

IN THE SUPREME COURT OF MISSISSIPPI

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CAUSE NO. 2007-AN-00826

CITY OF HORN LAKE, MISSISSIPPI,
ET AL.

APPELLANT

VERSUS

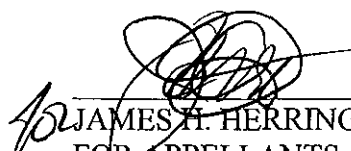
CITY OF SOUTHAVEN, MISSISSIPPI

APPELLEE

AMENDED CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. James H. Herring, Esq., and Herring, Long & Crews, P.C., Attorneys at Law, P. O. Box 344, Canton, Mississippi 39046; Attorneys for the Appellants.
2. Mark Sorrell, Esq., 8710 Northwest Drive, Southaven, Mississippi 39671. Attorney for Appellee.
3. Jerry L. Mills, Esq., and Danks, Dye, Mills, & Pittman, 800 Avery Boulevard North, Suite 101, Ridgeland, Mississippi 39157; Attorney for Appellee.
4. Summerwood and Whitten Place Homeowners Associations, Olive Branch, Mississippi
5. Hon. Mitchell M. Lundy, Jr., Chancellor, Third Chancery District (Chancery Court of DeSoto County, Mississippi).


JAMES H. HERRING, ATTORNEY
FOR APPELLANTS

IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2007-AN-00826

IN THE MATTER OF THE ENLARGEMENT AND
EXTENSION OF THE CORPORATE LIMITS AND
BOUNDARIES OF THE CITY OF SOUTHAVEN,
MISSISSIPPI

CITY OF HORN LAKE, MISSISSIPPI
ET AL.

APPELLANTS

VERSUS

CITY OF SOUTHAVEN, MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLANT

(On Appeal From the Chancery Court of DeSoto County, Mississippi)

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I. STATEMENT OF ISSUES

1. Should the decision of the Trial Court be reversed and rendered as a matter of law because this action was filed by the City of Southaven for an improper and arbitrary purpose constituting an abuse of discretion of the City's governing body?

2. Should the decision of the Trial Court pertaining to the Northeast Parcel be reversed and rendered as manifestly in error because the Trial Court ruled that the City had no need to annex the Northeast Parcel and that there was no need for planning and zoning in the Northeast Parcel?

3. Was the decision of the Chancellor that granted the proposed annexation by the City of Southaven manifestly erroneous and unsupported by substantial credible evidence?

II. STATEMENT OF THE CASE

A. **Course of proceedings.** On March 5, 2004, the City of Southaven (hereinafter sometimes referred to as "Southaven" or the "City") filed its Petition to annex and to bring within its municipal boundaries four areas to be added to the City. One of those areas was referred to as the "Northeast Parcel" which is approximately 1.67 square miles. (C.P.182). Two homeowners' groups in the Northeast Parcel, namely the Summerwood Homeowners' Association and Whitten Place Homeowners Association, as well as numerous other objectors from the Northeast Parcel (hereinafter referred to as "Objectors"), filed objections on July 19, 2004. (C.P. 61). Other Objectors from other areas being annexed in this action filed formal written objections or personally appeared to voice their objections, *pro se*, to the annexation throughout these proceedings, notably Q. B. Gray of Nesbitt, Mississippi. (T. 1)

On October 27, 2005, the Objectors filed a Motion to Dismiss. (C.P. 120). In the Motion to Dismiss, the Objectors challenged, *inter alia*, the accuracy of the description of property to be annexed, that the proposed improvements by the City in the proposed annexation area

(hereinafter sometimes referred to as the "PAA") were vague, uncertain, and therefore meaningless; and that the complaint to annex failed to conform to the requirements of *Miss. Code Ann.* §§21-1-27 and 21-1-29 (1972). After both sides filed legal memoranda, the Court ruled that the description of the PAA was defective, but denied the other relief sought in the Motion. As a result of the Trial Court's ruling that the description of the proposed annexed area was defective, an Amended Complaint by the City was filed on February 10, 2006. (C.P. 175). Thereafter, a pre-trial order in this proceeding was filed on May 8, 2006, (C.P. 233); and a non-jury trial was scheduled by Administrative Order dated June 9, 2006, for the week of September 18, 2006. (C.P. 262)

On February 23, 2007, the Trial Court rendered its opinion and on April 10, 2007, (C.P. 263), filed its Final Judgment (C.P. 296). The Objectors filed a Motion For New Trial on April 10, 2007, (C.P. 306); and after a hearing on May 8, 2007, their Motion was denied by ruling of the Court on that date. (C.P. 320). Feeling aggrieved of the Trial Court's ruling, the individual objectors filed their Notice of Appeal to this Court on May 11, 2007. (C.P. 321).

B. **Statement of Facts.** The Northeast Parcel of the proposed annexation area (PAA) is a relatively small, rectangular, suburban area situated in DeSoto County, Mississippi which is bounded on the west by Getwell Road, on the north by State Line Road and on the south by various roads, all in the City of Southaven. The Northeast Parcel is bounded on the east by Malone Road, owned and maintained by DeSoto County, Mississippi. Immediately to the east of Malone Road is the municipal boundary of the City of Olive Branch, Mississippi. (T. 2152, *et seq.*) The Post Office address of all residents of the Northeast Parcel is "Olive Branch, Mississippi 38654". (T. 262). This parcel is provided with potable water service by Olive Branch, Mississippi, by virtue of an Agreed Order issued by the Mississippi Public Service Commission on March 31, 2005, which was specifically agreed to by Southaven. (T. 2235; Ex.

D-30; D-124). The total number of homes in this parcel is 434, and the area is essentially “built out”. (T. 2173, 2174, Ex. P-45; D-15). The evidence established that there is no spillover growth from the City of Southaven in the Northeast Parcel; and the City has other adequate avenues to expand its boundaries without annexing the Northeast Parcel. (T. 327-328). The citizens of the Northeast Parcel are presently receiving adequately all of the “municipal” services they need, and they have no need for any additional services from Southaven. (T.2296).

The evidence further established that the City filed this annexation proceeding to take in the Northeast Parcel for an arbitrary and improper purpose, as shown by the testimony of Mayor Davis in his telephone conversation with Stephanie Russell. (T. 2599, *et seq.*). Moreover, there are many individual septic tank sewerage disposal systems used by homeowners located in the existing City of Southaven and septic tank use within the existing City of Southaven is optional to homeowners. (T.2304). Likewise, the City’s position in this case on wastewater service to citizens of the Northeast Parcel is that they have the option, if annexed, to maintain their individual septic tanks so long as their use complies with State Department of Health Rules and Regulations. Their other option is to receive wastewater transportation and treatment from their individual homes through the installation of a “pressure sewer system” installed on the premises of the homeowner, which will be connected to a sewer main owned by the City along Getwell Road. (T.2266). The existing City has only 272 individual pressure sewer systems in existence out of approximately 12,000 homes. (T. 2266). By offering to allow citizens of the Northeast Parcel to maintain their existing septic tanks, it is respectfully submitted that Southaven has taken off the table any “potential health hazards” as an indicia of reasonableness for annexation.

The Objectors voiced concern that this annexation action against residents of the Northeast Parcel was improperly filed because of a feud between City Officials with one of the objectors. The Mayor agreed that an annexation proceeding filed for spite should not be granted.

(T.281). They voiced concern that their property values would be adversely affected if potential purchasers were aware that the Northeast Parcel homes had pressure sewer systems and not gravity flow central sewer systems. (T.1688). The evidence further established that the Northeast Parcel will account for sixty-one percent (61%) of the total assessed valuation in the future of the four (4) parcels taken in this annexation. (T. 2005; Ex. P-52).

The evidence established that the Northeast Parcel property taxes in the future will finance the existing fire station and other fire protection improvement indebtednesses made and obligated to by Southaven *prior to* the date of this annexation. (T.2009). The City Engineer for Southaven does not design proposed residential subdivisions for water and sewer service for integration into the overall city water and sewer systems; nor does the City charge impact fees to developers of new subdivisions. (T.321-326). These fees are necessary to (1) defray the costs of bringing in new subdivisions and adding new customers onto the existing systems; and (2) to compensate the City and protect its liquidity as a result of the diminished overall capacity of water supply or sewerage treatment capability of the City; as well as for the protection of existing citizens of Southaven. The Objectors contended that the City policy not to impose impact fees to developers is a bad policy, which weighs against the reasonableness of this annexation. Such fees (assessed to developers to defray the costs incurred by a city for connecting new subdivisions onto the City's existing water and sewer systems and to compensate for the city's loss of overall capacity to provide water and sewer service) are legitimate fees typically charged by many cities throughout Mississippi as a method to require a developer to assume the risk of the success of his subdivision, rather than place that risk on existing homeowners within a city. Thus, the Objectors contend that as a result of Southaven's failure to charge impact fees to a developer, existing citizens of Southaven, rather than the developer, are required to assume the risks of the success or failure of the developer to sell off

the lots of the new subdivision. In other words, regardless of whether the developer sells off all of his lots, the City, by accepting the subdivision as a part of its utility system, commits its existing limited capacity for water and sewer service to that new subdivision even if the developer fails to sell a single lot. Thus, additional capacity for utility services for future developments will necessarily need to be constructed, at significant costs to taxpayers, once the City's existing limited capacity for services (water wells, infrastructure, etc.) is obligated or used up. (T.668-670).

