ET NO. 6

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

THE TOHONO O'ODHAM NATION, a federally recognized Indian tribe, Plaintiff/Appellant, CITY OF GLENDALE, et al., Defendants/Appellees.	No. 1 CA-CV 10-0341 (Maricopa County Superior Court No. CV2009-023501)

ANSWERING BRIEF OF DEFENDANTS/APPELLEES CITY OF GLENDALE, ET AL.

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STATEMENT OF THE CASE

In November 2001, Appellee City of Glendale ("Glendale") adopted Ordinance No. 2229 to annex property completely surrounded by Glendale known as Annexation Area 137. (ROA 46 ¶ 4; ROA 58 ¶ 13; ROA 61 ¶ 13.)[1] An owner of property in the proposed Annexation Area 137 filed a timely action in court to challenge the annexation. (ROA 46 ¶ 5.) In May 2002, Glendale adopted Ordinance No. 2258, which mistakenly stated that the November 2001 "attempted" annexation was repealed and that the annexation of Area 137 was abandoned. (ROA 46 ¶ 6.) In October 2002, the court dismissed the challenge to Glendale's annexation of Area 137 for lack of prosecution. (ROA 68 at 2.)

In 2003, Rainer Resources, Inc. ("RRI"), a corporation in which the Tribe was the only shareholder, bought land within Annexation Area 137 to build a gambling casino. (ROA 58 ¶¶ 17 and 18; ROA 61 ¶¶ 17, 18, and 20.) Before it purchased the land, the Tribe's corporation knew that the seller had requested annexation by Glendale and that Glendale was in the process of annexing the land. (ROA 61 ¶ 21.)

In June 2009, Glendale adopted Ordinance No. 2688. (ROA 46 ¶ 12.) That ordinance: a) repealed Ordinance No. 2258, adopted in 2002,

[1] "ROA" refers to the Clerk of the Superior Court's Index of Record on Appeal.

because Glendale lacked authority to abandon the annexation of Area 137; and b) declared that the annexation of Area 137 in 2001was valid. (ROA 46 ¶ 12.)

The Tribe then filed an action in the Maricopa County Superior Court challenging Glendale's actions concerning the annexation of Area 137. (ROA 1.) The parties filed cross-motions for summary judgment on one issue of law. (ROA 47 and 57.) That issue was whether Glendale's annexation of Area 137 in 2001 became "final after the expiration of thirty days from the adoption of the ordinance annexing the territory by the city or town governing body . . . subject to the review of the court to determine the validity thereof if petitions in objection have been filed," as provided in A.R.S. § 9-471(D). (ROA 47, 57, 60, 65.)

After a very thorough analysis, the Maricopa County Superior Court granted Glendale's motion for summary judgment and denied the Tribe's. (ROA 68.) Judge Mangum concluded: "[T]his Court finds that the statute's language is unambiguous and must be given effect. Therefore, A.R.S. § 9-471(D) means exactly what it says: "The annexation *shall become final after the expiration of thirty days* from the adoption of the ordinance . . . ." (ROA 68 at 5, emphasis in original.) The Tribe has appealed that ruling. (ROA 71.)

STATEMENT OF THE FACTS

I. Arizona's Statutory Annexation Procedure.

"Municipal annexation power, like other municipal powers, is entirely derivative of legislative grant." *Israel v. Town of Cave Creek*, 196 Ariz. 150, 155, 993 P.2d 1114, 1119 (App. 1999); *see also City of Scottsdale v. Superior Ct.*, 103 Ariz. 204, 205, 439 P.2d 290, 291 (1968). The annexation statute, A.R.S. § 9-471, permits a city or town to annex contiguous territory by following the procedures set out in A.R.S. § 9-471, which is Appendix 1 to the Tribe's Opening Brief.

The city or town begins the annexation process by filing a blank annexation petition identifying the territory proposed to be annexed, holding a public hearing on the proposed annexation, circulating the annexation petition to obtain signatures of enough property owners who desire annexation, and providing notice in several ways to the public and interested persons. A.R.S. § 9-471(A). The city or town then adopts an ordinance approving the annexation. A.R.S. § 9-471(C) and (D).

A.R.S. § 9-471(C) allows "[a]ny city or town, the attorney general, the county attorney, or any other interested party" "to question the validity of the annexation for failure to comply with this section," if such party files "within thirty days after adoption of the ordinance annexing the territory by

the governing body of the city or town" a verified petition alleging how the annexation procedure did not comply with the statute. The first sentence of A.R.S. § 9-471(D) states:

> The annexation shall become final after the expiration of thirty days from the adoption of the ordinance annexing the territory by the city or town governing body, provided the annexation ordinance has been finally adopted in accordance with procedures established by statute, charter provisions or local ordinances, whichever is applicable, subject to the review of the court to determine the validity thereof if petitions in objection have been filed.

II. Glendale's Final Annexation of Area 137.

On November 27, 2001, the Glendale City Council adopted Ordinance No. 2229, New Series, (the "2001 Ordinance"), Appendix 4 to the Tribe's Opening Brief, to annex certain territory described as "Annexation Area 137." (ROA 46 ¶ 4; ROA 58 ¶ 4.) The "expiration of thirty days from the adoption of the ordinance annexing the territory," after which A.R.S. § 9-471(D) states "[t]he annexation shall become final," occurred on December 27, 2001.

