IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

NORMAN PISHNY, *et al*.,	)	
	)	Case No. 08CV02338
Plaintiffs,	)	Court No. 8
	)	Chapters 12, 19, and 60
v.	)	
	)	
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JOHNSON COUNTY, KANSAS, *et al.*	)	

Defendants

PLAINTIFFS' REPLY BRIEF

Come now Plaintiffs and respectfully submit their Reply Brief.

1. THE DEFENDANTS INCORRECTLY STATE THE STANDARD OF REVIEW.

Both Defendants have repeatedly asserted that Plaintiffs have some burden of proof in this case by a preponderance of the evidence. Neither defendant offers any citation or legal authority for this statement in Kansas annexation law. See, e.g., County's Brief, p. 14. To be sure, the City has the burden of proof to make its case before the Board of County Commissioners (hereinafter also "BOCC" or "Board"), but there is no basis for asserting some burden of proof in this appeal. K.S.A. 12-521(c).

Defendants must mean the Court can look at the evidence and substitute its judgment for all the facts. However, that is incorrect. Here, we are guided by (and, with few exceptions, limited to) a written record. Although we may refer to this proceeding as a "trial," and the Court has properly requested trial briefs, this is an appeal of an administrative action. This Court exercises the same functions as an appellate Court. *Petition of City of Shawnee*, 236 Kan. 1, 19, 687 P.2d 603, 617 1984), citing *Kansas*

Board of Healing Arts v. Foote, 200 Kan. 447, 436 P.2d 828 (1968). In order to determine the sufficiency of the evidence and the legality of the annexation, an appellate court makes “an independent examination of the record.” *Shawnee*, 236 Kan. at 19, 687 P.2d at 617.

In determining questions of law, such as Plaintiffs have presented in this appeal, the scope of the Court’s review is plenary. Whenever “an appeal frames a question of law…a *de novo* standard of review applies.” *Schlup v. Bourdon*, 33 Kan. App. 2d 564, 567, 105 P.3d 720 (2005). The Court here must determine the meaning of K.S.A. 12-521, and "interpretation of a statute is a question of law over which an appellate court exercises an unlimited review." *Genesis Health Club, Inc. v. City of Wichita*, 285 Kan. 1021, 1031, 181 P.3d 549 (2008).

Also, written evidence is subject to unlimited review. To the extent controlling facts are based solely upon written or documentary evidence, the Court may exercise *de novo* review. *Giblin v. Giblin*, 253 Kan. 240, 253, 854 P.2d 816 (1993). Similarly, the issues pertaining to the various contracts for the provision of fire safety services are subject to no limitation, because the interpretation of a "contract is an issue of law over which appellate review is unlimited.” *Shelden v. KPERS*, 40 Kan. App. 2d 75, 81,189 P.3d 554 (2008).

The only authority the City cites to support its claim is *Manly v. City of Shawnee*, 287 Kan. 63, 194 P.3d 1 (2008). *Manly* is inapplicable to this case. First, it is a zoning case and at best has only tangential relevance to annexation.

Second, the City has misstated the *Manly* rule even as it would apply to zoning cases. A zoning case typically has two elements for a court to consider: the lawfulness of

the action, and the reasonableness of the action. The burden of proof by a preponderance of evidence only relates to issues of the zoning's reasonableness, not to any question of whether the actions in question were lawful. In this case Plaintiffs have raised the lawfulness of the annexation, so the *Manly* standard for proving "reasonableness" is irrelevant. *Manly*, 194 P.3d at 10, citing *McPherson Landfill, Inc. v. Board of Shawnee County Commissioners*, 274 Kan. 303, 304-305, 49 P.3d 522 (2002) citing *Combined Investment Co. v. Board of Butler County Commissioners*, 227 Kan. 17, 28, 605 P.2d 533 (1980). Further, "[r]easonableness is a question of law." *Dowling Realty v. City of Shawnee*, 32 Kan. App. 2d 536, Syl. ¶ 9, 85 P.3d 716 (2004).

Plaintiffs here have asserted that numerous actions by the BOCC or the City were unlawful. This Court's review is unlimited.

2. THE DEFENDANTS MISSTATE THE REQUIREMENT OF SUBSTANTIAL COMPLIANCE.

The Defendants err in arguing that "substantial compliance" is tantamount to no compliance at all. They seem to urge that an annexation may wander from the statutory mechanism prescribed by the legislature. This is not true. "'Substantial compliance'" means "'compliance in respect to the essential matters necessary to assure every reasonable objective of the statute.'" *City of Lenexa versus City of Olathe*, 233 Kan. 159, 164, 660 P.2d 1368 (1983) quoting *Sabatini v. Jayhawk Construction Co*., 214 Kan. 408 Syl ¶ 1, 520 P.2d 1230 (1974). A valid annexation may only deviate from those matters which are not essential and do not relate to the objectives of the statute.

The statute itself demonstrates that its requirements and sequence constitute a careful web of procedures designed to protect citizens like the Plaintiffs, and any deviation from that network of protections is fatal to the annexation. "Legislative intent is

to be determined from a general consideration of an entire act. An appellate court's duty, as far as practicable, is to harmonize different statutory provisions to make them sensible." *City of Topeka v. Shawnee County Board of County Commissioners*, 252 Kan. 432, Syl. ¶ 3, 845 P.2d 663, 666 (1993). Although virtually every provision in K.S.A. 12-521 bears some relationship to protecting the rights and interests of citizens, several examples are particularly illustrative. For example, the requirement that a plan be filed on a certain day and that 60 days pass before a hearing gives the citizenry, who do not have the benefit of legions of staff or consultants, time to read and understand the plan and to prepare for the hearing. K.S.A. 12-521(a), (b). The mandate that the plan be sufficient to "provide a reasonable person with a full and complete understanding of the intentions of the city" is to let the people know what the annexation is all about. An incomplete or partial plan would be confusing at best, and deceptive at worst. Unless the "costs of providing such services" (K.S.A. 12-521(a)(2); see also 12-521(c)(8)) are explicitly described, no one could know if an annexation makes any sense at all or would result in manifest injury. The requirement that the City present its plan and proposal at the public hearing assures that the people will be informed of all the information on a date certain, and have a public forum in which to respond. K.S.A. 12-521(c).

