where "relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed extending to or including others

more remote." *Id.* In context, the term "territory to be annexed" used in subsection (B)(3) as a qualifying phrase necessarily relates to the "annexation" used in subsection (B)(2) and in *contrast* to the phrase "territory to be incorporated" in that same provision. § 3-2-3(B). Thus, the only way to harmonize the two related phrases is using "or" to permit incorporation as dependently disjunctive between the two subsections: either Sunland Park allows 120 days to expire after PGOST presents a valid petition, § 3-2-3(B)(2); ***OR*** Sunland Park votes to annex Santa Teresa and PGOST can "conclusively prove" Sunland Park "is unable to provide municipal services [to Santa Teresa] within the same . . .time that the Santa Teresa could[.]" §3-2-3(B)(3).

In sum, the Legislature intended to make Section 3-2-3(B)(2)'s filing of a petition for annexation a prerequisite for incorporation where an existing municipality has not passed a resolution to allow a community in its urbanized territory to become a new town. The Legislature did so by *choosing* the term "territory to be annexed" in subsection (B)(3) to refer to the validly filed petition for annexation required before the "territory to be incorporated" can move forward with the incorporation process. Had the Legislature intended PGOST's interpretation, the statute would likely read:

> B. 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**~~ ***incorporated*** 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 services.

Instead, our democratically elected lawmakers, settled on the phrase "territory to be annexed" instead of "incorporated." In context of Section 3-2-3(B), there can be no territory to be annexed without a petition to annex. Because the District Court's order gives effect to this significant choice, this Court must affirm.

B. Even if Section 3-2-3(B)(2) and (B)(3) are Ambiguous, the Policy Behind Them Requires Section 3-2-3(B)(2) be Construed as a Precondition to Section 3-2-3(B)(3).

As a lawfully incorporated city, Sunland Park enjoys the right to exercise control over its urbanized territory—the land within the five miles of its corporate limits. *See* NMSA 1978, § 3-2-3. In specifically addressing the Legislature's policy in enacting and amending Section 3-2-3(B) and as applied to Santa Teresa less than thirty years ago, the New Mexico Supreme Court explained:

> The legislature has, 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 manner. Further, it is the state's policy to discourage splinter communities or 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, 792 P.2d 1138.

Section 3-2-3 therefore exists to discourage a richer community like Santa Teresa from dividing the tax base, not to mention removing diversity from the area by separating the affluent English speakers from the poorer predominately Spanish speakers, and placing additional burdens on utility and emergency service providers. Thus, to balance the Sunland Park's right to ensure orderly growth and development in its surrounding territory, prohibit splintering, and preserve diversity against the secondary entitlement of a community within an urbanized area to incorporate, the Legislature granted Sunland Park a first right of refusal. Only if Sunland Park fails to act on—or decides to annex Santa Teresa—after presented with PGOST's valid petition may PGOST proceed with incorporation either by moving the next statutory step or conclusively proving Sunland Park is incapable of serving Santa Teresa.

In light of how our Legislature foresaw local development, it makes perfect sense that those desiring a new town first ask an existing city to become part of it to ensure orderly growth and to make sure municipalities are not marginalized along socioeconomic lines. Even if the Court disagreed with this purpose and what appears

at first glance to be a counter-intuitive requirement, it is for the Legislature to change the statute, not the courts. *See Jones v. Holiday Inn Express*, 2014-NMCA-082, ¶19, __ N.M. __, 331 P.3d 992 (courts may not rewrite statutes and must refrain from "judicial legislation") (citation omitted).

C. The Existence of a General Annexation Statute Does Not Render Impossible PGOST's Filing of a Valid Petition for Annexation as a Precondition to Incorporation; Nor Does Agency Precedent Dictate a Different Result.

The firm basis for upholding the District Court on statutory-construction and public-policy grounds is discussed in detail above and directly refutes the arguments PGOST advances. PGOST makes two additional arguments not addressed above, both of which lack merit.

First, PGOST misguidedly insists that the Court must read Section 3-2-3(B)(3) as providing a third, stand-alone option for incorporation because under NMSA 1978, § 3-7-17.1, Sunland Park apparently must act on a petition for annexation within 30 days, thus making it impossible for PGOST to petition for incorporation *and* file for annexation. Yet Section 3-7-17.1's 30-day period does not control. Section 3-2-3(b)(2) contains its *own 120-day* time frame for Sunland Park to act. § 3-2-3(b)(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").

Thus, the 120 days for accepting or rejecting a valid petition for annexation addresses any timing concerns. And nothing prevents the County from addressing any time constraints in fulfilling its obligations under Section 3-2-5. *See* NMSA 1978, 3-2-5.

