

APPENDIX A

A. The People Have Spoken

The Constitution of the State of New Mexico provides that “[a]ll political power is vested in and derived from the people: all government of right originates with the people, is founded upon their will and is instituted solely for their good.”¹ The people have spoken; as the result of an unfunded grass-roots effort, over half of the registered voters in the unincorporated area known since 1768 as Santa Teresa have signed a petition to incorporate their community as a separate and distinct municipality. Thus, it is the political will of a majority of the voters in Santa Teresa to form their own city.

B. Urbanized Territory

A portion of the urbanized area identified for incorporation into Santa Teresa lies within five miles of the City of Sunland Park (“Sunland Park”). In general, “it is the state’s policy to discourage . . . 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.”²

Accordingly, state law provides that urbanized territory within five miles of a municipality may not incorporate unless (1) the existing municipality approves, by resolution, the incorporation of the territory, (2) the residents of the territory petition for annexation by the municipality and the municipality fails to act within one hundred and twenty days, or (3) “the 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

The unincorporated area generally known as Santa Teresa already has established municipal services, including fire protection and fire safety services (Santa Teresa Volunteer Fire Department); water supply, distribution, and wastewater treatment (Camino Real Regional Utility Authority); electric services (El Paso Electric); gas services (New Mexico Gas); and regional planning and zoning services (Camino Real Regional Utility Authority). It also has a private security force backed

¹ N.M. Const. art. 2, § 2.

² *City of Sunland Park v. Santa Teresa Concerned Citizens Ass’n, Inc.*, 110 N.M. 95, 99, 792 P.2d 1138, 1142 (N.M. 1990).

³ NMSA § 3-2-3.

by the Doña Ana County Sheriff's Department and recreational facilities. In accordance with the "Joint Powers Agreement for a Joint Water and Wastewater Operating Authority and Joint Subdivision, Zoning, Planning and Platting Authority between the City of Sunland Park and The County of Doña Ana, New Mexico," which entered into force on February 24, 2009, the City of Sunland Park relinquished all authority to adopt resolutions and ordinances necessary for the regulation of subdivisions, zoning, planning, and platting outside the city limits of Sunland Park to the Camino Real Regional Utility Authority. See Appendix B. The City of Santa Teresa will continue to rely on these and other services upon incorporation. It will also continue to rely on talented volunteers to perform critical tasks such as applying for grants and lobbying for commercial development.

C. Annexation Not an Option

State law also provides that a municipality must use one of only three methods to annex territory: (1) arbitration, (2) boundary commission, or (3) petition by land owners.⁴ Moreover, in a class A county, if the owners of a majority of the land in the contiguous territory do not sign the petition, the extraterritorial land use commission⁵ must consider the matter and make a recommendation to the extraterritorial land use authority.⁶ If approved by the extraterritorial land use authority, the city council may, by ordinance, approve the annexation.

On August 19, 2014, Sunland Park City Councilor Ken Giove introduced a resolution to annex unspecified areas contiguous to Sunland Park. During subsequent discussions, council members conceded that Sunland Park could not assist with repairing streets, installing street lights, or implementing any infrastructure improvements to the adjoining areas. Despite these acknowledgments, the Sunland Park city council adopted a resolution on October 7, 2014, stating that it would promulgate a policy concerning annexing unincorporated areas surrounding the city,

⁴ NMSA § 3-7-1.

⁵ See NMSA § 3-7-17.1B ("The extraterritorial zoning commission in a class A county shall be known as the "extraterritorial land use commission" if it is formed by a municipality and a class A county that have adopted ordinances pursuant to Paragraph (2) of Subsection A of this section stating that the county and municipality will create an extraterritorial land use authority.").

