IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2007-AN-00826

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

CITY OF HORN LAKE, MISSISSIPPI ET AL. — APPELLANTS

VERSUS

CITY OF SOUTHAVEN, MISSISSIPPI — APPELLEE

REPLY BRIEF FOR THE APPELLANT

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

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. James H. Herring, Esq., and Herring, Long & Crews, P.C., Attorneys at Law, P. O. Box 344, Canton, Mississippi 39046; Attorneys for the Appellants.

2. Mark Sorrell, Esq., 8710 Northwest Drive, Southaven, Mississippi 39671. Attorney for Appellee.

3. Jerry L. Mills, Esq., and Danks, Dye, Mills, & Pittman, 800 Avery Boulevard North, Suite 101, Ridgeland, Mississippi 39157; Attorney for Appellee.

4. Summerwood and Whitten Place Homeowners Associations, Olive Branch, Mississippi

5. Hon. Mitchell M. Lundy, Jr., Chancellor, Third Chancery District (Chancery Court of DeSoto County, Mississippi).

JAMES H. HERRING, ATTORNEY
FOR APPELLANTS

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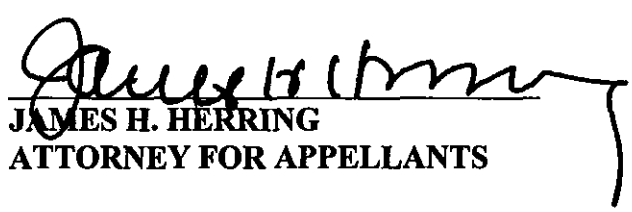
STATEMENT AS TO WHY ORAL ARGUMENT WOULD BE HELPFUL TO THE COURT IN ACCORD WITH RULE 34 (b)

Respectfully, certain unique errors which amount to errors at law, as well as manifest errors on factual matters, occurred in these proceedings. It is submitted that these errors require the final ruling of the Trial Court to be reversed and rendered. Furthermore, this is a case of first impression on whether an annexation is reasonable when the Trial Court has ruled, factually, that the proposed annexation is not necessary, which should be the cornerstone of why any annexation action is filed in the first place. For these reasons, it is submitted that oral argument would be helpful to the Court.



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REPLY BRIEF OF APPELLANTS/OBJECTORS

Come now the Appellants/Objectors [the Summerwood and Whitten Place Homeowners' Associations and the individuals who reside in the Northeast Parcel of the Proposed Annexation Areas (PAA) that filed objections in these proceedings], and present to the Court their response to the Brief filed herein by the Appellee, the City of Southaven, Mississippi (Southaven).

I. IS THE POSITION OF THE OBJECTORS STRONGLY REMINISCENT OF THE OBJECTORS IN POOLE V. CITY OF PEARL?

On pages 2 and 73 of its Brief, Southaven alleges that the ". . . position taken by the Appellants is strongly reminiscent of that rejected by this Court in *Poole v. City of Pearl, Mississippi,* 908 So. 2d 728, 742 (Miss. 2005). . . ." This statement is made in part because the Northeast Parcel of the PAA is bound on three sides by Southaven and on the east by the City of Olive Branch. Thus, Southaven basically argues that since the PAA and the objectors are bound on all sides by some municipality, and since Olive Branch did not object to these proceedings, annexation by Southaven should be viewed as "inevitable", regardless of the other facts of the case. This argument is made by Southaven notwithstanding the position taken by the objectors that they would prefer to petition Olive Branch to take them in, or allow Olive Branch to annex them, thus preserving their historic relationship with Olive Branch.[1]

Contrary to the erroneous allegations made by Southaven in its Brief, there are significant differences in the facts of the case, *sub judice*, and *Poole v. City of Pearl.* For example:

(1) In *Poole v. City of Pearl*, the Chancellor ruled that the City had a *need to expand* its municipal boundaries, *Id.*, ¶16, p. 733, and had a *need for developable land* which could be

[1] In *Poole v. City of Pearl*, the PAA was bound to some extent on the west and south by Pearl, and on the east by the City of Brandon. The City of Flowood was located just to the north of the PAA and the Jackson Municipal Airport also was located just to the west of the PAA.

satisfied through the annexation of the PAA. *Id.*, ¶22, pp. 734, 735. In the present case, the Trial Court ruled that there was no need for expansion by the City into the Northeast Parcel and that the Northeast Parcel (unlike the PAA in the *Pearl* case) is "built out".

