IN THE SUPREME COURT OF MISSISSIPPI

No. 2006-AN-01574-SCT

IN THE MATTER OF THE ENLARGEMENT AND EXTENSION OF THE CORPORATE LIMITS OF THE CITY OF MADISON

RONALD RUSSELL, KELLY KERSH, CHARLES WARWICK, TOM JOHNSON, RICHARD DAVIS, HARLAN SISTRUNK, AND FRANK BELL — APPELLANTS-CROSS-APPELLEES

VS.

CITY OF MADISON, MISSISSIPPI — APPELLEE-CROSS-APPELLANT

APPEAL FROM THE CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI

APPELLANTS' COMBINED REPLY BRIEF ON DIRECT APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

The population of the southern tier of Madison County has been growing due to its proximity to Jackson. Madison County is a good example of how counties here and elsewhere have responded to such development by providing what were once thought of as "municipal" services, such as trash and solid waste disposal, zoning and planning, road building, police, and fire services.

Madison argues that it alone provides a full range of urban services, but the County provides all the essential service needs of the PAA's residents save one: central sewer – about which more will be said *infra*. Madison claims that residents of the PAA depend upon the City for at least some social, cultural, and recreational opportunities forming a "community of interest" between residents of the City and the PAA. But a careful reading of the City's brief reveals that Madison's rationale has shifted from the traditional purpose of annexation – the need to extend municipal-level services to a newly urbanizing area – to an argument that annexation will maintain the economic vitality of the City.

Annexation under this reasoning becomes a means of extending to ex-urban residents a share of the expenses and social responsibilities of what is just the nearest small town to the PAA. Whether the existence of a sovereign already providing a high level of services should affect traditional Mississippi annexation law, and if so to what extent, are policy-based questions about which the Court may be well served by hearing argument.

ARGUMENT IN REPLY

I. Madison County supplies the essential services to residents of the PAA who stand to receive only speculative benefits under the current plan of annexation.

As the Court has observed in nearly every annexation case, municipal annexation is a creature of the Legislature which has delegated that authority to the legislative branch of municipalities. The function of the courts "is limited to the question whether the annexation is reasonable." *Matter of the Boundaries of City of Jackson,* 551 So.2d 861, 863 (Miss.1989); see also, Miss.Code Ann. § 21-1-33 (1972).

"Reasonableness" is determined by analyzing twelve factors having been announced over time in the fifties to see what the factors "indicate."[1] Members of the Court, including the sitting Chief Justice, have criticized this method as arbitrary for failing to provide substantive guidance. *See, In the Matter of the Enlargement of the Corporate Limits and Boundaries of the City of Gulfport,* 627 So.2d 292 (Miss.1993)(Smith, J., dissenting, "I am convinced that the test has been expanded so far that now it is absolutely meaningless."); *Matter of Boundaries of City of Vicksburg,* 560 So.2d 713 (Miss.1990) (Sullivan, J. dissenting, "'Reasonable' is now determined by the length of the chancellor's nose, or foot, if you prefer."); *Jackson,* 551 So.2d at 878 (Miss.1989) (Blass, J.

[1]While no opinion from the Court acknowledges the debt, given the timing of the Court's adoption of the "indicia" it seems clear that they were largely cribbed from Virginia's statute the current version of which is Va. Code § 15.2-3209. "Reasonableness" under the Virginia statute is "necessity and expedience."

dissenting, "[T]he proliferation of 'indicia of reasonableness" . . . can only lead one to the conclusion that [the indicia] are either now devoid of substance or so malleable as to be meaningless.").

Despite the criticism, the Court remains committed to the "indicia": "fairness to all parties has always been the proper focus of our reasonableness inquiry. Thus, we hold that municipalities must demonstrate through plans and otherwise, that residents of annexed areas will receive something of value in return for their tax dollars in order to carry the burden of showing reasonableness." *In re Extension of Boundaries of City of Hattiesburg,* 840 So.2d 69, 82 (Miss.2003).

This focus, on the benefits to be received by residents of the PAA, is the crux of this case. Notwithstanding occasional remarks by the Court to the contrary, it remains a truism that the primary purpose of annexation is to extend municipal services to urbanizing areas so they do not develop "harum-scarum." *Dodd v. City of Jackson*, 238 Miss. 372, 396, 118 So.2d 319 (1960). Where, as here, a county already provides the essential "municipal" services, the potential issue of harum-scarum development is largely obviated. The Objectors are understandably suspicious of the putative "benefits" they are to derive from the increased taxation related to the annexation.

