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

NORMAN PISHNY, GERALD U. MATILE and LYNNE L. MATILE, Husband and Wife, AND THOMAS S. WATSON, TRUSTEE OF THE THOMAS S. WATSON TRUST U.T.A. 05/02/01,	)	
Plaintiffs,	)	Case No. 08CV02338 Court No. 8 Chapters 12, 19, and 60
v.	)	
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JOHNSON COUNTY, KANSAS, ANNABETH SURBAUGH, CHAIRMAN, AND ED EILERT, JOHN PATRICK SEGALE, DOUGLAS E. WOOD, C. EDWARD PETERSON, JOHN TOPLIKAR, AND DAVID A. LINDSTROM, COMMISSIONERS,	)	
and	)	
THE CITY OF OVERLAND PARK, KANSAS,	)	
Defendants	)	

RESPONSE AND OBJECTIONS TO DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Come now the Plaintiffs, and respectfully submit their response and objections to Defendants' Proposed Findings of Fact and Conclusions of Law.

GENERAL OBJECTIONS

Plaintiffs generally object to the repeated failure to cite factual references to the Record and to the statement of a proposition of law without any authority cited.

Pursuant to the Court's instructions, Plaintiffs will try not to re-state their Briefs, Proposed Findings, or oral argument. However, Plaintiffs will point out when a citation does not support the finding or conclusion urged, is inconsistent with another Proposed Finding, or a citation does not accurately describe or support the fact or legal conclusion stated.

Plaintiffs also will try to point out when a citation is improper for the purposes urged. For example, a citation to a document outside the Administrative Record may be relevant to an *ex parte* communication, but cannot be used by Defendants to support the Board's decision. Plaintiffs are not, however, waiving any objection or conceding any issue herein. Plaintiffs note Defendants' Findings are rife with factual assertions that are not properly cited to the Record or the pleadings in this case, and posit legal positions without reference to established authority under annexation law.

Plaintiffs also note generally that at page 36 of their Proposed Findings, Defendants urge that the City's February 12, 2008 submittal (R. 1682-2144) and its February 15, 2008 submittal (R. 2151-2293) did not contain "material issues that were not otherwise in the record," and state that "with the possible exception of the Option 6 fire contract, very little of any substance was included in those submissions." However, Defendants repeatedly have relied on those submittals to justify the BOCC's decision, and so Plaintiffs would ask that any citation to those documents be stricken or disregarded. Defendants will focus on this at appropriate junctures throughout this response.

Plaintiffs have followed the chronology of the Defendants' Findings, and

have put certain headings from those Findings in boldface at appropriate intervals.

Accordingly, Plaintiffs also respectfully submit the following specific objections.

SPECIFIC OBJECTIONS

1. Plaintiffs object to the characterization of the "Proposed Annexation" described in paragraphs 14 and 16 of Defendants' Proposed Findings of Fact and Conclusions of Law (hereinafter also "Defendants' Proposed Findings") to the extent that these findings suggest that there was a hearing on the subsequent renditions of the Plan, although such was required by law. K.S.A. 12-521(b), (c).

2. Plaintiffs object to paragraph 19 of Defendants' Proposed Findings to the extent that Frank and Virginia Mackey were apparently identified to the City as land owners, as the affidavit of City Attorney Watson and the attachments thereto demonstrate (R. 493), although the City did not provide the timely notice required by statute.

3. Paragraph 24 is incorrect. Although the City did provide notice to the Mackeys on September 24, 2007, instead of September 10, 2007, the statement that "Kansas Title had failed to identify the owners of an 11.33% interest in the Mackey Tract" may not be correct, because the list of ownership attached to City Attorney Watson's first affidavit lists Frank and Virginia Mackey as owners. R. 493.

4. Plaintiffs object to paragraph 25 on page 6. Defendants are still asking the Court to take judicial notice but provide no citation to any authority to do so. *See* K.S.A. 60-409.

5. Plaintiffs object to paragraph 32 on page 8. Statements by the Chairman

and attorney for the Board are not binding on the Board as a matter of law, since only a majority vote can lawfully continue the meeting as required by K.S.A. 12-521(b). *State of Kansas, ex rel. Stephan, v. Board of Sedgwick County Commissioners*, 244 Kan. 536, 543, 770 P.2d 455 (1989); *see also Wycoff v. Board of County Commissioners*, 191 Kan. 658, 673, 383 P.2d 520 (1963); K.S.A. 77-201 (*Fourth*).

6. Plaintiffs object to paragraph 35 regarding statements made by Plaintiffs. Subparagraphs (a), (b), (c), (e), (f), and (g) were never placed in the Administrative Record and properly considered by the Board, despite the Chairman having invited people to come speak at the Board meetings. R. 254. They cannot be used to defend the Board's decision.

7. Plaintiffs object to the characterization in paragraph 37 of the Resolution continuing the annexation because it speaks for itself. It states it was a continuance of the public hearing, and it did not authorize the City to provide any new information or changes to its Plan or proposal. R. 1338

8. Plaintiffs object to the characterization of the subject matter of the January 28, 2008 letter as regarding the "Proposed Annexation" in finding paragraph 45 on page 11. The letter was not directed at the merits of the annexation so much as objecting to the procedures employed. The January 28, 2008 letter complained of the insufficient time allotted at the hearing and the multiple speakers and a Power Point facility being made available to the City. It also objected to changes being made in the Plan. It pointed out that the City's then-most-recent proposal changed police protection elements of the Plan without providing any cost information, and

changed ordinances and the regulatory scheme proposed within the Plan, and added that a "public hearing is required on the now-modified proposal." The letter further pointed out that the City providing additional information to the Board was "like a court asking the plaintiff for more evidence after he has rested his case." R. 2943. [This is also important because Defendants assert that no objection was made to the proceeding, which is not true].

9. Plaintiffs object to Defendants' paragraphs 41 and 42 regarding Ms. Matile's and Mr. Pishny's statements. These were not in the Administrative Rcord, and so despite the Chairman having told them they could address the BOCC at its regular meetings (R. 254), they were not considered by the BOCC.