The legislative history confirms that a primary purpose of the statute is to protect the rights of Plaintiffs and other citizens. For example, a key concern in the 1973 amendments was that "'the rights of individual property holders should be enhanced."' *Cedar Creek Properties, Inc. v. Board of County Commissioners of Johnson County*, 249 Kan. 149, 154, 815 P.2d 492, 495-496, quoting Proposal No. 92--Annexation, Report on Kansas Legislative Interim Studies to the 1974 Legislature, P. 92-4 (November 1973).

That same report also identified that other significant purposes of the changes to the law were: to afford individual property owners the right to challenge annexations; to address that "[f]armland is sometimes indiscriminately annexed by cities either for tax purposes or to protect future expansion needs;" and to rectify the problem that "annexations by cities are sometimes accomplished without proper notice to property owners affected by such annexation." The legislative emphasis on protection of individual rights is particularly pertinent with respect to proceedings under K.S.A.12-521, which provides "the property owners with additional safeguards." *Petition of City of Overland Park*, 241 Kan. 365, 368, 736 P.2d 923 (1987).

Defendants suggest that protecting individual rights is only a concern with respect to annexations arising under K.S.A. 12-520 apparently because the standard as recited uses the word “unilateral.” The same protections and concerns apply in an annexation pursuant to K.S.A. 12-521, because the same standard was recited in a proceeding pursuant to K.S.A. 12-521 in *Topeka v. Shawnee County*, 252 Kan. at 437, 845 P.2d at 668-669. Not coincidentally, the city of Topeka made an argument nearly identical to that posited in this case. "According to the City, if protecting property owners were the ultimate goal of the law, there would be no annexation statutes." *Topeka v. Shawnee County*, 252 Kan. at 448, 845 P.2d at 675. That argument was unavailing before our Supreme Court, and must be here as well.

The case law makes it clear that the Court must interpret the statute as written and may not ignore any provision. We are constrained to follow the statute because it is "free from ambiguity." *Shawnee*, 236 Kan. at 14, 687 P.2d at 614. "To depart from the clear meaning expressed by statutory language is to alter the statute, to legislate and not to

interpret." *Shawnee*, 236 Kan. at 14, 687 P.2d at 614. "If a statute is plain and unambiguous, the court must give effect to it as it is written." *Dillon Real Estate Co. v. City of Topeka*, 284 Kan. 662, 163 P.3d 298, 310 (2007). Since *Shawnee* held the statute to be unambiguous, we must read its express language for what it says.

The statute is explicit about what is not essential and can be disregarded. K.S.A.12-521(d) states that the failure of a board to grant an order granting annexation upon the journal "shall not invalidate such order." The obvious negative inference is that any other failure does invalidate the annexation.

"Substantial compliance" does not mean that express provisions regarding the substance of the Plan, precise timing mandates, and required notice provisions can be ignored. While an "ordinary typographical error in spite of which the public could have ascertained the City's true intent" would not violate the strictures of substantial compliance, ignoring the plain language of the statute such as by failing to give a required notice voids the annexation, because "[i]t can be assumed that the legislature intended publication to be of some importance and not merely a useless or meaningless act when it passed K.S.A. 12-523." *City of Lenexa v. City of Olathe*, 233 Kan. 159, 164, 660 P.2d 1368 (1983).

3. THE MULTIPLE CHANGES TO THE CITY'S PLAN AND PROPOSAL VOID THE ANNEXATION.

There should be no serious factual dispute that the City made numerous substantive changes to its Plan and proposal. The statute unequivocally allows only one plan to be presented according to a clear sequence of events. The changes over time are unlawful.

The City admits it made "legitimate changes to the City's Annexation Report," although it fails to identify why they are "legitimate." City's Brief, p. 15. The City has previously represented to the Court that "[i]t is true that the City modified its service plan during the course of the approval process." Defendant City of Overland Park's Memorandum in Opposition to Motion for Stay of Annexation, p. 18.

The County, however, contradicts the City, saying there were no changes. Its characterization that these were not changes, but rather were "updates, corrections, or clarifications or were information in response to questions or comments…arising through the public hearing process" is a triumph of euphemism over reality. County's Brief, p. 21. Updates, corrections, and clarifications to a "full and complete" plan *are* changes. Moreover, adding millions in costs, changing the scope and cost of the City's intentions with respect to fire safety, altering regulatory ordinances, amending the tax structure of development, changing costs of annexation to the residents, and adding corrections upon corrections are changes by any rational definition. A summary of the changes made by the City also shows the Plan and proposal were profoundly altered.

The original Plan covered numerous key topics but with respect to fire services it was grossly inadequate. It stated either the City would pay the Fire District (R. 51), the Fire District might pay the City (R. 51), or failing all else, the "city intends to provide fire and emergency services in cooperation with other service providers." R. 51. In its Brief, the City ignores the latter two options (R. 52), yet these alternatives point out that the Plan is meaningless because K.S.A. 12-521(a)(2) requires that the costs be fully and completely described in the Plan; K.S.A. 12-521(c)(8) requires a description of the proposed costs of the Plan; K.S.A. 12-521(c)(9) requires a description of the tax impact

of the annexation; and K.S.A. 12-521(c)(11) requires a description of the impact of the annexation on the Fire District. None of these provisions were met by the Plan, even if the whole annexation had been granted. See R. 48-52.

