IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-TS-00584

IN THE MATTER OF THE ENLARGING, EXTENDING AND DEFINING THE CORPORATE LIMITS AND BOUNDARIES OF THE CITY OF HORN LAKE, DESOTO COUNTY, MISSISSIPPI

CITY OF HORN LAKE, MISSISSIPPI — **APPELLANT**

VS

TOWN OF WALLS, MISSISSIPPI, DESOTO COUNTY, MISSISSIPPI, and THE WALLS FIRE PROTECTION DISTRICT — **APPELLEES**

REPLY BRIEF OF APPELLEE TOWN OF WALLS

Appeal from the Chancery Court of
DeSoto County, Mississippi
Cause No. 08-05-0981
Consolidated with
Cause No. 07-12-2387ML

ORAL ARGUMENTS REQUESTED

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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.

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Honorable Percy L. Lynchard, Jr.
Chancery Court Judge
P. O. Box 340
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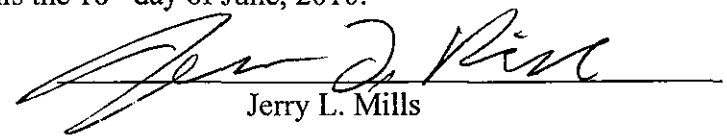
Respectfully submitted this the 18th day of June, 2010.



Jerry L. Mills

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I. STATEMENT OF ISSUES

The brief of the Appellant raises a single issue. That issue is set out by Appellant as follows: "The decision of the DeSoto County Chancery Court to deny the annexation proposed by the City of Horn Lake is manifestly erroneous and is not supported by substantial and credible evidence." (Brief of Appellant, 1, 7.)

This Court has stated the appropriate standard of review as follows:

> This Court's standard of review for annexation is very limited. The Court can only reverse the chancery court's findings as to the reasonableness of an annexation if the chancellor's decision is manifestly wrong and is not supported by substantial and credible evidence. *In re Enlargement and Extension of Mun. Boundaries of City of Madison v. City of Madison,* 650 So. 2d 490, 494 (Miss. 1995). We also stated "[w]here there is conflicting, credible evidence, we defer to the findings below." *Bassett v. Town of Taylorsville,* 542 So. 2d 918, 921 (Miss. 1989). "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." *Id.* at 921. "We 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. City of Hattiesburg,* 840 So. 2d at 81.

In re Enlargement and Extension of Mun. Boundaries of City of D'Iberville 867 So. 2d 241, 248 (Miss. 2004). In this case, there is no contention that the Chancellor employed an erroneous legal standard. Thus, the only issue is:

Whether the decision of the DeSoto County Chancery Court to deny the annexation proposed by the City of Horn Lake is manifestly erroneous, given the weight of the conflicting evidence presented at trial.

II. STATEMENT OF THE CASE

The Appellant's statement of the case appears generally adequate. The Town of Walls agrees with the Appellant's statement of the standard of review – this Court may reverse a chancellor's determination that an annexation is either reasonable or unreasonable if that

decision is manifestly erroneous or is unsupported by substantial and credible evidence. *In the Matter of the Enlargement and Extension of the Municipal Boundaries of the City of Clinton,* 920 So. 2d 452, 454 (Miss. 2006) *(citing In re Extension of the Boundaries of the City of Batesville,* 760 So. 2d 697,699 (Miss. 2000).

III. ARGUMENT

Is the Annexation Reasonable Under the Totality of the Circumstances?

The principles applied to the initial determination of annexation cases have often been repeated by this Court as follows:

> While "[a]nnexation is a legislative affair," confirmation of annexations is in the province of the chancery court. *Matter of the Boundaries of City of Jackson,* 551 So. 2d 861, 863 (Miss. 1989); Miss. Code Ann. § 21-1-33 (1972). The role of the judiciary in annexations is limited to one question: whether the annexation is reasonable. *City of Jackson*, 551 So. 2d at 863. Courts are "guided" in this determination of reasonableness by twelve factors previously set forth by this Court. This Court recently reaffirmed these twelve "indicia of reasonableness," but held "that municipalities must demonstrate through plans and otherwise, that residents of annexed areas will receive something of value in return for their tax dollars in order to carry the burden of showing reasonableness." *In the Matter of the Extension of the Boundaries of the City of Columbus*, 644 So. 2d 1168, 1172 (Miss. 1994).
>
> The twelve indicia of reasonableness are: (1) the municipality's need to expand, (2) whether the area sought to be annexed is reasonably within a path of growth of the city, (3) 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) need for zoning and overall planning in the area, (6) need for municipal services in the area sought to be annexed, (7) whether there are natural barriers between the city and the proposed annexation area, (8) past performance and time element involved in the city's provision of services to its present residents, (9) economic or other impact of the annexation upon those who live in or own property in the proposed annexation area, (10) impact of the annexation upon the voting strength of protected minority groups, (11) whether the property owners and other inhabitants of the areas sought to be annexed have in the past, and in the foreseeable future unless annexed will, because of their reasonable proximity to the corporate limits of the municipality, enjoy economic and social benefits of the municipality without paying their fair share of taxes, and (12) any other factors that may

suggest reasonableness. See *Matter of Boundaries of City of Jackson,* 551 So. 2d 861, 864 (Miss. 1989).

> These twelve factors are not separate, independent tests which are conclusive as to reasonableness. *Western Line Consol. School Dist. v. City of Greenville*, 465 So. 2d 1057, 1059 (Miss. 1985). Rather, these factors are "mere indicia of reasonableness." "[T]he ultimate determination must be whether the annexation is reasonable under the totality of the circumstances." *City of Columbus,* 644 So. 2d at 1172 (citing *Matter of Enlargement of Corp. Limits of Hattiesburg,* 588 So. 2d 814, 819 (Miss. 1991); *Matter of Boundaries of City of Vicksburg,* 560 So. 2d 713, 716 (Miss. 1990); *In re Enlargement of Corporate Boundaries of the City of Booneville, Prentiss County, Mississippi,* 551 So. 2d 890, 892 (Miss. 1989); > In the Matter of the Extension of the Boundaries of the City of Jackson, Mississippi, 551 So. 2d 861, 864 (Miss. 1989); *Bassett v. Town of Taylorsville,* 542 So. 2d 918, 921-22 (Miss. 1989)). An annexation is reasonable only if it is fair. *Western Line,* 465 So. 2d at 1060. In making this determination, the annexation must be viewed "from the perspective of both the city and the landowner[s]" of the proposed annexation area. Id. at 1059-60.

Enlargement and Extension of Mun. Boundaries of City of Madison v. City of Madison, 650 So. 2d 490, 494 (Miss. 1995). The well settled standard of review applied by this Court on the issue of reasonableness is as follows: "Where the finding of reasonableness is challenged on appeal, this Court conducts no plenary review. It may reverse where – and only where – the chancery court's finding of ultimate fact that the annexation was (un)reasonable is manifestly wrong or without the support of substantial, credible evidence." *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi,* 744 So. 2d 270, 277 (Miss. 1999) (internal citations omitted). The evidence in this matter clearly supports the finding of the Chancellor. An examination of each of the indicia reveals strong evidentiary support for the findings of the Chancellor.

Perhaps the most striking concern with the brief of the Appellant is the failure to recognize the trial court's clear consideration of the evidence. The Appellant's brief is clearly an inaccurate summary of the testimony and evidence presented at trial. Reading the Appellant's

brief, one would never know that any evidence was presented supporting the conclusions of the Chancellor. The basic approach taken by the Appellant was simply to restate in its brief to this Court the points it urged the Chancellor to make in his findings at trial. At no point does the Appellant recognize the fact that substantial conflicting evidence was presented by the Town of Walls. The Appellant's efforts amount to nothing more than an attempt to have this Court conduct a de novo review of the evidence. This is improper. All issues raised by Horn Lake are without merit, and this matter should be affirmed in whole.

1. The City's need to expand.

With regard to the City of Horn Lake's need for expansion, the Chancellor found:

> When determining a city's need for expansion, this Court has been directed to consider many sub-factors, including: (a) Spillover development into the proposed annexation area; (b) The city's internal growth; (c) The city's population growth; (d) The city's need for development land; (e) The need for planning in the annexation area; (f) Increased traffic counts; (g) The need to maintain and expand the city's tax base; (h) Limitations due to geography and surrounding cities; (i) Remaining vacant land within the municipality; (j) Environmental influences; (k) The city's need to exercise control over the proposed annexation area; (l) Increased new building permit activity. ***In the Extension of the Boundaries of the City of Winona, 879 So. 2d 966*** (Miss2004). Evidence adduced at the trial of this cause reflected that spillover development may be defined as "where development occurred within a municipality and that development exceeds that municipality's boundaries". Although there may be other examples of spillover development, it would appear that this definition is most appropriate for the case at bar. Horn Lake argues that the subdivision developments, particularly along and either side of State Highway 302 also known as Goodman Road, within the first square mile of the city's western municipal boundary and other developments are the result of spillover growth from Horn Lake. However, it must be noted that these developments were in place and largely developed prior to Horn Lake's 2002 annexation which extended its municipal boundaries along that state highway for a period of one and a half to two miles. A municipality can hardly be credited with spillover growth when it races to within a particular development which already exists and then claims that it exceeded and "spilled over" from its municipal boundary.
>
> With respect to the city's internal growth, the evidence reflected that a number of subdivisions and housing developments have been commenced since

the year 2000. These included, but are not limited to, Dancy Landing PUD, Willow Point, Nicole Place PUD (two phases), and Turman Farms. However, the evidence also reflects that except for a large apartment complex constructed on Turman Farms, the majority of these developments remain largely vacant and undeveloped, their development apparently slowed by the economic downturn which the City of Horn Lake, the State of Mississippi, and indeed the nation in general is experiencing at this time. Some lots contain "spec" houses that were constructed, but remain unsold and empty, a monument to the existing however. It appears that 797 people on the average annually have moved into the corporate limits of Horn Lake since the municipality's last annexation in 2002. The majority of these, perhaps half of these, arrived in 2007, following the development of the Turman Farms apartment complex which consisted of 513 housing units. Because of legislation passed by the municipality since the opening of this complex, assumedly as a result of same, these types of large multi-family units will now be drastically curtailed in the city. With respect to the city's internal growth, the evidence reflected that a number of subdivisions and housing developments have been commenced since the year 2000. These included, but are not limited to, Dancy Landing PUD, Willow Point, Nicole Place PUD (two phases), and Turman Farms. However, the evidence also reflects that except for a large apartment complex constructed on Turman Farms, the majority of these developments remain largely vacant and undeveloped, their development apparently slowed by the economic downturn which the City of Horn Lake, the State of Mississippi, and indeed the nation in general is experiencing at this time. Some lots contain "spec" houses that were constructed, but remain unsold and empty, a monument to the existing however. It appears that 797 people on the average annually have moved into the corporate limits of Horn Lake since the municipality's last annexation in 2002. The majority of these, perhaps half of these, arrived in 2007, following the development of the Turman Farms apartment complex which consisted of 513 housing units. Because of legislation passed by the municipality since the opening of this complex, assumedly as a result of same, these types of large multi-family units will now. The evidence reflects that the city's need for developable land should be considered by the Court at the same time in which the remaining vacant land within the municipality should be considered. The city's absorption of developable land has been slow. By Horn Lake's own evidence, 3,146 acres amounting to 30.1 percent of Horn Lake's existing city is vacant unconstrained land. An additional 1,411 acres amounting to 13 ½ percent of the total acreage within the existing city is vacant constrained land on which development may occur. While the Court is cognizant that constrained vacant land is not prime development land, the Court also notes that a large development within the city occurs on constrained land, that being the DeSoto Commons development which was constructed with infrastructure by the City to accommodate it, in a floodway.

With respect to the sub-factor which included the need for planning in the annexation area, the Court notes that the area is subject to planning and zoning

provided by DeSoto County, Mississippi. The resources and facilities in the planning department for DeSoto County are in all respects synonymous with those provided by municipalities and may be construed to rise to the level of municipal planning because of its provision services. The majority of the area in the proposed area of annexation is presently zoned agricultural or agricultural-residential (A-R). In its own comprehensive plan, Horn Lake has failed to provide any long range planning for the proposed area outside of its existing city limits. As the area proposed to be annexed by Horn Lake is, in fact, large tracts of vacant agricultural type land with the exception of the developments noted earlier, there seems to be no exigent need for further zoning or planning.