⁶ See NMSA § 3-21-3.2 ("The extraterritorial land use authority shall consist of four county commissioners appointed by the board of county commissioners and three city councilors or two city councilors and the mayor appointed by the municipality. Alternates to the extraterritorial land use authority shall be appointed by the board of county commissioners from among the remaining county commissioners and by the municipality from among the remaining city councilors.").

and explaining that it would use the methods available under New Mexico law to annex any and all territories it perceived were in its best interest. Notably, it did not adopt a resolution to specifically annex the area known as Santa Teresa.⁷ Further, at the Sunland Park city council meeting on December 2, 2014, Sunland Park City Manager Vernon Wilson admitted that Sunland Park simply could not afford to annex Santa Teresa.

Nearly one thousand residents of Santa Teresa signed the original petition for incorporation. By signing the petition, they made it clear that they do not want to be annexed by Sunland Park. Moreover, at recent public meetings, Sunland Park Counselors have commented that it would not be in the best interest of Sunland Park to annex Santa Teresa.

D. Ambiguity in the Law

The New Mexico Supreme Court has recognized some ambiguity in the incorporation statute. According to the New Mexico Supreme Court, the “question of the interrelationship of the three subpart[s]” of the incorporation statute remains unanswered.⁸ The “primary goal when interpreting statutes is to further legislative intent.”⁹ “The principal command of statutory construction is that the court should determine and effectuate the intent of the legislature, using the plain language of the statute as the primary indicator of legislative intent[.]”¹⁰ If the plain meaning of the statute is “doubtful, ambiguous, or [if] an adherence to the literal use of the words would lead to injustice, absurdity or contradiction,” the statute should be construed “according to its obvious spirit or reason.”¹¹

E. The City of Sunland Park and Corruption

As described in official state documents, the Government of Sunland Park has a long and well-documented history of corruption, fraud, waste, and abuse.¹² An El Paso television station

⁷ Polk, Andrew, *Sunland Park Votes on Annexation Policy*, KVIA, Oct. 7, 2014, <http://www.kvia.com/news/sunland-park-votes-on-annexation-policy/29012628>

⁸ *City of Sunland Park v. Santa Teresa Concerned Citizens Ass’n, Inc.*, 110 N.M. 95, 100, 792 P.2d 1138, 1143 (N.M. 1990).

⁹ *Jordan v. Allstate Ins. Co.*, 149 N.M. 162, 168, 245 P.3d 1214, 1219 (N.M. 2010).

¹⁰ *State v. Ogden*, 118 N.M. 234, 242, 880 P.2d 845, 853 (1994) (citations omitted).

¹¹ *State v. Davis*, 134 N.M. 172, 175, 74 P.3d 1064, 1067 (N.M. 2003).

¹² See Attach. 1, Executive Summary, Special Audit Report, Office of the State Auditor, May 14, 2012.

reported on May 17, 2012, that Sunland Park “public officials are facing felony charges that they ran City Hall like a personal piggy bank, tried to steal an election in order to remain in power and ruled the 14,000 residents through intimidation and fear.”¹³ After an audit uncovered serious allegations regarding city spending, the New Mexico Department of Finance and Administration took control of the city’s finances.¹⁴ Governor Susana Martinez explained “[t]he extraordinary level of financial mismanagement in Sunland Park is unacceptable; protecting public funds will be our highest priority.”¹⁵ According to one commentator, the “[p]otential loss of new industry, new jobs and new opportunities desperately needed in the region are the real cost of such shenanigans.”¹⁶

F. The City of Sunland Park and Incorporation of Santa Teresa

Although Sunland Park Counselors have already agreed that their city should not annex Santa Teresa, the Counselors have not yet passed a resolution supporting the incorporation of Santa Teresa. Further, the residents of Santa Teresa have not petitioned Sunland Park for annexation because they have recognized that Sunland Park—as the city counsel and city manager have already conceded—will not be able to provide any benefits to Santa Teresa. Moreover, the residents of Santa Teresa have also recognized that, if given the opportunity, Sunland Park would annex Santa Teresa with a view toward collecting property and other taxes without providing any additional governmental services. Additionally, Sunland Park has not, by formal resolution, proposed to annex Santa Teresa by arbitration, boundary commission, or petition. Finally, Santa Teresa already has a