December 27, 2001 was also the last day allowed by A.R.S. § 9-471(C) for challenges to the annexation. On that day, Glendale Media I, LLC, a property owner within Area 137, filed a Petition to Set Aside

Annexation, subjecting the final annexation to court review pursuant to A.R.S. § 9-471(D). (ROA 46 ¶ 5; ROA 58 ¶ 5.)

III. Glendale's Mistaken and Invalid Attempt to Repeal the 2001 Ordinance After the Expiration of Thirty Days.

On May 28, 2002, the Glendale City Council adopted Ordinance No. 2258 (the "2002 Ordinance"), Appendix 7 to the Tribe's Opening Brief, which stated "[t]hat Ordinance No. 2229, New Series, adopted by [the] Glendale City Council on November 27, 2001, is hereby repealed and the attempted annexation of property described in Annexation Area No. 137 is hereby abandoned." (ROA 46 ¶ 6; ROA 58 ¶ 6; Appendix 7 to the Tribe's Opening Brief.) In attempting to repeal the 2001 Ordinance, Glendale correctly noted that "the delay caused by the contest of the annexation" "threaten[ed] development planned by owners of parcels who support the annexation of their property into the City of Glendale." (ROA 46 ¶ 7; ROA 58 ¶ 7.)

However, Glendale was mistaken that annexation had been delayed and that it could "abandon the annexation action approved by Ordinance Number 2229, New Series" by repealing the 2001 Ordinance after thirty days. (ROA 46 ¶ 7; ROA 58 ¶ 7; A.R.S. § 9-471(D)). In fact, Glendale could not then abandon the annexation, which had "become final after the expiration of thirty days from the adoption of the ordinance annexing the

territory by the city or town governing body . . . subject to the review of the court to determine the validity thereof if petitions in objection have been filed." A.R.S. § 9-471(D).

After the annexation became final, Glendale could only de-annex Area 137 in favor of another municipality by following the procedures required by A.R.S. § 9-471.02, or return Area 137 to the county as a county owned park by following the procedures required by A.R.S. § 9-471.03. Neither of the conditions for de-annexation has ever existed with respect to Area 137, and none of the statutory procedures for de-annexation was undertaken. (ROA 58 ¶¶ 13, 14 and 15.) "The parties agree that de-annexation was not an option." (ROA 60 at 5, footnote 9.)

IV. Glendale's Final Annexation of Area 137 Was Never Reviewed by a Court and Thus Remained Final and Effective.

Glendale Media I's timely objection caused the annexation to be "subject to the review of the court to determine" the validity of the annexation. A.R.S. § 9-471(D). Such court review never occurred because Glendale Media I never prosecuted its objection. Thus, the required joint pretrial statement was never filed in the case Glendale Media I initiated. That case was dismissed from the Court's inactive calendar on October 7, 2002. (ROA 46 ¶ 8; ROA 58 ¶ 8.)

V. The Tribe's Purchase of Land within Area 137 After Final Annexation.

In mid-2003, the Tribe engaged an attorney in the State of Washington to form Rainier Resources, Inc. ("RRI"), a corporation in which the Tribe was the only shareholder. (ROA 58 ¶ 17; ROA 61 ¶ 17.) The corporation was formed for the purpose of purchasing on the Tribe's behalf approximately 135 acres, some of which was within Annexation Area 137. (ROA 58 ¶ 17; ROA 61 ¶¶ 17 and 20.) The Tribe intended to build a gambling casino on the land. (ROA 58 ¶ 18; ROA 61 ¶ 18.) Before it purchased the land, the Tribe's corporation knew that the seller had requested annexation by Glendale and that Glendale was in the process of annexing the land. (ROA 61 ¶ 21.)

VI. Glendale's Acknowledgement of Its Mistake and That Area 137 Had Been Finally Annexed as of December 27, 2001, Thirty Days After Adoption of the 2001 Ordinance.

On June 23, 2009, the Glendale City Council adopted Ordinance No. 2688 (the "2009 Ordinance"), Appendix 9 to the Tribe's Opening Brief. The 2009 Ordinance:

1. Acknowledged that the 2001 annexation of "Annexation Area No. 137 was in accordance with Arizona Revised Statutes Section 9-471";

2. Acknowledged that the adoption of the 2002 Ordinance, which repealed the 2001 Ordinance, was "ineffective and a nullity" because Glendale lacked authority to abandon the annexation;

3. Acknowledged that Glendale annexed Area 137 as of December 27, 2001; and

4. Repealed the 2002 Ordinance.

(ROA 46 ¶ 12; ROA 58 ¶ 12.)

STATEMENT OF THE ISSUE

Under A.R.S. § 9-471(D), did Glendale's 2001 annexation of Area 137 "become final after the expiration of thirty days from the adoption of the ordinance annexing the territory," although the annexation was "subject to the review of the court to determine" whether the "annexation ordinance ha[d] been finally adopted in accordance with procedures established by statute . . . ?"

ARGUMENT

Standard of Review

The Tribe correctly stated the standard of review: "This Court reviews a trial court's summary judgment ruling *de novo*. *Acosta v. Phoenix Indemn. Ins. Co.*, 214 Ariz. 380, 381, ¶ 2, 153 P.2d 401, 402 (App. 2007); *League of Ariz. Cities & Towns v. Brewer*, 213 Ariz. 557, 559, ¶ 7, 146 P.3d 58, 60

(2006) (purely legal issues are reviewed *de novo*)." The Tribe's Opening Brief at 10-11.

