EXT NO. 6

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

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

PLAINTIFF/APPELLANT THE TOHONO O'ODHAM NATION'S OPENING BRIEF

James A. Ryan (#009253)
james.ryan@quarles.com
Lauren Elliott Stine (#025083)
lauren.stine@quarles.com
QUARLES & BRADY LLP
Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004-2391
602.229.5200

Lisa T. Hauser, Esq. (#006985)
LHauser@gblaw.com
GAMMAGE & BURNHAM
Two North Central Avenue, 18th Floor
Phoenix, Arizona 85004

Counsel for Plaintiff/Appellant
The Tohono O'odham Nation

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Phoenix, Arizona 85004-2391
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Lisa T. Hauser, Esq. (#006985)
LHauser@gblaw.com
GAMMAGE & BURNHAM
Two North Central Avenue, 18th Floor
Phoenix, Arizona 85004

Counsel for Plaintiff/Appellant
The Tohono O'odham Nation

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

ARIZONA STATE STATUTES AND RULES

MISCELLANEOUS

STATEMENT OF THE CASE

In November 2001, Appellee City of Glendale (the "City") adopted an ordinance to annex certain property adjacent to the City boundary. (See ROA 46 ¶ 4 & ex. 2.)[1] An owner of property in the proposed annexation area filed a timely action to challenge the ordinance. (See ROA 46 ¶ 4 & ex. 3.) In May 2002, the City publicly acknowledged that this challenge had delayed the effectiveness of the annexation -- even with respect to consenting property owners. (See ROA 7 & ex. 5.) Before the judicial challenge was resolved, the City adopted a new ordinance in May 2002 that repealed and declared invalid its attempted 2001 annexation so that it could proceed with the annexation of territory not owned by the challenger. (See ROA 46 ¶ 6 & ex. 4.) In October 2002, the challenge was dismissed by the Court for lack of prosecution. (See ROA 68 at 2.)

In 2003, Appellant the Tohono O'odham Nation (the "Nation") purchased approximately 135 acres of property that had been owned by the challenger and that was part of the failed annexation attempt the City had repealed in 2002. (See ROA 46 ¶¶ 1, 5, 6, 10.) In June 2009 -- some six years after the Nation bought the property and seven years after the City repealed the 2001 annexation ordinance -- the City attempted to nullify the repeal and revive the annexation as to the Nation's property through the adoption of a new ordinance. (See ROA 46 ¶ 12 & ex. 17.)

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

The City took this extraordinary action only after learning that the Nation had asked the United States to make the property part of its reservation and was planning to build a resort and casino on the property. (See ROA 46 ¶¶ 10-12; ROA 68 at 3 n.5.)

The Nation filed a timely complaint in Maricopa County Superior Court, challenging the City's actions. (See ROA 1.) The focus of this controversy is the interpretation of A.R.S. § 9-471(D) -- the Arizona statute governing the finality of annexation ordinances. (See ROA 1, 68.) Based on the plain language of A.R.S. § 9-471(D), fundamental principles of statutory construction, and public policy, the Nation moved for summary judgment, arguing that the timely challenge to the 2001 annexation ordinance had delayed the finality of the annexation pending judicial review. (See ROA 47.) In particular, the Nation argued that Section 9-471(D) conditions the finality of an annexation ordinance on compliance with applicable legal requirements and, if a timely court challenge is filed, on resolution of such challenge. (See ROA 47, 60, 66.) Thus, by repealing the 2001 annexation ordinance while the legal challenge was still pending, the City effectively withdrew its annexation ordinance before it became final. (See ROA 47, 60, 66.) The City filed a cross-motion for summary judgment. (See ROA 57.)

On March 10, 2010, the trial court denied the Nation's motion for summary judgment and granted summary judgment in favor of the City. (See ROA 68,

attached hereto as Appendix "2"; see also RT Mar. 5, 2010, attached hereto as Appendix "3".)[2] Although it recognized the "attractiveness" of the Nation's common-sense analysis of A.R.S. § 9-471, the trial court held that an annexation ordinance becomes effective thirty days after its adoption regardless of a timely legal challenge. (See ROA 68.) The Nation filed a timely appeal. (See ROA 71.)

STATEMENT OF THE FACTS

I. Arizona Law Evolves to Give Private Parties The Right To Challenge An Annexation Ordinance.

Since 1901, Arizona municipalities have had statutory authority to alter their boundaries through annexation. See Ariz. Civ. Code § 509 (1901) (predecessor to A.R.S. § 9-471). The process for exercising that authority has changed little over the years. See id. The Arizona statutes governing municipal annexation are now set forth in A.R.S § 9-471 et seq. Under Section 9-471(A), before a municipality may annex contiguous land, it must file a petition that identifies the property, hold a public hearing, circulate the petition for signatures, and comply with other requirements. Id. § 9-471(A).

