

April 20, 2007

Via Facsimile and First-Class Mail

The Honorable Nathan "Nate" Cote
State Representative
P.O. Box 537
Organ, NM 88052

The Honorable Mary Jane Garcia
State Senator
P.O. Box 22
Doña Ana, NM 88032

The Honorable Leonard Lee Rawson
State Senator
P.O. Box 996
Las Cruces, NM 88004

Re: Opinion Request – City of Las Cruces Annexation Proposal

Dear Representative Cote, Senators Garcia and Rawson:

This week you all asked for a legal opinion on the same basic question regarding the procedures that govern a pending annexation proposal being considered by the City of Las Cruces. We therefore respond to your requests with this joint reply.¹

Question:

At which point does the statutory time period during which a city council of a municipality must approve or disapprove a petition for annexation, pursuant to NMSA 1978, § 3-7-17.1 (1998, as amended through 2003), commence to run, and what are the relevant dates that apply to the pending annexation request for Vistas at Presidio I?

¹ Senator Rawson has also inquired whether, if a city council disapproves a petition for annexation, state law prohibits submission of a second identical petition for annexation. We are unable to answer that specific question in the abstract, because the answer may depend on specific facts and procedural issues and require the exploration, by the contestant to such action, of any available judicial remedies and the ramifications of possible decisions made by the contestant respecting the utilization of any such remedies. Representative Cote's request also raises a number of other matters and policy questions. This response is confined to the timing question that warrants an immediate reply.

Conclusion:

Procedurally, the governing statute, Section 3-7-17.1, contemplates that (1) a proper annexation petition is presented to the city council; (2) the city council submits that petition to the county commission for comment; (3) the county commission has thirty days within which to submit comments to the city council, presumably by submitting such comments in an appropriate manner to assure that it is official and accurate; (4) the city council has a deadline of a total of sixty days from its receipt of the presented petition to render a decision; and (5) during the initial thirty-day waiting period during which the county commission may make comment, the city council is disabled from acting with respect to an annexation petition. Implicitly, a city council must consider any timely-made comments of the county commission when the city council makes its decision whether to enact an annexation ordinance. Implicitly, also, any untimely comments, *i.e.* comments that a county commission may make after the statutory thirty-day deadline period for comment, may or may not be considered by the city council in the exercise of its discretion.

As applied to the specific facts in the situation presented, we conclude that the statutory timelines under Section 3-7-17.1 do not permit the Las Cruces City Council to take action at its scheduled meeting on April 23 on the proposed annexation application pertaining to Vistas at Presidio I. We believe that the earliest date that the City Council could lawfully take action is 30 days after April 16, which is the date the petition was formally presented to the City Council. We therefore conclude that the earliest date by which the City Council could lawfully act on the petition is May 16, 2007, and the latest date by which the City Council must make a decision to approve or disapprove is 60 days after April 16, or June 15, 2007.

Facts:

These questions arise in the context of a proposed City of Las Cruces ordinance approving an annexation for the Vistas at Presidio I. Giving rise to this proposed ordinance is an application for annexation submitted to the City on or about January 15, 2007, together with applications pertaining to zoning and to the master plan. These other applications involve Vistas at Presidio I and II. Following staff reviews, the various applications were submitted to the City's development review committee and the City's planning and zoning commission. On March 20, 2007, the City corresponded with the Doña Ana County Manager requesting comment on the proposed annexation pertaining to Vistas at Presidio I, stating, in part: "In accordance with NMSA 1978, § 3-7-17.1, the Doña Ana Board of County Commissioners (BOCC) has thirty (30) days from receipt to review and comment on the abovementioned annexation proposal. The City Council, by ordinance, shall approve or disapprove the annexation after considering any comments submitted by the Board of County Commissioners."