The City also estimated various costs in its Plan. R. 72-77. The net costs in 2009 were estimated to be $218,035. R. 74. This was based on the City paying the Fire District $180,000 that year. The City estimated the cost to a resident of the area to be annexed would drop for someone owning a residence appraised at $300,000. R. 79-80. The City said it would undertake to change ordinances pertaining to open space areas, animal regulations, outdoor storage and inoperable vehicles, discharge of firearms, and noise regulations as it had in 2002. R. 36. The City stated that it had an excise tax in the amount of $.215 per square foot imposed when land was platted. R. 79. The City said that land that was annexed would retain its zoning, until it was re-zoned. R. 63. The Plan described the costs of annexation to Aubry Township ($6,350) and the Fire District ($564,985). R. 80-86.

The County argues that the new information submitted at the public hearing, Round I, did not "actually change the City's service extension plan at all but actually only added supplemental information explaining" actions taken by the City, actions described in the Plan, and "clarifications to the Plan." This is not correct.

The Plan was massively altered at the public hearing. The Plan was 65 pages of text with 22 pages of sketches or graphics. The City submitted 30 pages of overt corrections to the Plan (R. 725-754), 25 pages regarding grandfathering and ordinance changes (R. 602-626) altering the Plan (R. 36), and 5 pages regarding a contract with Olathe (R. 756-760) adding to the Plan (R. 29). The intentions of the City regarding fire

safety were changed to include the October 24, 2007 contract. R. 704-723, 738-743. The stated purpose of this was to change pages 27-31 and 61-64 of the Plan. R. 726. This was necessary for a variety of reasons, including the fact that the new fire contract radically altered the costs of the annexation, creating a larger deficit for the City, now up to $531,825 for 2009 alone. R. 730. The City also changed the cost to the Fire District ($565,459) and the cost to Aubry Township ($6,073). R. 736-740. The City changed its Plan to say that residents with $300,000 homes would see a reduction of $35 in their total tax bill. R. 735, 736.

Although a full and complete plan would not require pages of clarification, this one did. In Round II, the answers to the November 13, 2007 questions, the City further discussed ordinances it would change. R. 811-815. The City now indicated it would grandfather uses in for 15 years “if the BOCC would prefer." R. 809. It specifically described changes to the ordinances regarding keeping animals (R. 817), hunting (R. 819), and changes to the excise tax (R. 821-823). It addressed issues pertaining to Spring Hill (R. 831 840) as required in the initial Plan by K.S.A. 12-521(c)(11), and added information regarding franchise fees (R. 842-846), land owned by developers (R. 848-850), the 2002 fire contract (R. 852-987), the effect on residents east of 69 Highway (R. 989), the fire insurance rating (R. 991), the street maintenance and repair policy (R. 993-986), the policy regarding the construction of streets (R. 998), emergency response times for police and fire (R. 1000-1001), and fire and police mutual aid agreements (R. 1003). All of these pertain to subjects that were legally required to be addressed in the initial Plan, and in fact had been.

The County argues that the City's February 12 submittal of over 600 pages, Round IX, was not significant and did not change the City's Plan or proposal. The County's characterization is, again, at odds with reality. It contains 54 pages of information regarding the Plan's fire safety component alone. R. 2083-2136. The Plan provisions at R. 48-52 and R. 84-86 (costs), as well as the Round I data (R.704-723, 738-743) were totally superseded by this new information. Also, if the Plan were not changed, calling a submittal SEP Errata Sheet No. 2 would make no sense. R.1887-1895. The original Plan and its progeny changed again with the City asserting new information regarding the cost to residents in the area. Now the City stated that a homeowner whose property was worth $241,700 would have an increase of $24.65 in taxes. R. 2038.

The February 15 Round X submittal, of course, utterly changed the fire safety proposal. It increased the financial consideration by over $3 million. R. 2210-2213. It increased the duration of the agreement from 10 to 15 years. R. 2209. It changed the geographic scope of the agreement. R. 2210-2213. It contained provisions for determining who would serve a given area over time by establishing a notice provision whenever the City would take over service from the Fire District. R. 2210-2213. It explicitly contemplated some variety of partial annexation, although ineffectively so. R. 2210-2213. It created a personnel policy giving hiring preference to Fire District employees. R. 2220. It provided for a master plan for fire services. R. 2220. It contained a provision for future annexations. R. 2221-2224. It provided that the October 24, 2007 agreement would "become null and void only upon final execution of this present Agreement." R. 2227. The mere fact that these were so hotly negotiated over multiple

drafts demonstrates that these were not insignificant terms or "enhancements." R. 2156-2204; 2206-2209.

This submittal contained changes to the all-terrain vehicle ordinance, permitting all-terrain vehicles only on properties larger than 20 acres. R. 2297; 2204-2205. Finally, it also changed the Plan by virtue of Substitute for SEP Errata Sheet No. 2, which once again changed the assertions about the cost to residents owning a $300,000 house, now stating there would be no increase in taxes. R. 2234; R. 2232-2237. A resolution extending grandfathering of certain uses to 15 years was included. R. 2296.

There is no statutory authority for this and so the annexation is void. *Shawnee*, 236 Kan. at 12-13, 687 P.2d at 13. Defendants are silent with regard to any authority permitting these changes. These changes are inconsistent with crucial provisions designed to protect landowners when read *in pari materia.* K.S.A. 12-521(a) says the plan must be filed with the petition; K.S.A. 12-521(a)(2) says that the plan must provide a "full and complete" understanding of the City's intentions; K.S.A. 12-521(b) says the hearing must be at least 60 days, but no more than 70 days after filing; K.S.A. 12-521(c) says "[o]n the day set for hearing" the city "shall present the city's proposal for annexation, including the plan of the city." Nothing even remotely suggests that a city may amend or make any changes to its plan, particularly *after* the day of the public hearing or that mandatory provisions can continually change for three and half months, up to a few hours before the record closes. Such a reading emasculates the statute. *Topeka v. Shawnee County*, 252 Kan. at 432, Syl. ¶ 3, 845 P.2d at 666.