The evidence established that many cities in Mississippi have such capacity problems, and the citizens of those cities must bear the tax burden of constructing new facilities to avoid a shut-down of either new construction, or a shut-down of existing water and sewer service. (T.669). Moreover, the evidence showed that the imposition of impact fees on a developer (a certain dollar amount per lot) allows a city to collect and earmark the funds necessary to increase its capacity for utility service for future construction and places the risk of the success or failure of the developer's business venture where it belongs – squarely on the developer rather than upon existing taxpayers. Southaven's failure to charge such impact fees places existing citizens (including residents of the Northeast Parcel) at risk for regular increases in taxes - an extremely short-sighted and unreasonable policy - is a legitimate reason why objector's should avoid annexation if possible. (T. 670).

It is submitted that this policy of the City to tilt toward developers at the expense of uninformed and unwitting citizens who do not know what is happening to them, is reason enough to deny annexation in this instance.

It is uncontroverted that no formal annexation study was undertaken by the City or reduced to writing prior to this action being filed in Court. (T.320). Thus, there was no study which citizen/objectors could look to in making a determination whether to object in this

proceeding, prior to hiring an attorney or taking other expensive actions to avoid annexation taking place by default. The Objectors contend that without such an annexation study setting forth the needs of the City as guided by accepted indicia of reasonableness, the City's decision to file this action can only be characterized as arbitrary, without adequate consideration of all relevant factors, and therefore unreasonable.

It is likewise uncontroverted that the City's Services and Facilities Plan (Ex. P-52), which purportedly makes certain promises to the objectors as to what benefits the City proposed to give to the citizens of the Northeast Parcel and other areas of the PAA, was not formulated, reduced to writing, prepared or otherwise made available to the objectors until late in these proceedings when copies of exhibits were exchanged. Thus, the Objectors contend that the fact that the City filed this action without the existence of a Service and Facilities Plan conclusively proves that this annexation proceeding was arbitrarily filed and is therefore unreasonable. The fact that such a Plan was formulated "after the fact" during the discovery stage of these proceedings, should not detract us from the fact that this action was unreasonably filed to begin with, a fact that is crucial in whether or not the annexation should be granted.

The Objectors/Appellants herewith present the facts of this case consistent with the guidelines or "indicia of reasonableness" which prior cases tell us should be considered in determining whether a proposed annexation is reasonable. See *Dodd v. City of Jackson*, 238 Miss. 372, 396-397, 118 So. 2d 319 (1960); *In Re Extension of Boundaries of Batesville*, 760 So. 2d 697, 700, P. 8 (Miss. 2000).

While the cases cited above state the broad criteria or indicia of reasonableness to be considered by the Court in this case, the Supreme Court case referred to most often during the trial of this case and by the Trial Court was *In Re Enlargement and Extension of Municipal Boundaries of City of Macon*, 854 So. 2d 1029 (2003), which sets forth in a useful summary all

of the indicia of reasonableness mentioned above, as well as the “sub-indicia” to be considered by the Trial Court in determining whether the annexation is reasonable. For the Court’s convenience, a summary of the indicia and sub-indicia of reasonableness used in the *Macon* case are restated here as follows:

- 1) Municipality’s **need to expand**
 - (a) spillover development into the proposed annexation area (PAA)
 - (b) internal growth
 - (c) population growth
 - (d) need for developable land
 - (e) need for planning in the PAA
 - (f) increased traffic counts
 - (g) need to maintain & expand tax base
 - (h) limitations due to geography & surrounding municipalities
 - (i) remaining vacant land within the municipality
 - (j) environmental influences
 - (k) need to exercise control over PAA
 - (l) increased new building permit activity
- 2) Whether the area sought to be annexed is reasonably within the **path of growth** of the municipality
 - (a) spillover development into the proposed annexation area (PAA)
 - (b) PAA adjacent & contiguous to existing municipality
 - (c) limited area available for expansion
 - (d) interconnection by transportation corridors
 - (e) increased urban development in PAA
 - (f) geography
 - (g) subdivision development
- 3) **Potential health hazards** from sewage and waste disposal in annexed areas
 - (a) potential health hazards from sewage and waste disposal
 - (b) a large number of septic tanks in the PAA
 - (c) soil conditions not conducive to on-site septic systems
 - (d) open dumping of garbage
 - (e) standing water & sewage
- 4) Municipality’s **financial ability** to make improvements and furnish services promised
 - (a) present financial condition of the municipality
 - (b) sales tax revenue history
 - (c) recent equipment purchases
 - (d) financial plan & department reports proposed for implementing and fiscally carrying out the annexation
 - (e) fund balances
 - (f) municipality’s bonding capacity

- (g) alternate funding sources
 - (h) expected revenue to be received from taxes in the PAA
- 5) The **need for zoning and overall planning** in areas
 - (a) need for planning in the PAA
 - (b) need to exercise control over PAA
 - (c) incompatible land uses
 - (d) need for building inspection
 - (e) absence of county regulations
 - 6) The **need for municipal services** in areas sought to be annexed
 - (a) requests for water & sewage services
 - (b) plan of the municipality to provide 1st response fire protection
 - (c) adequacy of existing fire protection
 - (d) plan of municipality to provide police protection
 - (e) plan of municipality to provide increased solid waste collection
 - (f) use of septic tanks in the PAA
 - (g) population density of PAA
 - 7) Whether there are **natural barriers** between municipality and PAA
 - 8) **Past performance** and time element involved in municipality's provision of services to its present residents
 - (a) timely delivery of promised services after previous annexations
 - 9) **Economic or other impact** of annexation upon those who live in or own property in proposed annexation area (Fairness/Equity Evaluation)
 - (a) will PAA residents receive something of value for their tax dollars
 - (b) municipality's need to expand and benefits to PAA residents from annexation v. adverse impact, economic or otherwise, which will likely be experienced by those who live in & own property in the PAA (the fact that residents & landowners will have to pay taxes is not sufficient to show unreasonableness)
 - 10) Impact of annexation upon **voting strength of protected minority** groups
 - (a) will minority voting strength be negatively impacted
 - 11) Whether property owners and other inhabitants of areas sought to be annexed have in the past, and in foreseeable future unless annexed will, because of their reasonable proximity to corporate limits of municipality, enjoy economic and social benefits of municipality without paying their **fair share** of taxes
 - 12) Any **other factors** that may suggest reasonableness.

The twelve (12) indicia of reasonableness

1. Need to Expand.

One of the indicia of reasonableness of an annexation is whether or not the city has a *need to expand*. Significantly, the Trial Court ruled that it *did not* need to expand into the Northeast Parcel. (C.P.269). In considering this indicia, trial and appellate courts have looked at the “sub-indicia” of whether the city has a “need for developable land”. See *Macon*, 854 So. 2d 1029. In this situation it is, as stated, uncontroverted and admitted by the Mayor, that the Northeast Parcel is essentially built out. (T.2173, 2174; Ex. P-45; D-15). Thus, whether or not the City has a need for developable land is a non-issue in this case, because there is essentially no “developable land” to develop. It is a parcel of rooftops, and very nice ones at that.

In regard to the indicia of whether the City has a need to expand, a “sub-indicia” is whether there is a need for the City to “exercise control over the PAA”. This “need” is also a non-issue in this case, because the evidence is overwhelming and a simple drive-thru establishes that the Northeast Parcel is full of beautiful houses on its borders that are more substantial and expensive than the houses in Southaven to the east of Getwell Road, and to the south of the Northeast Parcel. (C.P. 269, 284; See also T. 2227-2228). The evidence establishes overwhelmingly that the City has no need to control its borders in regard to the Northeast Parcel.

Another sub-indicia in regard to whether the City has a need to expand is whether there is a “need for planning” in the Northeast Parcel. The testimony of Chris Watson notwithstanding, the evidence overwhelmingly establishes and a simple drive-thru confirms that there is no need for planning in this beautiful, built-out area of DeSoto County. (C.P.269). (The Trial Court ruled there was no such need in the Northeast Parcel). The County has adequate protections in place (zoning, building codes, etc.) and the area has already been planned and essentially built out.

Only seven (7) houses have been built in the Northeast Parcel since the year 2000. (T.2240; Ex. P-15A)

(a) At the time of trial, twenty-five percent (25%) of the total City or approximately 6,000 acres was categorized as vacant, developable land, outside the floodway. According to the testimony, at its present rate of growth, six (6) years would lapse before the City of Southaven would experience "build-out". Thus, without regard to the Northeast Parcel, the City's "need to expand" is limited at the present time. (T.2194, 2208; See Ex. D-15, D-16, D-17, D-18). As stated above, the evidence conclusively established that the Northeast Parcel has already established virtual build-out. In the present case, the City seeks to annex areas other than the Northeast Parcel which do have parcels that are vacant and developable. Consequently, the evidence presented on the "need to expand" indicia clearly weighs in favor of the objectors residing in the Northeast Parcel.

