

1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **Opinion Number:** _____

SUPREME COURT OF NEW MEXICO
FILED

3 **Filing Date:** _____

APR 13 2012

4 **NO. 33,069**



5 **MR. and MRS. RON GLASER, THERESA CULL,**
6 **CHERYL HOST, EDMUND AUERBACH, DR. and**
7 **MRS. DAVIS SPENCE, DONALD R. ASHER,**
8 **HEIDI LARSEN, BRAD LEONARD, TED THRASHER,**
9 **ANNE DANIELS, BRYAN and LISALEE GOSS,**
10 **WILLIAM W. MERSHON, KEITH and DEBORAH**
11 **HILLEGOND, and MR. and MRS. BRUCE CHARNLEY,**

12 Plaintiffs-Petitioners,

13 **v.**

14 **JAMES L. LEBUS, DANIEL E. RAKES, CHARLES VERRY,**
15 **ALAN G. YOUNG, STEVEN R. OLIVER, NEW MEXICO**
16 **FINANCE AUTHORITY, AUI, INC., ANGEL FIRE RESORT**
17 **OPERATIONS, L.L.C., and VILLAGE OF ANGEL FIRE,**

18 Defendants-Respondents.

19 **ORIGINAL PROCEEDING**

20 Armstrong & Armstrong, P.C.

21 Julia Lacy Armstrong

22 Roy L. Armstrong

- 1 Taos, NM
- 2 for Petitioners

- 3 Stelzner, Winter, Warburton, Flores, Sanchez & Dawes, P.A.
- 4 Nann M. Winter
- 5 Albuquerque, NM

- 6 Rodey, Dickason, Sloan, Akin & Robb, P.A.
- 7 Alan Hall
- 8 Albuquerque, NM

- 9 Canepa & Vidal, P.A.
- 10 Joseph F. Canepa
- 11 Santa Fe, NM

- 12 Modrall, Sperling, Roehl, Harris, & Sisk, P.A.
- 13 Peter Franklin
- 14 Santa Fe, NM

- 15 Sutin, Thayer & Browne, P.C.
- 16 Mark Chaiken
- 17 Benjamin Allison
- 18 Santa Fe, NM

- 19 for Respondents

1
2 **OPINION**

3 **SERNA, Justice.**

4 {1} Defendant-Appellee (Appellee), the Village of Angel Fire (the Village), held
5 an election to determine whether a public improvement district (PID) should be
6 formed within its boundaries, after supporters of the PID petitioned the Village to
7 do so. The requisite majority of eligible voters approved formation of the PID.
8 Plaintiffs-Appellants (Appellants), owners of real property located in Angel Fire,
9 filed suit in district court, seeking a declaration that the PID formation election was
10 procedurally defective and therefore void, that the PID lacks legal existence, and that
11 a special levy approved and assessed by the PID is invalid. The district court
12 dismissed Appellants' complaint as untimely, and Appellants sought review by the
13 Court of Appeals.

14 {2} The Court of Appeals determined that Appellants' complaint presents an
15 election contest, which is subject to a thirty-day statute of limitations under the
16 Election Code. *See* NMSA 1978, § 1-14-3 (1971). The Court further determined
17 that because Appellants waited more than one year to file suit, their complaint is
18 time-barred. After thoroughly analyzing these issues, however, the Court of Appeals
19 ultimately concluded that it lacked jurisdiction and transferred the appeal to this
20 Court, pursuant to the Election Code's directive that appeals in election contest
21 proceedings shall be made directly to this Court. *See* NMSA 1978, § 1-14-5 (1969).
22 Although we agree that the Court of Appeals did not have jurisdiction over this
23 appeal, we find its opinion to be both comprehensive and persuasive. We therefore

1 adopt its result as well as its reasoning, with one exception that we discuss below.

