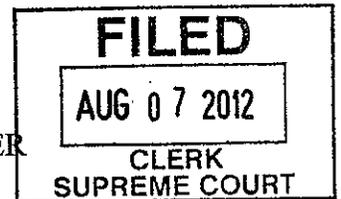


COMMONWEALTH OF KENTUCKY  
BEFORE KENTUCKY SUPREME COURT  
ON GRANT OF DISCRETIONARY REVIEW BY ORDER  
ENTERED APRIL 18, 2012  
SUPREME COURT ACTION NO.: 2011-SC-000468-D  
COURT OF APPEALS ACTION NO.: 2010-CA-000941  
MARION CIRCUIT COURT  
CIVIL ACTION NO.: 06-CI-00070



CITY OF LEBANON, KENTUCKY

APPELLANT

v.

BRIEF FOR APPELLEES

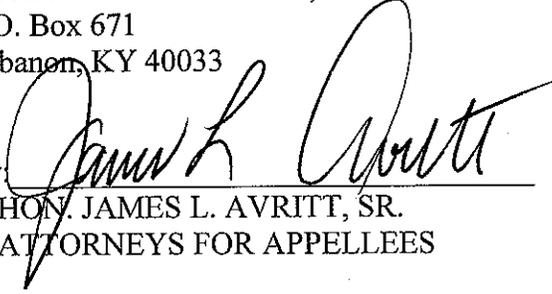
ELINOR B. GOODIN, Trustee of and on behalf  
of Elinor B. Goodin Revocable Trust, et. al.

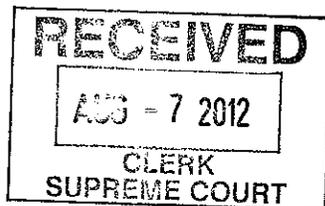
APPELLEES

The undersigned hereby certify that copies of this brief were served upon the following named individuals by U.S. Postal Service First Class Mail postage prepaid on August 3, 2012: Judge Glenn E. Acree, Kentucky Court of Appeals, Tate Building, 125 Lisle Industrial Avenue, Suite 140, Lexington, KY 40511-2058; Judge Sara Walter Combs, Kentucky Court of Appeals, 323 E. College Avenue, P.O. Box 709, Stanton, KY 40380-0709; Chief Judge Jeff S. Taylor, Kentucky Court of Appeals, 401 Frederica Street, Suite A-102, Owensboro, KY 42302; Judge Allan Ray Bertram, Circuit Judge, Justice Center, Suite 301, 300 East Main Street, Campbellsville, KY 42718; Hon. R. Temple Juett and Hon. Laura Milam Ross, 100 East Vine Street, Suite 800, Lexington, KY 40507 as counsel for Amicus Curiae, Kentucky League of Cities, Hon. Kandace D. Engle-Gray, P.O. Box 807, Lebanon, KY 40033, and Hon. David A. Pike and Hon. F. Keith Brown, Pike Legal Group, PLLC, P.O. Box 369, Shepherdsville, KY 40165, Counsel for Appellants. The Record on Appeal was not withdrawn by the attorneys for Appellees.

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STATEMENT CONCERNING ORAL ARGUMENT

Since the City does not contest the facts found by the Trial Court, and the legal issues thereby raised have been thoroughly briefed by the parties, Appellees do not believe that oral argument will assist the Court in deciding the issues presented.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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## INTRODUCTION

Unfortunately, Appellant's Statement of the Case does not include any of the relevant facts relied on by the Trial Court and the Court of Appeals. A counterstatement of the case is therefore necessary to provide the facts Appellees consider essential to a fair and adequate review of this case.

## COUNTERSTATEMENT OF THE CASE

The facts of this case are clear, simple, and undisputed. On March 2, 2006 Appellant, City of Lebanon, hereinafter referred to as "the City", annexed a tract of land containing 415.45 acres<sup>1</sup>. It lay within an area that was generally bounded on the north by US Highway 68, on the east by the existing city limits<sup>2</sup>, on the south by KY Highway 208, and on the west by the Southwest Industrial Subdivision and the farm of Paul Hilpp. Both the subdivision and farm were included in the annexation (Crenshaw dep., pg. 16, lines 24-25, pg. 17, lines 1-8, and Thomas dep. pg. 22, lines 6-19).

The annexation was initiated after Hilpp approached the City's mayor, Gary D. Crenshaw, and requested that the City annex that part of his farm that he was negotiating

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<sup>1</sup> The City's Annexation Map was filed as "Exhibit #2" to the deposition of Gary D. Crenshaw, the City's mayor. A copy of this map is included in the Appendix of this brief at tab #1 and the annexed area is shaded thereon in yellow.

<sup>2</sup> The former city limits, adjacent to the annexed territory, is depicted by the cross hatching shown on the City's Annexation Map, a copy of which appears in the Appendix of this brief at tab #1. U.S. 68 and KY 208 are also shown thereon.

to sell to Wal-mart for a new supercenter store. (Thomas dep., pg. 5, lines 10-25, pg. 6, lines 1-7).

The City initially considered annexing a narrow corridor, approximately 200 feet from and parallel to Highway 68, that lay between the Hilpp property and the former city limits, but then opted to annex a larger tract in order to also provide utilities to Southwest Industrial Subdivision (Thomas dep., pg. 6, lines 16-25, and pg. 7, lines 1-10).