I. Section 9-471(D) States Clearly that an Annexation Shall Become Final After Thirty Days. The Statute Contains No Provision that Finality Is Delayed or Stayed by a Challenge or Judicial Review.

The Tribe correctly states that Arizona courts look first to the statutory language when analyzing a statute's meaning. *U.S. West Communications, Inc. v. City of Tucson*, 198 Ariz. 515, 520, ¶ 11, 11 P.3d 1054, 1059 (App. 2000); *accord*, *Arpaio v. Steinle*, 201 Ariz. 353, 355, ¶ 5, 35 P.3d 114, 116 (App. 2001). Glendale agrees that if the language of a statute is clear and unambiguous, courts must "give effect to that language and apply it without using other means of statutory construction." *Arpaio*, 201 Ariz. at 355, ¶ 5, 35 P.3d at 116. Words used in a statute are to be given "their natural, obvious, and ordinary meaning." *Id.* "Each word, phrase, and sentence must be given meaning so that no part will be void, inert, redundant, or trivial." *City of Phoenix v. Yates*, 69 Ariz. 68, 72, 208 P.2d 1147, 1149 (1949).

By the same token, "[c]ourts cannot read into a statute something which is not within the manifest intention of the legislature as gathered from the statute itself. A departure from this rule is to alter the statute and legislate, and not to interpret." *State ex rel. Morrison v. Anway*, 87 Ariz.

206, 209, 349 P.2d 774, 776 (1960); *City of Phoenix v. Donofrio*, 99 Ariz. 130, 133, 407 P.2d 91, 93 (1965) (in banc).

The first sentence of A.R.S. § 9-471(D) states:

> The annexation shall become final after the expiration of thirty days from the adoption of the ordinance annexing the territory by the city or town governing body, provided the annexation ordinance has been finally adopted in accordance with procedures established by statute, charter provisions or local ordinances, whichever is applicable, subject to the review of the court to determine the validity thereof if petitions in objection have been filed.

The language of the statute is clear and unambiguous. The courts must therefore "give effect to that language and apply it without using other means of statutory construction." *Arpaio*, 201 Ariz. at 355, ¶ 5, 35 P.3d at 116. In its Statement of the Issue, the Tribe wrote: "Arizona law (A.R.S. § 9-471(D)) also provides that such an [annexation] ordinance will not become final until the thirty-day challenge period has expired, provided that the ordinance has been lawfully adopted and 'subject to review of the court." The Tribe's Opening Brief at 10, emphasis added. But that is not what the statute says. The actual language of A.R.S. § 9-471(D) says nothing about the annexation not becoming final. It states only that the annexation shall become final after thirty days. That critical difference vitiates all of the Tribe's arguments.

Indeed, the Tribe's Statement of the Issue does not make sense. The first clause of the Tribe's Statement, which does not appear in the statute, attempts to state that the annexation will not become final. But the second clause, correctly paraphrasing the proviso in the statute, provides the conditions under which the statute would become final.

Clearly, the actual, plain language of A.R.S. § 9-471(D) does not state what the Tribe claims in its Statement of the Issue. Instead, as the Tribe recognizes one page later, the statute states just the opposite, i.e., that the "annexation shall become final after the expiration of thirty days, *provided* or *on the condition that* the annexation ordinance has been adopted in accordance with the procedures set forth in A.R.S. § 9-471 . . . ." The Tribe's Opening Brief at 11-12, italics in original.

Glendale agrees with the Tribe that the first sentence of A.R.S. § 9-471(D) contains a proviso: "provided the annexation ordinance has been finally adopted in accordance with procedures established by statute . . . , subject to review of the court to determine the validity thereof if petitions in objection have been filed. . . ." Glendale also agrees that the function of that "proviso is to create a condition precedent; to except something from the enacting clause; to limit, restrict, or qualify the statute in whole or in part, or to exclude from the scope of the statute that which otherwise would be

within its terms." The Tribe's Opening Brief at 13, quoting *Lonergan v. May*, 53 S.W.3d 122, 130 (Mo. Ct. App. 2001).

But the proviso is concerned with whether an annexation is valid ("subject to review of the court to determine the validity thereof"), not when it becomes final. That is why the proviso says nothing about a stay or delaying the finality of the annexation. The proviso or condition addresses whether "the annexation ordinance has been finally adopted in accordance with procedures established by statute . . . ." A.R.S. § 9-471(D). Certainly if a petition challenging the validity of the annexation is filed and a court determines the annexation ordinance was not "finally adopted in accordance with procedures established by statute," the annexation would not be valid and would be reversed, regardless of when it became final. A.R.S. § 9-471(D); *Copper Hills Enterprises, Ltd. v. Arizona Dept. of Rev.*, 214 Ariz. 386, 153 P.3d 407 (App. 2007). That is what the plain language of the statute says: "subject to review of the court" to determine whether "the annexation ordinance has been finally adopted in accordance with procedures established by statute . . . ." There is no contention here that the 2001 Ordinance was not adopted according to statutory procedures.