The City argues that it may violate the law because Plaintiffs did not complain or correct this mistake. This is neither factually true nor legally correct. The "No" to

Annexation Coalition, of which Plaintiffs are members, did raise this issue before the BOCC, asserting that the failure to follow the Plan "as filed is fatal." R. 2329-2330; 2341-2343. Also, there is no authority in annexation law requiring an objection during the proceeding. Since a failure to follow the statutes is jurisdictional, it can be raised at any time. *Shipe v. Public Wholesale Water Supply District No. 25*, ___Kan. ___, 210 P.3d 105, Case No. 100,556 (2009).

The City again returns to *Paul* to excuse its failure to follow the statutes. As noted above, *Paul* provides no authority for the notion that annexation statutes are mere suggestions. If the annexation does not comply with the statutes, the "annexation is a nullity." *Dillon, 284* Kan. at 681, 163 P.3d at 311, citing *Shawnee*, 236 Kan. at 12-13, 687 P.2d at 13.

Although it is unnecessary to the disposition of the case, these changes were grossly prejudicial to Plaintiffs. It is their lives and property that are at stake in the fire safety issue. They will remain liable on the bonds for the Fire District. R. 48. They will bear costs to the City to pay back to the Fire District, whether or not the Fire District provides them services.

Defendants argue that because the citizenry was allowed to comment up to the last minute, the City should be able to change its proposal. That argument is specious. First, the City kept changing the subject matter up until the last minute, thereby frustrating public debate. Second, Plaintiffs, like all citizens, have a right under both the Kansas and United States Constitutions "to petition the government, or any department thereof, for the redress of grievances." Kansas Constitution, Bill of Rights, § 3; See

United States Constitution, Amendment I. These rights are necessary to give citizens a counterbalance to the enormous power and resources of the government.

4. THE CITY'S PROPOSAL AND PLAN DID NOT CONTAIN SUFFICIENT EVIDENCE TO JUSTIFY THE PARTIAL ANNEXATION.

The test for sufficiency of the evidence is that the Court must determine as a matter of law if there is "'evidence which supports the finding'" of the Board. *Topeka v. Shawnee County*, 252 Kan. at 440, 845 P.2d at 670, quoting *Lenexa*, 232 Kan. at 584, 657 P.2d at 47. Here, there is no evidence sufficient to justify the partial annexation for the simple reason that all of the evidence was predicated upon annexing 15 square miles.

The Court need go no further than to ask the Defendants, "What was this going to cost?" It is not in the record because the City never calculated the revenues to be gained from a much smaller area of land, and never calculated the costs of providing services to that much smaller area of land.

For example, the County argues vociferously that it had reams of information about costs, noting at p. 48 of its Brief that there were numerous pieces of cost data in the Plan, citing R. 40, 41, 47, 51, 64, and 72-86. The County's findings relied on the original Plan data to comply with K.S.A. 12-521(c)(8) and (9). R. 2433-2435. However, those provisions were rendered irrelevant by virtue of the City's changes offered at the Public Hearing. Also, that data (and all of the City's data) relied upon 15 square miles of revenue-generating area, and 15-square miles of services being provided.

To put this in more technical legal terms we must examine the statute. With respect to the smaller area annexed, the City did not provide: the "estimated cost impact" of providing services (K.S.A. 12-521(a)(2)); "the proposed cost, extent, and the necessity of governmental services to be provided by the city proposing annexation and the plan

and schedule to extend such services" (K.S.A. 12-521(c)(8)); the "tax impact upon property in the city and the area" (K.S.A. 12-521(c)(9)); and the "effect of the proposed annexation on the city and other adjacent areas, including... fire districts" (K.S.A. 12-521(c)(11)). The City did not meet its burden of proof by a preponderance of the evidence for these required elements in order to address the issue of manifest injury pertaining to the partial annexation. K.S.A. 12-521(c).

The Defendants go on at great length about the term manifest injury and correctly state that it can be summarized as resulting when substantial burdens are imposed without accompanying substantial benefits. There is no evidence of the cost of services for the lesser area; there is no evidence of the revenues to be generated by a lesser area; there is no way anyone could conclude what the benefit versus the burden would be. The partial annexation was and is a complete fiscal guess. The City's only response is that its total budget is over $266 million. That does nothing to say what this will cost.

The most startlingly wrong argument is that the Plan need have no pertinence to the annexation actually granted. The Plan, according to this formulation, need not bear any logical relationship to the land actually being annexed. The City's basic argument is that it is laughable or absurd to expect the City to develop a plan that actually pertains to the area to be annexed. Indeed, if the City is suggesting that the Plan does not support the Board's decision, the Court must void the annexation, since it is by definition not supported by a preponderance of the evidence.

The City now asserts it did not intend to annex the whole area, but the Record does not support that. As the attorney for the Fire District acknowledged to City Attorney Watson, “At this time, it is quite doubtful that the city will approve any partial

annexation." R. 3011. The City had said it would only grandfather uses if the BOCC "approves the petition for annexation…filed August 23, 2007." R. 602.

The City argues that if it had to have a Plan for every possible permutation, it would be an impossible burden upon the City. This is not true. The City must either provide all the information for whatever areas it will be satisfied to annex, or it will be denied, and have to go back to the drawing board.

There are many circumstances under which a Board could grant a partial annexation. For example, if the land area excluded were so minimal that it would not change the revenues or costs of the proposed annexation, such a proposal might withstand judicial scrutiny. Alternatively, the excluded land could be of a nature that creates no costs and generates no revenues, such as a cemetery owned by a tax-exempt entity. Finally, a city could propose an annexation in areas with data for each area to give the County a rational menu from which to choose.

5. PLAINTIFFS HAVE DUE PROCESS RIGHTS.

Plaintiffs' due process rights include "notice and an opportunity to be heard at a meaningful time in a meaningful manner." *Petition of City of Overland Park*, 241 Kan. 365, 370, 736 P.2d 923, 928 (1987).