Addressing other sub-factors under the indicia of need to expand, the Court notes that there is in Horn Lake, as in any municipality, a need to maintain and expand the city's tax base for financial reasons. There appear to be no environmental influences which affect the proposed area of annexation and again, because of the makeup of the area, the city's need to exercise control over that annexation area seems to be minimal. The Court notes that there are only three noted businesses within three miles into the proposed area of annexation from Horn Lake, thus bringing only minimal sales tax revenues to the potential municipality. The Court finds little reason for the city to exercise control over that proposed area of annexation. Although Horn Lake, located between Walls to the far West, Southaven to the immediate East and partial North and Hernando to the distant South, may one day find its ability to expand limited, such is not the case at the present time. The Town of Walls lies 2 miles to the West, and Hernando is much further still. The City of Horn Lake's ability to expand to the North to the Tennessee line remains. There are no significant parcels of land sought in existing annexations by other municipalities at this time. Lastly, with respect to these indicia, the evinced a desire to become part of that city.

Finally, the Court is directed to look at the sub-factor which involves the increased new building permit activity. While Horn Lake at times has experienced a healthy issuance of building permits, both commercial and residential, its own evidence reflects a severe drop since 2007. With respect to commercial building permits, only nine were issued in the year 2008, and none during the current year. Likewise, only 26 building permits for residential dwelling units have been issued by Horn Lake since December, 2007. There have been none issued during the current year, and at the present time, Horn Lake confesses that there is not a single home under construction as of the date of the trial hereof. Considering all of the sub-factors enumerated herein, the Court finds under the totality of the circumstances that there is no need for the City of Horn Lake to expand at the current time.

(R. 597-601.) Horn Lake commences its argument on the issue of need to expand with a totally frivolous claim. Horn Lake asserts:

> On this indicium, the Chancellor found that the City of Horn Lake did not have a need to expand. The Chancellor made this finding without citing to a single piece of evidence before the court, despite the fact that Horn Lake present substantial and credible evidence as to each of the factors set forth by this Court in Winona in support of its need to expand. The chancellor's finding on this indicium is manifestly wrong and not supported by substantial and credible evidence.

(Horn Lake's Brief of Appellant, 8.) While Horn Lake is correct that the Chancellor did not provide a specific citation to the trial transcript or exhibits in connection with his findings, the Chancellor is under no such obligation to do so. *In re Extension of the Boundaries of the City of Ridgeland*, 651 So. 2d 548, 560 (Miss. 1995). In fact, a simple reading of the Court's opinion clearly indicates the Chancellor relied upon very specific facts and evidence that could only be known by relying upon the evidence presented at trial.

In fashioning its opinion, the Chancellor clearly assessed spillover development from Horn Lake. In doing so, the Chancellor's definition of spillover growth was taken directly from the testimony of the urban planning expert for Walls, Chris Watson. Watson offered the following definition for spillover: "One meaning, obviously, is literally a cup runneth over type spillover, and that would be, for instance, where development occurred within the municipality, and that development began literally falling over in the city limits." (T. 378, 24-28.)

Contrary to the assertion of Horn Lake, the Chancellor set forth very specific evidence to support his opinion on this indicia regarding spillover development. By way of example, the Chancellor found:

> Horn Lake argues that the subdivision developments, particularly along and either side of State Highway 302 also known as Goodman Road, within the first square mile of the city's western municipal boundary and other developments are the result of spillover growth from Horn Lake. However, it must be noted that these developments were in place and largely developed prior to Horn Lake's 2002 annexation which extended its municipal boundaries along that state highway for a period of one and a half to two miles.

(R. 598.) Surely, Horn Lake does not contend that this conclusion was not drawn directly from the evidence presented at trial. Horn Lake's position with regard to spillover development as lying along Goodman Road and within the first square mile of the city's western boundary is found within the trial testimony. (T. 850, 881.) Further, the Chancellor's conclusion that much of the development that Horn Lake relies upon as spillover was annexed by the city can easily be made by reviewing exhibits HL-003 and HL-062. Exhibit HL-003 provides the timeframe in which this square mile area came into Horn Lake, and exhibit HL-062 provides information with regard to the timing of development approvals within the city. The two most significant developments in this area, Starz PUD and Dancy Landing PUD, have not yet developed.

With regard to the Starz PUD, Horn Lake Planning Director Anita Rainey testified as follows:

> Q. Ma'am, the fact that y'all have had that planning activity doesn't indicate an awful lot that could reasonably be expected have occurred there, does it?
>
> A. The owner constraints right there keep anything from happening right there.

(T. 811, 16-21.) With regard to Dancy Landing, Horn Lake Planning Director Anita Rainey testified as follows:

> Q. Let's go back to Dancy Landing. I've been handed a proposed plan for Dancy Landing. Have you seen that in 2008?
>
> A. Yes, I have.
>
> Q. And what's the status of that?
>
> A. It's awaiting approval by the board.

(T. 813, 1-6.) It is undisputable that the Chancellor relied upon substantial credible evidence in his analysis of spillover development from the City of Horn Lake.

Other examples of error of Horn Lake's argument can be found in the Chancellor's opinion:

> With respect to the city's internal growth, the evidence reflected that a number of subdivisions and housing developments have been commenced since the year 2000. These included, but are not limited to, Dancy Landing PUD, Willow Point, Nicole Place PUD (two phases), and Turman Farms. However, the evidence also reflects that except for a large apartment complex constructed on Turman Farms, the majority of these developments remain largely vacant and undeveloped, their development apparently slowed by the economic downturn which the City of Horn Lake, the State of Mississippi, and indeed the nation in general is experiencing at this time.
> . . .

The contention of Horn lake that this finding is not based on the evidence presented below is clearly erroneous. Specifically the record reveals the following testimony which is in full accord with the findings of the Chancellor. Michael Bridge provided the following testimony:

> Q. Now, you've mentioned Nicole Place, and you said you could tell us about many, but I don't want to spend a lot of time. Are you familiar with this blue area in 2007 up in the Sage Creek PUD, the future Willow Point area?
>
> A. Yes. Well, the Sage Creek PUD, nothing is happening there. That's number one. That is zip. Willow Point, roads have been put in, sewer has been put in, water has been put in, and the portion of Willow Point that is shown in light blue and is shown in the darker blue and also that portion that's shown in purple -- let me make absolutely sure. Three or four houses in that area.
>
> Q. Is anything happening other continuing erosion of that treeless, graded land?
>
> A. There's nothing happening. What's happening is that the infrastructure that's in place in that area as we speak, and there's none in Sage Creek. We're looking at the future Willow Point, future Holly Ridge. The infrastructure that's there is deteriorating rapidly.
>
> Q. Tell me what types of deterioration you've observed.

A. Streets are caving in, the erosion. There's no barricades there. If you're driving -- no street lights. If you drive down there and you don't stop, your automobile will disappear in the erosion that occurs, not only -- even if you stay on the paved road. The undermining of that road and the deterioration of that road, if you're not careful where you drive, you're going to call a tow truck.

Q. Again, I want to just take a couple more examples to show we're not picking on certain areas.

The Truman Farms area, what's happened there with the exception of 503 apartment units having been constructed?

A. With the exception of the apartments constructed there, that portion that -- all of that portion that is shown in the lighter purple is essentially vacant. There is that portion that is partially developed in that purple just where – on the map it's shown as Alden Station, but the rest of that in that area that's purple is essentially vacant. And there are -- in that southern portion, probably the vacancies of new houses approach in the neighborhood of 15 percent. We can go all over –

Q. I don't want to take time –

A. Scott Farms is the same thing. It's shown as -- there are -- there's got to be 150 subdivided vacant lots in that. You can go all over -- you go up here to King's View Lakes, vacant lots, vacant lots. You can go into essentially any new subdivision and things have stopped. There are literally thousands of acres of land, thousands of either subdivided or potentially subdivided lots that exist throughout this area.

Q. I want to go to another area, that being the PUD's. Have you had an opportunity to examine the amount of Horn Lake's development that could be accommodated by existing PUD's?

A. Dancy Landing PUD, only a portion of that has actually been filed, even though it contains roughly -- let me get my -- half a section. That is an area that you examined the planning director on two nights ago, and she had defined, even though there was a cap on multiple family and there's a question, all of these PUD's -- not all of them. Most -- a lot of these PUD's contain approved multiple family residential units that exceed the 10 percent cap. I don't know how that's going to work.

(T. 1230-32.) Next, the Chancellor found the following regarding Horn Lake's need to expand:

> The evidence reflects that the city's need for developable land should be considered by the Court at the same time in which the remaining vacant land within the municipality should be considered. The city's absorption of developable land has been slow. By Horn Lake's own evidence, 3,146 acres amounting to 30.1 percent of Horn Lake's existing city is vacant unconstrained land. An additional 1,411 acres amounting to 13 ½ percent of the total acreage within the existing city is vacant constrained land on which development may occur. While the Court is cognizant that constrained vacant land is not prime development land, the Court also notes that a large development within the city occurs on constrained land, that being the DeSoto Commons development which was constructed with infrastructure by the City to accommodate it, in a floodway.

(T. 599.) Once again Horn Lake's claim that the Chancellor cited no evidence to support his opinions is absolutely incorrect. Michael Slaughter, Horn Lake's expert testified:

> The vacant land which the total vacant land in the City of Horn Lake is 4,000 -- I'm sorry, yes, 4,557 acres or 7.12 square miles or 43 percent of the entire city. The vacant constrained land is 1,411 acres or 2.2 square miles or 13.5 percent which includes flood plain and floodway, severe slope that lies outside of that flood plain and floodway. So we wouldn't count it twice. And then any utility easements that lie outside the flood plain, floodway, and severe slopes. So we come up with the amount of vacant, unconstrained land to be 3,146 acres or 4.92 square miles or 30.1 percent of the existing city.

(T. 858.) In addition to following the testimony of Mr. Slaughter, the finding of the Chancellor is replicated on Exhibit HL-95.

Horn Lake's position that the Chancellor cited no evidence to support his opinion is directly contradicted when the opinion is compared to the testimony of Mr. Slaughter.

One point that should be noted relates to the argument of Horn Lake related to the percent of buildout which will support the reasonableness of an annexation. Horn Lake asserts that this Court has recognized certain levels of land development which support a need for expansion. They cite the finding of this Court in Hattiesburg. In that case, the Court stated:

> We have declined to set an absolute amount of usable vacant land that would prevent annexation. As Hattiesburg has pointed out, we have approved annexation in Southaven, Madison, and Ridgeland, which had **usable** vacant land of 43%, 59%, and 48%, respectively. *Matter of City of Horn Lake,* 630 So. 2d 10, 18

> (Miss. 1993); *Enlargement and Extension of Mun. Boundaries of City of Madison v. City of Madison,* 650 So. 2d 490, 496 (Miss. 1995); *Extension of Boundaries of City of Ridgeland v. City of Ridgeland,* 651 So. 2d 548, 554-56 (Miss. 1995). The record is unclear as to how much land within Hattiesburg's borders is actually usable vacant land, but the point is moot. We simply have no established number that must be reached to entitle a city automatically to expand. *In re Extension of Boundaries of City of Hattiesburg* 840 So. 2d 69, 85 (Miss.,2003).

Walls asserts the Chancellor properly considered the amount of vacant land in reaching his decision. However, this statement set out above is in error. [1]

In the *Matter of City of Horn Lake* case (consolidated annexations of Horn Lake and Southaven) the record reflects that Southaven had a total undeveloped land area of 43%. This Court stated:

> Lanny McKay, of the Mississippi Department of Economic Development, testified that forty-three percent (43%) of Southaven was undeveloped in March 1989. He stated that this percentage, in conjunction with the amount of Southaven's presently available land which is constrained from development by the flood plain and close proximity to the Memphis Airport, would not be a negative factor in the city's annexation request.

Matter of City of Horn Lake, 630 So. 2d 10, 17 (Miss. 1993). In *Extension of Boundaries of City of Ridgeland v. City of Ridgeland*, 651 So. 2d 548, 554 (Miss. 1995), the 48% number comes from the uncontradicted testimony of Corrine Fox, who stated that: "Ridgeland had 3,206 acres vacant, some of which included flood plain land. She stated 48.4% of Ridgeland land was currently vacant." The statement with regard to the amount of vacant unconstrained land in Ridgeland is incorrect. The *Hattiesburg* opinion correctly states the un-constrained vacant land in Madison. 840 So. 2d at 85.

