

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. REPLY BRIEF FOR APPELLANT CITY OF LEBANON, KENTUCKY

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

Appellees

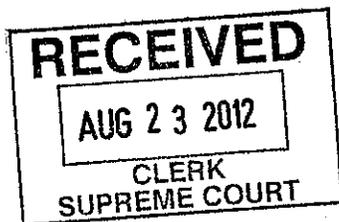
The undersigned hereby certify that copies of this Reply Brief were served upon the following named individuals by U.S. Postal Service First Class Mail postage prepaid on August 22, 2012: Hon. James L. Avritt, Sr., P.O. Box 671, Lebanon, KY 40033; Hon. Theodore H. Lavit, Lavit and Associates, PSC, One 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 40511-2058; Hon. Judge Sara Walter Combs, Kentucky Court of Appeals, 323 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 A-102, Owensboro, KY 42302; Hon. Judge Allan Ray Bertram, Circuit Judge, Justice Center, Suite 301, 300 E. Main St., Campbellsville, KY 42718; Hon. Laura Millam Ross, and James D. Chaney 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 The Record on Appeal was not withdrawn by the attorneys for Movants.

Respectfully submitted,


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1.0 INTRODUCTION

Appellees' Brief attempts to: (1) demonize advance planning of the Lebanon Annexation by city officials; (2) erroneously applies corridor annexation decisions; and (3) relies heavily on irrelevant out-of-state decisions. Neither the Court of Appeals finding of lack of contiguity nor the Circuit Court's arbitrariness determination are sufficient to invalidate the Lebanon Annexation in light of Appellants' Brief and the Brief of the Kentucky League of Cities ("KLC") as *Amicus Curiae*. Reversal of the Court of Appeals is fully warranted.

2.0 ARGUMENT

2.1 Reply to Counterstatement of the Case.

A. Annexation Planning/Ordinance Adoption. Contrary to Appellees' argument, the key factual event is not the narrative of how the annexation at issue came to take place nor how various executive or administrative officials evaluated who was "for or against" annexation, but, instead, is the ultimate City Council adoption of proposed and final annexation Ordinances 05-13 and 06-01 and the text of such enactments. (collectively the "Lebanon Annexation") Ordinances 05-13 and 06-01 were included as Appendix 3 and 4 to Appellant's Brief. The City could have lawfully attempted to annex a larger or smaller territory, but it was within its discretion to annex the territory which is the subject of this appeal based on the relevant meeting minutes and the aforementioned Ordinances 05-13 and 06-01 and findings therein.

The Lebanon Annexation does not run with the proposed bypass roadway in the manner of a long and narrow corridor, but the bypass instead bisects the 415 acres which includes a Wal-Mart supercenter store.

B. Testimony, Motives, and Intent of Lebanon Officials. Appellees place great importance on deposition testimony of Mayor Krenshaw and City Administrator Thomas.¹ (Appellee's Brief, p. 2-6). Neither of these officials had the authority to vote on the proposed or final annexation ordinance and their views of whether various property owners supported or opposed annexation is, as a legal matter, nothing more than speculation, which could not have controlled the City Council's vote on the Ordinances or who did or did not sign a KRS 81A.420 petition at a later date. Ultimately, the city officials were simply doing their duty in trying to plan for a successful annexation.

Appellees' seek to taint and invalidate the Lebanon Annexation based on what the Mayor, City Administrator, or City Council purportedly "knew" about preferences of various property owners desires as to annexation and how it may have impacted the shape of the annexed territory. Appellees' position is inconsistent with Hilltop Basic Resources, Inc., et al vs. County of Boone, et al, 183 S.W.3d 464 (Ky. 2005) in which the Kentucky Supreme Court recognized "in the administrative or legislative context, however, the concept of impartiality is, by necessity and by function, more relaxed and informal." Id. at 468. Furthermore, "The "right to an impartial tribunal " is nowhere to be found within

¹ Defendant's Depositions of Lebanon Mayor Gary Crenshaw (05/06/08), 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 were filed of record and are included in the Record on Appeal.

this list, and rightfully so, since the right, as it is commonly conceived within the judicial context, cannot be guaranteed (nor need it be) in the administrative or legislative setting.” *Id.* at 469.