(b) As shown by the evidence, there are large vacant areas, within the City of Southaven, which are located near the Northeast Parcel. See Exhibit "P-59", which shows a whole Section (Section 33) that is farming property as well as another large tract near Getwell and State Line Roads. (T.2153-2156; Ex. P-4). Moreover and specifically, the evidence established that as of 2004, the City's population was 36,556, of which 7.4% was in the floodplain. (See Exhibit D-13). There are large empty buildings on State Line Road (indicating urban decay), and there are over 5,000 acres of residentially zoned land available for development. Although there has been considerable development within Southaven since the passage of its comprehensive plan, nevertheless, its unamended comprehensive plan (which serves as a guidepost for the City's future) shows over 11,000 acres of vacant land available for development and estimates the City's growth to be 500 developed lots per year. (Ex. D-20; P-14).

As stated, a sub-indicia traditionally considered by trial courts when determining whether or not a municipality has a need to expand is whether there is a “need for planning in the PAA”. The evidence established and the Trial Court found that there is no need for planning in the Northeast Parcel that would reasonably justify annexation in this case, and that there was no need for the City to expand into the Northeast Parcel. (C.P.284). The evidence firmly established that DeSoto County has an excellent planning department in place that adequately meets the needs of its citizens, including those living in the Northeast Parcel. (T.2251). Significantly, the evidence also established that the City is not really engaged in planning for its future, but is merely promoting growth on an *ad hoc* basis, as shown by the fact that the City has no Capital Improvement Plan or “program of work” for the future which is reduced to writing. All of these facts were established and admitted by witnesses and planners, Sam Russell and Chris Watson, as well as by Mayor Davis. (T.284-288).

In summary the evidence established without contest that DeSoto County has (1) all the standard building codes; (2) geographic information systems; (3) a 2010 comprehensive plan, including implementation strategies which have been in effect prior to the 1997 annexation; (4) a comprehensive zoning ordinance; (5) a litter ordinance; (6) a flood ordinance; (7) subdivision regulations; (8) an animal control officer; (9) an active mosquito spray program; (10) an active code enforcement officer; (11) excellent planning and zoning (specifically admitted by Mr. Watson); (12) and an excellent county planning department and trained staff. Thus, the Court’s finding that no planning is needed in the proposed annexation area and that there was no need to annex the Northeast Parcel is amply supported by the evidence. (Ex. D-73).

Sub-indicia such as (1) increased traffic counts; (2) need to maintain and expand tax base; (3) limitations due to geography and surrounding municipalities; (4) environmental influences; and (5) increased new building permit activity, as developed by the evidence presented in this

case, have only marginal or negligible impact or influence on Southaven's need to expand into the Northeast Parcel. The testimony of the Mayor was that the City had other areas that it could expand into other than the Northeast Parcel and a look at the exhibits shows that he is absolutely correct. (See T. 298; Ex. P-4). Moreover, the Mayor testified that the City is very strong financially and generally has no need to annex the Northeast Parcel to maintain the City's tax base. (T.284, *et seq.*; 2227).

2. Path of Growth

On this indicia, the Appellate Courts have traditionally considered whether or not there is or has been any spillover development into the PAA. For the reasons stated above, the evidence firmly established and the Mayor admitted that there has been no spillover development into the Northeast Parcel from the City of Southaven. (T.327, 2160-2165). In fact, the Northeast Parcel, according to the uncontested testimony of all witnesses, was platted and being developed many years prior to Southaven's extension of its boundaries east to Getwell Road, which is now contiguous to the western and northern boundaries of the Northeast Parcel.

The evidence established that the City of Southaven has adequate areas for expansion other than the Northeast Parcel as shown by the sworn testimony of Mayor Davis. (T.298). Thus, that particular "sub-indicia" (which is to be considered in determining a city's path of growth) cannot be used as a basis to support the reasonableness of the proposed annexation. (See Ex. P-4). See also testimony of Sam Russell. (T.2218-2220).

Likewise, the other sub-indicia traditionally considered when determining whether the PAA is reasonably within the path of growth of a city [(1) interconnection by transportation corridors; (2) increased urban development in the PAA; (3) geography; and (4) subdivision development] do not support annexation in this case. Sam Russell pointed out that most of the roads within the Northeast Parcel do not interconnect with Southaven roads, and there is no

increased urban development going on in the Northeast Parcel, since the area was developed before Southaven started moving east. (T.2222-2223). The residents of the Northeast Parcel have an Olive Branch post office address, indicating that the Northeast Parcel is in the path of growth of Olive Branch, Mississippi, not Southaven; and large, vacant land masses are located near the Northeast Parcel within Southaven. For example, Section 33 and other properties within Southaven are farming or agricultural in nature and are populated only by livestock. Horses and other livestock are also located within the Northeast Parcel. (T. 2240-2242).

As stated, the Pleasant Hill Water Association was finally dissolved by Court Order on or about March 31, 2005. By signed agreement of all interested parties, including Southaven, the Northeast Parcel was to be served by Olive Branch. (T.2235, 2236; Ex. D-30, D-124, P-55). Thus, the Objectors contended that Southaven forfeited any claim that the Northeast Parcel was in its path of growth when it agreed to forego the right to provide a valuable utility service to the Northeast Parcel and ceded the right to provide those services to Olive Branch.

The Summerwood Subdivision (a portion of the Northeast Parcel) was platted in 1975 prior to Southaven's incorporation in 1980. It was built in four or five stages on the outskirts of Olive Branch, and contains 1 ½ acre lots or larger. The City of Southaven excluded the Northeast Parcel from its annexation in 1997, thus creating the "island" complained of by the City, which is the Northeast Parcel. Sam Russell testified that by failing to attempt to annex the Northeast Parcel in 1997, the City indicated that this area is not in its path of growth. (T. 2233-2234).

As a result of the written agreement between Southaven, Olive Branch, and the Pleasant Hill Water Association, the water association not only transferred (without compensation to its members) its exclusive certificate of public convenience and necessity to serve the Northeast Parcel to Olive Branch, but it also conveyed to Olive Branch two elevated water storage facilities and two water wells, again without compensation to association members. However, Southaven

alleged at trial that an “oral agreement” with Olive Branch exists to allow Southaven to take over and provide water service to the Northeast Parcel after all. (T.2237). The Objectors contended that while the two cities have the right, under certain circumstances, to enter into agreements, Southaven should not, in fairness, now be able to claim the Northeast Parcel to be within its path of growth or that there is a need for municipal water services within the Northeast Parcel, after reaching a firm agreement to forfeit to Olive Branch any right to provide such services, only a few months prior to filing this action.

The Objectors further contended that neither fire calls nor police calls within the Northeast Parcel by Southaven personnel, as developed by the evidence, should be considered as being an indication that the Northeast Parcel is within the City’s path of growth, since those activities were either required by agreements, written or otherwise, with DeSoto County, or as a result of calls for back-up or assistance from other agencies within DeSoto County.

3. Potential Health Hazards

The Objectors contended that the indicia of “potential health hazards” in the proposed annexation area, which is sometimes looked to by the Courts to determine if an annexation is reasonable, is not a legitimate issue in this case for several reasons. Sam Russell and others testified that the notion that annexation should be allowed because of the existence of potential health hazards in the PAA presupposes that annexation will somehow eliminate or dramatically reduce the problem for the benefit of residents of the PAA should be disregarded in the present proceeding. (T.2243-2244). In this case, the City does not offer centralized sewer service to the resident but only offers a “pressurized” sewer service on a voluntary basis, if the residents are willing to pay for it. (T.2304). The citizens who have septic tanks or individual treatment plants at their homes will be allowed to retain those facilities so long as State Department of Health regulations are complied with. (T.2266). In other words, there will be absolutely no change

from the health requirements that already exist as a result of annexation. Thus, the City offers no services that should compel a court to consider potential health hazards as grounds to justify annexation. (T. 2243-2244).

Although the City went to great lengths to demonstrate that potential health hazards exist in the Northeast Parcel, the health official who testified also stated that such “hazards” exist everywhere in Mississippi – in every community, in every city (including Southaven) and are the type that are correctible when called to the attention of the homeowners.(T.2247). It is noteworthy that neither the City of Southaven nor the Department of Health were overly concerned with the “hazards” which they presented at the trial, because the evidence showed that the “hazards” were discovered months before the trial of this case began and were never called to the attention of the homeowners involved until many months later – until during the discovery process of this proceeding and the actual testimony of their existence were presented in Court. Moreover, no complaint in regard to these “hazards” were ever formally processed with the Mississippi Department of Health. (T.2244). The Objectors pointed out that if the instances of Department of Health violations had been significant health hazards to even one family or one person, the health officials and the City officials (and their attorneys) would have violated their trust and obligations to the general public by concealing their existence in order to gain some advantage in court. As stated, no formal complaint with the Department of Health for any such violation had been filed against any citizen within the PAA at the time of the trial of this case, indicating that the indicia of “potential health hazards” is not significant in this case. (T. 2244).