(2) In the *Pearl* case, the Chancellor and this Court ruled that the PAA had a need for overall planning and zoning, since, *inter alia*, Rankin County (where the City of Pearl is located) had no zoning ordinance in place at the time of the trial. *Id.*, ¶46-48, p. 739. In the present case, the Trial Court correctly ruled that no overall planning or zoning was needed in the PAA and specifically was not needed in the built-out Northeast Parcel, in large part because DeSoto County had comprehensive zoning and planning ordinances and codes already in place, thus eliminating the need for such services.

(3) Unlike the facts as shown in the *Pearl* case, development in the Northeast Parcel (and the subdivisions located therein) was in place on the outskirts of Olive Branch long before Southaven began moving eastward in its annexation proceedings over the years. In the *Pearl* case, all the subdivisions located in the PAA were relatively new, which gave some credence to the City's claim that the growth in the PAA was caused by its proximity to the City of Pearl. In this case, as stated, the Summerwood and Whitten Place subdivisions were in existence long before Southaven began its eastward annexation movements. Moreover, Southaven's attempt on pp. 5-6 of its Brief to compare its growth rate to Pearl's growth rate in an effort to justify this annexation is irrelevant, since the Northeast Parcel was developed before Southaven began its eastern movement. This argument of the City has no merit.

(4) This Court has previously ruled that a fairness/equity evaluation should be conducted to determine if the proposed annexation is reasonable, which includes a determination of whether a city needs to expand. Since the Trial Court ruled in this case that Southaven had no need to

expand, there is no difficulty (unlike the *Pearl* case) in concluding that the adverse economic and other impact on the PAA as a result of annexation residents will far outweigh the benefits received by the PAA as a result of annexation. (See pp. 25-29, Brief for the Appellants).

In summary, the argument of Southaven on this issue (as shown on p. 2 of the Brief for the Appellee) is that the objectors oppose annexation simply because they do not wish to pay city taxes and that they ignore the benefits afforded them by their close proximity to Southaven. This argument, particularly in comparison to the facts of *Pearl* case, is obviously misguided, ill-conceived, and without merit. Indeed, it reflects the arrogance of a city that cannot conceive of any reason why an objector might oppose annexation other than that an objector does not want to pay his/her fair share of the taxes which the city wishes to impose upon the objector. The city is apparently blind to the fact that it should not be allowed to arbitrarily annex an area (and impose taxes and restrictions on its residents) if there is no need for the city to annex.

II. ANNEXATION FOR AN IMPROPER PURPOSE

Southaven seeks, with thewaive of a hand, to dismiss as "off base" and "perhaps paranoid", the claim of the objectors that this annexation proceeding was filed for an improper purpose; and that the Trial Court's refusal to rule upon or even acknowledge this issue in its opinion amounted to error as a matter of law. (See pp. 7, 11-12, Brief of Appellee). The City does not deny that the taped conversation between Mayor Davis and Stephanie Russell, one of the objectors, took place.[2] It does not deny that he told Ms. Russell that Mr. Sparkman had agitated enough of his aldermen so that Summerwood would be part of the annexation "no matter what" or that the aldermen were going to "go after him and prove him wrong." Instead

[2] The City is incorrect when it states in its Brief (p. 11) that Stephanie Russell "recorded" her telephone conversation with the Mayor. In fact, the conversation was recorded automatically by the bank where she worked, since the Mayor called Ms. Russell at her workplace. (See p. 35, Brief of Appellants).

the City just asserts that the tape recording only reflects "isolated statements" made by the Mayor (See p.7 of the Southaven Brief) or that ". . . [a]t most, the Mayor was stating his perception of the impact of Mr. Sparkman's impact on the aldermen." (See p. 11 of the Southaven Brief).

As stated in the Brief for the objectors (p. 37), it is noteworthy that Mayor Davis himself admitted that an annexation for spite should not be allowed (T. 281). It is also noteworthy that the Mayor was the main witness called by the City and that no alderman was called as a witness to dispute the Mayor's "perception" of what his aldermen told him as why they wanted to annex the Northeast Parcel.

