**IN THE SUPREME COURT OF MISSISSIPPI**
**NO. 2011-TS-00016**

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

**LEE COUNTY, MISSISSIPPI, CITY OF SALTILLO, MISSISSIPPI, THE BELDEN FIRE PROTECTION DISTRICT, THE PALMETTO-OLD UNION FIRE PROTECTION DISTRICT, AND THE UNITY FIRE PROTECTION DISTRICT** **APPELLANTS**

**V.**

**CITY OF TUPELO, MISSISSIPPI** **APPELLEE**

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**Appeal from the Chancery Court of Lee County, Mississippi Cause No. 08-1446-41**

# BRIEF OF APPELLANT LEE COUNTY, MISSISSIPPI

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**Oral Argument Requested**

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**CITY OF TUPELO, MISSISSIPPI** **APPELLEE**

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## CERTIFICATE OF INTERESTED PERSONS

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The undersigned counsel of record for Lee County, Mississippi, hereby certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. The City of Tupelo, Mississippi, Appellee;
2. Lee County, Mississippi, Appellant;
3. The City of Saltillo, Mississippi, Appellant;
4. The Belden Fire Protection District, Appellant;
5. The Palmetto-Old Union Fire Protection District, Appellant;
6. The Unity Fire Protection District, Appellant;
7. The Town of Sherman, Mississippi, statutory defendant to the City of Tupelo's Annexation Petition;

8. The Town of Plantersville, Mississippi, statutory defendant to the City of Tupelo's Annexation Petition;

9. The City of Verona, Mississippi, statutory defendant to the City of Tupelo's Annexation Petition;

10. James L. Carroll, J. Chadwick Mask, Clifton M. Decker, and the law firm of Carroll Warren & Parker PLLC, Attorneys for Lee County, Mississippi;

11. Gary L. Carnathan and the law firm of Carnathan & McAuley, Attorney for Lee County, Mississippi, the Belden Fire Protection District, the Palmetto-Old Union Fire Protection District, and the Unity Fire Protection District;

12. Guy W. Mitchell, III, William Spencer, John Hill, Martha Bost Stegall, Margaret Sams Gratz, and the law firm of Mitchell McNutt and Sams, Attorneys for the City of Tupelo, Mississippi;

13. Jason D. Herring, Henderson M. Jones, and the law firm of Jason D. Herring, PA, Attorneys for the City of Saltillo, Mississippi;

14. Jason L. Shelton and the law firm of Shelton & Associates, PA, Attorney for the Town of Plantersville, Mississippi;

15. The individual objectors listed on Exhibit A to this Certificate of Interested Persons.

**SO CERTIFIED**, this the 22nd day of August, 2011.

J. Chadwick Mask,
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## II. STATEMENT OF THE CASE

### A. Statement of the Facts

Lee County, Mississippi, as well as the Belden Fire Protection District, the Palmetto-Old Union Fire Protection District, the Unity Fire Protection District, and the City of Saltillo, Mississippi, have appealed from the Final Judgment of the Lee County Chancery Court approving, as modified, an enlargement and extension of the municipal boundaries of the City of Tupelo, Mississippi.

The proceedings below were instituted by the City of Tupelo seeking the approval of the enlargement and extension of the municipal boundaries of the City of Tupelo to include seven

(7) proposed areas of annexation, identified as Area 1, Area 2 North, Area 2 South, Area 3, Area 4, Area 5, and Area 6. R. 011-037.[1] Lee County, Mississippi ("Lee County"), the City of Saltillo, Mississippi ("Saltillo"), the Town of Plantersville, Mississippi ("Plantersville"), the Belden Fire Protection District, the Palmetto-Old Union Fire Protection District, and the Unity Fire Protection District (collectively the "Fire Protection Districts") each filed Answers and Objections to the City of Tupelo's proposed annexation and fully participated in the proceedings below. R. 082-087, 100-104, 108-113, 211-220, 221-230, 231-240. In addition, a number of individual objectors made appearances in the matter below and voiced objections to the City of Tupelo's proposed annexation. R. 60-81

Following a trial that lasted a total of twenty-two (22) days from March 29, 2010 to June 7, 2010, the Lee County Chancery Court, Special Chancellor Edward C. Prisock presiding, approved, in their totality, each of the City of Tupelo's proposed areas of annexation with the exception of Area 5, which the Chancellor modified and approved. Thereafter, timely Notices of Appeal were filed by Lee County, the City of Saltillo, and the Fire Protection Districts R. 1363-64, 1376-79, 1381-84.

**B. Statement of the Law**

This Court has held that the "role of the judiciary in annexation is limited to one question: whether the annexation is reasonable," and further that "the only power vested in the court is in the determination of reasonableness or unreasonableness of an enlargement and whether it should be reduced." *In re the Enlargement and Extension of the Municipal Boundaries of the City of Madison*, 650 So. 2d 490, 494 (Miss. 1995); *City of Jackson v. Byram Incorporators*, 16 So. 3d 662, 683 (Miss. 2009).

[1] For purposes of this brief, citations to the record of the Lee County Chancery Court will be cited as "R.1, R.2," etc. Citations to the transcript of the trial of this matter will be cited as "Tr. 1, Tr. 2," etc. Citations to exhibits presented by the Unity, Belden, and Palmetto-Old Union Fire Protection Districts will be cited as "FD 1, FD 2," etc. Citations to exhibits presented by Lee County will be cited as "LC 1, LC 2," etc. Citations to exhibits presented by the City of Tupelo will be cited as "T 1, T 2," etc. Citations to exhibits presented by the City of Saltillo will be "S 1, S 2," etc.

To guide courts in making a determination of the reasonableness or unreasonableness of a proposed annexation, this Court has established twelve indicators or "*indicia*" of reasonableness. These twelve factors are not, however, separate, independent tests which are conclusive as to reasonableness. *Bassett v. Town of Taylorsville*, 542 So. 2d 918, 921 (Miss. 1989). Rather, these twelve factors are "mere *indicia* of reasonableness," with the ultimate determination being "whether the annexation is reasonable under the totality of the circumstances." *City of Madison,* 650 So. 2d at 494.

In *City of Clinton*, this Court enumerated and explained the twelve *indicia* as follows:

> In a series of cases beginning with *Dodd v. City of Jackson*, 238 Miss. 372, 396-97, 118 So. 2d 319, 330 (1960) down through most recently *McElhaney v. City of Horn Lake*, 501 So. 2d 401, 403-04 (Miss. 1987) and *City of Greenville v. Farmers, Inc.*, 513 So. 2d 932, 941 (Miss. 1987), we have recognized at least eight indicia of reasonableness. These include (1) the municipality's need for expansion, (2) whether the area sought to be annexed is reasonably within a path of growth of the city, (3) the potential health hazards from sewage and waste disposal in the annexed areas, (4) the municipality's financial ability to make the improvements and furnish municipal services promised, (5) the need for zoning and overall planning in the area, (6) the need for municipal services in the area sought to be annexed, (7) whether there are natural barriers between the city and the proposed annexation area, and (8) the past performance and time element involved in the city's provision of services to its present residents.
>
> Other judicially recognized indicia of reasonableness include (9) the impact (economic or otherwise) of the annexation upon those who live in or own property in the area proposed for annexation; *Western Line Consol. Sch. Dist. v. City of Greenville*, 465 So. 2d 1057, 1059 (Miss. 1985); (10) the impact of the annexation upon the voting strength of protected minority groups; *Enlargement of Boundaries of Yazoo City v. Yazoo City*, 452 So. 2d 837, 842-43 (Miss. 1984); (11) whether the property owners and other inhabitants of the areas sought to be annexed have in the past, and for the foreseeable future unless annexed will, because of their reasonable proximity to the corporate limits of the municipality, enjoy the (economic and social) benefits of proximity to the municipality without paying their fair share of the taxes; *Texas Gas Transmission Corp. v. City of Greenville*, 242 So. 2d 686, 689 (Miss. 1971); *Forbes v. Mayor & Board of Alderman of City of Meridian*, 86 Miss. 243, 38 So. 676 (1905); and (12) any other factors that may suggest reasonableness *vel non*. *Basset v. Town of Taylorsville*, 542 So. 2d 918, 921 (Miss. 1989).

*In re the Enlargement and Extension of the Municipal Boundaries of the City of Clinton*, 955 So. 2d 307, 313 (Miss. 2007).

However, in *Western Line Consolidated School District v. City of Greenville*, this Court stated with regard to the *indicia* that:

> [w]hile the *Dodd* and *Renfro* criteria are helpful, they were never intended to be conclusive as to reasonableness . . . . The economic and personal impact on these landowners is as important a concern as the city's need to grow. Only by reviewing the annexation from the perspective of both the city and the landowner can the chancellor adequately determine the issue of reasonableness. In short, the common thread that must run through any reasonableness criteria is fairness. An unreasonable annexation is an unfair one and, as fairness is the foundation of equity, an annexation cannot be both unreasonable and equitable. The converse is equally true for an annexation cannot be both inequitable and reasonable.

*Western Line Consol. Sch. Dist. v. City of Greenville*, 465 So. 2d 1057, 1059-60 (Miss. 1985).

To this end, this Court held in *City of Columbus* that "although we retain our '*indicia*' for purposes of today's decision, we emphasize that fairness to all parties has always been the proper focus of our reasonableness inquiry" and therefore, "municipalities must demonstrate through plans and otherwise, that residents of annexed areas will receive something of value in return for their tax dollars in order to carry the burden of showing reasonableness." *In re the Extension of the Boundaries of the City of Columbus*, 644 So. 2d 1168, 1171 (Miss. 1994).

**C. 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 re the Enlargement and Extension of the Municipal Boundaries of the City of Clinton*, 920 So. 2d 452, 454 (Miss. 2006). More recently, this Court stated that it may reverse a chancellor's determination that an annexation is either reasonable or unreasonable "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." *In re the Enlarging,*

*Extending and Defining the Corp. Limits and Boundaries of the City of Horn Lake*, 57 So. 3d 1253, 1258 (Miss. 2011) (*citing Bassett*, 542 So. 2d at 921).

## III. SUMMARY OF THE ARGUMENT

As this Court stated in *City of Horn Lake*, it may reverse a chancellor's determination that an annexation is reasonable "where we are left with a firm and definite conviction that a mistake has been made." *City of Horn Lake*, 57 So. 3d at 1258. Lee County respectfully submits that, as demonstrated herein, mistakes were made in this matter which require reversal of the Lee County Chancery Court's decision finding reasonable the City of Tupelo's proposed annexation, as modified. It is noted at the outset that, as a result of the lower court's failure to set the proceedings over for a date and time certain prior to recessing the initial return hearing, all residents and property owners of the areas annexed were denied their statutory notice rights, and the lower court did not have jurisdiction over the City of Tupelo's Annexation Petition.

In addition to this significant jurisdictional defect, there were other legal deficiencies and errors made at the trial court level which require that the lower court's Opinion be reversed. First, Tupelo failed to demonstrate through plans or otherwise that residents of annexed areas will receive something of value in return for their tax dollars. This Court has repeatedly held that municipalities are required to make such a showing in order to carry the burden of proving reasonableness of a proposed annexation. *See, e.g., City of Columbus*, 644 So. 2d at 1172. However, in the proceedings below, the Tupelo City Council did not adopt any type of plan or commitment for the delivery of services or improvements to the proposed annexation area, and Tupelo's failure to do so requires that its proposed annexation be found unreasonable.

Second, the Lee County Chancery Court abused its discretion in the admission of the expert testimony of Tupelo's urban and regional planning expert, Karen Fernandez. The lower court prohibited a voir dire examination of Ms. Fernandez and admitted her testimony over the

*Daubert* objections of Lee County, Saltillo, and Plantersville. The Lee County Chancery Court abused its discretion and committed clear error in doing so.

Third, the Lee County Chancery Court erred in approving the City's proposed annexation, in light of the unresolved conflict created by the City's efforts to annex territories which are within the legal service areas of seven (7) different Lee County fire protection districts. As this Court recognized in *City of Horn Lake*, these fire protection districts, created by the Lee County Board of Supervisors pursuant to *Miss. Code Ann.* § 19-5-151, *et. seq.*, are the sole public corporations empowered to provide fire protection within their legally defined boundaries, regardless of the outcome of Tupelo's annexation. Nonetheless, residents in the PAA annexed into Tupelo would be assessed with the full city tax levy for municipal services, including municipal fire protection. Tupelo's failure to resolve this conflict results in unfair double taxation to residents and property owners annexed into the City, and the lower court erred in approving such an inequitable and unreasonable proposal by the City of Tupelo.

Further error was committed by the lower court in this matter in improperly limiting the cross-examination of expert witness Karen Fernandez on the issue of the dilution of minority voting strength as a result of Tupelo's proposed annexation. The issue of minority voting strength dilution was raised by individuals with standing, and the Lee County Chancery Court abused its discretion in limiting the cross-examination of Tupelo's expert witness on the issue.

Error was likewise committed by the lower court in approving Tupelo's proposed annexation, as modified. It is undisputed that the burden of proving reasonableness in this matter was squarely on the shoulders of Tupelo, yet the City completely failed to carry its burden. Tupelo's failure to carry its burden of proving reasonableness in this matter must necessarily defeat the City of Tupelo's annexation efforts. For the Lee County Chancery Court to find otherwise was in manifest error and was not supported by substantial and credible evidence.

Finally, this Court must consider whether the lower court was in error in taxing a large percentage of the expense associated with the statutorily-required publication of notice of Tupelo's proposed annexation against Lee County. Lee County would respectfully submit that such taxation was in error.

## IV. ARGUMENT

### A. The City of Tupelo Failed to Demonstrate a Commitment to Provide Residents and Property Owners of the Proposed Annexation Area Something of Value in Return for Their Tax Dollars.

This Court has held that in order for a municipality to carry the burden of showing reasonableness, it "**must demonstrate through plans or otherwise, that residents of annexed areas will receive something of value in return for their tax dollars**." *City of Columbus*, 644 So. 2d at 1172. The weight of the evidence before the Lee County Chancery Court demonstrated that there was absolutely no binding "plan" or other commitment of the City of Tupelo to providing residents of annexed areas anything of value in return for their tax dollars. As discussed below, the Tupelo City Council did not adopt any type of plan or commitment for the provision of services or improvements to the proposed annexation area. Rather, as the lower court stated with regard to Tupelo's "plan" for services and improvements associated with the City's proposed annexation, "...implicit in the document itself is that it is preliminary, it is temporary, it is subject to change." Chancellor Prisock, Tr. 3619. Accordingly, as Tupelo failed to demonstrate through plans or otherwise that residents and property owners annexed would receive something of value in return for their tax dollars, the City did not carry its burden of showing reasonableness, and it was manifest error for the Lee County Chancery Court to approve the City's proposed annexation.

It is well settled that a municipality may speak only through its minutes. *See, e.g., Tupelo Redevelopment Agency v. Abernathy*, 913 So. 2d 278 (Miss. 2005); *Rawls Springs Utility District*

*v. Novak*, 765 So. 2d 1288 (Miss. 2000); *Suggs v. Town of Caledonia*, 470 So. 2d 1055 (Miss. 1985). To this end, with regard to the Services and Facilities Plan before the lower court, Tupelo City Council President Fred Pitts testified that the Tupelo City Council had taken no official action to adopt the proposed plan. Pitts, Tr. 2548. As such, the City of Tupelo has no plan.

Rather, Tupelo's "plan" which was before the court below was to eventually come up with a plan. This does not meet the standard required by this Court that the City demonstrate that residents of annexed areas will receive something of value in return for their tax dollars, and is the very same type plan of which this Court criticized in *In re the Enlargement and Extension of the Municipal Boundaries of the City of Jackson*, 691 So. 2d 978, 983-984 (Miss. 1997).

Specifically, in *City of Jackson*, this Court reversed the decision of the Hinds County Chancery Court which found reasonable Jackson's proposed annexation, and stated with regard to the City of Jackson's "plan" that:

> Furthermore, it should be noted **that the proposal for improvements and extension of services presented to the Court by the City was merely the product of department head and planner recommendations, and the City Council had not approved any of the improvements the witnesses for the City testified that the City intended to make in the proposed annexation area.**

*City of Jackson*, 691 So. 2d at 983-984. [emphasis added].