While the point may seem small in the overall issues, this incorrect data continues to be recited by attorneys and Chancellors in annexation matter around the state. This Court made it

[1] Counsel for the town of Walls is most likely responsible for the misstatement in the *Hattiesburg* opinion as he argued the point on behalf of the city of Hattiesburg and appears to have misspoken.

clear in *Hattiesburg* that there is no magic percentage of vacant land required for a city to expand, and Walls submits that the need to expand must be evaluated on the totality of the evidence. 840 So. 2d at 85. Simply because other annexations have been approved with more vacant land does not require a Chancellor to conclude that a city has the need to expand.

Continuing with his analysis regarding Horn Lake's need to expand, the Chancellor considered the need for planning in the annexation area, finding as follows:

> With respect to the sub-factor which included the need for planning in the annexation area, the Court notes that the area is subject to planning and zoning provided by DeSoto County, Mississippi. The resources and facilities in the planning department for DeSoto County are in all respects synonymous with those provided by municipalities and may be construed to rise to the level of municipal planning because of its provision services. The majority of the area in the proposed area of annexation is presently zoned agricultural or agricultural-residential (A-R). In its own comprehensive plan, Horn Lake has failed to provide any long range planning for the proposed area outside of its existing city limits. As the area proposed to be annexed by Horn Lake is, in fact, large tracts of vacant agricultural type land with the exception of the developments noted earlier, there seems to be no exigent need for further zoning or planning.

(R. 599-600.) There was ample evidence that the Horn Lake and Desoto County zoning ordinances were comparable. Anita Rainey, Horn Lake's planning director testified:

> Q. Okay. Ma'am, you're aware that the County of DeSoto has a planning staff, are you not?
>
> A. Yes.
>
> Q. You know those folks, don't you?
>
> A. Yes, I do.
>
> Q. You know their work?
>
> A. Yes, I do.
>
> Q. And you don't have any criticism of their ability to do their jobs, do you?

A. No, sir.

(T. 808-809.) Exhibit HL-106 demonstrates that there are minor differences in the ordinance of Horn Lake and the County. Certainly the comparison found in HL-106 does not support a need for expansion by Horn Lake.

It should be kept in mind that the analysis of the factor "need for zoning" as it relates to need for expansion should be analyzed differently than the indicia "need for zoning and planning." In assessing need for zoning in the context of need to expand, a situation with no zoning is usually present. See *In re Extension of Boundaries of City of Winona*, 879 So. 2d 966, 976 (Miss. 2004).

The brief of Horn Lake ignores this Court's recent decision in neighboring Southaven. In Southaven the Court found:

> The chancellor found that this indicium did not favor the annexation of the Northeast parcel because it "is a platted area and also has restrictive or protective covenants which lessens the need for zoning and planning by the City of Southaven."
>
> In this case, the record clearly demonstrates that DeSoto County has "an excellent zoning ordinance and well organized county planning department." Chris Watson also testified that DeSoto County has had a comprehensive plan since 1958. Therefore, this Court finds that the chancellor's findings for this indicium were supported by substantial credible evidence and were reasonable. **Thus, this factor does not favor annexation.** This factor alone, however, does not determine whether or not the annexation is reasonable. *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi,* 744 So. 2d 270, 276 (Miss. 1999) (twelve factors "are only indicia of reasonableness, not separate and distinct tests in and of themselves.").

In re Enlargement and Extension of Boundaries of City of Southaven, 5 So. 3d 375, 380 (Miss. 2009). Precisely the same facts exist in this case. The Record supports the finding of the Chancellor.

Further analyzing Horn Lake's need for expansion, the Chancellor found as follows:

> Addressing other sub-factors under the indicia of need to expand, the Court notes that there is in Horn Lake, as in any municipality, a need to maintain and expand the city's tax base for financial reasons. There appear to be no environmental influences which affect the proposed area of annexation and again, because of the makeup of the area, the city's need to exercise control over that annexation area seems to be minimal. The Court notes that there are only three noted businesses within three miles into the proposed area of annexation from Horn Lake, thus bringing only minimal sales tax revenues to the potential municipality. The Court finds little reason for the city to exercise control over that proposed area of annexation. Although Horn Lake, located between Walls to the far West, Southaven to the immediate East and partial North and Hernando to the distant South, may one day find its ability to expand limited, such is not the case at the present time. The Town of Walls lies 2 miles to the West, and Hernando is much further still. The City of Horn Lake's ability to expand to the North to the Tennessee line remains. There are no significant parcels of land sought in existing annexations by other municipalities at this time. Lastly, with respect to these indicia, the Court notes that no one from the proposed area of annexation has come forward and evinced a desire to become part of that city.

(R. 600-01.) The Chancellor's analysis is fully supported by the record in this case. With regard to environmental influences, the same were discussed but only with respect to their impact to the existing city of Horn Lake, not the proposed annexation area. (T. 873-874.) The number of businesses noted by the Chancellor can be determined from exhibit HL-050. Finally, the constraints to Horn Lake's opportunity for future expansion can easily be determined by reviewing any one of the multiple maps in evidence. For instance, the proximity of Horn Lake and other municipalities is apparent on exhibit HL-011. Horn Lake's position that the Chancellor utterly disregarded the evidence in this case is without merit. It is apparent the Chancellor considered the evidence and carefully thought through the inter-related aspect of the various indicators under the indicium need to expand, and thus reached his conclusions. Doing so does not amount to error as assigned by Horn Lake.

Finally the Court concluded with regard to need of expansion as follows:

> Finally, the Court is directed to look at the sub-factor which involves the increased new building permit activity. While Horn Lake at times has experienced a healthy issuance of building permits, both commercial and residential, its own evidence reflects a severe drop since 2007. With respect to commercial building permits, only nine were issued in the year 2008, and none during the current year. Likewise, only 26 building permits for residential dwelling units have been issued by Horn Lake since December, 2007. There have been none issued during the current year, and at the present time, Horn Lake confesses that there is not a single home under construction as of the date of the trial hereof. Considering all of the sub-factors enumerated herein, the Court finds under the totality of the circumstances that there is no need for the City of Horn Lake to expand at the current time.

(R. 601.) The conclusion of Horn Lake that the Chancellor did not consider the evidence in regard to this issue is meritless. The building permit activity utilized evidence utilized by the Chancellor is found on Exhibit HL 16. As noted, the evidence reflects a severe drop in building permit activity in 2007 and 2008. In 2006, there were a total 716 of permits issued for a total value of $43,303,000 dropping to only 148 permits in 2007. The value of the 2007 permits dropped by nearly half ($24,352,910). In 2008 the number of permits had dropped to 35. The value of these permits was about a quarter of the 2006 numbers. As the Chancellor noted there was not a single home under construction in Horn Lake at the time of trial.[2]

As is often the case in this type litigation, the City of Horn Lake utilized a simplistic, formalistic approach, addressing a list of factors the courts have utilized in analyses of the indicium "need to expand." Because building permit activity is a factor helpful in determining need for expansion, Horn Lake asserts that the numbers here support a need for expansion. They fail to consider why Courts in the past have examined building permit activity. The reason

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[2] The record also reflects:

Q. So you've not issued a single new building permit this calendar year?

A. Not a residential. (T. 804.)

increased building permit numbers are important is that new building absorbs a portion of a city's vacant developable land inventory. In this case the drop in building permits indicates that far less land is being absorbed into urban usage than had previously been the case. Coupled with the large number of vacant subdivision lots and large inventory of spec houses, the data are indicative that existing land supplies are adequate to accommodate reasonably anticipated development.

The brief of Horn Lake states that the Chancellor erred because Horn Lake presented substantial and credible evidence as to each of the factors set forth by this Court in Winona in support of its need to expand. Horn Lake makes two mistakes in that argument. First it treats the factors referred to in Winona as indicia of reasonableness. In fact such is not the case. Second, the City of Horn Lake is not experiencing "increased new building permit activity." *Winona*, 879 So. 2d at 974.

When determining this indicium of reasonableness, **the following factors may but do not have to include:**

> (1) spillover development into the proposed annexation area; (2) the City's internal growth; (3) the City's population growth; (4) the City's need for development land; (5) the need for planning in the annexation area; (6) increased traffic counts; (7) the need to maintain and expand the City's tax base; (8) limitations due to geography and surrounding cities; (9) remaining vacant land within the municipality; (10) environmental influences; (11) the city's need to exercise control over the proposed annexation area; and (12) increased new building permit activity.

In re Extension of Boundaries of City of Winona, 879 So. 2d 966, 974 (Miss. 2004) (emphasis added, internal citations omitted). The decreased levels of building permit activity do not support a conclusion that Horn Lake has a need to expand.

The City of Horn Lake contends that its population density indicates a need for expansion. They contend that there are a number of cases which have recognized the significance of population density in evaluating a City's need to expand. This statement is generally correct. However, population density has typically been considered as it relates to need for municipal services and generally with regard to the population density of the area sought to be annexed. This Court has set forth the following factors the trial court may consider in determining whether there is a need for municipal services.

> (1) requests for water and sewage services; (2) plan of the City to provide first response fire protection; (3) adequacy of existing fire protection; (4) plan of the City to provide police protection; (5) plan of City to provide increased solid waste collection; (6) use of septic tanks in the proposed annexation area; and (7) population density.

In re Enlargement and Extension of Boundaries of City of Macon, 854 So. 2d 1029, 1041 (Miss. 2003) (internal citations omitted).

The Supreme Court has considered population density related to need to expand in only very limited cases. See *City of Jackson v. Byram Incorporators*, 16 So. 3d 662, 684-85 (Miss. 2009). In that case the Court relied on population density coupled with the fact the many subdivisions had literally spilled over from the City into the proposed annexation area. In some instances, houses and lots were actually split by the City limits. In the Clinton case cited by Horn Lake population density was a factor in finding that Clinton had a need to expand. Horn Lake presents the matter to this Court as though no other factors were considered. In fact there was substantial testimony with regard to the specific developmental constraints, the land use patterns resulting density and the need for uses other than residential. Jackson still maintains a

high population density of 1,724.27 residents per square mile. *City of Jackson v. Byram Incorporators*, 16 So. 3d 662, 684-85 (Miss. 2009).

In the Clinton case specific evidence of the land use patterns in the City of Clinton, remaining constrained land, remaining land available for development, land absorption rates (both commercial and residential) lead the City's expert to conclude and the Chancellor to find that "the City was in "desperate" need of vacant land and the City had reached population "capacity." The Mayor stated that one tract of vacant land was available in the City. Watson stated that a "cushion" of vacant land was needed, and that the area was "very dense." Given the testimony from the Mayor and Watson above, the overall testimony concerning the need to expand satisfies this indicium of reasonableness." *In re Enlargement and Extension of Municipal Boundaries of City of Clinton*, 955 So. 2d 307, 316-17 (Miss. 2007). Though population density, considered with the other evidence, supported a need to expand it was placed in proper perspective given the conditions on the ground. In this case the issue was not presented with sufficient corollary information to make population density of any significance related to need for expansion.

Never has the court considered population density standing alone. To do so would not make a lot of sense. Population density may well mean one thing in one municipality and an entirely different thing in another. Population density is merely a division of total population by the number of square miles in a municipality. Cities may have a relatively low population density but have a need to expand. An example would be where most houses are on larger lots. In contrast, a City such as Horn Lake, which has a high incidence of multifamily housing, may well have a higher population density but also have a far less need for expansion.

The Chancellor in this case clearly gave due consideration to all evidence presented, by all parties, and relied upon substantial credible evidence in reaching his findings. The position of Horn Lake is simply without merit, given the fact the Chancellor drew from the information available on trial exhibits and from witness testimony in finding that Horn Lake has no need for expansion at the current time. The decision of the DeSoto County Chancery Court on this indicium is not manifestly erroneous and is based upon substantial credible evidence and must be upheld. This issue is without merit.