Because involuntary annexation is by its nature a harsh exercise of governmental power affecting private property and many aspects of private conduct on that land, the Court has required cities to present plans clearly delineating the services and infrastructure to be provided. In this way annexation

is properly restrained and the statutory policy of reasonableness is measured against mandated standards and procedure. Madison has presented plans to provide services to the PAA that are the same or similar to those provided to current City residents; the Objectors do not claim the City's plan discriminates against them. As noted *supra*, the inquiry does not end there because the Objectors already receive and pay for such services from another source. While there have been precursors to this case, see *In re Oak Grove*, 684 So.2d 1274 (Miss. 1996), this case represents the Court's first clear opportunity to consider a county's interest in its residents where it provides them services traditionally thought of as "municipal."

A. Services Offered

1. Planning and Zoning

As the City's mayor said, the City's having certificated a broad area encompassing the PAA for sewer service has effectively bootstrapped the City into a position where it can influence the surrounding development. (V. 7: T. 88) Madison argues that its zoning and planning ordinances "are clearly more comprehensive than the County's." (Brief at 11) This statement is conclusory and unsupported by any factual development. Other such statements are also present in the City's brief. For example, it claims its sign ordinance is "much more comprehensive" than the County's. (Brief at 20) The City fails to undertake any analysis of the ordinances that might support such a view. Alan Hoops, Madison's zoning administrator, admitted during the hearing that he had not compared the

City's with the County's ordinance, but that he was nonetheless certain the City's was superior. (V. 12: T. 842-43)

Hoops was aware of the County's comprehensive land use plan and knew that it was consistent with the City's. (V. 12: T. 815) Aside from noting that the County's sign ordinance was not separate from the zoning ordinance, Hoops was unable to offer any substantive testimony reflecting the City's ordinance's overall superiority. (V. 12: T. 816-20) Aside from the conclusory hooey concocted by lawyers, there is no evidence that the County's zoning and planning is inferior to the City's.

In a similar vein, the City offers in its brief snide and snarky remarks about the County's then recent adoption of a new zoning ordinance. It purports to find suspicious the circumstance that the County's zoning map's scheduled updating had not yet occurred at the time the Board of Supervisors adopted the ordinance. (Brief at 20-21; as for the zoning map's periodic updating, see testimony of Bradley Sellers, V. 12: T. 1728) If the City had a case for its ordinance's superiority, that argument would appear in its brief rather than the trivial unpleasantness that is present.

2. Building Codes

Operating closely in conjunction with zoning and comprehensive planning are various building codes. In April, 2004, the City adopted the so-called International Codes for building, mechanical, plumbing, electrical and the like. At the time of the hearing, the County retained the 1997 versions of the various

codes.

The City correctly notes in its brief that its code enforcement process requires ten steps and the County's four. (Brief at 22) However, it remains true that the vast majority of Madison was constructed under the code regime to which the County still adhered. As City Fire Chief Laviviere admitted, buildings constructed under the former codes were not inferior and presented no real fire hazards. (V. 11: T. 571)

The City's expert, Mike Slaughter, acknowledged that both the City and County had similar codes and he thought the City's were a "little better" than the County's because of three items: green space requirements, signs, and sprinklers. As the City relates in its brief, the main difference is that the new code requires multi-family dwellings to have sprinklers. (Brief at 22)

This argument loses much of its force because there is not very much in the way of multi-family dwellings in Madison. The Court may notice that the City fought a long and, presumably, costly legal battle against one such developer, Steve Bryan. See, *Bryan v. Madison*, 841 So.2d 145 (Miss. 2003); *Madison v. Bryan*, 763 So.2d 162 (Miss. 2000).

The Objectors willingly acknowledge that no criticism can be lodged against the City for adopting updated building codes. But the bottom line is whether structures built under the County's code are materially inferior; whether four inspections are so few as to result in potential hazards; and whether subjective preferences about signs and green space materially affect the public

health, safety, and welfare.

There is no evidence that any of these things is so. The City's fire chief denied it was so; the City's expert admitted only marginal "improvements" of the City's regime over the County's; famed developer H.C. Bailey, Jr., said the County's ordinances require high quality construction. (V. 14: T. 966) Bailey's desire for the development in which he has an interest to be within Madison had nothing to do with concrete or roads, but with his belief that the City was better positioned than the County to deliver services and oversee the general functions of a city. (V. 14: T. 966)

The question is not whether the County provides "minimal" standards; the evidence is without contradiction that its ordinances produce a safe built environment. The evidence shows that the County provides essential related services – zoning, planning, building codes – and that the PAA stands to gain little in this respect from annexation.