The City confuses matters by stating "that a property owner does not have due process rights with respect to the annexation of land." City's Brief, p. 6. While it is true that the statutes *themselves* have been upheld as constitutional (*State, ex rel. Jordan v. City of Overland Par*k, 215 Kan. 700, 704, 527 P.2d 1340 (1974)), Plaintiffs here assert that this annexation violated their due process rights, not the statutes themselves.

The City has suggested that somehow its due process rights are implicated in this case. That is not so. The general rule and seminal case about local governments and due process is:

> Municipal corporations are political subdivisions of the state, created for exercising any governmental powers of the state as may be entrusted to them and they may not assert the protection of the due process clause against action of the state government.

Yonkers Com'n on Human Rights v. City of Yonkers, 654 F. Supp. 544 (S.D. N.Y. 1987).

6. THE QUASI-JUDICIAL ROLE OF THE BOCC PRECLUDED IT FROM PRIVATELY DISCLOSING ITS WISHES OR NEGOTIATING BEHIND CLOSED DOORS THROUGH PROXIES.

The BOCC is not a mediator. Neither Defendant recites any authority for an adjudicatory body to mediate or negotiate an annexation, let alone to do so in such a way as to frustrate public knowledge and scrutiny. K.S.A. 12-521(d) allows a board to grant an annexation but not craft proposals or plans.

Neither can the Board intervene in the City's proposal through its agents. The Defendants' actions would be like a judge sending his law clerk to work on a case with some, but not all, of the parties present. That is *ex parte* communication by indirection.

The Record unequivocally shows that the County used its lawyers to transmit its desires to the City, but not the public. The arguments raised by the County are wholly inconsistent in this respect. The County denies that the legal staff was "some friendly conduit of insider information" (County's Brief, p. 39), or that the attorneys acted as "conduits or messengers." County's Brief, p. 41. However the County does characterize this as "the County, through its attorneys…relayed the Board's concerns." County's Brief, p. 43. The County also acknowledges that what happened was an effort to "'work out a new agreement…in order to address concerns expressed through County

Legal…that the Board of County Commissioners had.'" County's Brief, p. 41-42 quoting Fire District Chairman Rod Richardson, Exhibit 127, p. 11. Finally, the County says that these were "actions taken by the County sought to resolve questions raised in the record to better protect the property owners." County's Brief, p. 44. There can be no doubt that the City had private access to the thoughts of the BOCC, that those concerns directly affected the Plaintiffs, and that the County legal staff transmitted those concerns to the City but not the public generally.

7. THE LAST-MINUTE CHANGES TO THE FIRE SAFETY ISSUE DEPRIVED PLAINTIFFS OF DUE PROCESS.

The Defendants argue that changing the fire safety component of the Plan (R. 48-52) without any notice or opportunity to be heard on the subject does not deny Plaintiffs their due process rights. The behind-the-scenes fire safety saga is a patent violation of the due process right to participate fully and knowingly in the proceeding and to have notice and an opportunity to be heard. The people must share equally in the flow of information from the County, and the City should not have gotten an early "heads up" on what the County was thinking. However, several points need to be clarified.

The City argues that the public had a chance to respond to the fire negotiations but does not explain how. The first "notice" the public had was the February 12, 2009 filing, although the County leaked its "concerns" much earlier to the City, at least some time before February 4, 2008. R. 2994. The crucial issue of Option 6 was submitted hours before the record closed. Keeping in mind that the County has taken the position that all responses were to be in writing, the suggestion that anyone had notice or an opportunity to be heard on Option 6 is a preposterous statement. See City's Brief, p. 55.

The argument that Option 6 was not a change is absurd. Most certainly the Fire District considered it a new agreement. Exhibit 127, p. 11. Moreover, the cost, scope, duration, and other elements were changed. An increase in cost by millions of dollars is more than an “enhancement.”

Furthermore, Plaintiffs are directly affected by this. Crucial public safety and fiscal issues were dramatically changed without public comment. As noted above, they remain liable on the bonds to the Fire District yet will pay the City taxes in order that the City may pay the Fire District regardless of whether it provides fire services. Plaintiffs and everyone else ought to be very concerned about this since it directly affects their pocketbooks and their lives.

8. THE FAILURE TO CONTINUE THE PUBLIC HEARING VOIDS THE ANNEXATION.

The Defendants argue that the Board did not lose jurisdiction at its initial public hearing. The Defendants are wrong for several reasons.

Both Defendants ignore K.S.A. 12-521(b). This states that the Board "for good cause shown may continue the hearing beyond the time specified in the notice without further publication." There was no continuance, nor was there any new publication. R. 2494. Notice is a statutory requirement, is jurisdictional, and is a component of due process. This failure voids the annexation.

In addition, the annexation was effectively adjourned *sine die* at the public hearing. The County advises us that the term *sine die* means to be adjourned without "assigning a day for a further meeting or hearing" or when a Board "adjourns without appointing a day on which to appear or assemble again." County's Brief, p. 16. At the October 30, 2007 public hearing, the County did not set a further hearing or appointed

day upon which it was going to appear or assemble, so it did, in fact, adjourn *sine die*. This is demonstrated by the fact that the County recognized it needed a resolution to extend the proceedings, because it had not undertaken "to provide notice and publication to the public since there was not an actual proceeding at which the continuance could be announced." County's Brief, p.17; see R. 1855.

The County says the meeting was adjourned to a day certain, which was November 30, 2007. County's Brief, p. 16. However, no meeting was set on November 30 at all. That was just the deadline for submittals to the record. R. 256.

Indeed, if Defendants are right, the BOCC never adjourned *sine die*. No meeting ever took place to adjourn the hearing. Further, adjourning and recessing a meeting are not the same thing. See, *e.g.*, K.S.A. 75-4319(a).