10. Plaintiffs object to paragraph 50 regarding the appearance of Ms. Matile, Mr. Watson, Mr. Pishny, and Mr. Orr at the February 14, 2008 BOCC meeting as support for the BOCC's decision. Defendants have asserted that appearance at such meetings was not properly before the Board which is why it is not in the Administrative Record. Exhibit 127, and cannot be used by Defendants to support the Board's decision. However, Plaintiffs agree that that Exhibit's contents are probative of the chaotic and inconsistent approach to the Record pursued by the BOCC's refusal to consider such comments, and that Exhibit 127 also establishes the BOCC's private transmittal to the City and the Fire District of its concerns regarding fire safety.

11. Plaintiffs object to paragraph 51. It relies upon evidence contained in R. 2151-2412 and 1682-2146. Defendants state later (page 36) that the Court should find "that with the possible exception of the Option 6 contract, very little of any

substance was included in those submissions." The Court cannot make factual findings in paragraph 51 on page 12 implying that certain essential, mandatory facts are supported by provisions in the Record and then turn around and make a finding on page 36 that those submittals contain "little of any substance." *See* Defendants' Proposed Findings, page 36.

12. Plaintiffs object to the Finding in paragraph 53 regarding adjournment sine die. The Record does not state the public hearing was adjourned sine die. The Record at R. 252-255 merely quotes the Chairman and the County Counselor at the October 30, 2007 Public Hearing saying the Board would keep receiving information, but it does not state that the public hearing was continued and it does not state the date for adjournment sine die. It just says the meeting was adjourned. R. 256. The citation of the Record at R. 1337-1338 also does not support this statement. This involves the belated resolution attempting to continue the public hearing, but the Record does not recite an adjournment sine die. Finally, the citation to the Record at R. 1860-1861 is improper for two reasons. First, it is a duplicate of the resolution improperly attempting to continue the public hearing, not documentation establishing the adjournment of the Board sine die. Second, it is contained in Volume 6 of the Record of the proceedings, which the Defendants have asked the Court to find as a matter of law is not material. *See* Defendants' Proposed Findings, page 36.

13. Plaintiffs object to Defendants' characterization of Exhibit 112, Mr. Orr's letter of February 21, 2008 on page 13, paragraph 54. It was not in the Administrative Record and Defendants may not use it to justify the BOCC's ruling.

Also, the letter did not address the annexation's merits; it addressed the flaws in the procedure and demonstrates that Plaintiffs were prejudiced by not having sufficient time to understand and comment on the fire safety issue. It raised objections to the denial of any notice or opportunity to be heard regarding the fire safety proposal the County privately asked the City to come up with in the last few days of the proceeding.

14. Plaintiffs object to paragraph 58 on page 14 regarding what the Board purportedly "considered." It contains no citation to the Findings of the Board. R. 2414-2464. Although the Board did break the area down into five smaller components, much of its analysis was based on and depends for its validity on the facts pertaining to the entire 15-square-mile area. R. 2426-2444. For example, when the BOCC recited the cost of annexation, it recited the original Plan, not the subsequent revisions and Errata submittals which demonstrate that the original Plan was simply wrong in many respects. R. 2433, 2435; *see* R. 74. The Plan contains no information found in the Record after R. 108. Thus any other citation to what the Board "considered" regarding costs is contrary to the Board's specific finding, and the Court should rely upon the Board's findings in reaching its conclusion. *Suburban Medical Center v. Olathe Community Hospital,* 226 Kan. 320, 331, 597 P.2d 654 (1979).

15. The specific findings in paragraph 58 are similarly flawed. Subparagraph (1), regarding the extent to which land is devoted to agricultural use, and Subparagraph (2), dealing with the area of platted and unplatted land, both rely upon the Substitute for SEP Errata Sheet No. 2 (R. 2232) which was provided too

late for public commentary, and which Defendants asked the Court to conclude was not substantial or material enough to justify public commentary. Defendants' Proposed Finding, page 36. If it was a basis for the decision, the public had a right to speak on it. This information is also set out at R. 1887 in the first SEP Errata Sheet No. 2.

16. Subparagraph (3), regarding topography and other issues contains no citation to the actual findings of the Board. Although it cites the original Plan (R. 22-23, 27-28, 98), that was largely later rewritten by the SEP Errata Sheet offered at the October 24, 2007 Public Hearing changing pages 27 to 31 of the Plan. R. 726.

17. Subparagraph (4), pertaining to the extent and age of residential development also contains no citation to the Board's actual findings, but rather cites R. 1895. This was contained in the February 12, 2008 submittals which again Defendants are asking the Court to disregard, and which was never the subject of any notice or opportunity to be heard for debate by the public, including Plaintiffs. *See* Defendants' Proposed Findings, page 36.

18. Subparagraph (5), regarding the present population in the area, has the same infirmities as the other subparagraphs. In addition, it recites R. 28-29 which was superseded by the City's belated SEP Errata Sheet No. 2 filed on February 12, 2008. R. 1888. The Defendants are asking the Court to rule that the Board considered evidence that the City later withdrew, which is an admission that the Board relied on the wrong evidence.

19. Subparagraph (6), dealing with the extent of business, commercial and industrial development in the area, is inappropriate in part. The fourth citation is

some draft minutes from the Aubrey Township Consolidated Zoning Board meeting of January 30, 2008. These were provided in the February 12, 2008 submittals which the Defendants assert is neither material, nor upon which subject did Plaintiffs have any opportunity to voice their opinion, yet it is obviously crucial to the validity of the Board's decision. R. 1900-1926. Also, Defendants are relying upon Exhibit 127. These are minutes of the February 14, 2008 Board meeting which is not part of the Administrative Record and so the BOCC did not rely on this.