The Kentucky Supreme Court further explained in *Hilltop, supra*, that “Mere familiarity with the facts of a case gained by an agency (or other nonjudicial body) in the performance of its statutory role does not, however, disqualify a decision-maker.” (Emphasis added.) *Id.* at 469. Of course, knowing who is for or against annexation is nothing more than familiarity with facts of the case. “[A]rbitrariness review is concerned primarily “with the product [of legislative or administrative action] and not with the motive or method which produced it.” *Id.* at 469-70. Whether the legislative action involves zoning as in *Hilltop, supra*, or annexation, as in the present case, legislative decision-makers are not under the kind of constraints as to their motives and facts considered in the process in the manner applied by the Court of Appeals Opinion now under review and as advocated by Appellees.

C. Non-Party Property Owners. Appellees reference the Leake, Mattingly, Brady and Meck Holding properties, which were not annexed, as being surrounded by the City boundaries, but fail to provide any Kentucky authority as to why this should be prohibited or mention that none of the referenced property owners are parties to this action. (Appellee’s Brief, p. 5).

D. Properly Rejected Petition. Appellees have never contested whether the City followed the express language of KRS 81A.420 in regard to a submitted petition. In fact, Appellees’ Brief concedes “correspondence was received from

opponent's counsel, but the Mayor properly rejected the petition as not including sufficient signatures under the statute....” (Emphasis added) (Appellee's Brief, p. 17).

E. Distinction between Factual Findings and Appeal Based on Legal Issues. Appellees once again list the 14 findings of fact made by the Circuit Court. (Appellees' Brief, p. 7-9). The absence of a Motion for the Circuit Court to alter or amend its findings of fact is of no consequence to this proceeding. The City had no desire to emphasize further review of factual matters in that it is the incorrect legal conclusions which are the basis of the City's appeal and the participation of *Amicus Curiae* Kentucky League of Cities. Even assuming all of the factual findings are true² and the City Council fully knew who supported or opposed the annexation, the City's position is that there was still no legal basis to overturn the City's lawful exercise of legislative discretion in compliance with KRS Chapter 81A and all applicable case precedent. The Lebanon Annexation had a rational basis and should be sustained.

2.2. Reply to Appellees' Legal Argument

Contrary to the position of Appellees' Brief, the Lebanon Annexation is fully consistent with the powers delegated to Kentucky cities by KRS Chapter 81A and recognized by long established precedent. The two issues of purported

² Factual findings 13 and 14 must be distinguished because they are “findings of fact” in name only. (Appellees' Brief, p. 9). Actually they are plainly legal conclusions as to what is purportedly arbitrary, unreasonable, capricious, and is gerrymandering.² The City has thoroughly contested these issues in its Memoranda opposing Summary Judgment, in its Prehearing Statement and Briefs before the Court of Appeals, and its Motion for Discretionary Review. See also CR 59.06 and CR 61.02.

gerrymandering/arbitrary action and lack of contiguity raised on page 10 of Appellees' Brief are properly answered so as to sustain the Lebanon Annexation.

A. KRS Chapter 81A is Constitutional. Appellees concede KRS Chapter 81A is constitutional (Appellees' Brief, p. 9).

B. The Lebanon Annexation met Statutory Standards. KRS 81A.410 requires an annexation is to meet a "contiguity" test and the "suitable for urban development" test³. KRS Chapter 81A reveals nothing of the elaborate "natural or regular" boundary requirements with purported "gerrymandering" as a key consideration as applied by the Court of Appeals as a precondition to contiguity and as advocated by Appellees in their Brief (pages 23-27). The absence of such requirements in the comprehensive statutory scheme of KRS Chapter 81A makes the Court of Appeals analysis highly suspect.