At its April 10, 2007 meeting, the County Commission of Doña Ana County entertained and passed a motion making comments and recommendations to the City with respect to the proposed annexation for Vistas at Presidio I. Those comments are presently reflected in draft

minutes, which will be presented for approval at the County Commission's scheduled April 24, 2007 meeting.²

The City of Las Cruces' planning and zoning commission, as well as the City's development review committee, have made recommendations with respect to the pending applications. On April 16, the City Council of Las Cruces entertained what is termed a "first reading" of the proposed annexation ordinance, discussed the matter for approximately four hours and by consensus agreed that the matter would be taken up for final action at the Council's April 23 meeting. The proposed ordinance presented at the April 16 meeting recites that "pursuant to the provisions of Section 3-7-17 NMSA 1978, a petition to annex contiguous territory" has been signed. The actual petition does not accompany the proposed ordinance. We are informed that the petition itself is usually an internal document that is not included in informational packets. According to information prepared by the City's staff with respect to the proposed annexation and furnished to the Council, "[t]he two property owners petitioning for annexation are the majority property owners."

The proposed ordinance approving an annexation for the Vistas at Presidio I, together with the related proposed resolutions pertaining to the master plan and to zoning for Vistas at Presidio I and II, are noticed as agenda items for the Las Cruces City Council's April 23, 2007 meeting.

Analysis:

The most commonly exercised option for landowners who wish to see their property annexed to a municipality is the "petition method," which is set out in NMSA 1978, §§ 3-7-17 and 3-7-17.1. City of Albuquerque v. State Municipal Boundary Comm'n, 2002-NMCA-024, ¶ 10, 131 N.M. 665, 41 P.3d 933, cert. denied, 131 N.M. 737, 42 P.3d 842. The "petition method" under Section 3-7-17.1 applies to the City of Las Cruces. That statute provides, in part:

A. A petition seeking the annexation of territory contiguous to a municipality located in a class A county with a population of less than three hundred thousand persons shall be presented to the city council and be accompanied by a map that shows the external boundary of the territory proposed to be annexed....

B. If the petition is signed by the owners of a majority of the number of acres in the contiguous territory:

(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 We are informed that at the City Council's scheduled April 23 meeting, staff intends to present the comments of the County and hard copies of County Commission's draft minutes would be distributed to the Council.

(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.

...

The timeframe described in Section 3-7-17.1 is ambiguous in certain respects. The overall thrust and purpose of it appears to be that the board of county commissioners must be given sufficient opportunity to review and comment with respect to a proposed annexation by the city and that the city council must be confined to a timeframe within which to make a decision. In considering ambiguities in annexation statutes, the courts consider the legislative purpose behind the statute to resolve its meaning, always striving to select the rationale that most likely accomplishes the legislative purpose. City of Albuquerque, ¶ 14. A court’s review of an annexation ordinance is limited to considering whether it was enacted in accordance with the governing statute. State ex rel. State Highway and Transportation Dep’t v. City of Sunland Park, 1999-NMCA-143, ¶ 17, 128 N.M. 371, 993 P.2d 85, cert. quashed, 133 N.M. 31, 59 P.3d 1263; Dugger v. City of Santa Fe, 114 N.M. 47, 53, 834 P.2d 424, 430 (Ct. App.), writ quashed, 113 N.M. 744, 832 P.2d 1223 (1992). See also Daugherty v. City of Carlsbad, 120 N.M. 716, 719, 905 P.2d 1120, 1123 (Ct. App.), cert. denied, 120 N.M. 636, 904 P.2d 1061 (1995) (with respect to annexation by the petition method, which is legislative in character, the judiciary merely determines whether the municipality has complied with the plain meaning of the legislation and whether the legislation is itself constitutional; judiciary makes no independent inquiry into the wisdom, policy or justness of the legislative action).

Procedurally, the governing statute, Section 3-7-17.1, contemplates that (1) a proper annexation petition is presented to the city council; (2) the city council submits that petition to the county commission for comment; (3) the county commission has thirty days within which to make comment to the city council, presumably by submitting such comment in an appropriate manner to assure that it is official and accurate; (4) the city council has a deadline of sixty days from its receipt of the presented petition to render a decision; and (5) during the initial thirty-day waiting period during which the county commission may make comment, the city council is disabled from acting with respect to an annexation petition. Implicitly, a city council must consider any timely-made comments of the county commission when the city council makes its decision whether to enact an annexation ordinance. Implicitly, also, any untimely comments, *i.e.* comments that a county commission may make after the statutory thirty-day deadline, may or may not be considered by the city council in the exercise of its discretion.