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

On this issue, the Chancellor stated that: "[T]he Court finds that the proposed area of annexation for Horn Lake in fact lies within its path of growth. This indicia favors annexation by Horn Lake." (R. 602.) The City of Horn Lake even recognized this in its own brief to this Court. (Brief of Appellant, 16.) That fact notwithstanding, Horn Lake continues for three more full pages making argument about an indicium which the trial court found favored annexation by Horn Lake. Thus, any assignment of error here would be nonsensical. This issue is without merit, and this Court should affirm the Chancellor's ruling.

*3. **Potential Health Hazards.***

With regard to the indicia related to the existence of actual or potential health hazard the Chancellor found:

> In addressing this indicia of reasonableness, the Supreme Court has indicated that potential health hazards from sewage and waste disposal, a large number of septic tanks in the area, soil conditions which are not conducive to on-site septic systems, open dumping of garbage and standing water and sewage are to be considered in determining this factor. ***The City of Winona***, 879 So. 2d 979. While both municipalities hurled rocks at the other's glass house with respect to the conditions within the existing cities, less evidence was produced concerning the proposed area of annexation with respect to open dumping of garbage, standing water and sewage, or health hazards from sewage and waste disposal.

> Though there was some evidence of same, it did not rise to the level of that found in the competing municipalities. Additionally, the evidence reflected that although soil conditions throughout the proposed area of annexation were not conducive to on-site septic systems, a vast portion of the area was presently connected to central sewer systems available through the City of Horn Lake or from the Walls Sewer District. Though there were in fact a number of on-site septic systems throughout the area, this appears to be of little consequence to Horn Lake as their proposal under their facilities and services plan for the proposed area of annexation indicates that only 72 homes are in need of sewer connections. Examining all of these sub-factors, this Court can come to no other conclusion but that any potential health hazards within the proposed area of annexation are minimal. Of interest, Horn Lake has no ordinance which would *require* a resident to connect to a central sewer system if it was in fact available or offered. Accordingly, this indicia does not favor annexation by Horn Lake.

(R.602-03.)

The City of Horn Lake argues that the Chancellor committed multiple errors in reaching this conclusion. First, Horn Lake contends that the Chancellor cited no exhibits to support his opinion. Next it argues that Horn Lake should be allowed to annex the area it already serves because the extension of utilities has been found to establish a path of growth. Horn Lake then contends that it presented substantial evidence to support a finding that the existence of potential health hazards indicates the reasonableness of the proposed annexation. All are without merit.

The opinion of the Chancellor is supported by substantial credible evidence. He notes that there is some evidence "with respect to open dumping of garbage, standing water and sewage, or health hazards from sewage and waste disposal. Though there was some evidence of same, it did not rise to the level of that found in the competing municipalities." Walls respectfully submits that the language of the Chancellor indicates a comparative analysis of the potential health hazards and concluded that a better job is being done in the unincorporated proposed annexation area than in either Walls or Horn Lake. The Chancellor easily had the information to rely upon as Horn Lake photographed conditions in the proposed annexation area,

and the same are set forth at exhibits HL-045 and HL-046, and the conditions within the city of Horn Lake were photographed by the Town of Walls and presented at exhibits W-038 through W-044. In reaching his conclusion, the Chancellor clearly relied upon substantial credible evidence.

The chancellor concluded that the soils in the area are not conducive to on site systems. He ultimately conclude that only 72 homes would be served in the annexation area under Horn Lake's plan to deliver sanitary sewer services. That conclusion is clearly supported by the record. Horn Lake's engineer, Mr. Malavasi testified:

> Q. Okay. If you would, take the calculator and add up how many homes are going to receive sewer service in the nine or so square miles Horn Lake is seeking to annex.
>
> A. I show 72.

(T. 703, 704.) It should be noted that the evidence indicated that many more homes in Horn Lake were unserved with sewer that would be served in the City of Horn Lake's plan.

The argument that the chancellor erred in not giving Horn Lake the area it already served because extension of utilities indicates path of growth is meaningless in evaluating this indicia. The Chancellor found that the area was in Horn Lake's path of growth. This is a separate issue from the existence of actual or potential health hazards.

The fact that no exhibits were specifically cited with regard to the findings of the Chancellor is of no import if the evidence supports the finding of the Chancellor. Here there is without question substantial credible evidence to support the findings of the lower court. Horn Lake cites no law which would require a Chancellor to cite specific exhibits in rendering an opinion in an annexation case. To adopt such a rule would impose an almost insurmountable

burden on a Chancellor. Here it is clear that the Chancellor reviewed that evidence based on the correct legal standards.

In *Extension of Boundaries of City of Ridgeland v. City of Ridgeland*, 651 So. 2d 548, 553 (Miss. 1995) this Court said:

> As the chancellor employed the correct legal standards, this Court's standard of review is limited. This court reverses the chancellor's findings regarding reasonableness of the annexation only if the chancellor is manifestly wrong and his findings are not supported by substantial credible evidence. *City of Jackson v. City of Madison,* 644 So. 2d 860; *Matter of Confirmation of Alteration of Boundaries of City of Horn Lake, Miss. and the City of Southaven, Miss.,* 630 So. 2d 10 (Miss. 1993), citing *Matter of Enlargement of Corp. Limits of Hattiesburg,* 588 So. 2d at 819.

Here there is substantial credible evidence to support the actions of the Chancellor. The fact that there is conflicting evidence on certain points does not put the chancellor in error.

4. Financial Ability to Provide Municipal Services.

The Chancellor found on this indicium the following:

> With respect to this indicia, the following sub-factors are appropriate: (a) The present financial condition of the municipality; (b) Sales tax revenue history; (c) Recent equipment purchases; (d) Financial plan and department reports proposed for implementing and fiscally carrying out the annexation; (e) Fund balances; (f) The city's bonding capacity; and (g) Expected amount of revenue to be received from taxes in the annexed area. ***The City of Winona***, 879 So. 2d 981. Evidence presented before this Court indicated that over the last five years sales taxes had grown from $3,864,329 in 2004 to $4,054,885 in 2008 for the City of Horn Lake. This, however, reflected a reduction of $103,000 approximately in sales tax diversions from 2007 to 2008, again collections for the fiscal year 2007 were $3,370,246 for the City of Horn Lake. However, this reflects a rise in the tax rate for Horn Lake from 30 mils in 2003 following its annexation to a current 42 mils beginning in the fiscal year 2007, an increase of 28.5 percent, the second highest among municipalities in DeSoto County. Standard & Poor's reflect a long-term rating of "A+/stable" for the municipality. Their outlook reflects an expectation that the city's debt burden will remain moderate given that additional capital needs are limited. With respect to the municipality's bonding, 4.5 million in general obligation refunding bonds were issued on November 1, 2008. The purpose for these bonds was to construct a fire station along the western boundary of the city and purchase a Pierce Pumper for service in that station. The city,

however, will still be required to finance an additional $310,000 toward the purchase of that fire truck over a three year period of time.

Although the city has maintained a deficit with respect to their budget over the last five years with the exception of the most recent fiscal year, their fund balances have remained consistent. If the Court were to consider these sub-factors only, obviously, the Court would find that the city has a financial capacity to finance the proposed annexation. However, there are areas which give this Court cause for concern.

The services and facilities plan adopted by the Municipality of Horn Lake for the proposed area of annexation on February 12, 2009, and again adopted by a specially called meeting mid-trial on February 18, contained numerous miscalculations on behalf of the city which reflected false or incorrect information regarding the assessed valuation of property in the proposed area of annexation, the combined city and proposed area of 20%, as well as other information. Though Horn Lake argues that these miscalculations are minor in nature (even though one admittedly resulted in a 4.4 million dollar reduction in bond capacity), the Court is unsure. The testimony of Horn Lake's expert in municipal finance was fully impeached and discredited on cross examination by counsel opposite and in rebuttal testimony by the expert designated by Walls, leaving the Court great concerns about the City's projections and ability to provide the necessary services called for under their facilities and services plan which was obviously adopted in haste by the City and perhaps with little time for reflection on its numbers considering the eleventh hour in which it was adopted.

Further complicating these calculations is evidence that income from ad valorem taxes may be speculative more so now because of possible reductions of assessed values within the next five years as a result of the present economic recession. Anticipated revenues to the municipality from permit fees, privilege licenses, sewer taps and the like are admittedly economy driven. Unquestionably, national and local economy conditions dictate a tremendous slowdown in home construction as well as commercial construction or expansion. A substantial decline in the value of commercial permits exists following Horn Lake's 2002 annexation to the present. These factors further give the Court cause for concern with respect to anticipated revenues for the municipality. Further, and perhaps most telling, is evidence presented by the objectors which indicate the municipality, despite its ratings and fund balances, is experiencing economic problems. Memos from the Mayor of Horn Lake in July, 2006, implemented both a hiring freeze as well as a freeze on all existing salaries. A position of patrolman for the municipality has Mayor likewise implemented an emergency expenditure policy wherein no one was to request expenditures that were not of an emergency condition except for those expenses for which the municipality may have already received "outside funds" to finance those expenditures. In December, 2006, the Mayor submitted a grant application with the following economic statement with

respect to the municipality:

> **"Over the last years, our city has been struggling to continue to provide and meet daily demands. In fact, for the third time in recent months, our new mayor and board of aldermen have had to take out a loan to meet state requirements and to make payroll demands due to a development company defaulting on their taxes for the third year in a row. These taxes are over $600,000 and have put the city in a financial bind having to pay the bond from city funds which has depleted much of our city's necessary operational funding revenue."**

Perhaps most telling, the grant writer for the municipality submitted correspondence in December of 2007, some five months prior to the petition for annexation, stating as follows:

> **"The influx in growth *due to the recent annexation* ... has continued to strain our budget just keeping up with the daily requirements." (emphasis added)**

The above referenced correspondence on behalf of the municipality is construed by this Court to be statements of economic need and indicators of economic stress. They do not reflect a city ready and able to take on over as much as nine square miles of new territory after having taken over eight square miles less than seven short years ago. Considering the evidence before the Court with respect to this indicia and being cognizant that the municipality has the burden of proving the reasonableness of this indicia, the Court cannot say under the totality of the circumstances that Horn Lake has met its burden. Accordingly, the Court finds this indicia weighs against annexation.

(R. 603-07.) Here, the opinion of the Chancellor examined the issue of Horn Lake's financial ability under the proper legal standards. Given the highly unusual nature of Horn Lake's preparation and presentation of evidence on this matter, the Court's discomfort was – without question – merited. To a large degree, Horn Lake can be described as the architect of its own doghouse. The record reflects dramatically different Services and Facilities Plans being developed by Horn Lake's expert. A full discussion of the matter is set forth commencing at page 842 of the transcript and running for many pages. Michael Slaughter prepared a financial

analysis that he presented to Walls as a 30(b)(6) designee. During trial a vastly different financial plan was presented. The changes were the result of both mistakes Horn Lake discovered but did not disclose and a modification of assumptions in the methodology utilized by Mr. Slaughter. Even when faced with direct evidence of his miscalculations Mr. Slaughter refused to admit the obvious.

The City of Horn Lake makes the following statement in its brief:

> **Mike Slaughter and Chris Watson were the only two witnesses accepted by the court below as experts in municipal finance and both testified that Horn Lake had the financial ability to follow through with its promises associated with the proposed annexation. For the Chancellor to find otherwise was manifest error.**

(Horn Lake's Brief of Appellant, 24) (emphasis in original). Walls takes exception to this. First, the town of Walls did not offer Mr. Watson as an expert in municipal finance. He was offered only as an expert in the field of urban and regional planning. (T-292) Second, the rule in Mississippi is permissive with regard to acceptance of a witness as an expert. "Rule 702 sets a 'low threshold for competency' in favor of courts' 'preference for leaving matters of credibility to the judgment of the jury . . . .'" *McDonald v. Memorial Hosp. at Gulfport*, 8 So. 3d 175, 183 (Miss. 2009) (quoting *State v. Calliham,* 2002 UT 86, ¶ 27, 55 P.3d 573, 583 (Utah 2002)). The analysis of Horn Lake's argument must be taken further for proper application. The mere fact that an expert testifies does not bind a Court to credit such testimony. This Court recently said:

> "Once a witness is qualified as an expert to render expert testimony, then it is within the province of the trier of fact to give weight and credibility to the testimony." *Palmer v. Anderson Infirmary Benevolent Ass'n,* 656 So. 2d 790, 796 (Miss. 1995). This Court has held that expert opinions are only advisory in nature and are not binding on a trier of fact. *Flight Line, Inc. v. Tanksley,* 608 So. 2d 1149, 1166 (Miss. 1992). "The jury may credit them or not as they appear entitled, weighing and judging the expert's opinion in the context of all of the evidence in the case and 'the jury's own general knowledge of affairs....' " *Id.* (quoting *Schoppe v. Applied Chems. Div.*, 418 So. 2d 833, 837 (Miss. 1982)).

Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 460 (Miss. 2010). In this case, the Chancellor's opinion dealt specifically with the credibility of Mr. Slaughter. The Court found:

> The testimony of Horn Lake's expert in municipal finance was **fully impeached and discredited on cross examination by counsel opposite and in rebuttal testimony by the expert designated by Walls,** leaving the Court great concerns about the City's projections and ability to provide the necessary services called for under their facilities and services plan which was obviously adopted in haste by the City and perhaps with little time for reflection on its numbers considering the eleventh hour in which it was adopted.

(R. 605) (emphasis added). It should be kept firmly in mind that Horn Lake has the burden of proof on the issue of reasonableness was borne by the City of Horn Lake. *In the Matter of the Extension of the Boundaries of the City of Columbus*, 644 So. 2d 1168, 1172 (Miss. 1994). Additionally, the City of Horn Lake's assertion with regard to the testimony of Mr. Watson is not complete. From reading Horn Lake's assertion it would appear that Mr. Watson unconditionally opinioned that Horn Lake has the financial ability to keep its commitments. In fact Watson testified:

> Q. Sir, you mentioned that you believe Horn Lake has the financial ability to provide services in making improvements?
>
> A. Yes, sir.
>
> Q. Can they do it in accordance with the plan that's in evidence in this case without having impact on their existing citizens?
>
> A. No, sir, I don't believe they can.
>
> Q. And what will that impact on their existing citizens be?
>
> A. In order for this plan to come true, there's going to have to be a tax increase.
>
> Q. And their financial ability is based in your opinion on their ability to increase taxes on all their citizens, is it not?
>
> A. That is precisely what I said, yes, sir.

(T. 1371-72.) Given the fact that Horn Lake adopted a new financial analysis just before trial and that the Court lost an afternoon to allow Horn Lake to produce its methodology, it is not at all unreasonable for the Court to conclude:

> The testimony of Horn Lake's expert in municipal finance was fully impeached and discredited on cross examination by counsel opposite and in rebuttal testimony by the expert designated by Walls, **leaving the Court great concerns about the City's projections and ability to provide the necessary services called for under their facilities and services plan which was obviously adopted in haste by the City** and perhaps with little time for reflection on its numbers considering the eleventh hour in which it was adopted.

(R. 605) (emphasis added). In addition to the opinion testimony, the Court made reference to a number of documents which were prepared in the normal course of doing business rather than in preparation for an annexation proceeding. He noted the following:

- Memos from the Mayor of Horn Lake in July, 2006, implemented both a hiring freeze as well as a freeze on all existing salaries. (R. 605-06.) (See Exhibit HL-112.)
- The letter to the Mississippi Office of Homeland Security dated December 5, 2007 which stated: **"The influx in growth *due to the recent annexation* ... has continued to strain our budget just keeping up with the daily requirements."** (R. 606) (emphasis in original). (See Exhibit HL-114.)
- The December 19, 2006, grant application the City used to seek funding for its police department **"Over the last years, our city has been struggling to continue to provide and meet daily demands. In fact, for the third time in recent months, our new mayor and board of aldermen have had to take out a loan to meet state requirements and to make payroll demands due to a development company defaulting on their taxes for the third year in a row. These taxes are over $600,000**

and have put the city in a financial bind having to pay the bond from city funds which has depleted much of our city's necessary operational funding revenue." (R. 606) (emphasis in original). (See Exhibit HL-113.)

In this case, the City of Horn Lake failed to meet its burden of proof on this indicia. Walls agrees that with the same type huge tax Horn Lake imposed as a result of the last annexation most any city could meet this requirement. What is missing here is the financial impact of the proposed on those affected. Obviously this includes the residents not only of the proposed annexation area but of the existing city. Here the City of Horn Lake failed to offer credible evidence sufficient to allow the Chancellor to conclude that the annexation was fair. This issue is without merit.

5. Need for Zoning and Planning.

As an initial matter, the Town of Walls has already addressed this issue as a sub-factor to the first indicium, Need to Expand. See discussion herein, above. Walls now re-incorporates this portion of their brief into this indicium's discussion by reference. On this issue, the Chancellor stated that:

> The proposed area of annexation which Horn Lake seeks is currently covered by the comprehensive plan of DeSoto County, Mississippi. Unlike a number of its sister counties, DeSoto County has been involved in planning and zoning within its county boundaries since 1958. Its comprehensive plan is backed up by a fully staffed planning department, planning commission, building inspectors, code enforcement officers and geographical identification services. Further, the characteristic of the proposed area of annexation does not call for highly sophisticated planning because of its general agricultural makeup. Accordingly, the Court finds this indicia weighs against annexation.

(R. 607.) While not disputing these factual findings of the Chancellor regarding the county's planning and zoning abilities, Horn Lake argued in its brief that this indicium should nonetheless be neutral.

This Court has already considered the planning services provided by the exact same planning department at issue in this case – that of DeSoto County – in the case concerning Horn Lake's neighboring City of Southaven. This Court stated there:

> The chancellor found that this indicium did not favor the annexation of the Northeast parcel because it "is a platted area and also has restrictive or protective covenants which lessens the need for zoning and planning by the City of Southaven."
>
> In this case, the record clearly demonstrates that DeSoto County has "an excellent zoning ordinance and well organized county planning department." Chris Watson also testified that DeSoto County has had a comprehensive plan since 1958. Therefore, this Court finds that the chancellor's findings for this indicium were supported by substantial credible evidence and were reasonable. Thus, this factor does not favor annexation. This factor alone, however, does not determine whether or not the annexation is reasonable. *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi,* 744 So. 2d 270, 276 (Miss. 1999) (twelve factors "are only indicia of reasonableness, not separate and distinct tests in and of themselves.")
>
> It should be kept in mind that the analysis of the factor "need for zoning" relates to need for expansion should be analyzed differently than the indicia "need for zoning and planning. In assessing need for zoning in the context of need to expand, a situation with no zoning is usually present. See *In re Extension of Boundaries of City of Winona*, 879 So. 2d 966, 976 (Miss. 2004).

In re Enlargement and Extension of Boundaries of City of Southaven, 5 So. 3d 375, 380 (Miss. 2009). The analysis of the indicium "need for zoning and planning" here is no different from that of the "need for zoning" factor in the "need for expansion" indicium. The Chancellor's findings concerning this issue are supported by substantial credible evidence, including that presented by Horn Lake, and were reasonable.

Horn Lake is merely engaging in a debate of semantics, attempting to argue that if a factor or indicium does not favor annexation, then it must not weigh against annexation. However, the evidence before the Chancellor proved that this factor does weigh against the annexation of the PAA by Horn Lake. In fact, Horn Lake's own evidence shows that DeSoto County has more than adequate planning services already in place in the PAA. Horn Lake's

expert planner Michael Slaughter testified: "I would like to say I work all over the state, and I think I mentioned yesterday that not all -- very few counties, as a matter of fact, in the State of Mississippi really provide the level of planning services that DeSoto County does." (T. 977.) Additionally, Amada Raniey, Horn Lake's planning director, testified she had no criticism of the ability of the DeSoto County Planning office. (T. 808-809.)

Precisely the same facts exist in this case as in the *Southaven* case; the planning services provided by DeSoto County are excellent. The record supports the finding of the Chancellor. This issue is without merit, and this Court should affirm the Chancellor's ruling.

*6. **Need for Municipal Services.***

In addressing the indicia the Chancellor found:

> With respect to this indicia, the Supreme Court has indicated that sub-factors to be considered in determining whether the need for municipal services is reasonable may include: (a) Request for water and sewage services; (b) Plan of the city to provide first response fire protection; (c) Adequacy of existing fire protection; (d) Plan of the city to provide police protection; (e) Plan of the city to provide increased solid waste collection; (f) Use of septic tanks in the proposed annexation area; (g) Population density. ***The City of Winona***, 879 So. 2d 984. The Supreme Court of Mississippi has determined that sparsely populated areas have less need for immediate municipal services than densely populated areas. ***In Re: Enlargement and Extension of the Boundaries of the City of Macon***, 854. So. 2d 1029 (Miss 2003). With respect to this indicia, the Court notes that there are no requests for water and sewage services, the same being provided by the Walls Sewer District, the Walls Water Association, Inc., and the City of Horn Lake. The entire area north of the Town of Walls proposed to be annexed by Walls and Horn Lake is currently being sewered by the Walls Sewer District. The subdivision development in the northeast quadrant of the proposed area of annexation of Horn Lake is currently being sewered by the City of Horn Lake. Apparently, the City of Horn Lake finds no immediate need for central sewer in this area as it only proposes five sewer projects in its proposed services plan for the area which again would only serve some 72 homes. Further, although Horn Lake seeks to provide first response fire protection for the area which it seeks, it should be noted that the obligation, and indeed the right to furnish that fire protection service lies solely with the Walls Fire Protection District established by the DeSoto County Board of Supervisors in 1986. That fire protection district created pursuant to Mississippi statute clearly has this right as set forth in Section

19-5-175 of the Mississippi Code Annotated (1972 as amended). That statute reads, in part, as follows:

> **"As long as any such district continues to furnish any of the services which it was authorized to furnish in and by the resolution by which it was created, it shall be sole public corporation empowered to furnish such services within such district."**

Horn Lake is quick to note that the fire rating for the municipality pursuant to the Mississippi Rating Bureau is a Class 6 as opposed to a Class 8 designated for the proposed area of annexation. In connection therewith, the Court would note that the last rating for the Horn Lake Fire Department from the Mississippi Rating Bureau was in November of 2007. Shortly thereafter by letter of December, 2007, the rating bureau continued, may well reduce its rating to a Class 7. Larry Carr with the Mississippi ratings bureau testified that Horn Lake's fire services were closer to a Class 7 rating than they were to a Class 5 rating, therefore being on the downside of a Class 6 rating. According to Carr, these increases in deficiency points may well have been as a result of the previous acquisition of land by the City of Horn Lake in its 2002 annexation. No evidence of attempts to stem this downward slide of classification was produced by Horn Lake.

The municipality plans to immediately provide police protection to the proposed area of annexation should it be granted. Considering their police force and its number of sworn officers, patrol units, detectives, and equipment, and further understanding that the municipality would be patrolled by radar units for which it is now ineligible, it could hardly be argued that enhanced police protection by the city is not superior to that currently provided by the county. Likewise, the city plans to immediately provide collection services for solid waste. However, the Court notes that the county presently serves that area by contract with an independent provider for once a week collection. The city would only continue to provide once a week service, no more so than the area is currently receiving. Finally, with regard to the issue of population density, the Court again notes that except for some major developments in the northeast quadrant of the proposed area of annexation for Horn Lake, the proposed area of annexation largely consists of single family residences on large lots and agricultural areas. As sparsely populated areas have less need for immediate municipal services than densely populated areas, this sub-factor is not conducive to reasonableness. Accordingly, considering all of generally the area is not in need of municipal level services which can be provided by Horn Lake, and accordingly, this factor weighs against annexation.

(R. 607-10.)

It is interesting to note that the City of Horn Lake does not contend that any of the factual

findings of the Chancellor on this point are not supported by substantial credible evidence. They simply disagree with his conclusions: ". . . the Chancellor was in error in holding this factor to weigh against annexation." (Brief of Appellant, 29.) Under these circumstances it is important to revisit the standard of review:

> This Court set out the limited standard of review for annexation matters in *In re Extension of Boundaries of City of Hattiesburg,* 840 So. 2d 69 (Miss. 2003). "The Court can only reverse the chancery court's findings as to the reasonableness of an annexation if the chancellor's decision is manifestly wrong and is not supported by substantial and credible evidence." *Id.* at 81 (citing *In re Enlargement and Extension of Mun. Boundaries of City of Madison v. City of Madison,* 650 So. 2d 490, 494 (Miss. 1995)). Moreover, in *City of Hattiesburg,* this Court said:
>
> > We also stated "where there is conflicting, credible evidence, we defer to the findings below." *Bassett v. Town of Taylorsville,* 542 So. 2d 918, 921 (Miss. 1989). "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." *Id.* at 921. "We 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.*

In re Enlarging, Extending and Defining Corporate Limits and Boundaries of City of Meridian, 992 So. 2d 1113, 1116 (Miss. 2008) (quoting *Hattiesburg*, 840 So. 2d at 81).