20. Subparagraph (7) (pages 14-15), deals with the present cost, methods and adequacy of governmental services and regulatory controls in the area, and it should not be considered. The Defendants' citation refers to the information in the Plan (R. 37-71) and the Mayor's comments (R. 274), but none of this was adjusted for a partial annexation. There is no such information in the Record for the smaller area actually annexed, which K.S.A. 12-521(c)(7) requires. For example, the Plan describes street maintenance having a cost "estimated to be $400,000" but that is for the entire 15-square-mile area. R. 39. Furthermore, much of this data was changed in the SEP Errata which was filed October 30, 2007 (R. 726-729, 740, 742-743) or even later, such as the February 15, 2008 submittal of Option 6 for fire safety. R. 2209, *et seq.* It was superseded by the City's later submittals.

21. Plaintiffs object to Subparagraph (8) on page 15, dealing with the proposed cost, extent and the necessity of governmental services to be provided by the City. It contains no citation to what the Board actually found, which was that the BOCC was relying on the original, though outdated, Plan. R. 2435. The information contained in the Plan as cited by Defendants (R. 37-72) was irrelevant

to the partial annexation actually granted, and contained revenue and cost data exclusively based upon a total annexation. The BOCC found that net operating costs in 2009 would be $218,035 "due to receipt of property taxes, motor vehicle taxes, storm water utility fees and ambulance fees." R. 2435. This is taken directly from the original version of the Plan (R. 74). However, the Plan was later modified and that information was not valid. *See*, *e.g.,* SEP Errata, R. 725-753; February 12, 2008 submittal (R. 1682-2144) and February 15, 2008 submittal (R. 2151-2293).

22. In addition, the citation to R. 1000-1001 is inappropriate because it relates to a response to Question 14 filed after any possible public hearing and so it was too late for compliance with K.S.A. 12-521(c). Also, the citation to R. 1814-1818, which were the minutes of a September 25, 2007 meeting of the Johnson County Planning Commission have nothing to do with cost, and dealt with the County's consideration of the original Plan, which was later modified and superseded. R. 1814. The finding must fail because there is no evidence in the Record as to what this annexation was actually going to cost, nor have Defendants attempted to cite to any such information.

23. Subparagraph (9), dealing with the tax impact upon property in the city and the area proposed to be annexed, is improper in part. Defendants assert that the Board relied upon Substitute for SEP Errata No. 2. R. 2234-2235. This is contained in the February 15, 2008 submittals upon which Plaintiffs had no opportunity to be heard, and which Defendants characterize later in their findings as containing "little of any substance." Defendants' Proposed Findings, page 36.

24. Subparagraph (11), on page 15, dealing with the effect of the proposed

annexation on the city and other adjacent areas, is improper. The citation to R. 710-723, the October 24, 2007 fire contract, as well as R. 736-738, the first SEP Errata, were not actually relied upon by the BOCC, so the citation is wrong. R. 2490. This Finding also ignores the City's submittal about the Fire Districts' lost revenue. R. 739-740. In addition, Defendants assert that the Board relied upon the fire services Option 6 at R. 2209-2229. If this is true, the Court must strike Defendants' finding on page 36 which asserts that there was no showing that the February 12 and February 15, 2008 submittals containing "material issues that were not otherwise in the record" with the "possible exception" of Option 6. The Court must also strike the assertion that there was "very little of any substance [that] was included in those submissions." Defendants' Proposed Findings, page 36. The BOCC relied heavily on this information, and without Option 6, it had no basis whatsoever to comply with K.S.A. 12-521(a)(2), 12-521(c), and 12-521a. Defendants cannot assert that a mandatory finding was based upon a submittal, and then argue that the submittal was neither material nor of substance.

25. Subparagraph (12) incorrectly states that the Board considered existing petitions for incorporation of the area. The only indication that the Board actually considered such information was Mr. Jarrett's statement to Commissioner Toplikar, who asked Mr. Jarrett about the petition. Mr. Jarrett said, "we deliberated on it." R. 2492. However, there is nothing in the Record regarding these deliberations. Also, this information was submitted on February 12, 2008, again contradicting Defendants' assertion at page 36 that this submittal was not substantive.

26. Subparagraph (13), on page 15, dealing with the likelihood of growth,

recites the Plan at R. 29-34. However, much information regarding growth was modified repeatedly. *See*, e.g., R. 1888; 2233.

27. Defendants also rely upon R. 1997-2002 for this growth data, which is contained in the February 12 submittal Defendants have characterized as being of no material importance. Further, the uncontroverted evidence showed that this submittal dealt with Final Development Plan approval for the Erhart Trusts, and did not provide evidence of growth. The Trust did "not intend to develop the property in the near future" (R. 2394). The Erhart zoning proposal was simply submitted to avoid planning under the Overland Park regime which was both "arduous and expensive." R. 2395.

28. Further, other information in subparagraph (13) was too late for comment. *See*, e.g., R. 2020-2027; 2030, 2142-2143, 2143-2144. Finally, Exhibit 127 is not in the Administrative Record and in fact was not considered by the Board.

29. Plaintiffs object to Paragraph 59 on page 16 pertaining to K.S.A. 12-521a. It states the BOCC considered certain criteria but makes no citation to the actual findings of the Board.

a. Subparagraph (1) (page 16) is inappropriate because the citation to the Record at 742, the first SEP Errata, did not answer the question of what the response time would be but rather says it will merely stay the same. The citation to R. 1000, the November 30, 2007 Question 14 answer does not really answer the question as to what the County response time would be either. This Finding overlooks the uncontroverted evidence that at present the Fire District had a better

response time than the City. R. 1639.

b. Subparagraph (2), the impact on the Fire District's tax base, relies on R. 742, the first SEP Errata which was later superseded and could not form the basis of a rational decision. The citation to R. 2203-2229 refers to Option 6, which the Defendants have asserted is not material, and therefore cannot form the basis of the decision.

c. Subparagraph (3), the impact on the City, is similarly inappropriately cited. It refers to R. 743, which was later superseded by Options 2 through 6, and so is irrelevant. Further, it refers to R. 2211-2212, which is the Option 6 information, which Defendants assert the Court should not consider material. If this information is statutorily mandated by K.S.A. 12-521a, the Plaintiffs, and all citizens, have a right to know and comment on this, and it was profoundly material to the decision. *See* Defendants' Proposed Findings, page 36. Option 6 changed the operations and financing of fire services, and added millions to the potential costs of annexation.

d. Subparagraph (4), impact on the residents, is cited to R. 743. This was the SEP Errata filed at the Public Hearing. It related to a total annexation. It was later superseded by Options 2-6. There is nothing in the Record that shows the impact on the residents of the area of the fire safety agreement actually relied upon by the Board. There is no factual basis for this finding.

e. Subparagraph (5), regarding the impact on the remainder of the Fire District, is similarly flawed. It recites the SEP Errata relating to the October 24, 2007 fire contract that was not considered by the BOCC. R. 743. It also relies upon

Option 6, which again Defendants have asked the Court at page 36 to rule was not material to the decision. R. 2209-2229.

