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	)	

TRIAL BRIEF

Come now the Plaintiffs and respectfully submit their trial brief as requested by the Court. Although the Court has requested a Trial Brief, the Court could consider this a Motion for Summary Judgment and grant Plaintiffs judgment based upon the uncontroverted facts herein.

SUMMARY OF FACTS

Plaintiffs respectfully proffer the following as salient, uncontroverted facts in this case. Further factual references will be added in the arguments section and either keyed to the Administrative Record page as "R." or to the Exhibits submitted by Plaintiffs which the Court

has ruled may be considered as part of the Judicial Record herein. These are referred to as "Exhibit."

1. The City of Overland Park (hereinafter also "the City") initiated this annexation by approving a Petition for Annexation on August 20, 2007 (R. 11) which authorized the City's Report Setting Forth Plans for Extension of Services (hereinafter also "Plan"). R. 11. These were filed with the Board of County Commissioners (hereinafter also "Board" or "County") on August 23, 2007. R. 2416.

2. The area the City sought to annex comprised approximately 9,569 acres, or approximately 15 square miles of southern Johnson County. R.110; 2414. The City never petitioned for a smaller area or provided specific cost, revenue, or similar data pertaining to any smaller areas.

3. Subsequently, on October 24, 2007, the City entered into a contract for fire services with Fire District No. 2, and presented that agreement at the Public Hearing convened on October 30, 2007. R. 710-723. This agreement was not part of the initial Petition or Plan, and was only operative if the Board of County Commissioners approved the annexation of the entire 15 square miles. R. 719; 1416.

4. On October 30, 2007, the Board of County Commissioners held a Public Hearing on the annexation. The City added to its Plan and proposal by filing the documents contained in Volume 2 of the Record. R. 442-794. City Attorney Robert Watson, Mayor Carl Gerlach, and a consultant spoke on behalf of the City that evening. R. 227-233; 258-335. The City also included a new October 24, 2007 fire safety agreement in its presentation. R. 710. The City was not limited in the time it was allotted, but other group representatives were limited to 15 minutes, and individual citizens were limited to 3 minutes to be heard on the annexation. R. 233.

5. The City also provided information at the Public Hearing demonstrating that the original Plan and proposal of the City had been reviewed by the Overland Park Planning Commission and the Johnson County Planning Commission. R. 770, *et seq.*; R. 781, *et seq.*

6. The City also submitted a number of corrections to the original Plan called SEP Errata at the October 30, 2007 hearing. R. 725-754.

7. There was discussion at the hearing that indicated the BOCC would continue to receive public commentary after the meeting. The Chairman stated that people could resubmit earlier written statements until November 30, 2007. R. 233. Also, County Counselor Donald Jarrett stated that comments could be added until November 30, which the Chairman repeated, adding that the deadline was 5:00 p.m. R. 252. No mention was made of any changes to the City's Plan or proposal. R. 225-256. No motion to continue the public hearing was made, and the meeting was "adjourned" at 10:44 p.m. October 30, 2007. R. 256.

8. Notwithstanding the adjournment, the chairman stated that there were three ways for citizens to continue to communicate with the Board:

> --You can continue to add information until November 30.
> --or contact commissioners; we can only listen.
> --We do have a public comment time at our meetings.

R. 254.

9. The Board continued to receive information from a variety of sources. The Board, through its attorney Richard Lind, sent a number of questions to the City on November 13, 2007. R. 800, *et seq.* The City responded to Mr. Lind on November 30, 2007. R. 805, *et seq.*

10. The Board passed a resolution extending the time for public comment past November 30, 2007. R. 1860. Counsel for the Board, Don Jarrett, had advised the Board on November 15, 2007 that such a resolution was necessary to continue the matter. R. 1855.

11. The Board, through Mr. Lind, asked further questions of the City on December 31, 2007 (R. 1340, *et seq.)*, to which the City responded on January 10, 2008. R. 1343, *et seq.*

12. On January 25, 2008, the City filed a Rejoinder to the information previously provided by Fire District No. 2. R. 1633-1641.

13. On February 2, 2008, the City submitted information indicating that service of the notice of the public hearing to Frank and Virginia Mackey was not timely. R. 1553, *et seq.*; R. 1553-1556. Attorneys for the City and the County held a private meeting to discuss this deficiency. R. 1553.

14. On February 6, 2008, the City filed a Rejoinder to certain information previously provided by the Sheriff of Johnson County. R. 1642-1651.

15. On February 6, 2008, the City filed a Rejoinder to information submitted by the City of Spring Hill. R. 1653-1657

16. On February 6, 2008 the City filed a Rejoinder to various citizen concerns. R. 1659-1677.

17. On February 12, 2008, the City filed a submittal with the Board of County Commissioners. R. 1682-2145. There is no evidence in the Record that this was posted on the County website before the Record closed on February 15, 2008 at 5:00 p.m.

18. This February 12, 2008 submittal consisted of 463 pages of additions, changes, corrections, and new information regarding the City's Plan and proposal. R. 1682-2145. It contained SEP Errata Sheet No. 2, which was a series of corrections to the Plan regarding existing land uses and platting, the population in the area, cable television issues, and the net tax impact on the area to be annexed. R.1887-1890. In addition, the City amended a sketch

(R.1893), provided evidence regarding the number of residential units in the area (R. 1895), and filed its Second Amended Sketch 17 regarding land that was alleged to be urbanizing. R. 2005.

19. The Plan was also modified by virtue of changes to Question 7 of the BOCC, which discussed the costs of annexation to residents being annexed. The Board had previously posed that question to the City and the City had previously answered it. R. 2037-2075.

20. The City also supplemented its earlier response to Question 8 of the BOCC regarding the amount of land possibly held by developers. R. 2078-2080.

21. In addition, there were numerous documents about changes to the fire safety component of the City's Plan, indicating for the first time that other alternatives, "Option 2" and "Option 3," might be under consideration. See R. 2083, *et seq.*; 2110, *et seq.*; 2135-2136.

22. The City filed its second submittal only hours before the February 15, 2008 deadline for the close of the Record at 5:00 p.m. R. 2151-2297. This submittal contained, among other documents, the minutes of a City Council meeting which was not adjourned until 12:48 p.m. that very day. R. 2203-2205.

23. Numerous further changes to the fire safety proposal were included in this last submittal, including Option 4 (R. 2156, *et seq.*), Option 5 (R. 2173, *et seq.*) and culminating in a proposal by the City called Option 6. R. 2209.

24. This last submittal also included Substitute for SEP Errata Sheet No. 2, which consisted of further changes to the Plan. This corrected the corrections filed 3 days earlier as SEP Errata Sheet No. 2. R. 2232, *et seq.*

25. The City submitted proposed Findings of Fact as well. R. 2239, *et seq.*

26. The Record contains no indication that anyone was given notice of any of the information contained in either the February 12 or 15, 2008 submittals, nor was any hearing held on the subject matter of those submittals.

27. The Board was inconsistent in defining the correct process for communication on the annexation issue. Direct contact with commissioners was approved by the Chairman (R. 254) and County Counselor Donald Jarrett (Exhibit 16). R. 254. The Board's press release approved of communications by e-mail or telephone. Exhibit 15. The County's website said to communicate by letter to the Board addressed to the attention of the clerk only. Exhibit 17A.

28. Sometimes communications from citizens were referred to counsel for the Board. Exhibit 22.

29. Several people expressed confusion over the appropriate manner in which to communicate. Kent Eckles, a lobbyist for the Overland Park Chamber of Commerce, had been told he had to explicitly ask that something be placed in the Record for it to be considered. Exhibit 24. Plaintiff Norman Pishny expressed similar confusion. Exhibit 25. A lawyer from California, Peter Brewer, had to write repeatedly to get a simple answer to a question, although the BOCC never responded. R. 2671; 2039; 2885.

30. Sometimes communications that were not sent directly to the Board still ended up in the Record, such as Larry Keenan's missive to the Chairman. R. 2787.

31. Plaintiff Tom Watson expressed confusion over the quasi-judicial nature of the proceeding and wrote board members asking if he could meet with them to discuss issues and concerns he had. Exhibit 23; Exhibit 96.

32. The BOCC had numerous undisclosed *ex parte* communications. Approximately two months prior to the public hearing, Commissioner Segale argued with Bruce West that taxes

would go down as a result of the annexation. Exhibit 91. He also wrote privately regarding 4-H questions (Exhibit 95) and debated with an Aubry Township Trustee about costs pertaining to unincorporated areas. Exhibit 97. He even received private legal advice regarding the effect of annexation on gun laws and hunting from a law firm that was one of his campaign supporters. Exhibit 100.

33. Prominent newspaper publisher Stephen Rose sent a private e-mail to Chairman Surbaugh and Commissioners Lindstrom and Segale urging that the annexation was necessary to manage growth. This was kept off the Record. Exhibit 113.

34. Kent Eckles, the lobbyist who had demonstrated confusion about how to get a matter on the Record, was able to write the Chairman and keep his views regarding the annexation off the Record. He successfully urged her not to delay the issue. Exhibit 114.

35. The most extensive examples of *ex parte* communications dealt with the fire safety issue. At the February 14, 2008 BOCC meeting, Commissioner Segale confirmed that the Board had concerns regarding the fire contract and sent the Board's attorneys to negotiate privately with the City and the Fire District on an agenda to change the fire safety component of the City's Plan and proposal. Exhibit 12, page 11.

36. The City was well aware that the Board was communicating with the City and the Fire District behind the scenes, as reflected in various communications authored by City Attorney Robert Watson. See R. 2083; R. 2086; R. 2071; R. 2074; R. 2253.

37. The Fire District also knew that it was dealing with the Board via its lawyers. The attorney for the Fire District, Barry Martin, repeatedly referred to the issues regarding the fire contract as concerns of the BOCC. See R. 3038; 3006; 3007; 3072; 3074.

38. The changes in the fire contract urged by the Board were substantial. They included concerns that the duration of the previous agreement was too short (R. 3038); that the amount to be paid was inadequate (R. 3038); that there was no agreement in existence that would be effective in the event of a partial annexation (R. 3038); and that there were no mechanisms for future annexations in place (R. 3039).

39. These communications were held exclusively in private, and in one case were held in such a fashion as to intentionally avoid triggering the Open Meetings Act. R. 2156.

40. The City of Spring Hill objected to this and pointed out that these negotiations amounted to substantial changes to the Plan, were harmful to Spring Hill, and indicated that Spring Hill "and other parties of interest have been denied proper notice and due process." R. 3095-3096.

41. The City ultimately proposed a fire contract referred to as “Option 6.” However, it was too late for the Fire District to consider the offer, let alone sign it, before the Record closed. R. 2209-2229. The Chairman of the BOCC referred to the timing of this as “the very last minute.” R. 2493. This Option 6 changed the previous October 24 contract by contemplating a partial annexation. R. 2210-2213. It contained dramatically greater payments, with potential minimum payments of $7,535,000, and in year 11 even required the City to make certain payments twice. R. 2210-2213; see paragraphs d, e at R. 2212-2213.

42. Option 6 now said the City would seek detachment of the Fire District’s property from the BOCC, instead of taking it automatically with no compensation or negotiation, although it obligated the Fire District not to object to such detachment. R. 2211. Option 6 set a duration of 15 years (R. 2210), imposed certain hiring covenants (R. 2220), established a provision for

creating a master plan for fire services (R.2220), and embraced a protocol for future annexations (R. 2221-2224).

43. The Record demonstrated a number of facts constituting manifest injury.

a. The City conceded that the net financial burden would increase for all but the more well-to-do, i.e, those in homes worth more than $300,000. R. 2234-2235. Plaintiff Pishny demonstrated a cost to an owner of 60 acres of $2,351,088, including the excise tax of $9,365.40 per acre should he subdivide his property. R. 2984; see R. 2959-2986.

b**.** Most services, such as sewers, electricity, lights, and gas, are provided by entities other than the City. Annexation will do nothing to provide sewers, electricity, lights, gas, cable television, telephone, or internet service. R. 2302.

c. There is a possibility that fire service by the City would not be equal to that which was then being provided by the Fire District**.** The evidence before the BOCC was that the Fire District had a superior ISO rating. R. 1316. The increased distance from the City would also increase response times. R. 1017-1318.

d. The tax base of the Fire District would erode since even the Option 6 proposal lasts only 15 years. R. 2210.

e. In this case either the Fire District will shrink, or it will continue to serve the same area, in which case the annexation serves no purpose. R. 2209, *et seq.*

f. The Plan provided no new police officers even for the entire 15-square-mile proposed expansion. R. 48. The County had a dedicated patrol deputy and an additional community police unit available for this area. R. 1124. The Sheriff stated that the law-enforcement services would potentially drop as a result of the annexation. R. 1124.

g. The Chairman of the BOCC specifically stated that the County's "road maintenance probably is above any city." R. 2493.

h. The City's Plan does not state any deficiencies in the present services provided. Its basis for annexation was the belief that there would be future development in the area in the foreseeable future. R. 29-36.

i. The City's estimates of costs to the residents changed over time up to the last hours the Record was open. R. 2234-2235 (February 15, 2008 submittal).

j. The costs to the City exceeded the revenue generated as set forth in the Plan as adopted by the BOCC. R. 2435. However, there is nothing in the Record regarding such factors in the event of a partial annexation.

k. Although the City stated that wealthier people might see their taxes drop, as noted above, the Record does not state who or how many people would see their burdens increase or decrease. See Plan, R. 79-80; Substitute for SEP Errata Sheet No. 2, R. 2234-2235.

l. It is not clear what effect this will have on Aubry Township, except that after 5 years it will suffer the loss of tax revenues. There is no evidence in the Record regarding the scope of the effect of the partial annexation ordered. R. 2460.

m. There is no evidence in the Record to establish what new services would become available other than those for which landowners would pay.

n. The County has a professional staff which already provides land-use regulation. R. 1042, *et seq.*

44. Commissioner Segale indicated that he had prejudged the proceeding. An e-mail circulated by one of his fundraisers stated he had indicated he favored the annexation. R. 3140.

In addition, he told Brenda Karlin he would support any annexation "as long as they have a service plan." R. 2588; Exhibit 93.

45. Commissioner Eilert participated despite the fact that he had been the Mayor of Overland Park during preceding annexations. R. 441.

46. The City had opposed any partial annexation throughout the annexation proceedings. R. 1347.

47. The Board of County Commissioners granted a partial annexation, eliminating approximately 40% of the area the City had originally sought to annex. See Map, R. 2463.