2 **I. BACKGROUND**

3 {3} In April and October of 2007, Defendant-Appellee Angel Fire Resort
4 Operations, LLC submitted petitions to the Village for the creation of a PID to
5 manage the construction of various infrastructure improvements within the district's
6 boundaries. These improvements were to be funded by the sale of bonds secured by
7 the proceeds of a special levy that would be assessed against owners of property
8 located within the proposed district. After notice to the property owners and a
9 hearing, the Village Council approved a resolution on February 14, 2008 supporting
10 the formation of the PID. In April 2008, the Village conducted an election by mail-
11 in ballot to determine whether to form the PID. More than three-quarters of eligible
12 residents voted in the affirmative, which was sufficient to approve formation. Later
13 that year, the Village mailed property tax assessments, which included the PID
14 special levy, to owners of property located within the district's boundaries, including
15 Appellants.

16 {4} Appellants filed suit on June 1, 2009, roughly thirteen months after the PID
17 formation election. In addition to the Village and Angel Fire Resort Operations,
18 LLC, Appellants named as defendants the individual members of the Angel Fire PID
19 Board of Directors (but not the PID itself), the New Mexico Finance Authority, and
20 AUI, Inc., a company that the PID hired to perform construction work within the
21 district. The complaint sought a declaration that the PID "was not properly

1 authorized pursuant to law [and] has no legal existence, and all of the contracts and
2 agreements made by its Board are void and unenforceable.” Appellants also asked
3 the district court to undo the results of the April 2008 formation election and to enter
4 an “order requiring the PID to refund all or part of the special levy funds improperly
5 collected from property owners” within the district.

6 {5} On June 8, 2009, the PID filed a motion to intervene, which the district court
7 granted. The PID also filed a joint motion with Appellees for dismissal as to
8 Appellees and judgment on the pleadings as to the PID. This motion sought
9 dismissal pursuant to Rule 1-012(B)(6) NMRA and judgment on the pleadings
10 pursuant to Rule 1-012(c) on various grounds, including that the complaint presented
11 a challenge to the validity of the PID formation election and therefore was time-
12 barred under the Election Code, which requires election contests to be brought
13 within thirty days of certification of the election results. *See* § 1-14-3.

14 {6} On June 19, 2009, Appellants filed an amended complaint with allegations
15 that were substantially similar to those in their original complaint, including that the
16 PID formation election was “so materially out of compliance with statutory
17 requirements as to invalidate it as a matter of law,” that the PID “has no legal
18 existence,” that the special levy authorized and assessed by the PID is illegal, and
19 that “the PID possesses no authority to levy or collect any tax or assessment.” By
20 order filed July 15, 2009, the district court granted Appellees’ and the PID’s joint
21 motion and dismissed both the complaint and the amended complaint (hereinafter,

1 “the complaint”) on the ground that they were untimely filed. Appellants sought
2 review by the Court of Appeals.

3 {7} The Court of Appeals determined that the PID formation election was subject
4 to the procedures set forth in the Election Code, that the entirety of Appellants’
5 complaint constitutes an election contest subject to the Election Code’s thirty-day
6 statute of limitations, and accordingly that the complaint was properly dismissed.

7 *Glaser v. LeBus*, 2012-NMCA-028, ¶¶ 1, 8-12, 15, 21-24. Because the complaint
8 presents an election contest, the Court of Appeals ultimately concluded that it lacked
9 jurisdiction, due to the Election Code’s mandate that challenges to an election shall
10 be appealed directly to the New Mexico Supreme Court. *Id.* ¶¶ 25- 26 (citing § 1-14-
11 5). The Court of Appeals therefore transferred the appeal to this Court, pursuant to
12 NMSA 1978, Section 34-5-10 (1966). *Id.* ¶ 26. After the parties submitted briefing
13 to this Court, Appellees filed a motion to dismiss the appeal as moot on the ground
14 that a substantial majority of the PID’s infrastructure improvements already had been
15 constructed, a motion which the Court denied on September 30, 2011. The Court
16 heard oral argument on October 11, 2011.