C. The Circuit Court's Finding of a Section 2 Arbitrariness Violation was in Error. Page 10 and 11 of Appellees' Brief cites Kelley v. S.E. Dailey, 366 S.W.2d 188 (Ky. 1963) and Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc., 177 S.W.3d 718 (Ky. 2005), but does not address Appellant's argument as to their inappropriate application by Appellees in the present case. (Appellant's Brief, p. 44 and p. 46).

D. Decisions from other States Unpersuasive. Appellees' Brief ranges far and wide in citing decisions beyond Kentucky. However, Appellees ignore Moorman v. Wood, 504 F.Supp. 467 (E.D. Ky. 1980) which is the most relevant

³ Appellee's recognition of the negotiation of the sale of a portion of the annexed territory for a new Wal-Mart supercenter confirms the urban suitability of the territory. (Appellees' Brief, p. 1-2).

decision to this appeal outside of the published decisions of Kentucky's appellate courts. Moorman provides real insight into the history of annexation in Kentucky and why the statutory scheme is consistent with the U.S. Constitution and why there must be some limit on whose interests can be controlling in annexation proceedings.

Appellee's cite City of Birmingham v. Community First District, 336 So.2d 502 (Alabama 1976). (Appellees' Brief, p. 11). Any conceivable persuasive value of this Alabama decision is substantially diminished by the Alabama Supreme Court subsequently limiting City of Birmingham to its "special factual setting." Hill v. Douglas, 359 So.2d 374, 377 (Ala. 1978). Ultimately, as further detailed in Appellants' primary and Reply Briefs in the Court of Appeals, there is simply no reason to find Alabama law persuasive as to the outcome of the present appeal.

Appellee's Brief (p. 13) also cites Owosso Tp. v. City of Owosso, Mich. App., 181 N.W.2d 541 (1970) which explains that (at least at the time) the Michigan requirement of contiguity includes "... the elements of reasonable compactness and regularity of boundary so as to insure that the annexed and annexing territories become an unbroken mass which can function effectively as a single unit rather than as an armed monster with only minimally-connected appendages." (Emphasis added.) The Lebanon Annexation is by no means an "armed monster." In contrast, see the more recent Midland Township v. State Boundary Commission, 401 Mich. 641 , 259 N.W. 2d 326 (1977) as to the broad powers of the Michigan legislature as to matters of annexation and incorporation.

Appellees' Brief (p. 14) cites the Louisiana Supreme Court's 1949 Opinion

in Pyle v. City of Shreveport, 40 So.2d 235 (La. 1949). Pyle, *supra*, is based on principles inconsistent with Kentucky law such as a reference to another state court decision in which "... it was further held that all doubtful claims of power by the municipal corporation, or any doubt or ambiguity in the terms used by the legislative, are to be resolved against the corporation." Id. at 265. Sections 6.5 and 6.6 of Appellant's Brief (pages 20-23) show that Kentucky law is to the contrary in that the judiciary is to presume the validity of ordinances. Pyle was decided pursuant to the then existing Louisiana statutes providing a cause of action where the question "shall be whether said proposed extension is reasonable". (Emphasis added.) Id. at 265-266. Current Kentucky law provides no such statutory cause of action as to "reasonableness" of an annexation.

Ultimately, the citation to out-of-state decisions only leads to an accumulation of contradictory decisions from different states based on differing statutes and state constitutional provisions⁴. For example, Appellees may applaud Pyle. However, in George Henderson, et al v. City of Laramie, 457 P.2d 498 (Wyoming 1969), the Wyoming Supreme Court found Pyle unpersuasive. See also State of Tennessee, et al v. City of Kingsport, et al, 659 S.W.2d 367 (Tenn. App. 1983) upholding an annexation against a claim of gerrymandering.