THE STANDARD OF REVIEW

The decision of the Board of County Commissioners is quasi-judicial, and the standard of review of a quasi-judicial proceeding like this annexation requires the Court to apply a three-pronged test. This Court must review this annexation to determine "whether, as a matter of law, the BOCC: (1) acted fraudulently, arbitrarily, or capriciously; (2) issued an order supported by substantial evidence; and (3) acted within the scope of its authority." *Petition of City of Kansas City to Board of County Commissioners of Wyandotte County for Annexation of Land Pursuant to K.S.A. 12-521*, 253 Kan. 402, 403, 856 P.2d 144 (1993); *City of Topeka v. Shawnee County Board of County Commissioners*, 252 Kan. 432, Syl. ¶ 1, 845 P. 2d 663, 665 (1993).

The First Two Prongs Merge: Fraudulently, Arbitrarily, or Capriciously and Supported by Substantial Evidence.

The first two prongs of this test are defined as follows, and are in essence the same issue. "Arbitrary, oppressive or capricious conduct is said to be shown 'where an order of an administrative tribunal is based upon findings which are not substantially supported by evidence in the record.' *U.S.D. No. 461 v. Dice*, 228 Kan. 40, 50, 612 P.2d 1203 (1980). 'Substantial evidence' is defined as 'that which possesses relevance and substance and which furnishes a

substantial basis of facts from which the issues can reasonably be resolved.' *Brinson v. School District*, 223 Kan. 465, 473, 576 P.2d 602 (1978). Thus the first two prongs of the test merge." *Appeal of City of Lenexa to Decision of Board of County Commissioners of Johnson County*, 232 Kan. 568, 583, 657 P.2d 47, 61 (1983). Accordingly this Court must set the annexation aside if there is not relevant substantial evidence of each of the facts or elements necessary to support the decision of the BOCC to grant the annexation the County actually approved.

The Third Prong, the Scope of Authority, Requires Compliance with the Law.

The third prong requires the Court to determine if the annexation were conducted according to the laws authorizing annexations. It includes a statutory and a constitutional component.

The Annexation Must Comply with All Statutes.

A valid annexation must follow the dictates of the annexation statutes. "In reviewing an annexation decision by a municipality the function of the courts is to determine whether the municipality has statutory authority to act and has acted in accordance with that authority." *City of Lenexa v. City of Olathe, 233 Kan. 159, 163, 660 P.2d 1368 (1983).* Thus, while courts do not evaluate the political wisdom of an annexation, they must determine the legality of an annexation. The basis for the Court's authority to review this annexation for statutory compliance lies in the fact that annexations are creatures of statute. "[T]he power of a municipality to alter its boundaries by annexation is vested absolutely and exclusively in the legislature, and this power is therefore completely controlled by statute, i.e., K.S.A. 12-519 *et seq*." *Crumbaker v. Hunt Midwest Mining, Inc*., 275 Kan. 872, 884, 69 P.3d 601 (2003). See *City of Leawood v. City of Overland Park*, 245 Kan. 283, 286, 777 P.2d 830, 832 (1989).

If the City or County did not comply with our statutes, the Court must set aside the

annexation. The “failure of a city to comply with the requirements of the legislative enactment which gave it power and authority to annex territory nullifies the attempted annexation ordinance.” *In re Petition of City of Shawnee for Annexation of Land*, 236 Kan. 1, 12-13, 687 P.2d 603, 613(1984); see *Dillon Real Estate Co., Inc. v. City of Topeka*, ___Kan.___, 163 P.3d 298, 311 (2007). Similarly, "[c]ounty commissioners likewise have only such powers as are conferred by statute.” *Petition of City of Shawnee*, 236 Kan. at 13, 687 P.2d at 613.

The test the Court should apply is one of substantial compliance with the statutes. *Lenexa v. Olathe*, 233 Kan. at 233-234. "'Substantial compliance,’ according to this Court, refers to 'compliance in respect to **the essential matters necessary to assure every reasonable objective of the statute**.'" *Lenexa v. Olathe*, 233 Kan. at 164. [Emphasis added.]

These objectives are abundantly clear: they are to protect citizens such as the Plaintiffs. "[T]he general purpose of the annexation statutes is to **protect the rights of landowners against unilateral annexation**." *City of Topeka v. Shawnee County*, 252 Kan. at 437, 845 P.2d at 668-669. [Emphasis added.] "The objectives of the annexation statutes are to notify the public and protect the rights of the landowners against a City's **unilateral** action in annexing their land.” *City of Leawood*, 245 Kan. at 283, Syl. ¶2, 777 P.2d at 831. [Emphasis in original]. Therefore this annexation must fail if the BOCC and the City did not follow all the statutes aimed at protecting the rights of Plaintiffs.

The Annexation Must Comply with All Constitutional Requirements.

In addition to complying with the annexation statutes, the Court also must determine whether all constitutional requisites have been met. This is a quasi-judicial proceeding (K.S.A. 12-521(c)), and thus Plaintiffs have due process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The Kansas Supreme Court has stated a quasi-

judicial action requires "'[a] full hearing at which every party has the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." *Adams v. Marshall,* 212 Kan. 595, 600, 512 P.2d 365, 370 (1973), quoting 2 Am. Jur.2d, Administrative Law, § 397, p. 202. Due process in a quasi-judicial action has also been described as follows:

> In speaking of due process requirements, the United States Supreme Court, in Int. Com. Comm. v. Louis. & Nash. R.R., 227 U.S. 88, 93, 57 L.Ed. 431, 33 S.Ct. 185, said:
>
> ". . . **All parties must be fully apprised of the evidence submitted or to be considered**, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. **In no other way can it test the sufficiency of the facts to support the finding**. . . ."

Adams, 212 Kan. at 600, 512 P.2d at 370. [Emphasis added].

There is some inconsistency in our law, however. *In re the Petition of the City of Overland Park for the Annexation of Land,* 241 Kan. 365, 371-372, 736 P. 2d 923, 928-929 (1987) recognizes that citizens have procedural due process rights in annexations, but that case indicates that some limitations on those rights, such as the right of cross-examination, may be consonant with due process. This is inconsistent with the rulings of the United States Supreme Court, which is dispositive. See also *Topeka v. Shawnee County,* 252 Kan. at 441-442, 845 P.2d 670-671. *Adams* cannot be reconciled with *Overland Park* and *City of Topeka*. Plaintiffs urge that they are entitled to the full panoply of due process protections, not some "due process lite." Plaintiffs respectfully request that the Court overrule *Overland Park* and its progeny to the extent they limit their due process rights.

However, even under *Overland Park's* narrower ruling, due process attaches, and Plaintiffs must have full and equal access to the information being considered for the requirements of due process to be met. That case recognizes that the hallmark of due process is

"notice and an opportunity to be heard in a meaningful time and in a meaningful manner." *Overland Park*, 421 Kan. at 370. Accordingly, the Court must examine this proceeding to be assured that the Plaintiffs' due process rights were accorded at every step.

ARGUMENTS AND AUTHORITIES

1. THIS ANNEXATION IS VOID BECAUSE THE BOARD OF COUNTY COMMISSIONERS LOST JURISDICTION TO ENTER THE FINAL ORDER.

This annexation is unlawful because the public hearing on October 30, 2007 was adjourned and by statute the BOCC lost jurisdiction to consider the issue after that. Therefore the Court must reverse the annexation because the BOCC failed to follow its statutory mandates and acted beyond the scope of its authority.

The facts of this issue are simple, certain, and conclusive. The transcript of the October 30, 2007 public hearing concludes with the statement that "the Chairman at 10:44 p.m., declared the public hearing to be "*Adjourned*." R. 256. Although there was discussion of leaving the Record open for public input by the citizenry, the BOCC never moved to continue the meeting, never voted to continue the meeting, and took no action whatsoever to retain jurisdiction over the proceedings or continue them further. There was no showing of "good cause" approved by the BOCC at the public hearing as required by K.S.A. 12-521(b). Thus the matter was concluded, albeit perhaps prematurely.

The governing statutory provisions are also clear and direct. K.S.A. 12–521(b) requires that the public hearing be held not less than 60 days nor more than 70 days after the filing of the City's Petition for annexation. That same statute states that the "board for good cause shown may **continue** the hearing beyond the time specified in the notice without further publication" but this did not happen. [Emphasis added]. Also, the "board of county commissioners **shall render a**

judgment within seven days after the hearing has been **adjourned** sine die." K.S.A. 12-521(d). [Emphasis added]. It does not take a parliamentarian to know that "continue" and "adjourn" mean precisely the opposite of each other.

Since the BOCC did not follow these requirements and proceed to a decision within seven days, it failed to make its decision in a timely fashion as required by statute and the proceeding is void. "Jurisdiction has been conferred upon the [BOCC] by the express provision of K.S.A. 12-521" and "[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." The BOCC did not comply with the express mandates of the statute and so lost jurisdiction to consider the annexation. *Petition of City of Shawnee*, 236 Kan. at 13, 687 P.2d at 613. Therefore the annexation is invalid.

The Board's subsequent action bears out this conclusion. On November 15, 2007, the attorney for the Board stated "by statute, there was a timeframe within which the County had to act after the record was closed. Therefore, **a resolution to continue the public hearing process would be necessary to establish a time for holding the record open and for information to be submitted."** R. 1855. [Emphasis added]. The Board continued the public hearing process by adopting Resolution No. 086-07 "upon a motion duly made, seconded and carried." R. 1860. By that time, however, it was too late. The BOCC knew it needed to take affirmative action to keep this issue alive. It had failed to do so on October 30, 2007, and so the matter died.

Finally, when the Chairman closed the February 21, 2008 meeting, the language was tellingly identical to that following the October 30, 2007 public hearing. The Record says the Chairman "declared the public hearing to be *Adjourned*." [Emphasis in original]. R. 2494.

Plaintiffs respectfully renew their request for the Court to take judicial notice of Exhibit 107, the Rules of Order of the BOCC, pursuant to the Court's suggestion to Defendant City regarding its request to take judicial notice. See Journal Entry and Memorandum Order, August 6, 2009, Paragraph III. These Rules confirm that BOCC action requires a motion, a second, a statement of the motion by the Chairman. Exhibit 107, p.7, Paragraph VI.1.A. A continuance requires a formal motion. Exhibit 107, p. 7, Paragraph VI.1D. A continuance requires a majority concurrence of the BOCC. Exhibit 107, p. 5, Paragraph IV.9.B.

This conclusion is fair. Reversal of the annexation is scarcely fatal for all time. Unlike in litigation, there is no *res judicata* effect to an annexation. A city may crank up its word processors, incur some modest mailing charges, and start over if it wishes to cure such a procedural ill.

2. THE BOCC LACKED SUFFICIENT EVIDENCE UPON WHICH TO GRANT THIS ANNEXATION.

The BOCC did not have sufficient evidence to justify the partial annexation granted. It is therefore arbitrary, capricious, and unreasonable. In order to pass muster, the BOCC's order must be "supported by substantial evidence." *Topeka v. Shawnee County,* 252 Kan. at 432, Syl. ¶1, 845 P. 2d at 665. Suggestions or wishful thinking do not suffice; the City had to produce evidence that is "relevant and of substance, and…of a type that a reasonable person would accept as being sufficient to support a conclusion." *Topeka v. Shawnee County*, 252 Kan. at 432-433, Syl. ¶4, 845 P.2d at 555. In the present case, the City failed to provide essential facts necessary to support the partial annexation, and so this annexation must fail.

Initially, the City sought to annex nearly 15 square miles of southern Johnson County. R. 23. However, the BOCC only granted a partial annexation. It divided the area proposed to be annexed into five regions, and carved out nearly 40% of the proposed area by eliminating two

large swaths of the land the City petitioned to annex. The result was that two areas south of the City were annexed, and a third, running southward along 69 Highway, created a peninsula of land jutting to the south. See Map, R. 2463. However, the City never proffered evidence upon which the BOCC could approve such a partial annexation. Its Petition and its supporting data were for a vastly larger area, and so this annexation fails.

One reason for this is that the City firmly rejected the notion of a partial annexation throughout virtually all of the proceeding, and therefore failed to supply any evidentiary support for anything but the whole annexation enchilada. For example, as late as the City's January 10, 2008 responses to questions posed by the BOCC, the City demonstrated its insistence on a total annexation. In discussing the issue of "grandfathering" ordinances, the City said, "In short, and with due respect to the authority of the BOCC, the City is unable to commit to grandfathering unless the BOCC approves the City's petition in its entirety. The City is willing to more specifically address any counter-proposal to the City's petition that the BOCC might wish to offer." R. 1347. Not until the waning hours of the annexation, after the BOCC had told the City of its concerns regarding a partial annexation, did the City even begin to consider a partial annexation, and then only with respect to the last-minute fire safety proposals culminating in Option 6. R. 2209. Nothing else in the City's Plan or proposal ever contemplated a partial annexation. This means the City did not provide crucial information needed for the BOCC to rule upon a partial annexation.

The Plan Lacked Sufficient Evidence to Support a Partial Annexation.

The City's Plan was based upon the total annexation of all 15 square miles. Therefore much of the Plan lacks any relevance to a partial annexation. It provides a wealth of information

for the wrong annexation, and is grossly lacking in any relevant substantial evidence to support this partial annexation. Thus the Plan is fatally defective with respect to the partial annexation.

Most significantly, it is painfully obvious from the Cost Analysis in the Plan that the City never included any calculations to justify a partial annexation. See Plan, R. 72-74. One of the most significant costs was for street, traffic and storm water maintenance. That, like other components of the cost calculations, is dependent upon how much area was to be absorbed, yet those amounts were never adjusted for a partial annexation to determine the net costs or if any cost savings could occur. Plan, R. 73.

The data regarding revenues were also never adjusted to support a partial annexation. Plan, R. 74-75. For example, the City's Plan estimated total revenues in 2009 of $604,840. However, with roughly 40% of the area having been chopped out by the BOCC, there is no conceivable way that that number is relevant. Real property taxes, personal property taxes, and the host of franchises and other City-imposed fees from the smaller annexed area would be anyone’s guess. Without knowing the revenues generated by each area considered separately by the BOCC, it is impossible to meet the evidentiary requirements for an annexation. Therefore the net operating costs information contained in the plan (R. 74) is not just irrelevant; it is utterly fictional.