17 **II. STANDARD OF REVIEW**

18 {8} We review de novo the district court’s grant of Appellees’ motion to dismiss
19 and for judgment on the pleadings. *See Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150
20 N.M. 97, 257 P.3d 917. A motion to dismiss “tests the legal sufficiency of [a]
21 plaintiff’s complaint,” and “should be granted only when it appears that the plaintiff
22 is not entitled to recover under any facts provable under the complaint.” *Kirkpatrick*

1 v. *Introspect Healthcare Corp.*, 114 N.M. 706, 709, 845 P.2d 800, 803 (1992). A
2 judgment on the pleadings is treated as a motion to dismiss when the district court
3 considers matters contained solely within the pleadings. See *GCM, Inc. v. Ky. Cent.*
4 *Life Ins. Co.*, 1997-NMSC-052, ¶ 9, 124 N.M. 186, 947 P.2d 143. “In reviewing a
5 district court’s decision to dismiss for failure to state a claim, we accept all well-
6 pleaded factual allegations in the complaint as true and resolve all doubts in favor
7 of sufficiency of the complaint.” *Delfino*, 2011-NMSC-015, ¶ 9 (citation omitted).
8 De novo review similarly applies to questions of statutory interpretation. *Cobb v.*
9 *State Canvassing Bd.*, 2006-NMSC-034, ¶ 33, 140 N.M. 77, 140 P.3d 498.

10 III. DISCUSSION

11 {9} As the Court of Appeals correctly determined, the Angel Fire PID formation
12 election is subject to the Election Code’s thirty-day limitation period for filing a
13 complaint. *Glaser*, 2012-NMCA-028, ¶¶ 1, 10-15. The procedures set forth in the
14 Election Code apply to general elections, primary elections, statewide special
15 elections, elections to fill congressional vacancies, and school district elections.
16 NMSA 1978, § 1-1-19(A) (1985). In addition, “[t]o the extent procedures are
17 incorporated or adopted by reference by separate laws governing such elections or
18 to the extent procedures are not specified by such laws, certain provisions of the
19 Election Code shall also apply to . . . special district officer or special district bond
20 or other special district elections.” *Id.* § 1-1-19(B)(2). Under the Public
21 Improvement District Act (PID Act), a PID formation election must meet certain
22 specifically enumerated requirements, NMSA 1978, § 5-11-7 (2001), and “[e]xcept

1 as otherwise provided . . . the election shall comply with the general election laws
2 of this state,” *id.* § 5-11-7(E), i.e., the Election Code. Because the PID Act
3 incorporates the Election Code by reference unless it is otherwise specified, and
4 because the PID Act nowhere provides a different limitations period for filing a
5 challenge to a PID formation election, the Election Code’s thirty-day statute of
6 limitations applies.

7 {10} The Court of Appeals also correctly concluded that the gravamen of
8 Appellants’ complaint is a challenge to the PID formation election. *Glaser*, 2012-
9 NMCA-028, ¶¶ 1, 21-24. Appellants allege that the proponents of the PID made
10 various misrepresentations in their petitions to form the PID, and that the formation
11 election was procedurally flawed because the mail-in ballots lacked adequate detail
12 and were not properly scrutinized by the Village. The principal relief Appellants
13 request is a declaration that the PID formation election was invalid and that the PID
14 therefore lacks legal existence. Because Appellants’ suit is thus properly construed
15 as an election contest, and because Appellants failed to file their complaint within
16 the thirty-day period mandated by the Election Code, the district court properly
17 dismissed the complaint, a result the Court of Appeals would have affirmed if it had
18 jurisdiction over the appeal.