The City again blames the Plaintiffs for this error. The assertion is that Plaintiffs should have corrected this mistake earlier. There is no authority for this assertion in annexation law, and, in any event, this jurisdictional failing can be raised at any time. Also, as noted herein, the *Paul* case is inapplicable here. *Paul v. City of Manhattan*, 212 Kan. 381, 511 P.2d 244 (1973).

Finally, waiver, estoppel, and the Clean Hands Doctrine do not apply here. Waiver does not apply because a waiver is "'an intentional renunciation of a claim or right and exists only when there has been some absolute action or inaction inconsistent with the claim or right.'" *Rice v. Hillenberg*, 13 Kan. App. 2d 155, 161, 766 P.2d 182 (1988), quoting *Procter Trust Co. v. Neihart*, 130 Kan. 698, 705, 288 P. 574 (1930). A waiver must be "knowing and voluntary" and there is no evidence in the record to suggest

that Plaintiffs or anyone else voluntarily renounced the right to statutory compliance. *State v. Freeman*, 32 Kan. App. 2d 1027, 93 P.3d 1223 (2004).

Furthermore, a failure to follow statutory language is a jurisdictional flaw (*Shawnee*, 236 Kan. at 13, 687 P.2d at 613), and parties cannot confer jurisdiction by consent, waiver or estoppel, nor can "'parties convey jurisdiction on the court by failing to object to its lack of jurisdiction.'" *State v. Valladarez*, 288 Kan. 671, 675, 206 P.3d 879 (2009) quoting *State v. Elliott*, 281 Kan. 583, 588, 133 P.3d 1253 (2006). Similarly, laches cannot breathe life into a void judgment. *Berkeley v. Toland*, 7 Kan. App. 2d 625, 629-630, 646 P2d. 1124 (1982).

The Clean Hands Doctrine has no applicability in this case. The Clean Hands Doctrine refers to a denial of relief when a party has engaged in "willful conduct, which is fraudulent, illegal or unconscionable." *Green v. Higgins*, 217 Kan. 217, 221, 535 P.2d 446 (1975). Failing to correct the City or the County's mistake is hardly willful or fraudulent conduct. There is no factual basis for any assertion of the Clean Hands Doctrine.

Plaintiffs, however, acknowledge a mistake at page 16 of their Brief. The Chairman declared the meeting, not the public hearing, adjourned on February 21, 2008. R. 2495.

9. THE FAILURE TO GIVE THE MACKEYS PROPER NOTICE VOIDS THE ANNEXATION.

The City failed to give timely notice to Frank and Virginia Mackey. It sent notice 19 days later. City's Brief, p. 15-16. The law requires that notice be sent "not more than 10 days following the presentation of the petition. K.S.A. 12-521(b). Since notice is an

essential element of any annexation, as well as a constitutionally-protected element, this annexation is void.

No case has ever suggested that notice is not an essential element of an annexation. To the contrary, in *Board of County Commissioners v. Lenexa*, 230 Kan. 632, 639, 640 P.2d 1212 (1983) the Court stated that "[n]otice of the hearing must be mailed to each owner of land proposed to be annexed" in an annexation pursuant to K.S.A. 12-520. Similarly, a flawed publication notice is fatal to an annexation, regardless of whether anyone actually read and was misled by the notice. *Lenexa v. Olathe*, 233 Kan. at 164, 660 P.2d at 1368.

The City's reliance upon *Paul v. City of Manhattan*, 212 Kan. at 381, 511 P.2d at 244 is misplaced. *Paul* was a zoning case, and while there are elements of a zoning law that are analogous to annexation law, it does not apply here.

Further, *Paul's* holding does not apply to requirements "relating to notice and hearing which we have held to be mandatory." *Paul*, 212 Kan. at 383. The "notice requirements of public hearings before a planning board are mandatory and jurisdictional in nature*." Martin Marietta v. Board of Leavenworth County*, 5 Kan. App. 2d 774, 783, 625 P.2d 516 (1981).

Paul's holding is quite limited. It did not deal with the statutes authorizing zoning, but rather dealt with internal procedures of the City of Manhattan. In *Paul*, the city was to attach a plat or certified list of property owners who are entitled to notice to an internal filing. Although everybody did get notice, this step was not followed. The Court held that since notice was properly given as required by statute, and there was no showing of injury from the technical omission, the court would not set aside the rezoning.

Also, the city planning board did not send its recommendations to the city commission in the form precisely required by ordinance. However, the city commission "did have and was conversant with all of said determinations." Thus, the Court held that there had been substantial compliance with the requirements of apprising the city commission of the planning commission's recommendations. *Paul*, 212 Kan. at 385. The rule, then, is that a provision is mandatory when it is essential to "'the preservation of the rights of the parties affected and to the validity of the proceeding,'" but is merely directory "'where the provision fixes a mode of proceeding in a time within which an official act is to be done, it is intended to secure order, system and dispatch of the public business.'" *Paul*, 212 Kan. at 385, quoting *City of Hutchinson v. Ryan*, 154 Kan. 751, 121 P.2d 179. The Court specifically noted that the procedural requirements did not intend anything "more than to provide an orderly procedure and secure for themselves the information necessary to make an informed decision." *Paul*, 212 Kan. at 385.

Notice is an essential element to the statutory and constitutional integrity of the proceeding. This is not a situation where the City actually provided timely notice, but did not document it correctly. In this case, the City simply did not give notice until 19 days later. That has repeatedly been held to be fatal in annexation and other cases. While the mistake is no doubt innocent, and due to an erroneous title report, the City's effort to resurrect the annexation is not permissible under our statutes.

Plaintiffs need prove no direct prejudice to prevail. Even in the absence of any "claim made that appellant was deprived of any right to be heard or that he was unaware when the proceeding was to take place," a flaw in a notice is fatal. *Carson v. McDowell*, 203 Kan. 40, 43-44, 452 P.2d 828 (1969). Such failures are jurisdictional, and void the

entire proceeding. *Shawnee*, 236 Kan. at 12-13, 687 P.2d at 613 (1984). Requiring a showing of prejudice would lead to an absurd result. If we accept this notion, the City could give timely notice only to one of the hundreds of landowners in the area, thereby effectively defeating any public outcry and community participation, yet the City would assert that that would be valid. That is nonsense. Plaintiffs and the public in general have a right to be sure their neighbors are aware of their common concerns.