Similarly, there was no evidence of the effect of a partial annexation on Aubry Township. Again, the City provided data assuming the entire area would be annexed. Plan, R. 80-82. The City estimated that if the entire area had been annexed, Aubry Township would have lost $31,700,000, or 33.9%, of its assessed valuation of real property. Plan, R. 80. It also would have lost personal property and state assessed valuation, although the City never had accurate data to describe this. Plan, R. 81. Because there is nothing in the Record which shows where the parcels

of tax-generating property lie in Aubry Township, and whether they were included or excluded in the annexation, there was no evidence to support any finding regarding the revenue lost to the Township.

The City also failed to provide sufficient evidence pertaining to the Fire District in the event of a partial annexation. Of course the City's original Plan had expenses pertaining to the Fire District that were inapplicable. The Plan, for example, said that the Fire District would receive $180,000 for three years beginning in 2009, or maybe the Fire District would pay the City $225,000. R. 51; R. 82-86. This part of the City's proposal did not even survive the Public Hearing. None of the subsequent changes cured this. The October 24, 2007 Agreement was inapplicable to a partial annexation. R. 710, *et seq.* The February 15, 2008 fire safety proposal "Option 6," which is unsigned by the Fire District (R. 2228), attempts to address a partial annexation, yet it only states what minimums may be paid to the Fire District. It did not, and cannot, state what actual money will be paid. Despite the belated efforts to engraft language contemplating a partial annexation, the Fire District proposal remains a pig in a poke.

There are other crucial facts needed for a partial annexation that are absent from the Plan. The location of residential districts, and thus the impact upon Plaintiffs and other citizens, was not sufficiently broken down to justify a partial annexation. See Plan, R. 25. The figures regarding the existing population were never allocated among the various areas to provide a justification for a partial annexation. Plan, R. 28, 29-30. The same problem is true with respect to infrastructure management issues. The City outlined snow removal and road maintenance costs for the whole 15 square miles (R. 39), but did not provide the same information for a smaller area. The City stated that there "are 46 known roadway culverts and concrete box culverts in the area proposed to be annexed," and it identified "44 miles of roadside ditches." It also stated that

such storm water maintenance would cost $50,000 per year, but never calculated that for the areas actually annexed. There is no way the Board could have known what those costs would be. Plan, R. 40-41.

Numerous examples of why the Plan fails are set out in summary fashion here:

·The information regarding streets and bridges was entirely based upon a total annexation of 87.4 lane miles of roads, and contains no way to determine how many paved, unpaved, or private streets would be left after a partial annexation. R. 38.

·The data for road maintenance, and the costs associated with that maintenance are similarly irrelevant because they do not address a partial annexation. The Plan refers to asphalt overlay cost of $750,000 and recurring costs of "$400,000, including work contracted with the county." R. 39. Again, this has no relevance to a partial annexation and no data was provided for the areas that were actually annexed.

·The City provided estimated costs for snow removal of $245,000, with annual recurring costs of $10,000, but these were predicated upon the entire 15 square miles being taken over, not some truncated portion. R. 39.

·The City's data regarding bridges (R. 39) is not broken down or allocated into regions in order to justify this partial annexation.

·The City estimated storm water maintenance would be $50,000 annually, but there is no way to know what that cost would be in the event of this partial annexation. R. 41.

·The City provided current average emergency response times for the City, but did not explain how annexing the southern peninsula extending down to 199th Street but chopping out the adjacent area would affect these response times. R. 45.

·The City's service of removing litter and mowing grass and weeds along rights-of-way was predicated upon 55.67 lane miles of streets in the total area and no partial annexation data was ever provided. R. 67. Although some of this information might be discernible from Sketch No. 21 (R. 107), it is scarcely possible to determine the cost to the City or the extent to which this service can be provided from the information the City provided.

·The Plan's Cost Analysis of Extension of Municipal Services on Residents of Area Proposed to be Annexed and on Residents of the City at R. 72-74 is utterly irrelevant because it was never adjusted for a partial annexation. There is no data regarding which areas would actually generate certain revenues and incur certain costs. See above.

·The Estimated Cost of Providing Municipal Services to the Area Proposed to be Annexed is meaningless because all of that evidence was predicated upon a total annexation. These cost calculations relied on a larger area being annexed and were millions of dollars out of date even before the Plan was presented because of the October 24 fire contract. Even the final fire safety proposal, Option 6, had no hard figures for the costs of service. R. 72-73; R. 710, *et seq.*, R. 2209, *et seq.*

·The data for estimated revenues is similarly meaningless because it was based upon property taxes, motor vehicle taxes, sales taxes, gasoline taxes, franchise taxes, user fees, licenses and permits, storm water utility fees, and ambulance fees generated by a 15-square-mile area, not the smaller area annexed. R. 74.

·The estimated ongoing operating costs were similarly useless to the BOCC because the City never provided such figures for a partial annexation. The costs for 40% less land would be different, but we have no way of knowing how much. R. 74.

·Also, the estimated one-time costs in years 2008 and 2009 are simply wrong because they apply to the entire area. These costs include paving for miles of roads that were never annexed and storm sirens for areas that were never brought into the City. The data is off by hundreds of thousands of dollars. R. 74.

·The City's assertions regarding the method by which it planned to finance the extension of municipal services are wrong because they are based upon the City expanding its tax base by 15 square miles, not some vastly smaller area. R. 75.

·The overall cost impact on residents of Overland Park similarly fails to consider that the City's Plan was predicated on having an additional tax base the size of Leawood, although it got a much smaller area. R. 75.

·The Board had no evidence of the effect of the partial annexation on Aubry Township, as noted above. The City did not identify the areas containing more valuable land, or break out the taxing status of the area in the Township the BOCC ultimately authorized to be annexed. The City did not locate the site of personal or state-assessed property at all. It is therefore impossible to know how much tax revenue Aubry Township would lose from a partial annexation. R. 80-82.

·There was no evidence of the impact upon Johnson County Fire District No. 2 in the Plan as discussed above. Neither the Plan (R. 82-86) nor the October 24 contract (R. 710, *et seq.)* nor Option 6 (R. 2209, *et seq.*) state what will happen with the large areas carved out.

·There was insufficient evidence for the Board to comply with the information regarding fire safety required by K.S.A. 12-521a. The City provided that information in its SEP Errata filed at the public hearing October 30, but it never amended or updated that to consider a partial annexation as set out in Option 6. R. 742-743.

The Lack of Evidence Defeats the Mandatory Five-Year Review.

This failure to provide a plan or proposal with evidence relevant to a partial annexation also makes the five-year review requirement impossible. K.S.A. 12-531(a) states that after five years "the board of county commissioners shall call a hearing to consider whether the city has provided the municipal services as provided in the timetable set forth in the plan in accordance with K.S.A. 12-520b or 12-521." This in turn triggers a hearing and the possibility of deannexation as set forth in K.S.A. 12-531(b):

> At the hearing, the board shall hear testimony as to the city's extension of municipal services, or lack thereof, from the city and the landowner. After the hearing, the board shall make a finding as to whether or not the city has provided services in accordance with its service extension plan. If the board finds that the city has not provided services as provided in its service extension plan, the board shall notify the city and the landowner that such property may be deannexed, as provided in K.S.A. 12-532, if the services are not provided within 2 1/2 years of the date of the board's findings.

Since the City never provided evidence pertaining to the partial annexation ordered, the BOCC will have no basis upon which it can decide in five years if the services were "in accordance with the plan," should the Board actually decide to hold such a hearing. If we cannot determine the costs now, the 12-531 review is meaningless, because we will have no benchmark for comparison. The Board will be unable to comply with the statute, and so this annexation is unlawful.

The BOCC'S Decision Verifies It Lacked Sufficient Evidence for This Partial Annexation.

The BOCC's decision proves that that the decision was based upon insufficient evidence since it used the wrong evidence, or at least evidence for the wrong annexation. The Board used facts applicable to the original Petition and Plan, cavalierly referring to the "detail in the City's Service Extension Plan." (R. 2433), but that Plan was predicated upon the annexation of the entire 15 square miles. R. 2433. The BOCC segregated the annexed area into five areas and

excluded two large regions, (R. 2024-2025), but based its decision on the facts pertaining to the larger area. R. 2426-2444. For example, it relied on the fact that agriculture was "scattered throughout" the entire area, but it had no evidence of where agriculture was with respect to each of the five regions it considered. R. 2426. Its analysis of platted versus unplatted land pertained to the total proposed area, not the areas actually annexed. R. 2426. The extent and nature of residential development was not broken down by region. R. 2429. The population findings were based on the aggregate 15 square miles, not on the areas actually annexed. R. 2430-2431. The BOCC looked at evidence that has no relevance to the areas annexed.

Most significantly, the BOCC's findings regarding any cost to the City of the areas actually annexed in the partial annexation are simply unsupported in the Record. R. 2433. Nothing in the Record supports the notion that the costs of 15 square miles would be the same as the costs of a much smaller area. However, the BOCC findings parroted the original Plan, and 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), but that Plan relied upon revenues being generated by the entire 15-square-mile area, not some abbreviated part. The data is obviously not relevant or reasonable because the BOCC did not annex the same income-generating area. Land is not fungible in its ability to generate tax revenues as a matter of law. Kansas Constitution, Article 11, §1.

The BOCC made similar mistakes with respect to the effect of the annexation upon Aubry Township. The decision of the BOCC dutifully recites that the Township would lose $36,360,000 of its assessed valuation if the "annexation were approved as requested." However, the annexation was not approved as requested. There is no evidence describing what would

happen to Aubry Township in the event of a partial annexation. Perhaps the areas annexed had valuable property with high assessments. Perhaps the Township lost areas that are only lightly taxed. The answer is not in the Record. Thus there was no evidence upon which to grant the annexation. R. 2438-2439.

The fire safety analysis of the BOCC also finds no basis in substantial evidence. Although the BOCC made reference to the inoperative fire safety proposal (the February 15, 2008 Option 6 offer of the City), even that document did not say what effect the annexation would have, other than that the City would pay the Fire District for its lost revenues, and the City guaranteed potentially approximately $7.5 million of such losses (or more) over 15 years. However, the BOCC had no evidence as to what a partial annexation would actually cost Overland Park.

While a board of county commissioners may approve a partial annexation (K.S.A.12-521(c)), it cannot do so without evidence. A city must present facts sufficient to justify the partial annexation. The City did not do so in this case.

There Was Insufficient Evidence Regarding Manifest Injury to Support All of the 14 Statutory Criteria.

Similarly, the BOCC did not have sufficient evidence upon which it could evaluate the question of manifest injury. While reasonable minds can differ over conflicting evidence, here there simply was none, yet a board at a minimum must review the 14 statutory criteria set out in K.S.A. 12-521(c). *Topeka v. Shawnee County,* 252 Kan. at 442, 845 P.2d at 671. In doing so, "it is clear that the statutory annexation scheme places significance on" numbers 7, 8, 9, 11. *Topeka v. Shawnee County*, 252 Kan. at 444, 845 P.2d at 673. While K.S.A 12-521(c) says "the board's considerations shall include" these 14 nonexclusive criteria, the City failed to provide any evidence whatsoever to support a partial annexation for many of these criteria, as set forth below:

*K.S.A. 12-521(c)(1) Extent to which any of the area is land devoted to agricultural use--Some of this information could be discerned from the sketches provided, although there is no clear data broken down according to the areas actually annexed.

*K.S.A. 12-521(c)(3) topography, natural boundaries, storm and sanitary sewers, drainage basins, transportation links or any other physical characteristics which may be an indication of the existence or absence of common interest of the city and the area proposed to be annexed--Although much of this was provided for any form of annexation, the information regarding storm sewers was never allocated to support a partial annexation.

*K.S.A. 12-521(c)(4) extent and age of residential development in the area to be annexed and adjacent land within the city's boundaries--This information was not provided to support a partial annexation. Although some charts show the locations of residential development, the Board could not divine from the City's information the age of such development on an area-by-area basis.

*K.S.A. 12-521(c)(5) present population in the area to be annexed and the projected population growth during the next five years in the area proposed to be annexed--This information was not provided to support a partial annexation.

*K.S.A. 12-521(c)(7) the present cost, methods and adequacy of governmental services and regulatory controls in the area--This information was not provided to justify this partial annexation, yet our Supreme Court has pointed out this is a factor of great importance. Even if the City had described the costs for the whole 15 square miles, it assuredly did not break down those costs into the areas upon which the BOCC ultimately ruled.

*K.S.A. 12-521(c)(8) 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--This information was not provided to support a partial annexation as discussed above, yet our Supreme Court has said this is key.

*K.S.A. 12-521(c)(9) tax impact upon property in the city and the area--This information was not provided to support a partial annexation. Although arguably the tax impact on the area to be annexed might not have been affected, the total revenues and total cost of the annexation were unknown, so the tax impact upon the City could not possibly be determined, although *Topeka v. Shawnee County* holds that this is particularly important information.

*K.S.A. 12-521(c)(11) effect of the proposed annexation on the city and other adjacent areas, including, but not limited to, other cities, sewer and water districts, improvement districts, townships or industrial districts and, subject to the provisions of K.S.A. 12-521a, fire districts--There was no information showing how much money the partial annexation would generate for the City. No information pertaining to a partial annexation was provided with respect to Aubry Township. As noted above, the last gasp information pertaining to the Fire District provided on February 15, 2008, hours before the Record closed, was incomplete, yet the Supreme Court has said in *Topeka v. Shawnee County* that this is of particular significance.

*K.S.A. 12-521(c)(13) likelihood of significant growth in the area and in adjacent areas during the next five years--This information was not provided to support a partial annexation. All of the data was aggregated for a total annexation.

3. THE CONTINUING CHANGES TO THE CITY'S PLAN AND PROPOSAL VIOLATED PLAINTIFFS' DUE PROCESS RIGHTS AND VOID THE ANNEXATION.

The City's belated onslaught of changes to its Plan and proposal deprived Plaintiffs of due process. Plaintiffs had neither notice of nor an opportunity to be heard on a vast array of

changes and additions to the City's proposal. Therefore the annexation exceeded the scope of the BOCC's authority and was unlawful.

The City submitted its Plan dated August 20, 2007 and gave notice of that Plan. It was mailed in a timely fashion to everyone in the affected area (R. 477) except Frank and Virginia Mackey. R. 1551-1631. However, the City launched barrage after barrage of information to the BOCC throughout this proceeding, both in public and in private, right up to the Board's deadline of 5:00 p.m. on February 15, 2008. Nearly six months after the original Plan was proposed, and three and a half months after the public hearing was adjourned, the City was changing its proposal. Changing the Plan and proposal without notice and an opportunity to be heard is unlawful. It invalidates this annexation.