It is further noteworthy that no evidence of open dumping of garbage in the Northeast Parcel was ever presented to the Court in this case.

4. Municipality's Financial Ability

In this case, the City admitted that it had no long term or planned program of work (or a capital improvements plan with the projected costs of those improvements) through which a Court can analyze what the City's long term goals or projects are, what those projects will cost, and how those goals and costs influence the City's ability to deliver the improvements promised to the PAA which are listed in the City's "Services and Facilities Plan" which was an exhibit in evidence in this case. This is true even though required by the City's duly adopted comprehensive plan. (T.285-288). On the other hand, the City promised through Exhibit "P-52" to deliver certain general services to the Northeast Parcel, such as police and fire protection, as well as such water and sewer facilities as are economically feasible, within five years of this Court's ruling allowing annexation. At trial and through Ex. P-52, the City estimated the costs of those improvements to be in excess of \$4,000,000. However, there was no estimate or projection in Ex. P-52 of the extent of what those costs will be five (5) years from the date of the Trial Court's ruling; nor was there any schedule of when those improvements will be delivered.

The City promised other improvements in the other areas to be annexed in these proceedings, at additional costs. According to Sam Russell, the City's failure to produce some future program of work in this case, with projected costs, should render the Court unable to determine whether the promised improvements to the PAA can be timely delivered and whether annexation are reasonable. (T. 2297-2299). According to Mr. Russell, it is noteworthy that the City obligated itself during the trial to a new \$1,000,000 obligation to purchase a portion of the certificated service area of North Mississippi Utility Company, a privately owned water and sewer company. (T.1037). This lease/purchase agreement was apparently consummated during the trial and did not appear as a projected expenditure in the services and facilities plan or any of the City's financial documents – an indication of lack of planning financially, and thus raising

questions as to whether the City's management of its finances is responsible or prudent in this burgeoning growth area. (T.1041). Specifically, Stephanie Russell stated that it is unreasonable to ask the Court to find the City to have the financial ability to implement its annexation when no realistic plan is shown as to what the City's expenditures will be in the future. (T.1986, 1987).

With the exception of the City of Horn Lake, Southaven has the highest ad valorem tax rate in DeSoto County and has raised its ad valorem taxes three (3) times since 1998 – a 14.5 mill increase. (T.1977; Ex. D-82). According to Stephanie Russell, this fact is an indication that the City is placing the burden of its unplanned expenditures on the taxpayers, without any systematic financial plan to limit the tax burden on its citizens or to anticipate future costs.

The City never did establish its present general obligation bonding capacity during the course of its two weeks of testimony, in its efforts to show that it had the financial ability to implement this proposed annexation. It only *projected* what its bonding capacity *would be in the future*. (See Table 3, Ex. P-52) Ms. Russell stated that this was unacceptable in terms of showing a city's financial capability. (T.1985-1991). Moreover, the fund balances of the City since 2001, as shown in the financial schedules produced by Southaven in its Services and Facilities Plan (Ex. P-52) indicate that the City is *losing* money in its day-to-day operation; and these schedules were made to show a surplus only by use of depreciation of equipment methods and as a result of the City selling off fixed assets. Furthermore, the City's projected general obligation bonding capacity (a sub-indicia of reasonableness of this annexation) even if one accepts the City's projections, is a relatively small amount, indicating limited financial resources available for the City to make large long-term investments for major capital improvements.

The City offered no plan in evidence as to how, from what resources, or when it would pay the approximately four million dollars (\$4,000,000) to make the improvements in the Northeast Parcel promised in its Services and Facilities Plan. (Ex. P-52). Moreover, the City

failed, as required by the Mississippi Supreme Court, to (1) present a true or accurate picture of its financial condition; (2) present an accurate picture of its sales tax revenue history; (3) present a schedule of its recent equipment purchases; (4) present a financial plan to implement *and fiscally carry out* the proposed annexation; and (5) has not presented accurate fund balances for the Court's inspection. Thus, as stated above, it has failed to provide adequate information to allow the Court to make a judgment of the financial well being of the City or its overall ability to meet the increased financial burdens of this annexation, in addition to the huge expenditures it is now facing or will face in the future in this high growth area.

In Exhibit "P-52" (the Services and Facilities Plan), the City offered into evidence projections of how its *existing* debt will decline through 2011. However, the City also offered oral evidence that the City presently has plans to spend \$12,000,000 on the Bean Patch Creek Sewer Interceptor and to lease/purchase a portion of the North Mississippi Utility Company water and sewer franchise for \$1,000,000. Since there is not a City Capital Improvements Plan, the evidence clearly establishes that the Court has no way of knowing how it will use its restricted general obligation debt capacity, as limited by *Miss. Code Ann.* §21-33-303, (1992, as amended). Thus, the Court is left with no reasonable way to determine when the proposed annexation improvements will be delivered. (T. 1985-1997).

Stephanie Russell stated that the annexation of the Northeast Parcel is a "tax grab" or "tax crutch" by the City, since the major ad valorem tax revenue to be gained by the City in this annexation is from the Northeast Parcel (61% in 2007), which is built out and needs no services. (T.1999-2013). These revenues from the Northeast Parcel will admittedly be used to finance the construction of a new fire station in the "Southern Parcel" of the annexation, although the new station is not required or needed for the City to maintain its Class 5 fire rating.

5. The Need for Overall Planning and Zoning

It is noteworthy that the Court determined that there is no need for new zoning or overall planning in the Northeast Parcel. (C.P.284). DeSoto County has an excellent zoning ordinance and a well organized county planning department. (T. 2265) Conversely, the City is not properly engaged in planning since it has no Capital Improvements Plan. This approach to planning, according to Sam Russell, is no planning at all, but is an operation merely reacting to events rather than legitimate planning for the future. Thus, the planning strategy of the City is not reasonable.

DeSoto County has had a comprehensive plan since 1958, which has had periodic reviews and updates. The Southaven Comprehensive Plan would allow development in the Northeast Parcel of one-acre units, thus destroying the character of the Northeast Parcel as it presently exists, where residents enjoy platted 1 ½ acre lots or larger. The Northeast Parcel is a platted area and also has restrictive or protective covenants, thereby further eliminating the need for zoning or planning in the area by the City.

The existence of building inspections in the Northeast Parcel, the non-existence of incompatible land uses in the Northeast Parcel, and the existence of extensive county regulations as shown above, attest to the fact that the proposed annexation of the Northeast Parcel is unreasonable based upon the need for planning or zoning. Moreover, an inspection of the Northeast Parcel makes clear that no annexation of the Northeast Parcel is necessary based upon the need for Southaven to control its borders against unsightly development. The Northeast Parcel is a beautiful area.

6. Need for Municipal Services

The evidence was overwhelming that there is no need for municipal services in the Northeast Parcel of the PAA. (T.2266). One of the sub-indicia often considered in determining

whether or not there is a need for municipal services is whether there is a need for water and sewer service in the PAA. In the present case, the evidence established that the City of Olive Branch provides water services to the citizens of the Northeast Parcel and that the citizens of the Northeast Parcel receive sewer services through the use of septic tanks or individual treatment plants. (T.2267). As stated, the City will not provide centralized sewer service in the area except on a voluntary basis. Moreover, the centralized sewer service offered will not be the normal "gravity" sewer service but merely a so-called "pressurized" sewer system that has been shown to be substandard, unreliable, and proven to be subject to breakdowns and mechanical failure. (T.2267). According to engineer Danny Rutherford, the central sewer service offered in this case by Southaven is not typically offered in a municipality, but rather is typically offered in rural settings (for example, to homes around a lake) where the more reliable gravity systems are not available. (T.1570-1575). According to Mr. Russell, by offering to allow citizens to retain their septic tanks so long as they meet Department of Health standards, and in offering pressurized sewer service only if certain fees are paid, the City of Southaven is in effect offering no central sewer service at all that could in any way be considered reasonable. (T.2267-2270). In effect, the evidence shows that the City once again wants to annex but also wants to give nothing significant in return, other than what the citizens already have.

The objectors were loud and clear in their opposition to "pressurized" central sewer service. They stated that they were being treated as second-class citizens by being offered sewer service that is substantially less reliable than the service offered the vast majority of the other citizens of Southaven who have centralized sewer service. (T.2267-2268).