In other words, Section 3-2-3, not a different statute, controls. *See State v. Cleve*, 1999-NMSC-017, ¶8, 127 N.M. 240, 980 P.2d 23. In *Cleve*, the New Mexico Supreme Court explained that courts should only look to another statute where the commonsense meaning is not clear from the lawmakers' language in the provision itself or the context thereof. *Cleve*, 1999-NMSC-017, ¶8 (courts first looking to the "plain language, the context surrounding a particular statute, such as its history, its apparent object" and then "other statutes in *pari materia*"). Even if the Court did examine Section 3-7-17.1, the specific timeframe for incorporation within *urbanized territories* would prevail over the more general annexation statute. *See id.*, ¶ 17 ("where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way," the more detailed controls in the event of conflict).

Second, that 30 years ago the County allegedly allowed a different party to move directly to Section 3-2-3(B)(3) and attempt to conclusively prove Sunland Park could not meet Santa Teresa's municipal needs (which they failed to do) now means "agency precedent" allows PGOST to do the same was never raised in the

District Court and is waived. *See Bustos v. City of Clovis,* 2016-NMCA-018, ¶37, __N.M.__, 365 P.3d 67 ("To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court."). Even if the issue were properly before the Court, an "agency" is not afforded deference in its interpretation of law that it does not promulgate. *Fitzhugh v. N.M. Dep't of Labor*, 1996-NMSC-044, ¶ 22, 122 N.M. 173, 922 P.2d 555 ("If an agency decision is based upon the interpretation of a particular statute, the court will accord some deference to the agency's interpretation, especially if the legal question implicates agency expertise" but "the court may always substitute its interpretation of the law for that of the agency[.]") In short, the County's interpretation of a state statute affords it no particular deference in this case. Even if it did, this Court is not bound by it.

Significantly, the concept of "agency precedent" PGOST advances has no discernable roots in New Mexico jurisprudence, and the case upon which PGOST relies, *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶9, 126 N.M. 413, 970 P.2d 599, does not create such a doctrine. Instead, that case explains that where a *local* agency has spoken on *local* zoning rules, property owners likely should be able to rely on that guidance. *See id.* Tellingly, the New Mexico Supreme Court actually held the Court of Appeals was wrong in deferring to the

city's interpretation of the ordinance at issue. *See id.*, ¶ 4. Thus, the Court need not reverse the District Court in deference to a 1990's determination by the County.

Decades ago, the New Mexico Supreme Court recognized that the interplay between Section 3-2-3(B)(2) and (B)(3) is an open question. *See City of Sunland Park*, 1990-NMSC-050, at ¶11, 110 N.M. 95, 792 P.2d 1138. This Court has an obligation to renew that question *de novo*, and therefore must decide which of the two different interpretations is correct. *See Cadena*, 2006-NMCA-036, ¶ 7 (reviewing statutory interpretations of an agency *de novo*.). The County's previous decision is not properly before this Court and is not in the record. Even assuming that decision says what PGOST claims, it offers no assistance to PGOST here. The Court must affirm the District Court's determination.

CONCLUSION

For the reasons stated above, Section 3-2-3(B) requires PGOST to first file a valid petition for annexation as a precondition for the incorporation of Santa Teresa before attempting to conclusively prove Sunland Park is incapable of providing services to Santa Teresa. This Court must therefore affirm the District Court's amended final order upholding the County's decision.

Respectfully submitted,

HOLT MYNATT MARTÍNEZ P.C.

BRADLEY A. SPRINGER
CASEY B. FITCH
Post Office Box 2699
Las Cruces, NM 88004-2699
Telephone: (575) 524-8812
bas@hmm-law.com
cbf@hmm-law.com

STATEMENT IN SUPPORT OF ORAL ARGUMENT

The undersigned believes oral argument will aid this Court's understanding of this matter of significant public importance and the irregular procedural history of the case.

CERTIFICATE OF COMPLIANCE

As required by 12-213(G), NMRA, I certify, to the best of my knowledge and belief after reasonable inquiry, that the body of this Answer Brief contains 4,711 words in Times New Roman, 14-point font, a proportionally-spaced typeface, and complies with 12-213(F), NMRA. I relied on my word processor to obtain the count and it is Microsoft Word.

BRADLEY A. SPRINGER
CASEY B. FITCH
Dated: March 17, 2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 17th day of March 2017, I served a true copy of Intervenor-Respondent's Answer Brief on the following via First Class U.S. Mail and electronic mail:

Robert M. White, Esq.
Randy M. Autio, Esq
Lance D. Hough, Esq.
500 Marquette Ave., NW, Suite 700
Albuquerque, NM 87102
Robert@roblesrael.com
Randy@roblesrael.com
Lance@roblesrael.com
Attorneys for Appellants

Nelson J. Goodin
Tom Figart
845 N. Motel Blvd.
Las Cruces, NM 88007
nelsong@donaanacounty.org
tomf@donaanacounty.org
Attorneys for Doña Ana County

Enrique Palomares
7362 Remcon Circle
El Paso, TX 79912
Txatty2001@yahoo.com
Attorney for Provisional Government of Santa Teresa

BRADLEY A. SPRINGER
CASEY B. FITCH