Exactly as in the *City of Jackson* case, the proposal for improvements and extension of services presented to the Lee County Chancery Court by the City of Tupelo was merely the product of department head and planner recommendations, and the Tupelo City Council had not approved any of the "suggested" improvements the witnesses for Tupelo testified that Tupelo intended to make in the proposed annexation area. Pitts, Tr. 2548. Moreover, the Tupelo City Council did not adopt nor make any other binding financial commitment to fund the personnel and equipment "suggestions" set forth in Tupelo's Services and Facilities Plan (Exhibit T-3). This complete lack of an **adopted** plan setting forth the City's firm financial commitments is

exactly why Tupelo's "preliminary" Services and Facilities Plan was **modified throughout the annexation trial.**

For example, Tupelo's "plan" called for the hiring, equipping, and training of three additional firefighters associated with its proposed annexation. T-3. However, the testimony at trial indicated that these three firefighters had absolutely nothing to do with this proposed annexation. Chief Walker, Tr. 2142. Rather, these three firefighters were being hired to comply with the recommendations and direction of the Mississippi State Rating Bureau for the past 15 years that Tupelo adequately staff a much needed ladder truck for the existing City. *Id.* This was not a commitment by Tupelo to offer enhanced fire services to the residents and property owners of the PAA; rather, it was evidence of a history of poor past performance by Tupelo in that it takes a legal proceeding in which the City is seeking to annex additional land in order for the City to actually commit and expend the necessary resources to implement a decades-old recommendation of the Mississippi State Rating Bureau.

Similarly, the "plan" before the lower court called for the hiring of five additional public works staff. T-3. However, testimony at trial established that Tupelo no longer intends to hire five additional public works personnel as a result of this annexation. Russell, Tr. 2362-63. Rather, Tupelo does not intend on hiring any additional personnel beyond that which is already budgeted for the existing city. *Id.* Accordingly, this is a $1,147,920 expenditure proposed by Tupelo's planners and department heads that the residents and property owners of the PAA can no longer expect to receive as a result of annexation by the City of Tupelo. LC-55.

Ultimately, with no true commitment before the Lee County Chancery Court by the City of Tupelo, as evidenced by the failure of Tupelo to offer into evidence a firm financial commitment of the City reflected in a Services and Facilities Plan adopted by the Tupelo City Council, the uncertainty and disturbing reality previously faced by this Court in the *City of*

*Jackson* case is again at the forefront of a municipality's attempt to annex residents and property owners without committing to provide annexed residents and property owners with something of value in return for their tax dollars. Just as in *City of Jackson*, Tupelo merely offered the recommendations and suggestions of its department heads and New Orleans-based planner, with no commitment or official action by the City Council on the services outlined in the Plan. As this Court has previously stated, in order to carry the burden of showing reasonableness, a municipality "**must demonstrate through plans or otherwise, that residents of annexed areas will receive something of value in return for their tax dollars**." *City of Columbus*, 644 So. 2d at 1172. The City of Tupelo failed to carry its burden. There was no plan or commitment before the Lee County Chancery Court by the City of Tupelo. Accordingly, the City of Tupelo did not carry its burden of showing reasonableness, and it was manifest error for the Lee County Chancery Court to approve the City of Tupelo's proposed annexation.

### B. The Lee County Chancery Court Committed Reversible Error in Improperly Limiting the Cross-Examination of Tupelo's Expert Witness.

In *State Highway Commission of Mississippi v. Havard*, 508 So. 2d 1099, 1102 (Miss. 1987), this Court stated that "the latitude allowed counsel in cross-examination in this state is quite wide," and that "any matter relevant may be probed." Further, *Mississippi Rule of Evidence* 611(b) provides that cross-examination shall not be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The comment to *Rule* 611(b) provides that "wide-open cross-examination" is permitted and that "under this wide-open cross-examination any matter may be probed that is relevant." *Miss. R. Evid.* 611 *cmt.* The lack of relevance is "found only when the information that counsel is attempting to elicit is wholly extraneous and unprovoked by direct examination." *Culp v. State*, 933 So. 2d 264, 276 (Miss. 2005). This Court has previously stated that, in the context of limiting the mode and order of

interrogation of a witness, the decision of a trial court will be reversed where the trial court has abused its discretion. *See, e.g., Prestridge v. City of Petal*, 841 So. 2d 1048, 1059 (Miss. 2003).

In the proceedings below, concerns over the impact Tupelo's annexation would have on minority voting strength were raised by persons with standing (i.e., minorities). *See, e.g.,* Wheeler, Tr. 1193; Goree, Tr. 1238; Deposition of Tommie Lee Ivy, pp. 21-22, January 6, 2009 (Exhibit T-131).[2] Where, as here, the issue is raised by minorities, this Court has held that this *indicium* of reasonableness should be given considerable weight. *See, e.g., City of Columbus*, 644 So. 2d at 1180. In this context, it is beyond dispute that the impact a municipal annexation will have on the voting strength of protected minority groups is relevant to this case, and inquiry into the issue on cross-examination of Tupelo's only witness testifying regarding minority voting strength is unquestionably permissible under the policy of "wide-open cross-examination."

However, at trial, Tupelo objected to Lee County's cross-examination of Karen Fernandez, the only witness testifying on behalf of Tupelo on this issue, on the basis that Lee County had taken no position on the issue in discovery (i.e., the County had undertaken no independent analysis of the impact Tupelo's annexation would have on the voting strength of protected minority groups). Tr. 3102-07. The lower court reserved ruling on the City's objection, and Lee County made a proffer on the issue. Tr. 3106. Following briefs being submitted on the issue by both Tupelo and Lee County, the trial court indicated that it would continue to reserve ruling on the issue and would address Tupelo's objection in the opinion ultimately rendered in this matter. Tr. 3270-71. However, the Lee County Chancery Court failed to do so, and its Findings of Fact and Conclusions of Law establish that the Chancellor did not consider proffered cross-examination testimony of Ms. Fernandez on this issue.

[2] The deposition of Lee County Supervisor Tommie Lee Ivy was admitted into evidence as Exhibit T-131 by stipulation of the parties.

In failing to overrule Tupelo's objection to the cross-examination of Ms. Fernandez on the issue of minority voting strength, the lower court abused its discretion. *Mississippi Rule of Evidence* 401 defines "relevant evidence" as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. In an annexation case, the impact a proposed annexation will have upon the voting strength of protected minority groups, as one of the *indicia*, is without question relevant evidence. This is particularly so in this case, where concerns over the dilution of voting strength were raised by minorities. *City of Columbus*, 644 So. 2d at 1180.

It must be remembered that the burden of proof in this matter was exclusively on the City of Tupelo to demonstrate reasonableness. *Miss. Code Ann.* § 21-1-33. Lee County was under no burden to prove anything, nor was Lee County required to independently analyze the impact Tupelo's annexation would have upon the voting strength of protected minority groups. Furthermore, whether Lee County conducted an independent analysis of minority voting strength dilution has no bearing on its cross-examination of Tupelo's trial witnesses on this issue, and certainly in no way limits the right of its counsel to be permitted "wide-open cross-examination" of Tupelo's expert witness on the opinions she expressed on this clearly relevant issue. For the Lee County Chancery Court to limit Lee County's cross-examination on this issue was an abuse of discretion which requires reversal of the lower court's Final Judgment.

### C. The Lee County Chancery Court Did Not Have Jurisdiction Over the City of Tupelo's Annexation Petition, and the Lower Court Committed Reversible Error in Denying Lee County's Motion to Dismiss on This Issue.

The proceedings below on the City of Tupelo's Annexation Petition were procedurally flawed and deprived residents and property owners in the proposed annexation areas of their fundamental, statutory due process notice rights, thereby rendering the lower court without subject matter jurisdiction. More specifically, the Lee County Chancery Court lost jurisdiction

over Tupelo's Petition at the conclusion of the November 3, 2008 return hearing wherein the matter was recessed without being set over for a date and time certain for future proceedings.

By way of background, the City of Tupelo adopted the City's currently operative annexation ordinance on July 3, 2007. R. 011. On September 12, 2008, following the dismissal of Tupelo's previously-filed annexation petition for failure to comply with *Mississippi Rule of Civil Procedure* 4, the City of Tupelo filed the annexation petition which gave rise to the matter now pending before this Court on appeal. Thereafter, by order of the Lee County Chancery Court, 9:30 a.m. on November 3, 2008, was set as the date and time certain upon which a hearing would be held on the City of Tupelo's currently pending Annexation Petition. R. 043.

Pursuant to the lower court's order, a return hearing was held in this matter on November 3, 2008, at 9:30 a.m. at the Lee County Courthouse in Tupelo, Mississippi. Numerous individuals interested in, affected by, or aggrieved by Tupelo's proposed annexation attended the return hearing to present their objections to the proposed annexation. In addition, both Lee County, Mississippi, and the City of Saltillo, Mississippi, appeared at the November 3, 2008 return hearing to record their respective objections to Tupelo's annexation Petition. However, while the Lee County Chancery Court set various discovery and motion deadlines during the course of the November 3, 2008 return hearing, the matter was recessed indefinitely at the conclusion of the hearing and was not set over for a date and time certain for any future proceedings.

Creation of, and changes to, the boundaries of municipalities are matters subject to, and governed by, the specific statutory provisions of *Miss. Code Ann.* § 21-1-27, *et seq.* In this regard, *Miss. Code Ann.* § 21-1-31 sets forth the notice requirements in annexation matters and provides, in part, that notice of the date certain fixed for hearing on the petition "shall be given in the same manner and for the same length of time as is provided in section 21-1-15 . . . and all parties interested in, affected by, or being aggrieved by said proposed enlargement or contraction

shall have the right to appear at such hearing and present their objection to such proposed enlargement or contraction."

*Miss. Code Ann.* § 21-1-15, which is incorporated by reference in *Miss. Code Ann.* § 21-1-31, requires notice to be given both by publication in "some newspaper published or having general circulation in the territory proposed to be [annexed]" as well as by posting "a copy of such notice in three or more public places in such territory."

This Court has made it explicitly clear that it takes seriously the rights granted under *Miss. Code Ann.* § 21-1-27, *et seq.* to those parties interested in, affected by, or being aggrieved by a municipal annexation, and goes to great lengths to protect the due process rights of those persons to receive notice of the hearing and to appear at the hearing and present their objections to a proposed municipal expansion. *See, e.g. City of Clinton*, 920 So. 2d at 455-58; *Norwood v. Extension of Boundaries of City of Itta Bena*, 788 So. 2d 747 (Miss. 2001); *In re Extension of the Boundaries of the City of Pearl*, 365 So. 2d 952 (Miss. 1978).

In ensuring that the rights of those persons interested in, affected by, or being aggrieved by a proposed annexation are protected, this Court has stated that "the issue of notice in annexation cases has been specifically classified as jurisdictional by this Court . . . ." *City of Clinton*, 920 So. 2d at 455. Further, the Court has held that "the requirements relative to notice as provided in Section 21-1-15 are mandatory and jurisdictional and in the absence of proper notice, the trial court [is] without jurisdiction . . . ." *Norwood*, 788 So. 2d at 751. This Court has likewise held that "the notice required by [21-1-15] is in lieu of personal service and it is well settled that a statute providing for notice in lieu of personal service must be strictly complied with . . . ." *City of Pearl*, 365 So. 2d at 953.

Requiring municipalities to strictly adhere to the notice provisions of *Miss. Code Ann.* §§ 21-1-15 and 21-1-31 follows the mandatory directive of Art. 3, § 14 of the Mississippi

Constitution that "no person shall be deprived of life, liberty or property except by due process of law." It is well settled that the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *See, e.g., Booth v. Mississippi Employment Sec. Comm'n*, 588 So. 2d 422, 428 (Miss. 1991); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Due process therefore requires that a defendant be given adequate notice. *Young v. United States ex. rel Vuitton et Fils S.A.*, 481 U.S. 787, 798-99 (1987).

In the context of municipal annexations, those persons interested in, affected by, or being aggrieved by a proposed municipal enlargement, who have a statutory right to appear at the hearing on the proposed enlargement and present their objections thereto, can only exercise their rights if they are given notice of a date and time certain, as well as a place to appear, in which they can be heard. Otherwise, such interested or aggrieved parties have absolutely no idea when to show up in Court to have their objections heard.

In this matter, the return hearing was held on November 3, 2008 (over 16 months before the trial of this matter). Neither at that hearing, nor at any other hearing prior to the trial of this matter, was a person interested in or aggrieved by Tupelo's proposed annexation given notice of when to show up and have their objections heard. Because the Lee County Chancery Court provided no date and time certain for objectors to appear in Court and be heard, it was without jurisdiction over Tupelo's annexation petition.

Changes to the boundaries of municipalities are strictly governed by *Mississippi Rule of Civil Procedure* 81. The summonses and Notices of Hearing which are issued in annexations are, at their core, designed to advise parties interested in or affected by the proposed annexation of the time and place to defend against the petition. Furthermore, because no responsive pleading is required by *Rule* 81 (the named defendants and other objectors are merely required to appear and defend on a date and time certain), *Rule* 81 puts in place certain procedures that **must** be

followed. One such procedure requires that when a matter is continued for a hearing on a later date, an order must be entered on the hearing date which continues the matter to a specific future date and time when further proceedings will be held. *See, e.g. Caples v. Caples*, 686 So. 2d 1071 (Miss. 1996); *Vincent v. Griffin*, 872 So. 2d 676 (Miss. 2004). Moreover, if no order is entered on the day of the hearing which sets a specific date and time for future proceedings, the court loses jurisdiction because necessary and indispensable parties are not advised of the future hearing date. *See, e.g. Caples*, 686 So. 2d at 1074; *Vincent*, 872 So. 2d at 678.

This procedure is followed as a matter of course in annexation matters in this State. *See, e.g. In re the Enlargement and Extension of the Municipal Boundaries of the City of Horn Lake*, 822 So. 2d 253 (Miss. 2002). The logic for such a procedure in annexation matters is quite simple: By setting the matter over for a date and time certain for future proceedings, residents and property owners interested in, affected by, or aggrieved by a proposed municipal annexation are provided adequate notice of the court date on which they may appear and exercise their statutory due process right to object.

Here, jurisdiction over parties interested in, affected by, or aggrieved by Tupelo's proposed annexation, was originally achieved by Tupelo's posting and publication of the Notice of the date and time certain for the November 3, 2008 return hearing. This jurisdiction was lost, however, when Tupelo failed to have this matter set over for a date and time certain for further proceedings following the November 3, 2008 return hearing.

When the issue was raised before the lower court, Tupelo represented that it would re-post and re-publish notice of the trial date in this matter in accordance with *Miss. Code Ann.* § 21-1-31. For example, in response to Lee County's Motion to Dismiss on the issue of lack of subject matter jurisdiction, Tupelo represented to the Lee County Chancery Court:

> 9. . . . . Nevertheless, and although not required by statute or otherwise, once this Court enters an order setting trial dates, **Tupelo will once again publish and post**

> **in three public places in each of the areas of annexation notice of the trial dates in the same manner as was done in accordance with Miss. Code Ann. § 21-1-31 for the November, 2008 hearing, and just as Lee County's attorneys have done in several instances in cases in which they represented the annexing party**. [Response of City of Tupelo to Lee County's Motion to Dismiss, p. 5. Filed October 22, 2009].

Further, during a December 14, 2009 Hearing on Motions to Dismiss filed by both Lee County and the City of Saltillo on this issue, counsel for Tupelo repeatedly assured the Lee County Chancery Court that such re-posting and re-publishing of notice would take place:

> [BY MS. STEGALL]:
> **Once this Court sets a trial date, we will again repost and republish for that trial date**, and anybody that wishes to object can appear at the trial on the merits will be able to do so at that time.

Transcript of December 14, 2009 Motion Hearing, pp. 29-30.

> [BY MS. STEGALL]:
> We will, as did the parties in this Horn Lake case, **we will republish and repost when we have a trial date**.

Transcript of December 14, 2009 Motion Hearing, p. 32. (See, also, pp. 26-27).

However, the testimony at trial confirmed that Tupelo failed to re-post and re-publish as required by the statutory due process mandates, and as **Tupelo had expressly represented to the lower court that it would do to cure the jurisdictional deficiencies**. Falkner, Tr. 446-48.

The City of Tupelo failed on November 3, 2008, to have this matter set over for a date and time certain upon which future proceedings were to be conducted. At that point, the lower court lost jurisdiction over future proceedings in this matter. The persons interested in, affected by, or aggrieved by the proposed annexation who desired to exercise their statutory right to appear at the hearing of this matter and present their objections to the proposed annexation had absolutely no notice of when this case was scheduled to be heard. Any review by a potential objector (whether of the Court file on November 4, 2008--the day after the November 3, 2008 return hearing--or any single day thereafter) failed to give such party the required notice of a date

and time certain to come to Court and be heard, **because there was no date advising when to show up in Court and be heard.**

The Lee County Chancery Court's continuance of the proceedings on Tupelo's annexation, having recessed the return hearing without setting a date certain for further proceedings, denied those persons residing in the proposed annexation areas of their fundamental right to due process. These residents had the statutory right to have their objections heard. These residents were not put on notice of when or where they needed to appear in order to exercise their rights under the law. Accordingly, this Court should find that the Lee County Chancery Court was without jurisdiction over the City of Tupelo's Petition, and should reverse and render a decision dismissing the City's annexation for want of jurisdiction.

