

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
CAUSE NO. 2007-AN-00826**

**CITY OF HORN LAKE, MISSISSIPPI  
ET AL.**

**APPELLANT**

**VERSUS**

**CITY OF SOUTHAVEN, MISSISSIPPI**

**APPELLEE**

Appeal from the Chancery Court of DeSoto County, Mississippi  
Cause No. No. 04-03-0376


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**BRIEF OF THE APPELLEE**

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Oral Argument Requested

Mark Sorrell, Esq.  
City Attorney  
8710 Northwest Drive  
Southaven, Mississippi 39671  
Telephone: 662-393-7294  
Facsimile: 662-393-7294

Jerry L. Mills [MB   
**Pyle, Mills, Dye, & Pittman**  
800 Avery Boulevard North, Ste. 101  
Ridgeland, Mississippi 39157  
Telephone: 601/957-2600  
Facsimile: 601/957-7440

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following list of persons 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.

**Appellant Parties**

City of Horn Lake, Mississippi

James H. Herring, MSB [REDACTED]  
HERRING, LONG & CREWS, P.C.  
129 East Peace Street  
Post Office Box 344  
Canton, Mississippi 39046-0344  
Telephone: 601-859-2573  
Facsimile: 601-859-3955

**Appellee Parties:**

Mark Sorrell, Esq.  
City Attorney  
8710 Northwest Drive  
Southaven, Mississippi 39671

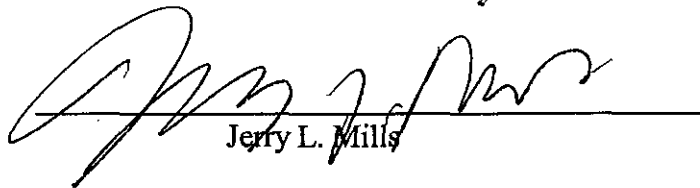
Jerry L. Mills MSB [REDACTED]  
PYLE, MILLS, DYE & PITTMAN  
800 Avery Blvd. North, Ste. 101  
Ridgeland, Mississippi 39157  
Telephone: 601-957-2600  
Facsimile: 601-957-7440

**Other Interested Parties**

Summerwood and Whitten Place Homeowners Associations  
Olive Branch, Mississippi

Honorable Mitchell M. Lundy, Jr.  
Chancellor, District Three  
Post Office Box 471  
Grenada, Mississippi 38901

Respectfully submitted this the 21<sup>st</sup> day of April, 2008.



Jerry L. Mills

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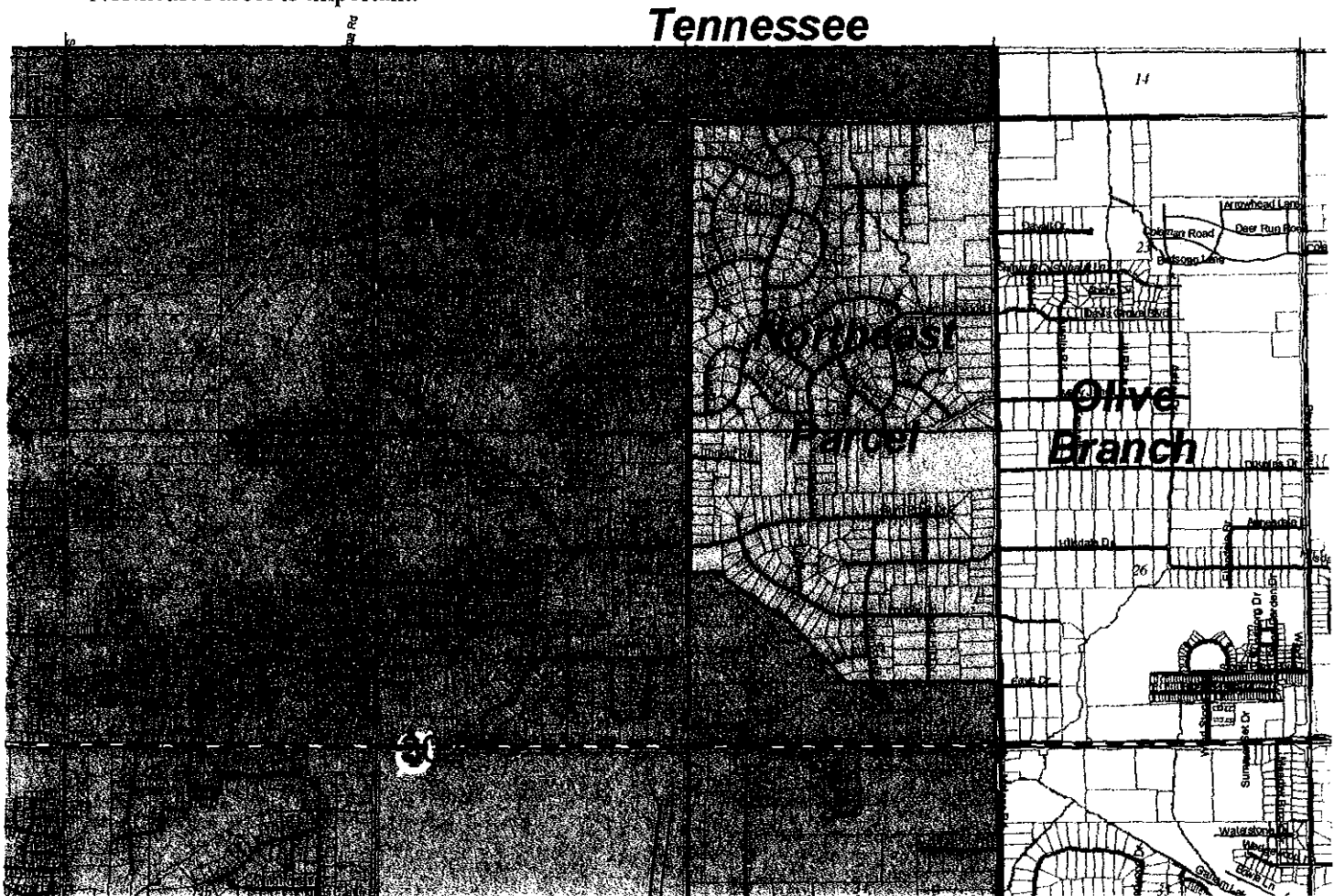
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## **I. INTRODUCTION**

The City of Southaven sought to annex three separate parcels. The lower court approved the annexation of all three as being reasonable. No appeal was taken with regard to any of the three except the Northeast Parcel. To fully appreciate the issues in this case the geography related to the Northeast Parcel is important.



As shown above the Northeast Parcel (shaded in pink) is currently surrounded on three sides by the City of Southaven (shaded in green). On the other side the Northeast Parcel is bounded by the City of Olive Branch (shaded in yellow). The Northeast Parcel constitutes an island of unincorporated

territory in the fastest growing county in the state.

The position taken by the Appellants is strongly reminiscent of that rejected by this Court in *Poole v. City of Pearl* 908 So.2d 728, 742 (Miss.,2005)

The proposed annexation area residents wish to remain as is, with no "citified" encroachment. Realistically, the area has changed, and is likely changing daily; the proposed annexation area is in a metropolitan area, and it is no longer rural, though it may seem so. It is growing and will do so whether annexed or not; annexation alone will not destroy any character already in existence, but it will plan for what is yet to be. Taxes will likely increase somewhat, but the benefit derived therefrom should exceed the cost. It is also just as probable that land values will increase rather than decrease; much of this may depend upon residents' conduct and expectations. Proposed annexation area children will not be required to change schools. Much of the impact is perceived, which is very important, but if the perceptions should turn into harsh reality, which is, hopefully, unlikely, there are other avenues of relief for proposed annexation area residents. Many objectors indicated that they simply did not like Pearl, did not want to be a part of it, and just found the idea repulsive, so to speak. The truth of the matter seems to be that no other municipality wants the proposed annexation area, and the proposed annexation area is too small and too close to Pearl to be overlooked.

Take away the desire to "remain as is, with no 'citified' encroachment" one finds that the arguments of the Appellants evaporate even more quickly than in Pearl. Like it or not the Northeastern parcel is not rural. Like it or not the Northeast parcel is surrounded on three sides by Southaven. Like it or not the City of Olive Branch does not seem to want the Northeast Parcel. As this Court said in *Bassett v. Town of Taylorsville* 542 So.2d 918, 922 (Miss.,1989)

The smoke screens removed, these Appellants simply do not want to pay town taxes. They claim that there is nothing Taylorsville can do for them and that they will achieve no benefits from annexation. Each would have us ignore the benefits. Taylorsville's proximity has long afforded them benefits each will continue to enjoy without regard to annexation.

## **II. STATEMENT OF THE ISSUES**

The Appellants raise the following 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?

The City of Southaven has no dispute that the issues stated above are those which the Appellants attempt to raise. Additionally, however, the City of Southaven would note that the objectors raise one additional issue in its brief which is not set out above. That is

4. Is the failure of the City of Southaven to impose impact fees on developers bad public policy which weighs against the reasonableness of this annexation? (See Appellants Brief page 4)

Each is without merit.

### **III. STATEMENT OF THE CASE**

The City of Southaven adopted its ordinance in compliance with the provisions of § 21-1-27 Miss. Code Ann.<sup>1</sup> As required by statute a certified copy of the ordinance, as amended is attached to the pleadings in this matter.

The City of Southaven filed a petition in the Chancery Court as required by the provisions of Miss. Code Ann. § 21-1-29.<sup>2</sup> Notice of these proceedings was given both by

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<sup>1</sup>§ 21-1-27 Miss. Code Ann provides:

The limits and boundaries of existing cities, towns and villages shall remain as now established until altered in the manner hereinafter provided. When any municipality shall desire to enlarge or contract the boundaries thereof by adding thereto adjacent unincorporated territory or excluding therefrom any part of the incorporated territory of such municipality, the governing authorities of such municipality shall pass an ordinance defining with certainty the territory proposed to be included in or excluded from the corporate limits, and also defining the entire boundary as changed. In the event the municipality desires to enlarge such boundaries, such ordinance shall in general terms describe the proposed improvements to be made in the annexed territory, the manner and extent of such improvements, and the approximate time within which such improvements are to be made; such ordinance shall also contain a statement of the municipal or public services which such municipality proposes to render in such annexed territory. In the event the municipality shall desire to contract its boundaries, such ordinance shall contain a statement of the reasons for such contraction and a statement showing whereby the public convenience and necessity would be served thereby.

posting and publication in the manner provided by § 21-1-31. Additionally each municipality within three miles of any portion of the proposed annexation area was served with process in the time and manner required by law.

The Court has jurisdiction of the subject matter and parties in this cause pursuant to Section 21-1-27 *et seq.*, Miss. Code of 1972. Proper notice and process have been fully accomplished in the manner provided by law.

This matter was tried over a period of several weeks beginning in May 8-13, 2006 and continuing to the weeks of June 5 – 9, 2006 and September 18-22. In addition the Court viewed the proposed annexation area and portions of the existing City. At the trial of this matter the City of Southaven bore the burden of establishing that the proposed annexation is reasonable.<sup>3</sup>

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<sup>2</sup> § 21-1-29. provides:

When any such ordinance shall be passed by the municipal authorities, such municipal authorities shall file a petition in the chancery court of the county in which such municipality is located; however, when a municipality wishes to annex or extend its boundaries across and into an adjoining county such municipal authorities shall file a petition in the chancery court of the county in which such territory is located. The petition shall recite the fact of the adoption of such ordinance and shall pray that the enlargement or contraction of the municipal boundaries, as the case may be, shall be ratified, approved and confirmed by the court. There shall be attached to such petition, as exhibits thereto, a certified copy of the ordinance adopted by the municipal authorities and a map or plat of the municipal boundaries as they will exist in event such enlargement or contraction becomes effective.

<sup>3</sup> § 21-1-33. Decree; Burden of Proof

If the chancellor finds from the evidence presented at such hearing that the proposed enlargement or contraction is reasonable and is required by the public convenience and necessity and, in the event of an enlargement of a municipality, that reasonable public and municipal services will be rendered in the annexed territory within a reasonable time, the chancellor shall enter a decree approving, ratifying and confirming the proposed enlargement or contraction, and describing the boundaries of the municipality as altered. In so doing the chancellor shall have the right and the power to modify the proposed enlargement or contraction by decreasing the territory to be included in or excluded from such municipality, as the case may be. If the chancellor shall find from the evidence that the proposed enlargement or contraction, as the case may be, is unreasonable and is not required by the public convenience and necessity, then he shall enter a decree denying such enlargement or contraction. In any event, the decree of the chancellor shall become effective after the passage of ten days from the date thereof or, in event an appeal is taken therefrom, within ten days from the final determination of such appeal. In any proceeding under this section the burden shall be upon the municipal authorities to show that the proposed enlargement or contraction is reasonable.

Following the trial the Chancellor rendered written findings of fact and conclusions of law finding that the proposed annexation is reasonable in its entirety. A final judgment was entered granting the annexation. Though a number of individuals appeared *pro se* objecting to the annexation of other parcels only the objectors from the Northeastern parcel appealed. The only issues raised in the brief of the Appellants relates to the Northeastern parcel.

#### **IV. STATEMENT OF THE FACTS**

The City of Southaven is seeking to annex territory adjacent to the City. The existing City of Southaven consists of approximately 35 square miles. The territory sought to be annexed consists of approximately 5.8 square miles. The population of the City of Southaven, according to the 2000 census was 28,977 persons residing in 11,462 dwelling units. The area sought to be annexed consists of three separate areas. The annexation area had a population according to the 2000 Census of 1,922 persons residing in 670 dwelling units. The population of the proposed annexation areas had grown to an estimated 2203 persons at the time of trial.

The sub-areas have the following demographic characteristics:

##### **Northeast Area**

<b><u>Year</u></b>	<b><u>Population</u></b>	<b><u>Dwelling Units</u></b>	<b><u>Persons / D.U.</u></b>
2000	1,251	427	2.93
2005	1,272	434	2.93
2006	1,276	435	2.93

##### **South Area**

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<u>Year</u>	<u>Population</u>	<u>Dwelling Units</u>	<u>Persons /D.U.</u>
2000	316	119	2.66
2005	515	194	2.66
2006	555	209	2.66

#### Northwest Area

<u>Year</u>	<u>Population</u>	<u>Dwelling Units</u>	<u>Persons /D.U.</u>
2000	355	124	2.86
2005	369	129	2.86
2006	372	130	2.86

The population density of the overall proposed annexation area was 374 persons per square mile. However the northeast area already has a population density of 706 persons per square mile.<sup>4</sup>

There were five (5) businesses located in the area sought to be annexed.<sup>5</sup> All areas of the proposed annexation area are immediately contiguous to the existing City of Southaven and are accessible by existing and in use roads and streets.

## **V. SUMMARY OF THE ARGUMENT**

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<sup>4</sup> Compare this density to the recently approved Pearl annexation where the supreme court found:

While Pearl, with a population density of over 1,000 persons per acre, increased its population by approximately 12% from 1990 to 2000, the PAA experienced a 33% increase in population during the same period and increased its population density from 283 persons per square mile in 1990, to 377 in 2000. *Poole v. City of Pearl* 908 So.2d 728, 734 (Miss.,2005)

It should be noted that the above quote states that Pearl had over 1,000 persons per acre. In reality it was a 1000 persons per square mile.

<sup>5</sup> See Exhibit P-15

The issues raised by the Appellants range from frivolous to simply not well taken. The argument that the annexation of the Northeast parcel was undertaken for an improper purpose is totally without merit. Appellants concentrate on isolated statements made by the Mayor while ignoring the mountain of evidence related to the reasonableness of the proposed annexation of that parcel. When considered under the totality of the circumstances the annexation of the Northeast parcel is patently reasonable.

Likewise the Appellants seek to isolate two of the indicia related to the reasonableness of an annexation as related to the Northeast parcel. Despite repeated statements of this Court the Appellants seek to convert need for expansion and need for planning and zoning into separate and independent tests of reasonableness.

The argument that "the City policy not to impose impact fees to developers is a bad policy, which weighs against the reasonableness of this annexation" (Appellants' Brief 4) is frivolous. During the trial of this matter, the Appellants were advised of the status of the litigation in Ocean Springs. This Court settled the issue of impact fees definitively in *Mayor and Bd. of Aldermen, City of Ocean Springs v. Homebuilders Ass'n of Mississippi, Inc.* 932 So.2d 44 (Miss.,2006). To raise the issue in view of this Court's pronouncement can only be classed a frivolous.

## **VI. ARGUMENT**

Annexation is a statutory procedure governed by the provisions of Title 21, Chapter 1 of the Mississippi Code of 1972. The Mississippi Supreme Court has repeatedly stated:

Annexation is a legislative affair. The judicial function is limited to the question of whether the annexation is reasonable. *City of Jackson v. Town of Flowood*, 331 So.2d 909, 911 (Miss.1976); *Ritchie v. City of Brookhaven*, 217 Miss. 860, 870-73, 878, 65 So.2d 436, 439-40 (1953). That question is presented first to the chancery court, Miss.Code Ann. § 21-1-33 (1990), and invokes the interests both of the municipality seeking annexation, the owners of property and other inhabitants of the area sought to be annexed, and, as well, others who may be affected. See *City of Greenville v. Farmers, Inc.*, 513 So.2d 932, 941

(Miss.1987); *Western Line Consol. Sch. Dist. v. City of Greenville*, 465 So.2d 1057 (Miss.1985). The burden of proving the reasonableness of the annexation is on the party asserting the annexation, here Biloxi. See *Dodd v. City of Jackson*, 238 Miss. 372, 396-97, 118 So.2d 319, 330 (1960). The chancery court has the authority to confirm the entire annexation, or such part thereof, as may be found reasonable.

The question before this Court is "Whether the proposed annexation of the territory sought by the City of Southaven is reasonable, under the totality of the circumstances, when measured by the indicia of reasonableness announced by the Mississippi Supreme Court."