Courts often use the sub-indicia of "adequacy of fire protection" in the PAA as a guide to determine the "need for municipal services" in the proposed annexation area. The evidence showed that the level of fire protection provided at present to the Northeast Parcel is adequate

and that the promise of an additional level of fire protection, while desirable, cannot reasonably be used as a basis for annexation in this case. (T.2271). The evidence in this case shows that the Northeast Parcel is provided with fire protection from the Pleasant Hill Volunteer Fire Department which has two fire stations – one located in Olive Branch very near the Northeast Parcel with little traffic between the fire station and the Northeast Parcel. (T.2271-2276; Ex. D-65, D-66, P-56). The Fire Rating given to the Pleasant Hill Fire Department by the Mississippi Fire Rating Bureau is “C-7”, an excellent rating that is identical to the Fire Rating given to the City of Olive Branch and the City of Hernando, both within DeSoto County. (T.2276; Ex. P-17, P-26).

The City of Southaven was awarded a “C-5” rating by the Fire Rating Bureau, which was a slightly higher rating than those awarded to Hernando, Olive Branch, and the Pleasant Hill Fire Department. According to the evidence, insurance rates for residential and commercial buildings are based upon these ratings. Again, according to the evidence, the insurance rates for brick and mortar structures are identical, whether the area where the buildings are located is a “C-5” or a “C-7” fire rating area. Insurance rates for frame structures are slightly or negligibly higher in a “C-7” area than frame structures located in a “C-5” area. (T.2307, 2330).

Southaven argued that it can provide better fire protection to the Northeast Parcel than Pleasant Hill Volunteer Fire Department because it has firemen available at a nearby fire station 24 hours a day, whereas Pleasant Hill relies on volunteers. Still, the evidence shows that Pleasant Hill has an excellent fire department and is well equipped to provide fire protection in all sorts of situations, with EMT-trained personnel available to provide emergency service. Moreover, in regard to who can provide the quickest fire protection, the location of the two fire departments (Pleasant Hill and Southaven) appears to favor Pleasant Hill. Its fire department is located in a relatively low traffic area. In answering a call to the Northeast Parcel a Pleasant Hill fire truck

travels through a low traffic area on a direct route. On the other hand, the Southaven Fire Department is located on the heavily traveled Getwell Road next to the massive Sports Complex and numerous baseball fields where thousands of people congregate regularly and traffic often approaches gridlock. (T.2223-2226). In addition, in order to answer a call to the Northeast Parcel, a Southaven fire truck must travel north on Getwell Road, pass through several stoplights, and cross Goodman Road, a major thoroughfare which has six traffic lanes, serves as the link between Southaven and Olive Branch, and is often gridlocked during rush hours. A fire truck from Southaven answering an emergency call to the Northeast Parcel could easily become gridlocked in the process. (T.2225).

The residents of the Northeast Parcel testified that their fire protection, ambulance protection and police protection from the County are excellent, and the evidence established that these services to the Northeast Parcel are certainly adequate. The evidence, (Ex. P-52), shows that the City has no plans to hire additional personnel to provide fire protection or police protection to the Northeast Parcel or any plan for additional employees for solid waste collection. (T.2276). Thus, while it arguably could be stated that Southaven could provide a higher level of such services, the evidence establishes beyond dispute that such services are adequately provided to the Northeast Parcel and that most citizens in that area are well satisfied.

The ambulance services of DeSoto County are under the overall 911 control of the County, as opposed to being controlled by the various cities in the county; and the County has contributed ambulances on a rotating basis each year to the cities. (T.2280, 2327). As stated by Sluggo Davis, the Chancery Clerk, it is in the public interest for the County to have a unified county ambulance program rather than several different ambulance services operated by the various cities in DeSoto County. (T.979-982). The evidence established that the present

8. The County Road Department is active and the County has been responding to ambulance calls since 1975.
9. Potable water is furnished to the Northeast Parcel by the City of Olive Branch; electricity is furnished by Entergy and Northeast Electric Power Company; telephone service is offered by Bell South and Century; natural gas by ATMOS; and cable television by Time-Warner in Memphis.
10. The County has an excellent park system and the Northeast Parcel has its own little park and walking trails.

In other words, the evidence established that there is no need for additional municipal services in the Northeast Parcel.

In summary, in regard to the pressure sewer system, the evidence was clear that the grinder pump to be attached to each proposed individual pressure system, has only an average life of 12 to 15 months, thereby insuring constant repair and maintenance on the unit installed at each residence. The evidence also showed that a gravity system required no maintenance.

As stated above, it is noteworthy that according to the Mayor's testimony, Southaven does not require centralized sewer service in the existing city, and there are many residents in the City still on septic tanks. It is also noteworthy that the City proposes no additional City personnel to provide the additional municipal services to the Northeast Parcel. (Ex. P-52).

7. Natural Barriers

One of the indicia of the reasonableness of a proposed annexation is whether there are any natural barriers between the municipality and the proposed annexation area. As shown in Exhibit "D-24" and "D-25", which depict the drainage basins in the area, the Horn Lake Basin has a natural barrier that restricts, pursuant to County and other regulations, the ability of a sewer

service provider to legally pump wastewater over the natural ridge for treatment that exists between Southaven and a portion of the Northeast Parcel without being in violation of Basin Rules and Regulations. (T.2214, 2299-2301). Thus, since there was no treatment facility east of the ridge at the time this action was filed nor at the time of trial, treatment by Southaven of wastewater from a portion of the Northeast Parcel is not legally available at the time this action was filed or at the time of trial.

8. Past Performance

Another indicia of the reasonableness of a proposed annexation is a city's past performance and whether or not the city has made timely delivery of promised services after previous annexations. From the limited evidence presented to the Court on this issue, there was strong evidence of inadequate past performance by the City in some instances. For example, the 1997 annexation by Southaven was extensive and near the Northeast Parcel in this action. (T.2301-2305). The evidence showed that according to the City Engineer, Ron Smith, some areas in the 1997 annexation did not get centralized sewer service until six (6) to eight (8) years after the annexation. (T.709, *et seq.*). Grove Meadows Subdivision on Stateline Road and the Getwell Methodist Church did not get sewer until 2004. Dove Meadows Subdivision did not get sewer until 2005. There are other areas in the 1997 annexation that still do not have centralized sewer at the time of trial in 2006 – the homes on College Road and Old Airways area. In addition, the Brackett and Esrey Roads are overgrown and barely passable; and Frances Road is not paved.

9. Adverse Economic, Social or Other Impact

Another indicia of the reasonableness of the proposed annexation is the economic or other impact of the annexation upon those that live in or own property in the proposed

annexation area. In arriving at a decision on the reasonableness of the annexation on this issue, courts have typically looked at:

- (a) will the PAA residents receive something of value for their tax dollars; and
- (b) a municipality's need to expand and the benefits to PAA residents from annexation, versus adverse impact, economic or otherwise, which will likely be experienced by those who live in or own property in the PAA. (T. 2305-2306; See also Ex. P-17)

Southaven argued through its evidence presented that the objectors certainly will receive some value for the tax dollars they will pay to Southaven if annexed. The objectors said that the proposed benefits they will receive are already furnished by the County. The evidence shows that DeSoto County provides all or virtually all of the services offered by Southaven, and in some instances, provides better services than Southaven. It is noteworthy that the Court expressly ruled, as shown above, that the City has no need to expand into the Northeast Parcel. (C.P. 269).

The evidence further established that the adverse economic impact on the objectors of the Northeast Parcel will be substantial, as well as unfair and inequitable. (T.2306). As stated above, the testimony of Chris Watson and Stephanie Russell established that the Northeast Parcel, if annexed, would account for 61% of the assessed valuation of the property taken in this annexation. The evidence established and Mr. Watson admitted that the taxes to be collected from the Northeast Parcel are projected to pay for fire protection improvements within the City and obligations made prior to this annexation proceeding. Mrs. Russell characterized this annexation of the Northeast Parcel as basically a "tax grab" or "tax crutch" for the City and therefore is not a proper purpose for annexation. She stated that the annexation was inequitable

to the residents of the Northeast Parcel and fails the fairness evaluation central to a consideration of this indicia.

As stated, Mr. Watson also admitted that the fire station which the City proposes to build in the Southern Parcel of the PAA is not necessary in order for Southaven to maintain its "Class 5" fire rating, a further corroboration of the intent of Southaven to annex solely to gain tax revenues (an improper purpose).

According to the testimony of Mrs. Coker, a realtor and real estate broker, the property values of the Northeast Parcel will suffer if the Northeast Parcel is annexed by Southaven, particularly because of the pressure sewer system the City wishes to install in the Northeast Parcel. Her testimony, based upon her experience and which was unchallenged, was that the general public looking at houses to purchase would, given a choice, prefer a house with a gravity centralized sewer system, rather than the more inefficient pressure system, thereby driving down the value of homes with pressure systems. (See also testimony of Mr. Russell at T. 2313).

The evidence established that if annexed, the mailing addresses in the Northeast Parcel will change from Olive Branch post office addresses to Southaven post office addresses. According to the testimony of Carol Williams, the just-retired longtime postal worker in Memphis and director of the Olive Branch Post Office, this change will result in a huge inconvenience to the citizens of the Northeast Parcel for several years after the changeover. Mail will be lost or delayed in delivery for years to come, a huge item for retired people such as those who live in the Northeast Parcel. (T.1412). Mrs. Coker and Mrs. Brisco and others testified that the disruption of their mail was a very important thing to them for personal reasons. (T. 1452, 1686).