### D. The Trial Court Committed Reversible Error in Not Allowing a *Daubert* Examination of Tupelo Expert Witness Karen Fernandez.

> The Court is of the opinion at this point that urban and regional planning is a legitimate field of professional expertise and that it qualifies under the *Daubert* standards.
>
> Now, the issue is, is she a qualified expert. **The Court is not going to allow you to go through all of her testimony and find that out** . . . .

Chancellor Prisock, Tr. 2669-70. [emphasis added].

In support of its proposed annexation, the City of Tupelo tendered Karen Fernandez as an expert in the field of urban and regional planning. Tr. 2643-44. During voir dire of Ms. Fernandez, counsel for the City of Saltillo sought to examine her under the "modified *Daubert*" standard for determining admissibility of expert witness testimony adopted by this Court in *Mississippi Transportation Commission v. McLemore*, 863 So. 2d 31, 39 (Miss. 2003). The Lee County Chancery Court, however, improperly limited the *Daubert* examination of Ms. Fernandez and admitted her testimony over the objection of the City of Saltillo, the Town of Plantersville, and Lee County. Specifically, the lower court found that urban and regional

planning is a legitimate field of expertise and is not "new science," and further that the court was "not going to allow" complete voir dire of Ms. Fernandez in order to find out if she was a qualified expert in the field. Chancellor Prisock, Tr. 2669-70. As discussed below, the Lee County Chancery Court's ruling was arbitrary and clearly erroneous, amounting to an abuse of discretion, and should be reversed by this Court.

The admissibility of expert witness testimony is governed by *Mississippi Rule of Evidence* 702, which provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *McLemore*, this Court adopted the standard for determining admissibility of expert witness testimony initially established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and later modified in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). *McLemore*, 863 So. 2d at 35, 39. Under the "modified *Daubert*" standard, a trial judge is vested with a "gatekeeping" responsibility concerning the admission of expert testimony. *Hubbard ex. rel. Hubbard v. McDonald's Corp.*, 41 So. 3d 670, 675 (Miss. 2010). As the gatekeeper, the trial court must ensure that expert testimony admitted is both relevant and reliable. *Id.*

In order for expert witness testimony to be "relevant," it must be sufficiently tied to the facts of the case such that it will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* In evaluating "reliability," the focus "must be solely on principles and methodology, not the conclusions they generate." *Id.* Therefore, in order for testimony to be "reliable," it must be grounded in the methods and procedures of science, not merely a subjective belief or unsupported speculation. *Worthy v. McNair*, 37 So. 3d 609, 615 (Miss. 2010).

In *McLemore*, this Court adopted a nonexclusive list of factors set forth by the *Daubert* court to be used in assessing reliability, namely: (1) whether the theory or technique can be tested; (2) whether the theory or technique has been the subject of peer review and publication; (3) whether there is a high known or potential rate of error respecting the technique; (4) whether there are standards that control the operation of the technique; and (5) whether the theory or technique has been generally accepted within the relevant scientific community. *Hubbard*, 41 So. 3d at 675 (*citing McLemore*, 863 So. 2d at 37).

Furthermore, *Mississippi Rule of Evidence* 702 places three additional prerequisites to the admission of expert witness testimony that were not in effect at the time of *Daubert* and *Kumho Tire*, namely that: (1) the expert testimony must be based on sufficient facts or data, (2) it must be the product of reliable principles and methods, and (3) the expert must have reliably applied the principles and methods to the facts of the case. *Id.* (*citing Miss. R. Evid.* 702).

Accordingly, under the "modified *Daubert*" standard, in order for the testimony of Karen Fernandez to be deemed admissible, the lower court, as "gatekeeper," must have found that her offered testimony was both relevant and reliable. *McLemore*, 863 So. 2d at 37. Moreover, pursuant to *Miss. R. Evid.* 702, in order for the expert testimony and opinions of Ms. Fernandez to be admissible, her testimony must based on sufficient facts or data; her opinions must be the product of reliable principles and methods; and she must have reliably applied the principles and methods to the facts of the case. Of equal importance, the lower court's findings on each of these threshold inquiries as to the admissibility of the expert's testimony must be satisfied prior to the admission of her testimony. *See, e.g., International Paper Co. v. Townsend,* 961 So. 2d 741, 760 (Miss. App. 2007). The lower court, however, accepted Ms. Fernandez as an expert witness without the benefit of a *Daubert* examination, including a determination of whether her testimony satisfied the additional prerequisites of *Rule* 702. Specifically, the trial court found:

> [By the Court]:...As far as I'm – the Court is of the opinion at this point that urban and regional planning is a legitimate field of professional expertise and that it qualifies under the Daubert standards.
>
> Now, the issue is, is she a qualified expert. **The Court is not going to allow you to go through all of her testimony and find that out** . . . .

Chancellor Prisock, Tr. 2669-70.

The Lee County Chancery Court's finding was explicitly related to urban and regional planning in general, not to the specific expert witness or testimony being offered in this case, and is against the clear mandate of *Daubert*. This Court has stated that "whether testimony is based upon professional studies or personal experience, the 'gatekeeper' must be certain that **the expert** exercises the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *McLemore*, 863 So. 2d at 37-38. For example, in *Giannaris v. Giannaris*, this Court reversed a chancellor's decision to accept a particular witness as an expert in the field of clinical social work as there was no evidence that the particular witness's opinions were "based upon sufficient facts or data" or "the product of reliable principles and methods." *Giannaris v. Giannaris*, 960 So. 2d 462, 470-71 (Miss. 2007). Similarly, in the case at hand, the Lee County Chancery Court erroneously cut short the voir dire of Ms. Fernandez and accepted her as an expert witness without any evidence that her opinions were based upon sufficient facts or data or the product of reliable principles and methods. Tr. 2669-75.

In *International Paper Co. v. Townsend*, the Court of Appeals of Mississippi stated:

> The trial court's failure to allow more extensive voir dire of Johnson as to his qualifications made it impossible for the court to determine whether Johnson was truly qualified in his purported field. Although these questions were later answered, for the most part, on direct and cross-examination of Johnson during trial, we find that, because the trial judge performs a gatekeeping function, **the proper arena in which to discuss these issues was voir dire.** We therefore find that the trial court abused its discretion in failing to allow these questions as to Johnson's qualifications.

*International Paper Co.*, 961 So. 2d at 760.

Just as in *International Paper Co.*, the lower court's failure to allow more extensive voir dire of Ms. Fernandez made it impossible to determine whether her opinions were based upon sufficient facts or data or the product of reliable principles and methods. As the trial court was acting as a gatekeeper, the proper arena to address these issues with respect to Ms. Fernandez was in voir dire, and the lower court abused its discretion by accepting Ms. Fernandez as an expert in her tendered field without affording counsel opposite the opportunity to a complete voir dire examination.

In *Watts v. Radiator Specialty*, this Court stated that "because of the weight that is given to expert testimony, it is imperative that trial judges remain steadfast in their role as gatekeepers under the *Daubert* standard." *Watts v. Radiator Specialty*, 990 So. 2d 143 (Miss. 2008). That the lower court should have remained steadfast in its role as gatekeeper under the *Daubert* standard is increasingly true in a case such as the one now pending on appeal before this Court. Here, where the City of Tupelo was relying on the testimony of its expert witness Ms. Fernandez to support a finding of reasonableness under the totality of the circumstances and considering the twelve *indicia* of reasonableness, the lower court should have first determined that her testimony was both relevant and reliable. However, the lower court failed to do so, focusing its finding on the particular field of expertise, urban and regional planning, and not the particular expert witness or expert testimony being tendered. To do so was an abuse of discretion.

Accordingly, in accepting Karen Fernandez as an expert witness in the field of urban and regional planning with no evidence that her testimony met the requirements of *Miss. R. Evid.* 702 and the standards of *Daubert*, the lower court made an arbitrary and clearly erroneous decision, amounting to an abuse of discretion. This Court should reverse the decision of the Lee County Chancery Court admitting Ms. Fernandez's testimony, and find that the trial court failed to remain steadfast to its role as gatekeeper in allowing an expert to testify without first determining

that the expert was qualified to testify in the field in which her testimony was offered. Such a finding by the lower court amounts to reversible error.

### E. The Lee County Chancery Court Erred in Failing to Consider the Inequitable and Unreasonable Impact of Tupelo's Proposed Annexation Upon the Lee County Fire Protection Districts and the Residents and Property Owners Annexed.

A critical issue before this Court on appeal of the Lee County Chancery Court's approval of the City of Tupelo's annexation, as modified, is the matter of the provision of fire protection services to the proposed annexation areas, and the inequitable impact Tupelo's failure to resolve the conflict regarding the provision of fire protection has on both the impacted Lee County Fire Protection Districts, as well as residents and property owners annexed. Specifically, as demonstrated by the *Brief of Appellants the Belden Fire Protection District, the Palmetto-Old Union Fire Protection District, and the Unity Fire Protection District* (hereinafter "Fire Districts' Brief") filed in this matter on July 20, 2011, the lower court committed reversible error in approving Tupelo's annexation without consideration of the inequitable and unreasonable impact the City's proposed annexation will have on affected Fire Protection Districts, as well as annexed residents now subject to double taxation for fire protection services.

As set forth in the Fire Districts' Brief, there are seven (7) separate fire protection districts impacted by the City of Tupelo's annexation, each created by the Lee County Board of Supervisors pursuant to *Mississippi Code Ann.* § 19-5-151, *et seq.* (*See, e.g.*, FD-002, FD-003, and FD-004). Pursuant to the clear and unequivocal terms of *Mississippi Code Ann.* §§ 19-5-165 and 19-5-175, each of the seven (7) Lee County Fire Protection Districts impacted by this proposed annexation are public corporations in perpetuity and are each charged with the responsibility to provide fire protection services within their defined boundaries. Moreover, pursuant to *Mississippi Code Ann.* § 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."

Recently, in *City of Horn Lake*, this Court upheld a lower court's denial of an annexation, in large part due to the municipality's failure to resolve the conflict its proposed annexation created with regard to a statutorily-created fire protection district. *City of Horn Lake*, 57 So. 3d at 1266-67, 1270-71. In doing so, this Court recognized the legal right held by districts created under the provisions of *Miss. Code Ann.* § 19-5-151, *et seq.* to be the "sole public corporation empowered" to provide fire protection services within their legally-defined boundaries. *Id.* at 1266-67. In addition, this Court recognized the inequitable double-taxation problem resulting from a municipality's failure to address this fire protection conflict. *Id.* at 1270-71.

Here, just as in *City of Horn Lake*, the evidence admitted at the trial of this matter established that, in order to provide support for each of the Lee County Fire Protection Districts, the Lee County Board of Supervisors levies a 4 mill tax against all taxable property within the boundaries of each respective District. Thompson, Tr. 3347. As the Districts' legal rights and obligations to continue rendering fire protection within their legally-defined service areas are not impacted by Tupelo's annexation, this 4 mill tax will remain in place following annexation. *Id.*

Further, as in *City of Horn Lake*, the evidence admitted at trial indicates that the City of Tupelo, if allowed to annex this territory, would levy full municipal taxes against residents and property owners annexed, a portion of which supports City fire services. Thompson, Tr. 3348; Watson, Tr. 3564-65. However, pursuant to *Miss. Code Ann.* § 19-5-175, the Districts would remain "sole public corporation[s] empowered" to provide fire protection services within annexed portions of their service areas. More importantly from the standpoint of fairness and equity to annexed residents and property owners of Lee County, this scenario results in annexed residents and property owners being double taxed for fire protection services.

Tupelo's failure to resolve the conflict with the Lee County Fire Protection Districts has created an inequitable scenario which can only play out in one of two ways: (1) assuming that the Lee County Board of Supervisors continues to levy the 4 mill tax on behalf of the Fire Protection Districts, the residents and property owners of the annexed areas will be double-taxed for the same service: fire protection; or (2) if the Board of Supervisors seeks to alleviate the double taxation problem created by Tupelo's annexation by removing the 4 mill tax levy, the resulting loss of tax revenues to the Lee County Fire Protection Districts will be absolutely devastating. Neither of these scenarios is equitable.

In *Western Line*, this Court stated as follows:

> In short, the common thread that must run through any reasonableness criteria is fairness. An unreasonable annexation is an unfair one and, as fairness is the foundation of equity, an annexation cannot be both unreasonable and equitable. The converse is equally true for an annexation cannot be both inequitable and reasonable.

*Western Line*, 465 So. 2d at 1059-60.

It is neither reasonable nor equitable to subject annexed residents and property owners to double-taxation for fire protection purposes, and the Lee County Chancery Court's approval of such an inequitable scenario was in error. Accordingly, for the reasons more fully set out in the Fire Districts' Brief, in which Lee County hereby fully joins, this Court should reverse the Final Judgment of the Lee County Chancery Court approving the City of Tupelo's annexation, as modified, and render an opinion finding the City's proposed annexation to be unreasonable.

### F. The Lee County Chancery Court's Decision Finding Tupelo's Annexation Reasonable, As Modified, Was Manifestly Wrong and Was Not Supported by Substantial and Credible Evidence.

*Mississippi Code Ann.* § 21-1-33 provides, in part, that "[i]n any proceeding under this section the burden shall be upon the municipal authorities to show that the proposed enlargement or contraction is reasonable." Further, this Court has stated that the "[p]arties seeking annexation have the burden of proving to the Chancellor the reasonableness of their cause. Failure to do so

must necessarily defeat their endeavor." *In re the Extension and Enlarging of the Boundaries of the City of Laurel*, 922 So. 2d 791, 796 (Miss. 2006). Accordingly, the burden of proving reasonableness under the totality of the circumstances in this matter is squarely on the shoulders of the City of Tupelo.

As discussed at length below, the evidence before the Lee County Chancery Court demonstrated that the City of Tupelo failed to carry its burden of proof in this matter. Furthermore, as previously noted, the City of Tupelo likewise failed to demonstrate, through plans or otherwise, that residents of the proposed annexation areas will receive something of value in return for their tax dollars. Tupelo's failure to demonstrate its proposed annexation was reasonable "must necessarily defeat their endeavor," and the Lee County Chancery Court's Opinion approving, as modified, the City's annexation was manifest error and was not supported by substantial and credible evidence. *Laurel*, 922 So. 2d at 796.

**1. <u>The City of Tupelo Did Not Demonstrate a Need to Expand.</u>**

In prior decisions, this Court has enumerated a number of factors which should be considered when determining whether a municipality has demonstrated that it has a need to expand. These factors include:

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

*In Re Extension of the Boundaries of City of Winona*, 879 So. 2d 966, 974 (Miss. 2004).

In his Findings of Fact and Conclusions of Law, the Chancellor found that Tupelo had a need to expand. However, as discussed below, the Chancellor's determination as to Tupelo's need to expand disregards the weight of the substantial and credible evidence submitted at trial

which demonstrated that, based upon the *Winona* factors, Tupelo does not have a present need to expand.

***a. The City of Tupelo's Present Supply of Vacant, Developable Land Is Sufficient and, Accordingly, Tupelo Does Not Have a Need for Additional Vacant, Developable Land.***

The City of Tupelo failed to establish that it has a need for vacant, developable land. Rather, the evidence clearly established that the City's present vacant, developable land supply of 10,458 acres (over 16 square miles) is sufficient to carry the City well into the future based upon historic land absorption rates, and the Chancellor's opinion finding otherwise is not supported by substantial and credible evidence.

This Court has previously identified two interrelated sub-factors with regard to vacant, developable land and its bearing on a municipality's need to expand, namely: (1) the amount of vacant, developable land remaining within the municipality, and (2) the municipality's need for additional vacant, developable land. *City of Winona*, 879 So. 2d at 974. Simply put, these two factors consider how much vacant land remains in the City, and how long that vacant land will last **(i.e., at current development rates, does the municipality have a present need for additional vacant, developable land?)**.

With regard to the City's remaining vacant land supply, the City of Tupelo's planning expert Karen Fernandez testified that presently 32% of the existing land within City of Tupelo is vacant and suitable for development. Fernandez, Tr. 2770, 2872-73. To this end, Tupelo City Planner Pat Falkner testified that the just under twenty (20) square miles of vacant and agricultural land inside Tupelo's city limits is "a lot of land." Falkner, Tr. 607.

In *City of Jackson*, this Court stated with regard to the presence of a high percentage of vacant land coupled with insignificant population growth:

> While it is true that this Court has allowed annexations even though there is no significant population growth and/or a relatively high percentage of undeveloped

land within the existing city limits, **[the] presence of these factors should, at the very least, be an impediment to annexation**. [emphasis added].

*City of Jackson*, 691 So. 2d at 981.