Over the years, the Mississippi Supreme Court has recognized a number of indicators or indicia of reasonableness. Recently, the Court said:

In a series of cases beginning with *Dodd*, 238 Miss. at 396-97, 118 So.2d at 330, including, *McElhaney* 501 So.2d at 403-04, and *City of Greenville v. Farmers, Inc.*, 513 So.2d 932, 941 (Miss.1987), this Court has recognized at least eight indicia of reasonableness. These are (1) the municipality's need for expansion, (2) whether the area sought to be annexed is reasonably within a path of growth of the city, (3) the potential health hazards from sewage and waste disposal in the annexed areas, (4) the municipality's financial ability to make the improvements and furnish municipal services promised, (5) the need for zoning and overall planning in the area, (6) the need for municipal services in the area sought to be annexed, (7) whether there are natural barriers between the city and the PAA, and (8) the past performance and time element involved in the city's provision of services to its present residents.

Other judicially recognized indicia of reasonableness include (9) the impact (economic or otherwise) of the annexation upon those who live in or own property in the area proposed for annexation; *Western Line*, 465 So.2d at 1059, (10) the impact of the annexation upon the voting strength of protected minority groups, *Yazoo City*, 452 So.2d at 842-43, (11) whether the property owners and other inhabitants of the areas sought to be annexed 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, *Texas Gas Transmission Corp. v. City of Greenville*, 242 So.2d 686, 689 (Miss.1971); *Forbes v. City of Meridian*, 86 Miss. 243, 38 So. 676 (1905); and (12) any other factors that may suggest reasonableness vel non. *Bassett*, 542 So.2d at 921. More recent cases have also relied upon these twelve factors. *In re Enlargement & Extension of the Mun. Boundaries of the City of Madison, Mississippi: The City of Jackson, Mississippi v. City*

*of Madison*, 650 So.2d 490 (Miss.1995) (hereinafter, *Madison* "); *In re Extension of the Boundaries of the City of Columbus*, 644 So.2d 1168 (Miss.1994) (hereinafter, *Columbus* "). *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, , (Miss. 1999)

The indicia of reasonableness are not separate and independent test. Rather, they are indicators, which are useful in determining the reasonableness of an annexation under the totality of the circumstances.<sup>6</sup> Though the indicia are not separate and independent tests, each should be examined individually and then under the totality of the circumstances.

#### A. Standard of Review

This Court has consistently reviewed annexation cases from the perspective of manifest error. The most recent pronouncement on the point came earlier this month. In *In re City of Madison* 2008 WL 879860, 3 (Miss.) (Miss.,2008)<sup>7</sup>

. . .[W]e have in the past acknowledged "the judiciary's limited role in determining whether a municipality's exercise of its legislatively granted authority to enlarge its boundaries via annexation is reasonable, given the totality of the circumstances." *Lamar County v. City of Hattiesburg (In re Extension of the Boundaries of Hattiesburg)*, 840 So.2d 69, 73 (Miss.2003). *See also In re Extension of Boundaries of City of Winona*, 879 So.2d 966, 971 (Miss.2004). When a chancellor determines an annexation to be reasonable, this Court will reverse on appeal only when the "chancellor's decision is manifestly wrong and is not supported by substantial and credible evidence." *Id.* (citing *City of*

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<sup>6</sup>*Bassett v. Town of Taylorsville* 542 So.2d 918, 922 , (Miss. 1989) the Mississippi Supreme Court changed the terminology from "criteria of reasonableness" to "indicia of reasonableness". In doing so they stated:

In the end, the Chancery Court is charged to determine whether under the totality of the circumstances the annexation (or any part thereof) is reasonable, having due deference to the interests of the municipality and, as well, the interests of the parties affected. *City of Greenville v. Farmers, Inc.*, 513 So.2d at 941-42.

This standard has consistently been applied since that time in annexation cases. "These factors have since been applied consistently by this Court. See e.g. *In re Extension of Corporate Boundaries of Mantachie*, 685 So.2d 724, 726-29 (Miss.1996)." *In re Exclusion of Certain Territory from City of Jackson*, 698 So.2d 490, 493 (Miss. 1997)

<sup>7</sup> It should be noted that as of the writing of this brief this decision is still subject to withdrawal or revision. It does, however, set forth the standard of review in a particularly articulate and clear manner.

*Hattiesburg*, 840 So.2d at 81). Furthermore,[w]here 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.

*Id.* (citing *Bassett v. Town of Taylorsville*, 542 So.2d 918, 921 (Miss.1989)). See also *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So.2d 270, 277 (Miss.1999); *McElhaney v. City of Horn Lake*, 501 So.2d 401, 403 (Miss.1987); *Extension of Boundaries of City of Moss Point v. Sherman*, 492 So.2d 289, 290 (Miss.1986); *Enlargement of Boundaries of Yazoo City v. City of Yazoo City*, 452 So.2d 837, 838 (Miss.1984); *Extension of Boundaries of City of Clinton*, 450 So.2d 85, 89 (Miss.1984).

In reviewing the chancellor's decision as to whether a proposed annexation is reasonable, this Court takes into account twelve indicia of reasonableness: (1) the municipality's need to expand; (2) whether the area sought to be annexed may be deemed to be reasonably within a path of growth of the city; (3) the potential health hazards from sewage and waste disposal in the proposed annexation area; (4) the municipality's financial ability to make improvements and furnish the promised municipal services; (5) the need for zoning and overall planning in the proposed area of annexation; (6) the need for municipal services in the area proposed to be annexed; (7) the existence *vel non* of natural barriers between the city and the proposed annexation area; (8) the past performance and time element concerning the city's providing of services to its current residents; (9) the economic impact or any other type impact of the annexation upon those persons who live or own property in the area proposed for annexation; (10) the impact of the annexation upon the voting strength of protected minorities; (11) whether property owners and all inhabitants of the area proposed for annexation have in the past, and will in the future, unless annexed, enjoy the 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 taxes; and (12) any other factors that may or may not affect the issue of the reasonableness of the proposed annexed area. *City of Biloxi*, 744 So.2d at 278; *In re Enlargement and Extension of Municipal Boundaries of City of Madison*, 650 So.2d 490, 494 (Miss.1995). With that in mind, “ ‘the ultimate determination must be whether the annexation is reasonable under the totality of the circumstances.’ ” *City of D'Iberville v. City of Biloxi*, 867 So.2d 241, 249 (Miss.2004) (citing *In re Corporate Boundaries of the Town of Mantachie*, 685 So.2d 724, 726 (Miss.1996) (quoting *Robinson v. City of Columbus (In re Extension of the Boundaries of the City of Columbus)*, 644 So.2d 1168, 1172 (Miss.1994)).

## **B. ERROR AS A MATTER OF LAW**

### **Annexation for Improper Purpose**

The Appellants argue that the annexation in this case is erroneous as a matter of law. They claim that the evidence presented clearly shows that the annexation was sought arbitrarily and for improper purposes. (See Appellants' Brief 35). This contention is totally off base.

The testimony revealed that a Mr. Sparkman was a vocal opponent of the proposed annexation. He did indeed make a number of public statements regarding the proposed annexation and the services proposed by the City of Southaven. Many were absolutely inaccurate and incorrect. Apparently, these are the statements referred to in the audio tape. (Stephanie Russell, an outspoken opponent of the annexation recorded a telephone conversation with Mayor Davis).

The tape recording does not indicate an arbitrary decision by the members of the Board of Aldermen.<sup>8</sup> At most the Mayor was stating his perception of the impact of Mr. Sparkman's statements on the aldermen. As this Court has often noted, annexation is a legislative issue. Acting in their legislative capacity the Board of Aldermen passed the ordinance which was ratified and approved by this court. This Court has long held that the legislative decisions of a municipality are not reviewable in an annexation matter. The Chancellor is to consider only the judicial question of reasonableness. *Ritchie v. City of Brookhaven* 217 Miss. 860, 871, 65 So.2d 436, 439 (Miss.1953). That is what the Court did here.

Despite the erroneous (and perhaps paranoid) perception of the objectors, the proof in this case is overwhelming that the annexation is reasonable. In reality the annexation was not undertaken for spite. The northeast parcel is heavily populated, immediately adjacent to the City of Southaven, in the midst of an urbanizing area and surrounded on three sides by the existing city of Southaven. The fact that Mr. Sparkman has had a personality conflict with one or more aldermen should not be an issue in determining the outcome of this annexation. If such is the

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<sup>8</sup> In a code charter municipality, the Mayor does not vote, except to break a tie.

case this Court should be prepared for the opening of the floodgates with regard to challenges of legislation base on the motives of legislators.

### **B. IMPACT FEES**

The Appellants argue that “the City policy not to impose impact fees to developers is a bad policy, which weighs against the reasonableness of this annexation”. This is a frivolous argument. At trial, the Appellants were advised of this Court’s ruling in *Mayor and Bd. of Aldermen, City of Ocean Springs v. Homebuilders Ass’n of Mississippi, Inc.* 932 So.2d 44 (Miss.,2006). The Ocean Springs case came down during the trial of this annexation. Despite being specifically informed of this Court’s decision the Appellants continue with this argument. Southaven respectfully submits that the argument is frivolous.

### **C. THE INDICIA OF REASONABLENESS**

Before embarking on an examination of the evidence related to each of the indicia of reasonableness one argument of the Appellants should first be examined. The Appellants raise the following issue “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?” The Objectors fall into a familiar trap. They seek to treat individual indicia as preconditions to annexation. Here the assertion is that the City failed to establish two indicia so the annexation must fail. This Court discussed such a situation recently. In *Poole v. City of Pearl* 908 So.2d 728, 732 - 733 (Miss.,2005) this Court rejected essentially the same allegations noting as follows:

Although some fall into the trap of strict adherence to the indicia as though they were twelve conditions precedent to an annexation, this Court has held \*733 otherwise. The twelve indicia of reasonableness are not to be treated as twelve distinct tests, rather, the chancellor must weigh the totality of the circumstances, using these twelve indicia of reasonableness only as a guide. *Id.* at 993 (Dickinson, J., dissenting) citing *Matter of Enlargement of Municipal Boundaries of the City of Jackson*, 691 So.2d 978, 980 (Miss.1997). See also *Extension of*

*Boundaries of City of Ridgeland v. City of Ridgeland*, 651 So.2d 548, 553 (Miss.1995), wherein we stated, "This Court has frequently reiterated its position that the factors to be considered are not to be treated as separate, independent tests but rather indicia of reasonableness, and that the ultimate determination must be whether the annexation is reasonable under the totality of the circumstances."

While Southaven firmly believes that all the indicia supported the reasonableness of the entire annexation, we note that the Chancellor made the correct ruling considering the totality of the circumstances.

**1. The municipality's need for expansion**

Among the factors that have been considered by the Mississippi Supreme Court in determining whether a municipality demonstrated a need to expand are set out below. It is extremely important to note that the "sub-factors" related to each indicia which were utilized by the Supreme Court in Macon, Winona and Pearl are not independent test by which an indicia is measured. In most cases all will not be present. In some cases none will be present. In setting forth these sub factors, the Supreme Court made it clear that **"These factors may or may not include."**<sup>9</sup>

- Whether "spillover" development had occurred into the proposed annexation area.<sup>10</sup>
- Remaining vacant land within the municipality.<sup>11</sup>
- The City's need for vacant developable land.<sup>12</sup>
- Whether the municipality is growing internally.<sup>13</sup>

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<sup>9</sup> In re Enlargement and Extension of Boundaries of City of Macon 854 So.2d 1029, 1035 (Miss.,2003)

<sup>10</sup> *Extension of Boundaries of City of Ridgeland v. City of Ridgeland*, 651 So.2d 548, (Miss. 1995)

<sup>11</sup> It is widely recognized that "rarely will a city become 100% "built out," *Extension of Boundaries of City of Ridgeland v. City of Ridgeland* 651 So.2d 548, 555, (Miss. 1995) See also *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, , (Miss. 1999)

<sup>12</sup> *Matter of Extension of Boundaries of City of Columbus*, 644 So.2d 1168, 1173 (Miss. 1994)

<sup>13</sup> *Extension of Boundaries of City of Ridgeland v. City of Ridgeland*, 651 So.2d 548, (Miss. 1995)



- Need to maintain or expand its tax base, especially as growth and development occurs on its perimeters.<sup>14</sup>
- Whether the population of the municipality is increasing.<sup>15</sup>
- Increasing traffic counts<sup>16</sup>
- Limitations due to geography and surrounding cities.<sup>17</sup>
- Environmental influences (i.e. floodplain, wetlands).<sup>18</sup>
- Need to expand the city's borders to exercise control over development and to provide comprehensive planning for growth.<sup>19</sup>
- Increased new building permit activity.<sup>20</sup>

A number of these factors indicate a strong need for expansion by the City of Southaven.

**a. Whether "spillover" development had occurred  
into the proposed annexation area**

The issue of spillover is also a factor to be considered on path of growth. See the discussion of this factor under "path of growth".

**b. "Whether the municipality is growing internally"**<sup>21</sup>

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<sup>14</sup> *Matter of Enlargement and Extension of the Mun. Boundaries of the City of Jackson*, 691 So.2d 978, 789, (Miss. 1997)

<sup>15</sup> *Matter of Extension of Boundaries of City of Columbus*, 644 So.2d 1168, 1174 (Miss. 1994), *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, , (Miss. 1999)

<sup>16</sup> *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, , (Miss. 1999)

<sup>17</sup> *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, , (Miss. 1999)

<sup>18</sup> *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, , (Miss. 1999) *Matter of Extension of Boundaries of City of Columbus*, 644 So.2d 1168, (Miss. 1994) *Matter of City of Horn Lake* 630 So.2d 10, 17, (Miss. 1993)

<sup>19</sup> *Extension of Boundaries of City of Ridgeland v. City of Ridgeland*, 651 So.2d 548, 553 (Miss. 1995)

<sup>20</sup> *Extension of Boundaries of City of Ridgeland v. City of Ridgeland*, 651 So.2d 548, 553 (Miss. 1995)

<sup>21</sup> Note The Chancellor's Opinion contains references to a transcript prepared in three parts without consecutive page numbering. All opinion references are edited to set add transcript references to the record before this Court.

The Chancellor correctly found:

The evidence is beyond dispute that the City of Southaven is growing internally.<sup>22</sup> Population is rapidly increasing. Building is occurring at a rapid pace. From the year 2000 until Aug 2005 there were three thousand two hundred and ninety five (3,295) new single-family residences permitted in the City of Southaven. The permitted value of these new residences was just over a third of billion dollars (\$333,631,260.00.) In addition 1,366 new multi-family units

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It is without any doubt the City of Southaven is experiencing tremendous growth. This Court toured several areas and took notice of such growth. Even Sam Russell, the urban planner and individual objector agreed that the City of Southaven is growing internally. 452 September. (T-2166) He based his admission in part on the contents of Amended D-11.

Internal growth is important in accessing the need for expansion because new construction absorbs the land within the city that was previously available for development. Chris Watson testified that in April of 2006 the number of acres of commercial development under roof had grown to 354 acres. 159 June. (T-1003) The Population of Southaven is rapidly increasing. Building is taking place (RE-9) all over the city. From the year 2000 until August 2005 there were 3295 new single-family residences permitted in the City of Southaven. The permitted value of these new residence was \$333,631,260.00. Also, 1366 new multi-family units were constructed. A total of 227 new commercial structures were permitted. From 2000 to August 2005 \$884,112,062.00 worth of new construction was permitted in Southaven. (Exhibit P-8).

Southaven is located in the fastest growing portion of the fastest growing county in the state. 156 June. (T-1000) Chris Watson testified that in the first four years following the 2000 census, the population of Southaven had grown by 25%. 158 June (T-1001).

As stated earlier, in 5 years, 4661 new residential units were permitted in the City of Southaven (P-8). This absorbs the ground and is necessary to accommodate the population growth of Southaven.

In 1990 the population of Southaven was 17,949 persons. When the second census came out Southaven had grown to a population of 28,977. Exhibit P-45. According to the latest available census estimates, Southaven had a population of 38,840 persons in July, 2005.

As stated Southaven has had increased building permit activity to accommodate its increase in population. At the end of 2005 Southaven had issued 933 permits for the construction of new single family residences. 74 May (T- 080). During its tour of the city and the PM the Court observed numerous areas of construction of single family residences in (RE-10) various stages of construction. There is not another city in the state approaching this level of new construction. 75 May (t-81). Sam Russell even admitted that Southaven is developing rapidly. 690 September (T-2404).

<sup>22</sup> Sam Russell the urban planner and individual objector agreed that the City of Southaven is growing internally. 452 Sept. (T-2164) He based this admission in part on the contents of Amended D-11. (The exhibit was amended during trial after Chris Watson exposed an error in the methodology used to prepare the original Exhibit D-11) Mr. Russell contended, however, that this was not significant because other cities were also growing rapidly. He totally missed the point as to the reasons for consideration of this and other factors related to need for growth. As noted in the next footnote the reason internal growth is important in assessing need for expansion relates to the fact that new construction absorbs land that was previously available for development. Since the growth of other cities is totally unrelated to this issue Mr. Russell's conclusions in this regard are of no real evidentiary value.

were constructed. Numerous large commercial structures were permitted. A total of 227 new commercial structures were permitted.<sup>23</sup> During this short period (2000 – Aug 2005) nearly a billion dollars worth of new construction was permitted in Southaven. (\$884,112,062).<sup>24</sup>

Chris Watson, the City's expert Urban Regional Planner, testified that the type of growth that has occurred within Southaven spans a variety of different types.<sup>25</sup> Growth has occurred in the commercial, residential, industrial and public sectors within Southaven. (T- 997) Southaven is located in the fastest growing portion of the fastest growing county in the state. (T-999-1000). Watson testified that in the first four years following the 2000 census, the population of Southaven had grown by 25%. (t-1001).

The view by the Court confirms the level of growth occurring within the City of Southaven. One cannot drive through Southaven without seeing new construction of all types, both public and private.

Closely related to this factor is "Whether the population of the municipality is increasing." As set out below the evidence is beyond dispute on this issue.