30. Plaintiffs object to paragraph 60 to the extent that there is no citation to the Record for their many assertions with the exception of R. 29-36. Some of this was modified or withdrawn by the City. *See* SEP Errata Sheet offered at the October 30, 2007 Public Hearing changing pages 27 to 31 of the Plan. R. 726. The citation is therefore wrong.

31. Plaintiffs object to the proposed findings in paragraph 66 (page 18) regarding the excise tax. The citation to the Record at R. 602 deals with grandfathering certain zoning and other ordinances for a period of 10 years. This position was subsequently changed by the City and cannot form a basis for a decision. On November 30, 2007 the City asserted it would grandfather uses for 15 years "if the BOCC would prefer" R. 809. The citation to R. 821-829 relates to Question Number 5, dealing with the excise tax, and cannot form a basis for the decision made because it was a commitment based upon the Board approving the total annexation. That submittal states the City would only enact such changes in the excise tax if the Board "approves the annexation petition that was presented to and filed with the BOCC on August 23, 2007" for the full 15 square miles. R. 825.

32. Plaintiffs object to the findings in Paragraph 67 (page 19) pertaining to specific areas. Generally, the BOCC failed to consider or make any findings with respect to any of the 14 factors required by K.S.A. 12-521(c) for these individual areas, nor do Defendants cite to the Record to show the BOCC did so. It made generic findings relevant to the 15-square-mile area, but then failed to tie that in

any rational or relevant way to the areas it approved for annexation.

33. The Area 1 findings proffered by the Defendants rely on information regarding the incorporation petition found in the Record at R. 1929-1978, which is part of the submittal the County and City insist is unimportant, and so this must be disregarded. This is also true with respect to the findings on page 23 regarding the growth and development of that area, as well as with respect to the further findings regarding the City of Stilwell. In addition, the findings regarding the natural growth corridor of the City rely in part on R.1808-1822 which was not submitted until February 12, 2008.This was too late for public comment, and this Finding contradicts Defendants' argument the submittal was not substantive.

34. Plaintiffs object to paragraph 69 of Defendants' Proposed Findings. This information was contained in the February 15, 2008 Substitute for SEP Errata No.2 which was too late for any commentary and thus could not lawfully form the basis for any decision. This is also inconsistent with Defendants' statement that this February 15, 2008 submittal contained "very little of any substance" and Defendants' statements that there were no material issues not otherwise in the Record in that submittal. Defendants' Proposed Findings, page 36. Further, the finding that the "net effect of annexation for most property owners would be a decrease in costs" has no citation to the Record, and is not what the Record says. The Record says the owner of a rural house or farmstead with an appraised value of less than approximately $300,000 likely will experience a net increase in total cost paid. R. 2235. Nowhere in the Record does it say how many people that would affect, or that "most property owners" would benefit.

35. Finally, the Finding in paragraph 69 that citizens will receive access to services that are equal or better is not supported by the citation. The citation to R. 37-68 was largely replaced by later submittals and was in large measure no longer valid at the time of the decision made by the Board. *See*, e.g., R. 2083, *et seq*.; 2110, *et seq*.; 2135-2136 [Options 2 and 3]; 2209-2229 [Option 6].

36. Plaintiffs object to paragraph 70 regarding the grandfathering of uses. The citation to R. 271 states the City would grandfather uses for 10 years, not 15 years. *See* R. 602-626. This contradicts the proposed finding. Not until November 30, 2007 did the City state it would grandfather for 15 years "if the BOCC would prefer" R. 809. However, this was not in the Plan upon which the Board relied. Also, the City qualified its position on grandfathering on January 10, 2008 by offering that "the City is unable to commit to grandfathering unless the BOCC approves the City's petition in its entirety." R. 1347.

37. Plaintiffs object to paragraphs 72, 73, 74, and 75 (page 28) for the same reasons Plaintiffs object to paragraph 70.

38. Plaintiffs object to paragraph 77 (page 29) pertaining to all-terrain vehicles. It was submitted on February 15, 2008. R. 2296-2297. There was no opportunity for comment or to determine if this proposal would harm Plaintiffs and others and is one of the many examples of a suggested finding that contradicts Defendants statement that the February 12 and February 15, 2008 submittals were not material or of consequence. *See* Defendants' Proposed Findings, page 36.

39. Plaintiffs object to paragraph 79 (pages 29-30) regarding the fire safety proposals. None of the citations support the Board’s decision. The statement that

"[i]n recognition that annexation would result in a loss of tax base for the Fire District, the City agreed to enter into a fire services contract" is not supported by the citations to the Record. The City entered into the contract because the Board leaked insider information to the City about what the BOCC wanted. *See* R. 3006-3012; R. 2439; Exhibit 12, p. 11.

40. Also, Defendants cite the Plan (R. 51) which had no clear proposal at all, but rather also suggested the Fire District might pay the City $225,000 per year for the City to provide services. R. 51. Defendants then cite the October 24, 2007 agreement (R. 710-723), which contemplated a total annexation and upon which the BOCC did not actually rely, so it cannot be a basis for this Court's findings. Also, it only provided payments for a limited time. Defendants then cite Option 6 (R. 2209-2229), which the BOCC did rely on, but which cannot be the basis for an annexation because it was not signed and therefore was inoperative, and also because Plaintiffs were denied notice and an opportunity to be heard on this crucial subject. Further, Defendants ask the Court to find that the February 15, 2008 submittal was neither material nor substantial. Defendants' Proposed Findings, p. 36. The Court cannot conclude Option 6 was so important that the BOCC decision cannot stand without it, and yet Defendants argue the Court should find it was contained in a submittal that was not material.