In those cases where this Court has allowed an annexing municipality to overcome the "impediment" of a relatively high percentage of undeveloped land within the existing city limits, the annexing municipality demonstrated circumstances justifying a need to expand which simply were not demonstrated by Tupelo in the proceedings below. For example, in *City of Ridgeland*, this Court allowed Ridgeland to annex despite significant vacant land resources available inside its existing city limits. *In re the Extension of Boundaries of the City of Ridgeland*, 651 So. 2d 548, 553-54 (Miss. 1995). However, the evidence in *City of Ridgeland* established that between 1970-1980, Ridgeland experienced a 230% population increase, and another 114% population increase from 1980-1990. *Id.* Further, the evidence in *City of Ridgeland* established that in a five-year period from 1987-1992, Ridgeland had experienced a 309% increase in the number of single family building permits issued. *Id.* at 554.

On the other hand, in the instant case, Tupelo has experienced a population growth of a mere 0.77% per year from 2000-2007 and 0.49% from 2007-2008. Exhibit T-123. Tupelo's extremely insignificant population growth is not in the realm of the level justifying a need to expand using the *City of Ridgeland* benchmark. Likewise, unlike in *City of Ridgeland* where the municipality had experienced a significant increase in new residential building permit issuance, Tupelo has seen a sharp decline in the issuance of building permits in recent years, moving from 169 new residential permits issued in 2007 to 52 new residential permits issued in 2009 (a 69.23% decrease in new residential building permits between 2007-2009). Exhibit T-113.

Furthermore, as *City of Ridgeland* demonstrates, purely looking at a municipality's remaining vacant, developable land reveals little with respect to the particular municipality's need to expand. In fact, for the percentage of vacant, developable land remaining in a

municipality to carry any weight for purposes of determining whether a municipality has a need to expand, a reviewing court must likewise review the rate at which that remaining land is going into production (i.e., the municipality's "land absorption rate"), an analysis which Tupelo City Planner Pat Falkner testified was an important consideration in determining whether a city has a need to expand. Falkner, Tr. 449. The Chancellor, however, disregarded the substantial and credible evidence related to this significant consideration.

Specifically, the substantial and credible evidence admitted at trial demonstrated that the significant amount of vacant, developable land remaining in Tupelo will last well into the future at current development rates. The evidence reflects that, between 1990 and 2009, land absorption within the City of Tupelo has been slow. Specifically, based upon the calculations of Tupelo expert Karen Fernandez, the City of Tupelo's land absorption rate between 1990 and 2009 was 134 acres per year. Fernandez, Tr. 2945-46; LC-64. Accordingly, with the City of Tupelo having approximately 10,458 acres of vacant, developable land within its existing boundaries, Tupelo has a vacant land supply of approximately 78 years. *Id.* However, recognizing that municipalities do not typically reach 100% "build out," Ms. Fernandez testified that it would take the City of Tupelo 39 years to develop half (50%) of its remaining vacant, developable land. *Id.*

Similarly, Lee County's expert witness in the field of urban and regional planning, Christopher Watson, testified that he had done an analysis of Tupelo's land absorption rate over the past 19 years and determined that the City of Tupelo was developing at a rate of 129.9 acres per year. Watson, Tr. 3478-81; LC-49, 64. According to Mr. Watson, based on his calculation of Tupelo's land absorption rate for the past 19 years, the City's 10,458 acres of vacant, developable land supply would last Tupelo 80.5 years. *Id.* Mr. Watson testified that, in his expert opinion, there is sufficient land available for development in the City of Tupelo, and the City has

no need to expand based upon the amount of vacant, developable land currently remaining within the existing City. *Id.*

Ultimately, the substantial and credible evidence and testimony at trial established that the City of Tupelo has a significant amount of vacant, developable land remaining within its existing boundaries, and that, at present development rates, Tupelo has no need for additional vacant, developable land. These factors weigh heavily against the City of Tupelo's need to expand, and the Chancellor's opinion finding otherwise disregards this substantial and credible evidence and was manifest error.

***b. The City of Tupelo's Internal Growth and Population Growth Do Not Support a Need to Expand.***

The Chancellor's finding that Tupelo's population growth supported annexation is contrary to the substantial and credible evidence admitted at trial, which established that Tupelo's population and internal growth have been extremely slow. T-123. In fact, Karen Fernandez, Tupelo's expert witness, testified that Tupelo is one of the slower growing cities in Lee County. Fernandez, Tr. 2980. For example, Tupelo's growth rate is 20% of that of the neighboring City of Saltillo. *Id.*

The evidence demonstrates that the City of Tupelo's annual population growth rate has declined substantially since its previous annexation in 1989. Falkner, Tr. 486-87; T-123. Between 1990 and 2000, Tupelo experienced an annual growth in population of 1.04% per year. Between 2000 and 2007, however, the City's population growth slowed to approximately 0.77% per year, with its 2008 population growth being a mere 0.48%. T-123.

Moreover, with regard to the City of Tupelo's current population density, Karen Fernandez testified that Tupelo's population density is low, at around 670-675 persons per square mile. Fernandez, Tr. 2883-85. Ms. Fernandez testified that Tupelo's low density was in part due to its "previous annexation where it nearly doubled in size." *Id.*

Prior cases in which this Court found that a municipality's population growth and population density supported a need to expand dealt with municipalities that were much more densely populated than the City of Tupelo. For example, in *City of Clinton*, this Court found that Clinton's population density of 1,000 persons per square mile was supportive of a need to expand. *City of Clinton*, 955 So. 2d at 315. Similarly, in *City of Jackson*, this Court found that the City of Jackson's population density of 1,724.27 persons per square mile justified a "limited need to expand." *City of Jackson*, 16 So. 3d at 684-85.

Tupelo's population density of only 670 persons per square mile is well below levels which this Court has previously held were indicative of a city that has a need to expand. The reason is simple: a city which has a population density of only 670 persons per square mile has more than sufficient available land supply to develop within the existing city. Tupelo's very low population density of 670 people per square mile also explains the policy implemented in the recently-adopted Comprehensive Plan to focus development within the existing city boundaries and use existing vacant land within the city in a more dense development pattern. T-9, p. 2.

Furthermore, considering Tupelo's recently-adopted Comprehensive Plan, which is based upon a development policy of densification of land use (i.e., increased density) inside the City of Tupelo, the evidence established that Tupelo's proposed annexation is contrary to its adopted growth and development policies. T-9; Falkner, Tr. 492, 497. Specifically, Karen Fernandez testified that the population density of the PAA is approximately 262 persons per square mile and that, if its annexation were approved, Tupelo's resultant population density would be approximately 604 persons per square mile. Fernandez, Tr. 2919-21.This inherently conflicts with the adopted goals and policies of the Tupelo City Council, and this is a significant factor weighing against Tupelo's need to expand. Neither Tupelo's population growth, nor its present population density, support a need to expand.

### *c. The City of Tupelo is Not Experiencing "Increased New Building Permit Activity."*

In *City of Winona*, this Court found that a factor to be considered in assessing a municipality's need to expand is whether the municipality is experiencing "increased new building permit activity." *City of Winona*, 879 So. 2d at 974. The Chancellor's opinion notes that the issuance of new building permits has "abated somewhat," but the trial court's ruling on this issue completely disregarded the substantial and credible evidence which established that this factor weighed significantly against Tupelo's proposed annexation.

The substantial and credible evidence before the lower court demonstrated that the trend of permit issuance in the City is significantly downward. T-113, 115. To this end, Tupelo City Planner Pat Falkner testified that both commercial and residential new building permit issuance has been in decline for several years, and the level of new construction in Tupelo was absolutely feeling the impact of the national and local economic downturn. Falkner Tr. 463, 468-71.

Evidence placed before the lower court by Tupelo confirms Mr. Falkner's testimony with regard to the downward trend in permit issuance inside the City. For example, Exhibit T-113, which graphically depicts residential building permit issuance in Tupelo, demonstrates that residential permit issuance within the City has sharply declined in recent years, falling from 169 permits issued in 2007, to 115 issued in 2008, to 52 issued in 2009. This decline in residential building permit issuance results in a corresponding decrease in land absorption rate. For example, the City's recently adopted Comprehensive Plan projects that some 7,500 new residential structures will be needed to accommodate future growth in the City. However, at the present rate of permit issuance, it will take Tupelo 144 years to build those 7,500 new housing units. Watson, Tr. 3525-26. This simply does not support a need to expand.

Similarly, regarding Tupelo's commercial building permit issuance, Exhibit T-115 demonstrates that there has been a consistent downward trend in new commercial permits in

Tupelo since the year 2000. The evidence likewise indicates that certain developments within the City of Tupelo, such as Tupelo Place, have been put on hold as a result of current economic conditions. Falkner, Tr. 475. The fact that planned developments have been put on hold, together with the fact that the rate of building within the city has slowed to a snail's pace, significantly weighs against Tupelo's need to expand, and the trial court's decision on this *indicium* disregarded this substantial and credible evidence.

***d. Spillover of Development From Tupelo into the Proposed Annexation Areas Is Not Occurring.***

While the Chancellor correctly noted that PAA 6 has experienced no spillover growth from Tupelo, his opinion that this factor supports Tupelo's need to expand disregarded the substantial and credible evidence admitted at trial which established that the areas sought to be annexed are largely agricultural lands or low density residential developments, and are not spillover from the City. The testimony of Karen Fernandez (Tupelo's urban planning expert) indicates that "spillover growth is where growth is occurring on the outer limits beyond the current boundaries, and it can be due to a couple of things, and one is that the cup is absolutely full, and it's spilling over...." Fernandez, Tr. 2995-96. The evidence was clear however, that such is not the case within Tupelo. In fact, as the testimony of Ms. Fernandez established, the overwhelming majority of the land sought to be annexed is either undeveloped, agricultural, or right-of-way, and not spillover development from Tupelo. Fernandez, Tr. 2982-85, 2996-3009. Further, regarding older, existing developments such as Indian Hills in PAA 2 North, the testimony established that these developments should not be considered "spillover." Fernandez, Tr. 2997-98. Trial testimony further established that other existing developments in the PAA, such as those found in PAA 3, are more properly classified as "leapfrog development" rather than spillover from Tupelo. Fernandez, Tr. 2999-3000.

Ultimately, the substantial and credible evidence established that the overwhelming majority of the Proposed Annexation Areas are vacant, agricultural lands or low-density residential uses, and not spillover development from Tupelo. The Lee County Chancery Court's opinion finding otherwise was not supported by substantial and credible evidence.

***e. The City of Tupelo's Comprehensive Plan Is a Significant Factor Weighing Against Its Need to Expand.***

As discussed in more detail below with regard to the "path of growth" *indicium*, the Chancellor completely disregarded the substantial and credible evidence related to the City of Tupelo's recent adoption of a Comprehensive Plan which calls for densification of the existing City. Specifically, Tupelo's recently-adopted Comprehensive Plan calls for a "growth pattern that **focus[es] development within the existing city boundaries**" and utilizes a "filling in of Tupelo that **use[s] existing vacant land within the city in a more dense development pattern**," both of which are in direct conflict with the annexation of additional land. T-9, p. 2.

*Miss. Code Ann.* § 17-1-1 defines a municipality's comprehensive plan as a "statement of public policy for the physical development of the entire municipality." Accordingly, the stated public policy of the City of Tupelo is to develop internally, not externally, and Tupelo has no need to expand in this regard.

Furthermore, while Tupelo's Comprehensive Plan contemplates "future annexation," the substantial and credible evidence established that annexation is not needed now to accommodate growth and development within the City. Watson, Tr. 3546-48. Rather, the evidence established that the City should develop inwardly as the Comprehensive Plan recommends and, as it reaches build-out on those infill parcels that the Plan recommends developing, it should then consider looking outwardly for expansion. *Id.* However, with an 80 year supply of vacant land, declining residential and commercial building permit issuance, and a Comprehensive Plan which dictates

that the City focus its efforts on developing internally, Tupelo's annexation is premature. Watson, Tr. 3495, 3518-19, 3546-48.

The substantial and credible evidence established that the City of Tupelo does not have a present need for vacant, developable land, nor does it have a need to expand its boundaries. The Chancellor's opinion finding otherwise, given the weight of the substantial and credible evidence, was manifestly erroneous.

**2. The Proposed Annexation Areas Are Not Within the Path of Growth of the City of Tupelo.**

The Chancellor found that, with the exception of a portion of PAA 5, each of the proposed annexation areas were within a path of growth of the City of Tupelo. However, as demonstrated below, the Chancellor's opinion disregards substantial and credible evidence which indicated that the City of Tupelo's path of growth, based upon the policies and recommendations set forth in its recently adopted Comprehensive Plan, is inward. T-9.

*Mississippi Code Ann.* § 17-1-1, *et seq.* provides the statutory authority for the governing officials of municipalities and counties throughout the State to adopt a "comprehensive plan." *Mississippi Code Ann.* § 17-1-1(c) defines a comprehensive plan and provides, in part, that a comprehensive plan is "**a statement of public policy for the physical development of the entire municipality or county adopted by resolution of the governing body**...."

Pursuant to the authority set forth under *Mississippi Code Ann.* § 17-1-1, the Tupelo City Council recently adopted a Comprehensive Plan, "Tupelo 2025," and, in doing so, set forth the public policy for the physical growth of the City of Tupelo for the period 2008 through 2025. T-9; Falkner, Tr. 480-81. The central idea of the Tupelo Comprehensive Plan is the choice of a **compact form of growth**. Falkner, Tr. 492; T-9. Put in other terms, the adopted growth policy for the City of Tupelo, as established in its Comprehensive Plan, **is to increase density within the existing City**. Falkner, Tr. 493.

In considering the City of Tupelo's recently adopted Comprehensive Plan, and its corresponding impact on Tupelo's path of growth and overall annexation efforts, it is significant to take note of the two alternative growth options which were considered by the citizens of Tupelo and the Tupelo City Council when developing and adopting this Comprehensive Plan, namely: (1) Urban Sprawl and (2) New Urbanism (or, compact form of growth). These two planning and growth principles which were considered by Tupelo citizens and governing officials present two distinct, conflicting options for the City's future. In fact, these two growth scenarios are the exact opposite of one another. Falkner, Tr. 492.

By definition, urban sprawl is a lower density, more dispersed pattern of development, and it's more highly-separated land uses. Watson, Tr. 3499-3501. An excellent description of urban sprawl is "Scenario 1" from the Tupelo Comprehensive Plan:

> *Scenario 1: Continuation of Development Patterns*, assumed that Tupelo would continue to grow under status quo conditions, including **lower density**, separated uses and the predominance of automobile travel. The focus of development would move away from the heart of the city toward the west. This scenario illustrated **"development on the edges"** and used existing land on the periphery of the planning area under **traditional suburban densities.** This movement away from the city could likely have an effect on the long-term viability of established neighborhoods, many of them historic in character and in need of reinvestment.

City of Tupelo Comprehensive Plan, T-9, p. 2. [emphasis added].

On the other hand, New Urbanism, or the choice of a compact form of growth, is best described in "Scenario 2" of the Tupelo Comprehensive Plan:

> *Scenario 2: Center City Focus*, assumed a Tupelo with a different growth pattern that **focused development within the existing city boundaries**. Scenario 2 illustrated a "filling in" of Tupelo that **used existing vacant land within the city in a more dense development pattern**. This pattern provides a framework that can support future public transit and creates a more energy efficient community. Directing growth to established neighborhoods could revitalize and stabilize many areas that are in need of reinvestment and improve the inner core of the city. An additional feature in this scenario was emphasis on a network of trails and green corridors connecting the various sectors of the city and providing links to parks and open space.

City of Tupelo Comprehensive Plan, T-9, p. 2. [emphasis added].

Clearly, the central themes that distinguish the two planning principles are the density and location in which development is encouraged. Under Scenario 1, or urban sprawl, development is allowed at lower density and with a continued shift away from the center of a city, toward the edges or the periphery of a city. Falkner, Tr. 500-01. Annexation is the perfect example of the method by which urban sprawl proliferates. Falkner, Tr. 497-98, 501; Watson, Tr. 3499-3501. Under Scenario 2, or New Urbanism, which was ultimately adopted by the City of Tupelo as its policy, development is focused within the existing city boundaries at higher densities. Falkner, Tr. 502-03. A prime example of the method by which Scenario 2 is accomplished is through the practice of infill, or developing existing vacant land within the city. Falkner, Tr. 495-96, 503-04; Watson, Tr. 3499-3501. *See also, City of Jackson*, 691 So. 2d at 981-82 (discussing the policy and reasoning behind a municipality curbing urban sprawl).

The City of Tupelo, through its comprehensive planning process, adopted a policy against urban sprawl, electing instead to bring development back in to the heart of the city and to make use of existing vacant properties within the City (i.e., "infill development") in order to further densify the City. Put another way, Tupelo's adopted growth policy, its Comprehensive Plan, dictates that the City's path of growth is inward. Watson, Tr. 3499-3501. The Chancellor, however, completely disregarded this significant issue.