Although the procedures required for municipal annexations have changed little over the years, the avenues for challenging an annexation have changed considerably. Until 1967, private parties had no statutory right to challenge an

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[2] "RT" stands for the reporter's transcript of proceedings before the Maricopa County Superior Court.

annexation. (See ROA 60 at 7-9.) But in the 1930s and 1940s, Arizona courts had begun to carve out limited circumstances under which private citizens could bring a challenge. (See ROA 60 at 7.) For instance, Arizona courts held that an interested party could challenge an annexation before the ordinance became effective, but not afterwards. (See ROA 60 at 7-8.)

In response to judicial rulings permitting interested-party challenges, municipalities began adding emergency clauses to their annexation ordinances to make them effective immediately. (See ROA 60 at 9.) By adopting annexation ordinances with emergency clauses, municipalities effectively precluded interested parties from challenging annexations. (See ROA 60 at 9.)

In 1967, to preserve and clarify the right of private parties to challenge annexations, the Arizona Legislature amended A.R.S. § 9-471 to give private parties an express, statutory right to do so. (See ROA 60 at 9.) Section 9-471(C) states, in pertinent part, that an interested party may challenge an annexation ordinance by filing a petition "to question the validity of the annexation for failure to comply with this section." Id. A challenger has thirty days after the adoption of the ordinance to file a petition. Id. And such challenges are to be expedited and "preferred and heard and determined in preference to all other civil matters, except election actions." Id.

In the next subsection, Section 9-471(D), the Legislature provided that an annexation ordinance would not become "final" until thirty days after it was adopted, which obviously mirrors the thirty-day period in Section 9-471(C) for filing challenges. Id. § 9-471(C), (D). Section 9-471(D) also conditions finality of such an ordinance on compliance with all legal requirements "subject to the review of the court to determine validity" if a challenge has been filed. Id. The first full sentence of Section 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.*

Id. (emphasis added); see also ROA 60 at 4-5.

After Section 9-471 was amended to provide a private, statutory right of challenge, the Arizona courts held that municipalities could no longer thwart the right of a party to challenge an annexation by enacting annexation ordinances with emergency clauses. (See ROA 60 at 9-10.) And, as noted above, Section 9-471(C) states that annexation challenges are to be expedited and all hearings in connection with such challenges must be held on a priority basis. (See ROA 66 at 7.)

II. The City Adopts The 2001 Annexation Ordinance And Then Repeals And Invalidates That Ordinance After It Is Challenged In Court.

In November 2001, the Glendale City Council enacted Ordinance 2229 (the "2001 Ordinance") to annex territory adjacent to the City known as Area 137. (See ROA 47 ¶ 4 & ex. 2, Ordinance 2229 attached as Appendix "4".) In December 2001, the Nation's predecessor in interest, Glendale Media I, LLC ("Glendale Media"), owned a portion of Area 137 and timely filed a challenge to the annexation in Maricopa County Superior Court. (See ROA 46 ¶¶ 5, 10 & ex. 3, Petition attached as Appendix "5".)

While Glendale Media's challenge was still pending, the City expressly acknowledged that the challenge had delayed the effectiveness of the 2001 Ordinance. (See ROA 46 ¶¶ 7, 8 & exs. 5-9, May 28, 2002 City Council meeting minutes attached as Appendix "6".) As the City Attorney explained to the City Council in May 2002: "While the petition to contest the annexation is pending, the annexation of all the parcels that were part of the annexation will be *delayed until the matter is resolved in court.*" (See ROA 46 ¶ 7 & ex. 5) (emphasis added.)

Recognizing that the timely challenge to the 2001 Ordinance had delayed the effectiveness of the annexation, the City reevaluated its position. (See ROA 46 ¶ 7 & ex. 5.) While the challenge was still pending, the City abandoned its efforts to annex the entire Area 137, and instead focused on annexing a subset of parcels,

whose owners were not opposed to annexation. (See ROA 46 ¶¶ 7-9 & ex. 6-13.) Thus, on May 28, 2002, the City Manager and City Attorney recommended that the City Council repeal the 2001 Ordinance and enact new ordinances to annex a subset of parcels within Area 137. (See ROA 46 ¶ 7 & ex. 5.) Based on these recommendations, the City Council repealed the 2001 Ordinance, and enacted Ordinance No. 2258 (the "2002 Ordinance"), which stated, in part:

> That [the 2001 Ordinance] adopted by 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.*

(See ROA 46 ¶ 6 & ex. 4, Ordinance 2258 attached as Appendix "7") (emphasis added.)