The annexed properties were owned by the following 13 individuals/entities (See "Parcel Table" of the City's Annexation Map, a copy of which is included in the Appendix of this brief at tab #1):

- |      |                         |  |
|------|-------------------------|--|
| (1)  | P1, P1A, P1B, and P1C   | Elinor Goodin Revocable Trust                    |
| (2)  | P2 and P2A              | Rodney Ray & Kathy Noe Mattingly                 |
| (3)  | P3 and P3A              | Samuel E. Lee, III & Mary Sue Lee                |
| (4)  | P4                      | The Marion County Industrial Foundation,<br>Inc. |
| (5)  | P5                      | William P. and Theresa G. Thompson               |
| (6)  | P6, P6A, P6B, and P6C   | Paul F. Hilpp                                    |
| (7)  | P7 and P7A              | Frances H. Montgomery                            |
| (8)  | P8, P8A, P8B, P8C & P8D | Darrell and Rose Lee Shewmaker                   |
| (9)  | P9 and P9A              | Sarah S. & Lewis B. Buckler                      |
| (10) | P10                     | Jill M. Rucker                                   |
| (11) | P11                     | Randall and Connie Lawson                        |
| (12) | P12                     | Central Ky Production Association                |
| (13) | P13                     | Gerry D. and Karen P. Rodgers                    |

There were eight properties that abutted the south side of Highway 68 between the former city limits and the Hilpp property (See the City's Annexation Map, a copy of which is included in the Appendix of this brief at tab #1.). All were annexed with the exception of a residential tract owned by David and Sara McCarty<sup>3</sup>. Although their property was initially included in the proposed annexation (Thomas dep., pg. 24, lines 21-23), it was ultimately left out because the McCartys failed to timely indicate to the City whether or not they wanted to be annexed (Thomas dep., pg. 25, lines 9-25).

There were 14 properties that abutted the north side of Highway 208 (Agreed Statement of Facts, ROA 136-138, a copy of which is included in the Appendix of this brief at tab #2, and Crenshaw dep., Exh. #2). Only five of them, Parcels 6A, 6B, and 6C owned by Paul Hilpp, Parcels 2 and 2A owned by Rodney and Kathy Mattingly, Parcels 1B, 1C and a part of Parcel 1 owned by the Goodin Revocable Trust, Parcels 3 and 3A owned by Eddie and Mary Sue Lee, and Parcel 4 owned by the Marion County Industrial Foundation, were included in the annexation (See "Parcel Table" of "the City's Annexation Map", a copy of which is included in the Appendix of this brief at tab #1). The remaining nine<sup>4</sup>, owned by Joseph and Tammy Leake, Valerie Mattingly, Leonard and Martha Brady, Meck Holdings, LLC, Vic and Ann Peterson, Paul and Barbara

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<sup>3</sup> The McCarty property is designated as "A" on the City's Annexation Map, a copy of which is included in the Appendix of this brief at tab #1. Also see the parties' Agreed Statement of Facts (ROA 136-138), a copy of which is included in the Appendix of this brief at tab #2).

<sup>4</sup> These properties are designated as "B", "C", "D", and "E" on the City's Annexation Map, a copy of which is included in the Appendix of this brief at tab #1. Also see the parties' Agreed Statement of Facts (ROA 136-138), a copy of which is included in the Appendix of this brief at tab #2.

Powell, Charles and Wanda Tharp, Rick and Mary Ellen Followell, and Bobby and Faye Beavers, were excluded from annexation (Agreed Statement of Facts, ROA 136-138), a copy of which is included in the Appendix of this brief at tab #2. As a result, the boundary of the City along Highway 208 is irregular and unnatural with 18 directional boundaries changes.

The City included the property of Rodney and Kay Mattingly because they specifically requested that their property be included in the annexation (Thomas dep., pg. 10, lines 21-25, pg. 22, lines 20-25, and pg. 26, lines 9-14) It included the property of Eddie and Mary Sue Lee because they advised it that they were in favor of annexation (Df's. Supplemental Answers to Interrogatories, Interrogatory #2, [ROA 117]).

The City had previously contacted the owners of the Leake, Mattingly, Brady, Meck Holdings, Peterson, Powell, Tharp, Beavers and Followell properties (Thomas dep., pg. 15, lines 7-25, pg. 16, lines 1-4, and pg. 17, lines 10-16, and Agreed Statement of Facts, paragraphs (4), (5), (6), (7) and (8), [ROA 136-138], a copy of which is included in the Appendix of this brief at tab #2), to see if they would agree to the annexation of a narrow strip of land, including their properties, located along the north side of Highway 208 between the City and the Southwest Industrial Subdivision. Since they were all opposed to this earlier annexation, the City assumed they would also be opposed to the proposed annexation and therefore excluded their properties (Thomas dep., pg. 26, lines 9-25, and pg. 27, lines 1-5, and Agreed Statement of Facts, paragraphs (6), (7) and (8), [ROA 136-138], a copy of which is included in the Appendix of this brief at tab #2. The

result was that the Leake, Mattingly, Brady and Meck Holdings properties<sup>5</sup>, which were not annexed, are now on an island that is completely surrounded by property located within the city limits (Thomas dep., pg. 23, lines 15-25, pg. 24, line 1). Furthermore, the combined properties of the Petersons, the Powells, and the Tharps<sup>6</sup> are collectively bounded on three sides by annexed property, as are the individual properties of the Followells<sup>7</sup> and the Beavers<sup>8</sup>.

Both Crenshaw and Thomas admitted that prior to the first reading of “An Ordinance Declaring The City’s Intent To Annex Territory Located Along HWY 68 And

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<sup>5</sup> These properties are collectively designated as “B” on the City’s Annexation map, a copy of which is included in the Appendix of this brief at tab #1. See also the parties’ Agreed Statement of Facts, a copy of which is included in the Appendix of this brief at tab #2.

<sup>6</sup> These properties are collectively designated as “C” on the the City’s Annexation map, a copy of which is included in the Appendix of this brief at tab #1. See also the parties’ Agreed Statement of Facts, a copy of which is included in the Appendix of this brief at tab #2.

<sup>7</sup> This property is designated as “D” on the City’s Annexation map, a copy of which is included in the Appendix of this brief at tab #1. See also the parties’ Agreed Statement of Facts, a copy of which is included in the Appendix of this brief at tab #2.