The notion that Plaintiffs must prove the notice needed to have been directed to them to be "aggrieved" for purposes of standing to bring this action is incorrect. There is no such requirement in the law. Indeed, Defendants do not and cannot reconcile this with the explicit holdings of our Supreme Court stating that a purpose of the 1973 amendments was to enhance individual rights, not provide a "mulligan" for a mistake by the City. *Cedar Creek*, 249 Kan. at 154, 815 P.2d at 496. Since the failing is jurisdictional, even an appellate court could raise it.

The reliance upon *Fairfax Drainage District v. City of Kansas City*, 190 Kan. 308, 374 P.2d 35 (1962) is misplaced. Preliminarily, this case predates the substantial series of legislative changes that take place beginning in 1967, including broadening the rights of individual landowners, and is of limited authority.

In *Fairfax*, the Court held the Fairfax Drainage District did not have standing to contest an annexation by the City of Kansas City, Kansas for a number of reasons. *Fairfax*, 160 Kan. at 312-313. First, the Drainage District owned no property in the annexed area, with the apparent exception of some easements the Drainage District held. *Fairfax*, 190 Kan. at 308-309; 310, 312. Second, the Court relied on the old rule that a litigant cannot collaterally attack an annexation, and that only the Attorney General or

authorized state official had such standing. *Fairfax*, 190 Kan. at 313-314. Third, since the District was an arm of the state, it had no rights to the territory in its jurisdiction except as given by statute; its rights were not abridged; it would have the same powers, duties, and exclusive jurisdiction regardless of the annexation; and it would not be subjected to any tax burden or deprived of any revenue by the annexation. *Fairfax*, 190 Kan. at 315.

None of these elements is present here. K.S.A. 12-521(e) avoids the requirement that the attorney general bring an action. Plaintiffs are private citizens, and are directly affected by whatever entity will govern and tax them. Plaintiffs own land being annexed and will be subject to a host of City laws and regulations. Plaintiffs will pay the bonds for the Fire District and taxes to the City (R. 27, 29). Plaintiffs have standing to complain of the procedural flaws in this annexation.

10. THE COUNTY SHOULD HAVE CONDUCTED A JOINT HEARING ON THE ISSUE OF INCORPORATION.

The Board was obligated to jointly review the pending petition for incorporation. *In re Petition of the City of Kansas City for Annexation of Land*, 253 Kan. 402, 410, 856 P.2d 144 (1993). That case held that prior jurisdiction applies when two bodies both have jurisdiction over the same subject matter, but the *Kansas City, Kansas* case dealt with one body that had jurisdiction over two subject matters--incorporation and annexation. That case rested on the recognition that prior jurisdiction did *not* mean that the first action filed gets to be heard first, which happened here. Rather, the Court held the proper reconciliation of the matter is to hold a joint hearing, which did not happen here. *Kansas City, Kansas*, 253 Kan. 410-411.

11. THERE IS NO BASIS FOR THE COUNTY TO IMPOSE FUTURE CONDITIONS ON AN ANNEXATION.

The annexation statutes provide no basis for future conditions to be placed upon an annexation. The only decision a County is authorized to make is to conclude whether or not "the annexation or any part thereof should be allowed." K.S.A. 12-521(d). Neither the City nor the County has any authority to wander from their express and limited jurisdictional boundaries as set forth in the statutes.

The County at p. 47 argues other jurisdictions have recognized the appropriateness of placing conditions on annexations "upon landowners who want their land annexed into a City." This is not a consensual annexation. Plaintiffs do not want their land annexed. *See Colorado Springs v. Kitty Hawk Development Co*., 154 Colo. 535, 392 P.2d 467, 472 (1964). The County's other authority also relied upon a statute that was legislative, not quasi-judicial, in nature, and is inapposite. *Bradshaw v. Beaver City*, 27 Utah 2d 135, 493 P.2d 643 (1972).

The City argues that *Shawnee* does not apply. It states correctly that *Shawnee* holds that the Board loses jurisdiction upon the filing of an appeal. That would seem to prove Plaintiffs' point, since an appeal was filed, and the Board entered an order it could not police or enforce. The City, however, reads *Shawnee* too narrowly. The Court in Shawnee based its opinion upon the fact that "[t]he right of appeal implies a final order which is no longer open for rehearing or reconsideration by the administrative body." *Shawnee*, 236 Kan. at 14, 687 P.2d at 614. Thus once a decision is appealable it cannot be altered. This conclusion finds further basis in the *Shawnee* Court's reasoning. It applied the maxim *expressio unius est exclusio alterius*, found that our statute contained no provision expressly authorizing rehearing or reconsideration, and concluded that to

"depart from the clear meaning expressed by statutory language is to alter the statutes, to legislate and not to interpret." Further, in order to be appealable, the final order "reserves no further question, or direction for the future or further action of the administrative board." *Shawnee* 236 Kan. at 15, 637 P.2d 615. It is inescapable that the Board lost jurisdiction to do anything after it made its final decision.

Finally, even if Defendants are correct, the BOCC would have lost jurisdiction immediately, because Defendants have argued this matter adjourned *sine die* on February 15, 2008.

12. THE EX PARTE COMMUNICATIONS RENDERED THE PROCEEDINGS VOID.

This proceeding is marred by numerous *ex parte* communications. There was no mechanism for dealing with citizens wanting to contact their government, and there was no protocol for the disclosure of any *ex parte* communications. Securing a fair proceeding is the BOCC's obligation.