¹³ Shawn, Eric, *Voter Fraud Allegations in Mayoral Election Rock New Mexico City*, Fox News, May 17, 2012, <http://www.foxnews.com/politics/2012/05/17/voter-fraud-new-mexico-city/>. See also Villagran, Lauren, *Judge Denies State Rep.’s Voter Fraud Petition*, Albuquerque Journal, Aug. 23, 2014, <http://www.abqjournal.com/450827/news/judge-denies-state-reps-voter-fraud-petition.html>; Nikolewski, Rob, *Court to Hear Disputed Election and Voter Fraud Allegations in New Mexico*, New Mexico Watchdog.org, Aug 20, 2014, <http://watchdog.org/166068/voter-fraud-dispute/>; Staley, James, *Another Figure in Sunland Park Voting Fraud Case Pleads Guilty*, Las Cruces Sun-News, Mar. 13, 2013, http://www.lcsun-news.com/ci_22784882/another-figure-sunland-park-voting-fraud-case-pleads; Haussamen, Heath, *Former Sunland Park Judge Convicted of Voter Fraud*, DISQUS, http://www.jpattitude.com/FraudDocs/JudgeConvicted_SunlandParkTexas.pdf.

¹⁴ Borunda, Daniel, *New Mexico Takes Over Sunland Park: Audit Finds Misappropriation of City Money, More*, El Paso Times, May 15, 2012, http://www.elpasotimes.com/ci_20624596/nm-takes-over-sunland-park

¹⁵ *Id.*

¹⁶ Paul Maxwell, *The Gang Who Couldn’t Shoot Straight*, Border X Roads, <http://blog.bnsi.org/?p=161>.

well-established infrastructure and municipal services provided by various entities such as the Camino Real Regional Utility Authority, El Paso Electric, and New Mexico Gas Company. Annexation by Sunland Park would contribute little, if anything, toward improving the municipal services now available to Santa Teresa residents, other than perhaps increasing the law enforcement presence in an area with an historically low crime rate. Santa Teresa, on its own accord, is willing and able to police itself.

G. Orderly Urban Growth or Impasse?

The residents of Santa Teresa agree, as a general principle, that the State should help ensure orderly urban growth. However, the interplay between the Constitution, the incorporation statute, the annexation statute, the will of the Santa Teresa residents, and the interests of Sunland Park, have created an impasse within Doña Ana County. The voters and residents of Santa Teresa—with the political power vested in them by the New Mexico Constitution—have made it clear that they want to incorporate as a separate and distinct city. At some point Sunland Park will likely object at some point to the incorporation of Santa Teresa, but just as likely will not initiate those actions necessary to annex Santa Teresa. This is due to at least four factors. First, state law makes it difficult for a city to annex an established bedroom community because the law requires some cooperation from the residents. Second, Sunland Park lacks political support at the State level to pursue annexation because of its history of corruption, fraud, waste, and abuse. Third, annexation would dilute the Sunland Park voting population and upset the existing political balance. Finally, Sunland Park does not have the resources to fund infrastructure improvements and municipal services which the residents of Santa Teresa would demand.

This impasse—and the doubt it creates about the political and economic future of this region—does not help ensure orderly urban growth. Furthermore, it may actually have a chilling effect on future economic development in the region. In fact, at the Business Industrial Association meeting in Santa Teresa on January 14, 2015, Jerry Pacheco, a Board Director of the Dallas Federal Reserve Bank–El Paso Branch and an industrial business recruiter based in Santa Teresa, reported that several potential investors in the Santa Teresa Industrial Park had balked when they learned of the region’s political instability. If state and county officials want continued growth in Doña Ana County, this instability simply must end.

Furthermore, the legislature could not have intended for Sunland Park—with its documented history of corruption, fraud, waste, and abuse, and admitted inability to maintain its own infrastructure, much less the existing infrastructure within Santa Teresa—to use state annexation laws as a sword to subject the unwilling residents of the adjacent Santa Teresa to its governance, or to use the state incorporation laws as a shield to prevent the residents of Santa Teresa from incorporating. The annexation and incorporation statutes—which have created this impasse—only lead to injustice, absurdity, and contradiction.