<sup>8</sup> This property is designated as “E” on the City’s Annexation map, a copy of which is included in the Appendix of this brief at tab #1. See also the parties’ Agreed Statement of Facts, a copy of which is included in the Appendix of this brief at tab #2.

The City Of Lebanon's Southwest Boundary Into The City" on December 5, 2005 they knew<sup>9</sup> that of the 13 owners whose property was included in the annexation, eight approved annexation and five opposed it (Thomas dep., pg. 28, lines 3-25, pg. 29, lines 1-25, pg. 30, lines 1-2 and Crenshaw dep., pg. 40, lines 9-25), and that there were therefore not enough property owners opposed to annexation to require an election, or enough resident voters<sup>10</sup> to defeat annexation in the event of an election (Thomas dep., pg. 30, lines 3-25 and pg. 31, lines 1-19).

On January 23, 2006 James L. Avritt, Sr., counsel for Appellees, advised Crenshaw, by letter, that his clients objected to the annexation of their property and attached to said letter a "Petition In Opposition To Proposed Annexation" signed by each (See Affidavit of James L. Avritt, Sr. attached to Plaintiffs' motion for summary judgment, [ROA 141-157].).

On February 28, 2006 Crenshaw responded, by letter, to Avritt's correspondence, in which letter he stated "Understanding the statute to require the signatures of 50% of the landowners or registered voters in the area, I deem the petitions filed insufficient.

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<sup>9</sup> Thomas testified that "consent letters" went out to all property owners whose property was ultimately included in the annexation and that based on the responses to these consent forms, as well as additional information that came to his attention, he "...**knew (emphasis added) by the time of the first reading who was in favor of annexation and who was opposed to it.**" (his dep., pgs. 27-28). Crenshaw testified that as a result of his communications with some of the property owners, as well as the communications of Thomas with other property owners, the City knew at the time of the first reading of the ordinance who favored annexation and who opposed it (his dep., pg. 40).

<sup>10</sup> Gerry D. and Karen P. Rogers and Randall and Connie Lawson were not residents of the area proposed to be annexed, and therefore were not eligible to vote, nor was the Elinor Goodin Revocable Trust (see Affidavit of James L. Avritt, Sr. attached to "Plaintiff's Motion for Summary Judgment" [ROA 141-157].)

The City will proceed immediately with the first reading of the proposed annexation ordinance”. (See Affidavit of James L. Avritt, Sr. attached to Plaintiff’s motion for summary judgment, [ROA 141-157].).

The annexation ordinance was ultimately enacted on March 26, 2006, after which Appellees filed this action to set it aside on the grounds that: (1) KRS 81A.420 is unconstitutional and the City therefore had no authority to annex their property, and (2) the boundaries of the territory proposed to be annexed were determined arbitrarily, unreasonably, illegally, and unconstitutionally. They subsequently moved for summary judgment **only on the grounds that the boundaries of the territory proposed to be annexed were determined arbitrarily, unreasonably, illegally, and unconstitutionally (ROA 162).**

The trial court ultimately sustained their motion for summary judgment and in its judgment made the following findings of fact (ROA 275-280):

**“(1) Defendant had previously considered the annexation of a portion of the property actually annexed, specifically property along the north side of Highway 208, at which time it contacted the owners of each property located therein in order to determine who favored annexation and who opposed it. The opposition was so strong that it dropped its annexation plans.**

**(2) Defendant excluded from the subject annexation nine of the fourteen properties located on the north side of Highway 208 solely because the owners thereof objected to annexation.**

**(3) Defendant included in the annexed area the property of Plaintiffs even though they opposed annexation.**

**(4) The annexed area included 15 properties (owned by nine different individuals) located along the south side of Highway 68. All were annexed with the**

exception of a residential tract owned by David and Sara McCarty which, although initially included in the proposed annexation, was ultimately left out because the McCarty's failed to timely indicate to Defendant whether or not they wanted to be annexed.

(5) Four of the unannexed properties located on the north side of Highway 208 are now completely surrounded by property located within the city limits.

(6) Three of the unannexed properties located on the north side of Highway 208 are collectively bounded on three sides by annexed properties, as are two individual tracts.

(7) Two properties located on the north side of Highway 208 are individually bounded on three sides by annexed property.

(8) In order to guarantee the success of its annexation Defendant intentionally included in the annexation all properties whose owners approved annexation, but omitted therefrom enough properties whose owners opposed annexation.

(9) Eighteen property owners were allowed to choose whether or not they wanted to be annexed while five (the Plaintiffs) were given no choice with regard to annexation.

(10) Defendant arranged the boundary lines and predetermined the result of the election by eliminating most of the opposition thereto.

(11) Defendant knew, prior to the first reading of its annexation ordinance, that of the thirteen owners whose property was included in the annexation, eight approved annexation and five opposed it.

(12) Defendant knew, prior to the first reading of its annexation ordinance, that there were not enough property owners opposed to annexation to require an election, or enough resident voters to defeat annexation in the event of an election.

**(13) In order to avoid being arbitrary and unreasonable Defendant's annexation should have included, at the very least, the entire area bounded on the north by Highway 68, on the east by the former city limits, on the south by Highway 208, and on the west by the properties of the Marion County Industrial Foundation (inclusive) and Hilpp (inclusive).**

**(14) Defendant gerrymandered its annexation so as to ensure the success thereof, which action was unreasonable, arbitrary, capricious and an abuse of its discretion."**

Based on these facts the Trial Court concluded **"...as a matter of law, the annexation conducted by Defendant was, in fact, arbitrary and unreasonable and violative of Plaintiffs' constitutional rights under Section 2 of the Bill of Rights of the Kentucky Constitution."**

The foregoing facts were not challenged by the City on appeal and the Court of Appeals therefore found them to be "uncontroverted"<sup>11</sup>.

