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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

vs.

BRIEF FOR APPELLANT CITY OF LEBANON, KENTUCKY

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 June 18, 2012: Hon. James T. Ayatt, Sr., P.O. Box 671, Lebanon, KY 40033; Hon. Theodore H. Layt, Layt and Associates, PSC, One Court Square – P.O. Box 676, Lebanon, KY 40033; both as counsel for Respondents; Hon. Judge Glenn E. Acree, Kentucky Court of Appeals, Tate Building, 125 Lisle Industrial Avenue, Suite 140, Lexington, KY 40511-2056; Hon. Judge Sara Walter Combs, Kentucky Court of Appeals, 328 E. College Avenue, P.O. Box 709, Stanton, Kentucky 40380-0709; Hon. Chief Judge Jeff S. Taylor, Kentucky Court of Appeals, 401 Frederica Street, Suite 102, Owensboro, KY 42302; Hon. Judge Allan Ray Bertram, Circuit Judge, Justice Center, Suite 301, 300 E. Main St., Campbellsville, KY 42718; Hon. R. Jeffrie Duett and Hon. Laura Milam Ross, 100 East Vine Street, Suite 800, Lexington, KY 40507 as Counsel for *Amicus Curiae* Kentucky League of Cities before the Court of Appeals. The Record on Appeal was not withdrawn by the attorneys for Movants.

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1.0 INTRODUCTION

The Court of Appeals affirmed the Marion Circuit Court on grounds an annexation conducted by the City of Lebanon of approximately 413 acres touching the pre-existing city boundary by FOUR THOUSAND SEVEN HUNDRED EIGHTY FEET AND SIX INCHES (4,780.5 feet) (the "Lebanon Annexation") was not "adjacent or contiguous" pursuant to KRS 83A.410. Appellant City of Lebanon moved for Discretionary Review on grounds the Lebanon Annexation was lawful legislative action annexing contiguous territory in compliance with KRS Chapter 81A, the Kentucky Constitution, and long established precedent and that the Court of Appeals erroneously applied corridor annexation precedent in circumstances where no corridor was involved.

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3.0 STATEMENT CONCERNING ORAL ARGUMENT

Appellant City of Lebanon does not request Oral Argument. The Record on Appeal ("ROA") is not voluminous and does not arise from an evidentiary hearing or trial. The Supreme Court will be fully able to make its decision based upon its interpretation of the ROA, long established appellate precedent and KRS Chapter 81A. Oral argument would not further clarify Kentucky law or the appropriate legal authority to be applied upon judicial review.

4.0 STATEMENT OF THE CASE

The factual and procedural events necessary for the understanding of this Appeal are relatively simple, as reflected in the compact ROA. The key facts involve the adoption of Ordinance 05-13 Proposing to Annex Territory to the City of Lebanon, and the subsequent adoption of Ordinance 06-01 finally Annexing Territory to the City of Lebanon by unanimous vote of the City Council (collectively the "Annexation" or the "Lebanon Annexation") (ROA 223-253. Ordinances 05-13 and 06-01 are included in the Appendix to Appellant's Brief.)

The Annexation was pursuant to the comprehensive statutory framework of KRS Chapter 81A and annexed approximately 415 acres in an area where a new state highway was to be constructed. The 415 acres is shaped somewhat akin to the state of New Jersey and is bisected by a new state highway. (See Survey in Appendix – Part 3 and 4). The Lebanon Annexation is by no means a long narrow strip or corridor.

The stated purpose of the Annexation was set forth in Ordinance 05-13:

"WHEREAS, the City declares it desirable to annex the approximately 415+/- acres further described in this ordinance and its attached Exhibit A for purposes of economic growth and development of the City and to accomplish provision of services throughout the annexed territory and to take advantage of the industrial and economic growth proposed for the City by the proposed bypass roadway." Id. at Lebanon Ordinance 05-13. (ROA 223-253 – Included as Exhibit C to "Notice of Filing" & in Appellant's Appendix).

Annexation opponents were unable to file a Petition for an annexation election which met the requirements of KRS 81A.420 and do not contend that they did so. (ROA 252-253).

Plaintiffs (now Appellees) filed an action in Marion Circuit Court challenging the constitutionality of the Annexation as well as of KRS 81A.420 under Plaintiffs' interpretation of Section 2 of the Kentucky Constitution. (ROA 1-4, ROA 14-20 – Amended Complaint). The Complaint, as amended, and all of Plaintiffs' filings of record make no allegation of any Plaintiffs being a member of any protected class under any Civil Rights statute.

The Circuit Court considered Cross Motions for Summary Judgment on the validity of the Annexation pursuant to an Agreed Briefing Schedule Order. (ROA 169-170). Key municipal records were filed in Circuit Court (ROA 223-253).[1] Defendant's Depositions of Lebanon Mayor Gary Crenshaw (05/06/08),

[1] The following public records of the City of Lebanon documented the Annexation in the Circuit Court and now Appellate record and were filed contemporaneously with Lebanon's Memorandum Supporting Summary Judgment attached to document styled "Notice of Filing" (ROA 223-253):

- Minutes of December 12, 2005 Meeting of City Council
- Minutes of December 27, 2005 Meeting of the City Council.
- Lebanon Ordinance 05-13 Proposing to Annex Territory to the City of Lebanon.
- Minutes of March 1, 2006 Meeting of City Council.

City Administrator John Thomas (05/06/08), and City Surveyor Mark Crow (12/05/07, corrected 01/08/08), which had been taken over the City's objection[2], were also filed of record and are included in the Record on Appeal. The filed records and depositions were available for the Circuit Court's consideration on the Cross Motions and later available to the Court of Appeals.

Plaintiffs' argument against the Lebanon Annexation Ordinance was made as a claim of "gerrymandering" as reflected in the Complaint, as amended. (ROA 14-18). What Plaintiffs derisively described as "gerrymandering", the Defendant City of Lebanon contended to be a nonconsensual annexation fully within its statutory powers and in compliance with KRS Chapter 81A and the Kentucky Constitution. (Answer to Amended Complaint [ROA 21-24]). The City of Lebanon defended against the Plaintiffs' claims upon multiple grounds as set forth in Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment [ROA 175-200] and Defendant's Memorandum in Support of its Motion for Summary Judgment [ROA 201-222].

In Ordinance 05-13 Proposing to Annex Territory to the City of Lebanon the subject approximately 415 acres was stated to be "... contiguous to the City of Lebanon..." and "... either urban in character or suitable for urban

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- Minutes of March 2, 2006 Meeting of City Council.
- Lebanon Ordinance 06-01 Finally Annexing Territory to the City of Lebanon.
- Annexation Map. [Included in foregoing Ordinance 06-01]
- Documentation of Notice as to Lebanon Annexation.
- Documentation of Publication of Lebanon Annexation.
- Correspondence as to purported Petition in regarding to Lebanon Annexation.

[2] Objections stated by Defendant's Counsel in each deposition. See also Defendant City's Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery. (ROA 101-108).

development without unreasonable delay...." (Appendix to Appellant's Brief – Part 3). The same finding was repeated in final Annexation Ordinance 06-01 (Appendix to Appellant's Brief – Part 4).

A Survey Map attached to both Ordinances 05-13 and 06-01, as prepared by a Kentucky Licensed Surveyor[3], as well as the metes and bounds description in the Ordinance text, plainly depicts the annexed territory touching the preexisting boundary of the City of Lebanon across thousands of feet. Lines 48-57 as depicted on the Survey Map provide a continuous line of contiguity between the annexed territory and the preexisting corporate boundaries of the City of Lebanon which totals **FOUR THOUSAND SEVEN HUNDRED EIGHTY FEET AND SIX INCHES (4,780.5 feet)**.

On May 1, 2009, the Circuit Court entered Summary Judgment in favor of Defendant City of Lebanon and denied Plaintiffs' Motion for Summary Judgment. (ROA 267-274 and in Appendix to Appellant's Brief).

After Plaintiffs' subsequent Motion to Vacate (ROA 273-274), the Court completely reversed itself and vacated the May 1, 2009 Summary Judgment. Summary Judgment was entered in favor of Plaintiffs on April 22, 2010. (ROA 275-280 and attached in Appendix to this Brief.)