3. Streets

The City sensibly keeps its head down over the matter of the area's streets, devoting one paragraph to the issue. (Brief at 30) In response to the Objector's observation that allocating $250,000.00, for streets was patently ridiculous given the testimony that Annandale alone may require nearly $10 million of street improvements (V. 18: T. 1598-99), the City musters the claim that "much of the expense for drainage work, road subgrade repair and curb repair work will be taken out of the normal operating budget." (Brief at 30) One would have thought

that the "normal" operating budget was what was being addressed.

The City's public works chief, Denson Robinson, criticized a variety of street conditions in the PAA – implying that the City had a plan to deal with the situation – but overtly offered nothing in the way of a solution through testimony or in the City's plan. (V. 14: T. 1028-39) As Robinson admitted, the City has done virtually no road-building during his long tenure. (V. 15: T. 1122)

The City's streets have been paved predominantly by the County (V. 18: T. 1603-06) and this appears to be the source the City is counting on to continue dealing with the PAA's roads. Now-former Supervisor Taggart said that the County had recently allocated more than $10 million for road work over and above the annual budget of some $7 million. (V. 18: T. 1579-80) Only the County had any plan – or money – to begin addressing substandard streets in the PAA. (V. 18: T. 1598-99; testimony regarding sample borings)

The City's silence stands as an admission that the Objectors and residents of the PAA will receive little in the way of road services as a result of annexation that they do not already enjoy as County residents.

4. Police

The City argues that there are primarily two reasons the PAA requires municipal-level policing. Citing a developer's testimony, Madison implies that the quantity of construction in the area requires a police presence to deter theft of building supplies. (Brief at 26) Sheriff Trowbridge confirmed that crime in the PAA was mostly construction theft. (V. 19: T. 1670)

The second reason was that increased traffic volumes suggested more rigorous speed control is needed. (Brief at 26) In addition, the City asserts in its brief that "many" of the traffic control signs in the PAA had bullet holes. (Brief at 26) A review of Police Chief Waldrop's testimony reveals a reference to one stop sign evidencing bullet damage, not "many." (V. 10: T. 396) Sheriff Trowbridge acknowledged that such fleeting vandalism was not preventable. (V. 19: T. 1682-83)

As for crime in the area, the City again sensibly keeps its head down. Chief Waldrop frankly admitted there was no crime problem in the PAA. (V. 10: T. 440) Slaughter made a similar concession. (V. 17: T. 1398) Waldrop further admitted that he agreed with Sheriff Trowbridge that municipal-level policing was not currently needed in the PAA. (V. 10: T. 428)

Traffic speed control, however, was a different matter according to the City's police chief. The City's field survey of traffic conditions at two highly-traveled roads in the PAA revealed drivers frequently speeding. (Brief at 27) That drivers speed from time to time is unlikely to be fresh news. Indeed, that "speed" has become a verb meaning "to exceed assigned limits" in our culture speaks volumes about a form of trivial civil disobedience engaged in by almost everyone at some point.

For reasons best known to the Legislature, county sheriffs are not permitted to use radar speed control devices, Miss. Code Ann. § 63-3-519. That did not stop Toby Trowbridge from obtaining such devices – who, after all, is going to enforce

the statute against a county sheriff? In any event, Trowbridge said he had also conducted a field survey within Madison and his results were substantially the same as Waldrop's in the PAA. (V. 19: T. 1676)

The City has responded 188 times during a recent five-year period to requests from the Sheriff to provide backup in the PAA. (V. 9: T. 381-82; Ex. 80, 81) Responding some three times a month to calls from within the PAA superficially seems significant. However, Waldrop admitted most of these incidents were on I-55 or Highway 463 and had nothing to do with "crime" or even speed control within the PAA. (V. 9: T. 383; V. 10: T. 431-32)

Finally, the City asserts that it alone provides animal control services. (Brief at 27, 28) This is a correct statement of what the Record reflects but the City failed to make the concomitant showing that there was an animal control problem either in the City or in the PAA.

In sum, the City's and County's chief law enforcement officers agreed that the PAA has little real crime and presently has no need of municipal-level law enforcement. As Trowbridge's little experiment showed, speeding is as pervasive within Madison as it is without. If municipal-level policing cannot reduce speeding inside Madison, the City has little to offer the PAA in this regard.