### ISSUES

Appellees concede that KRS Chapter 81A is constitutional, that ordinances and other legislative acts are presumed to be valid, that ordinances and other legislative acts are subject to only limited judicial review, and that the standard of review on this appeal

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<sup>11</sup> Although the City claims on pages 13 and 14 of its brief that it objected to the Circuit Court's inferences with regard to what it knew, what it had predetermined, and what it did to guarantee the success of its annexation, such "objection" was made in a brief filed by the City in opposition to Appellees' motion for summary judgment, before the Trial Court made its findings of fact. Furthermore, the City did not move the Trial Court to alter or amend its findings of fact and did not list the sufficiency of the evidence on its pre-hearing statement as an issue to be raised by it on appeal, and under CR 76.03(8) it is therefore precluded from contesting the Trial Court's findings of fact.

is “de novo”<sup>12</sup>. Therefore, they will not address these issues herein, although a substantial portion of the City’s brief and the amicus curiae brief filed by the League of Cities is devoted thereto<sup>13</sup>.

The two main issues on this appeal are the following:

**(1) Based on the uncontroverted facts found by the Trial Court, did it properly conclude that the City had “gerrymandered” the annexation, and that the annexation conducted by it was arbitrary and unreasonable and violative of Plaintiffs’ constitutional rights under Section 2 of the Bill of Rights of the Kentucky Constitution?**

**(2) Did the Court of Appeals correctly conclude “...that the boundaries of the annexed property were not contiguous or adjacent to the boundaries of the City per KRS 81A.410(1)(a) and that the annexation violated the statute.”?**

#### ARGUMENT

**(1) BASED ON THE UNCONTESTED FACTS FOUND BY THE TRIAL COURT IT CORRECTLY CONCLUDED THAT THE ANNEXATION CONDUCTED BY THE CITY WAS ARBITRARY AND UNREASONABLE AND VIOLATIVE OF APPELLEES’ CONSTITUTIONAL RIGHTS UNDER SECTION 2 OF THE BILL OF RIGHTS OF THE KENTUCKY CONSTITUTION.**

The Trial Court based its decision on Kelley v. Dailey, 366 S.W.2d 181 (Ky. 1963), and Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc., 177 S.W.3d 718 (Ky. 2005).

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<sup>12</sup> The City does not question the Findings of Fact made by the Trial Court, which the Court of Appeals therefore found to be “uncontroverted”. However, had the City questioned these findings a review thereof by this Court would have been under the “clearly erroneous standard” prescribed by CR 52.01.

<sup>13</sup> Since the issues raised by the League of Cities are identical to those raised by the City, this brief shall be considered as the Appellee’s response brief to the briefs filed by the City and the League of Cities.

In the Kelley case the Court of Appeals stated that the fixing of municipal boundaries is not reviewable by courts unless **arbitrary, unreasonable or violative of constitutional rights**<sup>14</sup>.

In the Kentec case our Supreme Court stated that :

**“Section 2 of our Bill of Rights is unique, only the Constitution in Wyoming having a like declaration....Section 2 of our Constitution reads ‘absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority...’. So it may be said that whatever is contrary to democratic ideas, customs and maxims, is arbitrary. Likewise, whatever is essentially unjust or unequal or exceeds the reasonable and legitimate interests of the people is arbitrary.”.**

In Kelly v. Dailey, supra, the Court specifically noted that **“...when the statutory prerequisites of the proposed annexation are met there can be no defense except on constitutional grounds (including, of course, arbitrariness per const. §2...”.**

The facts in the case-at-bar are remarkably similar to those in City of Birmingham v. Community Fire District, Ala., 336 So.2d 502 (1976). In that case Birmingham made surveys and took polls to ascertain who would vote for and against annexation. It admittedly included in its annexation territory where the vote would be favorable and excluded territory where it would be unfavorable. Some of the territory omitted from annexation formed islands or enclaves either completely or primarily surrounded by the

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<sup>14</sup> This statement is consistent with the general rule that **“the fixing of municipal boundaries is generally considered to be a legislative function involving questions that are political in nature, and the legislative action is not reviewable by the courts, unless it is arbitrary, unreasonable or violative of constitutional rights...”** McQuillin The Law of Municipal Corporations, sec. 7:3, 3<sup>rd</sup> edition (a treatise recognized by the City to be “well-regarded” on pg. 26 of its brief.).

annexed territory. The trial court concluded that Birmingham had arranged the boundary lines and predetermined the result of the election by eliminating most of the opposition. It therefore determined that Birmingham had “gerrymandered” the territory to be annexed so as to ensure the success of the election, which action was unreasonable, arbitrary and discriminatory.

The Supreme Court of Alabama affirmed the decision of the trial court concluding that “...the action of Birmingham in excluding the inhabitants by gerrymandering the boundaries was both unreasonable and unconstitutional, stating as follows:

**“The statutes, Tit. 37, ss 138--187, provide that an election must be held by the people living in the territory to be annexed and a majority must vote for annexation. But the legislature never intended that the boundaries would be so arranged that most of those against annexation would be prohibited from voting. Those excluded had a right to voice their opinion as to who should govern them. As already shown, in some cases, neighbors in the same block or across the street could vote, but those excluded could not vote, only for the reason that Birmingham knew in advance that they were against annexation. To deprive them of their right to vote, especially when their interest was equal to that of their neighbors who were permitted to vote, was a violation of their rights under the Fourteenth Amendment to the Constitution.”**

The City argued before the Court of Appeals that this “...**decision does not give a complete picture of Alabama law...**” because in City of Birmingham v. Wilkerson, 516 So. 2d 585 (Ala. 1987), the Alabama Supreme Court subsequently upheld “...**an annexation in which the City of Birmingham drew the boundaries of the annexation area in question specifically by reference to the residents’ opposition or support of the annexation...**”. However, in that case the residences of the electors that did not

want to be annexed were **scattered** and **isolated** and the Court held that the reasonableness of their inclusion in the annexation was “fairly debatable” and therefore complied with the general rule that “...if the reasonableness of a proposed annexation is fairly debatable, the Courts will defer to the judgment of the council enacting the annexation ordinance...”. In the case-at-bar the excluded properties were neither **scattered** nor **isolated** and their exclusion is not “fairly debatable”.