Although the Court of Appeals references the Circuit Court's factual findings as "uncontroverted" (p. 8), the City had objected to the Circuit Court's

3 The Deposition of the City Surveyor appears in the Record on Appeal.

inferences that the success of the annexation was guaranteed, what the City had "predetermined", and what the City "knew".[4]

Appellant City of Lebanon, Kentucky thereafter timely appealed to the Kentucky Court of Appeals. (ROA 280-281). The Kentucky League of Cities filed a Motion requesting leave to file a Brief as *Amicus Curiae* which was granted October 6, 2010 by Order of the Court of Appeals. The Kentucky League of Cities thereafter filed a Brief supporting Appellee City of Lebanon's position that the Lebanon Annexation was lawful. The Court of Appeals granted a Motion to Advance the Appeal supported by all parties. The Court of Appeals rendered an Opinion affirming the Marion Circuit Court, but on much different grounds than relied upon by the Circuit Court (i.e. purported absence of contiguity rather than arbitrariness). In short, the Court of Appeals found the Lebanon Annexation not to be contiguous to the City of Lebanon pursuant to KRS 81A.410.

The Court of Appeals Opinion was rendered July 15, 2011, as modified July 29, 2011 (hereinafter "Court of Appeals Opinion"). The Court of Appeals Opinion is designated *"to be published."*[5]

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[4] See City's Memorandum in Opposition to Motion for Summary Judgment, p. 3, as certified September 30, 2008. See Appellant's Brief, p. 20-25.

[5] Particularly if the Court of Appeals Opinion is upheld, Appellant requests the Supreme Court Opinion also be published so as to provide guidance to cities across the Commonwealth as to standards for determining "contiguity." If the Court of Appeals Opinion is upheld, such a ruling will likely have a major chilling impact on how annexations are considered and conducted throughout Kentucky.

5.0 STANDARD OF REVIEW

The Court of Appeals Opinion is based on its interpretation of "adjacent or contiguous" as utilized in KRS 81A.410(1). The Court of Appeals recognized that "the interpretation of a statute presents a question of law" and stated its review proceeded "de novo" citing City of Worthington Hills v. Worthington Fire Protection District, 140 S.W.3d 584 (Ky. App. 2004). (Court of Appeals Opinion at page 4.) The Supreme Court likewise should proceed *de novo* in addressing the issues of contiguity, including whether the Lebanon Annexation involved a "natural or regular boundary" and the purported legal import of city officials' knowledge of who was in favor or opposed to the Lebanon Annexation.[6]

6.0 ARGUMENT

Annexation involves complex impact on a municipality on a variety of critical issues including economic development, taxation, transportation planning, utility expansion, budgeting, planning for state and federal grants, as well as on the jurisdiction of regulatory agencies and police and other emergency services.[7]

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[6] Blevins v. Moran, 12 S.W.3d 698, 700 (Ky. App. 2000);. Wilfong v. Commonwealth of Kentucky, 175 S.W.3d 84 (Ky. 2004); Schmidt v. Leppert, 214 S.W.3d 309, 311 (Ky. 2007); and Sprint Communications Company, L.P. v. Albert E. Leggett, III, 307 S.W.3d 109, 113 (Ky. 2010) Commonwealth of Kentucky v. Edward Green Jameson, 215 S.W. 3d 9, 15 (Ky. 2006) (constitutionality of local ordinance reviewed *de novo*.)

[7] See David Rusk, The Brookings Inst., *Annexation and the Fiscal Fate of Cities* 10 (2006); Jamie L. Palmer & Greg Lindsey, *Classifying State Approaches to Annexation*, 33 St. Loc. Gov't. Rev. 60 (2001); David Rusk, *Cities without Suburbs* (Woodrow Wilson Center Press 2nd ed. 1995); S.A. McManus & R.D. Thomas, *Expanding the Tax Base: Does Annexation Make a Difference?*, 1 Urb. Interest 15 (1979); Thomas Dye, *Urban Political Integration: Conditions Associated with Annexation in American Cities*, 8 Midwest J. Pol. Sci. 430 (1964).

It is not easy for legislative bodies to exercise their discretion in choosing which properties to annex and which not to annex.[8] There is a proper role for the judiciary in review of annexation pursuant to KRS Chapter 81A and the Kentucky Constitution. However, the Court of Appeals has gone much too far in the present case and has usurped the comprehensive statutory scheme of KRS Chapter 81A and the legislative power of cities in a manner which should not prevail.

As argued by the Movant and *Amicus Curiae* Kentucky League of Cities before the Court of Appeals, the Lebanon Annexation of approximately 415 acres via Ordinances 05-13 and 06-01 ("Lebanon Annexation") should be upheld because it was a lawful exercise of municipal authority as delegated by the Kentucky Legislature in KRS Chapter 81A. Far from being the type of "corridor" or "shoestring" annexation that has been criticized by Kentucky's appellate courts, the Lebanon Annexation encompasses numerous properties including one with a new Wal-Mart "big box" retail store and is bisected by a new state highway connector road.[9] The Survey Map attached to Ordinance 06-01 in the Record on Appeal and hereto as Appendix Exhibit 3 reveals the 415 acres to be shaped somewhat akin to the state of New Jersey.

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[8] M. Edwards, *Annexation: A Winner-Take-All Process?*, 31 State and Local Government Review No. 3 (Fall 1999), 221-231, 230 ("Understanding the fiscal implications of annexation is important to local government planning; however this study illustrates that the fiscal effects of annexation are not obvious, nor are they easily predicted.")

[9]See Ordinance 05-13 (5th Whereas Clause), Appendix to Appellant's Brief – Part 3. See Appellee's Brief before the Court of Appeals at page 1, referencing Wal-Mart.

If its Opinion is sustained, the Court of Appeals panel will have dramatically expanded the role of the judiciary in determining the validity of annexations based on shape and legislative motives and divining what is or is not a "natural or regular boundary" in a manner that Kentucky's highest court has previously applied only to "corridor annexations." Moreover, with the absence of any short-term statute of limitations period for annexation challenge, uncertainty as to the validity of annexations, extensive discovery, and evidentiary hearings or trials will be the future of annexation protest efforts.[10]

The Court of Appeals Opinion is fully inconsistent with the powers delegated to Kentucky cities by KRS Chapter 81A and recognized in the Kentucky Supreme Court's Opinion in Louisville Shopping Center vs. City of St. Matthews, 635 S.W.2d 307 (Ky. 1982), and other long established precedent. Should the Court of Appeals be sustained, any city in the Commonwealth preparing to conduct a non-consensual annexation will have to carefully evaluate the Court of Appeals' reference to the exercise of municipal discretion in the selection of territory to be annexed as a purported "manipulation."[11] City officials will have to further assess whether any knowledge of consideration of who supported or opposed an annexation should impact their decision of whether to proceed with annexation if the Court of Appeals is upheld. In addition, any city in the

[10] For example, statutory zoning appeals are required to be filed within 30 days of legislative body vote per KRS 100.347. In contrast, there is no annexation specific limitations period in the Kentucky Revised Statutes. The applicable statute of limitations period may be as long as the ten years period provided in KRS 413.160 (action for relief, not provided for by statute) or perhaps the five year limitations period of KRS 413.120(7).

[11] Court of Appeals Opinion, page 8.

Commonwealth preparing to conduct an annexation would have to further evaluate whether the specific properties included or excluded would constitute a "natural" or "regular" boundary so as to be "contiguous" pursuant to the Court of Appeals restrictive interpretation of the use of the term in KRS 81A.410.

The new Court of Appeals standard does not focus on whether the 415 acres has a "concrete or tangible municipal value or purpose", but instead on whether additional properties were excluded from the outer perimeter of the annexation. Whether a road, lot line, utility line, railroad track, steam, valley, hill, tree line, change in type of land use, etc. constituted a "natural or regular" boundary in a particular case would be up in the air for post-hoc judicial determination. If the Lebanon Annexation, which follows property lines along its entire 4780.5 foot border with the pre-existing city, fails to meet the "natural or regular" test, then it appears there is no objective standard at all on judicial review.