What the plain and unambiguous statutory language does not say is what the Tribe claims, namely: "an annexation ordinance becomes final after

thirty days *unless* a timely challenge has been filed." The Tribe's Opening Brief at 14, italics in original. According to the Tribe, "[i]n that event, the ordinance becomes effective only when the challenge is dismissed or there is a judicial determination that the annexation is valid." The Tribe's Opening Brief at 14, italics in original, underlining added.

> [H]ad the legislature wanted to *suspend* the annexation from taking effect as opposed to the Court later reversing it, it could have said so. In other words, rather than using the phrase "shall become final [after] 30 days," the legislature could have said that the annexation will not take effect if an objection is filed, and that the annexation will be effective only if a reviewing court finds the objection to have been without merit."

Judge Mangum's Ruling granting Glendale's motion for summary judgment, ROA 68 at 6.

The Tribe's argument is that, despite the absence of any statutory language stating that finality of the annexation is delayed by a challenge until a court reviews that challenge, courts should interpret the statute that way. But the language of the statute is plain and unambiguous, so interpretation is neither needed nor permitted. *Arpaio*, 201 Ariz. at 355, ¶ 5, 35 P.3d at 116.

The principle that an action is final pending judicial review is not unique to the annexation process. The appeal process offers an apt analogy. Appellate courts also review the validity of prior proceedings. But an appeal

does not prevent the judgment from being final. On the contrary, an appeal can typically be taken only from a final judgment. A.R.S. § 12-2101(B). Indeed, unless a supersedeas bond is filed, execution can proceed to enforce a final judgment while an appeal is pending. Rule 10(e), Arizona Rules of Civil Appellate Procedure ("A cost bond or affidavit provided for in subdivisions (a) and (c) of this rule shall not suspend the judgment, but execution may issue thereon as if no appeal had been taken."); Rule 7(b), Arizona Rules of Civil Appellate Procedure ("When a supersedeas bond . . . is filed . . . the execution of the judgment appealed from and all further proceedings thereon shall be stayed . . . .")

The annexation statute operates the same way. Annexation is final thirty days after the annexation ordinance is adopted. A court may later invalidate the final annexation if it upholds an objection to it, but A.R.S. § 9-471(D) nowhere suggests that that possibility will prevent the annexation from becoming final. If the legislature had intended that the annexation not be final pending court review of a challenge, it would have said so explicitly, rather than providing first that the "annexation shall become final after the expiration of thirty days" and then, in the same sentence, stating only that the annexation is "subject to the review of the court" if "petitions in objection have been filed." A.R.S. § 9-471(D).

II. Case Law Supports Following the Actual Language of A.R.S. § 9-471(D), Namely that an Annexation Shall Become Final After Thirty Days and that Finality Is Not Delayed or Stayed by a Challenge or Judicial Review.

One Arizona case relied on by the Tribe is *Rural/Metro Fire Dept., Inc. v. Pima County*, 122 Ariz. 554, 596 P.2d 389 (App. 1979). *Rural/Metro* concerned a different statute, A.R.S. § 9-1006, which provides for annexation of property to a volunteer fire district. That statute "contains no provision for appeal," just as was true with A.R.S. § 9-471 before subsection (D) was added to it in 1967. *Id.*, 122 Ariz. at 555, 596 P.2d at 390.

For that reason, the opinion in *Rural/Metro* relied on earlier municipal annexation cases before the addition of subsection (D) to A.R.S. § 9-471 granting landowners the right to challenge an annexation, which they now have. Thus, *Rural/Metro* held that where the annexation statute contains no provision for appeal, "a private citizen has no standing to attack the validity of a completed annexation." *Id.* A private citizen could, however, "bring an action to prevent the completion of the proposed annexation" before it has been completed. *Id.* To do so, a citizen would bring an action for an injunction. That is what the plaintiffs did in the cases *Rural/Metro* cites, *Colquhoun v. City of Tucson*, 55 Ariz. 451, 103 P.2d 269 (1940), and *Gorman v. City of Phoenix*, 70 Ariz. 59, 216 P.2d 400 (1950).

> [W]hen proceedings changing the boundaries of a municipal corporation have been initiated but not completed, taxpayers of the area involved are proper parties to maintain an action for an injunction against completing the change.

Colquhoun, 55 Ariz. at 454, 103 P.2d at 271.

> A citizen may not attack an annexation ordinance after the same is complete, but may enjoin the city during the process of annexation where it is alleged that the city lacks jurisdiction of the property.

Gorman, 70 Ariz. at 64; 216 P.2d at 403. *See also*, *City of Phoenix v. Town of Cave Creek*, 167 Ariz. 227, 228, 805 P.2d 1048, 1049 (App. 1990) ("The ordinance became effective 30 days after passage. Phoenix timely challenged the ordinance and sought to enjoin its implementation.")

The party that challenged Glendale's annexation, Glendale Media I, did not apply for an injunction "to prevent the completion of the proposed annexation." Appendix 5 to the Tribe's Opening Brief at 4; *Rural/Metro*, 122 Ariz. at 555, 596 P.2d at 390. And the "[a]vailability of other means of judicial review did not make the proceedings before the [fire district] board [approving annexation] any less complete or final." *Id.*, 122 Ariz. at 555-56, 596 P.2d at 390-91, citation omitted. *Rural/Metro* supports Glendale's position that Glendale Media I's challenge did not delay the finality of the 2001 annexation.