The City's arguments are without merit. The City argues that Thomas Watson had breakfast with a commissioner, but fails to put in the record what was discussed. No one argues about the other Plaintiffs. Further, the City even accuses counsel of *ex parte* communication by sending a letter to the Board and asking it to be placed in the record just like the City's submittals. See Exhibit 112.

13. THE PROCEEDING WAS MARRED BY PREJUDGMENT.

This proceeding was tainted by elements of prejudgment. This issue stems from the fact that Commissioner Segale made comments about how he felt about the annexation issue, and the fact that Commissioner Eilert, who "directed Overland Park's

expansion for decades” (R. 247) was such a significant proponent of previous annexations that his efforts were evidence in this annexation.

While Commissioner Segale may have stated he was keeping an open mind, he went on to comment “that said,” he would have “no problem with cities annexing land in the unincorporated area as long as they have a service plan.” Exhibit 93. This annexation had a plan. He voted for it. As a matter of logic and fact it is inescapable that he stated how he was going to vote and did vote. This conclusion is bolstered by the fact that the record shows his fund-raising allies confirmed he supported the annexation. Finally, Commissioner Segale demonstrated how he would vote by telling a constituent "we should stop playing politics with the Annexation issue." He went on to state that "I do not think that anyone can look at Stillwell (along 199th) or the North and central areas of the proposed annexation area and say that it is not developed in a sprawling manner." He expressed frustration that permitting sewers in unincorporated Johnson County "encourages suburban development styles matching that which can take place in our cities," and talked about "horror stories in Nevada" regarding subdivisions in unincorporated areas. He then said"[i]t is not possible to play all sides on this issue-be against annexation and permissive of development in unincorporated Johnson County." Exhibit 98. This must also be read in context with his complaint that he did not find the “$15 million subsidy” by the County to unincorporated areas to be “an acceptable state of affairs.” Exhibit 93. The only solution to that state of affairs was annexation.

The inescapable conclusion to be derived from this is that the Commissioner had made up his mind. He was frustrated with development in unincorporated areas, and saw

annexation as the solution to that problem. To suggest his mind was not made up is to ignore his off-the-record comments.

Finally, the argument that a majority of the board must be involved is met here. One commissioner voted against the annexation. One commissioner abstained. R. 2493-2494. Therefore the participation of Commissioners Segale and Eilert carried the day on this annexation.

This is utterly unlike other cases involving prejudgment. For example, a statement regarding financial concerns of the County made long before a decision comes before a commissioner does not constitute prejudgment of a specific zoning matter. *Tri-County Concerned Citizens, Inc. v. Board of County Commissioners of Harper County*, 32 Kan. App. 2d 1168, 95 P.3d 1012 (2004). Here we have one commissioner committing to a course of action and justifying that action. We have another commissioner who is in effect a witness in the proceeding.

14. THE HOMESTEAD PROTECTIONS APPLY TO THESE PLAINTIFFS.

Several arguments Defendants have raised are incorrect regarding the application of the homestead protections. Plaintiffs have not sought to invalidate the entire annexation statutes, but rather they have questioned the validity of the annexation as applied to them. Also, there is evidence in the record showing the land is farming land. Dr. Matile's affidavit specifically states that his property "includes 53.5 acres of farmland" and that depriving him of his homestead rights would cause them to suffer manifest injury. R. 2380.

15. THE CITY IS ONLY ALLOWED ONE PRESENTER.

The Defendants argue that the City was not limited to one presenter. Plaintiffs contest this because the statute says "a representative" (K.S.A. 12-521(c)) and the Supreme Court has used the singular repeatedly, stating "[t]he representative of the city is required to present the City's proposal for annexation including the plan of the City." *Lenexa*, 230 Kan. at 639, 640. Similarly, the Court referred to "'a representative'" in *Shawnee*, 236 Kan. at 13, 687 P.2d at 613, quoting K.S.A. 12-521. Other witnesses on both sides may participate, but the statute uses the singular.

16. PLAINTIFFS HAVE SUFFERED MANIFEST INJURY BY THIS ANNEXATION.

Plaintiffs have detailed the various hallmarks of manifest injury, all of which are present in this case. This is important for a number of reasons.

First, this demonstrates that Plaintiffs and others have in fact been harmed by the actions of the City and County in this case. This annexation has prejudiced them in their lives and their pocketbooks. They receive no additional services that are superior in any way. Most of the services they require are provided by other entities. Although it is anybody's guess, the cost of annexation was going to exceed revenues even when the City sought the entire 15 square miles. The rationale of the City, that it provides superior development services, is cold comfort to people who live on rural acreages and where there is no evidence in the record to suggest that that service will be of any benefit to them.

Further, the indicia of manifest injury cited by Plaintiffs are not controverted. The only possible exception to this the City could take is that it did occasionally assert that the City's fire fighting services were at least as good as the Fire District's. However, since it

plans to hire the Fire District to provide those services, that is not a relevant argument. There is nothing here for the Court to weigh or consider, because these facts are drawn from undisputed statements in the record.

Finally, the burden to prove or disprove manifest injury based upon the preponderance of evidence is upon the City. K.S.A. 12-521(c). It failed to provide sufficient evidence to overcome the various criteria identified in our case law as the indicia of manifest injury. The City failed to meet its burden.

CONCLUSION

Plaintiffs respectfully request that the Court rule the annexation to be invalid and void. The annexation should be nullified and overturned.

Respectfully submitted,

JAMES R. ORR

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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing was mailed to counsel of record Mr. Donald Jarrett and Mr. Richard Lind at 111 S. Cherry, Suite 3200, Olathe, Kansas 66061; Mr. Robert Watson at 8500 Santa Fe Drive, Overland Park, Kansas 66212, Mr. Michael Shultz at 901 Kentucky, Suite 305, Lawrence, Kansas 66044 and to Mr. Neil Shortlidge at 10975 Benson, Suite 550 Overland Park, Kansas 66210-8600 on the 5th day of October, 2009.

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James R. Orr