Kentucky's modern statutory framework for annexation in KRS Chapter 81A simply does not box cities in so as to impose such extensive constraints on their discretion to annex new territory. Interestingly, a Kentucky Attorney General Opinion of April 17, 2012 discusses municipal annexation in the Commonwealth and provides no indication that determination of whether a property is contiguous involves the complex standards applied by the Court of Appeals.[12]

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[12] See *2012 Ky. AG Lexis 80, No. 0AG 12-005* (April 17, 2012) explaining: "There is no specification as to the size of the property or a minimum number of properties to be annexed, so a city may "spot annex" an individual property provided it qualifies under KRS 81A.410(1)"). The Attorney General Opinion provides no indication there is a need to assess whether the annexation has a "natural or regular" boundary or the extent of the city council's knowledge and consideration of who was for or against the annexation. These issues would be

The following questions of law which are critical to the future of annexation in the Commonwealth are now at issue before the Kentucky Supreme Court:

- Whether the definition of "contiguous" in KRS 81A.410 was lawfully applied by the Court of Appeals to void a non-consensual annexation which touches the pre-existing boundary of a City by a boundary of approximately *4,780.5 feet* and in which the subject property was expressly found by the City in Ordinances 05-13, and 06-01 to be "contiguous" and to be "either urban in character or suitable for urban development without delay."

- Whether judicial tests previously applied in Kentucky only to determine the legality of a "corridor annexation" should lawfully be extended to other municipal annexations.

- Whether the Kentucky Court of Appeals lawfully exercised its authority in voiding the Lebanon Annexation upon a determination that boundaries of the annexed territory are not "natural or regular" in circumstances where: (a) neither the Circuit Court or Court of Appeals has found a "corridor" or "roadway" annexation to exist; and (b) where boundaries of the challenged annexation follow property lines.

- Whether the Court of Appeals lawfully based its voiding of the Lebanon Annexation on its interpretation of evidence of record which it determined to show the City "intentionally omitted sufficient dissenting property owners so as to ensure the success of the annexation"[13] in facial compliance with KRS 81A.420 and that the City purportedly "manipulated" its boundaries in connection with the annexation.

- Whether, under current KRS Chapter 81A and other law, Kentucky cities have the right to consider who is in favor of or opposed to annexation prior to effecting such annexations in

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critical determinations if the Court of Appeals Opinion were an accurate interpretation of Kentucky law.

[13] The Kentucky Supreme Court has held that property owner support of incorporation of territory is irrelevant to whether territory is "contiguous" Griffin v. City of Robards, et al, 990 S.W.2d 634, 640 (Ky. 1999).

their discretion without impacting the validity of such annexations.[14]

6.1 KRS CHAPTER 81A IS A CONSTITUTIONAL STATUTORY FRAMEWORK GOVERNING ANNEXATION IN KENTUCKY

The Court of Appeals Opinion with its expansive view of what is required for a property to be "contiguous" would shake the foundations of municipal annexation practice in Kentucky which has long been governed by the plain language of the relevant statutes. KRS Chapter 81A is presumed valid[15] and, in fact, a constitutional statutory scheme adopted by the Kentucky Legislature to govern municipal annexation. Its constitutionality is made abundantly clear by Louisville Shopping Center vs. City of St. Matthews, 635 S.W.2d 307 (Ky. 1982); Moorman v. Wood, 304 F.Supp. 467 (E.D. Ky. 1980); and other authority discussed below.

The Kentucky Supreme Court's decision in Louisville Shopping Center vs. City of St. Matthews, 635 S.W.2d 307 (Ky. 1982) illustrates the extent of the Kentucky Legislature's plenary authority over municipal annexation:

> "However, a party has no constitutional right to resist annexation. Annexation is purely and simply a political act within the exclusive control of the legislature. *City of St. Matthews v. City of Beechwood Village*, Ky., 373 S.W.2d 427 (1963). The legislature has the right to pass such laws for the annexation of territory to municipal corporations as in its judgment will best achieve the desired end. *Yount v. City of Frankfort*, Ky., 255 S.W.2d 632 (1953)." Id at 310.

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14 The Kentucky Supreme Court has recognized that the "... the legislature has the right to pass such laws for the annexation of territory as in its judgment will best achieve the desired end." Louisville Shopping Center vs. City of St. Mathews, 635 S.W.2d 307, 310 (Ky. 1982).

15 Posey v. Commonwealth, 185 S.W.3rd 170 (Ky. 2006).

The Kentucky Supreme Court concluded its Louisville Shopping Center Opinion with the following passage:

> Section 2 of our Constitution was intended to protect citizens against actions which are essentially unjust, unequal and in excess of the legitimate interest of the people. ... As we view the questioned statute, it enhances the rights of the people to overcome a decision which they view to be inimical to their interests. The statute clearly is not a violation of Section 2." Id. at 313.

The statute reviewed by the Kentucky Supreme Court was KRS 81A.420. Lebanon's efforts to conduct an annexation sustainable within the parameters of this statute is likewise consistent with Section 2 of the Kentucky Constitution. What the statute provides is an opportunity to protest the annexation pursuant to statutory criteria. It does not provide nor is it intended or required to provide that those opposed to an annexation will always be able to succeed in their efforts.

In Burks Williams, Jr. v. City of Hillview, 831 S.W.2d 181 (Ky. 1992), the Kentucky Supreme Court reiterated that "Louisville Shopping Center, *supra*, concluded that the annexation statute did not violate Section 2 of the Kentucky Constitution because annexation and its procedures do not involve constitutional rights but merely provide a method whereby citizens are given the opportunity to overcome a decision which they believe is adverse to their interests." Id. at 182.

The rules of law expressed in Louisville Shopping Center and Burks Williams are nothing new. These principles have been recognized for over a hundred years as evidenced by Lewis v. Brandenburg, 105 Ky. 14, 47 S.W. 862, 48 S.W. 978 (Ky. 1898), on petition for rehearing, and Lenox Land Co. v. City of Oakdale, 137 Ky. 484, 489, 125 S.W. 1089, 127 S.W. 538 (Ky. 1910), on petition

for rehearing ("In short, the manner of annexation is entirely beyond the power of the courts to control if the provisions of the statute are followed.") See also Yount, et al vs. City of Frankfort, Ky., 255 S.W.2d 632 (1953) and Hopperton v. City of Covington, 415 S.W.2d 381 (Ky. 1967).

Carrithers, etc. v. City of Shelbyville, 104 S.W. 744 (Ky. 1907) provides a detailed discussion of the history of incorporation of and annexation by Kentucky cities in the first hundred years of the Commonwealth. The then Court of Appeals explains fundamental principles of annexation as follows:

> "The act of incorporating towns, and enlarging or redistricting their boundaries, is legislative and political. In its exercise of discretion in such matters the Legislature has plenary power. It is no infringement of any constitutional right of any person that he is not first consulted before the power is exercised, or if it is allowed to be exercised upon the petition or with the consent of a selected class, as for example voters or property owners." Id. at 747.

The Court of Appeals provides no valid basis for deviation from the controlling rules of law set forth in the foregoing precedent of Kentucky's highest Court[16] in assessing the validity of municipal annexation. The Court of Appeals' error begins with its statement that "adjacent or contiguous," as utilized in KRS 81A.410(1)(a), is not defined therein, and to resolve this appeal it is necessary to define same." (Court of Appeals Opinion, p. 4).

[16] Kentucky Supreme Court Rule 1.040(5) provides: "On all questions of law the circuit and district courts are bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court and, when there are no such precedents, those established in opinions of the Court of Appeals." Also, as stated in Schilling v. Schoenle, et al, 782 S.W.2d 630, 633 (Ky. 1990), "Appellate Courts should follow established precedent unless there is a compelling and urgent reason to depart thereform which destroys or completely overshadows the policy or purpose established by the precedent." No such compelling and urgent reason is present in the within action.