***c. Whether the population of the municipality is increasing***

As noted above from 2000 to August 2005, four thousand six hundred and sixty one (4,661) new residential units were permitted in the City of Southaven.<sup>26</sup> Each absorbed into

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<sup>23</sup> One of the reasons internal growth is important in assessing need for expansion relates to the fact that new construction absorbs land that was previously available for development. In this case the tremendous size of the commercial structures permitted in Southaven is significant. The 227 permitted structures contain 293 acres under roof. This number does not include the additional land required to support such structures which went into urban usage (i.e. parking lots, road and streets) See Exhibit P-8. Watson testified that he had updated this portion of the study and that in April of 2006 the number of acres of commercial development under roof had grown to 354 acres. (T-1003).

<sup>24</sup> Exhibit P-8.

<sup>25</sup> See also testimony of Mayor Davis that Southaven was experiencing "population growth, retail growth, industrial growth. . ." (T-96).

<sup>26</sup> See P-8. The objector and expert for the objectors admitted population growth in the City of Southaven.

urban usage the ground on which it was built. This level of building has been necessary to accommodate the large population growth which has been experienced by Southaven.

The first census to occur after Southaven was incorporated occurred in 1990. That year the population of Southaven was 17,949 persons. By the second census Southaven had grown to a population of 28,977 persons.<sup>27</sup> The United States Bureau of census estimates population during the periods between decennial censuses. According to the latest available census estimates, Southaven had a population of 38,840 persons in July 2005. This population increase of almost ten thousand residents makes Southaven the fastest growing municipality in the state.<sup>28</sup> In fact, Southaven is growing at a rate sufficient to equal, in their entirety, the population of many of the municipalities of this state.

#### ***d. Increased building permit activity***

This point is discussed above. It is helpful however to further quantify the level of building permit activity on going in the City of Southaven. Mayor Davis testified that he had requested that Exhibit P-8 showing the numbers of permits issued be updated. That exhibit only went through August of 2005. In the balance of the year an additional 599 permits for new single-family residences were issued. At year's end Southaven had issued 933 permits for the construction of new single-family residences. (T-80). There is not another city in the state approaching this level of new construction. (T-81).

#### ***e. The City's Need for Vacant Developable Land***<sup>29</sup>

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<sup>27</sup> See Exhibit P-45

<sup>28</sup> This calculation is based on absolute numbers not as a percent.

<sup>29</sup> The Chancellor found in this regard:

That Southaven needs additional vacant develop able land is evidenced by the amount of land going into urban use. Even by the projections of the objectors, Southaven's land supply is sufficient to accommodate only 5 to 10 years of growth. R-162. This Court is certainly aware of the fact that annexation proceedings take much time and would clearly create a land shortage in the immediate future unless annexation was allowed. Sam Russell admitted that the population numbers

The need the City of Southaven has for additional vacant developable land is clearly evidenced by the amount of land going into urban use.<sup>30</sup> Watson calculated that land in Southaven is going into urban use at the rate of 1,675 acres per year. (Approximately 2.6 square miles per year) (T-1010). With the rate of population increase and commercial and industrial development, land in Southaven is quickly being absorbed. While in a slow or even moderately growing city the number of vacant acres found in Southaven may be sufficient to meet demand, such is not the case in Southaven.

Even by the projections of the objectors, Southaven's land supply is sufficient to accommodate only five to ten years of growth. Given the time annexation proceedings take, this is clearly insufficient.<sup>31</sup> The objectors offered the testimony of Sam Russell on direct to show that the City of Southaven had a land supply sufficient to accommodated growth for the next 27 years. (T-2184). On cross he admitted to several errors in reaching this conclusion. Mr. Russell used the City of Southaven's Comprehensive Plan (Exhibit P-14) in reaching his conclusions.

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he saw for Southaven were a strong indicator that land is being absorbed in a number of land use categories. 694-695. He further agreed that land absorption was a factor to consider in a city's need to expand. He agreed that Southaven had grown by more than 9000 persons between 2000 and 2005. 697 September. (T-2411) He agreed that the growth rate in Southaven is dramatic in the State of Mississippi. 699 (T-2413). He admitted that the growth actually occurring in the City of Southaven exceeded the growth projected in the Comprehensive Plan by 50%. 699 (T-2413). He also admitted that the 27-year land supply that he testified to on direct was not realistic at this point in time. 700 (T-2414) . Mr. Russell changed his testimony from Southaven having a 27-year supply of land to having a 7-year supply of land. 712 (T-2427).

Chris Watson's testimony, the city's land supply is running thin" is believable to this Court upon a tour through Southaven. ( RE-11)Southaven has limitations due to other cities and the state line and therefore does have limitations on expansion due to geography and surrounding cities. This is clearly a factor in the city's need to expand. The objector's view is obviously different. They point to the "sub-indicia' of whether the city has a "need for develop able land". See Macon 854 So. 2d. 1029. In this situation it is, as stated, un-controverted and admitted by the Mayor, that the Northeast Parcel is essentially built out. This Court agrees with the objector's view after studying the case and touring the Northeast Parcel. With reference to the municipality need for expansion, this indicia favors annexation for all the PAA except for the Northeast parcel. That determination alone, however, does not decide whether or not the annexation is reasonable.

<sup>30</sup> Sam Russell admitted that Southaven is developing rapidly. (T-2404).

<sup>31</sup> Watson testified that the rate of land absorption in Southaven indicated that it need to start the annexation process sooner rather than later. Otherwise, the city runs the risk of exhausting its supply of vacant developable land before the process of annexation is concluded.

From this document he obtained his numbers related to the amount of land use. The Comprehensive Plan numbers he used were related to land in Southaven's planning area, not the city limits. Russell admitted he used the wrong numbers. He erred both in the amount of vacant land in the City and the total amount of land in the City. (T-2391). These errors he admitted would alter the calculations he presented on direct.<sup>32</sup> (T-2391). He then admitted that the Comprehensive Plan on which his numbers were based was adopted at some point in 2002. He testified that the data from the Comprehensive Planning would have been gathered in advance. He knew that the land use numbers did not take into account development for the last four years. He admitted that Southaven's population had increased rapidly this decade. He admitted that the population numbers he saw for Southaven were a strong indicator that land is being absorbed in a number of land use categories. (T-2408-2409) He agreed that land absorption was a factor to consider in a city's need to expand. He agreed that Southaven had grown by more 9,000 persons between 2000 and 2005. (T-2411) He agreed that the growth rate in Southaven is dramatic in the State of Mississippi. (T-2413) He admitted that the growth actually occurring in the City of Southaven exceed the growth projected in the Comprehensive Plan by 50%. (T-2413) Finally he admitted that the 27-year land supply that he testified to on direct was not realistic at this point in time. (T-2414). He admitted that cities using good planning principles do not build out to 100%. (T-2416). He agreed that when a city had reached 75% build out they ought to be expanding. Considering these factors, his testimony changed from Southaven having a 27-year supply of land to having a seven-year supply of land. (T-2427). The testimony of Watson sums up the situation in Southaven. "The city's land supply is running thin." (T-1011)

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<sup>32</sup> On further cross examination Mr. Russell admitted that he knew before he testified to the erroneous land use numbers that the northeastern annexation area was included in the calculations and that had to make the numbers he testified to wrong. (T-2397)

Further emphasizing the need for additional vacant land is Mayor Davis' testimony regarding new projects which are committed in the City of Southaven. Mayor Davis testified:

I think it's crucial that the city expands its boundaries before the land is developed and then you can control a lot of the infrastructure needs that need to be met.<sup>33</sup> You can work with the zoning, and hopefully keep tight control on that area. (T-83).

***f. Limitations due to geography and surrounding cities***

Southaven is situated in a rapidly developing portion of the state. The fact that it is surrounded by other municipalities is clearly a factor to be considered in addressing its need to expand. Exhibit P-4 indicates the geographic relationship of Southaven to Horn Lake, Olive Branch, Hernando and the Tennessee border.

The City of Southaven needs to expand its boundaries.

***g. Need to control land on periphery of city.***

Mayor Davis described the explosive growth which is occurring throughout the City. He related how the area has gone from cows, horses, cotton and corn to a rapidly developing city. (T-79) The City of Southaven is a rapidly developing city, quickly absorbing vacant developable land in the existing city. In addition, substantial development has occurred on the periphery of the City. Such development has occurred and continues to occur without the benefit of any effective municipal land use controls. This factor weighs in favor of the reasonableness of the annexation.

The City of Southaven submits that each of the factual findings set forth by the Chancellor are fully supported by credible evidence. Southaven submits that the evidence overwhelmingly supports the proposition that Southaven has a need for expansion. Southaven respectfully disagrees

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<sup>33</sup> During the course of this trial the objectors frequently raised concerns about the type of sewer system being proposed for the Northeastern area. The testimony of the City established that one of the principle reasons for use of this type system was to prevent disruption of the existing development which would accompany the installation of gravity flow lines. This points to one of the obvious reasons for annexation and proper planning of utilities prior to development.

with the Chancellor's conclusion that this indicia support the need for expansion with regard to all but the Northeastern parcel. While the ability of the Northeastern parcel is more limited than others with regard to the availability of vacant developable land, the need for expansion was adequately proven. Need for expansion is not a parcel specific indicator. However, in view of the finding of the Chancellor that under the totality of the circumstances, the proposed annexation is reasonable, any error is harmless.

2. **Whether the area sought to be annexed is reasonably within a path of growth of the city.**

The Chancellor found:

The factors the Mississippi Supreme Court has considered in the past with regard to the issue of "path of growth" include.

1. Evidence that the PPA was immediately adjacent to the city.

*In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So.2d 270, (Miss. 1999) *Extension of Boundaries of City of Ridgeland v. City of Ridgeland*, 651 So.2d 548,556 (Miss. 1995)

2. Evidence that the P AA was accessible by in use public street, highways, and roads.

*In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, (Miss. 1999). (Page 7 of 32)

3. Evidence that the PAA was experiencing spillover of urban development from the city.

*In re Enlargement and Extension of municipal Boundaries of City of Biloxi*, 744 So. 2d 270, (Miss. 1999) *Extension of Boundaries of City of Ridgeland v. City of Ridgeland*, 651 So. 2d 548, 556 (Miss. 1995)

4. The limited area available for expansion

*In re Enlargement and Extension of municipal Boundaries of City of Biloxi*, 744 So. 2d. 2760, (Miss. 1999).

5. The geography.

*In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 SO. 2d. 2760, (Miss. 1999).



6. Development in the P AA.

*In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 SO. 2d. 2760, (Miss. 1999).

7. Proposed subdivision development.

*Enlargement and Extension of Mun. Boundaries of City of Madison v. City of Madison*, 650 So. 2d. 490, 497 (Miss. 1995).

**a. Adjacent to the City of Southaven**

It is without question that the PAA' s are adjacent to the City of Southaven. The Northeast parcel is surrounded on three sides by the City of Southaven. Chris Watson testified that from an urban planning perspective that the adjacency of the PAA indicated that they were in Southaven's path of growth. 37 June. (T-881) The areas not already served by Southaven can be readily served by the City. 38 June. (T-882) It will obviously be a smooth operation for Southaven to begin serving these areas because (re-13) of the adjacency to the city.

**b. Interconnected by Existing and in use Streets**

Each of the proposed annexation areas are interconnected to the existing city of Southaven by roads and streets. The many map exhibits presented by the City of Southaven demonstrate this point beyond doubt. Mayor Davis testified to the interconnection of the southern area by Starlanding Road. He testified that the northwestern area is connected to the existing city by Stateline Road and DeSoto Road. 111 May. (T-117) The Northeastern area is interconnected by Getwell on the west, Malone on the east and Stateline on the north. 112 May (T-118).

As noted by Watson portions of the annexation areas are only accessible from within the City of Southaven. He gave examples of South Hunter Road in the southern area, Threat road in the northeast and Fair Oaks Drive in the northeast. 38 June. (T-882) Watson gave the professional opinion that the interconnection by existing and in use roads indicated that each of the areas sought to be annexed were in Southaven's path of growth. <sup>1</sup> 39, 40, 41 June. (T-882-885)

**c. Spillover Growth**

The objectors note that the Northeast parcel was platted and being developed many years prior to Southaven's extension of its boundaries east to Getwell Road. This is inconsequential to the Court as this Court believes the Northeast parcel has experienced spillover from the State of Tennessee, Southaven, and Olive Branch. Frankly every area of Desoto County is experiencing spillover growth from the State of Tennessee more (Page 9 of 32)directly the City of Memphis.

***d. Geography and Limited Areas for Expansion***

Southaven is limited in places to expand and grow because of state line, and other cities in Desoto County.

***e. Subdivision Development***

Watson testified that the level of subdivision development which had occurred and was occurring at the time of trial indicated that each of the areas sought to be annexed lay within a path of growth of the City of Southaven. He reviewed development reflected on Exhibit P-40 and testified that the series of photographs "is an indicator of the type growth and development that is occurring with the areas ... "47 June. (T-891)

Mayor Davis testified as to the increasing subdivisions to the south, both in the existing city and the proposed annexation area. 112. (T-118)

Further he testified that the northeast area is already largely built out with subdivision development. 113 May. (T-119) He testified that he agreed with the deposition testimony of Mr. Russell that the northeast area was not rural. He stated that five lane corridors are seldom necessary to serve rural areas. He noted that one of the largest IRS centers was only 1300 feet north of the northeastern area (across the state line in Tennessee). 114 May. (T-120) Further he testified that there is increasing urban activity in the vicinity of the northeastern area. 114 May. (T-120)

Objector and planner Sam Russell admitted that subdivision development within a city (Page 10 of 32) in a particular direction is an indicator of path of growth. 689 Sept. (T-2403) That this was occurring in the direction of each of the proposed annexation areas is undisputed.

***f. Proposed subdivision development***

The Court noted in its drive through of the massive subdivision development occurring in Southaven in various stages. The Court was impressed with the testimony of Lance Smith a developer in Desoto County, that, detailed numerous advantages to being in Southaven.

The above factors validate that this indicia favors annexation of all three areas of the PAA.

The factual findings set out above are fully supported by substantial credible evidence. The arguments of the Appellants are without merit. The record evidence presented clearly shows all areas sought to be annexed lie in a path of growth of the City of Southaven. Likewise, the cases cited by the Chancellor correctly sets forth prior cases of this Court dealing with the issue of path of

growth.

The test with regard to "path of growth" is whether an area is in "a" path of growth, not necessarily a City's primary "path of growth".<sup>34</sup> The Mississippi Supreme Court said:<sup>35</sup>

According to *Matter of Boundaries of the City of Jackson*, this factor requires only a showing that the area to be annexed is, "in a path of growth, not necessarily the most urgent or even the city's primary path of growth." 551 So.2d at 865. Also, this Court has previously held that our law gives municipalities the discretion, based on convenience and necessity, to choose between various paths of growth by annexation. *Ritchie, et al. v. City of Brookhaven*, 217 Miss. 860, 65 So.2d 436 (1953).

The argument of Appellants that Southaven has other paths of growth is simply without merit.

The area sought to be annexed lies within a path of growth of the City of Southaven. The territory sought to be annexed is presently accessible by existing and in use roads and streets. Urban development has spilled over into the area sought to be annexed. The City of Southaven has already extended municipal utilities in portions of the area sought to be annexed.

#### *g. Adjacency*

The City of Southaven submitted numerous maps showing that each of the areas sought to be annexed are adjacent to the existing city. In fact the northeastern area is surrounded on three sides by the City of Southaven and on the remaining side by the City of Olive Branch. See testimony of Chris Watson (T-881). Watson testified that from an urban planning perspective the adjacency indicated that each of the areas was in the path of growth of the City of Southaven.

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<sup>34</sup> The objectors devoted substantial time and effort arguing that the northeast area was also in Olive Branch's path of growth and the southern area was in Hernando's path of growth. This is identical to the discredited argument in the recent Pearl case. The Supreme Court noted:

Because of the proximity of Flowood and Brandon, Johnstone testified that the PAA "is not uniquely a path of growth for Pearl" and that much of Pearl's recent development has been to the south and west. However, the key question on this point is whether the PAA is in a path of growth of Pearl, regardless of whether there may be other paths of growth. Also, the fact that the PAA may lie in the path of growth of other municipalities does not negate that it also lies in a path of growth of Pearl. *Poole v. City of Pearl* 908 So.2d 728, 736 (Miss.,2005)

<sup>35</sup> *Matter of City of Horn Lake*, 630 So.2d 10, 19(Miss. 1993)

(T-881). He stated that the adjacency indicated that the areas not already served by the City of Southaven can be readily served by the City. (T-882) See also testimony of Mayor Davis (T-56-58)

*h. Interconnected by Existing and in use Streets*

Each of the proposed annexation areas are interconnected to the existing city of Southaven by roads and streets. The many map exhibits presented by the City of Southaven demonstrate this point beyond doubt. Mayor Davis testified to the interconnection of the southern area by Starlanding Road. He testified that the northwestern area is connected to the existing city by Stateline Road and DeSoto Road. (T-117) The Northeastern area is interconnected by Getwell on the west, Malone on the east and Stateline on the north. (T-118).

As noted by Watson, portions of the annexation areas are only accessible from within the City of Southaven. He gave examples of South Hunter Road in the southern area, Threat road in the northeast and Fair Oaks Drive in the northeast. (T-882) Watson gave the professional opinion that the interconnection by existing and in use roads indicated that each of the areas sought to be annexed were in Southaven's path of growth.<sup>36</sup> (T-882-885)

*i. Spillover Growth*

Mr. Watson testified that the spillover is a concept recognized in the discipline of urban and regional planning. (T-859) He traced the history of development surrounding the northeastern area. He opined that spillover has occurred from Southaven, from Olive Branch and the City of Memphis. (T-867) After extensive voir dire Mr. Watson testified that there had been spillover growth into the northeastern area. (T-877) He testified that the presence of spillover indicates that the area lies in the City of Southaven's path of growth. (T-878). Watson

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<sup>36</sup> Watson acknowledged that the Northeastern area is probably also in the path of growth of Olive Branch. He noted however that Olive Branch was not seeking to annex. (T-885).

testified that there is not an area where Southaven's growth is not spilling over. He stated that Southaven is growing in all directions. (T-1012).