E. Appellees' Fail to Justify Misapplication of Corridor Annexation

Precedent. Appellee's citations to the corridor decisions of Ridings v. City of

⁴ For example, Appellees Brief (p. 22) cites Big Sioux Township v. Streeter, 272 N.W.2d 924 (S.D. 1978) interpreting terminology "... in the annexation statutes to require not only common boundaries but also community of interest." This standard has not been applied in Kentucky by KRS Chapter 81A or published precedent, and Appellees present no compelling reason it should be applied.

Owensboro, 383 S.W.2d 510 (Ky. 1964); Griffin v. Robards, 990 S.W.2d 364 (Ky. 1999); and to Hopperton v. City of Covington, 415 S.W. 381 (Ky. 1967); and City of Hickman v. Choate, 379 S.W.2d 238 (Ky. 1964) in pages 20-26 of their Brief are all fundamentally misguided. Appellee makes erroneous assumptions as to corridor annexations having any relevance to the large and wide 415 acre Lebanon Annexation and presumes that boundaries following property lines can be considered “irregular” and illegal. Appellees and the Court of Appeals Opinion are fully in error on these points.

Appellees’ efforts to argue Hopperton v. City of Covington, 415 S.W.2d 381 (Ky. 1967) in their favor should not succeed. (Appellee’s Brief, p. 23-24). Hopperton provides a property “... is contiguous because the northern end of the area adjoins the present city limits” and “[t]he monuments constitute reasonable and easily identified boundaries and mere irregularity in shape does not vitiate its compactness.” Id. at 383. What could be more reasonably and easily identified boundary than property lines as is the case of the entire perimeter of the Lebanon Annexation? Thus, it is clear from Hopperton, *supra*, that Kentucky law is unconcerned 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.

F. Support or Opposition to Annexation Unrelated to Contiguity.

Appellees’ Brief conveniently ignores the following critical passage from Griffin v. City of Robards, 990 SW.2d 634 (Ky. 1999):

“... 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 Appellees and the Court of Appeals have 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 plainly required by Griffin, supra, in that the Court of Appeals connection of the City’s purported knowledge of who favored or opposed annexation to whether the annexation was contiguous directly contradicts the Kentucky Supreme Court.

G. Treatise Inconclusive. The Lebanon Annexation follows property lines and is shaped somewhat like New Jersey, with very substantial boundaries on each major direction and touching the pre-existing city boundary by approximately 4,780.5 feet. (City’s Brief – Map - Appendix 4). A close reading of Appellee’s quotation from *McQuillan*⁵ reveals only a reference to “irregularly shaped parcels” possibly lacking contiguity. Appellee’s citation to *McQuillan – The Law of Municipal Corporations* (3rd Edition) (Appellees’ Brief, p. 26) provides no answer to the issues under consideration in the present case.

H. Statutory Construction. Appellees’ Brief did not address Section 6.3 of the City’s Brief addressing proper construction of “adjacent or contiguous” pursuant to KRS 81A.410.

⁵ Appellees’ Brief, p. 26.

I. “Contiguous” as Standard for Consensual and Non-Consensual Annexation. Appellee’s Brief failed to address Section 6.4 of the City’s Brief and the inherent contradiction in how the Court of Appeals interpreted “contiguity” as the term is used for *both* consensual (KRS 81A.412) and non-consensual annexation (KRS 81A.410).

5.0 CONCLUSION

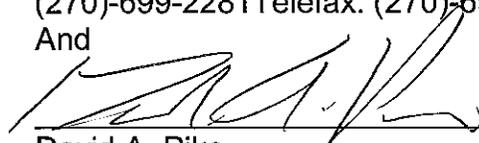
As also recognized by *Amicus Curiae* Kentucky League of Cities, the facts of this case, KRS Chapter 81A, and long established precedent compel reversal of the Court of Appeals Opinion and/or any other relief to which the Appellant City of Lebanon, Kentucky is entitled.

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