41. In addition, the statement that the agreement was "negotiated by the City and the Fire District" is a misstatement and is not cited to the Record. Rather, it was a proposal, not a signed contract, and the Fire District had not even seen Option 6 at the time the City submitted it to the Board (R. 2200; 2209), and the citation to

R. 2439 does not support that conclusion.

42. Plaintiffs object to paragraph 80 on page 30. There was never any evidence as to what the compensation would be for a partial annexation so this finding was inherently unsupported by the evidence. Further, the citation to R. 738 is inappropriate because it simply says the "City will consider proposals for compensating the township." The City did not “agree” to anything.

GENERAL CONCLUSIONS.

43. Plaintiffs object to the General Conclusions numbered 1 through 4 on page 33 because there is no citation to the Record or to any legal authority. Also, as noted above, some statements are simply incorrect, such as the assertion that the BOCC lawfully held the Record open (paragraph 2). The BOCC was required to continue the hearing or re-publish notice (K.S.A. 12-521(b)), and could only do so by a vote of its members. *State of Kansas v. Board of Sedgwick County Commissioners*, 244 Kan. at 543; *see also Wycoff*, 191 Kan. at 673; K.S.A. 77-201 (*Fourth*). However Plaintiffs do agree that the Court can determine the basis of the Board's decision from the findings and conclusions the Board actually made (*Suburban Medical Center,* 226 Kan. at 331), but Plaintiffs want to make it clear that Defendants have tried to urge bases for a decision not contained in the Board’s findings, which is improper.

44. Plaintiffs object to paragraph 6 on page 33. The Board did not make adequate findings relating to each area. There is no information in the Record pertaining to costs or other information required in K.S.A. 12 -521(c)(7), (8), (9), and (11) that pertains to the areas actually annexed, nor have Defendants cited to

the Record for such information. Because this action does not comply with K.S.A. 12-521(c), this nullifies the annexation. *Dillon Real Estate Co. v. City of Topeka,* 284 Kan. 662, 681, 163 P.3d 298, 311 (2007), citing *In re Petition of City of Shawnee for Annexation of Land,* 236 Kan. 1, 12-13, 687 P.2d 603, 613(1984).

45. Plaintiffs object to paragraph 8 on page 33. This paragraph states that Plaintiffs "have not challenged any specific finding or conclusion of the BOCC." There is no citation to the Record, and Plaintiffs' Brief specifically enumerated numerous challenges at pages 18 through 28, 36, and 40, which Defendants have failed to controvert.

46. Plaintiffs object to paragraph 10 on page 34 stating that Plaintiffs failed to show that any action of Defendants was contrary to any essential matter contained in K.S.A.12-521. Defendants cite nothing to the Record, take no issue with Plaintiffs' briefs or other arguments, and offer no factual examples beyond a bald conclusory statement. Plaintiffs listed nearly two dozen examples of the City and County failing to comply with the annexation statutes. Plaintiffs' Brief, pages 18-20; 35-43.

47. Plaintiffs also object to the statement in paragraph 10 that "plaintiffs have failed to demonstrate any prejudice." Defendants have cited no authority for this and it is also not correct. Our Supreme Court has held that landowners are entitled to participate to protect their interests if they deem the annexation inappropriate or unlawful. *Shawnee*, 236 Kan. at 10, 687 P.2d at 611. An action may by brought by "any owner of land within the territory annexed by the city on the ground that the city had no statutory authority to annexed the territory under

these circumstances." *Clarke v. City of Wichita,* 218 Kan. 334, 346, 543 P.2d 973 (1975). Indeed, the County admitted Plaintiffs were aggrieved by the decision of the BOCC in its Answer. K.S.A. 12-521(e); *see* Second Amended Appeal and Petition for Review, paragraph 67; *see* Answer of County, paragraph 67. *See also, e.g.,* Plaintiffs' Reply Brief pages 4-5; 28; 29-30. Finally, a failure to follow the statutes is jurisdictional because "[a] Board of county commissioners has no jurisdiction to act upon a petition for annexation except in substantial compliance with the language and purpose of the statute." *Shawnee,* 236 Kan. at 13, 687 P.2d at 613. Jurisdictional infirmities may be raised at any time, (*Shipe v. Public Wholesale Water Supply District No. 25,* 289 Kan.160, Syl. ¶ 3, 210 P.3d 105 (2009) even by an appellate court on its own. *See* Plaintiffs' Brief, page 12.

C. Conclusions on Due Process Issues.

48. Plaintiffs object to the paragraph beginning at the bottom of page 36 dealing with the February 12, 2008 and the February 15, 2008 submittals. Defendants concede that these were submittals "which they did not have an opportunity to respond to." Defendants' Proposed Findings, page 36. This in itself requires that the annexation be held void. *Suburban Medical Center,* 226 Kan. at 331. The law is clear that Plaintiffs are entitled to an opportunity to respond to all of the facts and proposals of the City.

49. The statement that Plaintiffs have not shown they were prejudiced (page 37) is not a proper legal standard, nor have Defendants cited any authority for this proposition, so it should be disregarded. The assertion that Plaintiffs have suffered no prejudice is also false. *See* Plaintiffs' Reply Brief and citations, pages 12

through 13.

50. The statement denying that "there were material issues that were not otherwise in the record" and further stating that "very little of any substance was included in these submissions" is contradicted by Defendants' repeated proposed findings in the same document relying on those submittals. *See* page 36. A simple way for the Court to analyze this would be to strike every finding that takes place in the Record at R. 1682-2144 (the February 12 submittal) and R. 2151-2293 (the February 15 submittal). The BOCC's decision will clearly fail because these submittals were absolutely critical to the Board's decision. Presumably that is why Defendants have repeatedly referred to those two documents in these very findings. For example, Defendants have relied upon these two submittals as follows: paragraph 30, page 7; paragraph 39, page 10; paragraph 40, page 12; paragraph 51, page 12; paragraph 52, pages 12 through 13; paragraph 53, page 13; and paragraph 2, page 48. *See also* pages 55-56 regarding the incorporation petition for Stilwell.