The Court of Appeals interpreted contiguity in a manner which does not exist in the statutes or case precedent outside of the narrow exception of "corridor annexation" and then set standards that upend the statutory scheme, long-established case precedent, and actual annexation practice as evidenced by the Kentucky League of Cities *Amicus Curiae* Brief before the Court of Appeals. The Supreme Court should not allow this approach to prevail in area of law in which the judiciary has shown great deference to the Kentucky Legislature.

6.2 LEBANON COMPLIED WITH KRS CHAPTER 81A IN ADOPTING THE ANNEXATION ORDINANCES.

The City of Lebanon has argued throughout this litigation that it complied with KRS Chapter 81A in effecting the Annexation and that the Annexation should be upheld as a result. (ROA 171-174, ROA 175-200, ROA 201-222). The official records of the City, which were before the Court in its consideration of the Cross-Motions for Summary Judgment (ROA 223-253), when compared to the statutory standards, leave no doubt Summary Judgment in favor of the Defendant City was compelled by the record and applicable law. The Court of Appeal's interpretation of "adjacent and contiguous" was overreaching to thwart the intent of the relevant comprehensive statutory scheme contrary to statutory construction and controlling case precedent.

KRS 81A.410, as set forth below in pertinent part, provides simple and direct standards for annexation of territory:

> "(1) A city legislative body may extend the city's boundaries to include any area:
>
> > (a) Which is adjacent or contiguous to the city's boundaries at the time the annexation proceeding is begun; and

> (b) Which by reason of population density, commercial, industrial, institutional or governmental use of land, or subdivision of land, is urban in character or suitable for development for urban purposes without unreasonable delay. ...." (Emphasis added.) Id. at KRS 81A.410.

In short, an annexation is required to meet the "contiguity" test and the "suitable for urban development" test.

KRS 81A.420 sets forth a procedure for possible opponents to request an election on the annexation. Correspondence was received from opponent's counsel, but the Mayor properly rejected the petition as not including sufficient signatures under the statute. (ROA 252-253). The Plaintiffs/Appellees did not allege and the Court of Appeals does not find the Mayor's decision to be inconsistent with the statute.

As stated in Hopperton v. City of Covington, Ky., 415 S.W.2d 381 (1967), "... **it is contiguous because the northern end of the area adjoins the present city limits of Covington. ....**" Id. at 383. The then Court of Appeals went on to state: "**... [t]he mere irregularity in its shape does not vitiate its compactness**." Id. at 383.

It is irrefutable from the Annexation Map attached to Ordinance 06-01 in this action and from the metes and bounds description in the Lebanon Annexation Ordinance prepared by a professional land surveyor (ROA 223-253, Notice of Filing – Ex. F and Appellant's Appendix – Item 3) that the annexed territory adjoins the preexisting city boundary over several thousand feet. The preamble to Ordinance 06-01 states the territory annexed "... is contiguous to the

City of Lebanon and of urban character or suitable for urban development without unreasonable delay."

The "Intent to Annex" Ordinance No. 05-13 (ROA 223-253, Notice of Filing – Ex. C and in Appellant's Appendix), provides a rational basis for the Lebanon Annexation in stating the Annexation was "... for purposes of economic growth and development of the City and to accomplish provision of services throughout the annexed territory and to take advantage of the industrial and economic growth proposed for the City by the proposed bypass roadway." Lebanon Ordinance 05-13. Clearly, the stated basis for the Lebanon Annexation bears a rational relationship to a legitimate governmental action pursuant to KRS Chapter 81A. Nothing more was constitutionally required to sustain a legislative action and the Circuit Court and Court of Appeals were in error. Steven Lee Enterprise v. Varney, 36 S.W.3d 391, 394-395 (Ky. 2000); and Chapman v. Gorman, 839 S.W.2d 232 (Ky. 1992).

6.3 THE COURT OF APPEALS FAILED TO PROPERLY CONSTRUE THE STATUTE TO DEFINE "ADJACENT OR CONTIGUOUS"

The Court of Appeals error in seeking to interpret the meaning of "adjacent or contiguous" in KRS 83.410 involved its apparent conclusion that review of three "corridor annexation" cases[17] was the best way to define the term, even though the Lebanon Annexation is plainly not a corridor annexation. This approach led the Court of Appeals to reach an erroneous result.

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17 Ridings v. City of Owensboro, 383 S.W.2d 510, Griffin v. City of Robards, 990 S.W.2d 634 (Ky. 1999), and Merritt v. City of Campbellsville, 678 S.W.2d 788 (Ky. App. 1984).

KRS 81A.410 and its use of the terms "adjacent or contiguous" should not be considered to even need further definition by the judiciary. As stated by the Kentucky Supreme Court in Commonwealth v. Steve Plowman, 86 S.W.3d 47 (Ky. 2002), "An unambiguous statute is to be applied without resort to any outside aids." Id. at 49. In addition, the Supreme Court explained, "This Court has repeatedly held that statutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required" citing McCracken County Fiscal Court v. Graves, 885 S.W.2d 307 (Ky. 1994); and Commonwealth v. Shively, Ky., 814 S.W.2d 572 (Ky. 1991). See also Funk v. Commonwealth, 842 S.W.2d 476 (Ky. 1992) ("The intention of the General Assembly is so apparent on the face of the statute that there is no room for construction.")

Section 7.31 of Eugene McQuillan's Treatise titled *The Law of Municipal Corporations* (Rev. 2006) provides the following discussion of contiguity:

> "Although some variations and differences may be observed in specific statutory definitions of the term (footnote omitted), contiguous lands ordinarily are such as are not separated from the corporation by outside land, (footnote omitted), to an appreciable or substantial degree, (footnote omitted), which have a substantial common boundary. (footnote omitted)" Id. at 637-639.

This passage from such a well-regarded treatise gives no inkling that annexations involving a substantial common boundary with the existing city should be subject to extensive scrutiny as to whether the shape may be considered "natural or regular" or the extent of knowledge of who is for or against

annexation may impact contiguity.[18] While certainly not controlling precedent, McQuillan's Treatise makes it clear the Court of Appeals Opinion is out of the mainstream of annexation law.

KRS 446.080 provides for a liberal construction of statutes with the view to promote their objects and to carry out the intent of the Legislature. As the Supreme Court has stated in *Plowman*, *supra*, "All words and phrases shall be construed according to the common and approved usage of language." *Id.* at 49. Other statutes using the term "contiguous" use the term in the nature of a physical reference and give no inkling of the complex approach of the Kentucky Court of Appeals.[19] The Kentucky Supreme Court has also explained, "we are not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used." *Commonwealth v. Harrelson*, 14 S.W.3d 546 (Ky. 2000). Of course, as Appellant sees it, the Court of Appeals has done just that.

In the alternative, if the requirement for annexed territory to be "adjacent or contiguous" in KRS 81A.410 could be viewed as ambiguous in any way, the Court of Appeals approach to a definition was misguided. The much better approach to statutory construction would have been to review common definitions which the Kentucky Legislature would have been presumed to be familiar with in adopting KRS Chapter 81A. For example, the Kentucky Supreme

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[18] Corridor annexation, is, of course, a unique issue, which has no applicability to the Lebanon Annexation. Mcquillan goes on to discuss corridor annexation in subsequent passages of his Treatise.

[19] See KRS 81.400 referring to merger of contiguous cities and KRS 148.876 referring to the acquisition of "adjacent or contiguous" tracts in the context of eminent domain.

Court has explained, "A trial court may take judicial notice of the definition of a word as an adjudicative fact where the definition of a term is indisputable, that is, where it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." See KRE 201(b)(2). Stanley Stokes v. Commonwealth of Kentucky, 275 S.W.3d 185, 188 (Ky. 2008). See also Robert G. Lawson, *The Kentucky Evidence Law Handbook* Section 1.00(3)(c), at 10 (4th Ed. 2003); Samuel A. Thumma and Jeffrey L. Kirchmeier, The Lexicon has Become a Fortress: *The United States Supreme Court's Use of Dictionaries*, 47 Buff. L. Rev. 227, 248 (1999).