The Tribe also relies on *Gieszl v. Town of Gilbert*, 22 Ariz.App. 543, 529 P.2d 255 (1974), also cited by *Rural/Metro*. *Gieszl* held only that a municipality cannot use its emergency powers under A.R.S. § 19-142(B) to interfere with a landowner's right to object to annexation within thirty days under A.R.S. § 9-471(C). *Id.*, 22 Ariz.App. at 545, 529 P.2d at 258. But the Court of Appeals also made it clear that the annexation did indeed become final and effective after that thirty-day period. *Id.*, 22 Ariz.App. at 546, 529 P.2d at 258 ("such an annexation ordinance does not become effective until 30 days after the first reading of that ordinance.")[2]

The only authority that contains language that might appear at first glance to support the Tribe's position is *Copper Hills Enterprises, Ltd. v. Arizona Dept. of Rev.* The background of that case was that the City of Globe adopted an ordinance attempting to annex an area known as the Gila County Island. In a previous case, the Town of Miami had successfully challenged the annexation on the ground that the land to be annexed was not contiguous to Globe and thus failed to comply with the requirements of A.R.S. § 9-471. From the time the Globe ordinance was adopted until the Court of Appeals found it invalid, Globe had collected almost $100,000 in

[2] A.R.S. § 9-471(D) formerly provided that the ordinance became final thirty days from its first reading, rather than thirty days from adoption of the annexation ordinance, as it does today.

municipal transaction privilege taxes from Copper Hills Enterprises. Copper Hills Enterprises sued to recover the taxes paid.

The "crux of [the] appeal [was] whether the attempted annexation empowered the City [of Globe] for a limited time to levy taxes on businesses within the subject area." *Id.*, 214 Ariz. at 389, ¶ 7, 153 P.3d at 410. The Court of Appeals held that Globe was not entitled to the taxes collected "as a result of the invalid annexation," *Id.*, 214 Ariz. at 392, ¶ 20, 153 P.3d at 413, and that Copper Hills Enterprises was entitled to a refund. *Id.*, 214 Ariz. at 392-93, ¶ 26, 153 P.3d at 413-414.

The language the Tribe relies on is as follows:

> The City's argument that the annexation became final hinges on the premise that it complied with all applicable procedures, including the procedures required by A.R.S. § 9-471. That premise, however, is flawed. . . . [T]he annexation did not comply with at least one of the procedures required by A.R.S. § 9-471(A), and therefore it did not become final. *See* A.R.S. § 9-471(D).

Id., 214 Ariz. at 390, ¶ 9, 153 P.3d at 410.

The Tribe embraces the last phrase, "did not become final," as support for its position that a challenge and judicial review suspend the finality of the annexation. But that was not the issue or the holding in *Copper Hills*. In a later review in that case, this Court held that an annexation was invalid,

"null and void" *ab initio*. *Id.*, 214 Ariz. at 389, ¶ 10, 153 P.3d at 410. That process and holding is exactly what A.R.S. § 9-471(D) anticipates.

But the Court in *Copper Hills* was not asked to decide prospectively when the annexation would take effect. It decided retroactively that the annexation never became final because it was not valid, not because its finality was suspended prospectively pending court review. It is a prospective suspension the Tribe asks for here, in the absence of any warrant for doing so in the language of the statute. *Copper Hills* did not decide that question and so offers no actual support for the Tribe's position. No authority does. A.R.S. § 9-471(D) clearly provides for post-final review of the validity of the process, but not a delay or suspension of the annexation's finality after the thirty-day period. On the contrary, "[t]he annexation shall become final after the expiration of thirty days from the adoption of the ordinance . . . subject to the review of the court." A.R.S. § 9-471(D).

It is one thing, after the court review provided for in A.R.S. § 9-471(D), to declare that an annexation was not final because it was invalid. It is entirely a different matter to declare that the annexation is not final pending that court review. The statute does not suspend the finality of the annexation beyond thirty days.

III. Following the Actual Language of A.R.S. § 9-471(D) Gives Consistent Effect to All the Provisions of A.R.S. § 9-471.

Glendale simply relies on the actual language of A.R.S. § 9-471. Contrary to the Tribe's assertion, that reliance does not read out of the statute the proviso in subsection (D), but instead gives consistent effect to all the provisions of the statute. Subsection (C) of A.R.S. § 9-471 provides that an interested party "can question the validity of the annexation for failure to comply with this section." It also provides: "All hearings provided by this subsection and all appeals therefrom shall be preferred and heard and determined in preference to all other civil matters, except election actions."

The Tribe argues that "expediting consideration of an annexation challenge makes sense if the effectiveness of the annexation is suspended pending judicial resolution of that challenge under Section 9-471(D)." The Tribe's Opening Brief at 20-21. Expediting consideration of the challenge also makes sense if annexation is not suspended. The Tribe claims that difficulties may arise if finality is not suspended. The Tribe's Opening Brief at 24. But the legislature chose to address any such potential difficulties by providing that any challenge of the annexation would be resolved quickly after the annexation becomes final.