5. Fire Protection

The City's bizarre shenanigans regarding fire protection in the PAA will not be rehearsed here, see Principal Brief at 16-20. The City argues because it is a first-responder to the PAA that this "demonstrate[s]" the PAA's need for

municipal-level fire protection. (Brief at 25) Someone has to be a first-responder everywhere. That there is a first responder logically proves nothing aside from the response.

The City is justifiably proud of its unusual combined professional-volunteer force and the resulting fire rating. Nevertheless, the City errs in concluding that its fire rating necessarily results in lower premiums for homeowners. (Brief at 26) The rating bureau official, Carr, explained that his non-profit employer was not a state agency and did not set insurance rates but was only an advisory service using a multi-variable analysis to compare relative fire safety of geographic areas where someone had requested such a survey. (V. 10: T. 455-56, 462)

The City also errs in claiming that a Class 10 rating means the area is "unprotected." (Brief at 26) Carr explained that Class 10 areas were unrated – not unprotected – because no entity had requested the Bureau to perform a rating survey. (V. 10: T. 462) Carr said the PAA had the mutual aid classification because of the City's long history of responding to calls in the County. (V. 10: T. 491)

Initially this "long history" was a result of an agreement between the County and several municipalities for the County to provide additional fire apparatus to the towns, and money to maintain the trucks, in return for a promise by the town to respond to calls in the County. (V. 8: T. 154-60) An objector, Lisa Markham, revealed that Mayor Hawkins-Butler had used this agreement to forcibly dissuade Markham and others from their petition to the County to

establish a fire district in the PAA. (V. 21: T. 1962-63)

The City's brief repeats what Chief Lariviere said during the hearing: Madison will continue to respond into the PAA whether it becomes part of the City or not. (Brief at 26) During an eighteen month period the City responded to 300 calls from the PAA. (Brief at 25; Ex. 30, 31) As with City police responses into the PAA, seventeen responses in a month seems like a significant number that suggests what the City insists is so: the PAA needs a fire department.

However, as with the police responses, an examination of the nature of the responses undercuts the impression presented by the raw number. Lariviere explained that small town fire departments do very little fire fighting. Instead, most responses are for first-aid and emergency services. (V. 11: T. 541)

In comparison, the County has a full-time fire coordinator for five fire districts within the County. (V. 20: T. 1860, 1871) At the time of the hearing in January of 2006, a new million-dollar County fire station near the PAA was being bid. (V. 20: T. 1872-73) According to the fire coordinator, Caughman, the station was planned and being built in contemplation of full-time professional staff. (V. 20 T. 1873) In the near term, however, only "day-time" coverage was planned. (V. 21: T. 1909)

The fire protection services story in this case is its most unpalatable aspect. It reveals the current mayor's unfortunate penchant for political abuse and manipulation. Nevertheless, as Taggart explained with seeming confirmation from a blunt-spoken Chief Lariviere, fire protection is a pragmatic business and fire

stations are not staffed by politicians. (V. 19: T. 1643)

The question remains what will the residents of the PAA get that they do not already pay for? The Court cannot ignore the City's casting aside its County fire truck in order to make PAA residents appear to be free-loaders. It is clear that even if the City receded to mutual aid response, there is now a county fire station at Lake Caroline that is within minutes of the PAA. There is no doubt that a professional fire department is preferable to the most capable volunteer unit, if for no other reason than response time. There is also no doubt that the PAA, even without the City, is not unprotected.

6. Garbage and Solid Waste

The City devotes a single paragraph to garbage collection and solid waste disposal. (Brief at 28) And for good reason: it is not disputed that the County provides these services already and, moreover, they are bundled in the County millage rates and not the subject of additional user fees. (V. 20: T. 1885) Hoops, the City's development director, pointed to "junk" vehicles and exposed appliances that indicated a deficiency in solid waste collection. (V. 12: T. 793-96) Again, a closer inspection of the City's evidence reveals that the photographs depicting these conditions were isolated in territory covering perhaps a quarter of a section. (V. 12: T. 809)

As for garbage collection, no one from the PAA testified to preferring twice a week pickup to once a week. As with solid waste collection, the City provided photographs – mostly of neatly stacked boxes, bags, and trash cans. Once again,

on closer examination the City's evidence is less strong than it initially appears: Objector Ron Russell explained that the City's photographs were taken after Christmas which, in our culture, yields a quantity of trash everywhere. (V. 21: T. 1988)