51. Most significantly, Defendants repeatedly relied upon the February 12 and February 15 submittals in Defendants' paragraph 58 beginning at page 14 of their Proposed Findings, in whole or in part, to establish compliance with 8 of the required elements of K.S.A. 12-521(c):

a. K.S.A. 12-521(c)(1)-page 14;

b. (c)(2)-page 14;

c. (c)(3)-page 14;

d. (c)(6)-page 14;

e. (c)(8)-page 15;

f. (c)(9)-page 15;

g. (c)(11)-page 15; and

h. (c)(13)-page 15.

52. In addition, compliance with K.S.A. 12-521a was also predicated in whole or in part upon the submittals which Defendants deny were material. In paragraph 59, subparagraphs (2), (3), and (5) all relied upon these submittals. *See* Defendants' Proposed Findings, page 16.

53. Defendants also asserted that other mandatory information was contained in these last-minute submittals. Information regarding: the incorporation of Stilwell (pages 22-23); growth information (page 23); Area 4 (page 23); the City's tax levy (paragraph 69, page 27); the cost of annexation to property owners (paragraph 69, page 27); and the information regarding all-terrain vehicles (paragraph 77, page 29) all rely upon the two belated submittals.

54. Therefore at least 24 elements of the BOCC's ruling depend upon the February 12 and 15 submittals. Of those, 8 are required by K.S.A. 12-521(c). It is impossible for this decision to stand without reference to those submittals, so they cannot be deemed immaterial, nor can the denial of Plaintiffs' ability to comment on that evidence be deemed anything but a denial of their rights to participate in the subject matter of the Board's ruling in a meaningful way.

55. The assertion that the submissions were already somewhere in the record is wrong for a number of reasons. First, Defendants do not cite what those specific locations in the Record would be. Second, Plaintiffs have a right to know and respond to every issue, particularly those upon which the BOCC depended for its

ruling. *Suburban Medical Center,* 226 Kan. at 331. Third, if Defendants are right, the Court should strike every reference to these two submittals, although Defendants' own Proposed Findings would fail without these crucial elements. Fourth, if Option 6 was unimportant, Defendants have yet to explain why the City committed approximately $3 million overnight to Option 6, and why the County convened repeated meetings outside of public scrutiny with no fewer than three attorneys for the City present at each meeting to create it. If the City commits resources like that to unimportant issues, the taxpaying citizens should be outraged. Finally, if Plaintiffs had had an opportunity to address this issue, perhaps they could have prevented the City from making what appears to be a $485,000 error in Option 6, where the City committed to pay that sum in year 11 in addition to paying $360,000 in the same year. R. 2212-2213. Taxpayers have a right to expose and complain about bad judgment or wasteful errors.

D. Issues of City Compliance with K.S.A. 12-521.

56. Plaintiffs agree with the statement on page 38 that the Plan must be filed "at the time of presentation of the petition," but note that this is inconsistent with all of the submittals altering the Plan after August 23, 2007, and so those findings must be disregarded as inconsistent with the legal standard conceded (or insisted upon) by Defendants.

57. Plaintiffs object to section 3 on page 40 regarding changes to the City's Plan. The City cites no case and no specific statutory section in its discussion of this issue whatsoever, nor does it cite to the Record with examples of what are, or are not, changes to the Plan and proposal. From the earliest stages of this litigation,

the City has conceded it changed its plan. *See* City's Response to Motion for Stay. In these very findings, the City and County have repeatedly relied upon information submitted after the Plan was filed. Every citation to the Record after the last page of the plan, R. 108, must be excluded if the Defendants are correct in stating the Plan did not substantively change, yet this would clearly result in there being no basis at all for the annexation order.

58. Plaintiffs object to the findings pertaining to the failure to give notice to the Mackeys set out in paragraph 4 beginning on page 42. Plaintiffs object to the Court taking judicial notice of the location of the Mackeys' property. Defendants have cited no authority allowing the Court to take judicial notice of such an obscure fact. If the location of the Mackeys' tract were sufficiently well-known to be subject to judicial notice, the City would not have failed to give proper notice to them.

59. Plaintiffs object to part of section 5 on page 44 pertaining to the City's presentation of the annexation proposal in part. Plaintiffs assert that the statute should be read literally. It is correct that "'[o]n the day set for hearing,'" the City's representative "shall present the City's proposal for annexation.'" Page 44, quoting K.S.A. 12-521(c). However, this is inconsistent with Defendants supporting the BOCC's decision with submittals after the October 30, 2007 Public Hearing.

60. Plaintiffs object to the comments regarding Planning Commission Review page 48, paragraph 2. While the original Plan was submitted to the County and City Planning commissions, none of the subsequent changes on which the Board actually ruled were submitted, so this finding should state that. Further, Defendants cite R.

1808-1826 and 1784-1805 which are contained in the February 12, 2008 submittal, and therefore ought not to be considered material evidence by the Court according to Defendants. *See* page 36 of Defendants' Proposed Findings.

61. Plaintiffs object to paragraph 3 on page 49 because it contains a finding that the Board "extended the period of time in which the record would be kept open." This could not happen as a matter of law. By law, "where a joint authority is given to three or more persons, a majority vote of those persons is a binding statement of that joint authority." *State of Kansas, ex rel. Stephan, v. Board of Sedgwick County Commissioners*, 244 Kan. at 543; *see also Wycoff*, 191 Kan. at 673; K.S.A. 77-201 (*Fourth*). Defendants have never controverted the fact that the Board did not continue the hearing as required by K.S.A. 12-521(b).

62. Plaintiffs object to the findings pertaining to adjournment sine die beginning at page 49. There is no citation to the Record stating when the meeting was actually adjourned sine die. Plaintiffs also object to the statement that the Board need "not take formal action to continue the hearing" (p. 50) for the reasons cited above. *See State, ex rel. Stephan*, 244 Kan. at 543. Neither Mr. Jarrett nor Chairman Surbaugh have the authority to bind the Board, as the Board's subsequent resolution makes clear.