Black's Law Dictionary, Sixth Edition (1990) defines contiguous in pertinent part as follows:

> ""In close proximity; neighboring; adjoining; near in succession; in actual close contact; touching at a point or along a boundary; bounded or traversed by." Id. at p. 320.

Other dictionary definitions are to the same effect and are consistent with Appellants' understanding of the term.[20]

The Court of Appeals took an incredible leap in considering what "contiguous" should mean when reviewing a comprehensive statutory scheme

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20 *Ballantine's Law Dictionary*, Third Edition (1969) defines contiguous in pertinent part as follows: "Literally, in actual contact, an actual touching. One parcel of land is contiguous to another parcel of land when the two parcels are not separated by outside land. Appearing in statutes, the term is construed at times somewhat differently depending upon the context and subject matter of the entire statute.... In its popular sense, and as used in local improvement acts, the word means in actual or close contact; touching; adjacent; or near...." See also *the American Heritage Dictionary of the English Language*, Third Edition (1992), defining "contiguous" in pertinent part as: "sharing an edge or boundary; touching" and "connecting without a break." *Webster's Seventh New Collegiate Dictionary* (1971) is in accord in defining contiguous as: "being in actual contact: touching 2: adjoining ...."

largely adopted in 1980. The Lebanon Annexation meets the dictionary definitions of contiguous and any other reasonable definitions. Except for the unique and fully distinguishable case of a "corridor annexation," there is nothing in Kentucky law suggesting the statutory use of the term should be anything other than as the dictionary definitions suggest. The Court of Appeals was in error in concluding otherwise and voiding the Lebanon Annexation.

6.4 THE APPLICATION OF KRS 81A.410 TO BOTH CONSENSUAL AND NON-CONSENSUAL ANNEXATIONS SHOWS "ADJACENT OR CONTIGUOUS" IS A PHYSICAL STANDARD

Kentucky's "consensual annexation" statute at KRS 81A.412 specifically applies KRS 81A.410 and its reference to "adjacent or contiguous" property in determining the standards for a consensual annexation. In this context, it appears "contiguous" must be a physical standard (i.e. touching the preexisting boundary) rather than a standard intertwined with the city's and property owner's intent.

"Consensual annexations" are planned in detail and shaped to obtain the relevant property owner's agreement. A choice to consensually annex one property logically and as a practical matter involves the choice not to annex another property. However, the Court of Appeals' approach says a purportedly "manipulated" boundary cannot be contiguous. Nonetheless, such planning is the essence of consensual annexation. Because of the interconnection of the two statutes, there cannot be one definition of "contiguous" for non-consensual annexations and one for consensual annexations. Both processes use the same

"adjacent or contiguous" standard in KRS 81A.410. Thus, the Court of Appeals interpretation is in error.

Principles of statutory construction should help the Supreme Court in reaching this conclusion. The Supreme Court's recent Opinion styled Desean Maynes v. Commonwealth of Kentucky, 361 S.W.3d 922 (Ky. 2012) summarizes the appropriate framework for statutory construction under Kentucky law:

> "Statutory construction is a matter of law which requires de novo review by this Court. Heam v. Commonwealth, 80 S.W.3d 432, 434 (Ky. 2002) (citing Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, 983 S.W.2d 488, 45 13 Ky. L. Summary 28 (Ky. 1998). In construing statutes, our goal is to give effect to the intent of the General Assembly. We derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration. Osborne v. Commonwealth, 185 S.W.3d 645 (Ky. 2006). **We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes**. Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008); Lewis v. Jackson Energy Cooperative Corporation, 189 S.W.3d 87 (Ky. 2005). We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one. Layne v. Newberg, 841 S.W.2d 181 (Ky. 1992). Only if the statute is ambiguous or otherwise frustrates a plain reading, do we resort to extrinsic aids such as the statute's legislative history or the canons of construction. MPM Financial Group, Inc. v. Morton, 289 S.W.3d 193 (Ky. 2009)." (Emphasis added.) Id.at 925.

The Kentucky Supreme Court's Opinion in J. Randolph Lewis v. Jackson Energy Cooperative Corporation, et al, 189 S.W.3d 87 (Ky. 2005) is also informative on principles of construction applicable to the meaning of "adjacent or contiguous" in KRS 81A.410 and as cross-referenced b KRS 81A.412:

> "It is a primary rule of statutory construction that the enumeration of particular things excludes ideas of something else not mentioned....
> ....

> ... Any apparent conflict between sections of the same statute should be harmonized if possible so as to give effect to both sections....
>
> ....
>
> It was plain error for both the circuit court and the Court of Appeals to construe KRS 279.020 as permitting rural electric cooperatives to engage in non-electric ventures. If the rationale of the circuit court were followed to its logical conclusion, it would in effect destroy the distinction between a special purpose electrical cooperative and a general purpose corporation. The Court of Appeals implicitly recognized that such a construction was not valid, but attempted to rewrite former Section 192 of the Kentucky Constitution so as to change the constitutional standard for defining lawful corporate purposes. Both courts were in error." Id. at 92.
>
> ....
>
> The use of extrinsic justifications for expanding the statute was error. Where a statute is unambiguous, there is no need to use extrinsic evidence of legislative intent and public policy which the statute is intended to effect. A reviewing court cannot amend it by means of a so-called interpretation contrary to the plain meaning. ... This statute is not ambiguous." Id. at 92-94.

Similarly, in the present case, the Court of Appeals has adopted a judicial definition of what territory is "contiguous" which has implications for both consensual and non-consensual annexations and fails to harmonize the statutes.

The only way to harmonize the standard of property being "adjacent or contiguous" in KRS 81A.410 in a manner which may be used consistently for both non-consensual annexations and consensual annexations governed by KRS 81A.412 is for it to have the same meaning for both statutes in that "contiguous" is essentially a physical standard in which a property with a substantial adjoining boundary to a preexisting city must be deemed contiguous. The knowledge of a city council as to who may support or oppose a non-

consensual annexation following property lines is of no relevance as to whether annexed territory is contiguous.

6.5 THE COURT OF APPEALS FAILED TO PRESUME THE VALIDITY OF THE LEBANON ANNEXATION.

Presumptions in Kentucky law clearly favor the validity of ordinances. Conrad v. Lexington-Fayette Urban County Government, 659 S.W.2d 190, 196 (Ky. 1983).[21] The Circuit Court wrongfully used Lebanon's decision to abandon a prior and separate contemplated annexation, which certain residents or property owners had indicated they opposed, but which never led to a proposed or final annexation ordinance[22] as a basis to void the Annexation at issue in the present case.[23] The Court of Appeals further did not recognize the appropriate presumption in finding the Lebanon Annexation to be void.

Planning for compliance with KRS 81A.420 should not serve as a trap for any city. Essentially, the Court of Appeals appears to have rushed to

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[21] See Michael Bess, at al v. Bracken County Fiscal Court, 210 S.W. 3d 177, 182 (Ky. App. 2006)("... a statute carries a strong presumption it is constitutional. ... This rule of construction is also applicable to local ordinances.")

[22] See Summary Judgment of April 22, 2010, p. 2. [ROA 275-280]. See also Deposition of Mayor Krenshaw in Record on Appeal and Deposition of City Administrator John Thomas.

[23] Id. at p. 2 of Summary Judgment entered April 22, 2010. Kentucky's Appellate Courts have rejected arguments based on a future council being bound by decisions of a past council. See Hume v. Franklin County Fiscal Court, et al, 273 S.W.3d 748,751 (Ky 2008) ("What a legislative body turned down one day may be highly coveted before a two-year waiting period has expired."). See also Louisville v. Jefferson County, 623 S.W.2d 219, 224 (Ky. 1981)("The law is clear that a legislative body may not limit its power to act one way or another in the future in governmental, as opposed to proprietary functions.") Accordingly, there is no basis in Kentucky law to rely upon prior abandonment of an annexation as a basis to invalidate a subsequent annexation.

characterize the Lebanon Annexation in a suspect manner when there is no reason to believe that what Plaintiffs/Appellees call "gerrymandering" is actually anything besides prudent planning of a successful annexation under Kentucky law, regardless of whether it reduced the chances annexation opponents would prevail in their efforts.[24] It is simply not contemplated in Kentucky law that legislative action will please everyone, especially in the field of annexation.