H. Respect the Constitution, Construe the Laws Liberally, and Permit Santa Teresa to Incorporate

Accordingly, the residents of Santa Teresa ask the State to respect the political power vested in them by the New Mexico Constitution, construe state statutes liberally and in a way that will not lead to injustice, and permit Santa Teresa to incorporate as a separate, business-friendly municipality, which will contribute to the growth of this region into a globally competitive center of industry, commerce, transportation, medicine, communications, and education.

**ATTACHMENT 1 TO APPENDIX A
(Extract)**

**STATE OF NEW MEXICO
OFFICE OF THE STATE AUDITOR**



**SPECIAL AUDIT REPORT
CITY OF SUNLAND PARK**

**Hector H. Balderas
State Auditor
May 14, 2012**

City of Santa Teresa - Limited Government, Local Control

I. EXECUTIVE SUMMARY

On February 23, 2012, the Office of the State Auditor (OSA) formally designated the City of Sunland Park (City) for special audit pursuant to the State Auditor's authority under the Audit Act, Sections 12-6-1 through 12-6-14 NMSA 1978. Specifically, Section 12-6-3(C) NMSA 1978 provides that the State Auditor "may cause the financial affairs and transactions of an agency to be audited in whole or in part." The State Auditor made the determination to designate the City for special audit based on the results of several years of special monitoring by OSA auditors of the City's troubling financial condition.

The City's repeated failure to submit timely annual financial audits in accordance with the Audit Act and the Audit Rule, 2.2.2 NAC, first led the State Auditor to designate the City "at-risk" for fraud, waste and abuse in the fall of 2009. During that time, the OSA received numerous allegations of financial malfeasance at the City. The allegations were reported through the OSA's Fraud Hotline and from concerned constituents. Certain complaints related to violations of purchasing procedures, procurement procedures, nepotism, incorrect water billings and waivers of bills for the City's residential and commercial users. To ensure the complaints were fully reviewed and audited, the OSA referred the issues to the City's independent public accountant (IPA) on January 7, 2010 and requested the IPA consider the allegations during its financial audit test work for the City's 2010 financial audit. The additional testing the IPA conducted, as a consequence of the OSA's referral, resulted in nine additional findings for the City's 2010 financial audit report, including findings for purchase order lack of detail, lack of contract for services and lack of supporting documentation for travel reimbursement.

In conjunction with the results of the IPA's test work, the State Auditor directed OSA staff to conduct a comprehensive risk review of the City's financial audit reports for fiscal years ended June 30, 2008 through June 30, 2010. The review indicated the City is in a complete state of financial disarray. The City failed to submit all three of the audit reports by the State Auditor's required deadlines and it received a disclaimer of opinion on all three reports. The review also revealed numerous findings that exhibited poor fiscal management and a widespread failure to adhere to internal controls within the City. For example, as far back as fiscal year 2002, the City has continued to receive a finding that reveals budget overages in multiple funds. In fiscal year 2010, the City overspent its approved budget by over \$760,000 with expenditure overages in various funds. The City also received findings related to insufficient attention given to accounting and internal controls process, lack of separation of duties, and failure to perform a complete physical inventory of the City's capital assets. In sum, the review revealed that the City has a severe lack of fiscal transparency, which creates extreme risks for fraud and misappropriation of taxpayer funds.