That the City of Tupelo's path of growth is internal is best demonstrated by the Future Land Use Map adopted as a part of the City of Tupelo's Comprehensive Plan. Regarding Tupelo's Future Land Use Map, Pat Falkner testified that the map shows both "how [Tupelo] would want [the existing city and the proposed annexation areas] developed" and "how [Tupelo] expects [the existing city and the proposed annexation areas] to develop." Falkner, Tr. 530.

It is significant with respect to Tupelo's "path of growth" that the Future Land Use Map adopted as part of the City's Comprehensive Plan, overwhelmingly designates the areas sought to be annexed as developing as either agricultural, open space protection, or low density residential.T-9; LC-63; Watson, Tr. 3511-13. To this end, Chris Watson testified that "the concept of path of growth is that it relates to the continuing urban development of a municipality." Watson, Tr. 3497-98. Here, the fact that Tupelo projects these areas to develop over the next 15 years just as they are developed today, as agricultural land and/or low-density residential developments, demonstrates that the City does not expect urban development to occur within the PAA. Watson, Tr. 3511-13. Rather, as the Future Land Use Map indicates that development is going to occur within Tupelo's existing boundaries, Tupelo's path of growth is inward. *Id.*

While it is not disputed that some of Tupelo's proposed annexation areas display some of the traditional indicators of a path of growth noted in the Chancellor's opinion, such as adjacency and interconnection with transportation routes, the substantial and credible evidence established that actual "growth" is more than just the physical attributes of adjacency and interconnectedness. Watson, Tr. 3511-14. Rather, "growth" is also impacted by policy. *Id.* In the case before this Court, the City of Tupelo has a clearly adopted policy that encourages the City to focus its development inwardly in order to densify the existing city, as opposed to an outward direction of growth or continuation of urban sprawl. *Id.*

There is no better evidence regarding the City of Tupelo's future plans for growth within both the existing City of Tupelo and the PAA, than the Future Land Use Map contained in the City's recently adopted Comprehensive Plan. T-9; LC-63; Fernandez, Tr. 2908-09; Watson, Tr. 3514. The Chancellor, however, completely disregarded this evidence. The City's Future Land Use Map clearly depicts that Tupelo anticipates that growth in the future will be focused inside

the existing City, with the lands in the PAA projected to develop just as they are today: as agricultural and low density residential uses. Accordingly, the City of Tupelo's path of growth is one direction: inward. The Chancellor committed manifest error in finding otherwise.

**3. Potential Health Hazards.**

On this *indicium*, the Chancellor found that potential health hazards exist in the Proposed Annexation Areas as a result of septic tank use in the areas in light of soil conditions which are unfavorable to such waste disposal methods. While it is not disputed that the suitability of soils for septic tank usage is certainly a factor this Court has previously reviewed in weighing this *indicium*, this alone does not rise to the level of establishing potential health hazards in the PAA.

For example, the fact that the soil conditions are not suitable for septic tank use is of no importance with regard to the undeveloped, agricultural lands which make up a substantial portion of the area sought to be annexed. T-69. Moreover, the fact that soil conditions in PAA 6 are not suitable for septic tank use is virtually meaningless in this case where the City of Tupelo has no plans to extend sewer into that area to eliminate such uses. T-3.

In *Poole v. City of Pearl*, this Court stated that, while the primary focus under this *indicium* is on hazards in the PAA, "**a municipality's track record for correcting and preventing health hazards within its city limits should certainly be a factor for a chancellor to consider in evaluating the potential health hazards of the PAA**." *Poole v. City of Pearl*, 908 So. 2d 728, 737 (Miss. 2005). In this regard, it is significant to note that soil conditions throughout the existing City of Tupelo, like those throughout the entire County, are not suitable for septic tank usage. G. Reed, Tr. 1965; Fernandez, Tr. 3025. This is significant in that there are a number of residents within the existing City of Tupelo to which Tupelo has failed to extend sewer infrastructure. Fernandez, Tr. 5-26-2010, pp. 3025-26.

For example, the City of Tupelo has failed to extend sanitary sewer to between 25 and 35 homes on Green Tee Road in the existing City. G. Reed, Tr. 1948. To the extent that the soil conditions in the PAA are unsuitable for septic tank use, the soil conditions along Green Tee Road, for example, are likewise not suitable for septic tank use. The City of Tupelo however, has no plans to extend sewer to Green Tee Road, despite it having been annexed over 21 years ago, just as the City of Tupelo has no plans for sanitary sewer service in any of PAA 6. T-3. To argue that soil conditions are not conducive to septic tank usage is of no consequence if there are no plans to eliminate such uses.

Soil conditions aside, the proof offered by Tupelo failed to demonstrate that there were potential health hazards in the PAA. For example, Ms. Fernandez testified that, in the 16.1 square miles sought to be annexed, she had only identified four septic tanks which were not functioning properly. Fernandez, Tr. 3029. Further, the City failed to establish that there was an issue with regard to open dumping of garbage in the PAA. While Tupelo submitted photographs that purported to depict "illegal dumping," the conditions depicted in those photographs had admittedly been largely resolved by Lee County prior to trial. Fernandez, Tr. 2903-09, 3037, 3047, 3052. Furthermore, photographs submitted at trial by Lee County depicted that the very same situations exist within the City of Tupelo. LC-51; Fernandez, Tr. 3039-41, 3046, 3056-57. In fact, Chris Watson testified that the conditions he observed in the City of Tupelo were "as bad or worse" than the conditions that Ms. Fernandez photographed in the PAA. Watson, Tr. 3590.

It should be noted that the presence or absence of potential health hazards is of little significance in this case if the City of Tupelo intends to implement the policies and objectives set forth in its recently-adopted Comprehensive Plan. Watson, Tr. 3552-53. Specifically, the City's Comprehensive Plan calls for the utilization of the city's existing water and sewer infrastructure in order to "reduce the need for public expenditures in outlying areas that are not currently

served." T-9, pp. 19-20. As with other services and improvements proposed with regard to this annexation, the Tupelo City Council has not committed to providing the sanitary sewer improvements in the PAA which have been proposed by Tupelo's planners and department heads. Rather, the Tupelo City Council, through adoption of its Comprehensive Plan, has adopted a policy of utilization of existing infrastructure to reduce the need for public expenditures in outlying areas that are not currently served (i.e., the PAA). T-9, pp. 19-20.

Accordingly, considering the evidence submitted at trial on this *indicium*, there is nothing in the record which remotely approaches convincing proof of any potential health hazards in the area sought to be annexed which would have a bearing on the reasonableness of Tupelo's annexation. The Lee County Chancery Court's Opinion finding otherwise was in manifest error and is not supported by substantial and credible evidence.

**4. The City of Tupelo's Financial Ability.**

The substantial and credible evidence at trial established that Tupelo failed to contemplate the costs of services and capital improvements set forth in its Annexation Ordinance, or make any commitment whatsoever, through the binding financial commitments of a Services and Facilities Plan adopted by the Tupelo City Council (it should be noted in this regard that a municipality's financial ability means little when there is not commitment to spend any money).

Rather, Tupelo offered general statements of services and improvements to be provided to the residents of the PAA (in the Annexation Ordinance), with absolutely no idea or estimation of what many of those "promised" services and improvements will cost and how they will be funded. **The threshold inquiry established by this *indicium* is whether the annexing municipality has the financial ability to provide the promised services and improvements to the proposed annexation area. The City of Tupelo completely failed to answer this**

**question, for it is impossible for a court to determine whether the municipality has the financial ability to provide services and improvements to an area if the city does not know what those services and improvements cost.**

With regard to Tupelo's present financial condition, the evidence indicates that the current economic downturn is significantly impacting the City. For example, Tupelo is in its third consecutive year of substantial shortfalls of operating revenues compared to operating expenses. Specifically, Tupelo had to draw on its general fund balance $250,000 in Fiscal Year 2008, $2,100,000 in Fiscal Year 2009, and budgeted a draw of $3,800,000 in Fiscal Year 2010 in order to balance its budget. Mayor Reed, Tr. 2442-44. Overall, this three-year downward trend has depleted the City's general fund balance from $22.9 Million in 2008 down to a budgeted $16.7 Million by the end of Fiscal Year 2010. Hanna, Tr. 999. Lynn Norris testified that, if this trend were to continue, the City could exhaust its fund balance. Norris, Tr. 1124.

Mr. Norris further testified that there are three ways for the City to eliminate its present operating deficit: (1) borrow money; (2) raise taxes; and/or (3) cut services. Norris, Tr. 1130-32. Tupelo City Clerk Kim Hanna testified that if the City chose to raise taxes to address the City's current fiscal year operating budget deficit of $3.8 Million, it would be necessary for the City to raise taxes by 9.16 mills just to break even for Fiscal Year 2010. Hanna, Tr. 1027.

Further concern over the City of Tupelo's current fiscal condition relates to the City's practice of maintaining a fund balance of six (6) months of annual operating revenue. Hanna, Tr. 1000-01. Specifically, the evidence indicates that, excluding any consideration of the proposed annexation area, the City of Tupelo was projected to go below this level by the end of Fiscal Year 2010. *Id.* Put another way, the current economic downturn is resulting in the existing City of Tupelo violating its own internal fiscal policy. This downward spiral in the City's existing

financial condition does not take into consideration the massive deficit annexation proposal currently before this Court.

Sales tax revenue accounts for approximately 51% of the City of Tupelo's budget. Norris, Tr. 1116. Sales taxes revenues are, however, down significantly over prior years. Property taxes account for 24% of the City of Tupelo's budget. *Id.* Assessed valuations in the City of Tupelo, the values upon which property taxes are based, are likewise down. Norris, Tr. 1400. The trends do not depict that these conditions are improving.

Further, it is significant that Tupelo, which is projected to go below its policy of a general fund balance of six-months of its annual operating revenue by the end of this fiscal year (prior to paying a single cost associated with this deficit annexation), erred in calculating the overall impact that this proposed annexation will have upon its general fund over the first five years following annexation. Hanna, Tr. 969-73, 1001-02. Specifically, Tupelo initially projected that, over the first five years following annexation, the annexation would result in a **net deficit** of $2,878,473. T-80, Hanna, Tr. 970. However, Tupelo City Clerk Kim Hanna testified that Tupelo's projections were overstated and could "possibly" be misleading. Hanna, Tr. 972. More specifically, Ms. Hanna testified while the City had initially projected its proposed annexation to result in a net five-year **deficit** of $2,878,473, the evidence reflects that the **actual net five-year deficit** will be **$4,636,292.** Hanna, Tr. 972-79; LC-56; T-80. It is fiscally irresponsible for a City projected to violate its policy of maintaining a general fund balance of six-months of annual operating expenses prior to the expenditure of any funds associated with this annexation, to embark on an annexation which will result in a net five-year general fund deficit of $4,636,292.

As further evidence of the fiscal carelessness demonstrated by Tupelo with respect to this annexation, the City failed to consider costs of improvements that are being promised in its Annexation Ordinance. For example, Lynn Norris, Tupelo's Chief Financial Officer, testified

that his opinion that Tupelo has the financial ability to undertake and pay for this proposed annexation is based on the $6,117,000 of operating expenses in the first five years following annexation and the $18,576,449 of capital improvements proposed within the same period projected in the City's preliminary Services and Facilities Plan. Norris, Tr. 1447. However, Mr. Norris testified that he failed to consider other capital improvements which Tupelo promises to make in its Annexation Ordinance. For example, Mr. Norris testified that he had "no idea" of the projected cost of the following "promised" improvements to the PAA: (1) improving existing streets to accommodate traffic demands; (2) developing new streets as required by increased traffic demands; (3) making intersection improvements, improving water drainage, installing traffic control and safety devices; (4) developing and improving storm water drainage facilities; (5) constructing and equipping additional public safety facilities; and (6) acquiring, upgrading, and interconnecting certificated public water and sewer utility suppliers. T-2, Section 3; Norris, Tr. 1446-1458. *See, also*, Fernandez, Tr. 3060-61.

As set forth in Sections IV(E) and IV(F)(12) of this Brief, as well as in the *Brief of Appellants the Belden Fire Protection District, the Palmetto-Old Union Fire Protection District, and the Unity Fire Protection District* filed in this matter on July 20, 2011, Tupelo's proposed annexation will have a devastating financial impact upon the existing fire protection districts in the Proposed Annexation Areas. The evidence at trial established that the loss of tax revenues alone would amount to approximately an $80,000 annual reduction in revenues to the Fire Districts. However, the evidence established that Tupelo completely disregarded the cost of compensating the statutorily-created Lee County Fire Protection Districts for their revenue loss if annexed by the City of Tupelo and forced to stop levying taxies in support of the Districts. Fernandez, Tr. 3066-67, 3081. For the trial court to ignore this evidence was error.

The point of this *indicium* is not to determine whether a municipality has the financial ability to continue running its present city. Rather, the question that is sought to be answered is whether the municipality has the financial ability to undertake its proposed annexation and pay for services and improvements to the area. Tupelo failed to answer this question. As Ms. Fernandez testified, in order to know whether Tupelo has the financial ability to pay for its annexation, you have to know how much it is going to cost to provide the promised services and improvements in the proposed annexation area. Fernandez, Tr. 3060. Tupelo did not know this cost and thus cannot, and did not, meet its burden on this *indicium* at trial. Norris, Tr. 1446-1458.

Further, while Tupelo states that it could finance the $18.6 Million in proposed water and sewer improvements in the PAA without impacting water and sewer rates, the evidence was clear that Tupelo had performed no analysis to support this contention. Norris, Tr. 1139, 1141; Hanna, Tr. 888, 906. Moreover, because customers outside of the city limits pay a higher rate for water and sewer services, the annexation could result in the City actually receiving less water and sewer revenues, a factor which was not taken into consideration by Tupelo. Hanna, Tr. 909.

The evidence at trial indicated that Tupelo's proposed $18.6 Million in proposed water and sewer improvements to the largely rural and agricultural annexation area is not necessary and economically feasible. Brett Brooks of Cook Coggin Engineers, who designed and estimated the cost for Tupelo's extension of water and sewer into the PAA, testified that water and sewer services would cost approximately $12,608 per household to deliver to PAA 1; $17,125 per household to deliver to PAA 2 South; $26,857 per household to deliver to PAA 3; $33,846 per household to deliver to PAA 4; and $17,984 per household to deliver to PAA 5. Brooks, Tr. 4-14-2010, pp. 125-29. Mr. Brooks further testified that he had done no analysis of whether these amounts were economically feasible and that he could not testify that these improvements were economically feasible. *Id.*

With regard to the time required for Tupelo to recoup its sanitary sewer expenditures in each of the Proposed Annexation Areas in which sanitary sewer improvements are planned, Director of Tupelo Water and Light, Johnny Timmons, testified it would take the City of Tupelo 52 years to recoup its sanitary sewer investments in PAA 1; over 71 years to recoup its sanitary sewer investments in PAA 2 South; nearly 112 years to recoup its sanitary sewer investments in PAA 3; approximately 141 years to recoup its sanitary sewer investments in PAA 4; and almost 75 years to recoup its sanitary sewer investments in PAA 5. Timmons, Tr. 1853-60.

With a timeframe of up to 141 years to recoup its sanitary sewer investments in the PAA, it is significant to review Tupelo's prior policy with regard to the economic feasibility of extending water and sewer infrastructure into annexed areas. For example, Johnny Timmons testified that the City had determined following the 1989 annexation that an expenditure of $189,000 to extend sewer infrastructure to between 12 and 25 residences on Green Tee Road was not economically feasible (as an aside, these residences remain without sanitary sewer to this day, despite having been inside Tupelo for 21 years). Timmons, Tr. 1846-48, 1865-66. To this end, the City of Tupelo failed to demonstrate how the extension of sewer infrastructure into the PAA's, an investment which will take up to 141 years to recoup, is any different than the extension of sewer to those areas of the City which Tupelo has deemed not economically feasible to serve based upon the time it would take to recoup its costs. This is particularly significant here, as the City of Tupelo has not authorized (through the adoption of a Services and Facilities Plan by Tupelo's City Council) any of the proposed water and sewer infrastructure improvements "planned" for the PAA's and has made no determination as to the economic feasibility of the proposed improvements.

In reviewing Tupelo's Annexation, the threshold question is whether Tupelo is financially able to provide promised services and improvements to annexed citizens, as well as

whether Tupelo is willing to do so. With regard to Tupelo's willingness to spend funds necessary to meet the needs of its citizens, the evidence reflects the City is unwilling to do so. For example, the evidence established that, for over 15 years, the Mississippi State Rating Bureau has recommended that the City of Tupelo purchase a ladder truck for the Fire Department in order to adequately protect the Barnes Crossing Mall area. LC-60. However, the City of Tupelo is only now doing so. In this regard, Karen Fernandez testified:

> **Q.** My question is fire truck. It doesn't take 15 years to buy a fire truck if you have the willingness to do it, does it?
>
> **A.** No, sir.