6.6 ANNEXATION IS A LEGISLATIVE ACT SUBJECT TO ONLY LIMITED JUDICIAL REVIEW.

Municipal annexation has long been held to be a legislative act. City of Eddyville v. City of Kuttawa, Ky., 343 S.W.2d 404, 406 (1961); City of Northfield v. Holiday Manor, Inc., 479 S.W.2d 596, 597-598 (Ky. 1972); City of Louisville v. Kraft, Ky., 297 S.W.2d 39, 42 (Ky. 1957). The Court of Appeals reached its unfavorable characterization of the Lebanon Annexation with no serious recognition that it was reviewing a legislative act in which the City Council had great discretion. A passage from Kraft is particularly informative:

> "... Of first consideration is the fact that the creation of municipalities and the increase or reduction of their boundaries, are matters of legislative function. The political and economic advisability of annexation, and the policy questions involved in the problem of municipal expansion, are to be determined solely by the legislative branch of government. It is incumbent on the legislature to prescribe the facts and conditions under which annexation may take place. The only function of the courts is to find whether the prescribed facts and conditions exist...." Id. at 42.

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[24] Jensen v. Kentucky State Board of Elections, et al, 959 S.W.2d 771, 776 (Ky. 1997) ("Nevertheless, the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render the scheme constitutionally infirm.")

The legislative acts represented by the Lebanon Annexation should be reviewed by the judiciary on a standard of whether there is any rational basis for the legislative enactment. There is good reason Courts are hesitant to evaluate the merits of legislative enactments such as annexations. If the Court of Appeals is correct, then how large or how small of an annexation does a city have to conduct to find a mix of voters that will avoid a claim from some voters that boundaries were "gerrymandered" and the property is not contiguous? What constitutes knowledge that a person will vote one way or another? Is a rumor sufficient? Does the city need to conduct a poll? Is hearsay sufficient to determine a person's inclination on an annexation vote? Does failure to agree to consensual annexation constitute conclusive evidence a person will vote against annexation if there is a referendum? Ultimately, such matters are so speculative and political that they are not suited for judicial review and certainly not sufficient to sustain the Court of Appeals finding that the Lebanon Annexation was not of "contiguous" territory.

The Court of Appeals appears to have taken great umbrage at the fact that consideration of who had indicated they were opposed or in favor of the annexation may have had some impact on the territory ultimately annexed.[25]

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[25] See Graham v. Mills, Ky., 694 S.W.2d 698, 701 (1989) (Courts are required to "draw all reasonable inferences and implications" from a legislative enactment as a whole in order to sustain its validity, if possible.); Conrad v. Lexington-Fayette Urban County Gov't, Ky., 659 S.W.2d 190, 195 (1983) ("... the legislative action of any governing body is subject to very limited judicial review. The legislature is not governed by judicial standards in making findings of fact."); Buford v. Commonwealth, Ky. App., 942 S.W.2d 909, 911 (1997) (Those attacking legislation have the burden to negate "... every conceivable factual or legal basis" which might support the challenged law.).

These assumptions and conclusions as to the intent of the City Council in shaping the boundary for the annexation then lead the Court of Appeals to take the next step in concluding the annexed territory is not "contiguous" to the pre-existing City of Lebanon. The Court of Appeals approach was in error because Kentucky law does not put local legislative bodies under such constraints when deciding to expand city boundaries and allow for such fine-tuning in assessment of motives, etc.

A. Misapplication of Corridor Annexation Precedents. To understand the breadth of the Court of Appeals' overreaching to set new standards for annexations in Kentucky, it is critical to know that Ridings v. City of Owensboro, 383 S.W.2d 510 (Ky. 1964); Griffin v. City of Robards, 990 S.W.2d 634 (Ky. 1999); and Merritt v. City of Campbellsville, 678 S.W.2d 788 (Ky. App. 1984), were all opinions specifically addressing circumstances of **"corridor"** annexation or incorporation and give no indication that the standards applied to the corridors in the particular cases were to apply to annexations in general. The Kentucky Supreme Court in Griffin, *supra*, explained that "the issue of corridor, shoestring or strip contiguity was last dealt with by this Court in Ridings v. City of Owensboro..." and cited Merritt v. City of Campbellsville, *supra*, as "... finding contiguity between unincorporated territory and incorporated territory by way of corridor in which water mains were located." The Supreme Court in Griffin, *supra*, concluded that "The territory of West Robards and the corridor which connects it to Robards are clearly not contiguous to Robards. Id. at 640-641. .

The aforementioned trio of precedents are fully distinguishable from the circumstances of the Lebanon Annexation involving an approximately 415 acre territory roughly shaped like the state of New Jersey and depicted on the Survey Map attached to Ordinance 05-03 and 06-01 and to Appellants' Court of Appeals Brief and this Brief in the Appendix as items No. 3 and No. 4. The Lebanon Annexation is simply in no way analogous to the annexation of a long narrow roadway to connect a preexisting city to some distant industrial or commercial property. The 415 acre Lebanon Annexation stands on its own and borders the preexisting city by a boundary of approximately 4,780.5 feet. On this basis alone, the Court of Appeals analysis and reliance on the three opinions falls apart and cannot be used to void the Lebanon Annexation consistent with Kentucky law.

B. Irrelevancy of Support/Opposition to Annexation as to Contiguity. The Court of Appeals Opinion is based on the presumption that whether a property is excluded from the annexation is not only relevant but of dispositive importance as to "contiguity" based on the intent of the City in excluding such property. This is stark contradiction to the following passage of the Kentucky Supreme Court Opinion in Griffin v. City of Robards, 990 SW.2d 634 (Ky. 1999) in which it explained Kentucky law as follows:

> "... Opponents speculate that the only reason that West Robards was included in the territory to be incorporated was that one of the principle supporters of the incorporation lived there. While this information is certainly informative, it is also irrelevant to any discussion of whether West Robards is contiguous to Robards." (Emphasis added) Id. at 640.

Thus, the Court of Appeals has made a fundamentally erroneous connection between whether a property owner supports or opposes annexation and whether inclusion or exclusion of his or her property in an annexation is determinative of whether the annexed territory is "contiguous." Reversal is required by Griffin, *supra*.

C. Cited Corridor Opinions Do Not Establish a Requirement of "Natural or Regular" Boundaries. The Court of Appeals Opinion should be examined carefully to reveal that its citations to Merritt, supra; Ridings, supra; and Griffin, *supra*, do not involve specific quotes from such opinions, and often include only a citation to the first page of the referenced opinion. A careful review of each cited opinion reveals that none of them support the voiding of the Lebanon Annexation. Pursuant to KRS 81A.410, annexed territory is required to be adjacent or contiguous to the preexisting city boundaries. However, nowhere in the three aforementioned opinions has Kentucky's highest court expressly or by implication stated that boundaries of an annexation must be "natural or regular" as required by the Court of Appeals Opinion (p. 7) in the Lebanon case. Furthermore, existing Kentucky law does not tie whether there is a "concrete or tangible municipal benefit" to the annexation to whether the boundary is "unnatural or irregular" where a corridor is not involved. (Court of Appeals Opinion, p. 8-9) The Court of Appeals has erroneously linked several concepts which are not interrelated under Kentucky law and wrongfully voided the Lebanon Annexation on such misinterpretation. This is a fatal flaw in reasoning that must be corrected by the Kentucky Supreme Court.

D. Contiguity Not Determined by Shape of Annexation. The Court of Appeals has failed to apply the proper standard for contiguity for non-corridor cases under Kentucky authority. The proper standard is well explained in Hopperton v. City of Covington, 415 S.W.2d 381 (Ky. 1967):

> "The only finding under this statute which is now attacked is that the area is "compact and contiguous" The evidence discloses that it has an irregular shape roughly similar to an hour-glass. It also 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 other cities. The southern and western boundaries coincide with a railroad track and certain highways. The monuments constitute reasonable and easily identified boundaries and mere irregularity in shape does not vitiate its compactness." Id. at 383.