To compound the City's fiscal problems, various City officials and employees were arrested on a range of criminal charges in the days and weeks following the OSA's special audit designation. This created administrative instability and left an overwhelmed City staff to deal with the financial operations of the City. For example, the City's former Mayor Pro-Tem, Daniel Salinas, and the former City Manager, Jaime Aguilera, were arrested on February 25, 2012 on felony charges of

extortion and tampering with evidence related to scheme to force Mayor Pro-Tem Salinas' opponent out of the City's mayoral race. Additionally, as noted in the findings of this report, criminal charges were recently brought against Mr. Salinas and the owners of two companies that were paid monies from the Border Crossing Fund. The findings and charges are associated with invoices submitted to the City that are fraudulent in nature. The cloud of criminal activity surrounding the City's operations has created a vacuum of oversight within the City's top management that only augments the OSA's concerns about the City's finance operations. As of the date of this report, the City is without a Mayor or City Manager.

Given the serious nature of these issues, the OSA performed a special audit of certain budgets, funds, accounts, and transactions of the City for fiscal years 2010 through 2012. The limited scope of the special audit consisted of the certain cash disbursements made from the Border Crossing Fund to certain vendors; the City's interim budgets, final budgets and quarterly financial reports; fund adjustments or transfers submitted by the City to the Local Government Division of the Department of Finance and Administration (LED-D.F.A.); adjustments to customer utility bills and accounts for fiscal year 2011; cash and investment accounts; capital asset additions, deletions and transfers; travel and per diem expenditures from Border Crossing Fund and Fire Protection Fund for the Mayor, Mayor Pro-Tem, City Manager, Public Information Officer, and all City Councilors; and the City's expenditures and final budgets for the Fire Protection Fund, Camino Real Regional Utility Authority (CRRUA) Fund, Joint Utility Fund and Border Crossing Fund.

During our special audit we performed certain procedures and tested all documentation provided by the City related to the procedures. The procedures included interviewing certain current and former City employees to obtain information and evidence as it pertained to the special audit's scope; determining whether certain disbursements were made in compliance with the Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978, the City's Purchasing Regulations; determining whether the City adhered to certain provisions of contracts or agreements with the vendors; determining whether the City allowed or approved claims or warrants in excess of the approved budgets, as prohibited by state law; tracing the bank balance on cash reconciliations to the balance per the bank statements; determining whether the City conducted an annual inventory of capital assets as required by state law; determining whether travel and per diem expenditures were made in compliance with the Per Diem and Mileage Act, Sections 10-8-1 through 10-8-8 NMSA 1978, and the City's Travel and Per Diem Reimbursement Policy; and determining whether the City Council and City Clerk complied with the Open Meetings Act, Chapter 10, Article 15 NMSA 1978.

With regard to the special audit's findings, we found certain instances in which the City made cash disbursements from the Border Crossing Fund that did not have adequate documentation and were determined to be made as a result of fraud. Notably, the City's lack of internal controls and oversight over disbursements from the restricted Border Crossing Fund increased the risk that payments would be made for unauthorized or illegal purposes. For numerous transactions, the City Manager, Finance Director and Purchasing Agent failed to request support for costs or certify goods or services were received before approving payment. The City also made payments without proper authorizing signatures on check request forms, proper supporting documentation or adequate

descriptions on invoices. In other instances we found the City consistently failed to adhere to the requirements of the Procurement Code, the City's Purchasing Regulations and terms of RAPS when evaluating proposals and awarding professionals services contracts related to the Border Crossing Fund. We also tested 46 cash disbursements, totaling \$978,050.95, from the City's Border Crossing Fund. For each disbursement we tested, we noted an irregularity or deficiency. For instance, payments were made without purchase orders in place, the City disbursed payments to vendors without a check request form, certain disbursements were not paid in the proper fiscal year, and the City Manager, Finance Director, and Purchasing Agent did not ensure that gross receipts tax was properly identified on the invoices submitted by vendors.

We also found that the Mayor, City Council and management failed to limit City expenditures in excess of approved budget amounts. The City does not have adequate internal controls in place to monitor each department and ensure that the departments are not expending funds in excess of their approved budgets. Since fiscal year 2002, the City has received a finding in its annual financial audit for making expenditures in excess of approved budgeted amounts in violation of state law. The City's failure to implement adequate internal controls and monitor the disbursement of public funds in excess of the City's approved budget increases the risk of budget deficits or unauthorized expenditures.