After adopting the 2002 Ordinance, the City adopted a series of new ordinances that annexed a subset of parcels within Area 137. (See ROA 46 ¶ 11 Exs. 14-16, ordinances collectively attached as Appendix "8".) However, the parcel owned by the Nation's predecessor, Glendale Media, was not annexed by the City under those ordinances. (See ROA 46 ¶ 10 & ex. 13.)

III. After The 2001 Ordinance Is Repealed And The Challenge Dismissed, The Nation Buys Property In The Area Encompassed By The Repealed 2001 Ordinance.

Glendale Media's challenge to the 2001 Ordinance was finally dismissed in October 2002. (See ROA 46 ¶ 8 & exs. 6-9.) In August 2003, the Nation purchased approximately 135 acres of unincorporated land in Area 137 (the

"Nation's Parcel"). (See ROA 61 ¶ 20.) As commonly happens in many such real estate transactions, the Nation did not acquire ownership under its corporate name, but rather formed a wholly-owned entity (Rainier Resources, Inc.) to purchase the land. (See ROA 61 ¶ 20.) The Nation later took title in its own name. (See ROA 46 ¶ 1.)

IV. Seven Years Later, After Learning That The Nation Had Purchased The Land, The City Attempts To Revive The 2001 Ordinance That It Had Repealed.

For over seven years -- from the repeal of the 2001 Ordinance in May 2002 until June 2009 -- the City did not exercise jurisdiction over the Nation's Parcel. (See ROA 46 ¶ 11 & exs. 14-16.) The City did not tax it. And the City did not provide any municipal services to the parcel, including police, fire, electrical, water, or sewage services. Rather, the City regarded and treated the Nation's Parcel as unincorporated land, outside the City's jurisdiction. (See ROA 46 ¶ 11.)

The City changed its position only after it learned that the Nation had acquired the parcel and, in January 2009, had announced its intent to develop and construct a resort and casino on the parcel. (See ROA 46 ¶¶ 11-12; ROA 58 ¶ 18; ROA 61 ¶ 18;ROA 68 at 3 n.5.) On June 23, 2009, the City reacted by adopting a new ordinance, Ordinance No. 2688 (the "2009 Ordinance"), which attempted to revive the 2001 Ordinance and give it retroactive effect to December 2001, and which also declared that the 2002 Ordinance repealing the 2001 Ordinance was

invalid. (See ROA 46 ¶ 12 & ex. 17, Ordinance 2688 attached as Appendix "9".) After adopting the 2009 Ordinance, the City claimed that the Nation's Parcel had been part of the City since December 2001. (See ROA 46 ¶ 12 & ex. 17.)

V. The Nation Challenges The City's Actions And The Court Finds For The City.

The Nation filed a challenge to the 2009 Ordinance under A.R.S. § 9-471 in the Maricopa County Superior Court. (See ROA 1.) After discovery, both sides moved for summary judgment. (See ROA 47, 57.) The parties agreed that there were no material issues of fact and that the dispute turned on the interpretation of Section 9-471(D) -- particularly, whether Glendale Media's timely challenge to the 2001 Ordinance had delayed its finality while the challenge was pending. (See ROA 47, 57, 60, 65-66.)

After briefing and oral argument, the trial court denied the Nation's motion and granted the City's motion in a written opinion. (See ROA 68.) The court's opinion began by noting that the Nation's position "is attractive because of its common sense analysis." (See ROA 68 at 5.) But the court went on to find that Section 9-471(D) was "unambiguous," and that the first part of the section -- that an annexation "shall become final after thirty days from the adoption of the ordinance" -- means that an annexation ordinance becomes effective after thirty days *even if* there is pending a timely judicial challenge. (See ROA 68 at 5-6.) In response to the Nation's argument that finality of an annexation ordinance before

resolution of a challenge would create a host of practical problems, the trial court simply observed that a court could "reverse the annexation and restore the parties to the *status quo ante*." (See ROA 68 at 6) (emphasis added.) The trial court held: (1) that the 2001 Ordinance had become effective automatically after thirty days even though a judicial review was pending; and (2) that the 2002 Ordinance repealing the 2001 Ordinance was a nullity. (See ROA 68 at 6-10.) The trial court entered judgment in favor of the City. (See ROA 68.)

STATEMENT OF THE ISSUE

Under Arizona law (A.R.S. § 9-471(C)), a private party may challenge an annexation ordinance by filing a petition within thirty days of its adoption. Arizona law (A.R.S. § 9-471(D)) also provides that such an 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." Did the trial court misread the language and intent of A.R.S. § 9-471(D) by finding that the annexation ordinance at issue became final thirty days after its adoption -- regardless of the fact that it was still "subject to review of the court"?