Plaintiffs Were Entitled to Notice and a Hearing on Any Changes to the City's Proposal.

Plaintiffs' due process rights were violated when they were deprived of notice and an opportunity to be heard on the many changes to this City's Plan and proposal. *Overland Park*, 421 Kan. at 370.

The Plan and Proposal Changes-Round I.

The first changes consisted of the hundreds of pages of information handed out at the October 30 public hearing. R. 449-794. This re-wrote much of the City' proposal and included the October 24 fire safety contract (R. 710-723) and the first SEP Errata submittal. (R. 725-753). Plaintiffs had no advance notice of this, and there was no subsequent hearing on these issues.

The Plan and Proposal Changes-Round II.

The next wave of information consisted of numerous filings by the City in response to questions posed by the Board. On November 13, 2007, the counsel for the Board posed questions to or requested information from the City (R. 800, *et seq.).* The City responded to

counsel on November 30, 2007. R. 805, *et seq.* The City's responses provided new information regarding grandfathering ordinances (R. 811-813), and changed elements of its prior Plan including changes pertaining to excise taxes (R. 821), franchise fees (R. 842), and land owned by developers (R. 848).

The Plan and Proposal Changes-Round III.

The Board sought additional information through its attorney on December 31, 2007, to which the City responded on January 10, 2008. R. 2422-2423. The City provided information regarding the finances of the Fire District pertaining to the 2002 annexation (R. 1345); provided additional commentary regarding grandfathering ordinances and expressed the City's insistence upon an approval of the Petition in its entirety (R. 1347); provided information regarding parkland acquisition (R. 1348); changed elements of its Plan regarding storm water utility issues and costs to the area to be annexed (R. 1351-1353); changed pages 50 to 51 of the Plan pertaining to financing certain services such as streets, thoroughfares, streetlights, and storm drainage (R. 1354); and expanded upon its Plan with respect to the increases in taxes needed to serve the area proposed to be annexed based upon "an additional 20,000 persons moving into Aubry Township by the year 2020." R. 1355-1356.

The Plan and Proposal Changes-Round IV.

Next the Plan and proposal changed when the City submitted information regarding the improper notice to the Mackeys. R.1551-1631.

The Plan and Proposal Changes-Round V.

The City also filed a Rejoinder to the Fire District (R. 1633-1640) adding further fire safety issues.

The Plan and Proposal Changes-Round VI.

The law enforcement component continued to evolve when the City filed its Rejoinder to the Sheriff on such issues. R.1642-1651.

The Plan and Proposal Changes-Round VII.

The City augmented its position pertaining to other cities in its Rejoinder to Spring Hill. R.1653-1657.

The Plan and Proposal Changes-Round VIII.

The City also added evidence in its Responses to miscellaneous citizen comments. R. 1659-1677.

The Plan and Proposal Changes-Round IX.

The February 12 information consisted of 463 pages of massive changes to the City's Plan and its overall proposal, yet was filed far too late for Plaintiffs to have notice or any opportunity to be heard on the information provided. See R. 1682 through 2145. This is ironic and telling given that the original Plan had only 65 pages of text, together with additional drawings and attachments, for a total of 90 pages. See R.18-108.

Although this submittal specifically designates one section as corrections to the Plan, much of the information in fact modified the City's Plan. Some corrections explicitly changed the Plan. Entitled SEP Errata Sheet No. 2, these made changes to the information regarding land uses and platting, population trends, and the net tax impact on the residents in the area proposed to be annexed. R. 1887-1889. SEP Errata Sheet No. 2 also contained new information regarding the growth of residential housing (R. 1895) and raised the issue of a Petition for the Incorporation of the City of Stillwell for the first time. R. 1929. The City also included a lengthy argument that the incorporation was not valid.

In addition to the pages that were candidly marked as corrections to the Plan, this submittal also contained dozens of pages of new information pertaining to the issues in the Plan and the City's proposal generally. The Record does not reflect when these hundreds of pages of documents were scanned and placed on the County's website to give Plaintiffs notice, even assuming anyone could read, absorb, and comment upon them by 5:00 p.m. on February 15. Most assuredly none of this evidence was ever disseminated to Plaintiffs in sufficient time to allow study, debate, or discourse.

The Plan and Proposal Changes-Round X.

On February 15, the City compounded this error. The City submitted an additional 146 pages scant hours before the Record closed. R. 2151, *et seq*. This second supplemental submittal contains the minutes of an Overland Park City Council meeting which did not even adjourn until 12:48 p.m. that very day, so the time for comment was nil. R. 2205.

This last submittal also contained profound changes to the City's Plan and proposal. Once again, the City overtly amended its moving target of a Plan. It submitted a Substitute for SEP Errata Sheet No. 2 correcting the corrections to the corrections to its Plan. R. 2232, *et seq.* It provided new information regarding the existing population in the area, cable television services, and franchises. It again changed the City's calculation of the net tax impact on residents in the area proposed to be annexed.

Perhaps most significant was the fact that the new "Option 6" proposal for fire safety radically altered both the City's original Plan and its later October 24, 2007 agreement. See R. 2209, *et seq*. Up until that point, there was no resolution of this issue, for the Chairman of the BOCC pointed out at the announcement of the Board's decision on February 21, 2008, "The Fire District issue was settled, and I know it was settled at the very last moment." R. 2493. Although

the matter was not really settled even then, truly at the last minute the City's fire safety proposal envisioned the possibility of a partial annexation. Option 6 also committed Overland Park to pay some unknown amount to compensate the Fire District for whatever revenues it might lose in annexation with a potential minimum of $7,535,000 in payments to the Fire District, with the sky as the limit. Thus Plaintiffs would have the continuing obligation to pay the Fire District's bonds (R. 48) in addition to paying taxes to the City to pay back to the Fire District for services the Fire District was already providing, although now at a potential new cost of millions to the City. Plaintiffs are harmed by this surreal approach to government, yet had no say in the matter.

This was a monumental change. The original Plan contained no contract whatsoever, but suggested that the City might offer the Fire District $180,000 for three years (R. 51) or possibly the Fire District could pay the City $225,000 per year (R. 51-52). The October 24, 2007 contract the City introduced at the October 30 public hearing was for 10 years, and would have provided that the Fire District keep its revenues for the first year and then receive payments of $3,607,000, but only for a total annexation. R. 711-712.

In addition to increasing the amount of money involved, this new proposal, Option 6, also contained numerous other changes. The City had previously relied on K.S.A. 19-3623f that gives Overland Park (and only Overland Park) an automatic "detachment" upon annexation. This means that the City can unilaterally take the Fire District's building, equipment, and other property with no compensation. This was changed to say the City will seek detachment from the BOCC. In addition, Option 6 contained provisions lengthening the duration of the contract to 15 years, providing for annexations other than those pursuant to K.S.A. 12-521, adding hiring requirements for the City, adding nondiscrimination language, and requiring a master plan for fire services.

Accordingly, the City's last-minute submittals changed the cost of the annexation by millions of dollars at a minimum, provided no information as to how that money would be paid, changed the cost to the City, changed the proposal for fire safety, changed information regarding land use patterns, and changed information regarding the costs to the citizens proposed to be annexed. Crucial, statutorily-mandated information was still in flux during the waning hours the Record was open. There is no conceivable way Plaintiffs could have had notice of this, let alone respond before the close of the Record to ensure that they would retain safe, sensibly-managed fire and emergency services.

There is no question that the proposal the BOCC was actually considering included the City's changes after the October 30, 2007 public hearing. The Board made specific findings regarding the City's changes in its Resolution approving the annexation at Paragraphs 19, 21, 22, 23, 25, and 26. R. 2422-2423. The Board specifically relied upon the "Option 6" February 15, 2008 fire contract in reaching its decision even though it was not signed by the Fire District. R. 2439. There is no conceivable way Plaintiffs or anyone could have had an opportunity to respond to the proposal that the Board actually considered.

These belated submittals deprived Plaintiffs of due process. The requirement of notice was violated. Even if one of the Plaintiffs had been sitting in the offices of the Board of County Commissioners when the last two packets rolled in, it would have been impossible to digest and intelligently comprehend all 609 pages of new information.

These submittals also make a mockery of the opportunity to be heard which is guaranteed to Plaintiffs. Plaintiffs had no way to express their views on the fire contract by 5:00 when the City had only approved the agreement hours earlier that very day. Although the BOCC could have held a hearing on these issues (assuming it still had jurisdiction), no hearing was ever held

on either of these two submittals or any other changes after October 30, 2007. This is particularly egregious because Plaintiffs were each accorded 3 minutes of speaking time at the public hearing, while the City was given unlimited time.

The appropriate remedy the Court should impose is to set the annexation aside. This is fair. The City could start over with its modified proposal and give the Plaintiffs a chance to respond to it. There would be no harm in doing this. This is a simple cure and any possible minor inconvenience or expense to the City is outweighed by the consequences of the callous disregard of Plaintiffs' constitutional rights.

4. THE ANNEXATION IS INVALID BECAUSE THE COUNTY AND THE CITY DID NOT COMPLY WITH THE ANNEXATION STATUTES.

Annexations are creatures of statute, and the repeated, systematic failure to comply with the statutes governing annexations renders this annexation void. As noted above, "a failure of the city to comply with the requirements of the legislative enactment which gave it the power and authority to annex territory nullifies the attempted annexation ordinance." *Petition of City of Shawnee*, 236 Kan. at 12-13, 687 P.2d at 613 (1984). The "language of K.S.A. 12-521 is free from ambiguity." *Shawnee,* 236 Kan. at 14, 687 P.2d at 614. There is no magic or mystery to interpret in this statute; it simply has to be read and followed. The numerous failures to follow the statute void the annexation.

This annexation is rife with statutory infirmities. Our legislative enactments are the "Kansas Statutes Annotated," not the "Kansas Suggestions Annotated." The deviations from the statutes include the following:

*K.S.A. 12-521(a) requires that "a copy" of the Plan be prepared, not an opening offer with multiple amendments and hundreds of pages of changes and supplements.

*K.S.A. 12-521(a) requires that the Plan be filed at the time of the presentation of the Petition, not in bits and pieces throughout the annexation proceeding.

*K.S.A. 12-521(a)(1)(C)(2) requires "a plan," not multiple versions of plans.

* K.S.A. 12-521(a)(1)(C)(2) requires that the Plan contain "sufficient detail to provide a reasonable person with a full and complete understanding of the intentions of the city." If a proposal is full and complete, it need not and cannot be modified, supplemented and corrected.

* K.S.A. 12-521(a)(1)(C)(2) requires that the Plan filed with the Petition provide the "estimated cost" of the annexation to the City. The costs of fire services were not in the original Plan at all (R.48-52), nor did it include the later cost changes resulting from the October 24 fire agreement or Option 6 (which contained no actual costs at all). The original Plan did not address the City's cost to reimburse Aubry Township for its lost tax revenues. The cost evidence in the Plan never even contemplated the partial annexation granted. The effect on revenues caused by the amended excise tax were absent from the initial submittal. See R. 821-829; 1866-1867. Further, the City never provided revenue figures for a partial annexation in the Plan (or elsewhere), including the actual cost to the City for Fire District and Aubry Township payments, so the net costs could not possibly be calculated.

* K.S.A. 12-521(a)(1)(C)(2) requires that the Plan filed with the Petition state the cost to the residents to be annexed. The August 20, 2007 Plan had no calculation for the cost to the residents as a result of changes to the excise tax. See R. 821-829. Although the Plan had outlined some hypothetical costs to hypothetical individuals (R. 79-80), these assertions regarding costs to individual residents were changed. For example, the February 12 submittal had 38 pages of changes to this assertion (R. 2037-2075), but that changed hours before the Record closed with the City's February 15 submittal. R. 2234-2235. The real evidence was not in the Plan.

* K.S.A. 12-521(a)(1)(C)(2) requires that the Plan filed with the Petition state a method by which the City plans to finance the extension of services. No mention of the extra millions to the Fire District, the tax guarantees to Aubry Township, or the effects of a partial annexation were described in the original Plan, nor did the City ever state how it would pay for a partial annexation.

* K.S.A. 12-521(a)(1)(C)(2) requires that the Plan "shall include a timetable for the extension of major municipal services." The August 20 original Plan failed to comply with this with respect to fire services, and the subsequent attempted changes were too late to comply with the statute and were ineffective.

* K.S.A. 12-521(a)(1)(C)(2) requires that the Plan filed with the Petition state how services provided by a special district will be maintained. The services to be provided by the Fire District were never resolved in the initial Plan, and were never brought to closure. The City changed its proposal with respect to fire protection half a dozen times after it filed its Plan, all to no avail. The October 24, 2007 agreement was only effective in the event of a total annexation of the 15 square miles. The final Option 6 proposal of the City was not accepted before the Record closed.

* K.S.A. 12-521(a)(1)(C)(2) requires that the Plan state services that are to be provided immediately, but this was impossible due to the Fire District agreement changes.

*K.S.A. 12-521(b) requires that a public hearing on the Plan and the City's proposal be held not less than 60 nor more than 70 days after the Plan and Petition are submitted. In this case the hearing was held and then the Plan started changing after the 70-day deadline. Also, the BOCC adjourned the meeting improperly and lost jurisdiction on October 30, 2007. R. 256.

*K.S.A. 12-521(b) requires that notice be given to all property owners by certified mail. The City failed to do this with respect to the Mackeys. R. 1558-1559.

*12-521(b) says that the BOCC "for good cause shown may **continue** the hearing" without further notice or publication. [Emphasis added]. In this case the Board did not continue the hearing; it "adjourned" the hearing. R. 256.

*K.S.A. 12-521(c) states that "on the day set for hearing" the BOCC is to hear testimony regarding the advisability of the annexation and the city is to present its proposal, "including the plan of the city for the extension of services." The phrase "on the day set for hearing" cannot be tortured to mean "months after the day set for hearing." In this case most of the evidence was received days, weeks, or even months after the hearing. See, e.g., City's February 12, 2008 submittal, R.1689-2145. Also, the City presented hundreds of pages of modifications to its Plan months after the hearing with no opportunity for a further hearing. Further, this provision, like all others in the statute, refers to the "plan" in the singular and does not permit different versions of the same plan.

*K.S.A. 12-521(c) also says that on the date set for the hearing "**a** representative of the city shall present the city's proposal for annexation, including the plan of the city for the extension of services to the area proposed to be annexed." [Emphasis added]. Here City Attorney Watson, Mayor Gerlach, and an outside consultant all made presentations on behalf of the City. R. 227-233.