It should go without saying that no ordinance or offered service is "self-executing." Despite offering solid waste collection and three sites where residents may take such objects, without a request to the County for pickup there will remain objects on the landscape that some find objectionable. But as Caughman said, if the item is within five feet of the right of way, the County picks it up. (V. 20: T. 1884)

7. Sewer

Madison is obligated, by its certificate, to provide sewer services to much of the PAA whether the annexation takes place or not. Presumably, the only benefit of annexation vis-a-vis central sewer is that City residents will pay less than those outside. Even this benefit – of unproven and uncertain magnitude – is doubtful. As the only significant infrastructure promised in the City's plan, the central sewer plan – or plans – takes on greater importance, just as it did in the recent case involving Brookhaven.

Unlike Brookhaven, the PAA in this case does not have present the large number of instances of untreated or illegally flowing wastewater. Herring, the Health Department official, explained that while no health hazards were present, and that more reliable "Aerobic Treatment Units" had been in use since 1992,

there were still remaining septic systems posing potential health hazards. (V. 11: T. 654, 680)

Due to the minimal health risks, in this case central sewer is not as urgent a need as was present in Brookhaven where the Court affirmed a massive annexation primarily to get central sewer into rural areas to meet a real need.[2] Madison has prepared two options for wastewater disposal. Option 1 calls for connection to the regional interceptor lines – owned by the City of Ridgeland – bound south to the Jackson treatment plant at Savannah Street. The City argues that Option 1 is a viable plan and that the only evidence that the Ridgeland interceptors are at capacity – and therefore closed to new connections – is a "desktop" analysis. (Brief at 29)

The City's statement is incorrect on two points. First, the computer analysis was not the only evidence that the Ridgeland interceptors are at capacity. The City of Ridgeland has denied access to the interceptors. (V. 20: T. 1768, 1793) Given that fact, what makes Option 1 "viable" is a complete mystery. Second, the City appears to be unaware that subsequent to the theoretical analysis of the over-capacity flows in the interceptor lines Ridgeland mounted four metering stations. That real time data confirmed the theoretical estimates: all four metering stations showed excess flow. (V. 20: T. 1792) The City seems to be unaware that a significant period of time elapsed during the hearing of this matter and by the time

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[2]See, Alison Yurko, *A Practical Perspective about Annexation in Florida*, 25 Stetson L. Rev. 699 (1996)(briefly discussing annexation as a means to provide urban services to rural areas).

Ridgeland's engineer, Hust, testified, the actual metering was complete and the fact of the over-capacity situation established.

Hust also explained that going south had the additional problem of being outside the Pearl River Drainage Basin and therefore outside the service area of the Jackson-based facility. (V. 20: T. 1795)

As for Option 2, the plan is to take wastewater north via the Madison County Wastewater Authority ("MCWA") facilities. The City claims that the Army Corps of Engineers "has verbally committed to giving the Madison County Wastewater Authority $7 million for construction projects during the present fiscal year, and Hust anticipated receiving the balance of the funding in from the Corps in the next fiscal year." (Brief at 29-30) This is incorrect. What Hust – also the MCWA engineer – actually said was that the Corps had promised funds and then not delivered on the promise. (V. 20: T. 1800)

The MCWA's board member, Wallace, said it has no other operating funds than those supplied by the Corps. (V. 19: T. 1755) The $7 million verbal "commitment" is subject to the priorities and agenda of the Corps; Wallace said that if the money did actual appear it had already been allocated to other pending projects. (V. 20: T. 1765)

The City points out that regardless of the debate over the viability of its central sewer options, it nevertheless was the "only entity that offered any plans to deal with sewage . . .." (Brief at 30) Madison is, of course, obligated by its certificate to plan for central sewer and eventually execute some plan.

So, what will PAA residents get for their tax dollars from the City's two dead-in-the-wastewater plans? It is perhaps in the nature of government that it always works too slowly, always wastes money in interminable "planning," and often seems preoccupied with reconciling competing fiscal exigencies rather than caring for its citizens. This may be one's "welcome" to democratic institutions, but at the moment it cannot be said that the PAA residents stand to gain anything from what is supposed to be – is designed to be – the principal benefit of annexation.

B. Without a viable plan for wastewater treatment, the benefits of another weekly trash pickup and radar speed control services seem paltry.

In nearly every annexation case where annexation has been allowed, each municipality proposing to extend its boundaries has offered substantial, significant, and numerous new services not currently provided to the area to be annexed. In this case Madison's proposed new services are not completely worthless but the essential services are already being paid for and provided by the County. For the "big ticket" items, roads and sewer, the City's promises are empty.