Our test work also revealed constitutional and statutory violations related to the City's forgiveness of debt related to customer utility bills and accounts. The City Council approved an 80 percent discount to certain utility bills without adequate justification, and we also noted that the Mayor Pro-Tem instructed the City Manager to make adjustments to certain bills regardless of whether the customer was eligible for the City's utility assistance program.

Furthermore, we found that the City's Finance Director did not reconcile certain bank accounts or properly maintain the books and records for certain bank accounts. The City's Finance Director failed to document the purpose for all transfers in or out of each bank account or institute proper accounting controls to protect the City's finances. Untimely or late reconciliations of the City's bank accounts increase the likelihood that misstatements of account balances will occur. Also, there is an increased risk of fraud and that missing funds may go undetected. Similarly, we noted that Finance Director is not properly maintaining the books and records for all investment accounts and reconciliations are not being prepared in a timely manner.

Regarding capital assets, we found the City Council and management continually violated state law by failing to conduct and certify an annual inventory of the City's capital assets. Without proper monitoring and certification by the City Council, there is an increased risk that capital assets will be subject to misappropriation and fraud. Moreover, we found the City did not process certain capital asset additions correctly and failed to maintain proper supporting documentation for certain capital asset additions, which can lead to material misstatements on the City's financial statements. The City also did not maintain proper accounting records for the capital assets, and it did not maintain proper documentation of the transfer of capital assets from the City to CRRUA. We noted that the City did not provide us a complete, certified, and detailed capital assets listing or a listing

of capital assets that were transferred to CRRUA, and we were unable to review the balances of capital assets along with the balances of infrastructure held by the City prior to the transfer.

In addition to these troubling findings, we also found deficiencies and violations of law relating to travel and per diem reimbursements, cash disbursements from the Fire Protection Fund, and the OMA. For example, during our test work of certain travel and per diem expenditures, we noted numerous instances in which travel vouchers were not properly approved before reimbursements were made. We also tested multiple cash disbursements from the City's Fire Protection Fund that did have proper supporting documentation, approvals, review and approval of invoices, and certification that goods and services. With regard to the OMA, we noted certain violations of the OMA related to the required approval and preparation of the City Council's meeting minutes.

Overall, throughout the course of our special audit and test work we found a range of significant deficiencies in the City's internal controls over procurement, capital asset acquisition, disposal and inventory, mileage and per diem, revenues and receivables. In many cases, we found that internal controls that should exist to shield the City from improper processing of transactions were ineffective or completely nonexistent. In other cases, we found that internal controls that did exist were not adhered to or simply overridden by the City Council, Mayor, City Manager, the Finance Director or the Purchasing Agent. Both the fiscal actions and inactions of the City Council and these City officials led to various violations of state laws and state regulations, many of which the Secretary of Finance and Administration is charged with enforcing. Accordingly, the special audit report's findings reveal numerous instances of fiscal management of City offices by certain persons that resulted in violations of law. Certain findings also reveal instances of fraudulent misappropriations of public money.

Therefore, based on our special audit's findings, we recommend that the Secretary of D.F.A. take immediate action pursuant to Section 10-5-2 NMSA 1978 and summarily suspend officials of City management who are identified by the findings. We recommend that the Secretary of D.F.A. take charge of those offices, primarily the offices of Finance Director and Purchasing Agent, which have not been vacated. We recommend that the Secretary also closely review the special audit's findings, and conduct further investigation as needed, as those findings may pertain to the suspension of members of the City Council, which is the City's board of finance.

The OSA will refer the findings of the special audit to the appropriate oversight and law enforcement agencies, including the Governor, D.F.A., the Third Judicial District Attorney, the New Mexico State Police, the Tax Fraud Investigations Division of the Taxation and Revenue Department, the Attorney General, the FBI, the U.S. Attorney for the District of New Mexico, and the Legislative Finance Committee. In cooperation with these agencies, the OSA will continue our efforts to aggressively audit the City's finances and its officials.