Likewise in the case of the Lebanon Annexation, the adjoining of the annexed territory with the preexisting City as evidenced from the Survey Map attached to Ordinance 06-01 and to this Appellants' Court of Appeals Brief and this Brief as Appendix items 3 and 4, leaves no doubt the annexed territory is contiguous. The outer boundaries of the Lebanon Annexation run along property lines and it is clear from Hopperton, *supra*, that Kentucky's highest court is not concerned with how many sides constitute the outer boundary of the annexed territory or how it is shaped as long as a corridor is not involved. The Court of Appeals Opinion's rigid focus on the shape of Annexation is entirely inconsistent with Hopperton, *supra,* and fully warrants reversal.

E. Court of Appeals Wrongfully Usurps Legislative Authority. The Court of Appeals Opinion not only goes far beyond existing precedent in attempting to expand the definition of contiguity, but further goes beyond existing law in referencing the City to have "manipulated the boundaries". (Court of Appeals

Opinion, p. 8). However, It cannot be a violation of Kentucky law for a City to exercise its discretion to plan an annexation which meets the requirements of KRS 81A.420 so it will be successful. Cities should be encouraged in complying with statutes rather than having ordinances voided when the outcome of statutory compliance is not to the satisfaction of persons seeking to file suit. Plaintiffs/Appellees abandoned any claim of invalidity of KRS 81A.420. (Appellees' Brief before Court of Appeals, p. 7).

The Court of Appeals was in error to refer to the City's efforts to comply with the statute as "politically expedient" and to conclude that no "... concrete or tangible municipal value or purpose existed justifying the unnatural and irregular boundaries of the annexed property" (Court of Appeal Opinion, p. 8-9). It is a dangerous precedent for the Court of Appeals to dismiss a city council's policy choices as to annexation as "politically expedient" and to characterize an annexation following property lines as "unnatural and irregular" in that any annexation disfavored by the judiciary could be condemned in this manner.

In contrast to the Court of Appeals reasoning for voiding the Lebanon Annexation, the City had sound rational basis for approving the annexation in that it had found the 415 acres to be contiguous, suitable for urban development, and Ordinance 05-13 even expressly stated the annexation was "... for purposes of economic growth and development of the City and to accomplish provision of services throughout the annexed territory and to take advantage of the industrial and economic growth proposed for the City by the proposed bypass roadway." (Ordinance 05-13 and Ordinance 06-01 - Record on Appeal 223-253 [Exhibit C to

Notice of Filing], Appendix to Appellant's Brief – Parts 3 & 4, and Appendix to this Brief, Parts 3 & 4).

Notwithstanding the Appellant's argument that legislative motives were an improper inquiry for judicial review,[26] the Circuit Court voided the Lebanon Annexation based upon its evaluation of the motives of City officials as identified in Depositions of the Mayor and City Administrator included in the Record on Appeal.

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. As recognized in Rose v. City of Paris, Ky. App., 601 S.W.2d 610 (1980), "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." Id. at 611.

In Louisville & Jefferson County Metropolitan Sewer District v. Joseph E. Seagram & Sons, Ky., 211 S.W.2d 122 (1948), the then Court of Appeals stated:

> "It is firmly settled that the courts will not inquire into motives which impel or the expediency or wisdom of legislative or administrative action, for that does not affect its legality or validity." Id. at 126.

To the same effect are Kentucky Utilities Co. v. City of Paris, 75 S.W.2d 1082, 1085-1086 (Ky. 1934); and Akers v. Floyd County Fiscal Court, 556 S.W.2d 146, 150 (Ky. 1977). As stated by the then Kentucky Court of Appeals in Moore v.

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[26] ROA 171-174, 175-200, 201-222, See Deposition of Mayor Crenshaw and Deposition of City Administrator Thomas and City's objections stated throughout as included in ROA. See also Defendant's Memo Opposing Motion to Compel at ROA 101-108.

Ward, Ky., 377 S.W.2d 881 (1964), "Legislative motive, understanding or inducement are not on trial, and it is not the function of the courts to reappraise legislative reasons or to weigh evidence with respect thereto" Id. at 883.

Ultimately, long-standing Kentucky law required the judiciary to refrain from consideration of legislative motives. When the Lebanon Annexation is viewed on its face in relation to public documents as it should be evaluated[27], there is no basis for it not to have been validated by the Circuit Court. Accordingly, the Supreme Court is requested to reverse the Court of Appeals and uphold the Lebanon Annexation.

The Kentucky Supreme Court in Louisville Shopping Center v. City of St. Mathews, 635 S.W.2d 307 (Ky. 1982) has recognized "The legislature has the right to pass such laws for the annexation of territory to municipal corporations as in its judgment will best achieve the desired end." Id. at 310. In addition, in City of Louisville v. Kraft, 297 S.W.2d 39 (Ky. 1957), the then Court of Appeals explained, "The political and economic advisability of annexation, and the policy questions involved in the problem of municipal expansion, are to be determined solely by the legislative branch of government." Id. at 42. By its enactment of the comprehensive framework of KRS Chapter 81A, the Kentucky Legislature has

[27] The public documents filed in the Circuit Court record and incorporated in Lebanon's Memorandum Supporting Summary Judgment (ROA 223-253) reflect the concrete actions taken by the City Council. A City Council speaks only through its records. Lone Jack Graded School District v. Hendrickson, 200 S.W.2d 736 (Ky. 1947); Louisville & Jefferson County Metropolitan Sewer District v. General Distillers Corp. of Ky., 257 S.W.2d 543 (Ky. 1953). The Circuit Court was in error to rely upon deposition testimony of a Mayor and City Administrator and any evidence other than city records to void the legislative action of the City Council.

detailed what is required for a municipality to conduct a lawful annexation. The City of Lebanon complied with those statutory requirements and all applicable prior case precedent.

6.7 THE CIRCUIT COURT'S FINDING OF A VIOLATION OF SECTION 2 OF THE KENTUCKY CONSITUTION WAS LIKEWISE IN ERROR

The circumstances of the Court of Appeals voiding the Lebanon Annexation and affirming the Circuit Court on very different reasoning from that of the Circuit Court[28] required Movant to additionally preserve all issues raised in its Brief before the Court of Appeals.[29] Although the Court of Appeals apparently was not at all persuaded by the Circuit Court's finding of a purported violation of Section 2 of the Kentucky Constitution for decision to rely upon its reasoning to affirm, Appellant believes it must address the Circuit Court's reasoning in order to make it clear the Kentucky Supreme Court should not rely on such reasoning either. Appellant incorporates all of its above argument in this Brief against the Circuit Court's finding of a Section 2 violation. However, Appellant further contests the Circuit Court's conclusions on the bases discussed below.

The following four issues as preserved for this Appeal are related in that the argument and case precedent cited below in the remainder of Appellant's Brief is relevant to all of them:

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[28] The Marion Circuit Court stated in its April 22, 2010 Summary Judgment that "the sole issue in this case... is whether the subject annexation by Defendant was arbitrary and unreasonable and/or in violation of Plaintiffs' constitutional rights."

[29] See Appellant's Motion for Discretionary Review, p. 9, and Appellant's Court of Appeals Brief, p.5.

- Issue 1. Whether Section 2 of the Kentucky Constitution prevents a City from considering which voters or property owners support or oppose annexation in deciding whether to conduct an annexation and/or the shape of the annexed territory.

- Issue 2. Whether the annexation conducted by the City of Lebanon via proposed Annexation Ordinance 05-13 and final Annexation Ordinance 06-01 was a legislative act with a rational basis and was in fact in compliance with Section 2 of the Kentucky Constitution

- Issue 3. Whether an annexation conducted in compliance with KRS Chapter 81A can be voided as being in violation of Section 2 of the Kentucky Constitution.

- Issue 4. Whether the Marion Circuit Court's April 22, 2010 grant of Summary Judgment in favor of Plaintiffs was in error as a matter of law and/or an abuse of discretion, and whether Defendant City of Lebanon's Motion for Summary Judgment should have been granted based on all applicable law.