*j. Geography*

Watson testified that geography is an important element in assessing the path of growth of the City of Southaven. He explained that upon examination of the spatial distribution of other cities and geopolitical entities that he found Southaven to have limited territories into which it could grow. (T-887)

*k. Subdivision Development*

Watson testified that the level of subdivision development which had occurred and was occurring at the time of trial indicated that each of the areas sought to be annexed lay within a path of growth of the City of Southaven. He reviewed development reflected on Exhibit P-40 and testified that the series of photographs "is an indicator of the type growth and development that is occurring with the areas. . . ." (T-890)

Mayor Davis testified as to the increasing subdivision to the south, both in the existing city and the proposed annexation area. (T- 118). Further he testified that the northeast area is already largely built out with subdivision development. (T-119). He testified that he agreed with the deposition testimony of Mr. Russell that the northeast area was not rural. He stated that five lane corridors are seldom necessary to serve rural areas. He noted that one of the largest IRS centers was only 1300 feet north of the northeastern area (across the state line in Tennessee). (T-120). Further he testified that there is increasing urban activity in the vicinity of the northeastern area. (T-120).

Objector and planner Sam Russell admitted that subdivision development within a city in a particular direction is an indicator of path of growth. (T-2403). That this was occurring in the direction of each of the proposed annexation areas is undisputed.

### ***l. Limited Area for Expansion***

The City of Southaven has limited opportunity for growth. As Chris Watson testified Southaven is constrained by Olive Branch, Horn Lake and Hernando. Additionally the Tennessee line eliminates growth to the north (T-879). See Exhibit P-1.

### ***m. Proposed Subdivision Development***

Sam Russell compared the 2002 existing land use map to a 2004 aerial photo. Definite subdivision development was shown. Additionally, Southaven offered the testimony of a developer of a new subdivision in the proposed annexation area. See testimony of Lance Smith.

### ***n. Traffic Counts***

Traffic count data from the Mississippi Department of Transportation is reflected on Exhibit P-54. That data indicates that within close proximity to the annexation areas that traffic counts are on the increase. Watson noted that the increase in traffic flow bears a relationship to development that is occurring. He testified that the traffic count data indicated that the areas sought to be annexed were in Southaven's path of growth but also that it was an indication of need for municipal services. (T-902).

After going through each of the sub factors, Mr. Watson testified that in his professional opinion each of the areas sought to be annexed were in Southaven's path of growth. Another factor important in addressing the path of growth of the northeastern area is the fact that it lies in Southaven's sewer service area. Transportation and treatment of sewer in the area is the responsibility of DCRUA (DeSoto County Regional Utility Authority). Responsibility for the provision of retail sewer services for the northeastern area has been assigned to Southaven. T-98.

### **3. Potential Health hazards from Sewage and Waste Disposal.**

The Chancellor devoted substantial attention to this indicia. He found:

This Court believes this indicia should be looked at closely as the future of mankind depends largely upon how we, as a people, deal with overexpanding problem of sewage and waste disposal. Our children, our grandchildren and their children very existence depends upon addressing this problem.

The Objectors note that this should not be a reason for annexation as the City of Southaven offers a "pressurized" sewer service on a voluntary basis.

They are correct, however, as long as their septic tanks or individual treatment plants operate appropriately. Mayor's testimony. This the Court believes will be and should be monitored closely. (Page 11 of 32) A large number of septic tanks in an area, *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, (Miss. 1999) *Matter of Extension of Boundaries of City of Jackson*, 551 So.2d 861,866 (Miss. 1989) Sam Russell agreed that there are a large number of septic tanks in the area. 728, Soil conditions which are not conducive to an on site system, *In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So.2d 724, 727 (Miss. 1996) The objectors engineer, Danny Rutherford, concurred that the soils in the northeast area are not conducive to septic tank usage. 752 June(T-1595). Open dumping of garbage, standing water, *Extension of Boundaries of City of Ridgeland v. City of Ridgeland*, 651 So.2d 548,558 (Miss. 1995) *City of Greenville v. Farmers, Inc.*, 513 So.2d 932,935 (Miss. 1987), and raw sewage, *City of Greenville v. Farmers, Inc.*, 513 So.2d 932,935 (Miss. 1987), are all factors used by the Supreme Court to determine this indicia.

Jim Weston with the Mississippi Department of Health testified that he conducted a survey of the existing conditions within each of the three proposed annexation areas. 581 May (T-587). By doing so he had the opportunity to observe the types of systems in place for the treatment of sewer. He explained that a wide variety of different systems, but in this area the soils "are not particularly favorable for those types of systems." He explained that when you have marginal soils the chance of failure is higher. 581 May (T-587).

Mr. Weston testified that a major problem with the types of systems he found in the proposed annexation areas was maintenance. During the first two years while the systems were maintained by the manufacturer, the systems worked well. After that period he related that "we've had a very large failure rate with alternate disposal systems because the property (RE-17) owners aren't maintaining them. In some areas, we've had as high as 70 to 75 percent failure." 582 May (T-588).

When asked what happens when you have a failure he explained that the types of failures varied. For example if proper chlorine was not used" the unit would not kill the viruses or bacteria that might be left over ... " He explained that these viruses and bacteria can be dangerous to humans. 582-583 May (T-588-589). He testified the health effects of this type failure could range from typhoid fever to cholera or hepatitis to vomiting and diarrhea. 583, 584 May (T-589-590).

Mr. Weston testified that in the proposed annexation areas he found examples "of most of the types of system that offer, we found examples of systems we do not

offer" 585 May (T-591). The types of systems in the area included mechanical treatment plants, septic tanks and even one instance of a straight discharge.

Mr. Weston utilized Exhibit P-30 to demonstrate the types and geographic distribution of potential health hazard he found throughout the proposed annexation area. 586-603 May (T-602-609). Mr. Weston offered his expert opinion that there were existing or potential health hazards in the area sought to be annexed. 605. (T-611) He expressed the opinion that it would be of benefit to the residents of the area to have available central or decentralized collection sewer disposal. 607-608 May (T-613-614). He testified that there was a need for one of the systems in the area sought to be annexed. 608 May (T-614).

Asked to describe what he found in the proposed annexation areas, Mr. Weston stated: (RE-18)

What I saw is a typical area in Mississippi that's being developed, and when we're under that type of pressure, and the area is being developed, those areas would be best served by some type of central or decentralized wastewater collection and treatment system as opposed to onsite systems, and I'll tell you why. On site systems rely on the property owner to maintain them. Central or decentralized collection disposal systems have an operator, that's a responsible person that makes sure these systems are functioning correctly. And that's a big difference, and so that's why, in my opinion, the area would be served by some type of centralized systems. 609-610 May (T-615-616).

Clara Respass, a resident of Whitten Place (Northeastern area) testified that though she had not had problems with her septic system, there are times when the smell of sewage from her neighbors system was evident. (370 May T-376) She asked the Court to grant the annexation. Joe Hale, a resident of Whitten Place in the northeast annexation area testified " ... we desperately, need a sewer system in our neighborhood." 401 May (T-407). He stated that the homes are on septic tanks. He stated that "on days that it's rainy or wet, the smell of drainage from the septic tanks is enough to take your breath away in certain spots ... " He stated that he was fearful that his own septic tank would fail and expose him to \$5,000 to \$8,000 in replacement cost. 402 May T-408.

Chris Watson, the city's urban planning expert testified that he had reviewed each of the photographs Mr. Weston testified about in exhibit P-30. He stated that he had observed in the field the conditions reflected by those photographs. 63 June (T-906). Mr. Watson verified the existence of the odor problems related by Ms. Respass. 63 June (907). Watson verified the widespread use of septic tanks in the annexation areas. 66 June (909). (Page 14 of 32 )

Watson noted that based on the close proximity to the city and the topography, that sewerage from a malfunctioning system flows back into the city. He demonstrated the flow of water on Exhibit P-46. 66 June (T-910). He testified that based on topography, the malfunctioning systems created potential health hazards in the City as well as in the proposed annexation area. (This testimony related primarily to the northeast



annexation area.) 66 June (T-910-911).

Watson opined that there was a definite need for central sewer in the proposed annexation areas given the density of development and the number of persons that live in the area. 67 June. (T-911) Watson contrasted the impact of potential health hazards in the different areas. He noted that the southern area was largely undeveloped but developing. In that area central sewer is provided as development occurs. In the northeast substantial development has already occurred. Developers will not be coming forth to install central sewer. That leaves the task to a governmental entity such as Southaven. 68 June. (T-912) It is important to note that the City of Southaven did not simply identify the problems in this area but have in place a plan to correct the concerns with health hazards. See testimony of Mayor Davis. 141 May. (T-147)

In addition to the potential health hazards from sewerage disposal, Watson testified to potential health hazards from standing water, burning of solid waste.

The objectors expert, Sam Russell admitted that there are existing or potential health hazards in the northeastern area. He testified:

Q. And so, sir, we have agreed that there are potential health hazards in your area, have we not? 729 Sept. (RE-20) (T-2442-2443)

A. Yes.

The Objectors complain of the problem that may be associated with the "pressure" system. This argument was diffused by their expert Danny Rutherford. One of the big points raised by the objectors throughout this trial was the argument that the force main system was inferior. They claimed it would be expensive for them to provide the electricity to run the pumps. Danny Rutherford testified that the topography plays a significant role in the location of gravity sewer. Typically gravity sewer is placed in the ground before development begins. Inconvenience may be a big factor in installing gravity sewer lines after construction is complete. He testified that there was no question that the pressure system proposed by the City would be less disruptive to the citizens of the annexation area than a gravity system. 758. (T-1601-1602)

One of the major contentions of the objectors was shown to be erroneous by this witness. There had been major concern that an inch and quarter pipe would be too small for the system to work. Mr. Rutherford testified that to utilize a pressure system you needed smaller pipe. He stated that smaller pipes worked better on pressure systems than larger pipes. 762. (T-1605) He agreed that septic tanks are going to fail over time. 764. (T-1607-1608) With regard to the system proposed by Southaven Mr. Rutherford agreed:

- o The installation would be less disruptive than gravity
- o It would eliminate potential health hazards
- o Installation would be faster
- o It would allow connections only were needed. 768 June (T-1611-1612).

It is this Court's opinion that this availability of the system at little cost to the (Page 16 of 32 )objectors will save them money when as opposed to having to install a new system at a high cost all they will have to do is elect to allow the City of Southaven to install the pressure system at Southaven's cost.

This indicia favors annexation in all three PAA' s.

The evidence fully supports the conclusions of the Chancellor. Factors which the Supreme Court has recognized as supporting the reasonableness of annexation related to potential health hazards from sewage and waste disposal<sup>37</sup> include a large number of septic tanks in an area,<sup>38</sup> soil conditions which are not conducive to on site systems,<sup>39</sup> open dumping of garbage, standing water<sup>40</sup> and raw sewerage<sup>41</sup>

The testimony in this case leaves little doubt that this factor weighs in favor of the proposed annexation. The City of Southaven called as an expert witness Jim Weston with the Mississippi Department of Health. Mr. Weston supervised the staff in the division which deals with the placement, design and installation of on-site wastewater disposal system. (T583) He has a BS degree in Soils and 16 years of experience with the Mississippi Department of Health. (T-584). He explained that a review of the soils of an area is important because the soil conditions dictate the type of sewer system which should be used. (T-584).

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<sup>37</sup> It is important to note that an annexation may be reasonable in the absence of potential or existing health hazards. See: *Matter of City of Horn Lake*, 630 So.2d 10, (Miss. 1993). In that case as in part of the PPA here, central sewer adequately served the annexation area.

<sup>38</sup> *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, (Miss. 1999) *Matter of Extension of Boundaries of City of Jackson*, 551 So.2d 861, 866 (Miss. 1989) Sam Russell agreed that there are a large number of septic tanks in the area. (T-2442)

<sup>39</sup> *In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So.2d 724, 727 (Miss. 1996) The objectors engineer, Danny Rutherford, concurred that the soils in the northeast area are not conducive to septic tank usage. (T-1595)

<sup>40</sup> *Extension of Boundaries of City of Ridgeland v. City of Ridgeland*, 651 So.2d 548, 558 (Miss. 1995) *City of Greenville v. Farmers, Inc.*, 513 So.2d 932, 935 (Miss. 1987)

<sup>41</sup> *City of Greenville v. Farmers, Inc.*, 513 So.2d 932, 935 (Miss. 1987)

Mr. Weston testified that he conducted a survey of the existing conditions within each of the three proposed annexation areas. (T-587). By doing so he had the opportunity to observe the types of systems in place for the treatment of sewer. He explained that a wide variety of different systems, but in this area the soils "are not particularly favorable for those types of systems."<sup>42</sup> He explained that when you have marginal soils the chance of failure is higher. (T-587)

Mr. Weston testified that a major problem with the types of systems he found in the proposed annexation areas was maintenance. During the first two years while the systems were maintained by the manufacturer, the systems worked well. After that period he related that "we've had a very large failure rate with alternate disposal systems because the property owners aren't maintaining them. In some areas, we've had as high as 70 to 75 percent failure." (T-588)

When asked what happens when you have a failure he explained that the types of failures varied. For example if proper chlorine was not used "the unit would not kill the viruses or bacteria that might be left over. . ." He explained that these viruses and bacteria can be dangerous to humans. (T-588-589). He testified the health effects of this type failure could range from typhoid fever to cholera or hepatitis to vomiting and diarrhea. (T-589, 590).

Mr. Weston testified that in the proposed annexation areas he found examples "of most of the types of system that offer, we found examples of systems we do not offer" (T-591). The types of systems in the area included mechanical treatment plants, septic tanks and even one instance of a straight discharge.

Mr. Weston utilized Exhibit P-30 to demonstrate the types and geographic distribution of potential health hazard he found throughout the proposed annexation area. (T-602-609)

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<sup>42</sup> Sam Russell admitted that the soils in the northeast area are not conducive to septic tank usage.

Mr. Weston offered his expert opinion that there were existing or potential health hazards in the area sought to be annexed. (T-605). He expressed the opinion that it would be of benefit to the residents of the area to have available central or decentralized<sup>43</sup> collection sewer disposal. (T-613-614). He testified that there was a need for one of the systems in the area sought to be annexed. (T-614)

Asked to describe what he found in the proposed annexation areas, Mr. Weston stated:

What I saw is a typical area in Mississippi that's being developed, and when we're under that type of pressure, and the area is being developed, those areas would be best served by some type of central or decentralized wastewater collection and treatment system as opposed to onsite systems, and I'll tell you why.

On site systems rely on the property owner to maintain them. Central or decentralized collection disposal systems have an operator, that's a responsible person that makes sure these systems are functioning correctly. And that's a big difference, and so that's why, in my opinion, the area would be served by some type of centralized systems. 609-610 May (T-615-616).

There are potential and existing health hazards in the area sought to be annexed by the City of Southaven. A central sewer serves little of the area sought to be annexed. There is evidence that septic tank systems are continuing to be installed in the area. The soil types are not conducive to septic utilization at densities occurring and projected to occur. Additionally, there is inadequate drainage; mosquito breeding areas; standing water; trash and garbage.

Clara Respass, a resident of Whitten Place (Northeastern area) testified that though she had not had problems with her septic system, there are times when the smell of sewage from her neighbors system was evident. (T-376) She asked the Court to grant the annexation.

Joe Hale, a resident of Whitten Place in the northeast annexation area testified "...we desperately, need a sewer system in our neighborhood." (T-407). He stated that the homes are on

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<sup>43</sup> He described "A decentralized system" as one "that can be set up by utility city or county to where it's a smaller type system, same concept as a collection and disposal system, but instead of pumping through a pipe for miles, this would be done on a more localized area."

septic tanks. He stated that "on days that it's rainy or wet, the smell of drainage from the septic tanks is enough to take your breath away in certain spots. . ." He stated that he was fearful that his own septic tank would fail and expose him to \$5,000 to \$8,000 in replacement cost. (T-408)

Chris Watson, the city's urban planning expert testified that he had reviewed the each of the photographs Mr. Weston testified about in exhibit P-30. He stated that he had observed in the field the conditions reflected by those photographs. (T-906). Mr. Watson verified the existence of the odor problems related by Ms. Respass. (T-907). Watson verified the widespread use of septic tanks in the annexation areas. (T-909).

Watson noted that based on the close proximity to the city and the topography, that sewerage from a malfunctioning system flows back into the city. He demonstrated the flow of water on Exhibit P-46. (T-910). He testified that based on topography, the malfunctioning systems created potential health hazards in the City as well as in the proposed annexation area. (This testimony related primarily to the northeast annexation area.) (T-910-911).

Watson opined that there was a definite need for central sewer in the proposed annexation areas given the density of development and the number of persons that live in the area. (T-911). Watson contrasted the impact of potential health hazards in the different areas. He noted that the southern area was largely undeveloped but developing. In that area central sewer is provided as development occurs. In the Northeast Parcel substantial development has already occurred. Developers will not be coming forth to install central sewer. That leaves the task to a governmental entity such as Southaven. (T-912). It is important to note that the City of Southaven did not simply identify the problems in this area but have in place a plan to correct the concerns with health hazards. See testimony of Mayor Davis. (T-147).

In addition to the potential health hazards from sewerage disposal, Watson testified to potential health hazards from standing water and burning of solid waste.

The objectors expert, Sam Russell admitted that there are existing or potential health hazards in the northeastern area. He testified:

Q. And so, sir, we have agreed that there are potential health hazards in your area, have we not? (T-2442-2443).

A. Yes.

One of the big points raised by the objectors throughout this trial was the argument that the force main system was inferior. They claimed it would be expensive for them to provide the electricity to run the pumps. Danny Rutherford testified that the topography plays a significant role in the location of gravity sewer. Typically gravity sewer is placed in the ground before development begins.<sup>44</sup> Inconvenience may be a big factor in installing gravity sewer lines after construction is complete. He testified that there was no question that the pressure system proposed by the City would be less disruptive to the citizens of the annexation area than a gravity system. (T-1601-1608).

One of the major contentions of the objectors was shown to be erroneous by this witness. There had been major concern that an inch and quarter pipe would be too small for the system to work. Mr. Rutherford testified that to utilize a pressure system you needed smaller pipe. He stated that smaller pipes worked better on pressure systems than larger pipes. (T-1605). He agreed that septic tanks are going to fail over time. (T-1607-1608).

Mr. Rutherford agreed that the availability of the type system Southaven proposed would be of assistance in correcting a potential health problem in the annexation area. (T-1611). He admitted that the lower front end cost of the system proposed would permit the city of Southaven to give those whose on site system was working the option of not having to connect. (T-1612).