The City also argued before the Court of Appeals that any conceivable persuasive value of City of Birmingham v. Community Fire District, supra, was substantially diminished by the Alabama Supreme Court when it held in Hill v. Douglas, 359 So. 2d 374, 377 (Ala. 1987), that the decision therein should be limited to its “special factual setting.” However, it should be noted that the Alabama Supreme Court itself distinguished Hill v. Douglas from Birmingham v. Community Fire District on the grounds that:

**“The City of Birmingham case dealt with an annexation statute. This case is controlled by the statutes dealing with the creation of municipalities. The two involve totally different statutes and different considerations.”**

In Birmingham v. Community Fire District, supra, the Alabama Supreme Court cited two cases in support of its decision, Town of Fond Du Lac v. City of Fond Du Lac, Wis., 126 N.W.2d 201 (1964), and Owosso Tp. v. City of Owosso, Mich.App., 181 N.W.2d 541 (1970).

In the Fond du Lac case the City excluded from annexation a small island which contained two residences solely to preclude the electors living therein from participating in the annexation proceeding. The Court held that creating an island within the city

solely for the purpose of assuring the success of the annexation was an arbitrary and capricious action and an abuse of discretion that invalidated the annexation.

In the Owosso case the city attempted to annex 240 acres which were physically connected to it by a strip of land approximately 1326 feet long and 280 feet wide. The area sought to be annexed had 40 sides but only two qualified electors. In the immediately adjacent township areas excluded from the parcel by means of the irregular boundary, but situated between the bulk of the parcel and the city, there were approximately 140 qualifying electors. In all, approximately 160 qualified electors were excluded by the irregularly drawn boundaries from the area which was sought to be annexed. The township objected to the annexation on the grounds the area sought to be annexed had been gerrymandered and therefore **lacked contiguity**. The trial court disagreed and found for the city. However, the appellate court reversed the trial court stating as follows:

**“We hold that the parcel outlined in the petition for annexation here lacks the contiguity and compactness necessary to the efficient and effective operation of municipal services as a result of the gerrymandering which also denied some 160 qualified voters an effective voice in the annexation proposal.”**

The facts in the case-at-bar are also remarkably similar to those in Pyle v. City of Shreveport, La., 40 So.2d 235 (1949), wherein the appellate court stated as follows:

**“An examination of the map attached to the original opinion discloses that the boundary lines are irregular, thereby including and excluding property in the same vicinity. It also reveals that a large area within the boundary is excluded. The record discloses no valid reason for the exclusion and inclusion of these properties. The irregularity of the boundary is not brought about by any barriers or obstacles, natural or**

**otherwise. There is some doubt as to whether the petitions of the property owners would have been sufficient in number and amount if certain properties had not been excluded in the proposed extension.”.**

It therefore concluded that the city had arbitrarily fixed the boundary lines in such manner as to exclude and include property in the same vicinity and that the arbitrary exclusion of property within the boundaries was not only unreasonable but discriminatory. It further recognized that:

**“...There is a vast difference between the necessity for an extension and the reasonableness of a proposed extension. The need for an extension may be ever so great but it would not justify the extension of the city’s limits in an arbitrary and discriminatory manner.”.**

This excerpt from the Pyle case effectively and succinctly rebuts the argument made by the Kentucky League of Cities on page 13 of its amicus curiae brief filed with the Court of Appeals that **“Upholding the Marion Circuit Court decision will have dire consequences for growth and preservation of all Kentucky cities”**, and the argument made by it on page 11 of its amicus curiae brief filed with this court that **“If the Court of Appeals opinion is upheld, cities will see incomprehensible law and unsustainable paralysis.”**

The Trial Court found that the City allowed **“eighteen property owners to decide whether or not they wanted to be annexed while five (Appellees) were given no choice with regard to annexation.”**, a finding that the City does not contest. The Trial Court concluded that the City therefore **“...gerrymandered its annexation so as to ensure the success thereof...”** In order for this Court to reverse the Trial Court it must

find that the City's conduct "...was not contrary to democratic ideas, customs and maxims...", and was not "...essentially unjust or unequal..." and therefore not arbitrary<sup>15</sup>

**(1)(a) BY GERRYMANDERING THE ANNEXED AREA IN ORDER TO GUARANTEE THE SUCCESS OF ITS ANNEXATION, THE CITY EFFECTIVELY CIRCUMVENTED THE PROVISIONS OF KRS 81A.420(2) WHICH ALLOW RESIDENT VOTERS OR OWNERS OF REAL PROPERTY THE OPPORTUNITY TO PROTEST AN ANNEXATION.**

KRS 81A.420(2) provides as follows:

**"If following the publication of the annexation ordinance pursuant to subsection (1) of this section and within sixty (60) days thereof...fifty percent (50%) of the resident voters or owners of real property within the limits of the territory proposed to be annexed petition the mayor in opposition to the proposal, an election shall be held at the next regular election..."**

On page 21 of its brief the City states that **"What the statute provides is an opportunity to protest the annexation pursuant to statutory criteria."** It also states that the annexation statutes **"...provide a method whereby citizens are given the opportunity to overcome a decision which they believe is adverse to their interest."** citing Burks Williams, Jr. v. City of Hillview, 831 S.W.2d 181 (Ky. 1992).

In the case-at-bar the Trial Court specifically found that the City had **"...gerrymandered its annexation so as to ensure the success thereof..."**. By doing so it effectively circumvented the provisions of KRS 81A.420(2), thereby denying

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<sup>15</sup> This is the definition of "arbitrary" as stated by the Court in the Kentec case, supra.

Appellees the opportunity to protest the annexation and depriving them of the opportunity to overcome the annexation decision<sup>16</sup>. Such conduct is clearly arbitrary and unreasonable and violative of Section 2 of the Bill of Rights of the Kentucky Constitution.