Fernandez, Tr. 3160.

The City of Tupelo failed to demonstrate that it has the financial ability to pay for promised services and improvements in the Proposed Annexation Areas. Tupelo failed to consider the costs associated with significant capital expenditures outlined in its Annexation Ordinance which should have been considered. The proper time for the City of Tupelo to present evidence with regard to these significant costs and the City's ability to pay for them was at the trial of this matter. The City of Tupelo undisputedly does not know what these costs will be. Instead, Tupelo's municipal finance experts testified that regardless of what the end cost to the City may be, the City of Tupelo can afford it. Such unsubstantiated "expert" testimony should be afforded little, if any, credibility by this Court. Accordingly, without knowing the costs associated with delivering services and improvements to the PAA, the Chancellor was without substantial and credible evidence on which to approve the City's annexation, and was in manifest error in finding that this *indicium* favored annexation.

**5. <u>The Need for Zoning and Overall Planning in the Annexation Areas</u>.**

The City of Tupelo failed to demonstrate that there is a **<u>need</u>** for zoning and overall planning in the Proposed Annexation Areas, and the Chancellor's finding on this *indicium* was

not supported by substantial and credible evidence. Specifically, while Tupelo offered testimony with regard to certain codes and ordinances that Tupelo has which are not in place in the County, the City failed to show that such codes and ordinances are needed in the PAA. Similarly, the Chancellor's finding that this *indicium* favors annexation merely cites to the codes and ordinances in place in Tupelo, but completely fails to demonstrate how such codes and ordinances are "needed" in PAA, particularly in light of the fact that the evidence established that Tupelo anticipates that the PAA will remain agricultural and low density residential. T-9.

Tupelo City Planner Pat Falkner testified that the Future Land Use Map adopted by the Tupelo City Council as a part of its new Comprehensive Plan depicts both how the City of Tupelo would "want" the Proposed Annexation Areas to develop, and how Tupelo "expects" the Proposed Annexation Areas to develop. Falkner, Tr. 530. As clearly depicted on Tupelo's Future Land Use Map, Tupelo's goals and expectations for the Proposed Annexation Areas are for development to continue in the PAA just as it is today: as either agricultural or low density residential. T-9; LC-63; Watson, Tr. 3513-14. In other words, the City of Tupelo does not anticipate the PAA to develop at an urban level within the next 15 years (the planning horizon of Tupelo's 2025 Comprehensive Plan). *Id.*

As Tupelo anticipates the PAA to remain largely rural and agricultural, it is significant to note the testimony of Karen Fernandez with regard to the zoning and code enforcement needs of agricultural lands of the type making up the overwhelming majority of the PAA:

> **Q.** And, Ms. Fernandez, so the Court is clear, is the City of Tupelo's position in this case that the only way that all this agricultural land out in the annexation will remain agriculture is if Tupelo is allowed to annex it and keep it agriculture?
>
> **A.** That's not what I'm saying. I'm saying, though, with proper management and zoning codes, it can be managed. It doesn't have the ability – it doesn't have zoning now from the county.
>
> **Q.** What type of zoning does a soybean field need?

**A.** Agricultural.

**Q.** How many times does a building inspector go out to a soybean field?

**A.** I wouldn't know.

....

**Q.** All right. The long and short of it is soybean fields don't need city services, do they?

**A.** No, sir.

Fernandez, Tr. 3005-06.

As Ms. Fernandez's testimony makes clear, agricultural lands simply do not need services at a municipal level. The City of Tupelo failed to demonstrate otherwise. Rather, Tupelo claimed that such services would be needed to manage growth in the future. However, as discussed above, Tupelo's Future Land Use Map does not anticipate urban growth in the Proposed Annexation Areas in the next 15 years. Watson, Tr. 3513-14. There can be no need to manage growth where no growth is anticipated.

Similarly, while Tupelo offered photographs of conditions in the PAA which would be in violation of Tupelo's codes and ordinances if these areas were in the City, the evidence established that the conditions pictured in the PAA exist throughout the City of Tupelo. LC-25, 26, 51, 65; Fernandez, Tr. 3039-41, 3046, 3056-57. Further, Chris Watson testified that the conditions he observed in the City of Tupelo were "as bad or worse" than the conditions that Ms. Fernandez photographed in the PAA. Watson, Tr. 3590. In fact, the testimony indicated that a number of the conditions which Ms. Fernandez had photographed in the County had been remedied by Lee County and no longer existed. Fernandez, Tr. 2903-09, 3037, 3047, 3052. Accordingly, the City of Tupelo failed to demonstrate how application of its codes and ordinances to the PAA would change anything with regard to the photographed conditions.

The proof offered by Tupelo is analogous to that offered by the annexing municipality in *In re the Enlargement of the Corporate Limits of the City of Hattiesburg*, 588 So. 2d 814, 823-24 (Miss. 1991). In *City of Hattiesburg*, Hattiesburg argued that while Lamar County had subdivision regulations, the County did not have any type of comprehensive plan or zoning ordinance, nor had the County adopted a standard building code, a standard plumbing code, standard gas code, standard mechanical code, standard swimming pool code, standard electric code, national electric code, national fire prevention code, or animal control ordinance. *Id.* at 823. This Court, however, affirmed the Chancellor's finding that Hattiesburg "did not convincingly present a need for zoning and overall planning" in the PAA. The Chancellor's finding in *City of Hattiesburg* was based, in part, upon the trial testimony that "Lamar County was a rural area, not an urban area, and that the area was not likely to develop much more in the near future." *Id.*

Here, just as in *City of Hattiesburg*, Tupelo offered similar testimony with regard to the purported superior ordinances and building codes of the City as compared to Lee County. However, just as in *City of Hattiesburg*, Tupelo failed to show that these codes and ordinances are needed in the PAA. The Proposed Annexation Areas are largely rural agricultural and low density residential developments, and, according to Tupelo's Future Land Use Map, Tupelo's goals and expectations for the PAA for the next 15 years are that the proposed annexation areas will remain agricultural and low density residential.T-9; LC-63; Watson, Tr. 3513-14.

The City of Tupelo failed to carry its burden of showing that zoning and overall planning are <u>needed</u> in the PAA as required pursuant to this Court's decision in *City of Hattiesburg*. Accordingly, the Chancellor's finding otherwise was in manifest error and was not supported by substantial and credible evidence.

### 6. The Need for Municipal Services in the Annexation Areas.

Among the factors which this Court has previously considered in determining whether a proposed annexation area is in need of municipal services are: (1) Requests for water and sewage service; (2) the 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 the City to provide increased solid waste collection; (6) use of septic tanks in the proposed annexation area; and (7) population density. *See, e.g., City of Madison*, 650 So. 2d at 502; *City of Winona*, 879 So. 2d at 984. In its Findings of Fact and Conclusions of Law, the lower court found that this *indicium* favored annexation. However, the substantial and credible evidence and testimony at trial overwhelmingly demonstrated that Tupelo failed to carry its burden of proving reasonableness under this *indicium*, and the Chancellor was in error to find otherwise. The City of Tupelo failed to demonstrate that the Proposed Annexation Areas have developed to a level which would require "municipal services" or that the present services being provided by Lee County to the residents and property owners of the areas were not adequately meeting their needs.

The evidence at trial established that the Proposed Annexation Areas are largely vacant, agricultural land and sparsely populated, low density residential developments. Fernandez, Tr. 2920. Karen Fernandez testified that the population density of the Proposed Annexation Areas is approximately 262 persons per square mile, which is "low density" and "not very developed." *Id.* This Court has stated that sparsely populated areas have less need for immediate municipal services than densely populated areas. *City of Winona*, 879 So. 2d at 984. Here, where the evidence undisputedly establishes that the areas sought to be annexed are very low density, there is less of a need for municipal services.

Moreover, Tupelo failed to establish that the present services being provided by Lee County to the citizens sought to be annexed are inadequate. For example, while Tupelo offered

testimony regarding the differences between the Tupelo Police Department and the Lee County Sheriff's Department, it failed to show that the Sheriff's Department's services were not adequate. Rather, as the testimony established, the Lee County Sheriff's Department provides an excellent level of police protection services to the residents and property owners of the PAA. For example, Tupelo Police Chief Anthony Carleton testified that the quality of services provided by the Lee County Sherriff's Office were "equal to" those provided by the Tupelo Police Department. Chief Carleton, Tr. 2218-19, 2220-21. Furthermore, Tupelo's expert urban and regional planning witness, Karen Fernandez, testified that as a part of her annexation analysis, she had identified no law enforcement deficiencies in the PAA. Fernandez, Tr. 3086.

Similarly, with regard to the fire protection services presently being provided to the Proposed Annexation Areas by the Lee County Fire Protection Districts, the City of Tupelo described the differences between the Tupelo Fire Department and the Districts, but failed to demonstrate any inadequacies with respect to the present services of the Districts. Rather, the evidence established that the present level of fire protection provided in the Proposed Annexation Area by the Districts is adequately meeting the needs of the residents. Supervisor Morgan, Tr. 3278-79; Supervisor Smith, Tr. 3304-05.

Moreover, the evidence with regard to the provision of fire protection services indicates that, pursuant to *Miss. Code Ann.* § 19-5-175, the respective Lee County Fire Protection Districts will remain the "sole public corporations empowered" to provide fire protection services within their legally defined boundaries, irrespective of whether or not the City of Tupelo is allowed to annex portions of their territory. Accordingly, absent Tupelo approaching the Districts and negotiating an agreement for the Districts to cede their jurisdiction to provide fire protection in annexed areas to the City of Tupelo, the City of Tupelo will not have the legal right to provide fire protection services in the Proposed Annexation Areas.

Furthermore, the substantial and credible evidence established that the City of Tupelo's plan to provide fire protection in the PAA, assuming the City of Tupelo and the Fire Protection Districts reached an agreement, would actually result in a diminished level of services being provided to residents of the Proposed Annexation Areas. For example, with regard to the provision of fire protection in PAA 6, the City of Tupelo proposed to install no municipal water infrastructure, and accordingly, no fire hydrants, in the area. T-3. The evidence also established that the Belden and Birmingham Ridge Fire Protection Districts are providing fire protection to PAA 6 through the use of tanker trucks, equipment which the City of Tupelo does not have, nor any plans to acquire. Accordingly, in order to respond to fires in PAA 6, the City of Tupelo's plan, in the event there is a fire in PAA 6, would be to deplete all five (5) pumper trucks in the existing City in order for the City to have the equal amount of volume that the Fire Protection Districts have on one tanker. Chief Walker, Tr. 2153.

Further, the substantial and credible evidence established that the roads and streets of the Proposed Annexation Area are being maintained by Lee County at an excellent level, and are in no need of additional maintenance from the City of Tupelo. Thompson, Tr. 3325-26; Russell, Tr. 2315, 2361; Mayor Reed, Tr. 2467-68.

Regarding the use of septic tanks in the PAA, this is of no consequence as it relates to PAA 6, as Tupelo has no plan to deliver sewer (or water) infrastructure to that area. T-3. For example, Brett Brooks testified that there was no money budgeted for water and sewer improvements in PAA 6. Brooks, Tr. 1672-73. Similarly, both Tupelo Water and Sewer Superintendent Greg Reed and Tupelo Water & Light Director Johnny Timmons testified that Tupelo had no present commitments to serve water and sewer to PAA 6. *See, e.g.*, G. Reed, Tr. 1967; Timmons, Tr. 1798.

The City of Tupelo failed to identify any Parks and Recreational needs within the PAA, as the City of Tupelo proposes no new parks and recreational facilities in the five years following annexation. T-3. Specifically, Tupelo Parks and Recreation Director Don Lewis testified that the City is "not committed at this time" to constructing or acquiring a single park or recreational facility in the PAA within the next five (5) years. Lewis, Tr. 2290-92.

Ultimately, the evidence established that the Proposed Annexation Areas are overwhelmingly vacant and agricultural lands. T-65. To this end, Karen Fernandez testified as follows regarding the municipal service needs of vacant and agricultural lands:

> **Q.** Let's talk about the need for municipal services. What type of fire protection does a soybean field need?
>
> **A.** Probably minimal.
>
> **Q.** What type of law enforcement does a soybean field need?
>
> **A.** Probably minimal.
>
> ....
>
> **Q.** Okay. What type of garbage collection does a soybean field need?
>
> **A.** Well, a farmer does need garbage collection.
>
> **Q.** The type that a city provides?
>
> **A.** No, sir.
>
> **Q.** All right. **The long and short of it is soybean fields don't need city services, do they?**
>
> **A. No, sir.**

Fernandez, Tr. 3005-06.

In the 1997 *City of Jackson* case, this Court stated:

> The City failed to prove that the current services in the proposed annexation area are inadequate. The City of Jackson produced no Byram resident, other than Ted Somers, Jackson's Public Works Director, who was not satisfied with the current level of services currently provided in the proposed annexation area. Instead, all

> residents who testified expressed concern about a decrease in the level of services, especially police protection, if annexation occurred. Furthermore, it should be noted that the proposal for improvements and extension of services presented to the Court by the City was merely the product of department head and planner recommendations, and the City Council had not approved any of the improvements the witnesses for the City testified that the City intended to make in the proposed annexation area. Michael Bridge testified that normally such plans are presented to the governing authorities for approval prior to being presented to the court.

*City of Jackson*, 691 So. 2d at 983-84.

Similarly, in the case at hand, resident after resident of the PAA testified that they were satisfied with the current services provided by Lee County, and had no need for Tupelo services. *See, e.g.*, Kolarik, Tr. 1169; Beasley, Tr. 1366-67. In fact, of the 28 residents and property owners of the area sought to be annexed that testified in this matter, 27 testified that they were against annexation by Tupelo and were satisfied with the services provided by Lee County. Tr. 1157-1365. Further, as in *City of Jackson*, the proposal for improvements and extension of services presented to the lower court by Tupelo was merely the product of department head and planner recommendations, and the Tupelo City Council had not approved any of the improvements the witnesses for the City testified that Tupelo intended to make in the PAA.

The burden was on the City to demonstrate that the Proposed Annexation Areas are in need of municipal services. Ultimately, Tupelo failed to carry its burden, and the lower court's finding otherwise was manifest error and was not supported by substantial and credible evidence.

7. **Natural Barriers**.

The Chancellor found that this *indicium* favored Tupelo's annexation. However, Tupelo's expert witness Karen Fernandez testified that this is a "neutral *indicia*." Fernandez, Tr. 2814-15. Ms. Fernandez was the only witness who provided any testimony regarding this *indicium*. Accordingly, this factor neither weighs in favor of Tupelo's annexation, nor against Tupelo's annexation. Rather, this *indicium* is annexation neutral, and the Chancellor ignored the

undisputed testimony at trial that this *indicium* neither weighed for or against annexation by Tupelo. Accordingly, his finding on this *indicium* was in error.

**8. The City of Tupelo's Past Performance.**

The purpose of the past performance *indicium* is to review a municipality's record of keeping promises made in previous annexations as some indication of whether or not the municipality will fulfill the promises to the proposed annexation area. *Poole v. City of Pearl*, 908 So. 2d at 741 [It must again be noted that the City of Tupelo has made no promises or approved financial commitments to the residents and property owners in its proposed annexation areas, as a result of its failure, or refusal, to have a Services & Facilities Plan or other financial plan for services and improvements adopted by the Tupelo City Council].

The Chancellor found that this *indicium* favored annexation. However, the Chancellor's opinion fails to consider substantial and credible evidence submitted at the trial of this matter which established significant problems respecting the City's past performance, particularly as the City's past performance relates to its record of addressing significant public safety issues present in previously annexed territories.

At trial, the City of Tupelo offered the testimony of Karen Fernandez that the City had extended services such as garbage collection, zoning and planning, police protection, and fire protection to areas previously annexed by the City of Tupelo. Fernandez, Tr. 2813-14. However, evidence related to the extension of these types of services is the very type of evidence that this Court specifically rejected as supportive of this *indicium* recently in *City of Jackson*, stating:

> The chancellor found that Jackson had failed to present sufficient proof of the provision of services to previously annexed areas. We agree. This Court evaluates this indicium by looking at the municipality's performance in previous annexations and whether it has provided promised services to its residents. **Jackson failed to present evidence regarding the provision of services to previously annexed areas. Instead, Jackson presented evidence of municipal services it generally provides to all of its residents. The record supports the chancellor's finding that**

**Jackson failed to present sufficient evidence to support this indicium.** [internal citations omitted/emphasis added].

*City of Jackson*, 16 So. 3d at 689-90

Here, as in *City of Jackson*, Tupelo completely failed to provide the lower court with sufficient evidence that its record of past performance was acceptable. Rather the City offered very general testimony with regard to services it provides to all its citizens.