With regard to this indicium, the City of Horn Lake would have the Court reverse while not contesting the factual findings of the Chancellor. Only if Horn Lake convinces this Court "with with a firm and definite conviction that a mistake has been made," should this Court reverse. Walls respectfully submits that the findings of the Chancellor are fully supported by evidence. He weighed this factor, both pro and con, and determined that Horn Lake had not met the burden. In this case the residents already have a high standard of services. This issue is without merit.

7. ***Natural Barriers.***

The Chancellor's entire finding with respect to this issue consists of the following two sentences:

> There is no evidence to indicate that there are any natural barriers between the municipality and the proposed area of annexation which would prohibit the City of Horn Lake from providing the full range of municipal services and facilities to all areas sought to be annexed. Accordingly, the Court finds that this indicia favors annexation.

(R. 610.) Horn Lake also noted in its brief that: "The parties stipulated, and the Chancellor found with respect to this indicium, that there was no evidence to indicate that there were any natural barriers between [Horn Lake] and the proposed annexation area . . . ." (Brief of Appellant, 34.) Thus, as Horn Lake correctly pointed out, no type of natural barrier exists that would prohibit Horn Lake from "providing the full range of municipal services and facilities to all areas sought to be annexed." Because this indicium weighs in favor of annexation, and was stipulated to at trial, this issue is not actually before this Court at this time. Thus, this issue is without merit, and this Court should affirm the Chancellor's ruling.

*8. **Past performance.***

Interestingly, on this indicium, Horn Lake does not complain that the Chancellor failed to point to any particular evidence or testimony in reaching his finding. Instead, Horn Lake is apparently not pleased with the fact that the Chancellor considered all the evidence before the court, both favorable and unfavorable for Horn Lake, and decided accordingly. Further, the Chancellor finding does not specifically weigh against annexation, but it clearly does not weigh in favor of annexation. The Chancellor conclusion was as follows: "Considering all of the aforesaid in the totality of the circumstances, the Court cannot say with any degree of certainty that Horn Lake's past record of performance in providing services for its citizens encourages or

favors annexation." (R. 612.) The Chancellor conducted his analysis in a fair and equitable manner, considering evidence both favorable and unfavorable with regard to Horn Lake's past performance. An analysis of this nature is not manifest error as Horn Lake claims.

The Chancellor enjoys fairly broad discretion when conducting the narrow review of determining the reasonableness of an annexation. It is well settled:

> [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. "The judicial function is limited to the question of whether the annexation is reasonable."

Poole v. City of Pearl, 908 So. 2d 728, 732 (Miss. 2005) (quoting *Winona*, 879 at 971.) 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 the case at bar, the Chancellor clearly weighed the conflicting testimony and evidence. The Supreme Court has never adopted any particular standard by which past performance must be measured and therefore the Chancellor is granted broad discretion. For the Chancellor to conclude that Horn Lake's record of past performance does not favor annexation is not error. Rather, it is an indication that Horn Lake failed to meet its burden of proof with regard to this factor. The burden of proof lies with the petitioner[3].

[3] Section 21-1-33 of the Mississippi Code requires: "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

9. Economic or Other Impact on Residents and Property Owners:

The Chancellor found on this indicium the following:

> Though the residents of the proposed area of annexation will, if annexed, be required to pay city taxes, that issue alone is insufficient to defeat annexation. *The City of Winona,* 879 So. 2d 988. In deciding this factor, the Court must balance the equities between the city's need to expand and any benefits which may come to the residents from that annexation taking into consideration any adverse impact, whether economic or otherwise which will be experienced by residents of the same. *The Matter of the Boundaries of the City of Jackson,* 551 So. 2d 861 (Miss. 1989).
>
> In return for their tax money, the area will immediately, at least for the next two years, be classified with a Class 6 rating for fire insurance premium purposes as opposed to its current Class 8. They will immediately receive enhanced police protection. However, with the exception of a small minority of the homes in the area, they will not receive central sewer services beyond that already available. Nor will they receive water, or increased garbage collection. Their planning and zoning will remain largely unaffected as well. Street lighting is proposed by the city, but only in the more densely developed areas which, to a certain extent, are already provided lighting by maintenance associations in the subdivision. In weighing the equities between the impact of increased taxation on the residents of the proposed area of annexation and the services which they would receive, again, this Court is unconvinced that the annexation would be reasonable.

(R. 612-13.) It is clear Horn Lake did not meet its burden of proof on this indicium, and as previously established, that burden clearly was on the shoulders of Horn Lake. The Chancellor relied upon the well established methodology in weighing this indicium:

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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**." (emphasis added).

> In deciding this factor, the Court must balance the equities between the city's need to expand and any benefits which may come to the residents from that annexation taking into consideration any adverse impact, whether economic or otherwise which will be experienced by residents of the same. *The Matter of the Boundaries of the City of Jackson,* 551 So. 2d 861 (Miss. 1989).

(R. 612.) It is particularly important to note that the Chancellor appropriately balanced the interests of all parties in reaching its conclusions. In analyzing previous indicium, the Chancellor found that Horn Lake did not a need to expand at this time, and other of the 12 indicia did not support annexation. When the evidence culminates into a municipality having no need to annex, it is only logical then to conclude that the imposition of municipal taxes in return for the delivery of limited and unnecessary services does not support annexation. To couple the impact of one or more indicia with others is exactly the type of analysis necessary to arrive at a conclusion concerning the **totality of the circumstances**. The Chancellor committed no error.

In consideration of this factor, the Chancellor in fact was without sufficient information to fully determine the economic impact upon those being annexed. Although Horn Lake prepared a detailed financial plan to demonstrate the implementation of the annexation ordinance and offered extensive testimony from its municipal finance expert, Michael Slaughter, the Chancellor found:

> The testimony of Horn Lake's expert in municipal finance was fully impeached and discredited on cross examination by counsel opposite and in rebuttal testimony by the expert designated by Walls, **leaving the Court great concerns about the City's projections and ability to provide the necessary services** called for under their facilities and services plan which was obviously adopted in haste by the City and perhaps with little time for reflection on its numbers considering the eleventh hour in which it was adopted.

(R. 605) (emphasis added). What the Chancellor did have to rely on was the testimony offered by the expert for the Town of Walls:

Q. Sir, you mentioned that you believe Horn Lake has the financial ability to provide services in making improvements?

A. Yes, sir.

Q. Can they do it in accordance with the plan that's in evidence in this case without having impact on their existing citizens?

A. No, sir, I don't believe they can.

Q. And what will that impact on their existing citizens be?

A. **In order for this plan to come true, there's going to have to be a tax increase.**

Q. And their financial ability is based in your opinion on their ability to increase taxes on all their citizens, is it not?

A. That is precisely what I said, yes, sir.

(T. 1371-72) (emphasis added). Further, the Chancellor had before him the fact that Horn Lake was experiencing financial hardships caused by the previous annexation (see Exhibit HL-114) and that a substantial tax increase had occurred since the prior annexation, in the amount of 17.75 mills. (T. 111-13.) Horn Lake offered no reliable information upon which the Court could determine the magnitude of the financial impact to those being annexed. As such, Horn Lake simply failed to meet its burden of proof.

Horn Lake contends the Chancellor again citied no evidence in support of his finding. However, the Chancellor's opinion clearly contains facts and conclusions that could only be derived from the record. The fact that the proposed annexation area, if annexed, would inherit Horn Lake's class 6 fire rating is derived from the testimony of Larry Carr, identifying the improvements necessary for the area to receive a class 6 fire rating. (T. 143.) Further, the record is clear that Horn Lake only has plans to provide sewer to some 72 homes, thus the "small minority of homes" the Chancellor referenced as being the only beneficiaries of central sewer

service. (T. 703-04.) Exhibit HL-022 clearly indicates the residents of the proposed annexation area will receive no more frequent garbage collection than already exists within the county. Horn Lake is once again wrong in its position is that the Chancellor did not rely on substantial credible evidence in support of his finding. This issue is without merit.

10. Impact of the Annexation upon the Voting Strength of Protected Minority Groups.

The Chancellor found the following: 1) the racial makeup of the City of Horn Lake is 83 percent white, 12.3 percent black, and 4.7 percent of other nationalities; 2) the racial makeup of the proposed annexation area is 86.1 white, 9.1 percent black, and 4.8 percent of other nationalities; and 3) the racial makeup of these two areas combined would be 83.6 percent white, 11.7 percent black, and 4.7 percent other nationalities. (R. 613.) The Chancellor then stated in the trial court's opinion: "Accordingly, it cannot be said that the impact on protected minority voting strength would be seriously damaged. This factor favors annexation by Horn Lake." (R. 613.)

Though this indicium favors Horn Lake, and is therefore actually not at issue before this Court, the Town of Walls should point out to this Court that these numbers in this factual finding of the Chancellor are the exact same numbers presented by Horn Lake at trial in its exhibits admitted as Exhibits H.L. 26, 69, and 70. (T. 1004-06.) Additionally, these are the same numbers offered by Horn Lake in its brief to this Court. (Brief of Appellant, 39-40.) Thus, Horn Lake's repeated argument that the "evidence, including both trial exhibits and witness testimony elicited on behalf of the City of Horn Lake's annexation, was utterly disregarded by the trial court" is disingenuous. (Brief of Horn Lake, 5.)

In truth, the Brief of the Appellants does not actually challenge this finding. The trial court clearly took into consideration the evidence and testimony presented by Horn Lake on this

issue when making its findings. Further, the facts concerning this indicium were stipulated and not in dispute. This issue is without merit, and this Court should affirm the Chancellor's ruling.

11. Fair Share of Taxes:

The Chancellor found on this indicium the following:

> The City of Horn Lake placed into evidence statistics which reflected nonresident participating in the city's recreational leagues. That evidences reveals that 33.2% of participation in football was by nonresidents, 44.4% of participation in organized baseball was by nonresidents, and 13.1 %of participation in basketball was by nonresidents. However, the municipality was not able to identify if any of these, or the extent of which these, were residents of the proposed area of annexation. The city argues that because of the transportation corridors from the proposed area of annexation to the city, members of that area routinely travel the streets of Horn Lake, shop at the stores located within the municipality, eat at its restaurants, and generally enjoy the benefits of living in proximity to the city. While it could hardly be argued that the residents of the proposed area of annexation travel the streets of Horn Lake, any shopping done in its stores or eating in its restaurants are not only at a cost to the nonresidents, but they likewise pay sales taxes imposed for those items which are a benefit to the municipality. Further, although it is certainly true that sewer services are provided to members of the proposed area, likewise a monthly service is paid by those residents for that service. Accordingly, again evaluating this indicia under the totality of the circumstances, it cannot reasonably be argued that the "fair share" of taxes and expenses are not paid by residents of the proposed area for any benefits which they received and which have been proven.

(R. 613-14.) Again, the Chancellor makes it clear that Horn Lake did not meet its burden of proof on this indicium and, as previously established, that burden was clearly on the shoulders of Horn Lake.

The City of Horn Lake points to its mutual aid fire calls as being supportive of the fair share indicium. However, the fact that the calls are mutual aid alone indicates that Horn Lake does, or will receive something of value in return for its fire calls, and that is the mutually beneficial working relationship that exists between many fire departments in this state. Horn

Lake responds to mutual aid calls because they agreed to respond. Likewise, Horn Lake benefits from mutual aid calls when the Walls Fire District is called to assist Horn Lake. This in fact has been the case as reference by the testimony of Mike Hancock:

> Q. You mentioned a mutual aid agreement. We don't have a map like that, but can you tell us whether that same type of responses have occurred by Walls into the City of Horn Lake?
>
> A. I had one in October.
>
> Q. In October?
>
> A. Yes, sir, where we responded in on trench rescue with them.