Under the facts described in the situation here, the procedures that the City has used do not neatly fit the procedures that the statute describes and seems to contemplate. First, the City Council has not been formally “presented” with a completed petition for annexation. At the City Council’s April 16 meeting, however, the City Council was first officially notified of an annexation petition. The proposed ordinance recites the submission of an annexation petition and, for purposes of Section 3-7-17.1 (A), may therefore be considered a formal “presentment” of the petition to the City Council. Second, the City Council did not, thereafter, “submit” that petition to the Doña County Board of County Commissioners. However, the City staff did, on March 20, submit the proposed annexation application to the County and request comment,

which the County Commission did make at its April 10 meeting. No provision of Article IX of the city’s ordinance pertaining to annexations addresses submission to the county of annexation requests.³

Under these facts, and considering the procedures that have been utilized by the City, it is difficult to pinpoint a precise “triggering event” for purposes of calculating the 30-day and 60-day deadlines for purposes of Section 3-7-17.1 (B). April 16, 2007 nevertheless appears to be the most logical “triggering event” date, because that date is consistent with Section 3-7-17.1 (A), requiring a formal presentment of an annexation petition to the City Council. Logically, also, the previous action of the Doña Ana County Commission taken on April 10 to make comments with respect to the proposed annexation should suffice for purposes of Section 3-7-17.1 (B) (1), provided those comments are relayed to the City Council in an official and accurate manner. The County Commission is scheduled to meet on April 24, 2007, at which time they may approve the draft minutes of their April 10 meeting and officially make those minutes a public document or otherwise officially communicate their comments on the proposed annexation to the City Council.

The process described above appears to comport with legislative intent. A petition submitted to the City needs to be first reviewed by staff to determine if it is complete. Once that determination is made by staff, and the necessary committees have reviewed the matter, then the petition may be formally presented to the City Council. That is what occurred when the “first reading” was presented on April 16, 2007. That date therefore started the statute’s relevant thirty and sixty day time periods.

More difficult is the question whether the early comment period related by City staff to the County disengages the otherwise required “thirty-day waiting period” under Section 3-7-17.1 (B) (2), disabling the City Council from taking action for a period of not less than thirty days after the City Council receives, *i.e.* is presented with, the petition for annexation. That “waiting period” normally would flow following presentment of the petition to the City Council and the Council’s submission of the petition to the County Commission. Because the language in Section 3-7-17.1 (B) (2) appears mandatory, in that the statute uses the word “shall” in that specific paragraph, it would seem reasonable for the City Council to abide by that requirement,

³ Sec. 37-269 (d) states: “Annexation requests will be referred to the applicable city departments and other governmental agencies for review, comments and recommendations. Each department shall have five business days in which to complete the review. Written reports with their recommendations shall be forwarded to the subdivision administrator.” This provision does not expressly direct the necessary submission to the county for review and comment within the required thirty-day period, but the County here, nonetheless, complied with the March 20 request. Article IX does not address at all the specific requirements of or timelines involved in § 3-7-17.1. NMSA 3-19-1 (1965) authorizes a municipality to, by ordinance, establish a planning commission and delegate various tasks and duties relating to planning, platting and zoning. This statute does not specifically address annexation or Section 3-7-17.1. The City’s planning and zoning commission ordinance, Subdivision VI, at Sec. 2-381 (a), addresses annexations in stating that the commission shall make recommendations relating to requests for annexation, zoning and other land uses to the city council. The ordinance does not delegate to the planning and zoning commission the authority or duty to satisfy the “presentment” or “submission” requirements of Section 3-7-17.1.

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with the result that any action taken by the City Council on April 23, as presently scheduled, would be premature.

Accordingly, we conclude that the statutory timelines under Section 3-7-17.1, as applied to the facts in the situation presented, do not permit the Las Cruces City Council to take action at its meeting on April 23 on the proposed annexation application pertaining to Vistas at Presidio I. The earliest date that the City Council could take action is 30 days after April 16, or May 16, 2007. The latest date by which the City Council must make a decision to approve or disapprove is 60 days after April 16, or June 15, 2007.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gary K.", written in black ink.

GARY K. KING
Attorney General of New Mexico

ANDREA R. BUZZARD
Assistant Attorney General

cc: Las Cruces City Council and City Attorney