*K.S.A. 12-521(c) states that the actions of the BOCC "shall be quasi-judicial in nature." In this case, the BOCC permitted the proposal to change far too late to provide notice and an opportunity to be heard, the BOCC received off-the-record information, and the BOCC

negotiated *ex parte* with the City and Fire District in utter disregard for its quasi-judicial role. Judges adjudicate, but the BOCC wrongly brokered a deal with the City in private.

*K.S.A. 12-521(c) requires that the BOCC base its decision on the "evidence presented." Here the BOCC based its decision upon an invalid fire safety contract; upon evidence received far too late to be considered; upon a reimbursement concept for Aubry Township with no evidence of the amount or mechanism for that process; and with no evidence to justify a partial annexation, including information about the cost to the City of such an annexation. As a matter of law, agricultural, residential, and commercial properties do not generate the same amount of tax revenue (Kansas Constitution, Article 11, § 1), so there is no way the BOCC could have known what this annexation would cost for the simple reason the City presented no evidence regarding the fiscal effect of any partial annexation. See R. 1682, *et seq*. (February 12, 2008 submittal); R. 2151, *et seq*. (February 15, 2008 submittal).

*K.S.A. 12-521(c) also demands that the BOCC determine "whether manifest injury would result from the annexation." The City provided no information regarding the economics of a partial annexation, other than offering to guarantee millions to the Fire District in its belated fire services offer. The City provided no information as to the tax revenues generated by a partial annexation. The City provided no information regarding the cost of services to the truncated area approved for annexation by the BOCC. The City provided no information as to how services could be rendered in the event of a partial annexation. For example, the City offered no explanation as to how the County Sheriff's Department would patrol an area with a large peninsula of Overland Park thrust in the middle of it or why that would even make sense. The BOCC could not make any finding regarding manifest injury without having that information.

*K.S.A. 12-521(c)(8) requires that the BOCC consider the "proposed cost, extent and the necessity of governmental services to be provided by the city." Here, the BOCC could not conceivably know the cost of the partial annexation, since the City provided no breakdown for costs of street maintenance, storm drainage, development, or other costs pertaining to a partial annexation. Further, there was no evidence of the cost the City would have to pay Aubry Township for the partial annexation, nor was there any cost information pertaining to the fire services contract, except for the minimums stated in the February 15, 2008 offer from the City.

*K.S.A. 12-521(c)(9) requires that the BOCC consider the "tax impact upon the property in the city and the area." Without knowing what area would be generating taxes and other revenues, there is no way this could be done. Similarly, the impact upon Aubry Township was never calculated for a partial annexation. Finally, the August 20, 2007 Plan contains no clear cost information for fire protection. The October 24, 2007 fire contract was not valid in the event of a partial annexation. The February 15, 2008 Option 6 was never signed and therefore was ineffective and too late. Indeed, that February 15, 2008 proposal had a formula for payments to the Fire District, but provided no data by which anyone would know what that contract was actually going to cost the City, other than the guaranteed potential payments of approximately $7.5 million.

*K.S.A. 12-521(c)(11) mandates that the BOCC consider the effect of the annexation upon townships and fire districts. The original Plan was woefully lacking regarding the Fire District, and the City provided no dollar amounts pertaining to a partial annexation with respect to either the Fire District (except the belated millions in guarantees) or Aubry Township. Further, as noted above, there was no valid fire contract in the event of a partial annexation.

*K.S.A. 12-521(c)(12) states the BOCC must consider petitions for incorporation. Although a petition for incorporation was presented to the County on February 4, 2008, this was never the subject of any public hearing. Mr. Jarrett simply opined that the request had been made but that the county clerk had not ruled the petition valid yet. R. 2491. The Record also states that Mr. Jarrett said "we deliberated on it," but nowhere in the Record is there any evidence of a public hearing or joint discussion of this matter, except the City's letter stating that the incorporation petition was not valid. R. 1981. This is not lawful. "The **legislature contemplated the joint review of incorporation and annexation petition [*sic*] undertaken by a board of county commissioners (board)**. In determining whether manifest injury would result from annexation, a board must consider under K.S.A. 12-521(c)(12) 'existing petitions for incorporation of the area as a new city or the creation of a special district.' Similarly, K.S.A. 15-121 requires a board, in analyzing a petition for incorporation, to consider '[t]he willingness of the city to annex the territory and its ability to provide city services in case of annexation.'" *Petition of Kansas City to Board of County Commissioners of Wyandotte County for Annexation of Land Pursuant to K.S.A. 12-521,* 253 Kan. 402, Syl. ¶3, 856 P.2d 144, 146 (1993). [Emphasis added]. The BOCC here did not jointly review these twin issues.

*K.S.A. 12-521(d) says the BOCC "shall render a judgment within seven days after the hearing has been adjourned sine die." The public hearing was adjourned the night of October 30, 2007 and the Board lost jurisdiction seven days thereafter. The BOCC apparently recognized this mistake. When it attempted to keep the Record open past November 30, 2007, Mr. Jarrett advised that a formal resolution was needed to continue the hearing. R. 1860-1862.

*K.S.A. 12-521(d) empowers a Board of County Commissioners to grant or deny an annexation or to grant it in part, but this statute contains no language giving the BOCC the

authority to place future conditions upon an annexation. Here, the BOCC requested that the City disregard 22 ordinances and regulations (R. 2445-2446; 2459-2460), that the City adopt future grandfathering ordinances, and that the City amend its excise tax. R. 2459. In addition, the BOCC required that the City "shall negotiate an agreement with the Aubry Township Board," and that the failure to do so would be noncompliance with the provision of municipal services and noncompliance with the "Board's decision and annexation order." The failure to negotiate such an agreement would render the annexation approval "void and not effective." These actions are all beyond the scope of the statutory authority of the BOCC. Indeed, they would require the BOCC to take action after it had made a final order and lost jurisdiction to do anything regarding the annexation. *Shawnee,* 236 Kan. at 13, 687 P. 2d at 613. Nothing in the Record shows these proffers were met.

*K.S.A. 12-530 requires that the County and City Planning Commissions must review the Petition for Annexation. The City sent its Petition with the original Plan to the Johnson County Planning Commission. R. 154. The City Planning Commission also ruled based upon the original Petition. R. 192. Here, the Plan and annexation proposal changed after such review numerous times and in numerous ways, including changing the grandfathering of zoning laws, and there was no review of these changes.

*K.S.A. 12-531 requires a review of any annexation after 5 years. This is a protection landowners have in the event of an imprudently-granted annexation. At the time of this annexation, however, the County had simply disregarded that statute as to the adjacent land annexed to the north of this area in 2002. R. 2488. In fact, Mr. Jarrett did not know of any five year review ever having been done by the County. R. 2490.

In summary, then, this annexation is crippled by profound and repeated violations of multiple provisions of the statutes. This annexation must be set aside.

5. THE SERVICE EXTENSION PLAN IS UNLAWFUL ON ITS FACE AND THE ANNEXATION WAS VOID FROM THE START.

The Plan proposed by the City was improper and thus the annexation proceeding was invalid from its inception, and so the BOCC exceeded its authority. The Plan states:

> Until this Report has been adopted by the City in its final form following any eventual judgment, orders, findings of fact and conclusions made by the Board of County Commissioners allowing the annexation in whole or in part, but before passage of any annexation ordinance, portions of this Report may change as a result of further review and evaluation by the City undertaken on its own initiative, undertaken as a result of suggestions made by the Board of County Commissioners or interested parties before, during or after any public hearing or hearings with respect to the Petition for Annexation, undertaken in light of new information learned or changed circumstances occurring before, during or after any public hearing or hearings with respect to the Petition for Annexation, or undertaken as a result of judgments, orders, findings of fact or conclusions of the Board of County Commissioners on the Petition for Annexation.

R. 18. The Notice of Public Hearing contains a similar statement suggesting that the Plan was a work in progress. R. 480. This renders the Plan unlawful because K.S.A. 12-521(a) requires that the Plan be filed "with the board of county commissioners at the time of presentation of the petition," and K.S.A.12- 521(a)(2) further requires that the Plan "provide a reasonable person with a full and complete understanding of the intentions of the city for extending to the area to be annexed" each service and its cost. If the Plan were to change in the future, it could not have been filed at the time of the Petition for Annexation. Also, a plan which could change even after the Board had ruled on the matter could scarcely be "full and complete." Further, this statement is misleading to the public. The Plan is a mandatory feature of any annexation (K.S.A. 12-521(a)) and this flaw is fatal to the annexation.

6. THIS ANNEXATION IS INVALID BECAUSE THE CITY'S PLAN AND PROPOSAL CHANGED NUMEROUS TIMES THROUGHOUT THE PROCEEDING.

The City's constantly changing Plan and proposal invalidates this annexation. The BOCC exceeded its authority in permitted such a moving target. By statute an annexation requires one plan and proposal, not a game of "Whack-a-Mole." K.S.A. 12-521(a) requires that a city develop *a* plan for the extension of municipal services, and that the city "shall file **a copy** thereof with the board of county commissioners **at the time of presentation of the petition.**" [Emphasis added]. This is a mandatory provision. It uses the word "shall." The Legislature chose to use the singular number by referring to "a copy," not "the first of many proposals." The timing requirements of the statute are absolute. The plan is to be filed at the time the initial petition is filed, not later.

This interpretation is echoed in K.S.A. 521(a)(2). That provision requires that the plan contain a "full and complete understanding of the intentions of the city." If the plan is full and complete it cannot be subject to additions, corrections, amendments, or changes. This language contemplates a concrete proposal, not a first draft.

K.S.A. 12-521(b) also contains provisions that demonstrate a city may only offer one plan and proposal. It requires that a hearing on a city's plan and proposal be held not less than 60 days nor more than 70 days after the filing of the plan. That statute also contains notice provisions. Clearly the purpose of the statute is to provide enough time for the citizenry to review the annexation yet to place limits so that it does not drag on indefinitely. Both the timing and notice requirements of the statute would be meaningless if the annexation proposal could change after it was filed. Further, the hearing itself would serve no purpose whatsoever if the subject matter of the hearing could change after the hearing were held. The purpose of the

hearing is to deliberate upon a full and complete proposal, not to convene a focus group to refine an ill-conceived proposal or respond to an “opening offer.”

K.S.A. 12-521(c) contains further provisions demonstrating that an annexation proposal is not a moving target. It states that "[o]n the day set for hearing, the board of county commissioners shall hear testimony as to the advisability of such annexation and a representative of the city shall present the city's proposal, including a plan for the extension of services." This provision prohibits the submission of anything by the City after the date of the hearing. The City was required to lay its cards on the table at the public hearing. That statute also states that the City’s proposal, including its plan, "shall" be presented at the hearing, not later. The requirement that a city disclose its intentions at the public hearing, together with the repeated use of the singular number, establishes that an annexation proposal is a "one and done" proposition.

This is also consistent with the remainder of the statute read *in pari materia*. K.S.A. 12-521(c)(14) refers to the submittal of the City as "the detailed plan." This language reinforces the fact that there is to be one plan. If it is detailed, it is not a mere discussion draft.

Accordingly, this annexation is unlawful because the City did not follow the statute with respect to its Plan. *Shawnee*, 236 Kan. at 12-13, 687 P.2d at 613. Further, the "[f]ailure of a city proposing to annex territory to prepare and submit a bona fide plan... will subject the annexation to challenge by any owner of land within the territory annexed by the city on the ground that the city had no statutory authority to annex the territory." *Clarke v. City of Wichita*, 218 Kan. 334, Syl. ¶ 7, 8, 543 P.2d 973 (1975). *Clarke* says “a plan,” not multiple plans.

Despite the statute repeatedly referring to one plan and one proposal for annexation, the City in this case made numerous changes, corrections, and additions to its proposal throughout

the proceeding, even up to the waning minutes before the Record closed. Examples of the shifting sands of the City's proposal are legion.

Initially, the City filed its Plan with its Petition as required by statute. That Plan is dated August 20, 2007. R. 18-108. That Plan was authorized and approved by the City on August 20, 2007. R. 8. However, the City provided 349 pages of information at the October 30, 2007 public hearing. R. 446-795. Of this, 29 pages were designated corrections to the Plan called SEP Errata Sheet and Exhibits A-G attached thereto. R. 725-754. Thus the City made 29 pages of corrections to its original 90-page Plan. Nearly a third of the original Plan was rewritten and not provided to the Plaintiffs or other citizens prior to the public hearing.

These Plan changes were significant, changing key information that is required by statute, and leaving Plaintiffs in the dark as to what would really happen to them. The City provided new data regarding the amount of undeveloped land in the City (28.36%) (R. 725), information about infrastructure (R.725), changes to the information regarding law enforcement (R. 725), tax data (R. 726), and additional information regarding fire services (R. 726; 742-743). This included new calculations regarding the net costs to the City of annexation (R. 729); the revenues to the City (R. 730); the amount of one-time costs of the annexation (R. 730); the methods of financing the annexation (R. 731); and the cost to the area to be annexed (R. 731-735). The City also included an addendum providing information regarding fire safety as required by K.S.A. 12-521a. R. 742-743. At the public hearing, the City also submitted a new agreement between Fire District No. 2 and the City dated October 24, 2007. R. 710-723. This "agreement contemplates the City's petition for annexation being approved in its entirety by the BOCC." R. 719. This further changed the Plan and proposal of the City by millions of dollars. The original Plan suggested the Fire District might pay the City $225,000 (R. 51), or maybe the City would pay the

Fire District $180,000 for three years. R. 51. The new agreement required the City to pay $3,607,000 to the Fire District.

These changes pose other procedural problems. The Record does not indicate that other than with respect to the fire contract, these changes were ever approved by the Overland Park City Council, for no amended Petition with an Amended Plan was ever submitted.

Also, both the City and County Planning Commissions reviewed the original proposal as required by K.S.A. 12-530. However, these commissions were provided only the original Plan. They were not provided with any of the changes or modifications to the City's Plan or proposal. They were not provided with any information regarding a partial annexation. R. 770; R. 781, *et seq.* The information presented to these Planning Commissions was different from what was ultimately presented to the public and the BOCC.

This was only the beginning, however. The City continued to change its proposal repeatedly over time. As discussed above, on November 30, 2007, the City provided yet another series of changes to its proposal in its response to questions which the BOCC posed through its counsel. R. 805, *et seq*. Far from merely clarifying specific issues, the City substantially modified its policies and proposal in its response to the Board's attorney. The City proposed amendments to its excise tax by virtue of action it took on November 28, 2007. R. 823; 826-828. This would change the amount of revenue the City would obtain from the annexed area in the event of development, would change the cost of annexation to certain citizens, and would limit the amount of money available for infrastructure and other City needs. Therefore this constituted a significant change to the original information provided.