The Circuit Court fundamentally misinterpreted Section 2 of the Kentucky Constitution in granting Summary Judgment voiding the Annexation. With the absence of any short term limitations period for challenges to annexation[30], a ruling which allowed annexations conducted in compliance with KRS Chapter 81A to nonetheless be found unconstitutional based on perceived intent of city officials in shaping the annexation would throw a dark cloud over the validity and finality of past and future annexations throughout Kentucky. Home Rule/Public Purpose authority of cities pursuant to KRS 82.082 and the power of the Kentucky Legislature to provide for alteration of boundaries of cities pursuant to

[30]. For example, statutory zoning appeals are required to be filed within 30 days of legislative body vote per KRS 100.347. In contrast, there is no annexation specific limitations period in the Kentucky Revised Statutes. The applicable statute of limitations period may be as long as the ten years period provided in KRS 413.160 (action for relief, not provided for by statute) or perhaps the five year limitations period of KRS 413.120(7).

Section 156a of the Kentucky Constitution would be circumvented by the judiciary if the Marion Circuit Court's decision is affirmed.

On all of the facts and circumstances in the Record on Appeal and all applicable law, the April 22, 2010 Summary Judgment was in error as a matter of law and was an abuse of discretion. Plaintiffs' Motion for Summary Judgment should have been denied and the Defendant City of Lebanon's Motion for Summary Judgment should have been granted. In the alternative, should any fault be found with the Annexation, the appropriate remedy is remand to the City Council for a further decision and findings considering the separation of powers issues involved and the legislative nature of annexation.

Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc., 177 S.W.3d 718 (Ky. 2005), as cited by the Circuit Court in primary support of its Summary Judgment, is an administrative agency civil penalties case which provides no support for resolution of Issues 1, 2, 3, or 4 against the validity of the Lebanon Annexation. (ROA 275-280, Summary Judgment – p. 1). The facts of Kentec involved the Natural Resources Cabinet's attempt to impose penalties in what the Supreme Court found to be an arbitrary manner. As stated in Kentec, "... we can, and do hold, the Cabinet's assessment of a penalty without access to a subsequent formal hearing based upon a permitee's inability to pay was unreasonable and arbitrary and in violation of Section 2 of the Kentucky Constitution." Id. at 727.

As recognized in Kentec, persons have substantial rights to resist monetary penalties being imposed on them by the Commonwealth. However, the Kentucky Supreme Court has ruled there is no inherent right to resist annexation in the absence of a statutory provision[31]. The federal district court for the Eastern District of Kentucky has further upheld KRS Chapter 81A against federal constitutional challenge.[32]

A far more relevant precedent than Kentec in determining the application of Section 2 to legislative action, such as annexation, is White vs. Danville, 465 S.W.2d 67 (Ky. 1971). White makes it clear that the Article 2 prohibition on the exercise of arbitrary governmental power, cannot be used to prevent legitimate governmental actions:

> "... Section two of our Constitution does not rule out policy choices which must be made by government. Many times these choices are in reality political actions and if they are not otherwise in conflict with constitutional principles they do not violate section two as being arbitrary." Id. at 69-70.

In choosing the properties to include in or exclude from the Annexation, the Lebanon City Council simply made the type of policy decision contemplated by the White Opinion within the lawful framework of KRS Chapter 81A.

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31 Louisville Shopping Center vs. City of St. Matthews, 635 S.W.2d 307 (Ky.1982)

32 Moorman v. Wood, 304 F.Supp. 467 (E.D. Ky. 1980)

The Kentucky Supreme Court Opinion in Hilltop Basic Resources, Inc. v. County of Boone, 180 S.W.3d 464 (Ky. 2005), further illustrates the appropriate analysis under Section 2 of the Kentucky Constitution that should be applied to legislative action:

> "At its core, arbitrariness review is concerned primarily "with the product [of legislative or administrative action], and not with the motive or method which produced it." National-Southwire Aluminum, supra, at 515; ... A focus on the product of the action (rather than the motive behind the action) balances the need to ensure fair and nonarbitrary treatment before a legislative or administrative body with the equally compelling need to avoid undue infringement upon the legislative or nonjudicial aspects of the process or function of such bodies." Id. at 469-470

Ultimately, Lebanon Annexation Ordinances 05-13 and 06-1 (ROA 223-253, Notice of Filing – Exhibits C and F, and in Appellant's Appendix) identify the statutory basis for the Annexation and its boundaries, which is the product of the legislative process and is the proper subject of judicial review. The motive or method that led to the Annexation is not subject to arbitrariness review and should never have resulted in a grant of Summary Judgment to Plaintiffs under Kentucky law.

The Circuit Court's citation to the fire district[33] annexation case of Kelley v. S.E. Dailey, 366 S.W.2d 181 (Ky. 1963) does not support the Summary Judgment of April 22, 2010. The then Court of Appeals did state that "[t]he fixing of municipal boundaries is generally considered to be a legislative and not a judicial function, and the legislative action is not reviewable by the courts, unless

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[33]See KRS 75.010 as in effect in 1963.

it is arbitrary, unreasonable or violative of constitutional rights." Id. at 183. However, the Court of Appeals went on to explain:

> "Since the creation of municipalities and all matters in relation to annexation are political acts, whether they shall be done or not is within the power and discretion of the Legislature as the political department of government; hence the assent or the will of the people particularly affected is not controlling, for they hold their property subject to the exercise of the legislative power." (Emphasis added) Id. at 183.

Likewise, in the circumstances of the Lebanon Annexation, whether the Plaintiffs would have preferred not to have been annexed, or that the Annexation be shaped differently, does not control the validity of the legislative action.

While Kelley does recognize that an annexation must be Constitutional, the Circuit Court in its citation to the 1963 Kelley Opinion does not take into account that the current KRS Chapter 81A statutory framework for annexation, as adopted in 1980, has been found to be Constitutional in more recent precedent such as Louisville Shopping Center vs. City of St. Matthews, Ky., 635 S.W.2d 307 (Ky. 1982) and Moorman v. Wood, 304 F.Supp. 467 (E.D. Ky. 1980) and other authority discussed above.

On balance, Kelley, in which a Fire District annexation was ultimately upheld, is best interpreted as supporting Appellant. The Circuit Court was in error to rely upon it to support Summary Judgment in favor of Plaintiffs/Appellees.

Ultimately, the Lebanon Annexation should be sustained in that neither the Court of Appeals' nor the Circuit Court's reasoning is sufficient under Kentucky law to strike down the Ordinance 06-01 and eviscerate the legitimate

and long used statutory powers of cities to annex new territory in their lawful discretion.

7.0 CONCLUSION

The Court of Appeals Opinion affirming the Marion Circuit Court was inconsistent with KRS Chapter 81A and long established precedent and was an abuse of discretion in finding the Lebanon Annexation which touches the preexisting City along 4,780.5 feet to not be "contiguous" for purposes of KRS 81A and other authority. The Court of Appeals should be reversed with direction that Summary Judgment be entered in favor of the Appellant City of Lebanon and/or the Appellant City of Lebanon should be granted any other relief to which it is entitled.

Respectfully Submitted,

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APPENDIX TO APPELLANT CITY OF LEBANON, KENTUCKY BRIEF

1. **Opinion of Kentucky Court of Appeals rendered July 15, 2011, as modified July 29, 2011**
2. **APRIL 22, 2010 OPINION, ORDER, AND SUMMARY JUDGMENT OF MARION CIRCUIT COURT[1]**
3. **LEBANON ORDINANCE O5-13 PROPOSING ANNEXATION[2] (Survey is on last page)**
4. **LEBANON ORDINANCE 06-01 ANNEXING TERRITORY[3] (Survey is on last page)**
5. ***LOUISVILLE SHOPPING CENTER V. CITY OF ST. MATHEWS*, 635 S.W.2D 307 (Ky. 1982)**

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[1] Appearing in Record on Appeal at p. 275-280.

[2] Appearing in Record on Appeal as Exhibit C to Notice of Filing (ROA 223-253).

[3] Appearing in Record on Appeal as Exhibit F to Notice of Filing (ROA 223-253).