63. Plaintiffs object to Defendants' Proposed Findings regarding the Board's conditional approval of the annexation set out in section 5 beginning at page 53. Plaintiffs object to the statement that the "conditions" are "more properly considered as representations or agreements proffered throughout the process by the City, and that the BOCC's decision journalizes them as part of the order."

Defendants cite no examples to the Record for this, nor do they cite any legal authority to justify this.

64. Plaintiffs object to Defendants' Findings regarding the consideration of the incorporation petition. Defendants have argued that the last-minute submittal of February 15, 2008 was of no meaning, yet their sole citations to the Record are within that very submittal. *See* R. 2491-2492, 2439 cited on page 55; R. 2439 cited on page 56. This was a mandatory consideration for the Board and Plaintiffs were denied the opportunity to voice their opinion on this issue. *See* K.S.A. 12-521(c)(12). Defendants have offered no explanation for why an additional public hearing was not convened.

65. Further the factual statements regarding the incorporation of Stilwell are incorrect. Commissioner Toplikar said, "there is a request in and it is on the table." R. 2491). However, the issue was never subject to public scrutiny. R. 2491. Although Mr. Jarrett said "we deliberated on it" (R. 2492), there is no information of any such deliberation in the Record.

F. Issues of a Fair and Impartial Tribunal.

66. Plaintiffs object to the proposed findings regarding *ex parte* communications. Defendants are wrong regarding the effect of prejudice at page 61. Without the two commissioners voting, the vote would have been at most 3 to 1, and K.S.A. 12-521(d) requires that a majority of the Board, or four members, are required to approve an annexation.

G. The Negotiation of the Revised Fire Services Contract.

67. Plaintiffs object to the findings regarding the Option 6 fire services

contract. Defendants mischaracterize the initial statement of the City in its Plan. *See* page 62. In fact, the City had no specific proposal but rather it suggested that "the city is offering $180,000 annually" for three years (R. 50-51), or if the "Fire District and the City are unable to reach agreement on the terms of a reciprocal service agreement for the annexed area that is reasonable in terms of duration and financial considerations, the city intends to provide fire and emergency services to the annexed area in cooperation with other service providers." R. 51. Those other providers are not named, nor is any price tag attached to that suggestion in contravention of K.S.A. 12-521(a)(2). This finding omits that the City's Plan said that possibly the Fire District would pay to the City approximately $225,000 a year. Page 51. The suggestion that there was any single, coherent, "full and complete" statement of this service and "the estimated cost of providing such" service is simply a fiction. K.S.A. 12-521(a)(2); R. 50-51.

68. Defendants are correct that the Plan could be construed as merely a suggestion and "that the City's offer was simply an offer and that compensation was to be negotiated by the City and Fire District." Pages 61-62. However, that does not comply with K.S.A.12-521(a)(2). Also *Clarke* prohibits a plan based upon "'doubtful contingencies'" and the delegation of obligations to others. *Clarke,* 218 Kan. at 344, quoting *In re Annexation Ordinance*, 255 N.C. 633, 122 S.E. 2d 690 (North Carolina 1961). Since "compensation was to be negotiated," no one could read the Plan and say what the City actually intended to do, or what it would cost. The Plan was unlawful.

69. The Proposed Findings at pages 63-64, regarding the October 24, 2007

contract are also flawed. The BOCC did not, in fact, rely on this agreement. R. 2490. Also, the statement that the "contract... was valid and binding even for a partial annexation" is not true. The agreement says it "contemplates the City's petition for annexation being approved in its entirety by the BOCC." It further states that in the event of a partial annexation "the land to be annexed is unknown at the present time, thus the responsibilities of the Fire Department to provide services cannot be ascertained, that [sic] therefore the amount of consideration to be paid is uncertain." R. 719. That is most certainly not "full and complete" and Defendants do not explain how a contract would be enforced without any provision for the services to be provided, the area the contract is subject to, or the amount of money to be paid. Rather, in such an event there is simply an agreement to negotiate something new, not an agreement to provide fire services.

70. The assertion that the October 24 contract did not constitute "a material alteration from the proposal in the August 20 Service Extension Plan" is incorrect. *See* page 63-64. Defendants do not cite or quote the alterations or state how their assertion could be true. Part of the Plan suggested that the Fire District might pay the City $225,000 per year. The October 24 contract obligated the City to pay the Fire District approximately $4.5 million over 10 years. Defendants cannot argue in good faith that those are materially similar provisions.

71. The assertion that anyone had an opportunity to comment on the October 24, 2007 agreement at the Public Hearing, stated at page 64, is incorrect. Defendants cite nothing in the Record, so Plaintiffs object to this. However, the City Attorney handed copies of the agreement and the rest of the City's proposal

(including R. 710-723, the October 24, 2007 contract) and R. 725-753 (additional fire safety information)) to the Board's Clerk about a third of the way through the meeting, (R. 233), but no one had an opportunity to read it. Defendants are asserting that the citizens could somehow absorb that information which was not available and then comment thoroughly and intelligently on it in the three minutes they were allotted for presentations. R. 233. This is not possible. The citizenry was given three minutes each to respond to a 14-page contract with 19 pages of supporting material which they did not even have an opportunity to read. The statement that “plaintiffs had an opportunity to comment on the responses but did not do so" is false. Counsel did present objections to the City’s Plan and proposal, (*see* R. 2300, *et seq.*; 2302-2305), but the City had changed the Plan and proposal at the last minute without any notice. Any response was to no avail. The City changed the subject matter to which Plaintiffs were responding.