It has been said that facts "are stubborn things" and that is true in this case. The uncontroverted testimony in the case *sub judice* is that this annexation was filed for spite against the citizens of the Northeast Parcel and to "go after Mr. Sparkman." This testimony is corroborated by the factual conclusion by the Chancellor that the City had no need to annex the Northeast Parcel. As admitted by the Mayor, such a reason does not rise to the level of the standard required for annexation: (1) that there must be a reasonable basis for it; (2) or that the annexation is just or necessary; (3) or that the annexation is in the overall public interest. See 46 *C.J.S.*, Municipal Corporations, §47. (See also p. 35 of Brief for the Appellants).

Southaven is also incorrect when it states on page 11 of its Brief that the Trial Court may only consider in its opinion "the judicial questions of reasonableness." It is noteworthy that *Poole v. City of Pearl*, cited with approval by Southaven, clearly states that this Court may reverse if the Trial Court employed erroneous legal standards. *Id.*, ¶12, p. 732.

It is respectfully submitted that the Trial Court committed error, which amounted to error as a matter of law, when it refused to deny an annexation filed for spite; and when it failed to

even address the issue in its opinion. (See also pp. 31, 35, Brief for the Appellants).

III. IMPACT FEES

On pages 4 and 5 of their Brief, the Objectors make the case as to why a city's refusal to impose appropriate impact fees on real estate developers is detrimental to existing citizens of a municipality and is a factor that should be considered when determining whether a proposed annexation is reasonable. See T. 668-670 where the City's witness and financial planner, Demery Grubbs, agreed that the imposition of such impact fees is desirable and would be of benefit to existing citizens and the City's financial position. It is submitted that citizens of a municipality, where no impact fees are imposed on developers, are unnecessarily at risk for regular increases in taxes to defray the costs of new infrastructure and water and sewer capacities to serve new subdivisions in a rapidly growing urban area. Since these new subdivisions may or may not be successful, the costs of new infrastructure should be borne by the developer who hopes to make a profit through his real estate development, and should not be assumed by existing taxpayers. Such is not the case in Southaven.

On page 12 of its Brief, Southaven alleges that the argument of the objectors (that Southaven's policy not to charge impact fees weighs against the reasonableness of this annexation) is frivolous, citing this Court's decision in *City of Ocean Springs v. Homebuilders Ass'n of Mississippi, Inc.,* 932 So. 2d 44 (Miss 2006). The final decision in the *Ocean Springs* case was rendered during the trial of this action but subsequent to the issuance of the annexation ordinance by Southaven. It is the opinion of many who have studied the *Ocean Springs* case that properly structured impact fees may still be imposed by a city if they are imposed as legitimate regulatory fees and meet the criteria set out in *Ocean Springs*. See this Court's reference in its

Ocean Springs opinion to its earlier decision in *Sweet Home Water and Sewer Ass'n v. Lexington Estates, Ltd.*, 613 So. 2d 864 (Miss. 1993), when it said "[w]hile Sweet Home may, under §19-5-195, assess 'rates, fees tolls, or charges', those assessments must be reasonably calculated to provide for the system's functioning and growth. *Id.* at 870." *Ocean Springs*, 932 So. 2d at ¶35, 36, p. 54. The court also stated in its *Ocean Springs* opinion that "t]he fees at issue do not qualify as regulatory in nature." *Id.* at ¶39, p. 55. It is submitted that this statement is a clear indication that properly structured impact fees which do meet the criteria of regulatory fees (as opposed to the unauthorized imposition of taxes) may be charged to a developer. Thus, the argument of Southaven that the impact fee argument of the objectors is frivolous is without merit. Respectfully the objectors should have a right to voice an objection without fear of reprisal if their taxes are being asked to finance real estate developments that may or may not be successful within a rapidly growing municipality. That is precisely what the objectors will be forced to do in this case is this proposed annexation is successful.