The City, however, states on page 33 of its brief that what it did was nothing more than “...**prudent planning of a successful annexation under Kentucky law...**” and argues on page 40 of its brief that “**even if local officials consider how an annexation election might turn out, such effort is nothing more than speculation and cannot reasonably be viewed as an actionable violation of KRS 81A.410 or any other rights.**”, citing Rose v. City of Paris, 601 S.W.2d 610 (Ky.App., 1980), wherein the appellate court stated that “**At the time of passage of the initial ordinance the City has no way of knowing how many, if any, of the resident voters will oppose the annexation.**”.

In the case-at-bar, the Trial Court found that the City did much more than just “**consider how its annexation might turn out**” and that when it adopted its annexation ordinance it knew exactly who favored and who opposed annexation<sup>17</sup>, as reflected by the following findings of fact:

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<sup>16</sup> The City concedes that “...**correspondence was received from opponent’s counsel, but the Mayor properly rejected the petition as not including sufficient signatures under the statute...**”.

<sup>17</sup> Both Gary Crenshaw, the City’s Mayor, and John Thomas, the City’s Administrator, admitted that by the time of the first reading of the annexation ordinance the City knew exactly who favored annexation and who opposed it.

**“(2) Defendant excluded from the subject annexation nine of the fourteen properties located on the north side of Highway 208 solely because the owners thereof objected to annexation...”**

**(8) In order to guarantee the success of its annexation Defendant intentionally included in the annexation all properties whose owners approved annexation, but omitted therefrom enough properties whose owners opposed annexation...**

**(10) Defendant arranged the boundary lines and predetermined the result of the election by eliminating most of the opposition thereto.**

**(11) Defendant knew, prior to the first reading of its annexation ordinance, that of the 13 owners whose property was included in the annexation, eight approved annexation and five opposed it.**

**(12) Defendant knew, prior to the first reading of its annexation ordinance, that there were not enough property owners opposed to annexation to require an election, or enough resident voters to defeat annexation in the event of an election...**

**(14) Defendant gerrymandered its annexation to as to ensure the success thereof...”**

The City does not contest the accuracy of these facts, which the League of Cities calls “speculation”, and the record does not disclose any valid reason why some of the properties located along Highway 208 were included while other adjacent properties were excluded. Nor does it offer any valid reason why the annexation did not include the island of properties created by their exclusion from annexation.

As stated by the Louisiana court in the Pyle case, supra:

**“The record discloses no valid reason for the exclusion and inclusion of these properties...”**

**The arbitrary fixing of the boundary lines in such manner as to**

**exclude and include property in the same vicinity and the arbitrary exclusion of property within the boundaries is not only unreasonable but discriminatory.”.**

**(1)(b) MOTIVES FOR LEGISLATIVE ACTS ARE A PROPER INQUIRY FOR JUDICIAL REVIEW WHERE THOSE ACTS ARE FOUND TO BE ARBITRARY, UNREASONABLE AND UNCONSTITUTIONAL.**

Although the general rule is that the Courts will not inquire into the motives behind the adoption of an annexation ordinance, as argued by the City, in Kentucky Utilities Co. v. City of Paris, 75 S.W.2d 1082 (Ky. 1934), the Appellate Court recognized an exception to this rule. After citing a number of cases that reflected the general rule, the appellate court stated as follows:

**“All these authorities clearly indicate that courts are not to be concerned about the wisdom or policy of ordinances enacted by city authorities or the way and manner in which they discharge their duties so long as they act within the limitations prescribed by law and do not make arbitrary or excessive use of the power reposed in them.” (emphasis added).**

In the case-at-bar the Trial Court specifically found that **“...as a matter of law, the annexation conducted by Defendant was, in fact, arbitrary and unreasonable and violative of Plaintiffs’ constitutional rights under Section 2 of the Bill of Rights of the Kentucky Constitution.”** The motives behind the City’s arbitrary, unreasonable, and unconstitutional conduct are therefore relevant.

Unfortunately, the Court of Appeals Opinion does not address Appellees’ argument that the City’s annexation was a violation of Section 2 of the Kentucky Constitution. However, the Court of Appeals did conclude that **“From the**

uncontroverted facts, it is evident that the City manipulated the boundaries to the annexed property and, in so doing, intentionally (emphasis added) omitted sufficient dissenting property owners so as to ensure the success of the annexation...”, which in and of itself is arbitrary and unreasonable and an egregious violation of Section 2 of the Kentucky Constitution. The failure of the Court of Appeals to specifically address this issue is therefore no indication that the Court found Appellees’ constitutional argument to be either **non-persuasive**, as alleged by the City on page 42 of its brief, or **without credence**, as alleged by the League of Cities on page 11 of its brief.

**(2) THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE BOUNDARIES OF THE ANNEXED PROPERTY WERE NOT CONTIGUOUS OR ADJACENT TO THE BOUNDARIES OF THE CITY AS REQUIRED BY KRS 81A.410(1)(A).**

The Court of Appeals’ Opinion relies primarily on Ridings v. City of Owensboro, 383 S.W.2d 510 (Ky. 1964), and Griffin v. City of Robards, 990 S.W.2d 634 (Ky. 1999), to support its conclusion that the annexed territory in the case-at-bar was not contiguous to the City, stating as follows:

**In *Ridings*, 383 S.W.2d 510, and *Griffin*, 990 S.W.2d 634, the Supreme Court set forth a test to determine if the boundaries of annexed property and of a municipality were contiguous. To reach a determination upon contiguity, the court must consider the boundaries of the annexed property in relation to the boundaries of the municipality. *Ridings*, 383 S.W.2d 510; *Griffin*, 990 S.W.2d 634. Annexed property is considered contiguous to municipal property if the boundaries of the annexed property are touching or sharing common boundaries with the municipality and if the boundaries of the annexed property are natural or regular. *Griffin*, 990 S.W.2d 634. If the annexed property has unnatural or irregular boundaries, the annexed property does not *per se* violate the contiguity requirement of KRS 81A.410(1)(a). *Griffin*, 990 S.W.2d 634. Rather, the court must then**