Alison Yurko, writing in the Stetson Law Review, has observed that in Florida "with the onset of counties providing services, the traditional reason to annex has been diminished greatly. Rather than annexation being a logical prerequisite to the development of property, it has become, at least in urban counties, a kind of bargaining chip for property owners to negotiate with local governments in order to find the best deal for development of their property." *Practical Perspective*, 25 Stetson L.Rev. at 699.

The traditional reason to annex is to allow urbanized and urbanizing areas to unite with the city to which the areas are related. Annexation allows an efficient utilization of existing municipal resources that are needed by the urbanizing area. While counties providing such "municipal resources" is a fairly new phenomenon in Mississippi, it is not so elsewhere.

In Virginia in 1979, the conflict between counties that provided services and cities seeking to annex the developed or developing area to which the county provided services (and charged for them) reached a point where the legislature declared a moratorium on annexations. As has been done elsewhere,[3] a Commission was appointed to study the issues. The Virginia Commission reported in 1975 that many counties were providing municipal services and recommended that limitations be placed on cities' annexation into those counties. *See, County of Rockingham v. City of Harrisonburg*, 224 Va. 62, 294 S.E.2d 825 (Va. 1982).

The complex "growth sharing" system enacted by the Virginia legislature in 1979 to accommodate the competing interests of cities and counties is beyond the authority of the Court to "enact" for Mississippi. Yet it is also true that adopting the indicia to give meaning to "reasonable" was an act of legislating. It has not been so long ago that common law courts were unembarrassed by the reality that "saying what the law is" – meaning declaring normative standards based on public policy – was a form of "legislating."

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[3]E.g., *Annexation in Indiana: Issues and Options*, Advisory Commission on Intergovernmental Relations (November, 1998); *Annexation Criteria: Report to the Legislature*, Minnesota Planning (April 1995).

Be that as it may, the Court does have the authority and power to incorporate within the indicia of reasonableness a recognition that "delivery of urban services by county governments . . . has undercut much of the rationale and, more importantly, the popular support for city annexation. . . ." *County of Rockingham*, 224 Va. at 72, fn. 3, 294 S.E.2d at 829, fn. 3. The Court may do so in this case by refusing the annexation request where the value of benefits and services provided by a city applying for annexation does not exceed the value of benefits and services already provided by the county.

The indicia already require that the residents of the PAA receive some benefit in return for their tax dollars. Where a county already provides "municipal" services, a simple balancing test to demonstrate real value from the annexation is not unreasonable. It may be that there are other factors to be captured within the catch-all twelfth indicia. For example, it is not impossible to imagine that a city could justify an annexation by showing it is capable of being more responsive to highly localized needs than a county which of necessity plays on a larger stage, notwithstanding services already provided by the county.

II. Aside from the marginality of the benefits provided by the annexation, the PAA is not sufficiently densely populated to require municipal-level services nor does it share a true community of interest with the City.

Historically, the growth of cities by annexation has been a result of expanding business development and increasing population. To use the experts' phrase, residential and commercial development begins to "spill over" the old boundaries. America's post-war prosperity cannot be overlooked as a contributor

to this phenomenon because greater individual wealth has allowed people to desire and obtain larger more spacious homes and afford the transportation required to reach an area where such residential development is possible – usually over the city line, of course.

People moving out from the city usually continue to work in the city. The city provides shopping, entertainment, dining, and cultural amenities. The former citizen continues to receive the benefits of the city without paying for the privilege. In such cases there is a clear community of interest between the people who have left the city and those who remain.

In this case it must be said that Madison owes its increasing population to nothing that has happened within its borders. The growth in both the PAA and in Madison is attributable to their proximity to the location of State government in Jackson, Mississippi. Jackson is the financial and commercial center for the State. The only newspaper with statewide circulation is published in Jackson. It may be said with some pride that our state Capital offers, for example, an art museum, a symphony orchestra, and dance events of uniquely high quality for a city of its comparatively small size.

As Mayor Hawkins-Butler and the Objectors testified, the whole area including Madison is a satellite of the City of Jackson. The Objectors do not propose that this fact without more should bar annexation in a proper case where those proposed to become new residents by annexation receive tangible new benefits and services. But because the growth of the area is not attributable to

Madison as a city, the community of interest sub-factor enters into the picture and should be considered. *The Matter of the Extension of the Boundaries of the City of Batesville*, 760 So.2d 698, 702 (Miss. 2000).