19 {11} We now take the opportunity to correct the Court of Appeals in one respect.
20 While Appellants unquestionably contest the PID formation election, their complaint
21 also asks for declaratory relief with respect to various actions that the PID took after

1 formation, particularly the imposition of the special levy and the execution of
2 contracts to perform the infrastructure improvements. The Court of Appeals
3 determined that these claims “also rest on challenges to the underlying validity of the
4 formation election.” *Glaser*, 2012-NMCA-028, ¶¶ 23-24. We disagree. A legal
5 challenge to governmental action is not converted into an election contest simply
6 because the action at issue followed an election; otherwise, virtually every lawsuit
7 against a governmental entity would be subject to the Election Code’s thirty-day
8 statute of limitations.

9 {12} The district court nonetheless was correct in dismissing the complaint. *See*
10 *Maralex Res., Inc. v. Gilbreath*, 2003-NMSC-023, ¶ 13, 134 N.M. 308, 76 P.3d 626
11 (“[A]n appellate court will affirm the district court if it is right for any reason and if
12 affirmance is not unfair to the appellant.” (citation omitted)). Appellants assert that
13 the special levy is invalid because it was approved by resolution of the PID Board
14 of Directors rather than by election. The PID Act, however, explicitly authorizes a
15 PID’s board of directors to assess a special levy by resolution after notice and a
16 hearing, NMSA 1978, § 5-11-20(A) & (B) (2001), or alternatively by election. *Id.*
17 § 5-11-7(A)(5) & (7-8). Because the applicable statute does not require a PID
18 special levy to be approved through an election, Appellants’ complaint fails as a
19 matter of law.

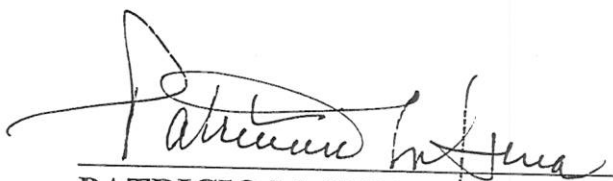
20 {13} Appellants’ complaint seeks declaratory relief regarding other aspects of the
21 levy, such as the method for its apportionment and the alleged disparity between the
22 amounts assessed and the benefits conferred on affected property owners.

1 Appellants also request a declaration that all contracts the PID entered into are “void
2 and unenforceable.” Appellants, however, do not offer any factual allegations
3 whatsoever in support of those claims. Their complaint, therefore, was properly
4 dismissed for failure to state a claim for which relief could be granted. *See Delfino*,
5 2011-NMSC-015, ¶ 12. Finally, we note that Appellants were required to include
6 in their brief-in-chief “a statement explaining how the issue was preserved in the
7 court below, with citations to authorities, record proper, transcript of proceedings or
8 exhibits relied on.” Rule 12-213(A)(4) NMRA. Because Appellants fail to inform
9 this Court where in the record they have preserved their challenge to the
10 apportionment of the levy or other post-formation acts of the PID, it is within this
11 Court’s discretion to refuse to consider those issues. *See State v. Goss*, 111 N.M.
12 530, 533, 807 P.2d 228, 231 (Ct. App. 1991) (“Where a party fails to comply with
13 Rules 12-208 and -213 and fails to indicate “that [an] issue was properly preserved
14 for appellate review, an appellate court may decline to address such contention on
15 appeal.”).

16 **IV. CONCLUSION**

17 {14} We affirm the order of the district court. In doing so we adopt the reasoning
18 and result of the Court of Appeals’ opinion, with the one exception discussed above
19 regarding Appellants’ challenge to the PID’s apportionment of the special levy and
20 other post-formation acts of the PID, which as we explain are not properly construed
21 as an election contest but nonetheless were properly dismissed.


1 {15} IT IS SO ORDERED.


PATRICIO M. SERNA, Justice

4 WE CONCUR:


PETRA JIMENEZ MAES, Chief Justice


EDWARD L. CHÁVEZ, Justice


CHARLES W. DANIELS, Justice

11 RICHARD C. BOSSON, Justice, recused