ARGUMENT

I. Standard of Review.

This Court reviews the trial court's summary judgment ruling de novo. See, e.g., Acosta v. Phoenix Indemn. Ins. Co., 214 Ariz. 380, 381, ¶ 2, 153 P.3d 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).

II. The Plain Language of Section 9-471(D) Supports The Nation's Position That A Timely Challenge Delays The Effectiveness Of An Annexation Ordinance Pending Judicial Review.

Arizona courts look first to the statutory language when analyzing a statute's meaning. U.S. West Commc'ns 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) (same). Words used in a statute are to be given "their natural, obvious, and ordinary meaning." Arpaio, 201 Ariz. at 355, ¶ 5, 35 P.3d at 116 (quoting Samsel v. Allstate Ins. Co., 199 Ariz. 480, 483, ¶ 10, 19 P.3d 621, 624 (App. 2001)); accord A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language."). And "[e]ach 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). If the language of the 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.

Applying these principles of statutory interpretation to Section 9-471(D), the language of the statute is not ambiguous -- an annexation ordinance becomes final after 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, which, if a timely annexation challenge has been filed, must be reviewed and resolved by a court. Again, the first sentence of Section 9-471(D) addresses when an annexation becomes final. The first phrase of that sentence states that the annexation will become "final after the expiration of thirty days from the adoption of the ordinance . . . ." A.R.S. § 9-471(D). The sentence could have stopped there, but it doesn't. It goes on to state that the ordinance becomes final "provided the annexation ordinance has been finally adopted in accordance with procedures established by statute" or other law. Id. And the "provided" clause doesn't end there. It adds one more condition to finality if a timely challenge has been filed: It is "subject to the review of the Court." Id.

Giving effect to its ordinary meaning, the word "*provided*" introduces a proviso or conditional phrase. A proviso is a limitation on the operation of a statute, and is often introduced by the word "provided." Norman J. Singer et al., Sutherland Statutory Construction: Statutes and Statutory Construction at § 20:22 (7th ed. 2007) ("Sutherland") (stating that for purposes of statutory interpretation, the word "provided" may "introduce a condition or exception, and be synonymous with 'if," or it can be used as a conjunction meaning 'and'"); see also Lonergan v. May, 53 S.W.3d 122, 130 (Mo. Ct. App. 2001) (same).

Provisos "serve the purpose of restricting the operative effect of statutory language to less than what its scope of operation would be otherwise." Sutherland at § 47:8; see also Lonergan, 53 S.W.3d at 130 ("Generally a proviso is confined to the clause or distinct portion of a statute to which it pertains or which immediately precedes it."). Indeed, the typical function "of a 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." Lonergan, 53 S.W.3d at 130 (quoting Commerce Bank of Kansas City v. Mo. Div. of Fin., 762 S.W.2d 431, 434 (Mo. Ct. App. 1988)).

Section 9-471(D) contains such a proviso: "*provided* the annexation ordinance has been finally adopted in accordance with procedures established by statute . . ., subject to the review of the court to determine the validity thereof if petitions in objection have been filed . . . ." Id. (emphasis added). This proviso operates as a condition on the portion of the statute that immediately precedes it: "The annexation shall become final after the expiration of thirty days . . . ." Id. In other words, the proviso imposes a condition precedent on the finality of the annexation ordinance: "The annexation shall become final after the expiration of thirty days . . . *provided [i.e. on the condition that]* the annexation ordinance has

been finally adopted in accordance with procedures established by statute . . . ." subject to review of the court to resolve a timely challenge. Id. (emphasis added).

The proviso in Section 9-471(D) also indicates how the delay of finality is resolved if a timely challenge has been filed: "*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." Id. (emphasis added.) Thus, if a timely challenge is filed, a court is to determine whether the condition imposed on finality of the ordinance (i.e. compliance with the applicable legal requirements) has been satisfied. And until that challenge is resolved in favor of the annexation's validity, the challenged annexation does not become final. See id.

This interpretation of Section 9-471(D) makes sense. The Arizona Legislature did not simply condition the effectiveness of an annexation on whether the "annexation ordinance has been finally adopted in accordance with procedures established by statute," but also specified how to resolve that issue. Under the plain language of Section 9-471(D), an annexation ordinance becomes final after thirty days *unless* a timely challenge has been filed. In that event, the ordinance becomes effective only when the challenge is dismissed or there is a judicial determination that the annexation is valid.

III. The Nation's Interpretation Gives Effect To Each Word And Phrase Of A.R.S. § 9-471(D) And Is Consistent With Arizona Case Law Interpreting That Subsection.