The Tribe also contends that "the reference to judicial review in Section 9-471(D) must mean something different from the reference to judicial review in Section 9-471(C), because otherwise the reference to judicial review in Section 9-471(D) would be superfluous." The Tribe's Opening Brief at 21. The Tribe appears to suggest that reading the two subsections together and giving effect to both means that two judicial reviews are allowed to the same annexation. That would not make sense.

Rather, Judge Mangum was correct: the phrase "subject to the review of the court to determine the validity thereof" in Subsection (D) "merely point[s] out that judicial review of the annexation process is allowed." ROA 68 at 6. A.R.S. § 9-471 subsections (C) and (D) are entirely consistent with each other and are not redundant. They refer to the same judicial review. Subsection (D) provides that an annexation is "subject to the review of the court." Subsection (C) anticipates the "review of the court" in subsection (D) and provides that all hearings in connection therewith ("provided by this section" rather than "this subsection") shall be preferred over other civil matters.

The subsections of the statute are consistent. It is the Tribe's Opening Brief that is not. At page 21, the Tribe states: "Consistent with these common principles of statutory construction, the Legislature obviously

intended Section 9-471(D)'s thirty-day delay in the finality of an annexation to correspond with the thirty-day period in Section 9-471(C) for filing a challenge." Glendale agrees. But then one page later, the Tribe writes:

> The City's interpretation – that the ordinance becomes effective in thirty days, no matter what, even if judicial review is pending . . . ignores the proviso in Section 9-471(D) and conflates the references to thirty-day periods in Sections 9-471(C) and 9-471(D).

The Tribe's Opening Brief at 22, emphasis added. The Tribe was right the first time; the thirty-day delay in the finality of an annexation in subsection (D) corresponds with the thirty-day period in subsection (C) for filing a challenge.

It is the Tribe that seeks to make the thirty-day periods inconsistent by reading into subsection (D) a suspension that is not there:

> But while Section 9-471(C) sets a thirty-day time limit on seeking judicial review, Section 9-471(D) suspends finality of an annexation ordinance during that same thirty-day period and, in the same sentence, imposes a condition that further suspends finality if a timely challenge is filed.

The Tribe's Opening Brief at 21, emphasis added. Section 9-471(D) contains no language to support the emphasized portion of the Tribe's statement.

Our Supreme Court recognized the consistency of the two subsections without reading into the statute any suspension of finality in *Salt River*

Project Agricultural Improvement and Power District v. City of St. Johns, 149 Ariz. 282, 718 P.2d 184 (1986) (in banc):

> The legislative intent in providing for a thirty-day period to contest the validity of an annexation ordinance *before it is final* is clear. Since, prior to the enactment of the amendment, it was normal for all nonemergency annexation ordinances not to be final for 30 days, the legislature must have intended to make this 30-day waiting period applicable in *all* cases by adopting § 9-471(C) and (D). Thus, the legislative granting of the power to annex, given to a city or town, is expressly limited by the language of A.R.S. § 9-471 which provides that final annexation cannot be accomplished for thirty days following the first reading of the ordinance. A.R.S. § 9-471(D).

Id., 149 Ariz. at 285, 718 P.2d at 187, italics in original. The Supreme Court held that a municipality could not use the device of an emergency ordinance to make an annexation immediately final. In doing so, the Court recognized that the thirty-day periods provided in subsections (C) and (D) are one and the same.

The Tribe also cites *City of Phoenix v. Lockwood*, 76 Ariz. 46, 258 P.2d 431 (1953), claiming that it supports the position that "an annexation cannot be both final and subject to judicial review." The Tribe's Opening Brief at 22. That case was decided before A.R.S. § 9-471 was amended to allow interested parties to challenge an annexation. Under the prior law, "when the annexation has not been completed, a property owner within the

area affected [could] maintain an action to prevent the completion thereof." *Id.*, 76 Ariz. at 48, 258 P.2d at 433, citing *Colquhoun* and *Gorman.* That action would have been one for an injunction, as was the case in *Colquhoun* and *Gorman.*

But the legislature then changed the law to require that any challenge to the validity of the annexation be brought before the annexation is final and provided the courts with authority to void the final annexation expeditiously, if necessary. With that statutory remedy in place, an injunction is no longer needed.

Neither *City of Phoenix v. Lockwood*, nor any other case decided before A.R.S. § 9-471 was amended, provides any authority for the Tribe's proposition that, under the current A.R.S. § 9-471(D), the challenge must be decided before the annexation is final. As *Rural/Metro* held after the statute was amended, the "[a]vailability of other means of judicial review did not make the proceedings . . . any less complete or final." *Id.*, 122 Ariz. at 555-56, 596 P.2d at 390-91, citation omitted. The amendment adding subsection (D) to A.R.S. § 9-471 "make[s] an ordinance final and yet still allow[s] the annexation to be attacked." *Salt River Project v. City of St. Johns*, 149 Ariz. at 285, 718 P.2d at 187.

The Tribe writes that "an annexation must be attacked before it is final," if a challenge is to be brought at all. The Tribe's Opening Brief at 23. That is the purpose of A.R.S. § 9-471(C). But the Tribe's statement does not answer the question at issue: the finality of the annexation after thirty days, even if challenged. That question is answered by the plain language of A.R.S. § 9-471(D), which does not support the Tribe's position that the challenge must also be decided before the annexation becomes final. Instead, the statute only makes the final annexation "subject to the review of the court to determine the validity thereof. . . ."