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<sup>44</sup> Mr. Rutherford testified that the developer generally installs the sewer lines and passes the cost on through the price of the lots.

Under the DeSoto County regulations connection is mandatory if a system is available. This is without regard to individual need. (T-1611).

With regard to the system proposed by Southaven Mr. Rutherford agreed:

- The installation would be less disruptive than gravity
- It would eliminate potential health hazards
- Installation would be faster
- It would allow connections only where needed. (T-1612).

This indicia weighs in favor of annexation.

The Appellants totally misconstrue the evidence related to this indicia. They argue that “the City does not offer centralized sewer service to the resident (sic) but only offers a “pressurized” sewer service on a voluntary basis, if the residents are willing to pay for it.” It appears that the objectors have yet to realize that the “pressurized” system offered by Southaven is a part of central sewer system. The statement in the Appellants’ brief that central sewer will not be offered is simply incorrect. (Appellants’ Brief 14). Somehow the Appellants seem to find fault with Southaven’s policy of allowing the use of septic tanks which are not creating a present health hazard and providing a mechanism to eliminate potential health hazards. The argument of Appellants defies logic. The Appellants are critical of a plan that provides maximum flexibility to the residents while arriving at a solution which will resolve both existing and potential health hazards.

The argument that “there will be absolutely no change from the health requirements that already exist as a result of annexation” ignores the obvious. Without the expenditure by Southaven, there is no central solution to address either existing health hazards nor those which will arise in the future.

The argument that Southaven has made no formal complaint regarding existing health hazards is totally disingenuous. Given the complaints of improper motives for annexation made by

the Appellants one can only imagine the cries of foul which would have arisen if Southaven had made such complaints. At any rate, making a complaint without a willingness to provide a meaningful solution would accomplish little. The City of Southaven has proposed such a solution.

#### **4. The Municipality's Financial Ability to Make the Improvements and Furnish Municipal Services promised.**

The Chancellor found:

The Objectors offer that the City of Southaven has no long term or planned program of work (or a capitol improvements plan with the projected costs of those improvements) through which the Court can analyze what the City's long term goals or projects are, what they will cost, and how those goals and costs influence the City's ability to deliver the improvements in the PAA which are listed in its "Service and Facilities Plan." P-52. According to "P-52" the city plans to deliver certain general services, such as police and fire protection, and water and sewer facilities such as are economically feasible, to the PAA within five years of this Court's ruling if it allows annexation. The Objectors state there is no way to tell whether the City could deliver on its promises because there has not been given a future program of work or any adopted capital improvements plan and the projected costs of those improvements, in the future. They state 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 and annexation are reasonable. While the objector's argument is well taken, the City of Southaven is in the (RE-22) unusual state of "dynamic growth flux" And that is one of the main reasons this Court differs with the Objectors on this indicia. In past cases the Court reviewed the following factors relating to financial ability:

- A) Present financial condition of the municipality. *In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So.2d 724, 728(Miss. 1996) *Matter of Extension of Boundaries of City of Columbus*, 644 So.2d 1168, 1171 (Miss. 1994) *City of Greenville v. Farmers, Inc.*, 513 So.2d 932, 935 (Miss. 1987) *Matter of Extension of Boundaries of City of Ridgeland*, 388 So.2d 152, 156 (Miss. 1980) *Extension of Boundaries of City of Biloxi v. City of Biloxi*, 361 So.2d 1372, 1374 (Miss. 1978) *In re City of Gulfport*, 179 So.2d 3, 6, 253 Miss. 738, (Miss. 1965)
- B) Sales tax revenue history. *In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So.2d 724, 728(Miss. 1996)
- C) Resent equipment purchases. *In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So.2d 724, 728(Miss. 1996)
- D) The financial plan and department reports proposed for implementing and fiscally carrying out the annexation. *Enlargement and Extension of Mun. Boundaries of City of Meridian v. City of Meridian*, 662 So.2d 597, 611 (Miss. 1995) 178 So.2d



683, 685 253 Miss. 812, *Bridges v. City of Biloxi*, (Miss. 1965)

- E) Fund Balances. *Extension of Boundaries of City of Ridgeland v. City of Ridgeland*, 651 So.2d 548, 558 (Miss. 1995)
- F) The City's Bonding Capacity. *In re City of Gulfport*, 179 So.2d 3,6,253 Miss. 738, (Miss. 1965)
- G) Expected amount of revenue to be received from taxes in the annexed area. *Bridges v. City of Biloxi*, 178 So.2d 683, 685, 253 Miss. 812, (Miss. 1965)

The Court finds that the evidence is solid on the good financial condition of the City of Southaven. Testimony of Mayor Davis and Demery Grubbs, an expert in municipal finance impressed the Court with Southaven's financial condition. Mr. Grubbs stated "The City of Southaven is in an excellent financial posture at this current time, and both in the general fund, water and sewer fund, and special funds. They have maintained a sound financial posture, and do so today." Mr. Grubbs testified that the audits of the City for the last five years as reflected in Exhibits P-20, P-21, P-22, P-23, and P-24, reflect a healthy fund balance over time.

***a. The financial plan and department reports proposed for implementing and fiscally carrying out the annexation***

As previously noted, the City of Southaven adopted a services and facilities plan in addition to the more generalized promise of the ordinance. This plan sets forth the minimum commitments of the City of Southaven to the citizens it is seeking to annex. It provides for the provision of services on a department-by-department basis. It was prepared in conjunction with each of the department heads and sets forth in some detail exactly what additional personnel, equipment and budget each department will need to (Page 19 of 32) extend its services into the proposed annexation areas. Mr. Grubbs reviewed this plan (Exhibit P-52) in forming his opinion of the financial ability of Southaven to meet its commitments. He concluded

Based on my history with city, and based on previous annexations, and based on review of the audits of the city, and the Services and Facilities Plan as prepared, I find that the city is more than capable of providing the services outlined in this Services and Facilities Plan and can, financially, afford to do so. 661 (T-666).

***b. Fund balances***

Grubbs testified that his firm recommended to municipalities that fund balances be maintained in the 10 to 12 percent range. The most current audit reflects that Southaven had over a 20% fund balance in the general fund. 647 (T-653). The fund balances maintained by Southaven is indicative of the financial ability to provide the services and make the improvements promised.

***c. Sales tax revenue history.***

Demery Grubbs testified that he had observed the sales tax history of Southaven during his long tenure with the City of Southaven. He noted that sales tax revenues to the City of Southaven had more than doubled during that time period. 643 (T-649). He indicated that the sales tax trends in the City of Southaven indicated "a very positive future as relates to sales tax." 644 (T-650).

Mayor Davis testified that sales tax revenues had gone up from \$3.5 million when he became mayor to more than \$10 million dollars for the current year. 152 May (T-158). Retail development continues to be strong and prospects for continued sales tax growth is extremely positive. 153 May (T-159. (RE-25)

#### ***d. Recent Equipment Purchases***

In prior cases recent equipment purchases have on occasion been of significance in addressing a city's ability to provide services. For example in *In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So.2d 724, 728 (Miss., 1996) the Court noted the testimony of the Mayor that the town had recently acquired a new fire truck and police car which could serve the annexed area. In this case the proactive nature of the City of Southaven is dynamic evidence of its financial ability to serve the area. Southaven is not waiting for the annexation to become effective to add the additional police officers population growth demands. 73 June (T-917). These officers are in the current budget. Southaven has located a fire station to serve the northeast area. It is already staffed and equipped ready to serve the first day after annexation. 73 June (T-917). Southaven has already purchased property on Highway 51 to build the new fire station to serve the northwest area. 73 June (T-917). Southaven has already purchased the North Mississippi Utility Company for the purpose of supplying water and sewer to the southern area. 74. June (T-918). The pipe necessary to extend service to the southern annexation area was on the ground ready to be installed in June (T-918). (It had been installed prior to the conclusion of the trial) 74. As Mayor Davis testified the City had already bought the pumps to provide sewer service to the areas it seeks to annex. 74 June (T-918).

#### ***e. The City's Bonding Capacity***

The City of Southaven currently has some 37 to 38 percent of its general obligation bonding capacity available. 650(T-657). Mr. Grubbs testified that "They have an excellent bonding capacity." 650 (T-657). (RE-26) Southaven maintains an A+ rating with Standard and Poor's Rating Agency. Mr. Grubbs testified that this was an excellent bond rating. He testified that Southaven was rated among the top ten municipalities in the state. 651 (T-658). Mayor Davis testified that the city is in a healthy condition as related to remaining bond capacity. 157 (T-163).

Grubbs explained in detail other non-bond financing options available to the City of Southaven should it desire to use them. These options are detailed in Exhibit P-25 and clearly indicate that Southaven has the financial ability to comply with the promises of its ordinance. 657 (T-662-663)

The evidence clearly establishes that the City of Southaven has the financial ability to provide the services and make the improvements set out in its ordinance of

annexation. This conclusion is fully borne out by the expert testimony of Demery Grubbs and Chris Watson. This factor weighs in favor of the proposed annexation in all three PAA's.

The City of Southaven presented substantial credible evidence that it has the financial ability to make the improvements and provide the services set forth in its ordinance of annexation. Additionally, the cases cited by the Chancellor correctly set forth the law. The ordinance of annexation sets out the services the City of Southaven proposes to provide and the improvements the City proposes to make. The time frame for the improvements is set out in the ordinance. Southaven, however, has taken the additional step of adopting a much more specific plan of when and how it will provide each service. That plan is set out in Exhibit P-52.<sup>45</sup> The plan specifically details the additional personnel, equipment and cost of providing each additional service and improvement. It utilized methods which the testimony revealed as time tested for analyzing current and historic financial trends to project future revenues.<sup>46</sup> The testimony revealed that the methodology utilized was quite conservative. Chris Watson testified that the plan likely underestimates revenues and overestimates costs. Based on this analysis the testimony was undisputed that the City of Southaven has the financial ability to make the improvements and provide the municipal level services it promises.

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<sup>45</sup> Chris Watson explained the methodology utilized to prepare this document. He stated that it is divided by city departments and relates to the city service each now provides and will extend into the proposed annexation area. (T-926) He explained in detail how the projections were made on a department-by-department basis. (T-926-939)

He then explained the manner in which historical financial data was incorporated into the plan, how revenue and how expenditure projections were made. (T-939-944). He stated that the projections of revenues were "very conservative". (T-944) Expenditures are over estimated. (T-945). The methodology utilized is accepted with in the planning profession. Watson stated that he previously utilized this methodology and had consistently found it to underestimate revenues and over estimate costs. (T-947)

<sup>46</sup> See testimony of Demery Grubbs:

Q. Sir, do you recognize the methodology utilized in compiling Exhibit P-52 to compatible with good municipal financial planning?

A. yes, sir. . . (T-665).

He went on to testify that based on use of this methodology over time he had found it to be "very reliable". (T-666).

***f. Present financial condition of the municipality***

The evidence is undisputed that the City of Southaven is in good financial condition. Mayor Davis testified that "We're in great financial shape, our revenues are above -- our revenues are higher than expected, and our expenditures are lower than expected." (T-154).

Demery Grubbs, an expert in municipal finance, testified that he had served as the City of Southaven's financial adviser since 1991. In that position he had come to know the financial condition of the City. He stated "The City of Southaven is in -- has an excellent financial posture at this current time, and --both in their general fund, water and sewer fund, special funds. They have maintained a sound financial posture, and do so today."

This testimony was supported by the audits of the City for the last five years. See Exhibit P-20, P-21, P-22, P-23, and P-24.<sup>47</sup> Mr. Grubbs testified that these exhibits reflect a healthy fund balances over time..

***g. The financial plan and department reports proposed for implementing and fiscally carrying out the annexation***

As previously noted, the City of Southaven adopted a services and facilities plan in addition to the more generalized promise of the ordinance. This plan sets forth the minimum commitments of the City of Southaven to the citizens it is seeking to annex. It provides for the provision of services on a department-by-department basis. It was prepared in conjunction with each of the department heads and sets forth in some detail exactly what additional personnel, equipment and budget each department will need to extend its services into the proposed

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<sup>47</sup> Mr. Grubbs noted that these documents are required by state law and are the most reliable source available related to prior municipal finances. (T-652)

annexation areas. Mr. Grubbs reviewed this plan (Exhibit P-52) in forming his opinion of the financial ability of Southaven to meet its commitments.<sup>48</sup> He concluded:

Based on my history with city, and based on previous annexations, and based on review of the audits of the city, and the Services and Facilities Plan as prepared, I find that the city is more than capable of providing the services outlined in this Services and Facilities Plan and can, financially, afford to do so. (T-666-667).

#### ***h. Fund balances***

Grubbs testified that his firm recommended to municipalities that fund balances be maintained in the 10 to 12 percent range. The most current audit reflects that Southaven had over a 20% fund balance in the general fund. (T-653). The fund balances maintained by Southaven is indicative of the financial ability to provide the services and make the improvements promised.

#### ***1. Sales tax revenue history.***

Demery Grubbs testified that he had observed the sales tax history of Southaven during his long tenure with the City of Southaven. He noted that sales tax revenues to the City of Southaven had more than doubled during that time period. (T-649). He indicated that the sales tax trends in the City of Southaven indicated "a very positive future as relates to sales tax." (T-650).

Mayor Davis testified that sales tax revenues had gone up from \$3.5 million when he became mayor to more that \$10 million dollars for the current year. (T-158). Retail development continues to be strong and prospects for continued sales tax growth is extremely positive. (T-159).

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<sup>48</sup> Chris Watson testified extensively as to his role in the preparation of Exhibit P-52 and sources of information that he utilized in forming his opinions.

### ***i. Recent Equipment Purchases***

In prior cases recent equipment purchases have on occasion been of significance in addressing a city's ability to provide services. For example in *In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So.2d 724, 728 (Miss.,1996) the Court noted the testimony of the Mayor that the town had recently acquired an new fire truck and police car which could serve the annexed area. In this case the proactive nature of the City of Southaven is dynamic evidence of its financial ability to serve the area. Southaven is not waiting for the annexation to become effective to add the additional police officers population growth demands. (T-917). These officers are in the current budget. Southaven has located a fire station to serve the northeast area. It is already staffed and equipped ready to serve the first day after annexation. (T-917). Southaven has already purchased property on Highway 51 to build the new fire station to serve the northwest area. (T-917). Southaven has already purchased the North Mississippi Utility Company for the purpose of supplying water and sewer to the southern area. (T-918). The pipe necessary to extend service to the southern annexation area was on the ground ready to be installed in June. (It had been installed prior to the conclusion of the trial) (T-918). As Mayor Davis testified the City had already bought the pumps to provide sewer service to the areas it seeks to annex. (T-918).

### ***j. The City's Bonding Capacity***

The City of Southaven currently has some 37 to 38 percent of its general obligation bonding capacity available.<sup>49</sup> (T-657). Mr. Grubbs testified that "They have an excellent

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<sup>49</sup> The objectors attempted to counter the testimony offered by the City related to the financial ability of the City of Southaven with the testimony of Stephanie Russell. She testified as to the bonding capacity of the City of Southaven according to her calculations. Her calculations would have resulted in the City having a significantly reduced bonding capacity. On cross-examination she was forced to admit that her numbers were wrong. Ultimately she admitted, "I made a mistake." (T-2064). Though Ms. Russell worked in a bank she admitted in voir dire that she had no education or experience in the field of municipal finance. (T-1962). She acknowledged that she was not

bonding capacity.”. Southaven maintains an A+ rating with Standard and Poor’s Rating Agency.<sup>50</sup> Mr. Grubbs testified that this was an excellent bond rating. He testified that Southaven was rated among the top ten municipalities in the state.<sup>51</sup> Mayor Davis testified that the city is in a healthy condition as related to remaining bond capacity. (T-163).

Grubbs explained in detail other non-bond financing options available to the City of Southaven should it desire to use them. These options are detailed in Exhibit P-25 and clearly indicate that Southaven has the financial ability to comply with the promises of its ordinance. (T-662-663)

The evidence clearly establishes that the City of Southaven has the financial ability to provide the services and make the improvements set out in its ordinance of annexation. This conclusion is fully borne out by the expert testimony of Demery Grubbs and Chris Watson. This factor weighs in favor of the proposed annexation.

The arguments of Appellants are completely without merit related to Southaven financial ability. They recite the failure of Southaven to address certain factors. However, as set forth above, it is clear that both the evidence and the opinion of the Chancellor deals directly with these issues. In reality, Appellants are doing nothing more than arguing that the Chancellor should have accepted their version of the evidence. The decision of the Chancellor is based on substantial credible evidence and should not be disturbed.

## **5. The Need for Zoning and Overall Planning**

The Chancellor found:

That DeSoto County has an excellent zoning ordinance and well organized county planning department is without question. Chris Watson admitted that in his testimony

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an expert in the field of municipal finance. (T-1925-1926) In the end her testimony is of little value in addressing issues related to municipal finance.

<sup>50</sup> See Exhibit P-5.

<sup>51</sup> Grubbs testified that of the 295 municipalities in the state only three have better bond ratings than Southaven.

Desoto County has had a comprehensive plan since 1958. Testimony of Sam Russell and Chris Watson.

The Northeast parcel of the PAA is a platted area and also has restrictive or protective covenants which lessens the need for zoning and planning by the City of Southaven.