The Nation argued in the trial court that if a timely challenge to an annexation ordinance has been filed, that challenge must be resolved before the ordinance becomes final. (See ROA 47, 60, 66, 68.) The Nation's interpretation of Section 9-471(D) is consistent with what Division Two of the Court of Appeals had to say about municipal annexation laws in Rural/Metropolitan Fire Department, Inc. v. Pima County, 122 Ariz. 554, 596 P.2d 389 (App. 1979). Although Rural/Metro involved a challenge to the annexation of certain property by a fire district, the court relied on municipal annexation case law to determine whether the annexation challenge at issue was timely. Relying on cases decided both before and after the Legislature amended A.R.S. § 9-471 in 1967 to give private parties the statutory right to challenge an annexation, the court stated that if the annexation has not been completed, "a private citizen can bring an action *to prevent the completion of the proposed annexation* and has standing to raise a jurisdictional challenge." Id. at 555, 596 P.2d at 390 (citing Colquhoun v. City, 55 Ariz. 451, 103 P.2d 269 (1940); Gorman v. City of Phoenix, 70 Ariz. 59, 216 P.2d 400 (1950); Gieszl v. Town of Gilbert, 22 Ariz. App. 543, 529 P.2d 255 (App. 1974)) (emphasis added). Thus, consistent with the Nation's interpretation of

Section 9-471(D), Rural/Metro supports the conclusion that a timely challenge "prevents the completion of" the proposed annexation pending judicial review.

Rural/Metro is also consistent with this Court's ruling in Copper Hills Enterprises, Ltd. v. Arizona Department of Revenue, 214 Ariz. 386, 153 P.3d 407 (App. 2007). In Copper Hills, the City of Globe had adopted an ordinance in July 1996 that purported to annex certain unincorporated property referred to as the Gila County Island. Id. at 388, ¶¶ 2-3, 153 P.3d at 409. The Town of Miami filed a timely challenge to the ordinance, alleging that the City of Globe had failed to comply with the annexation requirements of A.R.S. § 9-471. Id. ¶ 3. That challenge was ultimately successful because the land that the City of Globe attempted to annex was not contiguous. Id.

From the adoption of the challenged ordinance in July 1996 until the court declared it invalid in December 1998, the City of Globe had levied municipal transaction privilege taxes on businesses located within the Gila County Island. Id. ¶ 2. After the court declared the annexation ordinance invalid, a taxpayer within the Gila County Island filed a claim seeking a refund of nearly $100,000 in taxes that it had paid to the City of Globe between September 1996 and December 1998. Id. ¶ 4. An administrative law judge with the Arizona Department of Revenue ("ADOR") issued a ruling in the taxpayer's favor. Id. But that ruling "was reversed on appeal by the ADOR director," who concluded that whether the City

of Globe had jurisdiction to impose municipal taxes between the date that the annexation ordinance was passed and the date that the court declared the ordinance invalid, had not been litigated in the Town of Miami's annexation challenge. Id.

On appeal, this Court reversed, noting that the crux of the issue was whether the City of Globe's attempted annexation authorized it to levy taxes within the proposed annexation area while the annexation challenge was pending. Id. at 389, ¶ 7, 153 P.3d at 410. The City of Globe argued that, from the date of the passage of the annexation ordinance through the date that the ordinance was invalidated, "the purported annexation was effective for taxation purposes." Id. ¶ 10. In other words, according to the City of Globe, the annexation ordinance was final and effective, even though it was subject to judicial review. Id. ¶¶ 9-10. As this Court noted, however, the "City's argument that the annexation became final [hinged] on the premise that it complied with all applicable procedures." Id. ¶ 9. That premise was flawed because "the 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.*" Id. (emphasis added). Thus, failure to comply with the requirements of A.R.S. § 9-471(A) was a failure to satisfy a condition precedent to effective annexation and rendered the annexation ordinance "null and void". Id. ¶ 10; see id. at 390, ¶ 13, 153 P.3d at 411. Without a valid annexation ordinance, the City of Globe did not have jurisdiction to levy taxes on those businesses located in the proposed

annexation area. Id. at 391, ¶ 16, 153 P.3d at 412.

The interpretation of Section 9-471(D) proposed by the City and adopted by the trial court is inconsistent with this Court's decision in Copper Hills. The trial court's ruling cited the Copper Hills case in a footnote to suggest that the effects of an invalid annexation could be reversed without "undue difficulty." (See ROA 68 at 6.n.12.) But the trial court ignored this Court's conclusion in Copper Hills that an annexation ordinance does "*not become final*" when it does not comply with A.R.S. § 9-471. See 214 Ariz. at 389, ¶ 9, 153 P.3d at 410. And only by overlooking the holding in Copper Hills could the trial court conclude that the purported 2001 annexation of the Nation's Parcel became final regardless of the procedures established by A.R.S. § 9-471.