In addition, the City changed certain franchise fee data (R. 842-846); the City provided additional information regarding land allegedly owned by investors (R. 848-850); the City

provided additional information regarding the Fire District (R. 852); the City addressed services east of 69 Highway (R. 989); the City offered additional information regarding the City's Insurance Services Office (ISO) rating (R. 991); the City submitted additional information regarding street maintenance (R. 993-996); the City responded regarding who would pay for new residential and collector streets (R. 998); the City changed its previous SEP Errata information regarding fire services response time, amending its addenda to Errata (R. 1000-1001); the City added information regarding mutual aid agreements for fire and police services (R. 1003); and the City addressed certain grandfathering ordinances (R. 809).

The City made further changes as the proceeding continued. On January 10, 2008, the City responded to a second set of questions posed by an attorney for the BOCC. R. 1343, *et seq.* Again, the City made changes to the fire safety component of the annexation, providing information pertaining to the 2002 annexation and certain amounts that the Fire District was excused from paying the City. R. 1345. This changed the facts regarding the cost of the annexation to both the City and to the residents of the proposed annexed area, as well as the impact on the Fire District.

The City's response also included commentary on park and streamway acquisition. R. 1348. This topic had already been covered in the Plan. R. 41. The City also added statements regarding the extent of platting and development in the area proposed to be annexed. R. 1349. This, too, changed the initial Plan. See R. 32-33.

This January information also addressed the City's storm water utility. R. 1351-1353. Thus the scope of the City's services and the costs to the residents with respect to storm water levies changed by nearly one mill plus a stormwater user fee. R. 1352. Significantly, the City

failed to provide any calculation of what this utility would actually cost in the event of either a total or partial annexation, nor did it describe the impact on the proposed annexed area.

The City also added information regarding County financing of certain services and explicitly changed pages 50 and 51 of the City's Plan, although it was not called an errata sheet or amendment. See R. at 1354; R. 71-72. Although the City provided no numerical data upon which the Board could rely, the City noted that the County would participate in street, bridge, and storm drainage maintenance; thoroughfares; streetlights; storm drainage; and housing. R. 1354.

Finally, the cost of services to the annexed area also was changed. R. 1355-1356. This data changed various elements of the Plan, such as the Cost Analysis of Extension of Municipal Services. R. 72, *et seq.* This analysis, however, did not address any partial annexation.

The next round of changes served up by the City was contained in the City's February 12, 2008 submittal, just three days before the close of the Record. R. 1682-2145. Far too late for any public dissemination or commentary, the City offered up hundreds of pages of changes and additions to its proposal.

This submittal contained yet another version of the Plan, SEP Errata Sheet No. 2. R. 1887-1890. This included additional information regarding existing land uses and platting; (R. 1887-1888); data pertaining to the existing population in the area (R. 1888); and cable television service (R. 1889). The City again changed its assertions regarding the net tax impact on the area proposed to be annexed. (R. 1889-1890).

Although not specifically contained in the Errata sheet, the City provided further assertions effectively modifying its Plan. The City added an amended sketch regarding existing

plats (R. 1893) and provided data regarding the number of residential units built (R. 1895). Further, the City provided its Second Amended Sketch 17 regarding urbanizing land. R. 2005.

The City also supplemented its previous response to Question 7 which the BOCC had posed earlier. R. 2037-2075. This dealt with the costs of annexation to the residents. K.S.A. 12-521(a)(2) requires that the original plan "state the estimated cost impact of providing such services to... the residents of the area proposed to be annexed." Three days before the Record closed, the City provided 38 pages of corrections and revisions on this subject matter alone. This is over one third of the entire length of the original Plan. Thus a key, mandatory component of the original Plan was dramatically expanded and changed at the last minute. Interestingly, the City characterized this change to the Plan as a supplement to its previous answers to the BOCC, not as part of its Errata sheets. This is misleading.

The City also provided a supplemental response to Question 8 of the BOCC. R. 2078-2080. This changed its January 20, 2008 submittal with respect to the amount of land believed to be held by developers.

The City included for the first time a suggestion that the fire services component of the Plan might change, describing the “Option 2” and “Option 3” fire safety proposals. R. 2083; 2110; 2135-2136.

The City fired its final salvo on February 15, 2008 with its second supplemental submittal. R. 2151, *et seq.* This submittal included a number of changes, such as new options for fire services, Option 4 (R. 2156, *et seq.),* and Option 5. R. 2173, *et seq*.

However, Options 4 and 5 were not the end of the story, for the sands shifted yet again with respect to fire safety. The Record states that at 10:41 a.m. on February 15, 2008 City Attorney Watson sent yet another fire proposal, Option 6, to the chairman and attorney for the

Fire District. R. 2200; 2209. In fact, the City Council did not adjourn from its meeting approving that offer until 12:48 p.m. the very day the Record closed. R. 2203-2205.

The City proposed to grandfather in the use of all-terrain vehicles. Although such vehicles are generally illegal in the City, the City determined to make them legal on tracts of 20 acres or more. R. 2204-2205. The Record does not state who that would affect, how many people that would affect, or whether that acreage limitation imposed manifest injury or not, since no one had an opportunity to address the Board on that issue.

Although much of this submittal tacitly changed the City's Plan, the City also explicitly modified its Plan in a separate section called Substitute for SEP Errata Sheet No. 2. R. 2232, *et seq*. The City once again provided information regarding existing land uses and platting, affirming that 78.84% of the area proposed to be annexed was unplatted. R. 2232. There was also information regarding the existing population in the annexation area (R. 2233), further facts regarding cable television franchise fees (R. 2234), and yet another version of the net tax impact on residents in the area to be annexed. R. 2234. Given that that latter piece of information is explicitly required by statute to be in the Plan filed with the Petition, it is incomprehensible that the City was changing this mere hours before the Record closed. In addition, the City changed its Plan providing a new sketch regarding agricultural land. R. 2236.

The City also submitted proposed findings of fact and conclusions of law which contained new material, again with no public notice or hearing. R. 2239, *et seq*. These proposed findings made reference to the Fire District proposals. R. 2252, *et seq*. Most significantly, these proposed findings refer to private meetings held between representatives of the BOCC, the Fire District, and the City. R. 2253, ¶ 55, *et seq.* These findings describe a telephone conference with County Counselor Jarrett regarding fire safety contract Option 5, in which he suggested certain

compensation changes. R. 2254. Mr. Jarrett spoke with great impact, because the next iteration of the contract obligated the City to pay millions more in compensation.

Plaintiffs' concerns that the City was proposing a "moving target" were scarcely unique. The City of Spring Hill weighed in on the frantic, last-minute fire contract changes. With respect to Option 3, Spring Hill stated that, "the proposed changes to the originally proposed agreement are significant deviations from the terms originally presented to the public and other concerned organizations." R. 3096. Spring Hill went on to state as follows (R. 3096):

> The changes are prejudicial to Spring Hill and constitute substantive changes to Overland Park's Annexation Petition and Service Extension Plan. Spring Hill is a party of interest in these proceedings and there is now an issue of whether Spring Hill and other parties of interest have been denied proper notice and due process.

Finally, there is no indication that all of these changes were authorized by the City. Although the City approved of the answers to the BOCC's questions (R. 1866, *et seq.*,1871, *et seq.*), no amended petition or plan was ever authorized by the City.

The annexation statute only permits one plan and proposal and is subject to strict timing requirements. Fire protection, the Plan component the City changed half a dozen times, is a required element of a plan for annexation. K.S.A. 12-521(a)(2); see also 12-521a. The City provided multiple versions of its Plan, and implicitly changed its Plan and proposal in dozens of ways up until the very last minutes of the proceeding. The Court should apply established precedent and set the annexation aside for this reason.

7. THE BOCC ENGAGED IN NUMEROUS *EX PARTE* CONTACTS WITH CITIZENS REGARDING THIS PROCEEDING AND THEREFORE DEPRIVED PLAINTIFFS OF THEIR DUE PROCESS RIGHTS.

The BOCC deprived Plaintiffs of their due process rights by permitting and failing to disclose private communications with the BOCC, particularly with respect to communications with the City. *Ex parte* communications generally refer to arguments "on one side only," or to

proceedings “without notice to, or contestation by, any person adversely interested.” Black’s Law Dictionary, Fifth Ed. Courts are more receptive to challenges of bias in quasi-judicial proceedings where *ex parte* communications are present, and to withstand a challenge “the parties must be informed of the evidence submitted for consideration and must be provided an opportunity to respond and rebut the evidence.” *McPherson Landfill, Inc. v. Board of County Commissioners of Shawnee County*, 274 Kan. 303, Syl. ¶ 5, 49 P.3d 522 (2002) (quasi-judicial proceeding for re-zoning).

Our Supreme Court has addressed this issue and found no reversible error only under very limited circumstances. In the case of *Petition of City of Overland Park*, 241 Kan. 365, 371-372, 736 P.2d 923, 928-929 (1987) the Court held that *ex parte* communications did not violate due process under very limited circumstances. In that case, the communications were a few letters regarding the minimum lot size for septic tank purposes, a letter containing a copy of an editorial, and a phone call between the mayor and a commissioner prior to the annexation proceedings. These were discovered in ample time to respond, and the subject matter had been "raised and objected to by appellants at the first hearing before the board." The communications were more in the nature of "'status reports' rather than attempts by an interested party to unduly influence a commissioner." By contrast, the communications in this case constitute substantive argument and were fashioned to keep the public in the dark in some cases.

There Was No Coherent Procedure for Communication or Disclosing Communications.

Due process was violated because the procedure announced by the BOCC was inconsistent and chaotic at best, and in fact facilitated or even legitimated off-the-record exchanges of information. There was no procedure or requirement for BOCC members to disclose any *ex parte* communications. The County failed to impose a single procedure to protect

against *ex parte* communications. There was no uniform, approved process that gave everyone equal access to open communication.

At the October 30, 2007 public hearing, Chairman Surbaugh identified three approved ways for the public to contact the County:

> --You can continue to add information until November 30.
> --or contact commissioners; we can only listen.
> --We do have a public comment time at our meetings.

R. 254. She made no mention of the City being able to provide additional information. Also, by expressly authorizing individual contacts with commissioners, she authorized *ex parte* communications.

There were several other versions floating about that described the approved way to communicate with the BOCC. Mr. Jarrett advised the BOCC that they could listen to *ex parte* communications but could not consider those unless they were repeated at a public hearing. Exhibit 16. Thus the County approved of *ex parte* communications, trusting to its quasi-judicial BOCC to separate the on-the-record wheat from the *ex parte* chaff, and placing the burden upon citizens to repeat the same communication at some unidentified public hearing if they wanted the BOCC to pay attention.

The BOCC press release, however, had yet another spin on approved communications. Exhibit 15. This document stated "commissioners will not be receiving or responding to communications on the annexation, whether from citizens, city officials, or the media." However that same press release approved of communications by telephone, e-mail or mail to the entire Board. It is utterly unclear how a telephone communication could not be an *ex parte* communication.

The County's website stated the appropriate way to communicate was by letter to the BOCC addressed to the attention of the Clerk only. Exhibit 17 A.

Chairman Surbaugh provided slightly different information prior to the public hearing. She stated that "I must refrain from any discussion of the petition outside the parameters of the public hearing," but also said she would "be glad to listen" if contacted, and would be "reviewing all correspondence from constituents." Exhibit 18, 19. However in reality, when a constituent raised questions regarding Commissioner Eilert's possible conflict of interest and Commissioner Wood's review of the public hearing transcript, she referred the e-mail to attorney Richard Lind to respond for her. Exhibit 22.

Commissioner Lindstrom had a couple of additional approaches. At one point he deferred comment stating that "[a]s the details of the proposal are formally made available to me through our JC staff, I will be in a better position to comment." Exhibit 21. Later in that string of e-mails he suggested submitting the comments to the Clerk of the Board. Exhibit 21. Commissioner Lindstrom also placed a notice that all communications should be in writing only and sent to the Clerk of the Board. Exhibit 17.

Even sophisticated insiders were confused by this. Kent Eckles, a lobbyist for the Overland Park Chamber of Commerce, had been told by a county representative that he had to explicitly ask that his comments be put in the Record in addition to writing to the entire BOCC. Exhibit 24.

Plaintiff Norman Pishny expressed confusion over the proper protocol to follow. He had been addressing the BOCC at its meetings, as the Chairman had invited him to do at the public hearing. However he later understood he was to bring eight copies of his comments and address the BOCC as a whole. Exhibit 25.

Others were confused by this as well. A lawyer from California, Peter Brewer, had to write repeatedly to find out how to get his questions regarding his clients' property answered. On October 30, 2007 he wrote to inquire what the process was to be. R. 2671. He wrote again on November 19, 2007 stating he had received no response. R. 2889. Finally City Attorney Robert Watson responded on behalf of the City on December 14, 2007, but the BOCC never responded to Mr. Brewer. R. 2885.

In practice, these rules were sometimes followed and sometimes disregarded. For example, a Larry Keenan wrote directly to the Chairman, addressing his letter to "Annabeth Surbaugh, Chairman Board of County Commissioners," and his letter found its way into the Record. R. 2786. He did not have to address his letter to the Board as a whole. He did not have to address his letter to the Clerk. He did not have to specifically ask that the letter be placed in the Record. It just got there.

Thus the "rule" apparently was any of the following: anyone could speak up at a BOCC meeting; anyone could speak at a BOCC meeting, but he better bring eight copies of his comments in writing; the commissioners would not meet individually with anyone; the commissioners would meet individually with anyone but would have to ignore what was being said; concerned citizens could write the BOCC; concerned citizens could write to the BOCC but had to specifically ask that something be put in the Record; if a citizen wanted to "woodshed" a Commissioner, all he had to do was talk, e-mail, or mail the Commissioner individually and that would be kept out of the Record.

This failure to impose a consistent, coherent means of commenting on the case denies Plaintiffs of their due process rights. The proceeding was not fair, open, or impartial.

Ex Parte Communications Were Common and Substantial.

In addition, even these "rules" were disregarded and there were a number of substantive, *ex parte* communications which void this annexation.