IV. Following the Actual Language of A.R.S. § 9-471(D) Does Not Lead to Absurd or Irrational Results.

No matter how good an idea the Tribe thinks it would have been for the legislature to have delayed final annexation until a judicial challenge was completed, that is not what A.R.S. § 9-471(D) provides. To read a stay into the statute as the Tribe asks would be to legislate anew, not to interpret. That courts cannot do. *State ex rel. Morrison v. Anway*, 87 Ariz. at 209, 349 P.2d at 776; *City of Phoenix v. Donofrio*, 99 Ariz. at 133, 407 P.2d at 93.

The Tribe makes one final attempt to get around the absence of any manifest intention of the legislature in A.R.S. § 9-471(D) to make a challenge sufficient by itself to stay the finality of an annexation. It argues that "land could shift in and out of incorporated and unincorporated status

depending on the success of an annexation challenge." The Tribe's Opening Brief at 24.

The Tribe expresses concern that allowing a final annexation to be subject to later reversal, as stated in A.R.S. § 9-471(D), will create "intolerable limbo" in "taxes and assessments, fire services, police services, utilities, voting and election rights, and even the application of civil and criminal fines and penalties." The Tribe's Opening Brief at 24. But, "[a]ll hearings provided by this section and all appeals therefrom shall be preferred and heard and determined in preference to all other civil matters, except election actions." A.R.S. § 9-471(C). As a result, this "parade of horribles" is avoided or substantially mitigated by the expedited court review of a challenge.

It is true that a final annexation that is subject to later invalidation creates some uncertainty until the court reviews it. However, such uncertainty was resolved in *Copper Hills*; Globe had to refund the privilege taxes it had collected before the Court of Appeals held that Globe's annexation was invalid. As Judge Mangum wrote: "Reversing the effect of an annexation has perhaps occurred any number of times without undue difficulty." ROA 68 at 6, footnote 12.

Again, the Tribe's suppositions undermine the core of their argument. Potential problems could occur after finality. The legislature recognized that fact and chose to provide an expedited hearing of challenges to balance the interests involved.

Moreover, the choice the Arizona Legislature made for court review after an annexation becomes final is a reasonable one. By making the annexation final before any judicial review, the legislature chose to recognize and provide for important interests. Annexation occurs only upon the approval of a majority of the affected property owners. If a challenge were sufficient alone to delay annexation beyond thirty days, the majority of property owners who are in favor of annexation would continue to be deprived of all the benefits annexation into the municipality would provide. The majority could be deprived of those benefits by a single landowner who opposes annexation and files a completely frivolous challenge. The wishes of the majority of landowners and the City for a timely annexation should not be delayed or held hostage to the whims of one other landowner. That is not the way democracy works and that is not the way annexation works.

The legislature's reasonable choice to allow court review after an annexation becomes final recognizes the very limited nature of a court's review, i.e., to determine whether the annexation ordinance followed

statutory procedures. The legislature's choice also recognizes that municipalities generally follow the annexation procedures correctly, that most annexations are never challenged, and that few challenges are sustained.

Even if the statute as written produces occasional uncertainty that is not outweighed by other policy considerations, it is still up to the legislature, not the courts, to change the statute to provide for a stay pending judicial review. Again, "[c]ourts cannot read into a statute something which is not within the manifest intention of the legislature as gathered from the statute itself. A departure from this rule is to alter the statute and legislate, and not to interpret." *State ex rel. Morrison v. Anway*, 87 Ariz. at 209, 349 P.2d at 776; *City of Phoenix v. Donofrio*, 99 Ariz. at 133, 407 P.2d at 93.

The Tribe cites a number of cases from other states to support its contention that the finality or effectiveness of an annexation should be delayed by a legal challenge and judicial review. The Tribe's Opening Brief at 25, footnote 3. But those cases highlight exactly why a delay in finality cannot be read into A.R.S. § 9-471(D). In all but the last of the cases the Tribe cites, the state statutes involved clearly provided for a delay or stay of the annexation, which A.R.S. § 9-471(D) does not.

Thus, in *Jackson v. City of Little Rock*, 621 S.W.2d 852, 853 (Ark. 1981), the court quoted Ark.Stat.Ann § 19-307.2, now Arkansas Code of 1987 Annotated (A.C.A.) § 14-40-303(b)(2)(B): "'The annexation shall be effective . . . (if, as here, contested in circuit court) on the date the judgment of said Court becomes final.'" A.C.A. § 14-40-503(b) provides: "The decision of the municipal council shall be final unless suit is brought . . . ," emphasis added.

In *County Com'n v. Denver*, 547 P.2d 249, 251 (Colo. 1976), the court wrote: "However, Section 139-21-10 of the Act states in specific words that an annexation ordinance 'shall not become effective prior to court approval as specified in this section . . . .' The legislative intent is clear . . . ." (Emphasis added.) The Indiana Statute § 48-722 at issue in *Ensweiler v. City of Gary, Lake County, Ind.*, 325 N.E.2d 507, 507-508 (Ind. Ct. App. 1975), read: "Pending the appeal, and during the time within which the appeal may be taken, the territory sought to be annexed shall not be deemed a part of the annexing city." (Emphasis added.)