Moreover, the City's interpretation runs contrary to the universal principle of statutory construction that "[e]ach word, phrase, and sentence must be given meaning so that no part will be void, inert, redundant, or trivial." See City of Phoenix, 69 Ariz. at 72, 208 P.2d at 1149. In enacting Section 9-471(D), the Legislature obviously intended to give meaning to the proviso; otherwise, it would not be part of the statute. See Airport Props. v. Maricopa County, 195 Ariz. 89, 96, ¶ 23, 985 P.2d 574, 581 (App. 1999) ("We presume that the legislature does not intend to draft statutory provisons that are redundant, void, inert, superfluous, or contradictory."). Under the City's interpretation, however, the proviso is

effectively read out of the statute entirely because, no matter what, an annexation ordinance becomes effective in thirty days. And that interpretation violates a basic canon of statutory construction.

IV. The Nation's Interpretation Of Section 9-471(D) Is Consistent With Other Relevant Provisions In § 9-471.

"[S]tatutory provisions must be considered in the context of the entire statute and consideration must be given to all of the statute's provisions so as to arrive at the legislative intent manifested by the entire act." One Hundred Eighteen Members of Blue Sky Homeowners Ass'n v. Murdock, 140 Ariz. 417, 419, 682 P.2d 422, 424 (App. 1984); Skyview Cooling Co. v. Indus. Comm'n of Ariz., 142 Ariz. 554, 558, 691 P.2d 320, 324 (App. 1984). "Different sections of a single statute should be interpreted consistently." Indus. Comm'n of Ariz. v. Old Rep. Ins. Co., 223 Ariz. 75, 78, ¶ 8, 219 P.3d 285, 288 (App. 2009).

As with other statutory language, a proviso should be interpreted in a manner that is consistent with the entire body of the statute. See Reno v. Review Bd. of the Ind. Employment Sec. Div., 209 N.E.2d 269, 272 (Ind. Ct. App. 1965) ("A proviso must be construed together with the body of the act and a construction of a statute which would nullify or make a proviso plainly repugnant to the body of an act should be avoided."). "The words of a proviso must be construed to effectuate rather than to defeat the purpose of the statute." State v. Johnson, 179 S.E.2d 371, 383 (N.C. 1971). A "proviso should be construed together with the

enacting clause or body of the act, with a view to giving effect to each and to carrying out the intention of the legislature as manifested in the entire act and acts in pari materia." Id. (quoting 82 C.J.S. Statutes § 381); see also Lazare Kaplan & Sons v. Pensacola Hotel Co., 153 F. Supp. 31, 34 (N.D. Fla. 1957) (same). As discussed below, the Nation's interpretation of the proviso in Section 9-471(D) is in harmony with other relevant sections in A.R.S. § 9-471; the City's interpretation is not.

As noted above, Section 9-471(C) gives an interested party the statutory right to challenge an annexation ordinance:

> C. Any city or town, the attorney general, the county attorney, or any other interested party may upon verified petition move to question the validity of the annexation for failure to comply with this section. The petition shall set forth the manner in which it is alleged the annexation procedure was not in compliance with this section and shall be filed within thirty days after adoption of the ordinance annexing the territory by the governing body of the city or town and not otherwise. The burden of proof shall be on the petitioner to prove the material allegations of the verified petition. No action shall be brought to question the validity of an annexation ordinance unless brought within the time and for the reasons provided in this subsection. 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. * * *

A.R.S. § 9-471(C).

As Subsection (C) also provides, all proceedings related to an annexation challenge are given preference over almost all other civil matters. Id. Of course, 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).

Moreover, the Legislature obviously intended the references to judicial review in Sections 9-471(C) and 9-471(D) to serve different purposes. Section 9-471(C) permits an interested party to challenge an annexation ordinance within thirty days. According to the trial court, however, the reference to judicial review in Section 9-471(D) "merely point[s] out that judicial review of the annexation process is allowed". (See ROA 68 at 6.) But 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. See Airport Props., 195 Ariz. at 96, ¶ 23, 985 P.2d at 581 (App. 1999) (avoiding interpretation of statute that would render provision redundant).

Consistent with these common principles of statutory construction, the Legislature obviously designed 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. 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. Construing

the time references in Sections 9-471(C) and 9-471(D) in this fashion so that they work together has a "common sense" appeal -- one that the trial court itself found "attractive."