Based upon the Court's drive through the Northeast parcel this Court's believes this factor does not favor annexation. (Page 22 of 32 )

The cases decided by the Mississippi Supreme Court have considered a variety of factors in addressing this indicia. Annexations have been approved where the municipality proposes to provide no zoning at all.<sup>52</sup> Many of the cases decided have involved situations where there is no zoning in the county.<sup>53</sup> The Supreme Court has even addressed the need for zoning even though there is a county zoning ordinance in place.<sup>54</sup>

In this instance DeSoto County has a zoning ordinance. Chris Watson testified that the County does a good job with their zoning. However, he noted that planning involves more than just zoning. He mentioned the planning Southaven was doing for the five laning of Getwell Road from Goodman to the state line as an example of overall planning. He noted that overall planning encompasses utilities and the work Southaven has done planning for a sewer system for each of the areas sought to be annexed. He noted that the northeast area is an island of unincorporated territory situated within an urban environment. He noted that Southaven

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<sup>52</sup> "Zoning and Planning: Mayor Moore testified that the Town presently has no zoning ordinance. There was no evidence offered that the Town participates in any form of urban planning." *In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So.2d 724, 728, (Miss. 1996)

<sup>53</sup> *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, (Miss. 1999)

<sup>54</sup> See: *Extension of Boundaries of City of Ridgeland v. City of Ridgeland*, 651 So.2d 548, 559 (Miss. 1995)

Ridgeland responds that the proposed areas are currently covered by the Madison County Zoning Regulations Ordinance, but contends its own zoning and development regulations are "superior." Ridgeland notes its regulations were designed with urban development in mind. Ridgeland argues the proof certainly showed a need for zoning and overall planning in the areas in order to combat problems associated with unregulated growth and incompatible land uses.



imposed municipal level development standards as opposed to those of DeSoto County. He was of the opinion that the proposed annexation areas were in need of municipal level planning and zoning. (T-957-958).

Watson reviewed photographs which show the result of the different levels of planning and administration of planning ordinances that have occurred within the annexation areas. See Exhibit P-38. He noted that in his view of the proposed annexation area he found junk cars, dead end streets with no turnarounds, incompatible land uses, overgrown yards, discarded appliances and dilapidated houses. (T-960-962). He noted that Southaven is still coping with these types of problems in areas that came into the city limits after developing under county guidelines. Watson stated "My opinion is that zoning and overall planning is definitely needed in these areas. . ." (T-963).

Mayor Davis testified as to the need to enforce appropriate municipal codes in the area surrounding the city. He testified, "that what surrounds you can ultimately determine the destiny of what's on the inside or you'll spend a major amount of resources preventing any infiltration of your dislikes into your city limits." (T-86).

An additional need for overall planning noted by Mayor Davis related to the different requirements for fire hydrants in the County. Additionally he noted that the fire review and code enforcement procedures of the city would better serve the proposed annexation areas.

There is a need for municipal level planning and zoning in the area sought to be annexed by the City of Southaven. In the northeast area urban level development has already occurred. Unfortunately this area developed without adequate planning for the provision of sewer. Now the individual treatment facilities are aging. There is a clear need for central sewer. To install

conventional gravity flow collection would disrupt yards, trees and street infrastructure.<sup>55</sup> Mayor Davis testified that though Desoto County had in place a good zoning ordinance, it did not have the full complement of planning tools which would have prevented the problems now associated with provision of sewer.

In the other areas urban-type development is occurring and is anticipated to continue to occur on the periphery of the City of Southaven without adequate municipal level overall planning. This factor favors annexation.

We note this Court's most recent pronouncement in a similar situation. In *In re City of Madison* 2008 WL 879860, 8 (Miss.) (Miss.,2008) this court said:

In *City of Ridgeland*, 651 So.2d at 559, this Court upheld an annexation even though the county already had a suitable zoning ordinance in place. Thus, the fact that a county may have zoning ordinances does not mean that an area of the county cannot be annexed. *Id.*

The decision of the Chancellor is fully supported by credible evidence.

#### **6. The Need for Municipal Services in the Area Sought to be Annexed.**

The Chancellor found:

This factor weighs heavily on the conscience of this Court. Fire protection, police protection, solid waste collection, septic tanks, and population density are all factors considered in determining this indicia.

It is without a doubt that the City of Southaven with their full time firefighters can deliver full time fire protection superior to volunteer fire departments. Robert Story stated that the Southaven Fire Department was largest in Desoto County with "the most advance technology out there.. The response time obviously saves lives. 251 May (t-257) The Court was impressed with the testimony of Vernon McCammon and Robert Story. Mayor Davis testified that the fire station was relocated to serve the Northeast annexation area. 63 May.(T-69) The Southern annexation area is served by a department located down on the Tunica County Line. 215 May (T-221). Ambulance Service in the area is currently being provided by the City of Southaven. Although the City has been providing the Service, there is (or was not shown) no interlocal

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<sup>55</sup> In a perfect world, gravity systems installed prior to any infrastructure development, before any houses, before any structures on individual lots are built. (T-142). We suggest that this is a legitimate goal of proper zoning and overall planning.

agreement to provide such Service. There is no question in this Court's mind that there is such a "continuing" need for ambulance service in the PAA.

Police protection is an obvious benefit to the PAA that this Court deems invaluable. The Court was impressed with the testimony of Chief Tom Long. One need only watch the news in the evening to understand more police protection is better. (RE 28)

The testimony of Chief Tom Long demonstrates that the City of Southaven has properly planned for the provision of municipal level police services to the areas sought to be annexed. Chief Long explained in detail how his department would provide services to the proposed annexation areas. 457 May (T-463). The testimony reflects that the Sheriff does not routinely patrol inside the City of Southaven. Chief Long testified that the visibility of regular police patrol is important in crime prevention. Because of the regularly assigned patrol, the City will be able to provide faster response times than the Sheriff 459 May (T-465). The plan of the City of Southaven "would provide more police presence" in the annexation area. 462 May (T-468). Chief Long explained in detail why this was the case given the personnel of the Sheriff and of the City of Southaven. Southaven has more officers to cover less territory. 463-464 May (T-469-470). To provide service to the unincorporated island of the northeast annexation area the Sheriff must pass through miles of area he would not otherwise patrol. 178 May (T-184).

The use of septic tanks in the proposed annexation area (in the NE PAA) and a densely populated area is one of great concern for this Court and definitely established a immediate need for municipal services such as central sewer. The evidence was summed up by the opinion of the objectors' engineer Danny Rutherford.

Mr. Rutherford when he testified:

Q. Okay. Let's talk about some of the opinions that you did give me at that time. (Referring to the time of his deposition) One of them was that based upon septic tank usage in the northeast area, and based on your knowledge of the density there was a need for central sewer to protect the public health. . .

A. Yes

Q. And that's still your opinion. (RE-29)

A. Yes. 751 June (T-1594)

Another sub-indicia that points out the need for municipal services in the area sought to be annexed is population density.

It is significant to note that Sam Russell admitted that the population density of the northeastern area exceeded that of the neighboring City of Olive Branch. 623 Sept (T-2337). He admitted that the northeastern area was not rural by any definition. 626 Sept (T-2340). Mr. Russell admitted that the population density of the Northeast proposed annexation exceeds that of many municipalities around the state. He admitted that as population density increases, the need for services increase. 716. (T-2430)

There were numerous requests from the residents in the Northeast PAA indicating a desire for sewer, as testified by Mayor Davis 131 May (T-134-136).

There also was the testimony of Richard Neal, Lance Smith, Jerry Perry, Jamie Akin, Carla Respass, Emmy Powell, and Joe Hale indicating various reasons why they wanted to be annexed.

All the territory sought to be annexed by Southaven is in need of municipal services or will be in the foreseeable future. All the parcels sought to be annexed are primarily urban or urbanizing.

With reference to water and service to the southern annexation area, Southaven had been requested to provide water and municipal services. Part of this area was in the certified area of North Mississippi Utilities. At the start of the trial, Southaven committed to seek to acquire the right to serve this area and provide water and sewer following annexation. Before the trial was (Page 25 of 32) over Southaven had acquired the right to serve and had actually extended utility service in that area. This Court finds that this indicia favors annexation in all three PAA's.

The record strongly supports the Chancellor's finding regarding the need for municipal services in the area sought to be annexed. Among the factors the Supreme Court has considered related to this indicia include<sup>56</sup>:

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<sup>56</sup> It is important to note the context in which the Supreme Court has considered the issue of need for services. Obviously, more developed areas have a different level of need for services than lesser-developed areas. In the recent Biloxi case the Mississippi Supreme Court provided an excellent analysis of the proper standard to be applied:

¶ 47. The chancellor found that the PAA is in need of municipal services and that the Biloxi annexation would provide parcel A with three new fire stations in the first five years, a lower fire rating, enhanced police patrols, and the installation of several park facilities. Harrison County contends however that, based upon the testimony of Harrison County Sheriff Joe Price, Harrison County Fire Chief George Mixon, Harrison County Board of Supervisor President Bobby Eleuterius, and planning expert Michael Bridge, fire, utility, garbage collection, road and street maintenance and police services are more than adequate, if not already at a municipal level.

¶ 48. Although Biloxi's comprehensive plan does not detail plans for more remote undeveloped areas, Lusteck testified that these will be served when needed and economically feasible. The Objectors criticize this lack of planning. However, we have held that "[p]lans that call for extension of services into annexation areas when economically feasible are not 'per se unreasonable.'" Mantachie, 685 So.2d at 729 (citing Columbus, 644 So.2d at 1182).

¶ 49. As these utilities are revenue-driven enterprises, this approach makes sense. Biloxi intends to spend approximately \$12 million in water and sewer investments in the first five years. We have held that "five year plans" such as Biloxi's are reasonable. See Columbus, 644 So.2d at 1182; Jackson, 551 So.2d at 861. Also, in Madison, this Court found that the PAA needed municipal services based in part upon testimony from the mayor that the city could provide quicker police response, additional police protection, first level fire protection, and overall planning. Madison, 650 So.2d at 501-02. The evidence presented in this indicium and throughout

- Requests for water and sewage service.<sup>57</sup>
- Plan of the City to provide first response fire protection.<sup>58</sup>
- Adequacy of existing fire protection.<sup>59</sup>

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this litigation shows that parcel A will receive enhanced municipal services in accord with this Court's language in *Madison*, 650 So.2d at 494 (residents of the PAA will receive something of value in return for their tax dollars). Thus, we find that this indicium weighs in favor of the reasonableness of annexation. In *re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, (Miss. 1999)

The Supreme Court has addressed specifically the difference in how this indicia should be addressed, depending on the level of development.

Sparsely populated areas:

The dominating fact here is that approximately 90 percent of the area to be annexed is undeveloped at this time. Concededly there is no immediate need for municipal services in the area. Yet in the past we have complimented the City of Jackson for annexing an area before it is fully developed. See *Dodd v. City of Jackson*, 238 Miss. 372, 118 So.2d 319, 330 (1960).

*Matter of Extension of Boundaries of City of Jackson*, , 551 So.2d 861, 867 (Miss. 1989)

Densely populated areas:

The area immediately North of the City limits is densely populated and no serious argument can be advanced against the need for municipal services in that area." *Matter of Extension of Boundaries of City of Columbus*, 644 So.2d 1168, 1177 (Miss. 1994)

<sup>57</sup> *Extension of Boundaries of City of Ridgeland v. City of Ridgeland*, 651 So.2d 548, 559, (Miss. 1995)

<sup>58</sup> *Enlargement and Extension of Mun. Boundaries of City of Madison v. City of Madison*, 650 So.2d 490, 502 (Miss. 1995)

<sup>59</sup> See *Matter of City of Horn Lake*, 630 So.2d 10, 21 (Miss. 1993) where the Supreme Court reversed the Chancellor's finding that there was no need for municipal level fire protection in an area served by a Class 10 volunteer fire department. The Court said:

Mack Bowles, a former volunteer of the DeSoto Woods Fire Department, stated that the DeSoto department provides adequate fire protection for the DeSoto Woods area. Eric Allen, a resident of DeSoto Woods, also stated that he was entirely satisfied with the fire protection extended by the DeSoto Woods Volunteer Department. However, neither individual is a resident of the area Southaven proposes to annex.

Joe Shoemaker, a Superintendent of the Public Protection Department of the Mississippi State Rating Bureau, stated that the DeSoto Woods Volunteer Fire Department currently has a fire insurance rating of ten (10). This rating is on a scale of one to ten (10), with ten (10) being the lowest rating. Horn Lake has a fire insurance rating of eight (8). Southaven, on the other hand, has a fire insurance rating of six (6), which means that its residents pay less for monthly fire insurance premiums.

- Plan of City to provide police protection.<sup>60</sup>
- Plan of City to provide increased solid waste collection.<sup>61</sup>
- Use of septic tanks in the proposed annexation area.<sup>62</sup>
- Population density.<sup>63</sup>

The City of Southaven presented substantial credible evidence of the need for municipal services in all areas sought to be annexed. Chris Watson noted that the different areas sought to be annexed have differing needs for municipal services. The northeast area is largely built out. Watson testified that the northeast area, because of the level of development has the greatest need for municipal services at present. (T-965).

*a. Adequacy of existing fire protection*

Watson addressed specific services needed within each area. Exhibit P-26 shows that the proposed annexation area has class 7 and class 10<sup>64</sup> fire insurance ratings.<sup>65</sup> The City of Southaven has a superior class 5 rating. Fire service in the proposed annexation area is all

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The chancellor concluded that fire protection was the primary responsibility of DeSoto Woods, but the chancellor's decision failed to adequately weigh the importance of Chief Newton and Chief McCammon's testimony which seriously questioned the adequacy of the DeSoto Woods volunteer fire department. The chancellor also failed to properly consider the fire insurance ratings in Southaven's favor. See *Matter of Boundaries of City of Jackson*, 551 So.2d at 868. Thus, the chancellor's conclusion was not supported by the substantial and credible evidence.

<sup>60</sup> *Enlargement and Extension of Mun. Boundaries of City of Madison v. City of Madison*, 650 So.2d 490, 502 (Miss. 1995)

<sup>61</sup> *Enlargement and Extension of Mun. Boundaries of City of Madison v. City of Madison*, 650 So.2d 490, 502 (Miss. 1995)

<sup>62</sup> *Enlargement and Extension of Mun. Boundaries of City of Madison v. City of Madison*, 650 So.2d 490, 502 (Miss. 1995).

<sup>63</sup> *Matter of Extension of Boundaries of City of Columbus*, 644 So.2d 1168, 1178 (Miss. 1994)

<sup>64</sup> The worst rating available.

<sup>65</sup> Testimony of Robert Storey (T-219).

volunteer.<sup>66</sup> Mr. Storey, County Fire Coordinator, testified that during the daytime hours, the availability of volunteers had become critical.<sup>67</sup> He stated "A lot of times, we just hope and pray that somebody is in that area to get a fire truck out. . ." 216 The City of Southaven has full time paid professional firefighters at the station ready to respond when a call comes in.<sup>68</sup> (T-966). Robert Storey stated that the Southaven fire department was the largest in DeSoto County with "the most advanced technology out there."<sup>69</sup> (T-234) Mr. Storey testified:

Q. Given the totality of the circumstances, which department, based upon your experience, is more likely to have someone on scene, ready to respond when the call comes in?

A. Well, you know if you're paid to do a job it's a no brainer, it would have to be Southaven.

Q. No brainer?

A. They're there for a reason, and that's to protect lives and save property. (T-220-221)

Mayor Davis testified that the fire station was relocated to serve the northeast annexation area. (T-69). The southern annexation area is served by a department located down on the Tunica County line. (T-221).

The City of Southaven currently provides the first run ambulance services in the area.<sup>70</sup>

The Court can take notice of the age range of the objectors in this case. The availability of

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<sup>66</sup> Robert Story testified that with volunteers "we get called out, we drive to the station, wherever we may live, we put our turnout gear on, and we drive . . . to where the fire is . . ." "You use six to eight minutes to drive from home and get the truck, then the fire has spread six to eight minutes that we could have had if we had career level firefighters sitting at the station." (T-220)

<sup>67</sup> He explained that during those hours most of the volunteers were at work and unavailable to answer calls.

<sup>68</sup> Robert Storey called adversely testified that response time is important because depending on fire load a fire can double or triple in size every minute. (T-220-221) Mr. Storey testified that Southaven can provide the best level of response time to the northeast annexation area. 217 May

<sup>69</sup> Mr. Storey acknowledged that Southaven can provide the proposed annexation areas the best fire protection available. This includes not just the protection of property but also protection of lives. He testified that "time saves lives."

<sup>70</sup> Mayor Davis explained that Southaven is "theoretically a part of the county wide ambulance service." He noted however, each municipality is responsible for the maintenance of the ambulance, the personnel that goes on the ambulance, any repairs that take place on the ambulances. The County's role is limited to contributing to the cost of

ambulance service<sup>71</sup> and the services of the paramedics<sup>72</sup> in place in Southaven is clearly a needed and valuable service. (T-966-967). County Fire Coordinator Robert Storey's testimony puts into proper perspective the need for this service in the proposed annexation area. He testified:

Q. I've heard in a lot of these cases, well I don't use that service. And, in fact, most people don't use ambulance service. Can you tell me why it's fair to – why you need a service that you don't use every day?

A. You know, I hate to hear those comments because every time I hear that comment, it seems like the very next day that's the person who has to call for the ambulance. They never planned on using it, but things do happen in life that we don't anticipate happening. And one of them being my own father. He made that statement, and the next day he was transported in full arrest. Luckily, he was saved. My ambulance was right there three minutes away, that kind of stuff bothers me. (T-232).

***b. Plan of the City to provide first response fire protection***

The evidence is undisputed that Southaven can provide professional full time fire protection to the northeastern and northwestern areas from and existing stations. The City has already acquired the land to construct a new station for the southern area. Exhibit P-52 sets out a viable plan for service from these stations. Chief Vernon McCammon explained in detail the need for the services of his department in the proposed annexation area. He described in detail the plans to extend fire service into the proposed annexation area.

Robert Storey's testimony is telling. He stated:

Well, as I started to explain a minute ago, the fire grows from one to three times a minute in size. There's been some cases, if we could have had a fast

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an ambulance. (T-55). The objectors initially urged that there was an Interlocal agreement in place between the City of Southaven and the County related to ambulance service. Chancery Clerk Davis was called by the City of Southaven to refute this contention.

<sup>71</sup> Throughout the course of this litigation the Objectors urged that ambulance service was pursuant to an Interlocal agreement. In fact no such Interlocal agreement exists. While the DeSoto County provides some equipment, the City of Southaven staffs and operates the ambulances that serve the areas sought to be annexed. They do so on a voluntary basis with no agreement in place requiring such service. See Testimony of Chancery Clerk Davis 132-139.

<sup>72</sup> The paramedic level of service is the highest level of service available outside hospital treatment. (T-55)



response, we could have probably contained that fire to a kitchen or to a bedroom or to one section of the home. Duet to the amount of time we have to travel, everything plays into affect, you wind speed, direction, everything plays in.