Commissioner Segale carried on a robust and vigorous on-line debate with a number of constituents without notice to Plaintiffs. He sent an e-mail to a Bruce West asserting that taxes would go down as a result of the annexation, although he reached this conclusion two months prior to the public hearing on the matter. Exhibit 91. The Record contains the e-mail to the Commissioners directed to Commissioner Lindstrom, but Commissioner Segale's private, and prejudicial reply, was not in the Record. R. 2509. He reiterated this sentiment to yet another constituent in Exhibit 92. Commissioner Segale also wrote privately to discuss such issues as 4-H questions (Exhibit 95). He carried on a spirited e-mail correspondence with an Aubry Township Trustee debating about costs pertaining to unincorporated areas. Exhibit 97. His topics also included future development in the area proposed to be annexed (Exhibit 98) and growth issues (Exhibit 99). He even received off-the-record legal advice from a law firm fund raiser regarding the key issue of gun laws and how they would be affected by the annexation. Exhibit 100.

Of course Commissioner Segale was not the only offender. Prominent newspaper publisher Stephen Rose had private access to Chairman Surbaugh and Commissioner Lindstrom as well as Commissioner Segale. He sent a private e-mail urging the annexation was a necessity to properly govern growth. Exhibit 113.

Ironically, lobbyist Kent Eckles apparently learned from his earlier question about how to get information on the Record. He evidently also figured out how to keep information off the Record. He was able to write the Chairman about the annexation without any public scrutiny by

the expedient of addressing his communication to her alone. He commented on the annexation issues, and urged that she not delay any vote. This is particularly disturbing given that a delay of the vote would have given Plaintiffs and their fellow citizens an opportunity to review and comment on the hundreds of pages of last-minute changes the City made. Exhibit 114.

To be sure, Plaintiff Thomas Watson also sent e-mails. However, he expressed that he did "not understand the Board's quasi-judicial role" and asked if the Chairman would meet with him. The Record does not indicate that she said that that was improper. Exhibit 23. The Record is silent as to what, if any, communications took place.

8. THE FIRE SAFETY CONTRACT WAS THE RESULT OF EXTENSIVE EX PARTE COMMUNICATIONS AND INVALIDATES THIS ANNEXATION.

The most egregious examples of *ex parte* communications took place on the issue of the fire safety contract. To be sure, the County and the City collaborated on such issues as the failure to give notice to the Mackeys (R. 1558-1559) and the petition for incorporation (R. 1981), but the fire safety issue represents the most egregious effort by the BOCC privately to negotiate, not adjudicate, the annexation. Unlike the City, Plaintiffs had no knowledge of the BOCC's concerns regarding this issue, and no ability to participate in that discussion. Fire safety, of course, was a key issue throughout this proceeding, as a matter of law (see K.S.A. 12–521, 12-521a) and a matter of fact. The City's Plan contains substantial information regarding this. R. 48-52. Various amendments to the Plan also addressed this issue. R. 726; 742-743; 710-723; 2151, *et seq.* However, the City proposed numerous changes to that issue because the City was told the private wishes of the BOCC by its staff. Plaintiffs were kept in the dark.

The City had a pipeline of communication to the BOCC through the BOCC's representatives that Plaintiffs did not have. Commissioner Segale confirmed that the BOCC

communicated privately to the City and the Fire District through its counsel in the following dialogue with Fire District Chairman Rod Richardson the day before the Record closed:

> Commissioner Segale: Without getting into details would you say that the **direction that the County Commission gave** in the negotiations between the Fire District and Overland Park's Fire Department or the City, was that direction intended to make the deal or any possible arrangement more favorable financially to the Fire District than otherwise would have been negotiated or was it to make it less or was it neutral?
>
> Mr. Richardson: I believe that the information we were given was that there was concern about the agreement that had been reached about being inadequate from a financial perspective, inadequate also in considering issues that had to do with future annexations. Mr. Jarrett detailed a list, and I don't have the list with me. There were five or six different items **relayed to us that the Commissioners had concerns about with the agreement that had been reached**."
>
> Commissioner Segale: Therefore, we wanted the agreement to be more favorable to the rural fire district than otherwise had been negotiated. Is that an accurate characterization?
>
> Mr. Richardson: Right. That is correct because of the concern that not only would it affect us as to the area being annexed, but the effect it would have on the area not being annexed of having the loss of revenue shoved off on that area is a much higher mill levy.
>
> Commissioner Segale: I just wanted to make sure that my understanding of what had been asked was correct **because that was a concern that we had**.

Exhibit 12, p. 11. [Emphasis added].

The Record further verifies that the City had a direct line to Mt. Olympus. On February 6, 2008, City Attorney Robert Watson said the City's position at that time "satisfies all of the concerns that the Board of County Commissioners ('BOCC') expressed concerning the agreement between the parties." R. 2083. He knew the BOCC's concerns, but neither Plaintiffs nor the public did. He recognized that "[t]he BOCC has given us a very short time to come up with an agreement on a revised fire service contract." R. 2086. If the City was having trouble addressing these issues in time, there is no way Plaintiffs could absorb them and comment upon them, since this was kept a secret from the public.

On February 14, 2008 Attorney Watson wrote in an e-mail to the County's attorneys that

certain changes intended to embrace future annexations arose because of the "BOCC insistence." R. 2173. Indeed, the frantic fire safety negotiations were the result of "what the city was led to believe was the wish of some or all of the BOCC." R. 2173. City Attorney Watson knew precisely what the BOCC was after when he commented that "[i]f the BOCC continues to want such a provision, the City is willing to re-insert it." R. 2174.

The City's proposed findings of fact verify the private meetings as coming from the County. The City states "Mr. Jarrett and Richard Lind, Deputy County Counselor representing the County" conducted the meetings. R. 2253.

The Fire District also knew it was dealing behind the scenes with the BOCC. Fire District Attorney Barry Martin stated in his February 4, 2008 letter that "the Board of County Commissioners (BOCC) has concerns regarding the present Agreement." R. 3038. Indeed, Mr. Martin identified four profoundly significant issues about which the “in crowd” was acutely aware, but of which the BOCC kept the citizenry in ignorance. These were that the duration of the previous contract was too short (R. 3038); that there was not enough money being paid (R. 3038); that there was no provision for partial annexation (R. 3038); and that there was no provision for future annexations (R. 3039). No notice was given the public of these concerns. Of course there is no record of any meeting that documented these discussions. There is no valid reason why the BOCC did not hold public meetings or hearings and disclose its concerns regarding the fire safety contract. The only explanation is behind-closed-doors political maneuvering which, in the context of a quasi-judicial proceeding, is unlawful.

There are more examples that the Fire District knew it was communicating with the BOCC. Mr. Martin made repeated statements in his February 8, 2008 communication that the BOCC was using its counsel to communicate privately with the Fire District. He stated that the

"City should have to address concerns the Board of County Commissioners ('BOCC') has regarding the proposed annexation, the City's current service plan, and the agreement 'rushed together' prior to the public hearing in October 2007." R. 3006. His communications repeatedly demonstrate that the BOCC was privately communicating with the Fire District and the City:

> --"The *BOCC's concerns* are merely exasperated [*sic*] by the City's current proposal." R. 3006.
>
> --"The *BOCC questioned*" why the City was paying less to the Fire District than the Fire District was losing under the original contract. R. 3007.
>
> --One of the topics of discussion was "To address *the BOCC concerns* regarding compensation...." R. 3007.
>
> --He stated that "possibly the city misunderstood *the BOCC's concerns*." R. 3007.
>
> --"One of the *concerns of the BOCC* is that there is no agreement between the City and Fire District in the event of a partial annexation." R. 3011.
>
> --"Instead of listening to *the BOCC concerns*" the City submitted "draconian" terms which were worse than the initial agreement. R. 3013.
>
> --He refers to the February 4, 2008 letter as being "in accordance with *the BOCC's wishes*." R. 3013.
>
> --The BOCC instructed the parties to consider future annexations "thus addressing *another concern of the BOCC*." R. 3012.

[Emphasis added]. Each one of these phrases indicates that the BOCC, the judge in this process, was privately telling the City and the Fire District what it wanted on a key topic with profound implications for Plaintiffs' fiscal and safety concerns. This makes a mockery of the quasi-judicial process.

There is additional evidence of this as well. Mr. Martin's February 12, 2008 letter is replete with statements proving that the belated fire safety negotiations were a direct result of *ex parte* communications between the BOCC, the Fire District, and the City. He states that the

issues were addressed "at the request of the BOCC and with appreciation for its concern over the adequacy of the current agreement." R. 3072. The Fire District was "addressing therein the concerns of the BOCC, as relayed to us by the BOCC's counsel." R. 3074. He refers to "the BOCC's and my Board's concerns," and the "BOCC's and [the Fire District's] own concerns." R. 3074.

Plaintiffs are not a voice crying in the wilderness on this issue. The City of Spring Hill found out what was going on and complained that the substantial changes to the Plan violated due process. R. 3096. Even other cities were kept in the dark.

Finally, the findings of the BOCC itself demonstrate that the BOCC was the puppeteer pulling the strings of the City and Fire District behind the scenes. "The City and the Fire District **were asked** to further negotiate to resolve the questions, and a revised Agreement was approved by Overland Park on February 15, 2008." [Emphasis added]. R. 2439. The passive voice, the last refuge of a linguistic scoundrel, cannot hide the fact that the City and the Fire District were asked in private by the BOCC to make changes to the annexation. This is unlawful.

Nobody could possibly be fooled by this. The BOCC communicating through a third party is the same as if the meeting were face-to-face. This was how the BOCC communicated when it had its attorney ask questions and receive answers from the City and others. As a matter of law, the BOCC or the City, like any corporate body, can only act through their officers, agents or employees. *City of Arkansas City v. Anderson*, 243 Kan. 627, 635, 762 P.2d 183 (1988). This is particularly true with respect to the attorneys involved, because the relationship of an attorney to a client is one of agency. *State v. Dickens*, 214 Kan. 98, 102, 519 P.2d 750 (1974). City Attorney Robert Watson was just as much an arm of the City during his participation on the Record at the public hearing (see R. 227; 233) as he was in participating in changing the fire

contract at the behest of the BOCC.

In addition, any knowledge possessed by any of the attorneys would be imputed to their respective clients as a matter of law. *City of Arkansas City*, 243 Kan. at 635. The BOCC used its representatives to negotiate with the City's representatives behind closed doors to avoid public scrutiny and comment. Indeed, lawyers have an obligation to keep their clients reasonably informed about matters and to explain a matter to the extent necessary to make informed decisions. KRPC 1.4. The Board must have been fully apprised of the behind-closed-doors workings on the fire services contract and other issues.

This situation is actually worse than if an individual commissioner had met with a City official. In such a case, the officials could only speak for themselves. A lawyer, however, has to speak for his client (*In re Friesen*, 268 Kan. 57 (1999)). The actions of the attorneys on behalf of the Board and the City cannot be individual or personal, but must be imputed to be those of the entities involved. A lawyer for the BOCC has to speak for the entire Board and must be representing the interests of the entire County Commission.

In fact, the meetings were even structured to avoid public participation. The Fire District urged its members to allow only its Chairman, its attorney, and the Fire Chief to represent the District at a meeting to avoid it becoming a public meeting, stating "additional board members should not attend because of Open Meeting law [*sic*]." R. 2156. This emasculates the public hearing process and ignores due process. If the BOCC had "concerns," it had an obligation to air those publicly, and not just in closed-door sessions.

Defendants can scarcely argue that these communications were not substantive or that Plaintiffs could have commented on them. The *ex parte* communications of the BOCC via its attorneys profoundly changed the substance of the annexation proposal. Key issues of safety and

the cost of the annexation to Plaintiffs were conducted in a fashion no one could say was “fair, open, and impartial.” *Overland Park,* 241 Kan. at 371, 736. P.2d at 928. These communications were only submitted for the Record by filings on February 12, and February 15, 2008, far too late for anyone to understand them and comment upon them. Indeed, the final changes were even too late for the Fire District to comment on, since there is no signed agreement in the Record. R. 2209, *et seq.*

9. THIS ANNEXATION IS INVALID BY THE TERMS OF THE FIRE SAFETY DOCUMENTS.

The terms of the documents pertaining to fire safety invalidate this annexation. Fire safety is, of course, an essential component of any annexation. It is a major service required to be described in the City's Plan. K.S.A. 12-521(a)(2). However in this case, the documents pertaining to fire safety preclude the annexation as granted.

A brief survey of the City's various fire safety proposals shows that there was never a proposal that permitted this partial annexation. The original Plan made no concrete provision for fire services, and contained no language describing the costs and provision of such services in the event of a partial annexation. R. 48-52.

The October 24, 2007 agreement acknowledges on its face that it was insufficient to justify a partial annexation. R. 710-723. That agreement specifically stated that the "Agreement contemplates a City's petition for annexation being approved in its entirety by the BOCC." R. 719. In addition, it stated that in the event of a partial annexation the "responsibilities of the Fire District to provide its services cannot be ascertained" because the land to be annexed was unknown. R. 719. This Agreement also acknowledged that in the event of a partial annexation "the amount of consideration to be paid is uncertain."

Also, no one could have a full and complete understanding of the fire services, the cost of services, the cost impact to the City, the cost to the area to be annexed, the method of financing fire safety, a timetable for providing fire safety services, or how services would be maintained at an equal or better level if only part of the area were annexed. K.S.A. 12-521(a)(2).

This was widely recognized by the parties throughout the annexation proceeding. As the attorney for the Fire District stated, "the City's Service Plan relies on an agreement for services from the Fire District. In the event of a partial annexation we presently have no agreement, and without an agreement there is no service provided as envisioned by the City's Service Plan." R. 3012. This was also understood by the BOCC. "One of the concerns of the BOCC is that there is no agreement between the City and the Fire District in the event of a partial annexation." R. 3011. The City, too, was well aware of this for it spent a considerable amount of taxpayers' resources and time discussing changes which included provisions to attempt to embrace a partial annexation. See R. 2085.

The final proposal also does not permit a partial annexation. Option 6, the February 15, 2008 proposal, was ineffective. It states "This Agreement supersedes and replaces in its entirety the Agreement entered into between the parties and dated October 24, 2007, *which agreement will become null and void only upon final execution of this present Agreement*." R. 2227. [Emphasis added]. However, this document was not signed as of the close of the Record. R. 2228. Thus the October 24, 2007 agreement was still in force, and it had no provision for a partial annexation. Therefore the partial annexation granted by the BOCC is not valid and must be overturned.