The City's interpretation -- that the ordinance becomes effective in thirty days, no matter what, even if judicial review is pending (see ROA 57, 65, 68) -- 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). Because it ignores statutory language and renders one part of the statute superfluous, the City's interpretation cannot stand. See, e.g., City of Phoenix, 69 Ariz. at 72, 208 P.2d at 1149; Airport Props., 195 Ariz. at 96, ¶ 23, 985 P.2d at 581 ("We presume that the legislature does not intend to draft statutory provisions that are redundant, void, inert, superfluous or contradictory.").

The principle that an annexation cannot be both final and subject to judicial review has long been the law in Arizona. Nearly sixty years ago, the Arizona Supreme Court noted that although a citizen has no standing to challenge a completed annexation, "when the annexation has not been completed, a property owner within the area affected may maintain an action to prevent the completion thereof." City of Phoenix v. Lockwood, 76 Ariz. 46, 48, 258 P.2d 431, 433 (1953).

The Supreme Court reinforced this principle in Salt River Project v. City of St. Johns, 149 Ariz. 282, 718 P.2d 184 (1986). In that case, the court reviewed a

Court of Appeals decision holding that a city could enact an emergency ordinance to permit an annexation to become immediately final under A.R.S. § 19-142(B), but that such annexation could still be subject to judicial review under Section 9-471(C) and (D). The Supreme Court reversed the Court of Appeals, holding that the statute permitting emergency ordinances to become final immediately "cannot be harmonized" with Section 9-471(C) and (D). Id. at 285, 718 P.2d at 187. And the reason they could not be harmonized was that "[a]nnexation ordinances must be attacked before they are final." Id.

Because an annexation must be attacked before it is final, it would make little sense to suspend finality for thirty days after adoption to allow for judicial review -- as Section 9-471(D) provides -- only to permit the ordinance to become final before judicial review is completed. As the Salt River Project decision teaches, when it comes to annexation ordinances, finality and judicial review don't mix. Thus, Section 9-471(D) cannot be read to permit an annexation ordinance to become final immediately after judicial review has begun.

V. The City's Interpretation Of Section 9-471(D) Will Lead To Absurd And Irrational Results.

Statutory language should be construed in a way that avoids an absurd or irrational result. See, e.g., In re Estate of Zaritsky, 198 Ariz. 599, 603, ¶ 11, 12 P.3d 1203, 1207 (App. 2000) ("[W]e presume that the legislature did not intend an absurd result and our construction must avoid such a consequence."); State v.

Medrano-Barraza, 190 Ariz. 472, 474, 949 P.2d 561, 563 (App. 1997) (same). In this case, the interpretation urged by the City and adopted by the trial court will have absurd and chaotic results.

Allowing an annexation ordinance to become effective pending judicial review would mean that land could shift in and out of incorporated and unincorporated status depending on the success of an annexation challenge. Such a result "would create a limbo intolerable to annexee and annexor alike". Ensweiler v. City of Gary, Lake County, Ind., 325 N.E.2d 507, 508 (Ind. Ct. App. 1975). Indeed, municipal annexation implicates a host of municipal functions, including taxes and assessments, fire services, police services, utilities, voting and election rights, and even the application of civil and criminal fines and penalties. See, e.g., Town of Scottsdale v. State ex rel. Pickrell, 98 Ariz. 382, 387, 405 P.2d 871, 874 (1965) (recognizing that "annexation could affect title to property, taxes, bond issues, sewer, road and paving assessments, power and sewer lines to name a few," which are "some of the major factors that affect property owners"). While an annexation challenge is pending and there remains a possibility that the annexation will be set aside, no reasonable municipality or individual property owner would "pursue the provision of city services, utilities, sewage disposal and the like

together with property taxes and other assessments." Ensweiler, 325 N.E.2d at 508.[3]

The Copper Hills decision identifies just one of the many complications that could arise under the City's interpretation of Section 9-471(D). As noted above, in that case, the "annexing" city collected nearly $100,000 in taxes from one taxpayer while an annexation challenge was pending. 214 Ariz. at 388, ¶¶ 2-3, 153 P.3d at 409. But when that challenge was sustained years later, the city had to refund the money that it assessed. This Court concluded that annexation was never final and therefore the city never had the jurisdiction to levy taxes in the first place. Id. at 389-90, ¶¶ 9-10, 153 P.3d at 410-11.