As stated above, Southaven's ad valorem tax rates are the highest tax rates in the County except for Horn Lake and are constantly increasing. According to Sam Russell, the property

taxes on a \$160,000 home, for example, built of frame or masonry, with a \$50,000 automobile, will go up over \$1,000 per year if annexation is successful. (T.2308). According to Mr. Russell and Exhibit "P-17", annexation will cost each such homeowner from \$1,062 to \$1,319 per year, and most of the homes in the Northeast Parcel are valued at considerably more than \$160,000. (See also Ex.D-102).

Also according to the uncontested testimony of Mr. Russell, as stated above, annexation of the Northeast Parcel will not result in a reduction of fire insurance rates for the homeowners of the Northeast Parcel, since the insurance rates are the same for masonry houses, whether the Fire Insurance Rates are calculated by "C-5" or by "C-7" standards. There is a negligible difference in the fire insurance rates on frame houses between houses located where the fire department has a "C-5" rating and houses where the fire department has a "C-7" rating. (See Ex. P-17) Thus, annexation in this case will not result in a positive economic impact of any significance on residents as a result of annexation, so far as fire insurance rates for homeowners are concerned.

According to the testimony of numerous individual objectors, the Northeast Parcel residents, because of their mailing addresses, identify with Olive Branch, which has received recognition as one of the best cities in America for quality of life and property values. As shown in Exhibit "D-79", the median home value in Olive Branch is \$125,800, while the median home value in Southaven is \$91,400, thus demonstrating that Olive Branch's property values are higher than Southaven's property values. (T.2311). The objectors testified that this loss of identity with Olive Branch will affect the fair market value of their valuable property rights.

As shown by Exhibit "D-107", the Northeast Parcel is not like most of Southaven, which has relatively few large lots. The Northeast Parcel is nothing but large lots, and this unique

character would be lost if the Northeast Parcel is annexed by Southaven and subjected to its comprehensive plan allowing one-acre lots per unit construction in the area. (T.2321-2322).

In summary on this issue, the evidence established that the City did not need to expand into the Northeast Parcel; that the benefits of annexation to the citizens of the Northeast Parcel are minimal, while the adverse impact to those citizens is substantial. Thus, annexation is not reasonable on this issue because the evidence established the adverse impact greatly exceeds the benefits received or the need to expand – a highly unfair and inequitable situation. (T. 2323).

10. Impact on Minority Voting Strength

As shown by the testimony of Sam Russell, annexation of the Northeast Parcel would negatively impact minority voting strength in the City of Southaven. (T.2323-2325). As shown by Exhibits “P-15” and “D-3”, the overall racial make-up of the entire proposed annexation area is different from the racial make-up of the Northeast Parcel. Thus, it is highly misleading for the City to provide calculations on this issue (Exhibits “P-47” and “P-48”) for the entire PAA, instead of showing calculations on the impact of minority voting strength by the Northeast Parcel.

11. Proximity Benefits

Another indicia of the reasonableness of this annexation is whether property owners and other inhabitants of the Northeast Parcel have in the past and will, in the foreseeable future unless annexed, enjoy economic and social benefits of the municipality, because of their reasonable proximity to the corporate limits of the municipality, without paying their fair share of the taxes. As stated, both Mayor Davis and Mr. Watson stated that the citizens of the Northeast Parcel were not “freeloaders” as far as receiving economic and social benefits from Southaven. Moreover, as pointed out by Sam Russell, the citizens of the Northeast Parcel pay county taxes and sales taxes when shopping or eating, etc. . . , and those tax dollars are spent in

the County and the cities of DeSoto County. Sales taxes are recovered by the cities when Northeast Parcel dollars are spent in those cities. (T. 2325,2331).

The Objectors contended that there were several “non-issues” raised by Southaven during the trial:

- (a) The school district is a non-issue because it is a county-wide system and school assignments are made without regard to corporate limits;
- (b) Driving on Southaven roads is a non-issue because county, state and federal dollars are all used to maintain those roads;
- (c) The existence of a Southaven Park system is a non-issue because the Summerwood neighborhood has its own park and the county has parks for its citizens;
- (d) The ambulance service provided to the Northeast Parcel is a non-issue because there is a charge for the service, the County controls the service, and compensates the cities for their participation in the ambulance services to the citizens of DeSoto County;
- (e) Hospital services are paid for by the citizens of the County;
- (f) The libraries in DeSoto County and Southaven are part of a multi-county regional system.
- (g) In looking at Exhibit “P-4”, it is apparent that the Northeast Parcel benefits from its proximity to many places – the Memphis Zoo; the Memphis International Airport; shopping and restaurants in every direction; jobs all over the metropolitan area; the state and federal highway systems, schools, churches, etc. – but the citizens pay for all of those benefits, just like everyone else.

(See T. 2326-2330).

12. Other Factors

The Mississippi Supreme Court has stated finally that the Trial Court may also consider any factors other than those already mentioned that may suggest the reasonableness or unreasonableness of the annexation. In this regard, two other matters were presented in evidence:

(a) Annexation for spite or for an improper or arbitrary purpose. In this case the evidence established, based upon the taped telephone conversation between Mayor Davis and Mrs. Stephanie Russell, that this annexation was pursued because of the animus that the Southaven Board of Aldermen had against Mr. Sparkman, one of the objectors, and others who were very vocal at City Board Meetings in opposition to this annexation. Mayor Davis' statement to Stephanie Russell was that he tried to keep the Northeast Parcel out of this annexation but Mr. Sparkman "ran his mouth" and made the members of the Board of Aldermen mad. The tape of this conversation is in evidence before the Court. (T. 2599-2606; R.E. 48).

As shown above, the Mayor of Southaven testified that a proposed annexation for spite or to "teach someone a lesson" is not a proper purpose for annexation.(T.281). However, the Mayor's own words confirmed that such an improper purpose was used in this case.

(b) Is the Northeast Parcel an area that is nothing more than an isolated island that will sooner or later be annexed by someone? In this case, the

citizen/objectors testified that if they must be annexed, they wanted to be annexed by Olive Branch, and then only for a proper purpose.

SUMMARY OF THE ARGUMENT

Respectfully, the evidence presented in this case clearly shows that this annexation proceeding was filed arbitrarily, for improper purposes, and its approval was an abuse of discretion by the City. As stated by the textwriter:

[u]nder various statutes, annexation is permissible where it is reasonable or there is a reasonable basis therefor; where it is necessary and expedient or reasonable, just, and necessary; or where it is in the overall public interest. *Under such statutes, an arbitrary, unreasonable, and unnecessary annexation is invalid* (emphasis added).

See 46 C.J.S., Municipal Corporations, §47. See also *Whispering Springs Corp. v. Town of Empire*, 183 Wis. 2d 396, 515 N.W. 2d 469, 473 (Ct. App. 1994). (Annexation must not be result of arbitrariness and some reasonable future need must be established).

In this case, as shown by the testimony and the transcript of the telephone conversation between Mayor Davis and Ms. Stephanie Russell, this annexation proceeding was filed because of the animus of the governing body of Southaven against Mr. Sparkman, one of the objectors, and others who were vocal in opposition to annexation. (T. 2599-2606; R.E. 48).

Furthermore, it is apparent, given the facts of this case, that this annexation proceeding against the Northeast Parcel was solely filed for the improper purpose of collecting tax revenues to finance existing City projects – and was a “tax grab” or “tax crutch”, as characterized by Mrs. Stephanie Russell. The fact that the Trial Court ruled that the City had no need to expand into the Northeast Parcel and that the Northeast Parcel had no need for municipal planning or zoning, makes clear that this annexation was filed for the improper purpose of collecting taxes. Thus, this proceeding should be dismissed as a matter of law.

The proposed annexation is also unreasonable and the Objectors respectfully submit that the Trial Court committed manifest error in approving the reasonableness of annexation in this action. Respectfully, there is simply no way that the evidence presented demonstrates that the annexation was reasonable. This statement is particularly true since the Trial Court ruled that the City of Southaven (1) had no need to expand its municipal boundaries into the Northeast Parcel, and (2) that there was no need for planning and zoning in the proposed annexation area. Most of the sub-indicia in the other indicia of reasonableness recognized by this Court deal with whether there is a need for expansion of the city or a need for planning and zoning. Thus, the threshold for determining the reasonableness of annexation is whether or not there is a need for the city to expand.

As in the *Matter of Enlargement of Municipal Boundaries of Jackson, Mississippi*, 691 So. 2d 978 (Miss. 1997), this case contains considerable undisputed testimony of other vacant developable land within the existing city and elsewhere that the City might look to for expansion. Further, the evidence showed that the Northeast Parcel of the PAA is “built out” and has considerable and entirely adequate “municipal services” available to it, thus establishing that the only possible reason for the annexation was to increase the tax revenues of the City – admittedly an improper purpose.