In *Parish of Ouachita v. Town of Richwood*, 697 So.2d 623, 627 (La. Ct. App. 1997), *reversed on other grounds*, *Caldwell Parish Police Jury v. Town of Columbia*, 930 So.2d 65 (La. Ct. App. 2006), the court quoted Louisiana statute § 33:174(C): "'If the extension of boundaries is adjudged

reasonable, the ordinance shall go into effect ten days after the judgment is rendered . . . ," emphasis added. The North Carolina Court of Appeals wrote in *Biltmore Square Assoc. v. City of Asheville*, 129 N.C.App. 101, 103, 497 S.E.2d 121, 123 (N.C. Ct. App. 1998):

> When judicial review of an annexation ordinance is sought, the effective date of the ordinance is set forth in N.C.G.S. § 160A-50(i):
>
> (i) If part or all of the area annexed . . . is the subject of an appeal to the superior court, then the ordinance shall be deemed amended to make the effective date with respect to such area the last day of the next full calendar month following the date of the final judgment of the superior court . . . ."

(Emphasis added.) Indeed, the Court of Appeals strictly construed the statutory stay in *Biltmore Square*:

> There is no evidence to support a conclusion that the General Assembly intended the automatic stay of an annexation ordinance to include appeals to the United States Supreme Court. In any event, if a party desires to stay the effective date of an annexation while a petition for certiorari is pending before the United States Supreme Court, a stay can be requested . . . ."

Id., 129 N.C.App. at 104, 497 S.E. 2d at 123.

The last case from another state on which the Tribe relies is *Town of Huntsville v. Scott County*, 269 S.W.3d 57, 62 (Tenn. Ct. App. 2008). That decision did state, as the Tribe notes, that "the mere 'filing' of a *quo*

warranto action holds the effective date of the annexation in abeyance until the filed action is dismissed." But in Tennessee,

> a property owner challenging [an] annexation via a *quo warranto* proceeding will bear the burden of showing that the annexation 'is unreasonable for the overall well-being of the communities involved' or that '[t]he health, safety, and welfare of the citizens and property owners of the municipality and territory will not be materially retarded in the absence of such annexation.

Highwoods Properties, Inc. v. City of Memphis, 297 S.W.3d 695, 707 (Tenn. 2009), citing the Tennessee statute. The question in a Tennessee *quo warranto* action, whether the annexation is unreasonable, is much broader than the limited review of whether statutory procedures have been followed, which is the only question subject to court review under A.R.S. § 9-471(D). Thus, there is more reason to delay the effectiveness of an annexation in Tennessee than there is in Arizona.

The controlling statute, A.R.S. § 9-471(D), provides that Glendale's annexation of Area 137, including the parcel subsequently and surreptitiously purchased by the Tribe for a casino, became final thirty days after Glendale adopted the annexation ordinance. The fact that Glendale Media I challenged the annexation made it subject to court review. But the statute contains nothing that indicates any intention by the legislature to stay

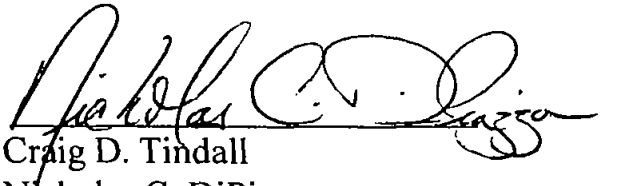
the finality of the annexation pending that review. Judicial review does not require a stay.

Of course, the Tribe has no real interest in the state's annexation statute. Delaying the final annexation until a judicial challenge is completed would serve the Tribe's interests here, which are not merely to avoid municipal jurisdiction, but to remove the land from all state jurisdiction and adherence to state law. But that is not what the statute says and is not in the best interests of all the other residents of Arizona and its municipalities.

CONCLUSION

For the foregoing reasons, this Court should affirm the Superior Court's summary judgment ruling in favor of Appellees the City of Glendale, et al.

RESPECTFULLY SUBMITTED this 5th day of October, 2010.

By: 

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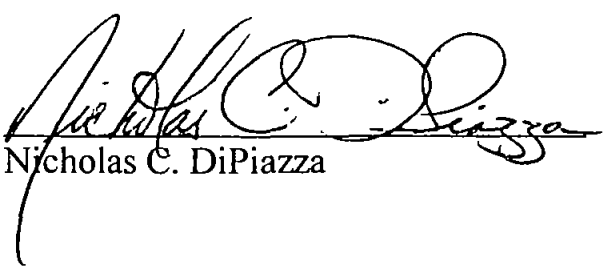
CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the attached brief uses proportionately spaced type of 14 points or more, is double spaced using a roman font and contains 7,252 words, and does not exceed 40 pages.

DATED this 5th day of October, 2010.



Nicholas C. DiPiazza

CERTIFICATE OF SERVICE

I certify that on October 5, 2010, I caused the original and six copies of the foregoing Answering Brief to be hand-delivered, to:

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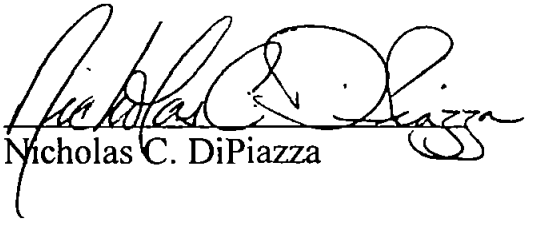

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