IV. THE INDICIA OF REASONABLENESS

As stated above and in prior Briefs, this court is faced, perhaps for the very first time in its long history of ruling on annexation matters, with the questions as to whether an annexation is reasonable and whether citizens should be saddled with additional taxes and regulatory restrictions when the Trial Court rules (without appeal) that the annexation is unnecessary and that the City had no need to expand or annex. To the knowledge of the objectors, the Mississippi Supreme Court has not ruled on this issue.

In its Brief on page 12, Southaven argues that by raising this issue, the objectors fall into a "familiar trap", once again citing *Poole v. City of Pearl.* In that case and others, this Court has indeed ruled that the "indicia of reasonableness" are not conditions precedent to an annexation or

indeed ruled that the "indicia of reasonableness" are not conditions precedent to an annexation or distinct tests, but are only guides to a decision on whether a proposed annexation meets the judicial test of "reasonableness". *Poole v. City of Pearl, Mississippi,* 908 So. 2d at 732-733. Respectfully, the objectors fell into no trap on this issue, as shown by their argument on p. 40 of their original Brief herein [". . . these factors are only indicia of reasonableness and not separate or distinct tests in and of themselves"], citing, *inter alia, Bassett v. Town of Taylorsville, Mississippi, 542 So. 2d 918, 921 (Miss. 1989).* Still, it is submitted that whether or not a city has a need to expand, given the sub-indicia that are to be considered in making this determination[3], is a threshold question that goes to the very heart of whether an annexation is reasonable. See the statement of the text-writer on this issue:

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

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

The questions are:

(1) Can it be said that this annexation is reasonable where the Trial Court has ruled (unchallenged on appeal) that the annexation is unnecessary?

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[3] See the indicia and sub-indicia of reasonableness cited in *In Re Enlargement and Extension of Boundaries of the City of Macon*, 854 So. 2d 1029 (Miss. 2003) and referred to on pp. 6, 7, 40, 41 of the Brief of the objectors. Please note that most of the indicia and sub-indicia cited in *Macon* revolve around whether the annexation is necessary or whether there is a need for the City to expand.

(2) Can it be said that this proposed annexation is in the public interest when it is not necessary and where DeSoto County has in place highly sophisticated services designed to promote the quality of life of its citizens to the maximum?

(3) Can it be said that allegedly enhanced fire and police protection from Southaven makes this annexation reasonable when the Northeast Parcel is a very low crime area with a sophisticated neighborhood watch program in place, and where the Northeast Parcel's fire protection rating is C-7, the same rating awarded to Olive Branch and other cities in DeSoto County?

(4) Can it be said that the offer by Southaven to allow the citizens to maintain their septic tanks in the Northeast Parcel somehow makes this annexation reasonable?

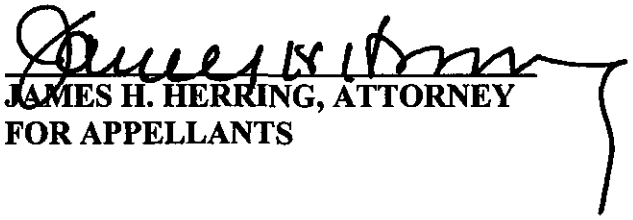
Respectfully, the answer to these and other such questions should be a resounding "No". This Court should rule that this annexation is not "reasonable" if it is unnecessary, and put in place some check on municipalities that attempt to abridge the rights of ordinary citizens and taxpayers without justification. If this annexation is not necessary, why not allow these citizens to apply to Olive Branch if that is what they want?

V. CONCLUSION

It is respectfully submitted that certain errors which amounted to errors at law occurred in these proceedings, as well as manifest error on factual matters. These errors require this proceeding to be reversed and rendered. It is further suggested that this is a case of first impression on whether an annexation is reasonable when the Trial Court has ruled, factually, that the annexation is not necessary. It is submitted that whether or not an annexation is necessary should be the cornerstone of whether an annexation action is reasonable. For these reasons, it is submitted that oral argument would be helpful to the Court.

The objectors respectfully request that the Court carefully consider all issues raised by them in these proceedings and, after oral argument thereon, issue its order finally reversing and rendering the Trial Court's decision herein..

Respectfully submitted,



JAMES H. HERRING, ATTORNEY
FOR APPELLANTS

CERTIFICATE OF SERVICE

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

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This the 4th day of June, 2008.

JAMES H. HERRING