If you can get on the scene quick, you could use less water, and you don't really have to, as I like to put it in terms, take a chance of killing the manpower because of the eight to ten minutes of fighting a fire as hard as you can, when it's gotten that size, you have pretty much wore yourself down to the point of, you could possibly make some mistakes.

So, I have to look at all these pictures, and I have to always say, if we could have gotten there quicker, we wouldn't have had to work near as hard to get this fire under control and possible save a life. (T-224)

Mr. Storey testified that to safely fight a fire six responders were needed. He stated that the failure to have the necessary number of responders happens every day. (T-226).

***c. Plan of City to provide police protection***

The testimony of Chief Tom Long demonstrates that the City of Southaven has properly planned for the provision of municipal level police services to the areas sought to be annexed. Chief long explained in detail how his department would provide services to the proposed annexation areas. (T-463). The testimony reflects that the Sheriff does not routinely patrol inside the City of Southaven. Chief Long testified that the visibility of regular police patrol is important in crime prevention. Because of the regularly assigned patrol, the City will be able to provide faster response times than the sheriff. (T-465). The plan of the City of Southaven "would provide more police presence" in the annexation area. (T-468). Chief Long explained in detail why this was the case given the personnel of the sheriff and of the City of Southaven. Southaven has more officers to cover less territory. (T-469-470). To provide service to the unincorporated island of the northeast annexation area the Sheriff must pass through miles of area he would not otherwise patrol. (T-184).

***d. Use of septic tanks in the proposed annexation area***

The testimony of Jim Weston together with many of the witnesses for the objectors demonstrates the widespread use of septic tanks, particularly in the northeastern area. The

evidence in this case is summed up by the opinion of the objectors' engineer Danny Rutherford.

Mr. Rutherford testified:

Q. Okay. Let's talk about some of the opinions that you did give me at that time.<sup>73</sup> One them was that based upon septic tank usage in the northeast area, and based on you knowledge of the density there was a need for central sewer to protect the public health. . .

A. Yes

Q. And that's still your opinion.

A. Yes. (T-1594)

***e. Population density***

Watson testified that there was a clear correlation between the urbanization that he found in the northeast area and the need for municipal level police protection.<sup>74</sup> (T-965). He testified that as an area urbanizes and densities increase there are needs for the full range of municipal services. He noted that the northeastern area, though presently unincorporated is in a major metropolitan area. He noted that the City of Memphis has a bad reputation for crime and that criminals don't stop at the state line. (T-968). Mayor Davis testified as to the need for

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<sup>73</sup> Referring to the time of his deposition.

<sup>74</sup> Compare the population density of over 700 persons per square mile to the following cases affirming the reasonableness of annexations:

***Poole v. City of Pearl*** 908 So.2d 728, 734 (Miss.,2005)

While Pearl, with a population density of over 1,000 persons per acre, increased its population by approximately 12% from 1990 to 2000, the PAA experienced a 33% increase in population during the same period and increased its population density from 283 persons per square mile in 1990, to 377 in 2000.

***In re Enlargement and Extension of Boundaries of City of Macon*** 854 So.2d 1029, 1043 (Miss.,2003)

The Chancellor noted the increase in population in the PAA. Statistics show that the population has increased in the area from 231 persons per square mile in 1990 to 255 persons per square mile in 2000.

municipal police protection, including the legal authority to run radar on Malone Road adjoining the northeastern parcel. (T-61-62).

It is significant to note that Sam Russell admitted that the population density of the northeastern area exceeded that of the neighboring City of Olive Branch.<sup>75</sup> (T-2337). He admitted that the northeastern area was not rural by any definition. (T-2340) Mr. Russell admitted that the population density of the proposed annexation exceeds that of many municipalities around the state.<sup>76</sup>

On cross Mr. Russell calculated the population density of the northeast area if it builds out to the same density as presently found; it will have a density of around 900 persons per square mile. He admitted that as population density increases the need for services increase. (T-2430) This includes:

- Need for additional police protection
- Need for additional fire protection
- Need for ambulance service (T-2430-2431)

***f. Requests for water and sewage service***

An overwhelming majority of the residents of the northeastern area indicated the desire for central sewer service.<sup>77</sup> (T-973). At trial there was considerable discussion of the sewer system proposed by the City of Southaven. The City proposed to serve the northeastern area with a pressure sewer system. This system is already in use in portions of the City of Southaven.

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<sup>75</sup> Likewise the population density of Tupelo is 669.9 persons per square mile. (Less than the density of the northeast annexation area.

<sup>76</sup> i.e. Grenada, Olive Branch, Hernando

<sup>77</sup> Mayor Davis testified that the City received approximately 152 letters indicating a desire for sewer from the northeast area. (T-137). He stated that only 7 of the letters indicated that they did not want sewer. He further testified that the homeowners' association attempted to have these letters withdrawn after the annexation plans were announced. Only three requests were withdrawn. (T-111)

In an effort to accommodate the residents of the northeastern area that had properly functioning on site treatment facilities, the City's proposal would not require mandatory connection.<sup>78</sup> On the other hand, the Mayor testified that the City would provide gravity service with a mandatory connection.<sup>79</sup> The evidence reflects that the City of Southaven is already providing water service to the southern annexation area. (T-176).

Richard Neal, a property owner in the proposed annexation area testified that he desired better police and fire protection. His property was already getting the benefit of Southaven water. This resulted in cost savings. (T-430). He testified to problems in the area with "kids drag racing". He testified that every time he called the DeSoto County Sheriff's Department the response time had been from 45 minutes to an hour. He stated that there was a need for regular police patrol in his area. (T-431-432).

Additionally he testified as to the tremendous development ongoing in the city of Southaven. He testified as to the need for parks and recreation opportunities that are provided by Southaven. (T-433) His grandchildren, residing with him the proposed annexation area are already using the recreational facilities provided by the City of Southaven. (T-434)

He stated that he had previously lived in the City of Southaven and was familiar with the quality of municipal services the city provided. He stated that he wanted the same type of service and response he had receive in the City of Southaven. (T-434)

Lance Smith, a resident of the existing City of Southaven owned and was developing property in the proposed annexation area. (southern and northwestern areas) He testified that he

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<sup>78</sup> It should be noted that sewer service is not funded by municipal taxes. It is a fee-based service. Those who were not using the service would not be paying for it. See Biloxi, supra. Mayor Davis testified that "Tax dollars do not pay for utilities" t-122). With regard to the type of sewer service ultimately to be provided Mayor Davis stated that it is established that the residents of the northeast area want gravity sewer the City will provide it with a mandatory tie in. (T-148)

was developing Stewartshire and Newberry subdivisions. He was already pulling permits for his developments in the southern annexation area. The development in this area was active and ongoing at the time of trial. He testified that annexation would be beneficial to the property he owned. (T-440). Even though he would have to start complying with Southaven's municipal regulations he felt that the homes that were being built would be worth more money if they were in the City. He stated that based on his experience, home sell better in Southaven. (T-441) He stated that city services were needed for the type development he had underway.

Jerry Perry is a resident of the area sought to annexed (northeastern). Though he realized he would have pay city taxes he asked the Court to permit him to be annexed. He stated that he had a need for municipal fire service, city police service and emergency medical service. He noted his proximity to the police and fire stations in the City of Southaven in making his request to be annexed. (T-557).

Jamie Akin, a resident of the northeastern annexation area testified that she desired annexation. The day before she testified she had an occasion to need law enforcement She felt a clear need for municipal police service. She stated that she saw the Southaven Police patrolling on Getwell often. She observed the sheriff's office patrol her area much less frequently. (T-740). She testified that her area (Summerwood Subdivision) needs central sewer<sup>80</sup>, ambulance service, and fire protection.

Carla Respass,<sup>81</sup> a resident of Whitten Place in the northeastern parcel testified that she believed "we would be better served by the City of Southaven." I know the there's a fire station

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<sup>80</sup> She noted that in her own back yard she several spots that sewer leaked. (T-743)

<sup>81</sup> This witness had personal experience with the record of Southaven's concern with public safety. Her husband had been killed in an automobile accident on a county road in December 1996. While Mayor Davis was in the legislature she approached him for assistance in correcting this safety hazard. Shortly thereafter the area was

within minutes, over by Snowden Grove Park; I truly, believe we would be better served by the City of Southaven. (T-374) As a widowed mother she was concerned basically for the safety of herself and her children. Though she believes the sheriff does a fine job she had experienced 30 to 45 minute delays in response on previous alarm calls. (T-375). She testified that a faster response time by a municipal police department would be a valuable benefit to her. (T-375-377) Additionally she felt, given speeding problems in her area that it would be beneficial to have the municipal police power to run radar. (T-378)

She testified that though she had not had problems with her septic system, there are times when the smell of sewage from her neighbors system was evident. (T-376).

Emmy Powell, a resident of the proposed northeast annexation area, testified that she was asking the Court to approve the annexation because she needed municipal services, particularly ambulance service. She testified that the ambulance service provided by Southaven had saved her father's life. (T-387) She noted that in this emergency the fire department also responded outside the city limits. In addition she noted a need for municipal police protection. She testified that there was a real speeding problem in her neighborhood. She had complained to the Sheriff's department. She felt that she would benefit from routine regular police patrol with the authority to use radar to stop speeding. (T-390). In the past she had called for law enforcement assistance and gotten no response (T-391). On another occasion a call to the Sheriff's office resulted in a 30-minute response time. (T-391). She stated it would be a benefit to her to have faster law enforcement responses. She stated that she needed central sewer and that presently

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annexed by Southaven and Greg Davis was elected mayor. The city immediately made significant improvements to the road, eliminating the unsafe condition which had claimed the life of her husband. (T-372-374)

none was available. She testified that her own sewer disposal systems "stinks". Her system was not the only one in the neighborhood that smelled.<sup>82</sup> (T-392).

Joe Hale, a resident of Whitten Place testified that sewer was desperately needed in his area. In addition he stated that his area needed emergency services including fire, police and ambulance. (T-408).

The territory sought to be annexed by Southaven is in need of municipal services or will be within the foreseeable future. Annexation by the City of Southaven is reasonable. The parcels are primarily urban or urbanizing.

The testimony reflected that the City of Southaven had been requested to provide water and service to the southern annexation area. Part of this area was in the certificated area of North Mississippi Utilities. At the start of trial, Southaven committed to seek to acquire the right to serve this area and provide water and sewer service following annexation. Before the trial was over Southaven had acquired the right to serve and had actually extend utility service in to the area.

#### **7. Whether there are natural barriers between the city and the PAA.**

The Chancellor found:

The Court believes that there are no natural barriers that would prohibit Southaven from providing the full range of municipal services and facilities to all the areas sought to be annexed.

The City's expert in the field of urban and regional planning, Watson, testified he had reviewed the geographic features of Southaven and of the PAA's and found that there were no natural barriers that would serve as an impediment to providing municipal services to the annexed areas. (T-984).

Therefore this indicia favors annexation in all three PAA's. His conclusions are amply

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<sup>82</sup> With regard to the system Southaven proposed, she stated that all she cared about was a reliable system that worked. (T-393)

supported by the evidence and law. The mere existence of a barrier, natural, man-made or geopolitical, does not mean that an annexation is unreasonable. Recently, the Mississippi Supreme Court addressed the point. The Court said:

Similar to the *Jackson* decision which confirmed that county lines can be successfully crossed, Biloxi argues that the county judicial district line in this instance does not serve as a barrier. See *Jackson*, 551 So.2d at 865-66. Other natural barriers have not prevented annexation in other cases. See, e.g., *Columbus*, 644 So.2d at 1174-75 (floodplain); *Southaven*, 630 So.2d at 23 (interstate highway); *In re Enlargement of the Corporate Boundaries of the City of Booneville*, 551 So.2d 890, 893 (Miss.1989) (floodways). *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, (Miss. 1999)

The proper test for the consideration of the impact of "natural barriers" on the reasonableness of an annexation was stated as follows:

Reference to this Court's earlier experiences with natural barriers shows that it is not a constraint upon development that establishes unreasonableness under the natural barrier concept but rather a condition that makes provision of municipal services impossible or prohibitively expensive. See *City of Biloxi v. Cawley*, 332 So.2d 749, 751 (Miss.1976) ("Annexation of the territory north of Biloxi Bay would necessitate some duplication of facilities and personnel in order to render the services proposed by the ordinance of annexation."), see also, *Matter of Enlargement of Corp. Limits of Hattiesburg*, 588 So.2d 814 (Miss.1991) (Chancellor was not manifestly in error in observing that certain man-made barriers such as the interstate and the county line should not be ignored.); *Extension of Boundaries of Horn Lake v. Renfro*, 365 So.2d 623, 625 (Miss.1978) (Existence of floodplain between existing city limits and portions of proposed annexation could properly be considered to militate against finding of reasonableness.).

In the current case the chancellor found that there were no natural barriers between the City and the PAA that would interfere with provision of municipal services. This finding is supported by testimony from Mike Bridge, the City's expert, to the effect that:

There are no natural barriers that would prohibit the City from providing the full range of municipal services and facilities to the area sought to be annexed.... If you will observe the exhibit [P-187], you will see that the City is bisected and traversed by substantial flood plain and floodway areas. This [has] not impeded in any way, whatsoever, the ultimate service by the City to the areas within the municipality. *Matter of Extension of Boundaries of City of Columbus*, 644 So.2d 1168, 1175(Miss. 1994)



The City's expert in the field of urban and regional planning testified that he had examined the issue of whether there were natural barriers that impacted the reasonableness of the proposed annexation. He testified that he reviewed the geographic features of the City of Southaven and of those areas sought to be annexed and found that there were no natural barriers that would serve as a impediment to providing municipal services to the annexed areas. (T-984)

He noted that there is a floodway between the existing city and the western annexation area, but that it has already been traversed by Stateline Road, by Horn Lake Road and by utility lines. (T-984)

Watson found no natural barriers that impacted the reasonableness of the annexation of any of the three proposed annexation areas. (T-986)

#### **8. The Past Performance and Time Element Involved in the City's Provision of Services to its Present Residents.**

The Chancellor found:

The Objectors would offer that there is strong evidence of inadequate past performance by Southaven. Some areas in the 1997 annexation did not get centralized sewer service until six (6) to eight (8) years after the annexation. Grove Meadows Subdivision on Stateline Road and the Getwell Methodist Church did not get sewer until 2004. Dave Meadows did not get sewer until 2005. Some areas still do not have centralized sewer at the time of trial. They point out that some roads are barely passable and Frances Road is not paved. (Page 26 of 32) This Court would venture to say that such performance could be attributed to the vast amount of work that has to be done in a city with a growth rate of Southaven. There is much to be done and there must be a line of priority. The Court was impressed with the testimony of Lance Smith, who had developed property in other areas served by the City of Southaven and based upon his experience he believed, "They will do more than keep their promises." 436 May (T-442)

Mayor Davis went through the commitments of the services and facilities plan adopted as a part to the 1997 annexation

- o One building official was the commitment. One was hired but the city also hired an additional structural building official and two fire inspectors. 68 May (T-74)
- o In animal control the City committed to hiring three new employees. Instead the City hired four.
- o The City kept its commitment to add a mosquito truck

- o The City committed to making sewer improvements in the amount of 2.7 million dollars. Instead the City made \$15 million dollars worth of improvements; 69 May (T-75).
- o The City kept its commitment to open a new fire station. 69 May (T-75). It was opened in 14 days with a permanent station being constructed, staffed and equipped within two years.
- o The City committed to a total of 65 firefighters to serve the extended city. Instead they have 70. 15 of the firefighters are also certified as paramedics. 69 May (T-75)
- o The City committed to adding one Class A pumper. Instead they bought two, a rescue unit and a ladder truck.
- o In the police department the City committed to 57 officers. Instead they have 82.
- o The City committed to 10 dispatchers. Instead they have 13. 70 May (T-76).

The Mayor summed up the City's past performance:

"I would say that past performance way exceeds any expectations that were expected during that annexation trial" 70-71 May (T-76-77). Chris Watson was the planning director for the City of Southaven at the time of the 1997 (Page 27 of 32) annexation, testified that police protection, fire protection, public works projects, etc., were completed or began immediately following annexation 148 June (T-992). He believed Southaven "has a excellent record of past performance." June 152 (T-995)

Therefore this Court believes the past performance in providing services to the residents and landowners of the existing city supports the reasonableness of the proposed annexation and favors annexation in all three PAA' s.

The Chancellor accurately recites evidence which support this conclusion. The Appellants rely on isolated alleged failures. The record supports the conclusions of the Chancellor.

#### **9. The Impact (Economic or Otherwise) of the Annexation upon Those who live in or own Property in the Area.**

The Chancellor found:

The Objectors propose that the annexation is basically a "tax grab" or "tax crutch" for Southaven and therefore not a proper purpose for annexation. They argue 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 the annexation proceeding.

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 value of the homes would be driven down because of said system. This, in the Court's opinion is mere speculation and not supported by scientific data.

Also the Objectors argue that the mailing addresses in the Northeast Parcel will change and result in a huge inconvenience to the citizens of the Northeast parcel for several years after the changeover. (RE-33) The testimony of Billy Gene Proctor negated such major inconvenience theory when asked:

Q. Now, when you moved from Whitehaven (in Memphis TN.) did you change your address?

A. Yes, sir, had to.

Q. How much total time would you say you spent on making those address changes?

A. In the scheme of things, very small amount.

There is no question that increased taxes will cost each homeowner in Southaven if successful in its annexation venture. According to Mr. Russell and Exhibit "P-17", annexation will cost each such homeowner from \$1,067 to \$1,319 per year. The Supreme Court has repeatedly addressed the tax argument. The law on this point is clear

"the mere fact that residents in the P AA will have to pay more taxes is insufficient to defeat annexation." *In re Enlargement and Extension of Municipal Boundaries of the City of Biloxi*, 744 SO.2d 270, 284 (Miss. 1999). *In re Extension of Boundaries of City of Hattiesburg*, 840 So.2d 69, 93 (Miss.,2003)

But are they going to receive something of value for their money. This Court feels like they will. Some things they already are receiving: i.e. fire ratings, ambulance service, access to the cities assets and some things they will receive: i.e.-police protection full time fire protection, water services, street lights, better street maintenance, improved drainage services, more and better sewage and garbage and trash disposal as well as other municipal services.