While Copper Hills dealt with taxation problems, it is not difficult to envision even thornier problems that could result if property can flip back and forth

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[3] Because of these well-founded concerns, Arizona is certainly not the only state to delay the effectiveness of an annexation ordinance pending judicial review. See Jackson v. City of Little Rock, 621 S.W.2d 852, 853 (Ark. 1981) (noting that if annexation ordinance is contested, annexation is not final until date court resolves the challenge); County Com'n v. Denver, 547 P.2d 249, 251 (Colo. 1976) ("annexation ordinance here at issue was not effective until court approval was obtained"); Ensweiler, 325 N.E.2d at 508 (holding that annexation ordinance is not effective pending resolution of judicial challenge, including appellate proceedings); Parish of Ouachita v. Town of Richwood, 697 So.2d 623, 627 (La. App. 1997) (thirty-day "waiting period" before annexation becomes effective to permit court challenge) and La.Rev.Stat. 33:174(C) (annexation "shall go into effect" ten days after judgment upholding it); Biltmore Square Assoc. v. City of Ashville, 497 S.E.2d 121 (N.C. App. 1998); Town of Huntsville v. Scott County, 269 S.W.3d 57, 61 (Tenn. Ct. App. 2008) (stating that "the mere filing of a *quo warranto* action holds the effective date of the annexation in abeyance until the filed action is dismissed").

between incorporated and unincorporated status. For example, property owners in a newly "annexed" area may have cast their votes in a close municipal election while an annexation challenge was pending -- only to have the annexation undone later by the court. Would the votes cast by those property owners who were no longer in an incorporated area still count? Would the election be invalidated? Similarly, suppose a person in the "annexed" area is convicted of a crime under a municipal ordinance while judicial review is pending. What would happen to the defendant's criminal record when the annexation is later declared invalid? These questions demonstrate just a few of a host of potentially intractable problems that could arise under the City's interpretation of Section 9-471(D).

As the Arizona Supreme Court correctly noted in Town of Scottsdale v. State ex rel. Pickrell, because uncertainties about annexation could affect property title, taxes, assessments, and a host of services and infrastructure expenditures, "the annexation procedure should be as conclusive and definitive as the law will permit." 98 Ariz. at 387, 405 P.2d at 874. In this case, the Nation's interpretation of Section 9-471(D) satisfies the Arizona Supreme Court's directive. The City's interpretation does not.

THE NATION IS ENTITLED TO AN AWARD OF ITS ATTORNEYS' FEES AND TAXABLE COSTS INCURRED ON APPEAL

Pursuant to A.R.S. § 9-471(P), the Nation respectfully requests an award of its reasonable attorneys' fees incurred in pursuing this appeal. And pursuant to

Arizona Rule of Civil Appellate Procedure 21 and A.R.S. § 12-331, the Nation respectfully requests an award of its taxable costs incurred on appeal. See, e.g., City of Phoenix v. Kenly, 21 Ariz. App. 394, 397, 519 P.2d 1159, 1162 (1974) (recognizing that successful litigant may obtain award of taxable costs against a municipality).

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's summary judgment ruling and enter judgment in favor of Appellant the Tohono O'odham Nation.

RESPECTFULLY submitted this 28th day of July, 2010.

James A. Ryan
Lauren Elliott Stine
QUARLES & BRADY LLP
Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004-2391
602.229.5200

- AND -

Lisa T. Hauser, Esq.
GAMMAGE & BURNHAM
Two North Central Avenue, 18th Floor
Phoenix, Arizona 85004

By: James A. Ryan

Counsel for Plaintiff/Appellant
The Tohono O'odham Nation

CERTIFICATE OF COMPLIANCE

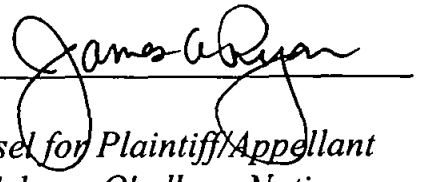
I, James A. Ryan, hereby certify that Appellant's Opening Brief is double-spaced, except for quotations more than two lines long, headings and footnotes, and that the brief uses proportionately spaced Times New Roman typeface of 14 points. According to the word count of the Word software used to prepare this Answering Brief, this brief has approximately 7,508 words.

DATED this 28th day of July, 2010.

James A. Ryan
Lauren Elliott Stine
QUARLES & BRADY LLP
Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004-2391
602.229.5200

- AND -

Lisa T. Hauser, Esq.
GAMMAGE & BURNHAM
Two North Central Avenue, 18th Floor
Phoenix, Arizona 85004

By: 

Counsel for Plaintiff/Appellant
The Tohono O'odham Nation

CERTIFICATE OF SERVICE

Angelina Chavez hereby certifies that on the 28th day of July, 2010, she caused an Original and six copies of this Opening Brief to be served via hand delivery to:

Court of Appeals
Division One
1501 West Washington
Phoenix, Arizona 85007

And, two (2) copies of this Opening Brief to be mailed this date to the following:

Nicholas C. DiPiazza, Esq.
Christina A. Parry, Esq.
Glendale City Attorney
5850 West Glendale, Suite 450
Glendale, Arizona 85301
Attorneys for Defendants/Appellees

Angelina Chavez

QB\138612.00002\10933755.1