The evidence presented makes clear that annexation would be devastating to the character of the Northeast Parcel, which is platted into lots one and one-half (1½) acres or greater, and will be costly to the Objectors.

In summary, the Objectors submit that this action should be reversed because the Trial Court was manifestly erroneous in ruling that the annexation was reasonable; and that the action should be reversed and rendered as a matter of law because it was filed for an improper purpose.

ARGUMENT

A. **Standard of Review.** This Court has set out the standard of review in annexation matters in numerous cases, and that it will reverse a Chancellor's decision as to the reasonableness of the annexation only when a Chancellor's decision is manifestly wrong and not supported by substantial and credible evidence. See *In re Extension of boundaries of City of Hattiesburg*, 840 So. 2d 69, 81 (Miss. 2003). On issues of fact, the Court has stated that "... [t]he judicial function is limited to the question of whether the annexation is reasonable." *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, 276 (Miss. 1999).

On the other hand, the Court employs a different legal standard in annexation cases if the Trial Court has employed an erroneous *legal* standard. See *Bassett v. Town of Taylorsville*, 542 So. 2d 918, 921 (Miss. 1989), wherein the Court stated:

Where there is conflicting, credible evidence, we defer to the findings below. Findings of fact made in the context of conflicting, credible evidence may not be disturbed unless this Court can say that from all the evidence that such findings are manifestly wrong, given the weight of the evidence. *We may only reverse where the Chancery Court has employed erroneous legal standards or where we are left with a firm and definite conviction that a mistake has been made.* (Emphasis added).

(cited with approval in *In the Matter of The Extension of the Boundaries of the City of Winona, Montgomery County: Harry Neal, Donna Neal, Scott Neal, Harriet Neal and Winona Elevator Co., Inc. v. City of Winona, Mississippi*, 879 So. 2d 966 (Miss. 2004).

In the case *sub judice*, the Objectors submit that the Chancellor not only manifestly erred in ruling that the proposed annexation was reasonable; but the Trial Court also erred as a matter of law in failing to deny annexation and to dismiss this proceeding as a matter of law because it was filed for improper and arbitrary purposes constituting an abuse of discretion by the City.

B. Error as a matter of Law. Respectfully, the evidence presented in this case clearly shows that this annexation was filed arbitrarily and for improper purposes, thereby constituting an abuse of discretion by the governing body of the City. As stated by the textwriter,

[u]nder various statutes, annexation is permissible where it is reasonable or there is a reasonable basis therefor; where it is necessary or expedient or reasonable, just, and necessary; or where it is in the overall public interest. Under such statutes, *an arbitrary unreasonable, and unnecessary annexation is invalid.* (Emphasis added).

See 46 C.J.S., Municipal Corporations, §47. See also *Whispering Springs Corp. v. Town of Empire*, 183 Wis. 2d 396, 515 N.W. 2d 469, 473 (Ct. App. 1994). (Annexation must not be result of arbitrariness and some reasonable future need must be established). In this case, the Trial Court not only made a factual finding that the annexation of the Northeast Parcel was not necessary and that the City had no need to annex it (C.P. 269), but the evidence also conclusively shows that the decision to annex the Northeast Parcel was arbitrarily made because of a personal animus between members of the governing body and one of the Objectors, because of his vocal opposition to the annexation at Board meetings and elsewhere. See, for example, a portion of a taped telephone conversation (which occurred automatically) between Mayor Davis and Stephanie Russell which occurred when he called her at her workplace:

FEMALE VOICE: Takes place on November 20, 2003 at 16:34 and 31 seconds. The caller is Greg Davis, Mayor of Southaven, the recipient of the call is Stephanie Russell, at that time, vice-president of the Summerwood Neighborhood Association. The call is received and (*sic*) Stephanie Russell's office at First Tennessee Bank and Memphis, Tennessee where all calls into the department are recorded because the department contains a trading operation. Callers calling into the area are not advised that calls are recorded, however the beep you hear in the background of the recording is to let the callers know that their call is being recorded.

FEMALE VOICE: International, this is Stephanie, may I help you.

MALE VOICE: Stephanie?

FEMALE VOICE: Yeah.

MALE VOICE: Greg Davis.

FEMALE VOICE: Hi.

MALE VOICE: How ya doing?

FEMALE VOICE: I'm okay. How are you?

MALE VOICE: I know we talked, was it this week or last week about –

FEMALE VOICE: I think it was the end of last week.

MALE VOICE: I couldn't remember.

FEMALE VOICE: I'm amazed it's Thursday, but you know?

MALE VOICE: I just thought I would call you back. Mr. Sparkman has successfully over the last three or four weeks, agitated enough of my alderman to where I can't keep Summerwood out of it. So, I was informed after he agitated the last one after this past Tuesday that Summerwood would be part of annexation no matter what. So, I felt like I needed to let you know, since I told you different.

FEMALE VOICE: Okay.

MALE VOICE: Sorry. And I had no idea, it's different issues with different alderman, so I – ranging from sewer and water accusations to other stuff. But they just there isn't no way in the world with him out there running his mouth that they aren't going to go after him, and prove him wrong. So, anyway, I felt like I owed you a phone call.
(T. 2599 - 2601)

MALE VOICE: But anyway we'll any questions that y'all have during the meantime whenever they move forward because like I say, I had to tried to keep y'all out to be honest. Every meeting I had said that, and I finally go told after Tuesday's meeting, too bad.

FEMALE VOICE: Who did he hack off?

MALE VOICE: The last one was Greg Guh.

FEMALE VOICE: Uh, oh.

MALE VOICE: So, that made number five, I gave up, I can hold three or four down.

FEMALE VOICE: He got six, right?

MALE VOICE: I can't hold five. Five out of seven is even too much for me to even fight.

FEMALE VOICE: Okay.

MALE VOICE: By anyway, I just thought I'd let you know.

FEMALE VOICE: Well, I appreciate your letting me know. I just – I think some of our neighbors will won't to fight it.
(T. 2603, 2604)

It is respectfully submitted that the dialogue between the Mayor and Mrs. Russell leaves no doubt as to why the annexation of the Northeast Parcel took place, despite the fact that the City had no need to annex the area. There is no doubt that the annexation decision by the City was arbitrary, and not for reasons of public necessity. Thus, it was a decision not in the public interest, certainly one of the cornerstones of why municipal annexations against the will of property owners are allowed.

It is noteworthy that Mayor Davis himself admitted that an annexation for spite is improper and should not be allowed (T.281). It is also noteworthy that the Trial Court remained silent and did not address this issue in its opinions and rulings, although the matter was brought to the Court's attention both during the trial, in the Objector's post trial Motion to Reconsider, and during the transcribed oral argument on the Motion by the Objectors. (T. 2586).

The Objectors further submit that the annexation of the Northeast Parcel was sought for spite and the improper purpose of seeking tax revenues for the City. This argument was made throughout these proceedings, particularly through the testimony of Mrs. Russell, a banker, who stated that her analysis of the City's financial information showed that the Northeast Parcel would account for sixty-two per cent (61%) of the additional tax revenues to be received from the four parcels in the PAA. Further, she testified that the financial documents established that this additional revenue from the Northeast Parcel would be used to finance debts of the City in existence prior to annexation. This allegation of Mrs. Russell was confirmed and agreed to by Chris Watson, the City's expert witness and City Planner. Thus, Mrs. Russell's statement that the annexation of the Northeast Parcel was nothing more than a "tax-grab" or "tax-crutch" for the City is accurate.

Courts have ruled and it is well settled that a proposed annexation for the sole purpose of raising revenues for a city is improper and should be denied. [62 C.J.S., Municipal Corporations

§47 (citing numerous Mississippi cases)]. When coupled with the Trial Court's ruling that there was no need for the City to annex the Northeast Parcel and that there was no need for municipal planning or zoning in the area, the stark reality, respectfully, is inescapable that this proposed annexation of the Northeast Parcel was for improper purposes – to punish an irate Objector or Objectors, and to use the additional tax revenues as a result of annexation to finance other obligations of the City. Under these circumstances the proposed annexation should be reversed and rendered.

C. The proposed annexation is unreasonable. As stated above, there have been an array of cases in Mississippi that deal with annexation. *In Re Extension of the Boundaries of Batesville*, 760 So. 2d 697 (Miss. 2000) sets out all of the criteria for the Trial Court to follow and keep in mind that apply to most of these cases. Over the years, beginning with the *Dodd v. City of Jackson* case, 118 So. 2d 319 (1960), the Court recognized at least eight (8) indicia of reasonableness, with the burden of proof squarely on the municipality to prove reasonableness:

- a). The municipality's need for expansion.
- b). Whether the area sought to be annexed is reasonably within the city's path of growth.
- c). The potential health hazards from sewerage and waste disposal in the annexed areas. See *Matter of City of Horn Lake, Mississippi*, 630 So. 2d 10, 19-20 (Miss. 1993); *Matter of Boundaries of City of Jackson, Mississippi*, 551 So. 2d 861, 866 (Miss. 1989); *In Re Municipal Boundaries of City of Biloxi, Mississippi*, 744 So. 2d 270, 280 (Miss. 1999). It is noteworthy that these cases held that use of septic tanks, while they may indicate health risks, is "rather

insignificant in overall test of reasonableness” (*Biloxi*, at p. 280).