(T. 183.) Horn Lake, in support of its position, also points to very generalized evidence to indicate the extent to which those outside the city utilize city facilities. Specifically, the Chancellor noted the proportions of participants in various sporting events that come from beyond the city's limits. The flaw, however, is that the evidence is not specifically crafted to represent the extent to which residents of the proposed annexation area participate in city sporting activities. Based on the evidence presented by Horn Lake, those participants from outside the city could have come from Southaven, Memphis, Olive Branch, Hernando, Coldwater, Tunica, or any other place. Horn Lake simply did not give the Chancellor any reliable data upon which to base an opinion.

While there may be individuals and instances where residents of the proposed annexation area receive a benefit from Horn Lake without paying their fair share of taxes, Horn Lake simply failed to undertake the necessary investigation to identify those individuals or instances. Because the city did not meet its burden of proof, the Chancellor's findings cannot be in error. This issue is without merit.

12. Other Factors that May Suggest Reasonableness.

With regard to the indicium "Other factors," the Chancellor found:

> This Court must consider and address the impact which an annexation by the City of Horn Lake in this area would have on residents of the Walls Fire Protection District. Exhibit W-023 admitted into evidence reflects that the Walls Fire Protection District encompasses in excess of 40 square miles of land which totally includes the Town of the City of Horn Lake. A 1 mill tax is imposed by the county for the benefit of the fire protection district on all residents' homes in that fire protection district. In addition thereto, the district survives on donations from those residents in that area. In 2002 when the City of Horn Lake last annexed, it took in six square miles of the fire protection district, some of the more populated portions of the district. This resulted in the residences of that area within the now existing City of Horn Lake paying an additional 1 mill tax for fire protection over and above any other residents of that city. That notwithstanding, the residents of that area of Horn Lake who reside within the Walls Fire Protection District have been shown to be unwilling to further contribute to the fire protection's operation, acquisition of equipment or training expenses. This results in an inequity not only to the fire protection district, but also to those "captured" residents within the City of Horn Lake who now pay 42 mils in taxes to Horn Lake and still must pay the additional mil in taxes to the fire protection district. Horn Lake now seeks to take in an additional nine square miles of the most heavily populated area of the Walls Fire Protection District, some 60% of its remaining residents. Not only would annexation by Horn Lake double tax the citizens of that fire protection district as was done in 2002 whereby they are paying additional monies without receiving additional services, it will have a chilling effect on the district's efforts to secure funding by way of donations and dues collections. The consequence will be that the remaining members of the fire protection district who are not annexed by Horn Lake will be forced to survive on reduced funds and resources for continued protection in fire emergencies. The foregoing notwithstanding, to allow the further annexation into this fire protection district would be **the Mississippi Code (1972 as amended)**. Until this conflict between the Walls Fire Protection District and Horn Lake or any annexing municipality remains, this will reflect negatively on an annexation application in this area.

(R. 614-16.) Horn Lake asserts that this finding amounts to error because state law does not prohibit a municipality from annexing into a statutorily created fire protection district. Walls would point out that the Chancellor did not say that such an annexation was prohibited in this area. He merely said that under the circumstances, the lack of a resolution of issues presently

existing will reflect negatively on annexation attempts. He made this finding after hearing the evidence of the adverse impact following the 2002 annexation:

- Detailed testimony related to problems that occurred after Horn Lake's most recent annexation into the Walls Fire Protection District. (T. 162-73.)
- Double taxation to those residents in the city and fire district for fire protection (T. 164.)
- Horn Lake's refusal to follow through on the settlement they proposed prior to the last annexation. (T. 166.) This ultimately led to litigation. (T. 168.) See Exhibit W-16.
- The cutbacks the fire district had to impose as a result of the lost income. (T. 169.)
- Horn Lake's stated intent to continue to provide fire protection in the district regardless of the law. (T. 177.)
- The problems which have arisen related to command at fire calls. (T. 178.)

The evidence is undisputed that Horn Lake intends to provide first response fire protection in the proposed annexation area despite the authority granted to the fire district. (See Horn Lake's Brief of Appellant, 32.)

Though Walls does not agree that the Chancellor held that annexation into fire districts is prohibited, Walls must point the Court's attention to the fact that counsel for Horn Lake recently made a compelling argument in an ongoing Tupelo annexation related to this issue contrary to the argument Horn Lake makes now in case at bar. Counsel for Horn Lake in that case argued that such annexations are prohibited, and filed a memorandum of authorities on this point with the same conclusion. Walls attaches the memorandum of authorities hereto as Addendum "A" and adopts the reasoning of Horn Lake's counsel in that case. This issue is without merit.

IV. CONCLUSION

The Chancellor's findings with respect to all of the indicia are supported by substantial and credible evidence. Horn Lake's cries that the Chancellor ignored the evidence it presented are disingenuous; the trial court's opinion was well supported. The Chancellor did in fact rely on credible evidence in making its findings. Regarding other evidence, such as portions of the testimony by Horn Lake's expert Michael Slaughter, the Chancellor considered such evidence and rejected it as not credible and substantial. All issues raised by Horn Lake are without merit, and this matter should be affirmed in whole.

CERTIFICATE OF SERVICE

I, Jerry L. Mills, one of the attorneys for the Town of Walls, do hereby certify that I have this day served a true and correct copy of the above and foregoing document by U. S. Mail, postage pre-paid to the following:

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Dated this the 18th day of June, 2010.

Jerry L. Mills

ADDENDUM

Memorandum of Authorities in related
Tupelo Annexation filed by counsel for Horn Lake

IN THE CHANCERY COURT OF LEE COUNTY, MISSISSIPPI

IN THE MATTER OF THE EXTENSION OF THE BOUNDARIES OF THE CITY OF TUPELO, MISSISSIPPI

CAUSE NO. 08-1446-41

LEE COUNTY, MISSISSIPPI'S MEMORANDUM OF AUTHORITIES

A critical issue before this Court on the application of the City of Tupelo to annex certain unincorporated areas of Lee County, Mississippi is the matter of the provision of fire protection services to the proposed annexation areas. Specifically, this Court must consider the issue of whether the City of Tupelo or the existing Lee County Fire Protection Districts will have the legal authority to provide fire protection services to the areas encompassed within the fire protection districts in the event those areas are annexed into the City of Tupelo.

The issue of the legal authority to render fire protection services within the proposed annexation areas has been at the forefront of this annexation battle since the inception of Tupelo's annexation efforts. After recent trial testimony by Ty Windham, Superintendent of the Public Protection Department of the Mississippi State Rating Bureau, and Thomas Walker, Chief of the City of Tupelo Fire Department, this Court requested the parties to submit legal briefs and authorities construing this critical legal issue. In accordance with the Court's instructions, Lee County, Mississippi respectfully submits the following Memorandum of Authorities:

Introduction

The Mississippi Legislature has codified the procedure for the establishment of fire protection districts in areas situated within any county of Mississippi which is not situated within the corporate boundaries of an existing municipality. Specifically, *Mississippi Code Annotated*

Sections 19-5-151, *et. seq.* provide the legal authority for the establishment of such fire protection districts, and set forth the express legal rights and obligations of the districts.

The issue of the legal authority to render fire protection services within the defined boundaries of fire protection districts created pursuant to *Mississippi Code Annotated* § 19-5-151, *et seq.*, is squarely before this Court for one reason: The City of Tupelo is seeking to annex territories that are situated within fire protection districts established by the Lee County Board of Supervisors pursuant to the above-referenced statutory provisions, but the City of Tupelo's "plan" before this Court for the provision of fire protection services to the proposed annexation areas is in direct conflict with the clear, undisputed legal rights and authority of the impacted Lee County Fire Protection Districts.

The Lee County Board of Supervisors has provided for fire protection services throughout all unincorporated portions of Lee County by the establishment of fire protection districts pursuant to *Mississippi Code Annotated* § 19-5-151. (See Fire Districts Map (Lee County Trial Exhibit 44) attached hereto as Exhibit "A"). Every square inch of the territory sought to be annexed by the City of Tupelo is situated within the defined boundaries of a statutorily created fire protection district. As depicted on the attached map of the Lee County Fire Protection Districts, seven (7) Lee County Fire Protection Districts are impacted by the City of Tupelo's proposed annexation in this matter, namely:

(1) Belden Fire Protection District;
(2) Birmingham Ridge Fire Protection District;
(3) Unity Fire Protection District;
(4) Mooreville-Eggville Fire Protection District;
(5) Greater Plantersville Fire Protection District;
(6) Greater Verona Fire Protection District; and
(7) Palmetto-Old Union Fire Protection District.

The three (3) fire protection districts with the largest geographical areas proposed to be annexed, the Belden, Unity, and the Palmetto-Old Union Fire Protection Districts, have each filed separate answers and objections to the City of Tupelo's proposed annexation.

Issue

If the City of Tupelo annexes portions of these seven (7) Lee County Fire Protection Districts, which entity will have the sole and/or primary authority to render fire protection services within the areas encompassed within the respective Lee County Fire Protection Districts?

Legal Authorities

1. Based upon the following legal authorities, it is clear that the Lee County Fire Protection Districts will continue to have the sole authority to provide fire protection services to all areas within their defined boundaries, even if those areas are annexed into the City of Tupelo.

2. The Mississippi Legislature authorized the creation of fire protection districts pursuant to *Mississippi Code Annotated* § 19-5-151, *et seq.*[1] Specifically, *Mississippi Code Annotated* § 19-5-151 sets forth, in pertinent part, that:

> Any contiguous area situated within any county of the state, and not being situated within the corporate boundaries of any existing municipality, and having no adequate water system, sewer system, garbage and waste collection and disposal system, or fire protection facilities serving such area, may become incorporated as a water district, as a sewer district, as a garbage and waste collection and disposal district, as a fire protection district, as a combined water and sewer district, as a combined water and garbage and waste collection and disposal district, as a combined water and fire protection district, or as a combined water, sewer, garbage and waste collection and disposal and fire protection district, in the manner set forth in the following sections.

3. Pursuant to the express authority set forth in *Miss. Code Annotated* § 19-5-151, *et seq.*, the Lee County Board of Supervisors created multiple fire protection districts throughout the

[1] *Miss. Code Ann.* § 19-5-151, *et seq.*, also provides the statutory authority for the creation of water, sewer, and garbage and waste collection districts.

County. For example, the Belden Fire Protection District, Palmetto-Old Union Fire Protection District, and the Unity Fire Protection District, each impacted by Tupelo's proposed annexation, were created by the Lee County Board of Supervisors by resolutions dated October 15, 1987, February 4, 1991, and December 2, 1996, respectively (Resolutions of the Lee County Board of Supervisors creating these fire protection districts have been admitted into evidence as Exhibits FD-002, FD-003, and FD-004). From and after their date of creation, each of the fire protection districts created by the Lee County Board of Supervisors have continued to provide fire protection services to the residents and property owners within their defined boundaries.

4. As depicted on Exhibit A, all of the territory sought to be annexed by Tupelo in this matter is situated within the boundaries of existing statutorily created fire protection districts. The rights and obligations with respect to the provision of fire protection services within the defined boundaries of the seven (7) fire protection districts impacted by the City of Tupelo's proposed annexation are set forth in *Mississippi Code Annotated* § 19-5-151, *et seq*.

5. *Mississippi Code Annotated* § 19-5-165 provides, in part, that:

> Beginning on the date of the adoption of the resolution creating any district, the district shall be a public corporation in perpetuity under its corporate name and shall, in that name, be a body politic and corporate with power of perpetual succession.