This factor weighs in favor of annexation. (RE-34)

The finding of the Chancellor is in accord with both the law and the facts. In the Columbus decision,<sup>83</sup> the Supreme Court restated the requirement as follows:

Although we retain our "indicia" for the purposes of today's decision, we emphasize that 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.

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<sup>83</sup> *Matter of Extension of Boundaries of City of Columbus*, 644 So.2d 1168, 1172 (Miss. 1994)

We have attempted to establish criteria<sup>84</sup> by which chancellors may gauge the reasonableness of an annexation. *Dodd v. City of Jackson*, 238 Miss. 372, 118 So.2d 319 (1960); *Extension of Boundaries of Horn Lake v. Renfro*, supra. These criteria require that the chancellor evaluate the services to be offered to the annexation area, the city's ability to offer those services, the city's need to grow and the needs of the area to be annexed. While the *Dodd* and *Renfro* criteria are helpful, they were never intended to be conclusive as to reasonableness. Other factors, including the interest of, and consequences to, landowners in the annexation area are relevant. The economic and personal impact on these landowners is as important a concern as the city's need to grow. Only by reviewing the annexation from the perspective of both the city and the landowner can the chancellor adequately determine the issue of reasonableness. In short, the common thread that must run through any reasonableness criteria is fairness. An unreasonable annexation is an unfair one and, as fairness is the foundation of equity, an annexation cannot be both unreasonable and equitable. The converse is equally true for an annexation cannot be both inequitable and reasonable.

The evidence reflects that the residents and property owners of the proposed annexation area will receive good and valuable services for the taxes they will pay following annexation. The City of Southaven offered into evidence Exhibits P-16, 17, 18 and 19<sup>85</sup> in an attempt to quantify the financial impact of annexation on residents and property owners. These documents take into account a number of financial impacts or potential financial impacts<sup>86</sup> of the proposed annexation.

- Two mills levied by DeSoto County for fire protection would be eliminated from the property taxes if annexed. (T-1022).
- The county garbage fee would be eliminated. The cost of this service is included in Southaven's tax rate. (T-1023)
- The property owners have potential fire insurance savings based on the full time professional fire department maintained by Southaven. (T-1024)

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<sup>84</sup> "Criteria" became "indicia" in *Basset v. Taylorsville*, 542 So.2d 918 (Miss. 1989) and the cases that followed.

<sup>85</sup> These charts do not take into account anyone who is receiving special homestead exemption as a result of being over 65 or handicapped. The Court can note that most of the objectors in this case were over 65 years of age. (T-1024) Likewise they do not attempt to quantify an amount which would be saved as a result of the permissible itemized deductions for municipal property taxes on state or federal income tax returns.

<sup>86</sup> The evidence established that certain property owners in the proposed annexation area are already getting the benefit of Southaven's class 5 fire insurance rating. They are thus benefiting from proximity to Southaven without paying for fire protection.

Mayor Davis testified that the City of Southaven had officially adopted a services and facilities plan which set out the minimum commitments for improvements and services being offered by the City of Southaven to the residents and property owners in the proposed annexation area. (T-71). That plan was admitted into evidence as Exhibit P-52.<sup>87</sup> (T-71-72) Mayor Davis testified that the citizens of the proposed annexation area will receive the entire realm of public services if the annexation is approved. (T-53). These include:<sup>88</sup>

- Ambulance service second to none
- Fire protection from a full time professional fire department with a 3 to 5 minute response time as opposed to a 10 to 15 minute response
- Municipal level police protection
- Extension of water services
- Sewer service on if needed or desired
- Street lights
- Park maintenance for the neighborhood park
- A voice in the affairs of Southaven including zoning decisions made on adjacent land already in the city
- A higher level of street maintenance
- Mosquito control services
- Parks and recreation services
- Improved drainage services
- A higher level of garbage and trash disposal
- A more favorable fire insurance rating

Taking into account the level of services that would be provided and the cost to the residents in taxes, Chris Watson testified:

My opinion is that for the taxes and ultimately the cost that the annexed residents will pay, they will receive good and valuable services for those taxes. We have seen exhibits and we've heard testimony with regard to the fire protection, the ambulance service, the police, the street lights are proposed to be installed, planning and zoning, mosquito control. The full array of municipal services will be delivered to each of these proposed annexation areas. And those services, absolutely, are worth the taxes that are paid. (T-1026)

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<sup>87</sup> Mayor Davis testified that this plan set a standard by which the fulfillment of the City's promises could be measured. (T-72-73).

<sup>88</sup> See testimony of Mayor Davis (T-196-206)

The objectors contended that the change of an Olive Branch address to a Southaven address would cause untold havoc and misery. Though there will be some inconvenience it is minor in terms of the value that will be added. The testimony of Billy Gene Proctor is telling:

Q. Now, when you moved from Whitehaven (in Memphis TN.) did you change your address?

A. Yes, sir, had to.

Q. How much total time would you say you spent on making those address changes?

A. In the scheme of things, very small amount. (T-1404)

The arguments of the appellants are simply without merit.

#### **10. The Impact of the Annexation upon the Voting Strength of Projected Minority Groups.**

The Chancellor found:

The proposed annexation will not impermissibly dilute the voting strength of any protected minority. The existing population of the City of Southaven is 90.3 % white, 6.7% African American and 3% other according to the 2000 census. The area sought to be annexed is 86.2% white, 13.1% African American and .084% other. The resulting City of Southaven would be 90.1 % White, 7.1 % African American and 2.9% other. See Exhibit P-15, Exhibit P-47 and Exhibit P-48.

This annexation, it doesn't appear was undertaken for any discriminatory purposes and therefore is a non-factor.

His opinion is fully supported by the evidence. Contrary to the contention of the white Appellants, this factor does not weight against the reasonableness of the proposed annexation.

#### **11. Whether the Property Owners and Other Inhabitants of the Areas Sought to be Annexed 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**

The Chancellor found:

Consider the testimony of Emmy Powell, a resident in the Northeast PAA .

Q. . . . do you and your neighbors benefit from proximity to the City of Southaven?

A. Yes, sir. Everything we do is involved in Southaven as far as sports, (RE-35)

Joe Hale expressed the following opinion:

Q. Why do you ask this Court to annex you into the City of Southaven? What is your reason for wanting to be in the City of Southaven?

A. I have two reasons. One as a resident. As a resident, I feel as a part of a community, we all have a responsibility whether we enjoy paying our taxes or not, we have a responsibility to support the community that supports our neighborhood. I think it's my duty, and an American citizen and citizen of whatever city annexes us that we pay for the services that they provide for us. 405 May (T-410 -411)

The second reason he wanted to be annexed was that he felt that the value of his property is greatly increased by being a part of Southaven because of the perception of what it means to be in a city rather than the county. 405 May (T-411).

No one is calling the inhabitants of the Northeast parcel "freeloaders". It is without a doubt that the residents would in fact be and are enjoying the benefits of proximity of Southaven. Examples are fire ratings, ambulance service, park and recreation, quick and road access to available corporate assets.

This indicia favors annexation. (RE-36)

The conclusions of the Chancellor are fully supported by the law and the evidence on this factor. In 1985 the Mississippi Supreme Court stated<sup>89</sup>:

With regard to this indicia the Mississippi Supreme Court made the following observation in Columbus:<sup>90</sup>

The lower court made no finding on this indicium. The value of this item as an indicator of reasonableness is questionable because it is difficult to envision a

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<sup>89</sup> *Western Line Consol. School Dist. v. City of Greenville* 465 So.2d 1057, 1060, (Miss. 1985) DeSoto County Fire Coordinator Robert Storey, called adversely, testified that Southaven had the closest available ambulances to the proposed annexation areas. He stated that the next closest was in Louisberg on Byhalia Road at 305. This could provide a minimum of 12 to 14 minute response time as opposed to the three to four minute response time Southaven is providing. There is no ambulance at the Summer Hill volunteer fire station. (T-228). He testified that the difference between the response time from Southaven and the next nearest ambulance is the potential to save lives. 223 May.

<sup>90</sup> *Matter of Extension of Boundaries of City of Columbus*, 644 So.2d 1168, 1180 (Miss. 1994)

situation where an individual's "fair" share of taxes is greater than the amount required by law. Residents of the PAA pay required county taxes as well as sales taxes when they buy goods in Columbus. Fairness requires no more.

The City of Southaven does not contend that the Appellants are "freeloaders".<sup>91</sup> It is true however that they receive benefits from proximity to the City of Southaven without paying a full share of the cost of providing those services. Among the benefits noted by Chris Watson are:

- Regular municipal police patrol by Southaven on the streets adjoining the proposed annexation area.<sup>92</sup> 186 June
- Use of the streets and full range of municipal services while utilizing churches and schools in the City<sup>93</sup>
- Use of the streets and full range of municipal services while utilizing doctors, lawyers, insurance agencies and other non sales tax producing businesses in the city
- Utilization of the parks system of the City of Southaven.<sup>94</sup>
- Lower insurance rates for many because of the favorable rating of Southaven<sup>95</sup>
- Ambulance service subsidized by the taxpayer of Southaven<sup>96</sup> 188 June (T-232)

As in most cases of this type the objectors' claim that the county already provides all the services they need. It is important to note that the undisputed evidence in this case is that the taxpayers of municipalities are funding 70 per cent of the cost of those county services. With only 27% of the residents of DeSoto County living in Southaven, its taxpayers are paying 32% of county taxes. (T-52)

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<sup>91</sup> The testimony of Mayor Davis was that these residents are paying their fair share of taxes under this standard. They are not however paying a full share for the services and benefits they receive as a result of proximity to Southaven (t210)

<sup>92</sup> Mayor Davis noted that Southaven provides traffic control for the northeastern area on Stateline road on the northern boundary and on Getwell on the western boundary.

<sup>93</sup> The objectors utilized a church in Southaven to organize to fight this annexation. (T-1033)

<sup>94</sup> Mayor Davis testified as the location of the City's premier park, Snowden Grove, in proximity to the northeastern proposed annexation area. 26 May He testified that since he became mayor in 1997 the City of Southaven has spent \$44,000,000.00 on its park system. The services provided range from a full spectrum of services aimed at youth to services designed to serve the need so senior citizens. (T-32-34)

<sup>95</sup> "A lot of the residents that are in the planned annexation area are already receiving our fire" rating. (T-91)

<sup>96</sup> Mayor Davis explained that Southaven provided primary ambulance response to the areas sought to be annexed (T-54) He refuted the contentions of the objectors that this service is paid for by the County. (T-54)



While it is difficult to say that individuals do not pay their fair share of taxes, it is evident that proximity to a municipality provides benefits for which cost is not allocated to those living nearby. For example, Carla Respass, a resident of Whitten Place Subdivision requesting annexation, testified that she worked in Southaven, her children played sports at the Southaven recreational facilities.

The testimony of Emmy Powell, a resident of Whitten Place in the northeast annexation area sums up the facts related to this indicia.

Q. . . . do you and your neighbors benefit from the proximity to the City of Southaven?

A. Yes, sir. Everything we do is involved in Southaven as far as sports, recreation.

Joe Hale expressed the following opinion:

Q. Why do you ask this Court to annex you into the City of Southaven? What is your reason for wanting to be in the City of Southaven?

A. I have two reasons. One as a resident. As a resident, I feel as a part of a community, we all have a responsibility whether we enjoy paying our taxes or not, we have a responsibility to support the community that supports our neighborhood. I think it's my duty, and an American citizen and citizen of whatever city annexes us that we pay for the services that they provide for us. (T-410-411)

The second reason he wanted to be annexed was that he felt that the value of his property is greatly increased by being a part of Southaven because of the perception of what it means to be in a city rather than the county. (T-411).

Laticia Redding, a resident of the southern proposed annexation area testified that she worked at Baptist DeSoto Hospital in Southaven. (a tax exempt entity) (421). She expressed a desire to be annexed. She stated that she was a registered nurse and saw particular value to the

emergency medical services provided by Southaven. She related two incidents she was familiar with which convinced her of the need for emergency services. On one occasion she was visiting a friend who fell. 911 was called and a sheriff's deputy showed up in a half hour. He made an assessment of the situation and called for an ambulance. Desoto County dispatched an ambulance. In all it was nearly an hour before the ambulance arrived. (The victim had broken bones) (T-423) She stated that as a nurse she had seen numerous cases that did not receive timely and proper medical attention because of delays in ambulance service. (T-424).

Based on her experience she desires the emergency services which can be provided by Southaven. Additionally she states that improved police and services are her primary desire.

She and her family have benefited from the parks and recreational services provided by the city of Southaven. Her children attend school in Southaven. She asked that the Court permit her full participation in "both the benefits and obligations" of being a citizen of Southaven. (T-427-428)

Lance Smith testified that the services provided by the City of Southaven increased the value of his property. He stated his proximity to the City of Southaven. (T-444).

Jamie Akin testified:

Q. Ma'am, you realize that if your annexed, you would have to start paying municipal taxes, do you not?

A. I do.

Q. You've mention several services that you would expect to receive. Do you consider those services to be valuable to you?

R.

A. I do.

Q. And are you willing to pay taxes in return for those valuable services?

A. I am.

Q. If you would, ma'am, please in your own words, express to the Court that you're asking this Court to do in this case?

R.

A. Well, in my own words, I guess what I'm thinking in terms of is, I feel that we're just sitting out there as a little island, and we don't have even a say so -- we don't have say so over in Olive Branch, we don't have any input into Southaven; and we're just sitting there as an island. If Southaven wasn't sympathetic to us, and, naturally, they have to put their own boundaries first, if an emergency came, would have be second place, and I realize that. And I'm uncomfortable with what's across the state line. I would just like the protection. (T-745).

This is consistent with the testimony of Robert Storey, DeSoto County Fire Coordinator.<sup>97</sup> He explained that the fast response times that Southaven provides could mean the difference between life and death. He noted that the American Heart Association recognizes that you have four to six minutes to do early prevention in a cardiac arrest. He testified:

Q. What happens if you don't meet that four to six minute time frame?

A. You're going to be looking at death. (T-229)

The decision of the Chancellor is fully supported by the evidence. He applied the correct legal standard on this issue.

## 12. Other Factors

The Chancellor found:

The objectors argue that when they moved to their present location, they moved there to get out of city life. This Court doesn't dispute that statement. But the fact of the matter is that is not a defense to annexation. Over time urbanization has caught up with Objectors. This phenomenon is happening everywhere in Desoto County and will most probably continue to occur. Progress is (RE-36) sometimes painful to one's way of life. This may be the case here, although this Court doesn't think so.

The objectors argue if they must be annexed, they would rather be annexed by Olive Branch. This is also not a defense to annexation by Southaven. There are avenues to request annexation. This consideration is not a bar to the reasonableness of this annexation.

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<sup>97</sup> Mr. Storey acknowledged that Mayor Davis would often get upset and tell the County that he was going to quit providing this lifesaving service to areas outside the city (including the proposed annexation area). He stated that because of the life and death situation the mayor never did so. Mr. Storey explained that though some fees were charged to the users of ambulance service, it was a money losing proposition. All ambulance service in DeSoto County is subsidized. (T-232)

Under this factor the Appellants argue first that this is an improper annexation for spite. Southaven has previously addressed this issue. The claim of the Appellants is totally without merit. The other argument is that the Northeast parcel is just an isolated island the citizens want to be annexed by Olive Branch if anyone. As previously noted this is the exact argument rejected by this Court in *Poole v. Pearl, supra*. Likewise, this argument is totally without merit.

#### **VII. TOTALITY OF THE CIRCUMSTANCES**

This Court finds after due consideration of all indicia that the annexation of the entire PAA is reasonable under the totality of the circumstances and should be and is hereby approved. (RE-36)

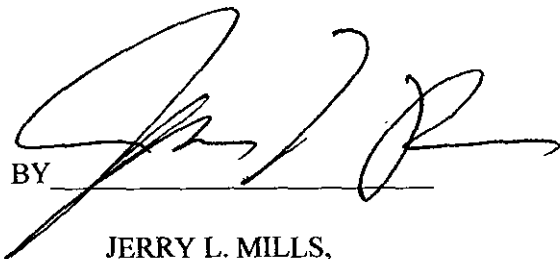
This conclusion is fully supported by the evidence.

#### **VIII. CONCLUSIONS**

In this case the evidence is overwhelming that the proposed annexation is reasonable. Smoke screens removed, the Appellants simply don't want to pay taxes. The decision of the Chancellor should be affirmed.

RESPECTFULLY SUBMITTED this the 21<sup>st</sup> day of April, 2008.

THE CITY OF SOUTHAVEN

BY 

JERRY L. MILLS,  
ONE OF ITS ATTORNEYS

Of counsel:

Mark Sorrell, Esq.  
City Attorney  
8710 Northwest Drive  
Southaven, MS 39671

JERRY L. MILLS, ESQ.  
[MB # [REDACTED]]  
PYLE, MILLS, DYE & PITTMAN  
800 Avery Boulevard North  
Suite 101  
Ridgeland, MS 39157  
Telephone: 601/957-2600  
Facsimile: 601/957-7440

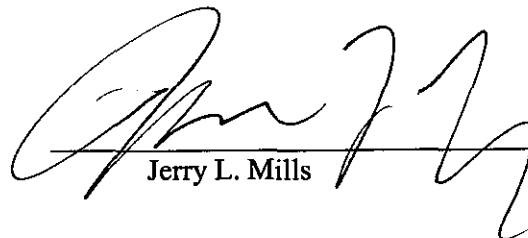
**CERTIFICATE OF SERVICE**

I, the undersigned attorney for the City of Southaven, Mississippi, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of foregoing Motion to:

Honorable Mitchell M. Lundy, Jr.  
Chancellor, District Three  
Post Office Box 471  
Grenada, Mississippi 38901

James H. Herring, Esq.  
HERRING, LONG & CREWS, P.C.  
129 East Peace Street  
P. O. Box 344  
Canton, MS 39046-0344

This the 21st day of April, 2008.

  
Jerry L. Mills