While the phrase "community of interest" has not been the subject of expansive analysis by the Court, it seems clear that the phrase suggests that the people of the PAA share interests and goals with City residents. The underlying assumption appears to be that fostering the municipality most responsive to its citizens' needs is accomplished by linking areas that are already tied by a well established community.

The Objectors' testimony shows that they want to continue their lives in a low-density environment that is neither urban nor rural. Streetlights, for example, were referred to by one Objector as light pollution. There is nothing in the testimony to suggest that the PAA and City together form any natural neighborhoods, urban or otherwise. Assuming it is true that local governments will be more effective if they cover the same area as that in which their citizens live, work and play, then Madison barely constitutes a town at all. Indeed, driving through and around the City reveals there is not very much "town" to Madison: no central business district, a visually bewildering sprawl along Highway 51, a growing sprawl at the intersection with I-55, a bunker-like city hall off down a side street – at least that is better than running the Police Department out of a ramshackle storefront as was the case as recently as ten or fifteen years ago. To be sure, Madison is not the New England-like "city on a hill."

No Objector who testified claimed an attachment to Madison as a locality. As noted *supra* the vast post-war changes in transport, communication, and level of affluence have a lot to answer for. The testifying Objectors had all come to the PAA from somewhere else; this represents a high degree of residential mobility and a related lack of identification with place. In-home entertainment via television, computer, DVD, and the like, rather than using outside entertainment facilities such as movie theaters, contributes to the lack of community attachment.

As an oxymoronic "bedroom community" where most people work in a place at some distance from where they live, the PAA and areas like it tend to cause people to form "communities of interest" not with their neighbors – whom they scarcely know – but with others in areas remote from where they live and around subjects having little to do with geographic place. Ironically, it is safe to say that the Objectors' funding vehicle for this litigation, an organization called Citizens Against Madison Annexation, Inc., has brought together persons of different ages and backgrounds who would never have met otherwise. In a real sense, the PAA has formed into a neighborhood only thanks to Madison's decade-spanning attempt to wrest control of areas west of the Interstate.

Identifying the community or communities of interest that link the PAA and Madison is elusive. On the other hand, somewhat simplistically put, annexation is a function of population and dollars: is an area urbanizing sufficiently that the cost of providing municipal services will be efficient? There is not very much traditional "law" or "equity" in that analysis. The Objectors recognize that

economic factors are often the motivating factors and major criteria for determining new boundaries regardless of what is said about the indicia. They have learned to look at what appellate courts do as well as to listen to what they say.

In their opening brief, the Objectors argued that at least for some purposes, the PAA was too sparsely settled to be considered urban. The Court has previously recognized the economic issues where a city attempts to incorporate "leap frog" developments. *In the Matter of the Extension of the Municipal Boundaries of the City of Jackson*, 691 So.2d 978 (Miss. 1997). As pointed out in the blue brief, some states have adopted density criteria based on population and land use. Once an area reaches the statutory density threshold, the area is presumptively suited for annexation.

The City correctly states that the Court has recently declined to create another criteria or put some teeth in the existing ones to require cities to provide greater quantitative information about the urbanization, or likelihood of urbanization, of a proposed annexation area. (Brief at 9) However, population density has long been a consideration tucked firmly within the indicia, for example, to support a showing of a need to expand. *In re Extension of Boundaries of Pearl*, No. 2002-AN-02139-SCT, ¶ 19 (August 11, 2005).

In this case, the Objectors respectfully suggest that given the totality of the circumstances the low density of the PAA should militate against approving the annexation. The City has been unable to show that residents of the PAA will

receive benefits and services of substantive value greater than the benefits and services they already are paying for and receive. Without a clear community of interest with the City, the low density development prevalent within the PAA suggests that the time is not yet ripe for the PAA to become a city. Obviously, if any of these factors were different, such as the City proffering up a genuine plan for central sewer and roads, then the case would take on a different cast.

As it stands, the City is offering too little and taking too much and the Objectors believe the Special Chancellor's decision should be reversed and rendered.

ARGUMENT IN ANSWER TO CROSS-APPEAL

I. The City failed to prove that an undeveloped area north of town was reasonable to annex.

It is not believed that the named objecting parties own any real property within the area Chancellor Floyd excluded from the annexation. However, the analysis here is more than an exercise in kibitzing. Considering this territory within the guiding indicia underscores the reasonableness of excluding territory where the City has no plans of providing services, where no services are needed due to the lack of any development, and where the City will have obtained a large area of undeveloped territory if the annexation is affirmed.