**determine whether a concrete or tangible municipal value or purpose exists to justify the unnatural or irregular boundaries. *Ridings*, 383 S.W.2d 510; *Griffin*, 990 S.W.2d 634. If such municipal value or purpose exists, the boundaries of annexed territory are deemed contiguous; on the other hand, if no such municipal value or purpose exists, the boundaries of annexed territory fail to meet the contiguity mandate. *Ridings*, 383 S.W.2d 510; *Griffin*, 990 S.W.2d 634.**

The Ridings case was decided in 1964 and at that time Kentucky's annexation statutes did not specifically limit annexation to contiguous territory. The Court therefore recognized that Ridings presented two issues, i.e. whether annexed territory must be contiguous to the annexing city and, if so, is contiguity which exists only through a "corridor" sufficient. The Court stated that both questions were of "**first impression**".

The Court answered the first question "yes" and then proceeded to a consideration of the second question. It began with a consideration of the "**concept of a city**" stating as follows:

**"The very concept of a city is of a geographical (as well as a political) unit. As stated in 37 Am.Jur., Municipal Corporations, sec. 27, p. 644<sup>18</sup>:**

**...The legal, as well as the popular idea of a municipal corporation in this country, both by name and use, is that of oneness, community, locality, vicinity; a collective body, not several bodies; a collective body of inhabitants—that is, a body of people collected or gathered together in one mass, not separated into distinctive masses, and having a community of interest because residents of the same place, not different places. So as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity (emphasis added) not separation or segregation..."**

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<sup>18</sup> This same Am.Jur. annotation is reprinted in 56 Am.Jur. 2d, Municipal Corporations, sec. 69, p. 125.

A similar annotation appears at 49 A.L.R.3d, Municipal Corporations—Annexations, sec. 7, p. 606, wherein it is stated that “...the courts in the following cases, in determining whether territory is contiguous, have inquired whether, upon completion of the annexation, the municipal entity created will constitute a unified body.” One of the cases cited in support of this annotation is the Ridings case.

On the basis of the foregoing analysis, the Court in the Ridings case came to the conclusion that property may not be considered to be contiguous if contiguity exists only through a corridor unless the corridor itself has some municipal value. Implicit in this conclusion was a determination that contiguity involves more than just a physical standard, i.e. touching the pre-existing boundary, as argued by the City on page 29 of its brief.

The facts in the case-at-bar are remarkably similar to those in Big Sioux Township v. Streeter, S.D., 272 S.W. 2d 924 (1978). In that case the trial court interpreted the terms “contiguity” and “adjoining” as meaning common boundaries in the context of a physical touching (the same argument made by the City herein) and upheld the subject annexation. In reversing, the Supreme Court of South Dakota stated:

**“In this context, we interpret the terminology in the annexation statutes to require not only common boundaries but also a community of interest. The terms “contiguous” and “adjoining” regarding annexation indicate a touching in the physical sense with a common border of reasonable length or width. Factors involved in this consideration include significant physical barriers, irregular shapes, such as narrow corridors and gerrymandering, and unjustified enclaves or islands of unannexed territory entirely surrounded by the municipal corporation. See, Annot. 49 A.L.R. 3<sup>rd</sup> 589.\*927 In the annexation context, “contiguity” and “best interests” include more than common boundaries. Township of Owosso v. City of Owosso, supra;**

**McQuillan, the Law of Municipal Corporations, 3d ed. s 7.20, p. 365. There must also be a showing of a community of interest flowing from one of the justifications for a natural and reasonable annexation discussed above. To qualify as a natural and reasonable annexation of “contiguous” or “adjoining” territory and the “best interests” of the annexing municipality, there must be a determination as to whether the requirements of a common boundary and a community of interest are met and whether the municipal body created upon completion of the annexation will constitute a homogenous and unified entity. See Annot. 49 A.L.R. 3d 589, ss 2(a), 7; and McQuillan, supra, at 364.”**

**(2)(a) THE OPINION OF THE COURT OF APPEALS DOES NOT “GRANT” THE JUDICIARY BROAD AND UNPREDICTABLE DISCRETION TO DETERMINE WHETHER ANNEXATIONS LACK CONTIGUITY BECAUSE THEY INVOLVE UNNATURAL OR IRREGULAR BOUNDARIES.**

The opinion of the Court of Appeals does not expand the role of the judiciary in determining the validity of annexations based on shape and legislative motive. It merely applies long recognized and clearly defined Kentucky law to the case-at-bar.

As pointed out in the previous section of this brief, the requirement of contiguity between the boundaries of annexed property and the boundaries of the annexing municipality was recognized as fundamentally implicit in this states’ statutory annexation scheme even before the enactment of KRS 81A.410(1)(a). Although the two cases relied on by the Court of Appeals, **Ridings** and **Griffin**, involved “corridor annexation”, in two other cases the Kentucky Court of Appeals considered how the irregular shape of the annexed areas affected their compactness and contiguity and thus the validity of their annexation.

In Hopperton v. City of Covington, 415 S.W. 381 (Ky. 1967), the Kentucky Court of Appeals was confronted with an annexation involving “...an irregular shape roughly

**similar to that of an hour-glass...".** The Court stated that **"...The evidence discloses that it is contiguous because the northern end of the area adjoins the present city limits of Covington. The eastern boundary of the area adjoins the boundaries of the other cities. The southern and western boundaries coincide with a railroad track and certain highways. These monuments constitute reasonable and easily identified boundaries and the mere irregularity in its shape does not violate its compactness."**<sup>19</sup>. The Court of Appeals therefore upheld the annexation because the annexed area had reasonable and easily identifiable natural boundaries and the mere irregularity of its shape did not vitiate its compactness.