72. Plaintiffs object to the Proposed Finding stating that “[t]he County's legal staff determined from reviewing documents in the record that there were questions and different perspectives between the City and the Fire District concerning the provision of fire services and the October 24 fire services contract." Page 64. There is no citation to the Record for this statement. Also it is not true. The Record repeatedly and uniformly states that the Board did not like the October 24 contract and wanted a number of changes made to it, as the statements of City Attorney Watson, Fire District Attorney Barry Martin, and Commissioner Segale unanimously demonstrate. *See* Plaintiff's Brief pages 58 to 62. Indeed, Defendants would now suggest to the Court that Mr. Jarrett thought on his own that the City

needed to come up with $3 million. This is neither supported by the Record, nor proper. Mr. Jarrett should not be allowed to “testify" by filing Proposed Findings after the hearing on this matter.

73. The Proposed Finding at page 65 stating that the attorneys for the county did not act as a conduit for the Board is not cited to the Record. It is also false. *See* Plaintiffs' Brief, pages 58 to 62; Plaintiffs' Reply Brief, pages 16 to 17; County’s Brief, p. 43; Exhibit 127, p. 11.

74. In addition, the Proposed Findings regarding the February 15 submittal, Option 6, at page 66-67, are also improper. There is no citation to the Record. It is not correct, as well. For example, the assertion that going from approximately $4.5 million to $7.5 million "is not a material alteration" may explain why so many governmental entities are in such dire fiscal straits at present. Of course there were numerous other changes, including changing the personnel policies of the City. R. 2220; *See* Plaintiffs’ Reply Brief, pages 10-11.

75. Defendants' statement that due process was accorded because counsel raised the fire contract issue is not cited to the Record and should be disregarded. The comments made at the BOCC’s public meeting on February 14, 2008 and in the February 19, 2008 letter are outside the Administrative Record, and the Court cannot consider that information for the purposes Defendants urge because the Board did not consider those comments. Exhibits 112, 147. Further, Defendants misconstrue the substance of those communications. The comments on February 14, 2008 (*see* Exhibit 127, pages 8-9) could not pertain to Option 6, because the City did not create Option 6 until the next day. Indeed, it was only later at that meeting

that Commissioner Segale disclosed that the Board had been giving "direction... in the negotiations between the Fire District and Overland Park's Fire Department or the City." Exhibit 147, page 11.

76. In addition, the comments that were made were predicated upon the problems with the October 24 agreement, not the agreement the Board actually considered. For example, those comments recited concerns voiced by the Fire District that that agreement would increase response times, jeopardize public safety, harm the rest of the fire district, "savage its tax base, and even harm our friends and neighbors in Miami County." In fact one of the City's offers "included buying a fire station, with fire trucks, for $100,000" although fire trucks "go for about $1,000,000 apiece." Exhibit 127, page 8. While those are comments that should have given the Board pause, they became irrelevant because the Board actually relied on a proposal that had not even been prepared as of that date. Plaintiffs also object to the characterization of comments at an open Board meeting, as invited by the Chairman, as somehow "outside of any public hearing" or otherwise *ex parte*. *See* Defendants' Proposed Findings page 67. Defendants do not explain how a presentation at a public meeting, invited by the Chairman of the BOCC and transcribed verbatim, is somehow the same as off-the-record e-mails not disclosed to the public.

77. Plaintiffs also object to the Finding that the February 19, 2008 submittal provided them due process. Again, Defendants cite nothing. Most of that submittal was objecting to the procedure, including the fact that Option 6 was never accepted as written (Exhibit 112, page 1) and that there "is no way to properly digest and

analyze all the implications of this new proposal in the time allowed." Exhibit 112, page 2. Objecting to insufficient notice and no opportunity to be heard is not the same thing as receiving notice and an opportunity to be heard.

78. Plaintiffs object to the statement that there was any failure "to raise any issue or criticize the City's plan" or the October 24 fire services contract. That is not correct. *See, e.g.,* R. 2300, *et seq*.

79. Plaintiffs object to the statement that the fire contract resulted from "the actions of the County's legal staff to initiate the negotiation of the revised fire services contract." It is not cited to the Record, and, in fact, the Record repeatedly states that the revisions were the result of information privately communicated from the Board. This finding should be stricken.

H. Issues of the Kansas Homestead Law.

80. Plaintiffs have briefed this matter exhaustively and would point to significant errors in these Proposed Findings. First, the case law that has addressed this subject matter has only dealt with rural land that has been platted which by early statutes rendered such land susceptible to annexation. Defendants cite no law arising under K.S.A. 12-521. Second, this annexation is only invalid as to property that comes within the purview of the Homestead laws, and is not per se unconstitutional for all purposes, since some individuals might have already been living on 1 acre.

I. Substantial Evidence in the Record and Manifest Injury.

81. Plaintiffs again object to the statement that the "burden is on the plaintiff to prove" anything. Defendants do not cite any authority for this statement and it is

incorrect. A party appealing a decision need only "designate a record sufficient to present his position to the court and to establish the claimed error." *State, ex rel. Love v. One 1967 Chevrolet*, 247 Kan. 469, 478, 799 P.2d 1043 (1990).

82. Further, Defendants recite no citation to any finding of any cost-benefit analysis as required by the annexation statutes. *See* K.S.A. 12-521(c)(8). In fact, Defendants cite nothing in the Record to controvert Plaintiffs' Findings. There is no possible way the Board could have found that manifest injury would not result because it had no evidence regarding "the estimated cost impact of providing" major municipal services, the method of financing such services, the timetable for such services and the means by which such services would be maintained at an equal or better level for a partial annexation. K.S.A. 12-521(a)(2). Further, the Board had no evidence regarding the present cost of governmental services in the area (K.S.A. 12-521(c)(7); the proposed cost of governmental services to be provided by the city proposing annexation (K.S.A.12-521(c)(8)); the tax impact upon property in the city in the area (K.S.A.12-521(c)(9)), or the effect on other entities including fire districts (K.S.A.12-521(c)(11)) for a partial annexation.

83. Defendants do not dispute that any of the factors constituting manifest injury presented in Plaintiffs' brief are present. They cite nothing to the Record. Defendants have failed to controvert Plaintiffs' assertions regarding manifest injury in any fashion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing was served by mailing the same by the U.S. Mail, first class mail, postage prepaid, addressed 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 20th day of November, 2009.

James R. Orr