6. Further, *Mississippi Code Annotated* § 19-5-175 describes the general powers conferred upon statutorily created fire protection districts. Specifically, *Miss. Code Annotated* § 19-5-175 provides:

> Districts created under the provisions of Sections 19-5-151 through 19-5-207 shall have the powers enumerated in the resolution of the board of supervisors creating such districts but shall be limited to the conducting and operating of a water supply system, a sewer system, a garbage and waste collection and disposal system, a fire protection system, a combined water and fire protection system, a combined water and sewer system, a combined water and garbage and waste collection and disposal system, or a

> combined water, sewer, garbage and waste collection and disposal and fire protection system; and to carry out such purpose or purposes, such districts shall have the power and authority to acquire, construct, reconstruct, improve, better, extend, consolidate, maintain and operate such system or systems, and to contract with any municipality, person, firm or corporation for such services and for a supply and distribution of water, for collection, transportation, treatment and/or disposal of sewage and for services required incident to the operation and maintenance of such systems. **As long as any such district continues to furnish any of the services which it was authorized to furnish in and by the resolution by which it was created, it shall be the sole public corporation empowered to furnish such services within such district....**

7. *Mississippi Code Annotated* §§ 19-5-165 and 19-5-175 are clear and unambiguous: the seven (7) Lee County Fire Protection Districts impacted by this proposed annexation, all created by resolutions of the Lee County Board of Supervisors pursuant to *Miss. Code Annotated* § 19-5-151, *et seq.*, are public corporations in perpetuity and are each charged with the responsibility to provide fire protection services within their defined boundaries. **Moreover, pursuant to *Miss. Code Annotated* § 19-5-175, as long as the fire districts continue to furnish fire protection services within their defined boundaries, the districts are the "sole public corporations empowered to furnish such services within such district."** As recent Chancery Court rulings and Attorney General opinions have further established, the legal authority to be the sole provider of fire protection services within their defined boundaries is not impacted by the annexation of portions of the districts into a municipality.

8. Recently, in response to an inquiry from the Reservoir Fire Protection District, the Mississippi Attorney General's Office addressed the very issue which is before this Court with respect to the City of Tupelo's provision of fire protection in the areas it seeks to annex. Specifically, the Attorney General's Office addressed the following question: If a municipality were to annex a portion of the Reservoir Fire Protection District, which was created pursuant to *Miss. Code Annotated* § 19-5-151, *et seq.*, what entity would have the sole and/or primary

authority to render fire protection services within the area encompassed within the Reservoir Fire Protection District but annexed into the corporate limits of the municipality? In response, the Attorney General's office opined:

> In response, we refer you to a prior opinion of this office to Kenner Ellis, Jr., dated December 8, 1989, in which we stated that "(I)t is our opinion that the intent of these statues was to create the duty of the district to provide services within its district, and not to cease to provide the same unless there was some other source that could immediately provide the same services as the district". MS AG Op., Ellis (December 8, 1989). We have also opined that a municipality has the statutory duty pursuant to Section 21-25-3 to provide fire protection within its corporate limits, and that if there is no fire protection district serving the area, the municipality must provide fire protection for the area. MS AG Op., Davis (September 25, 1998). A fire district may "cede" its jurisdiction over areas annexed by a municipality when the municipality is able and willing to assume the service being ceded. **Unless the Reservoir Fire Protection District cedes the area within its boundaries which was annexed by a municipality to that municipality, the district continues to have the sole authority to provide fire protection services to that area**. MS AG Op., Ellis (December 8, 1989) and MS AG Op., Woods (May 25, 1994).[2] [emphasis added]

9. While the issue of the impact of a municipal annexation upon the authority to provide fire protection services has not been addressed by the Mississippi Supreme Court in any opinion of which Lee County is aware, it has been addressed in recent federal and state court litigation between the City of Horn Lake, Mississippi, and the Walls Fire Protection District with respect to the City of Horn Lake's recent annexation efforts.

10. In *Walls Fire Protection District v. City of Horn Lake*,[3] the Walls Fire Protection District sought damages against the City of Horn Lake resulting from Horn Lake's annexation of a portion of the Walls Fire Protection District's defined service area in 2000. Specifically, the Walls Fire Protection District, a statutorily created fire protection district, sought damages against the City of Horn Lake on grounds that Horn Lake's provision of fire protection services within

[2] 2000 WL 799973 (Miss. A.G. May 26, 2000)
[3] *Walls Fire Protection District v. City of Horn Lake*, 2008 WL 619305 (N.D. Miss.)

those portions of the District's territory annexed into the City was in violation of State law and was an unjust taking.

11. In granting the City of Horn Lake's Motion to Dismiss, the District Court stated that the claims of the Walls Fire Protection District were "inextricably intertwined with the Chancery Court of DeSoto County's September 18, 2000 Opinion approving the subject annexation," and that the Walls Fire Protection District had failed to either object to the City's proposed annexation at the trial court level or to take an appeal from the opinion of the DeSoto County Chancery Court approving the City's annexation.[4]

12. Subsequently, on May 14, 2008, the City of Horn Lake initiated another proceeding to annex additional unincorporated territory situated in the defined service area of the Walls Fire Protection District, to which the Walls Fire Protection District filed a formal objection.[5]

13. The DeSoto County Chancery Court, in addressing the legal rights with regards to the provision of fire protection services in Horn Lake's proposed annexation area, found:

> Further, although Horn Lake seeks to provide first response fire protection for the area which it seeks, **it should be noted that the obligation, and indeed the right to furnish that fire protection service lies solely with the Walls Fire Protection District** established by the DeSoto County Board of Supervisors in 1986. That fire protection district created pursuant to Mississippi statute clearly has this right as set forth in Section 19-5-175 of the Mississippi Code Annotated (1972 as amended).[6] [emphasis added]

14. The DeSoto County Chancery Court further found with respect to Horn Lake's proposal to annex into the Walls Fire Protection District, that:

> **The foregoing notwithstanding, to allow the further annexation into this fire protection district would be this Court's approval for the**

[4] *Walls Fire Protection District*, 2008 WL 619305 at 2.
[5] See Opinion of DeSoto County Chancery Court in *Horn Lake v. Town of Walls*, a copy of which is being included herewith.
[6] Opinion of DeSoto County Chancery Court in *Horn Lake v. Town of Walls* at Page 16.

continued violation by Horn Lake of Section 19-5-175 of the Mississippi Code (1972 as amended). Until this conflict between the Walls Fire Protection District and Horn Lake or any annexing municipality remains, this will reflect negatively on an annexation application in this area.[7]

15. The exact legal issue currently before this Court with respect to Tupelo's proposed annexation of territories situated in the seven (7) Lee County Fire Protection Districts identified above, was before another Mississippi Chancery Court just 14 months ago with regard to Horn Lake's proposed annexation of an area situated within the Walls Fire Protection District. In that case, based in large part on the unresolved issue of the City of Horn Lake's attempt to annex territory located within the legal boundaries of the Walls Fire Protection District, the DeSoto County Chancery Court denied the City of Horn Lake's proposed annexation in its entirety.

16. Mississippi law on this point is clear and undisputed: ***Mississippi Code Annotated* § 19-5-175 provides that statutorily created fire protection districts, as long as they continue to furnish the service for which they were created to provide, are the sole public corporations empowered to furnish fire protection services within their defined boundaries**. The seven (7) impacted Lee County Fire Protection Districts in this case have, since their creation, continued to provide adequate fire protection services to the residents and property owners within their defined boundaries. Consistent with the Mississippi Attorney General's opinion to the Reservoir Fire Protection District, the Lee County Fire Protection Districts will remain the sole public corporations empowered to furnish fire protection services within their defined boundaries, to the exclusion of the City of Tupelo if its annexation is approved.

17. Further, as the Chancery Court of DeSoto County found with respect to Horn Lake's proposal to provide fire protection in the portions of the Walls Fire Protection District which it sought to annex (and which was denied), while the City of Tupelo "intends" to provide

[7] Opinion of DeSoto County Chancery Court in *Horn Lake v. Town of Walls* at Pages 23-24.

first response fire protection in those areas which it seeks to annex, "**it should be noted that the obligation, and indeed the right to furnish that fire protection service lies solely with" the Lee County Fire Protection Districts**. These fire protection districts clearly have this right and legal authority to the exclusion of all other public corporations (including the City of Tupelo), as set forth in *Miss. Code Annotated* § 19-5-175.

18. Further, consistent with the recent holding of the DeSoto County Chancery Court, for this Court to allow the City of Tupelo's annexation into these Lee County Fire Protection Districts would amount to this Court's approval for violation by the City of Tupelo of Section 19-5-175 of the Mississippi Code.

RESPECTFULLY SUBMITTED, this the 3rd day of May, 2010.

BY: LEE COUNTY, MISSISSIPPI

BY: CARROLL WARREN & PARKER PLLC

BY: _____
J. CHADWICK MASK

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CERTIFICATE OF SERVICE

I, J. Chadwick Mask, counsel for Lee County, Mississippi, do hereby certify that I have this day emailed and mailed via United States First Class Mail, postage prepaid, or as otherwise indicated, a true and correct copy of the above and foregoing to the following:

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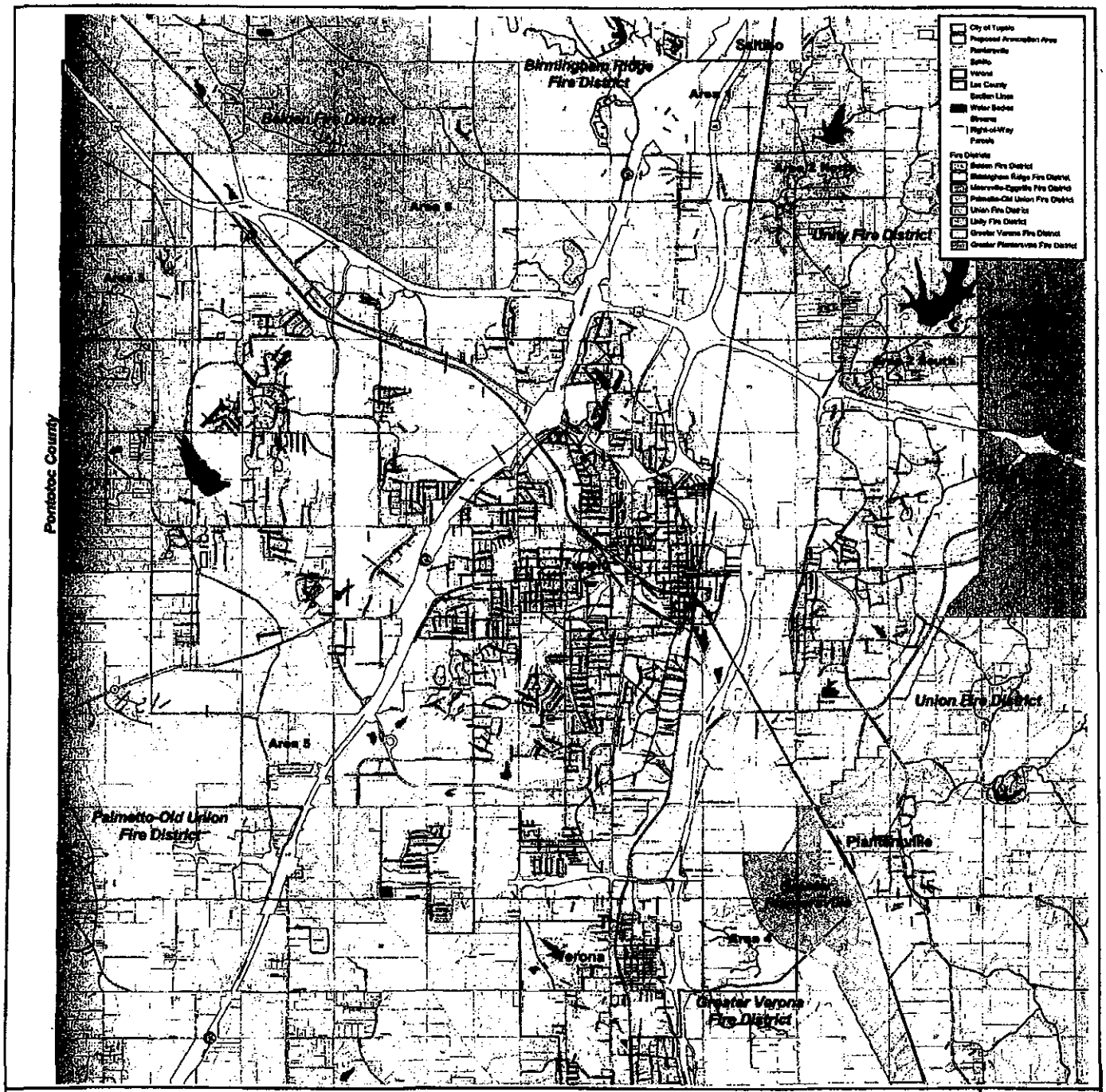
This the 3rd day of May 2010.

J. Chadwick Mask



BRIDGE & WATSON, INC.

Fire Districts
City of Tupelo, Mississippi

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Data Sources:
GIS Map produced by City of Tupelo, Lee County

February 25, 2010

EXHIBIT

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