The Hopperton case cited City of Hickman v. Choate, 379 S.W. 2d. 238 (Ky. 1964), in which the Court of Appeals was confronted with a "proposed extension" that looked **"...somewhat like the old-fashion pair of kidney-shaped water-wings children used to wear at the beach..."**. However, it too upheld the annexation because even though the annexed area had an irregular shape, it was **"...contiguous to the City, and is itself compact (emphasis added) and contiguous..."**.

These two cases effectively refute the argument made by the City on page 29 of its brief that **"...Except for the unique and fully distinguishable case of a corridor annexation...there is nothing in Kentucky law suggesting the statutory use of the**

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<sup>19</sup> The City also cites the Hopperton case in its brief (pg. 24) claiming that the court in that case found the annexed area to be **"...contiguous because the northern end of the area adjoins the present city limits of Covington."** However, it failed to mention that the court in the Hopperton case went on to say that **"the eastern boundary of the are adjoins the boundaries of other cities. The southern and western boundaries coincide with a railroad track and certain highways..."** and that the Hopperton court concluded that the annexed area was contiguous to the city because **all of these "...monuments constitute reasonable and easily identified boundaries..."**, and it was for this reason that the mere irregularity in the shape of the annexed area did not destroy its compactness.

**term (contiguous) should be anything other than as the dictionary definitions suggest...**” and reflect that the Kentucky Courts have long required that in order for an annexed area to be “contiguous” it must have boundaries that are natural and regular unless valid reasons exist for their irregular and/ or unnatural shape. In the case-at-bar the Court of Appeals stated that the irregularity of the boundaries of the City’s annexation resulted because “...**The City manipulated the boundaries to the annexed property and, in so doing, intentionally omitted sufficient dissenting property owners so as to ensure success of the annexation...**”, which it did not believe was a legitimate reason for their irregularity.

In the case-at-bar, the Trial Court also found that if the boundaries of the City’s annexation had been “**drawn naturally or regularly**”, the annexed area would have been bounded on the east by the City’s former limits, on the south by Kentucky Highway 208, on the west by the property of the Marion County Industrial Foundation (inclusive) and Freddie Hilpp (inclusive), the real focus of the City’s annexation, and on the north by US Highway 68.

Had US Highway 68 been used as the northern boundary of the annexed area, said boundary would have been a straight line. Instead, it was a straight line until it reached the property of David and Sarah McCarty, at which point it went around their property because, according to John Thomas, the City Administrator, the McCarty’s had failed to timely indicate whether or not they wanted to be annexed. If Kentucky Highway 208 had been used as the southern boundary of the annexed area, said boundary would also have been a straight line. Instead, it has eighteen directional boundary changes resulting in an island of unannexed property completely surrounded by property now located in the

City's limits, and numerous unannexed properties bounded on three sides by annexed property, which directional changes the Trial Court found were caused by the City's desire to exclude from annexation the property of all owners who were opposed to annexation (with the exception of Appellees).

The Opinion of the Court of Appeals is consistent with the general rule followed by most other jurisdictions, as reflected by McQuillin The Law of Municipal Corporations<sup>20</sup>, sec. 7.28 (3<sup>rd</sup> Edition), captioned "size and shape of area", which states as follows:

**"...Although an area that may be annexed is required to be compact, mere irregularity in its shape does not necessarily vitiate its compactness. However, an irregularly shaped parcel may lack contiguity (emphasis added) and compactness as a result of gerrymandering (emphasis added), precluding lawful annexation. An irregularly shaped parcel of land ordinarily raises a red flag as to the reasonableness of the proposed annexation (emphasis added)...".**

In support of this statement McQuillin lists numerous cases from various jurisdictions, including Kentucky, where the Courts have considered contiguity in the context of irregular or unnatural boundaries<sup>21</sup>.

The foregoing authorities clearly illustrate that the Kentucky Courts have long recognized that an annexation is voidable where the boundary lines of the annexed area

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<sup>20</sup> On page 26 of its brief the City acknowledges that this is a "well-regarded treatise."

<sup>21</sup> Both Griffin v. City of Robards, 990 S.W.2d 634 (Ky. 1999), and Hopperton v. City of Covington, 415 S.W. 2d 381 (Ky. 1967), are listed as supporting cases with unnatural boundaries.

are irregular and unnatural (with no legitimate reason therefor) because the annexing municipality has gerrymandered them in order to guarantee the success of its annexation.

### CONCLUSION

The City admittedly included in the annexation eight properties whose owners wanted to be included and admittedly excluded from the annexation ten properties whose owners did not want to be included. Only the Appellees were given no choice! The Trial Court found that this uncontradicted evidence established that the City gerrymandered its annexation so as to ensure the success thereof and concluded that this conduct was **unreasonable, arbitrary, capricious and an abuse of discretion** that constituted a violation of Section 2 of the Bill of Rights of the Kentucky Constitution.

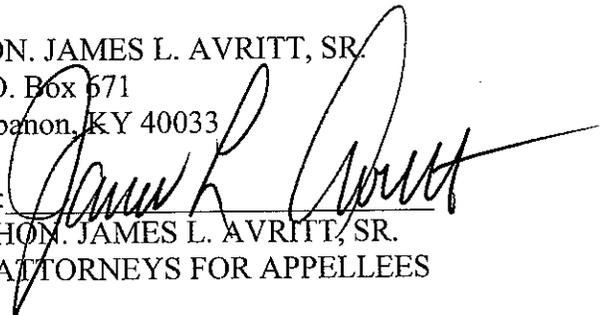
The Court of Appeals agreed that the City had gerrymandered the boundaries of the annexed property in order to ensure the success of the annexation and concluded that the annexed property was therefore not "contiguous" as required by KRS 81A.410.

Appellees respectfully submit that the summary judgment entered by the Trial Court should be sustained and the opinion of the Court of Appeals should be affirmed.

Respectfully submitted,

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## APPENDIX