The Court in *City of Batesville*, *supra*, excised an area because Batesville had no viable plan to provide services to a fairly remote part of the annexation area within a reasonable time. *Batesville*, 760 So.2d at 701-06. Similar to

Batesville, the City argues here that the area is within its path of growth and will likely soon evidence spillover development. (Brief at 45) Madison offers not a single fact supporting its conclusion. Also, the City overlooks the fact that there is no "competitor" for this area, Canton being unlikely to reach around the Nissan plant just for this morsel. Also, as argued *supra*, even assuming Madison is correct that development is imminent, the County's zoning and building code apparatus is designed to produce municipal-level structures and development. This fact obviates the purported pressure on the City to regulate hypothetical growth on its borders. (Brief at 45)

Madison accurately points out that a proposed road is proposed to be extended into the excluded area. (Brief at 46) This, the City claims, is spillover development. How a proposed roadway drawn on some developer's map constitutes spillover development is a mystery. But, the City says, the access road is currently under construction elsewhere and will offer access upon completion.

The City misses the point of the chancellor's reasoning. Aside from "qualifying" indicia, such as how did the city do in the last annexation, the substantive indicia capture development and its likelihood. Limited access transportation corridors such as the railroad and the interstate highway running through an area does not show urbanization. Madison points to no other clear signs such as advertisements offering otherwise rural property for sale in this area. Nor does the City point to any recent sales or filed plats demonstrating the imminence of urban-like development.

While complaining repeatedly that the Judge Floyd failed to apply all the factors to the area (Brief at 47), neither does the City apply each indicium. This alone suggests how little touched the indicia are by the facts relating to the excluded area. It may well be true that this area will eventually form part of the north-south axis of the City. But that time is some years away. And who among us does not wish to have borrowed every available penny twenty-five years ago to buy up land in Madison County. But the question still is whether annexation here and now is reasonable for the area. The City's argument boils down to little more than that it wishes to inventory land. This falls outside the traditional indicia of reasonableness and the chancellor's ruling should be affirmed.

The *amicus*, St. Dominic's, asks the Court to take judicial notice that it purchased fifty acres in the excluded 2.5 square miles after the hearing. Madison County posts a land records page on its website – just do not use any periods after "St." – and that site indeed shows the deed out to St. Dominic's. Like the City, St. Dominic's recites the proposed roads and its purchase of the real property as evidence that development "interest" in the excluded area is not new. (*Amicus* Brief at 2)

St. Dominic's says it has filed an application for a certificate of need to build a hospital in this area. Taking judicial notice of a publicly available land record is one thing, but taking judicial notice of an application for a certificate of necessity allegedly submitted to the Health Department is another. The Court functions on facts that are shown in a record or which are subject to judicial

notice. Mississippi's rules require that the fact asked to be noticed be "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Miss.R.Evid. 201(b).

Even assuming that the CON process has been initiated as the *amicus* avers, the Court is aware of the vagaries inherent to that process. See, *St. Dominic-Jackson Mem'l Hosp. v. Mississippi State Dep't of Health,* 728 So.2d 81 (Miss.1998); *St. Dominic Med. Ctr. v. Madison Med. Ctr.*, 928 So.2d 822 (Miss. 2006). The CON may or may not be granted, the hospital may or may not ever be built.

St. Dominic's arguments that the City's ordinances are superior to the County's and better provide for the health, safety, and welfare of the public are no more valid or less conclusory than the City's similar statements. The *amicus* provides some new and useful information but fails of the essential purpose of annexation analysis: does this territory now require the panoply of municipal-level services? On cross-appeal the Court should affirm the chancellor's ruling.

II. Conclusion

The proposed annexation area is guaranteed nothing of substantial value in return for its tax dollars. There may come a time when the City has developed a viable plan for roads and sewer into the area, but that time is not now. The Court should reverse the trial court's judgment with respect to the entire PAA ordered

annexed. On cross-appeal the chancellor's judgment should be routinely affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

The undersigned counsel of record to the Appellants-Cross-Appellees hereby certifies that the above and foregoing Objectors' combined brief on direct and cross appeals has been filed with the Clerk of the Court by personal deposit of the undersigned into the United States mail, first class postage prepaid, and that true and correct copies also have been deposited into the United States mail, first class postage prepaid, to the following addressees:

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SO CERTIFIED, this the 27th day of September, 2007.

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