- d). The municipality’s financial ability to make the improvements and furnish municipal services promised.
- e). The need for zoning and overall planning in the area to be annexed.
- f). The need for municipal services in the area sought to be annexed.
- g). Whether there are natural barriers between the City and the proposed annexation area.
- h). The past performance of the city and the time element involved in the city’s provision of services to its present residents.

Other indicia of reasonableness recognized by the Supreme Court over the years include:

- i). The impact (economic or otherwise) of the annexation upon those who live in or own property in the PAA. See *Western Line Consolidated v. City of Greenville, Mississippi*, 465 So. 2d 1057, 1059 (Miss. 1985).
- j). The impact of the annexation upon the voting strength of protected minority groups. See *Enlargement of Yazoo City v. Yazoo City, Mississippi*, 452 So. 2d 837, 842-43 (Miss. 1984).
- k). Whether the property owners or other inhabitants of the PAA have in the past and for the foreseeable future, unless annexed, will, because of their reasonable proximity to the corporate limits of the municipality, enjoy the economic and social benefits of proximity to the municipality without paying their fair share of the taxes. See *Texas Gas Transmission Corp. v. City of Greenville, Mississippi*, 242 So. 2d 686, 689 (Miss 1970).
- l). Any other factors that may suggest reasonableness *vel non*.

See *Bassett v. Town of Taylorsville, Mississippi* 542 So. 2d 918, 921

(Miss 1989).

As stated in *Bassett*, 542 So. 2d at 921, and *In Re Municipal Boundaries of City of Biloxi, Mississippi*, 744 So. 2d at 278, these factors are only indicia of reasonableness and not separate or distinct tests in and of themselves.

As stated above, while the cases cited above state the broad criteria or indicia of reasonableness should be considered by the Court in this case, the Supreme Court Case referred to most often during the trial of this action was *In Re Enlargement and Extension of Municipal Boundaries of City of Macon*, 854 So. 2d 1029 (2003), which sets forth in a useful summary all of the indicia of reasonableness mentioned above, as well as the “sub-indicia” to be considered by the Trial Court in determining whether the annexation is reasonable. The summary of the indicia and sub-indicia of reasonableness used in the *Macon* case are once again restated here for convenience as follows:

- 1) Municipality’s **need to expand**
 - (a) spillover development into the proposed annexation area (PAA)
 - (b) internal growth
 - (c) population growth
 - (d) need for developable land
 - (e) need for planning in the PAA
 - (f) increased traffic counts
 - (g) need to maintain & expand tax base
 - (m) limitations due to geography & surrounding municipalities
 - (n) remaining vacant land within the municipality
 - (o) environmental influences
 - (p) need to exercise control over PAA
 - (q) increased new building permit activity
- 2) Whether the area sought to be annexed is reasonably within the **path of growth** of the municipality
 - (h) spillover development into the proposed annexation area (PAA)
 - (i) PAA adjacent & contiguous to existing municipality
 - (j) limited area available for expansion
 - (k) interconnection by transportation corridors
 - (l) increased urban development in PAA
 - (m) geography

- (n) subdivision development
- 3) **Potential health hazards** from sewage and waste disposal in annexed areas
 - (f) potential health hazards from sewage and waste disposal
 - (g) a large number of septic tanks in the PAA
 - (h) soil conditions not conducive to on-site septic systems
 - (i) open dumping of garbage
 - (j) standing water & sewage
- 4) Municipality's **financial ability** to make improvements and furnish services promised
 - (i) present financial condition of the municipality
 - (j) sales tax revenue history
 - (k) recent equipment purchases
 - (l) financial plan & department reports proposed for implementing and fiscally carrying out the annexation
 - (m) fund balances
 - (n) municipality's bonding capacity
 - (o) alternate funding sources
 - (p) expected revenue to be received from taxes in the PAA
- 5) **The need for zoning and overall planning** in areas
 - (f) need for planning in the PAA
 - (g) need to exercise control over PAA
 - (h) incompatible land uses
 - (i) need for building inspection
 - (j) absence of county regulations
- 6) **The need for municipal services** in areas sought to be annexed
 - (h) requests for water & sewage services
 - (i) plan of the municipality to provide 1st response fire protection
 - (j) adequacy of existing fire protection
 - (k) plan of municipality to provide police protection
 - (l) plan of municipality to provide increased solid waste collection
 - (m) use of septic tanks in the PAA
 - (n) population density of PAA
- 7) Whether there are **natural barriers** between municipality and PAA
- 8) **Past performance** and time element involved in municipality's provision of services to its present residents
 - (b) timely delivery of promised services after previous annexations
- 9) **Economic or other impact** of annexation upon those who live in or own property in proposed annexation area (Fairness/Equity Evaluation)
 - (c) will PAA residents receive something of value for their tax dollars
 - (d) municipality's need to expand and benefits to PAA residents from annexation v. adverse impact, economic or otherwise, which will likely be

experienced by those who live in & own property in the PAA (the fact that residents & landowners will have to pay taxes is not sufficient to show unreasonableness)

10) Impact of annexation upon **voting strength of protected minority** groups
(b) will minority voting strength be negatively impacted

11) Whether property owners and other inhabitants of areas sought to be annexed have in the past, and in foreseeable future unless annexed will, because of their reasonable proximity to corporate limits of municipality, enjoy economic and social benefits of municipality without paying their **fair share** of taxes

12) Any **other factors** that may suggest reasonableness.

In the Statement of Facts set out above, the objectors followed the indicia and sub-indicia stated in the *Macon* case. By applying the facts presented to the law as stated in that case, the objectors submit that the Court should conclude that the evidence is overwhelming that the proposed annexation in this case is unreasonable. The objectors have arduously attempted to protect their valuable property rights and their lifestyle with limited resources against overwhelming resources and all of the advantages that a municipality brings to these cases. They urge the Court not to drift into the belief that a city has some sort of entitlement to annexation when it simply passes an ordinance to do so.

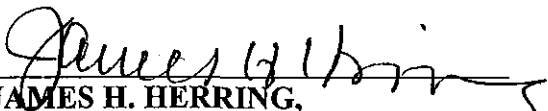
As stated on a number of occasions throughout this brief, the Objectors have pointed out that the Trial Court ruled (1) that Southaven has no need to expand into the Northeast Parcel, and that the area is "built out"; and (2) that there is no need for zoning and overall planning in the area. Indeed, the evidence is overwhelming that the Northeast Parcel citizens are more than adequately served by any of the very limited services that the City proposes to give them. Since the City allows optional septic tank usage throughout the existing City and will employ the same practice in the PAA, potential health hazards in the PAA, (which are characterized by health officials as no different from anywhere else in the State where septic tanks are used, including

Southaven) do not constitute a sufficient basis for the reasonableness of this annexation where the City has no need to annex.

The Trial Court noted that the economic impact on the citizens of the PAA will be substantial (C.P.291). Thus, the evidence is clear that the Objectors will be getting nothing new or substantial for the privilege of paying additional and substantial taxes to Southaven against their will. They will also face the very real inconvenience of having their post office addresses changed and, inescapably, depressed real estate values.

Southaven argues that the Northeast Parcel will sooner or later be annexed by some city. If so, at sometime in the future, the Objectors have said that they would prefer to be annexed by Olive Branch, which presently serves them water and where they have their post office addresses. The City of Southaven has no need to annex the Northeast Parcel except to collect addition taxes from its citizens, and the City offers, in exchange, nothing that the citizens do not already receive from DeSoto County. Annexation to prove a point or to punish an outspoken objector is not a proper basis for annexation. Thus, the objectors respectfully request that this annexation be denied.

Respectfully submitted,


JAMES H. HERRING,
ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

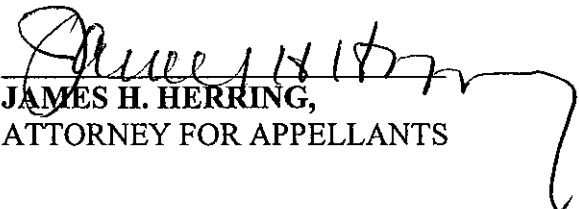
I, James H. Herring, attorney for appellants, the Summerwood and Whitten Place Homeowners Associations, and the individual objectors residing in the "Northeast Parcel, certify that I have this day caused to be delivered by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellants to the following persons at these addresses:

Hon. Mitchell M. Lundy, Jr.
Chancellor
DeSoto County Chancery Court
P. O. Box 471
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Mark Sorrell, Esq.
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This the 14th day of January, 2008.


JAMES H. HERRING,
ATTORNEY FOR APPELLANTS