Furthermore, the substantial and credible evidence at trial demonstrated significant past performance concerns which the City of Tupelo failed to address. For example, specific deficiencies in Tupelo's provision of services and improvements to areas previously annexed, including Tupelo's past performance in addressing and meeting the fire protection needs of its citizens, were established at trial. Specifically, correspondence from the Mississippi State Rating Bureau dated August 20, 2002, and September 7, 2005, admitted as Exhibits LC-60 and 61, respectively, identify areas in which the City of Tupelo's timeliness in addressing the public safety needs of its citizens has been critically deficient. Watson, Tr. 3620-23.

As demonstrated by LC-60, the Mississippi State Rating Bureau has been advising Tupelo for at least eight (8) years that there is a water pressure issue in the Belden area annexed by the City of Tupelo some twenty-one (21) years ago. Watson Tr. 3623; LC-60. However, the testimony of Tupelo witnesses established that the City of Tupelo has done nothing about this problem, nor does Tupelo have any plans in place to address the issue. Chief Walker, Tr. 2156.

Similarly, testimony at trial established that, as part of Tupelo's 1989 annexation, the City of Tupelo committed to building a fire station in its proposed annexation area. Chief Walker, Tr. 2156. However, as Tupelo Fire Chief Walker testified, that commitment was not fulfilled for ten (10) years after annexation. Chief Walker, Tr. 2156-57.

Furthermore, the State Rating Bureau has been advising the City since October of 1995 that an additional ladder truck is necessary in order to provide adequate fire protection to the

Barnes Crossing Mall area. LC-60, 61; Watson, Tr. 3620-23. However, the testimony of Chief Walker indicates that the City is just now, some fifteen (15) years later, acting upon the recommendation of the State Rating Bureau. Chief Walker, Tr. 2167-68.

Additionally, the State Rating Bureau has been advising the City of Tupelo for eight (8) years that it needs to relocate Fire Station No. 2 in order to provide adequate fire protection coverage to its existing residents and property owners, a recommendation which the City has failed to follow, and does not have any plans to follow. LC-60, 61; Chief Walker, Tr. 2167-68. As the City of Tupelo's provision of fire protection services relates to its "past performance" and the reasonableness of this annexation, it is significant to note that Tupelo's failure to timely address the needs outlined by the State Rating Bureau resulted in the Rating Bureau notifying Tupelo by letter dated September 7, 2005, that its failure to address the recommendations of the Rating Bureau resulted in an increase in the City's "deficiency points" (i.e., the City of Tupelo's Class 5 Rating, while remaining a Class 5, had moved closer to a Class 6). LC-61.

Outside of the realm of fire protection services, other past performance deficiencies were established at trial regarding the City of Tupelo's willingness to address the needs of its present citizens, including those annexed in 1989. By way of example, in the Haven Acres area annexed by the City of Tupelo in 1989, there was a pervasive flooding issue, with some 20 to 30 homes flooding every time there was a major rainfall in Tupelo. Thomas, Tr. 2557-58. The City of Tupelo, however, failed to address the issue for seventeen (17) years. *Id.* at 2565-66.

With regard to the City of Tupelo's provision of sanitary sewer service to its existing citizens, the evidence established that the City of Tupelo has failed to provide sewer service to all of its existing citizens. For example, there are a number of residences along Green Tee Road to which the City of Tupelo has failed to extend sanitary sewer. G. Reed, Tr. 1948. Similarly, there are residents on Main Street to which the City of Tupelo has failed to extend sanitary

sewer. *Id.* at 1968. Moreover, the testimony reflects that the developer of Love's Truck Stop at the corner of McCullough Boulevard and Highway 78, in the area annexed by Tupelo in 1989, was forced to spend $60,000 to run sewer to the establishment as a result of Tupelo's failure to provide sewer in the area. *Id.* at 1956-58.

Ultimately, there were significant issues exposed at the trial of this matter which the Lee County Chancery Court failed to consider in determining that the City of Tupelo's past performance favored this indicium. A review of the record below demonstrates that the City of Tupelo failed to carry its burden of demonstrating that its record of past performance is sufficient to establish reasonableness under this *indicium*. Accordingly, the Lee County Chancery Court was in manifest error in finding that this *indicium* weighed in favor of annexation.

**9. <u>There Will Be an Adverse Impact (Economic and Otherwise) of Tupelo's Proposed Annexation Upon Those Who Live in or Own Property in the Areas Proposed For Annexation</u>.**

This Court has stated that, in determining whether a proposed annexation is reasonable, emphasis should be placed on whether residents in the annexed area will receive something of value in exchange for their tax dollars. *Hattiesburg*, 840 So. 2d at 83. Under this *indicium*, the reviewing 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." *In re the Extension of the Boundaries of the City of Jackson*, 551 So. 2d 861 (Miss. 1989).

The Chancellor found that this *indicium* favored annexation, as the annexed residents would receive the benefit of Tupelo's police department, as well as of Tupelo's fire department and fire rating. However, the Chancellor's finding disregards substantial and credible evidence demonstrating significant adverse impacts which will be incurred by residents and property owners annexed. Further, the Chancellor's opinion utterly disregards the statutory right of the

impacted fire protection districts to be "sole public corporations" empowered to provide fire protection services inside of their respective service areas regardless of annexation, a right this Court recently reaffirmed in *City of Horn Lake.*

Of utmost significance is Tupelo's failure to put on any proof of a specific financial commitment by the City's governing authorities (i.e., there was no plan for services and improvements adopted by the Tupelo City Council). Accordingly, the City completely failed to demonstrate that residents and property owners annexed would receive anything of value in return for their tax dollars. This failure alone prohibits a finding that Tupelo carried its burden in this matter.

Moreover, the evidence clearly established that Tupelo's proposed annexation would result in the double taxation of citizens of the PAA for fire protection services. Specifically, the respective Lee County Fire Protection Districts into which the City of Tupelo seeks to annex were created pursuant to *Miss. Code Ann.* § 19-5-151, *et. seq.* Accordingly, the Fire Protection Districts, pursuant to *Miss. Code Ann.* § 19-5-175, are the "sole public corporations" empowered to provide fire protection in their respective legally defined boundaries. Put another way, the Fire Protection Districts maintain the exclusive franchise to provide fire protection within their respective legal service boundaries. Further, in order to support the operation of the respective Districts, the Lee County Board of Supervisors levies a 4 mill tax against all real property situated within the defined boundaries of each District.

It is well settled that the Fire Protection Districts' statutory rights are not altered by a municipal annexation and, until such a point (if ever) that a resolution is sought by Tupelo with the Fire Protection Districts, the Districts will retain their exclusive right to provide fire protection in their legally defined boundaries, including any area which may be annexed by the City of Tupelo. As the Districts remain the sole public corporations empowered to provide fire

protection services in any area annexed, the 4 mill tax which is levied to support such services will remain in place. Nonetheless, the City's proposed annexation, if affirmed by this Court, would result in the levy of municipal taxes against the residents and property owners of the proposed annexation areas, a portion of which undisputedly goes to support Tupelo's Fire Department. Accordingly, the residents and property owners of the Proposed Annexation Areas, if annexed, would be subjected to paying both the 4 mill county fire levy, as well as Tupelo's millage for fire protection (a service which Tupelo is legally prohibited from providing within the boundaries of the respective Districts). Watson, Tr. 3564-65, 3574-77. This double-taxation would be a significant negative impact upon those who live in or own property in the areas sought to be annexed. Supervisor Morgan, Tr. 3277; Thompson, Tr. 3351-52; Watson, Tr. 3633.

With regard to the City's proposed water and sewer improvements in the PAA, the evidence reflects that the City is considering financing those improvements through the issuance of general obligation ("G.O.") debt. Hanna, Tr. 897-99. However, the City of Tupelo's plans to finance the proposed water and sewer improvements through G.O. debt will negatively impact both those citizens in the existing City who do not currently receive water or sewer service, and those annexed who do not receive water or sewer service as part of the City's proposed capital improvements. Specifically, Tupelo City Clerk and former interim Chief Financial Officer Kim Hanna testified that, by financing water and sewer improvements through G.O. debt, all residents and property owners annexed (as well as those of the existing City) will be required to pay their portion of the 4.66 mill debt service millage levied by Tupelo, regardless of whether they ever receive any water and sewer service. Hanna, Tr. 897-902.

Accordingly, Tupelo's plans to finance its water and sewer proposal through General Obligation debt would tax residents throughout Tupelo's PAA, including PAA 6 where the City has no water or sewer infrastructure planned, for a service which the City of Tupelo has no plans

to provide them. Moreover, current Tupelo CFO Lynn Norris testified that this is the financing option he would recommend to the Tupelo City Council. Norris, Tr. 1140-42. This is a significant negative impact on those who live in the PAA and who will not be receiving sanitary sewer or water improvements from the City of Tupelo, yet will be required to pay for such infrastructure through their annual property taxes.

Ultimately, the substantial and credible evidence established that there will be significant adverse impacts to the residents and property owners of the Proposed Annexation Areas if Tupelo's annexation is approved, and the lower court failed to consider the weight of this evidence. Tupelo failed to carry its burden of proof under this *indicium*, and the lower court was in error in finding that this *indicium* weighed in favor of the City's proposed annexation.

**10. <u>The Impact of the City of Tupelo's Annexation Upon the Voting Strength of Protected Minority Groups</u>.**

This Court has held that this *indicium* should be given considerable weight in those cases in which it is raised by a party with standing. *See, e.g., City of Columbus*, 644 So. 2d at 1180. In the proceedings below, numerous African-American residents of the area sought to be annexed, as well as an African-American member of the Lee County Board of Supervisors, Supervisor Ivy, expressed concerns regarding the dilution of minority voting strength by the City's annexation. *See, e.g.,* Wheeler, Tr. 1193; Goree, Tr. 1238-39; Deposition of Tommie Lee Ivy, pp. 21-22, January 6, 2009 (Exhibit T-131). Specifically, these African-American Objectors noted their concern that the City of Tupelo's proposed annexation would have an adverse impact on the voting strength of minorities in the City of Tupelo. Accordingly, the lower court was required to give considerable weight to this *indicium.*

It must be remembered that the burden of establishing that the City of Tupelo's proposed annexation is reasonable rests squarely on the shoulders of Tupelo. *See, e.g., Mississippi Code Ann.* § 21-1-33 (providing, in part: "In any proceeding under this section the burden shall be

upon the municipal authorities to show that the proposed enlargement or contraction is reasonable."); *City of Laurel*, 922 So. 2d at 796 (holding "[p]arties seeking annexation have the burden of proving to the Chancellor the reasonableness of their cause. Failure to do so must necessarily defeat their endeavor.") In order for Tupelo to carry its burden of proving reasonableness, it must demonstrate that, considering the twelve *indicia* of reasonableness, its proposed annexation is reasonable under the totality of the circumstances. *City of Winona*, 879 So. 2d at 972-73. As part of meeting its burden of proof, Tupelo must establish that its proposed annexation will not have an adverse or impermissible impact upon the voting strength of protected minority groups. This is increasingly true here where minority objectors appeared and voiced concerns over the dilution of minority voting strength as a direct result of Tupelo's proposed annexation. *See, e.g., City of Columbus*, 644 So. 2d at 1180. The City of Tupelo, however, failed to carry its burden under this *indicium*.

In support of its position that its proposed annexation would not negatively impact the voting strength of protected minority groups, the City of Tupelo placed into evidence Exhibit T-92, which purported to show that the voting strength of African-Americans would be slightly diluted as a result of Tupelo's annexation. However, evidence and testimony at trial indicates that the City of Tupelo failed to accurately project the impact its proposed annexation would have upon the voting strength of protected minority groups.

For example, Karen Fernandez, the only witness testifying on behalf of Tupelo on this *indicium*, testified that T-92 uses U.S. Census Bureau data from the year 2000 as its baseline. Fernandez, Tr. 3128. Specifically, T-92 utilizes the racial makeup of the City in the year 2000 as the grounds for projecting the present racial makeup of Tupelo in 2008. However, the City's own evidence revealed that this projection is inherently flawed, as the demographic makeup of Tupelo has undergone significant changes since the year 2000. T-100. For instance, according to

U.S. Census Bureau estimates for the year 2007, there has been a 62% increase in the total African-American population within Tupelo between 2000 and 2007, with a decrease in the total white population of 3% over the same period. T-100. The City of Tupelo's contention that its proposed annexation will not adversely impact the voting strength of protected minority groups simply does not account for these significant demographic changes within the existing City.

Further, the City's contention that its proposed annexation will not adversely impact the voting strength of protected minority groups does not account for any demographic changes that may have occurred within the Proposed Annexation Areas between the years 2000 and 2007. In fact, Karen Fernandez testified that she "couldn't give a definitive answer" as to whether the Proposed Annexation Areas have undergone similar demographic changes as the City between 2000 and 2007. Fernandez, Tr. 3141.

As with all other *indicia*, the burden of proof was upon Tupelo to show that its proposed annexation would not negatively impact the voting strength of protected minority groups. Here, where the City's own planning expert does not know the current demographic makeup of the area sought to be annexed, Tupelo did not carry its burden. For the Chancellor to find otherwise was in manifest error and not supported by substantial and credible evidence.

**11. Tupelo Failed to Demonstrate How Property Owners and Other Inhabitants of the Areas Sought to be Annexed Have in the Past, and for the Foreseeable Future Unless Annexed Will, Because of Their Reasonable Proximity to the Corporate Limits of the Municipality, Enjoy Benefits of Proximity to the Municipality Without Paying Their Fair Share of the Taxes.**

The Chancellor's finding on this *indicium* reflects a misapplication of this Court's prior interpretation of the "fair share" *indicium* and its impact on the reasonableness or unreasonableness of a municipal annexation. More specifically, on this *indicium* the Chancellor found "that a number of benefits will accrue to residents in the PAAs as a result of annexation." However, in *City of Jackson*, this Court held that the proper analysis under this *indicium* is to

determine whether property owners and other inhabitants of the PAA enjoy the benefits of the municipality because of their reasonable proximity to its corporate limits "**without paying their share of taxes**" that support those benefits. *In re the Enlargement and Extension of the Municipal Boundaries of the City of Jackson*, 912 So. 2d 961, 970-71 (Miss. 2005). With regard to what is, and what is not, an individual's "fair share" of taxes, this Court has stated:

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

*City of Columbus*, 644 So. 2d at 1180.

In support of this *indicium*, Tupelo offered the testimony of its expert witness, Karen Fernandez, who testified, in very general terms, that residents of the PAA benefit from access to Tupelo's shopping mall, parks, and libraries, as well as through the use of Tupelo's roads. Tr. 2833-35. However, the proof offered by Tupelo in this matter is the very proof which this Court rejected as supporting a finding of reasonableness under this *indicium* in *City of Jackson*. Specifically, in *City of Jackson*, this Court held:

> The City of Jackson offered generalized evidence to suggest that property owners in the PAA enjoy the benefits of Jackson without having to pay taxes for those benefits. Although one might argue that the proximity of the PAA to Jackson provides residents with medical facilities, museums, parks, etc., this argument is without merit. No specific proof was forthcoming and the failure to develop the record to support this issue lies with Jackson. This Court will not go outside the record to assist Jackson where its proof is lacking.

*City of Jackson*, 912 So. 2d at 971.

Just as was the case before this Court in *City of Jackson*, Tupelo failed to provide the lower court with any specific proof as to any benefit that residents and property owners of the PAA enjoy as a result of their proximity to Tupelo without paying their fair share of the taxes for those benefits. Notably, while Ms. Fernandez offered generalized benefits resulting from proximity to Tupelo, not once did she testify that the residents were not paying their fair share of

taxes which support those benefits. Residents of the PAA who utilize Tupelo's shopping mall pay sales taxes. Residents of the PAA participating in Tupelo's recreational leagues pay a higher fee than Tupelo citizens. Lewis, Tr. 2278-79. Residents of the PAA who purchase gas in Tupelo pay fuel taxes. Fairness requires no more. *City of Columbus*, 644 So. 2d at 1180.

This Court cannot go outside the record to develop support for this *indicium* where the proof offered by the City of Tupelo is lacking. As Tupelo offered only generalized evidence with regard to this *indicium*, failing to provide any specific proof that the residents of the PAA benefit from Tupelo services without paying their fair share of the taxes which support such services, the City failed to carry its burden. The Chancellor's finding otherwise was not supported by substantial and credible evidence and was in manifest error.