10. THIS ANNEXATION VIOLATES THE HOMESTEAD LAWS OF KANSAS.

This annexation unlawfully deprives Plaintiffs of their homestead exemptions under

Kansas constitutional and statutory law. The Kansas Constitution guarantees that "160 acres of farming land, or... one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner" is exempt from forced sale under any process of law. Kansas Constitution, Article 15, § 9. K.S.A. 60-2301 also protects our homestead rights. Further statutes also recognize the sanctity of the homestead. For example, the homestead may be set aside by the children of the deceased person under our probate code. K.S.A. 59-2235. The surviving spouse is also "entitled to the homestead" under our probate code. K.S.A. 59-6a215. This annexation is unlawful because it whittled the 160-acre protection down to one acre in violation of the Kansas Constitution and statutes.

This injury is significant and widespread. Plaintiff Gerald Matile submitted an affidavit describing the damage annexation would cause him. Dr. Matile has made his home on a tract of 53.5 acres of farming land. It is worth potentially $25,000 per acre. Dr. Matile crafted his financial and estate plan in part in reliance upon the statutory and constitutional guarantees of our homestead laws. He provided a sworn statement that the annexation, by depriving him of his homestead rights, would cause manifest injury. Over $1.3 million dollars of his assets became exposed to his creditors by this annexation R. 2380-2381. Plaintiff Norman Pishny similarly demonstrated the injury to be $1,475,000 of lost homestead protection for a 60-acre tract. R. 2983; Exhibit 12, p.5.

Plaintiff’s concerns are not unique to them. The Record amply shows the manifest injury caused by depriving Plaintiffs of their homestead rights. The City's Plan states that 79.2% of the area sought to be annexed consists of agricultural uses and single-family dwellings with lots of over 10 acres. R. 25. Parcels greater than 40 acres comprise 56.8% of the total acreage originally sought. R. 23-24. Indeed more than half of the 561 single-family homes in the area lay outside of

platted subdivisions. R. 24. With nearly 80% of the residents in the area potentially similarly exposed, the harm is widespread.

In fact, the BOCC failed to give this issue any consideration. There is no evidence in the Record to deny that this results in manifest injury. There is nothing in the Record to show that any compensation was paid or accommodation made to address this violation of statutory and constitutional rights. No protection or provision to preserve these rights was addressed by the BOCC. This annexation, then, takes homestead rights at the stroke of a pen with no compensation and no remedial procedure.

Defendants may argue that this is some conflict in our statutes which should be resolved in favor of annexation. This argument would be specious. First, homestead rights are enshrined in our state constitution. Constitutional protections trump statutory annexation procedures. A "court has the power to declare a legislative act invalid when it infringes the superior law." *Harris*, 192 Kan. at 195-196. This annexation contravenes Kansas Constitution, Article 15, § 9 and is invalid.

Second, a proper reconciliation of the annexation and homestead laws shows that the rights of the Plaintiffs override the desire for expansion of the City. Obviously the homestead laws exist to protect individual citizens. Similarly, the purpose of the annexation statutes is to protect the rights of landowners. *Leawood*, 245 Kan. at 283, Syl. ¶2, 777 P.2d at 831 (1989). When navigating a statutory thicket, we must "harmonize different statutory provisions to make them sensible." *Topeka v. Shawnee County*, 252 Kan. at 432, Syl. ¶ 3, 845 P. 2d at 666. The only possible reconciliation of these statutes is to defer to the rights of the citizen. The tie goes to the Plaintiffs.

The only instances Plaintiffs have been able to find of a court considering our homestead laws in annexation matters have occurred where the person seeking the homestead protection openly courted and accepted annexation by platting, which even now allows a city to step in and annex. K.S.A. 12-520(a); see *Fletcher v. Weigel*, 152 Kan. 104, 102 P. 2d 1055 (1940); *City of Emporia v. Smith*, 42 Kan. 433, 22 P. 616 (1889); *Tilford v. Olathe*, 44 Kan. 721, 25 P. 223 (1890). The Court should either limit this rule to such annexations and/or adopt the rule that incorporation does not "change, restrict or contol [the] homestead, without the consent and approval" of the landowners. *Clark v. Nolan & Campbell*, 38 Tex. 416, 1873 WL 7430 (1873).

Defendants may argue that such a ruling would be the equivalent of the sky falling on orderly growth and development. Exactly the opposite is true. Recognizing homestead rights would do nothing to limit a city from annexing land that is legitimately urban or urbanizing in nature. Nothing would prevent a city from annexing large swaths of land held by absentee investors. The homestead limitations pertain solely to people who make their homes on farms or ranches. Agricultural land is precisely the type of property that should not be annexed anyway, for it is not on the verge of urbanization or development and is not in the hands of land speculators, but is the home of someone engaged in farming or ranching. Annexation does not make sense for such land. Farmers do not need urban services, and cities are not equipped to govern agricultural land (as the 22 ordinance changes forced on the City here aptly illustrate). R. 2445-2446.

11. THE ANNEXATION IS TAINTED BY PREJUDGMENT.

Quasi-judicial proceedings must be free from any taint of partiality or prejudice.

> First, we must point out in a quasi-judicial proceeding in Kansas, it is incumbent on the authority holding the hearing to comply with the requirements of due process in its proceedings. Simply put, due process requires the proceedings to be fair, open, and impartial. A denial of due process renders the resulting decision void.

Davenport Pastures, L.P. v. Morris Board of County Commissioners, Case No. 98,342, ___ Kan. ___ , 194 P.3d 1201, 1206 (2008).

Commissioner Segale tainted the annexation proceeding by prejudging this quasi-judicial matter. A December 5, 2007 fund-raising e-mail states that he "indicated that he supports the Overland Park annexation request." R. 3140. The fact that this statement came from someone raising money for Commissioner Segale renders the Commissioner's motives all the more suspect. He cannot be said to have been impartial. He advised Brenda Karlin that he would support any annexation "as long as they have a service plan." Exhibit 93; R. 2588. Since K.S.A. 12-521 requires that any such annexation have a plan, it is inescapable that the Commissioner had already made up his mind.

This is intolerable in a quasi-judicial proceeding. "In a quasi-judicial proceeding case involving a claim of prejudgment by the decisionmaker, prejudgment statements of the decisionmaker are not fatal to the validity of the zoning determination **as long as the statements do not preclude the finding that the decisionmaker maintained an open mind and continued to listen to all the evidence presented before making the final decision**." *McPherson*, 274 Kan. at 303, syl. ¶ 4. [Emphasis added]. Here Commissioner Segale had made it clear in advance that he was voting for this annexation and, in fact, did so vote.

The impartiality of the proceeding was further compromised by Commissioner Eilert's participation. He "directed OP's expansion for decades" (R. 441) and should have recused himself. In fact, some of the evidence in this proceeding was generated by the City while he was Mayor of Overland Park, such as earlier agreements with the Fire District. He executed the December 18, 1990 real estate contract, R. 947-981; the September 18, 2000 Addendum to Real Estate contract, R. 942-945; October 7, 2002 Second Amendment to Real Estate Agreement, R.

983-987. He also presided over meetings, confirming agreements with the Fire District pertaining to the City's relationship with the Fire District. R. 906-907. It is not proper to be a judge, an advocate, and a witness when considering an issue.

12. THE BOARD'S DECISION WAS INVALID BECAUSE IT ENTERED ORDERS BEYOND ITS JURISDICTION.

The Board's order required the City to enter into some agreement with Aubry Township for its tax losses (R. 47), and also required the City to enact 22 ordinances, a new excise tax, and adopt grandfathering ordinances allowing present uses for 15 years. R. 2458-2460. Because the County loses jurisdiction upon making a final order, there was no way for the County to enforce or police these requirements and so the decision is *ultra vires* and void. K.S.A. 12-521(d).

13. THE DECISION OF THE BOCC WILL RESULT IN MANIFEST INJURY TO PLAINTIFFS.

Assuming, *arguendo*, that the BOCC had sufficient evidence to determine if manifest injury would result, a cautious analysis shows that manifest injury will result to the residents in the area to be annexed. In *Appeal of the City of Lenexa*, 232 Kan. at 584, 657 P.2d at 62, the Supreme Court stated, "[a]s the term 'manifest injury' is used in our statute, it implies imposition of material or substantial burdens upon the landowners without accompanying material or substantial compensating benefits." Here, Plaintiffs have been denied a decision based upon evidence relevant to the annexation ordered; they were denied open access to all the facts; they were denied notice and an opportunity to be heard on factors of profound importance to their lives and property. No benefit for any Plaintiff or other identifiable citizen appears in the record. A review of the factors demonstrating manifest injury as described in our appellate cases shows this to be the case here.

The case law offers examples of what constitutes "manifest injury." *City of Lenexa*, 232 Kan. at 585, 657 P.2d at 62 lists several examples of evidence of manifest injury:

1. **The existence of sewers, electricity, lights, and gas, and the fact that other governmental agencies would continue to furnish such services even in the absence of annexation.** Most services are provided by entities other than the City. Annexation will do nothing to provide sewers, electricity, lights, gas, cable television, telephone, and internet service. R. 2302.

2. **The possibility that fire service by the City would not be equal to that which was then being provided by the township fire authorities.** The evidence before the BOCC was that the Fire District had a superior ISO rating. R. 1316. The increased distance from the City would also increase response times. R. 1017-1318. Indeed, the net effect of much of this annexation was to have the same fire district providing the same services, but only adding a layer of management in the form of the City Fire Department managing the existing Fire District. The City's bizarre solution was to annex part of the Fire District, leave the patrons continuing to pay the Fire District's bonds, and hire the Fire District back to keep doing what it was always doing. The City would also guarantee the Fire District potentially nearly $7.5 million. The taxpayers would have to pay twice for fire services.

3. **Decreasing the tax base of the existing fire and ambulance services by annexation.** There is no question the tax base of the Fire District would suffer under this annexation. Even if the February 15, 2008 proposal were effective, that proposal is finite and any payments run out after 15 years.

4. **Creating a detriment to the public by the diminution of the fire district serving the area to be annexed.** In this case either the fire district will shrink, or it will continue to serve the same area, in which case the annexation serves no purpose.

5. **Extending police protection to the area to be annexed "without additional personnel."** This is precisely what the Plan provided. R. 48. The City's proposal was to provide police services to 15 square miles "without adding additional resources." The Johnson County Sheriff pointed out that the County currently has a dedicated patrol deputy and an additional community police unit available for this area. R. 1124. The Sheriff stated that the law-enforcement services would potentially drop as a result of the annexation. R. 1124.

6. **Maintenance of streets and highways by the City without any evidence that the "service provided would be equal or superior to that presently provided with county personnel and equipment."** The Chairman of the BOCC specifically stated that the County's "road maintenance probably is above any city." R. 2493.

Further, *City of Topeka*, 252 Kan. at 444-445, 845 P.2d at 673 describes additional factors that constitute manifest injury:

1. **Where the existing government services are adequate without annexation, denial is appropriate if there is a failure of the City to establish "existing governmental services in the area to be annexed are inadequate."** The City's Plan does not identify any present inadequacies. Its entire rationale for the proposed annexation is based upon future development, not any lack of present services. Plan, R. 29-36.

2. **Where there are discrepancies in the City's cost estimates.** Here, the City's cost estimates changed numerous times. Indeed, at no time did the City ever reconcile its new fire services proposal with its original cost estimates**.** The cost to a hypothetical homeowner changed

up to the last minute in the February 15 submittal. R. 2234-2235. Finally, the City failed to provide any cost figures at all for a partial annexation. It is anyone's guess what this annexation will cost.

3. **Where the cost to the City of annexation exceeds the revenues received by annexation.** Since the City failed to provide the revenues generated by a partial annexation or the costs of such an annexation there is really no way to answer this question precisely, but it is sure to be a loser for the City. The City originally estimated the net operating costs for 2009 to be $218,035, and the BOCC adopted that as its finding. R. 2435. However, that did not consider that the City was proposing increasing the amount paid to the Fire District to at least $565,000. R. 2211. That figure also does not calculate that over 40% of the tax-generating area the City sought to annex was eliminated by the BOCC.

4. **Where annexation would result in an increase of taxes upon the area to be annexed**. Although the real property mill levy in Overland Park is low, wealthier landowners would see their aggregate costs drop; middle class or poor landowners would see their costs increase. There was no information in the Record to identify how many people would see their burdens increase or decrease. See Plan, R. 79-80; Substitute for SEP Errata Sheet No. 2, R. 2234-2235.

5. **Where the tax impact upon the remainder of the township would be "negative and substantial."** The City provided no evidence of the tax impact of the partial annexation. However, the BOCC required the City to negotiate an agreement with Aubry Township to alleviate this burden, whatever it may be, for five years. The Record does not disclose what took place, nor is there any evidence as to how much money was to change hands. At best, the financial harm to Aubry Township would be forestalled for 5 years by any such agreement.

In addition, in order to approve the annexation, the Board should be able to determine "what new services would be provided the area other than those for which the landowners themselves would be paying." *City of Shawnee,* 236 Kan. at 22, 687 P.2d at 619. The City identified substantial planning services which the landowners would have available, but for any subdivision of land other than limited intra-family sales, a tax of nearly $9,400 per acre is levied by the City. R. 821-829.

The Supreme Court in *City of Shawnee,* 236 Kan. at 22-24, 687 P.2d at 619-621 has also approved a denial of annexation when the evidence showed manifest injury as follows:

1. **The annexing city proposed to take over police protection from the County "without any increase in resources."** This is practically a verbatim description of the City's Plan.

2. **Firefighting capability may be compromised.** Again, the insurance ratings of the City are inferior to those of the Fire District.

3. **There would be no change in sanitary sewer services and septic tanks would remain in place.** The City does not provide sanitary sewer services at all. There would be no change in such services.

4. **There is no evidence that City street construction and maintenance would be superior to that of the county.** The Chairman of the BOCC stated the County services were unsurpassed. R. 2493.

5. **The area to be annexed already has access to land use regulation through the county, due to the fact that "because those in the area sought to be annexed now work with the county staff, there is no unregulated development occurring which is detrimental to the**

city." The County has a professional staff providing land-use regulation. There was no evidence they do a bad job.

Finally, Plaintiffs' constitutional due process and homestead rights have been trampled on and, as the Chairman of the BOCC conceded, the "lifestyles will change" for annexed people. R. 2493. It is difficult to conceive of a more intrusive injury than Plaintiffs having a government they could not vote for tax them in order to change their lifestyles. The uncontroverted evidence in the Record points to significant detriments to both the City and the land owners. The annexation must be rejected.

CONCLUSION

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

Respectfully submitted,

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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 17th day of August, 2009.

James R. Orr