**12. Other Factors Suggest that Tupelo's Annexation is Not Reasonable.**

The Chancellor's finding on this *indicium* is perhaps the most glaringly obvious example of the trial court's complete disregard for the substantial and credible evidence submitted establishing that the City of Tupelo's annexation was not reasonable. Despite very significant issues being raised under this *indicium*, including (1) Tupelo's configuration of the PAA in a manner which splits properties and roadways (complicating the delivery of municipal services); (2) Tupelo's recently-adopted Comprehensive Plan and its direct conflict with the City's current annexation efforts; and (3) the lose-lose scenario and legal dilemma created by Tupelo's failure to resolve the conflict with the Fire Protection Districts, the Chancellor's finding on this *indicium* consisted of two words: **"Not applicable."**

As discussed below, the Chancellor's finding on this *indicium* was manifest error and completely disregarded substantial and credible evidence admitted at trial. There were other factors present in this case which suggested that Tupelo's proposed annexation was not reasonable, and the Chancellor erred in failing to consider these factors. The Chancellor ruled

that this indicium was "Not applicable." R. 1352. The substantial and credible evidence at trial established that not only is this *indicium* applicable, it is extremely important. For the lower court to determine that this *indicium* is "not applicable" is not only shocking, but it also defies the substantial and credible evidence at trial.

***a. The Configuration of Tupelo's Proposed Annexation Areas Reflects Poor Urban Planning.***

The evidence at trial established that, in drawing the boundaries for its Proposed Annexation Areas, the City of Tupelo overwhelmingly drew the boundaries along section lines. Scherff, Tr. 292. However, drawing boundaries to follow section lines fails to give consideration to features on the ground such as existing property lines, existing subdivisions, residential and commercial structures, lots, churches, and transportation corridors.

For example, there are over a dozen instances of where the boundary of Tupelo's proposed annexation area is drawn along a section line and an existing road. Scherff, Tr. 293-94; LC-27. However, the undisputed testimony at trial established that the roadways do not follow the section lines. Scherff, Tr. 293. Rather, the existing roadways weave in-and-out of the section lines. *Id.* at 293-94. By configuring boundaries in such a manner, significant confusion will result in the provision of municipal services such as law enforcement, garbage collection, code enforcement, and the collection of property taxes. An example of the problem created by Tupelo's poorly planned boundary configuration is that of a Tupelo patrol officer attempting to issue a speeding ticket along one of the many roads which weave in-and-out of Tupelo's proposed boundaries, or any law enforcement or emergency response on a roadway which is split by Tupelo's proposed boundary lines.

Tupelo Police Chief Anthony Carleton testified that the use of radar traffic enforcement equipment is not allowed in the unincorporated portions of Lee County, and that the City of Tupelo has no jurisdiction to issue speeding or other traffic violation tickets outside its city

limits. Chief Carleton, Tr. 2231-33. To this end, Chief Carleton testified that it is very important for police officers to know exactly where the city limit lines are. *Id.* However, without the use of land surveying equipment, there is no way of knowing exactly what parts of the road are inside the City and what parts are outside the City. Scherff, Tr. 294-95, 303. Without a way of ascertaining what portions of a roadway are situated inside or outside of the city limits, it will be impossible for a Tupelo Police Officer to know whether or not he or she has jurisdiction to respond to a call or issue a traffic violation ticket. *Id.* at 314.

Another significant problem created by Tupelo's almost exclusive use of section lines as the boundaries of its Proposed Annexation Areas is the splitting of contiguous tracts of land. For example, the City of Tupelo's proposed boundary line splits the Autumn Hills Subdivision, putting some lots outside the City, some lots inside the City, and other lots partly inside and partly outside of the City. Scherff, Tr. 306-08; LC-8. The same situation exists with regard to the Cedar Grove Pentecostal Church, which is split by Tupelo's proposed boundary and, as a result, is partly inside the City and partly outside the City. *Id.* at 308-09; LC-12. To this end, Tupelo City Planner Pat Falkner testified that the splitting of properties such as Autumn Hills Subdivision is not good planning. Falkner, Tr. 557.

In *City of Greenville v. Farmers, Inc.*, this Court stated:

> Since drawing a line through the middle of the plants (for instance) would **violate the principle opposing half a lot in the City, half outside, and in addition, create taxing and record keeping havoc, such an approach does not seem reasonable or equitable**.

*City of Greenville v. Farmers, Inc.*, 513 So. 2d 932, 393 (Miss. 1987).

Further, in *City of Jackson*, this Court, reversing a chancellor's decision finding reasonable an annexation proposed by Jackson, stated:

> Worse yet, the opinion splits contiguous tracts of land. One tract, the Cole Road area, would require Ridgeland to travel through the [sic] Jackson in order to

> provide basic services to that area. This very question has already been addressed by this Court, and we did not allow such a split to occur.
>
> By failing to consider all twelve indicia, **as well as splitting contiguous tracts of land**, the chancellor was manifestly wrong in revising her original opinion.

*City of Jackson*, 912 So. 2d at 972.

Tupelo's configuration of its PAA boundaries, which were drawn in such a manner that contiguous properties are split and uncertainty in the delivery of public safety services and other basic municipal services is created, is a significant factor weighing against the reasonableness of Tupelo's proposed annexation, and the Chancellor's failure to consider this significant "other factor" was in manifest error.

***b. The City of Tupelo's Proposed Annexation Is Contrary to Its Recently Adopted Comprehensive Plan.***

As discussed above with respect to the need to expand and path of growth *indicia*, Tupelo's annexation efforts are in direct conflict with its recently adopted Comprehensive Plan. "Tupelo 2025," the comprehensive plan adopted in December of 2008 by the Tupelo City Council, is built upon a "growth pattern that **focus[es] development within the existing city boundaries**" and utilizes a "filling in of Tupelo that **use[s] existing vacant land within the city in a more dense development pattern**." T-9.

*Miss. Code Ann.* § 17-1-1(c) defines a comprehensive plan as a "**statement of public policy for the physical development of the entire municipality.**" Accordingly the stated public policy of the City of Tupelo is to develop internally, not externally. This is a significant factor which weighs against Tupelo's annexation efforts, as Tupelo's annexation efforts directly conflict with its stated public policy to focus development within the existing city boundaries, and the Chancellor erred in failing to give this factor due consideration.

For example, a primary goal of Tupelo's Comprehensive Plan is to increase the density of the existing City. T-9. As presently configured, the City of Tupelo is a "lower density" city ,

with a population density of approximately 670 persons per square mile. Fernandez, Tr. 2884-85. However, because of the sparsely populated nature of the PAA, the testimony established that if the City of Tupelo's annexation were approved, the City's population density would be **lowered** to an estimated 604 persons per square mile. Fernandez, Tr. 2919-21. This is in clear contrast to the stated policy of the City of Tupelo to increase density within the existing city.

Further, while Tupelo's Comprehensive Plan does contemplate a "future annexation," the annexation is not needed now to accommodate growth and development within the City. Watson, Tr. 3548-50. Rather, the City should develop inwardly as the Comprehensive Plan recommends and, as it reaches build-out on those infill parcels that the Plan recommends developing, it should then consider looking outside of its existing boundaries for expansion. *Id.* However, with an 80 year supply of vacant land, declining residential and commercial building permit issuance, economic uncertainty, undisputed declining municipal revenues and fund balances for the existing City, and a Comprehensive Plan which dictates that the City focus its efforts on developing internally, the City of Tupelo's annexation is premature. *Id.*

***c. The City of Tupelo Has Failed to Seek Resolution of the Conflict with the Lee County Fire Protection Districts Regarding the Provision of Fire Protection Services to the PAA.***

Another significant "other factor" disregarded by the Chancellor is that of the Lee County Fire Protection Districts. Specifically, as discussed above, the various Lee County Fire Protection Districts impacted by Tupelo's proposed annexation were created pursuant to *Miss. Code Ann.* § 19-5-151, *et seq.*, and are the sole public corporations empowered to provide fire protection services within their defined legal boundaries. *Miss. Code Ann.* § 19-5-175. This statutory right is unaffected by a municipal annexation and, as such, the City of Tupelo will not have the legal right to provide fire protection in any territory annexed unless and until such time as the City of Tupelo reaches an agreement with the Fire Protection Districts for the ceding of

jurisdiction to provide fire protection services in territories annexed. *See, City of Horn Lake*, 57 So. 3d at 1266-67. 1270-71. Tupelo, however, failed to resolve the conflict with the Fire Protection Districts, which is fundamentally inequitable not only to the impacted Districts, but also to the residents and property owners annexed.

For example, the City's annexation, if affirmed, would subject residents annexed to double taxation. Specifically, the evidence established that the Lee County Board of Supervisors levies a 4 mill tax against all property situated within the legal boundaries of each of the Lee County Fire Protection Districts in support of such district. Thompson, Tr. 3350-51. The testimony at trial established that, as the Districts would remain the sole public corporations empowered to provide fire protection services within their defined boundaries following any annexation of territory by Tupelo, the 4 mill tax levied in support of such Districts would remain in effect following annexation. *Id.*

The evidence further established that, if Tupelo's annexation were approved, Tupelo would levy its general municipal taxes against the citizens annexed. Thompson, Tr. 3348; Watson, Tr. 3564-65. It is undisputed that a portion of the City's general municipal tax levy supports Tupelo fire services. *Id.* Accordingly, any citizen annexed would be subject to paying taxes for both Tupelo fire protection services and County fire protection services. Thompson, Tr. 3348, 3351-52; Watson, Tr. 3564-65. This unnecessary and unreasonable double taxation situation was created exclusively by Tupelo's failure to seek resolution with the Lee County Fire Protection Districts. Watson, Tr. 3564.

Moreover, the evidence established that Tupelo's annexation, if approved, would not only subject residents and property owners annexed to double-taxation, but would likewise place a significant strain on those portions of the Districts not annexed if the County was forced to stop levying the 4 mill tax that supports the Districts. For example, within the Unity Fire Protection

District, Tupelo seeks to annex 40% of the District's total tax base. Supervisor Morgan, Tr. 3276-77. Unity, however, just built a new fire station, bought a new fire truck, and bought a new rescue truck. If the Fire District loses over 40% of its tax base as a result of Tupelo's proposed annexation, Unity will be under a significant financial burden. *Id.*

Similarly, within the Belden Fire Protection District, if the County was forced to stop levying the 4 mill tax in support of the District, the District would incur an annual revenue loss of $36,547.56. Thompson, Tr. 3351. This amounts to a loss of 42.17% of the Belden Fire Protection District's tax base. *Id.* at 3354. However, Tupelo is not seeking to annex 42.17% of the Belden Fire Protection District's land area. *Id.* Rather, the Belden Fire Protection District, as well as the other six (6) Lee County Fire Districts being impacted by Tupelo's proposed annexation, will have a significant amount of service area left outside of Tupelo's PAA for which it will be responsible for providing fire protection. Watson, Tr. 3581-84. Tupelo's "plan" to merely take over fire protection within these Districts' territories without compensating them for their lost tax revenue will result in a devastating financial impact to the Districts' abilities to provide fire protection in those portions of their defined service areas not annexed by Tupelo. *Id.*

Further, the substantial and credible evidence established significant concerns with regard to the willingness of Tupelo to address this conflict with the Fire Protection Districts if it is not resolved prior to Tupelo's annexation of territory. For example, Tupelo Fire Chief Walker testified that "as the chief fire officer [of the City of Tupelo], I have no plans to [acquire the right of first response in the proposed annexation area]." Chief Walker, Tr. 2140-41. Rather, as Chris Watson testified, Tupelo is very clearly trying to shift the burden associated with its annexation into the Lee County Fire Protection Districts over to the County. Watson, Tr. 3583-84.

Simply put, Tupelo created these issues by seeking to annex into statutorily-created fire protection districts, yet failed to provide the lower court with any evidence as to how it plans to

resolve the issues. Tupelo's failure to do so is an "other factor" which weighs heavily against the reasonableness of its proposed annexation, and should have been considered by the Chancellor.

Ultimately, Tupelo failed to carry its burden of demonstrating that its proposed annexation is reasonable, considering the twelve *indicia* of reasonableness under the totality of the circumstances. Accordingly, the lower court's approval, as modified, of the City's proposed annexation was manifest error and was not supported by substantial and credible evidence.

### G. It Was Error For the Lee County Chancery Court to Tax the Cost of Tupelo's Publication of Statutorily-Mandated Notice to the Public Against Lee County, Mississippi.

In its Final Judgment, the Lee County Chancery Court assessed forty percent (40%) of the expense of Tupelo's statutorily-required publication of notice of the hearing on the City's petition to Lee County, Mississippi. *Mississippi Code Ann.* §§ 21-1-31 and 21-1-15 require that the City of Tupelo publish notice of the hearing on its annexation petition in a newspaper having general circulation in the area sought to be annexed. The expense associated with such publication is required irrespective of whether a single person objects to the annexation, and is an annexation-related cost borne by the annexing municipality, not a court cost.

*Mississippi Code Ann.* § 21-1-35 provides the chancellor certain discretion, within the bounds of the *Mississippi Rules of Civil Procedure*, **to divide certain "costs" if objection is made to a proposed annexation** (although not specifically defining what is encompassed in "costs"). *Mississippi Rule of Civil Procedure* 54, which governs the award of "costs" under the *Rules*, as well as the comment thereto, provides guidance as to what may be encompassed within the meaning of "costs." Specifically, the comment to *Rule* 54(d) provides that "although costs has an everyday meaning synonymous with expenses, taxable costs under *Rule* 54(d) is more limited and represents those official expenses, such as court fees, that a court will assess against a litigant." The expense associated with the publication of notice of a hearing on an annexation

petition is not within this definition of "costs" and, as such, the Lee County Chancery Court was in error in taxing Lee County with forty percent (40%) of this $2,491.32 expense.

Again, the cost of publication of statutorily-required notice to the public is incurred by the annexing municipality regardless of whether there is any "objection" made to the proposed annexation. That this is a cost that must be incurred by and paid for by the party seeking to annex . . . not by the party or parties who dare to object. The Chancellor's allocation of a portion of the cost of publication to Objector Lee County was manifest error and must be reversed.

## VII. CONCLUSION

As demonstrated above, the decision of the Lee County Chancery Court must be reversed on the fundamental basis that the lower court lacked subject matter jurisdiction over Tupelo's Annexation Petition. Specifically, the lower court's recessing of the initial return hearing in this matter indefinitely, without setting any date or time certain for future proceedings, denied all residents and property owners sought to be annexed of their fundamental, statutory right to appear at trial and present their objections to Tupelo's annexation, and rendered the lower court without jurisdiction.

In addition, the City of Tupelo's failure to demonstrate, through plans or otherwise, that residents and property owners annexed will receive something of value in return for their tax dollars necessitates this Court's reversal of the lower court's decision. This Court has specifically held that annexing municipalities must make such a showing in order to carry the burden of proving that a proposed annexation is reasonable, and Tupelo's failure to do so, through the adoption of a Services and Facilities Plan or other plan setting forth financial commitments for the provision of services and improvements to the annexed areas which is adopted or approved by the governing authorities, requires that that its annexation be found unreasonable. *See, e.g., City of Columbus*, 644 So. 2d at 1172.

Furthermore, the Lee County Chancery Court abused its discretion in both its failure to allow a *Daubert* voir dire examination of Tupelo's expert witness, Karen Fernandez, as well as in its failure to allow cross-examination of Ms. Fernandez on the issue of the dilution of minority voting strength as a result of Tupelo's proposed annexation. Both of these evidentiary rulings by the Lee County Chancery Court were an abuse of the trial court's discretion, and both require that this Court reverse the lower court's decision.

This Court should likewise reverse the decision of the Lee County Chancery Court which found that Tupelo's proposed annexation was reasonable, as modified, as the lower court's decision was not supported by substantial and credible evidence, and was manifest error. The City of Tupelo had the burden of proving that its proposed annexation was reasonable, yet the City completely failed to do so. Tupelo's failure to carry its burden in this matter requires that this Court reverse the decision of the Lee County Chancery Court, and render an opinion finding that the City's proposed annexation is unreasonable.

Finally, this Court must reverse the decision of the Lee County Chancery Court taxing a large percentage of the expense associated with Tupelo's publication of statutorily-required notice to the public against Lee County. This is an expense which must be borne by the annexing municipality, and it was error for the Lee County Chancery Court to find otherwise.

In conclusion, for the reasons stated herein, Lee County respectfully requests that this Court reverse the decision of the Lee County Chancery Court which found reasonable, as modified, the City of Tupelo's proposed annexation, and render a decision finding the City's proposed annexation unreasonable.

**RESPECTFULLY SUBMITTED,** this the 22nd day of August, 2011.

**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 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 22nd day of August, 2011.

J. Chadwick Mask

## CERTIFICATE OF SERVICE ON TRIAL JUDGE

I, J. Chadwick Mask, the undersigned counsel for Lee County, Mississippi, do hereby certify that this day a true and correct copy of the foregoing pleading has been delivered *via* United States Mail, postage prepaid to the trial judge in this matter at the following address:

The Honorable Edward C. Prisock
201 S. Jones Avenue
Louisville, Mississippi 39339

This, the 22nd day of August, 2011.

J. Chadwick Mask