

CHAPTER II

THE NATURE OF THE MUNICIPAL CORPORATION

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THE MUNICIPAL CHARTER

The basic power of a municipality is set forth in its charter. The municipal charter is akin to the state's constitution in this respect. The municipal charter is the source of a municipality's power to act. Prior to the adoption of the *Mississippi Constitution of 1890*, municipalities actually had a document known as the municipal charter. Following the adoption of our current *Constitution*, and the laws passed as a result, few cities utilize their old municipal charter.

The *Constitution of 1890* directed the manner in which all future municipal charters would be granted in Mississippi. Prior to that time, individual charters were granted to municipalities. The adoption of the current *Constitution* ended this practice. Section 88 provides:

The legislature shall pass general laws, under which local and private interest shall be provided for and protected, and under which cities and towns may be chartered and their charters amended. . . .⁴⁸

In 1892, the Legislature passed laws which implemented this section of the *Constitution*. Municipalities were permitted to choose to keep their existing city charter⁴⁹ or elect to be governed by the new "code charter." New municipalities were required to be formed under the "code charter."⁵⁰ A number of cities and towns around the state chose to retain their private charter and continue to operate under them today.

⁴⁸*Const.*, Art. 4, § 88.

⁴⁹Today these charters are referred to as "private charters."

⁵⁰At the time there was only one form of government set out in the *Code*. That form called for a mayor-board of aldermen form of government. The term "code charter" is still frequently used in referring to the mayor-alderman form of municipal government. You will often see this term used when municipal officials request attorney general's opinions. In reality, all forms of municipal government are "code charters" in that the primary elements of government are defined by the *Mississippi Code*.

Since the initial creation of “code charters” in 1892, the Legislature has created a number of additional “forms of government” under which a municipality may operate. Presently, municipalities may operate under the following forms of government.⁵¹

- ▶ Private Charter⁵²
- ▶ Code Charter – Mayor-Board of Alderman Form⁵³
- ▶ Commission Form⁵⁴
- ▶ Council Form⁵⁵
- ▶ Mayor-Council Form⁵⁶
- ▶ Council-Manager Plan⁵⁷

The specifics of each form are discussed in Chapter III.

MUNICIPAL POWERS

Prior to the adoption of Mississippi’s home rule statute in 1985, the law specified that municipalities could only exercise powers delegated to them by the Legislature.⁵⁸ As a result, two things occurred. First, there are numerous specific grants of powers to municipalities found in our general law.⁵⁹ Second, there are hundreds of local and private acts giving specific authorities to specific municipalities.⁶⁰

⁵¹See *Code*, § 21-1-9.

⁵²Assuming it made the proper election in the late 1890s.

⁵³See *Code*, Title 21, Chapter 3.

⁵⁴See *Code*, Title 21, Chapter 5.

⁵⁵See *Code*, Title 21, Chapter 7.

⁵⁶See *Code*, Title 21, Chapter 8.

⁵⁷See *Code*, Title 21, Chapter 9.

⁵⁸ See *Videophile, Inc. v Hattiesburg* 601 F Supp 552 (1985, SD Miss).

⁵⁹Chapter X surveys specifically the major powers of municipalities.

⁶⁰As a municipal official you can expect to see other cities in the State taking some action only to be told that you do not have the authority to do the same thing. Frequently this will be because local and private legislation has been passed that applies only to that specific city.

HOME RULE

In 1985 the Mississippi Legislature granted municipalities limited home rule with the adoption of § 21-17-5 of the *Mississippi Code of 1972*. This section provides:

- (1) The governing authorities of every municipality of this state shall have the care, management and control of the municipal affairs and its property and finances. In addition to those powers granted by specific provisions of general law, the governing authorities of municipalities shall have the power to adopt any orders, resolutions or ordinances with respect to such municipal affairs, property and finances which are not inconsistent with the *Mississippi Constitution of 1890*, the *Mississippi Code of 1972*, or any other statute or law of the State of Mississippi, and shall likewise have the power to alter, modify and repeal such orders, resolutions or ordinances. Except as otherwise provided in subsection (2) of this section, the powers granted to governing authorities of municipalities in this section are complete without the existence of or reference to any specific authority granted in any other statute or law of the State of Mississippi.
- (2) Unless such actions are specifically authorized by another statute or law of the State of Mississippi, this section shall not authorize the governing authorities of a municipality to (a) levy taxes of any kind or increase the levy of any authorized tax, (b) issue bonds of any kind, (c) change the requirements, practices or procedures for municipal elections or establish any new elective office, (d) change the procedure for annexation of additional territory into the municipal boundaries, (e) change the structure or form of the municipal government, (f) permit the sale, manufacture, distribution, possession or transportation of alcoholic beverages, (g) grant any donation, or (h) without prior legislative approval, regulate, directly or indirectly, the amount of rent charged for leasing private residential property in which the municipality does not have a property interest.
- (3) Nothing in this or any other section shall be construed so as to prevent any municipal governing authority from paying any municipal employee not to exceed double his ordinary rate of pay or awarding any municipal employee not to exceed double his ordinary rate of compensatory time for work performed in his capacity as a municipal employee on legal holidays.

While the passage of the “home rule” statute did away with the general legal principle that a specific grant of power was necessary for a municipality to take an action, it contained numerous exceptions as set out above. With regard to the levy of taxes, issuance of bonds, procedures for elections, change of municipal boundaries, change in the form of government, sale of alcoholic beverages, donations, or rent control, the rule remains the same. In each of these instances state law must be followed.

Another major restriction on “home rule” is found in the requirement that actions of the municipality may not be inconsistent with state law. Numerous attorney general’s opinions have taken the restrictive view that if a state statute addressed a subject, municipalities could not act. This position

was taken based on a theory of pre-emption. It appears that the Courts may not take such a restrictive view.

At this point in time, the Mississippi Supreme Court has made direct determinations of issues related to municipal “home rule” in only three cases. In each, there is substantial reason to believe that the Courts will allow municipalities more latitude than the Attorney General’s opinions would seem to indicate. Directly on point is the most recent case involving the City of Tupelo’s “brown bag” ordinance.⁶¹ In that case the City of Tupelo sought to regulate “brown bag clubs” by ordinance. Suit was filed by one of the clubs contending that Tupelo did not have the authority to regulate such clubs. A primary basis for this argument was that Tupelo was preempted by state statute. The argument of the club was consistent with an opinion issued by the Attorney General’s office. The Court said:

Although the present issue is one of first impression for this Court, the issue has been considered in the past in the form of Attorney General (AG) Opinions. The consistent position of the AG has been that the passing of “brown bag” ordinances is precluded by statutory authority. The AG re-affirmed in a recent ruling the view of that office with regard to the authority of municipalities to pass ordinances restricting the possession of alcohol in brown-bag clubs:

As stated above, state law clearly authorizes possession and consumption of light wines and beer within certain meticulously detailed state parameters. It is readily apparent that consumers who fall within these state parameters may lawfully possess and consume the regulated beverages. Any local ordinance that places additional restrictions will effectively prohibit what the state expressly allows.

Thus, the Attorney General concluded that the applicable state legislation permits not only the possession, but also the consumption, of alcoholic beverages subject only to the restrictions contained in the applicable statutes. This Court disagrees, however. *Miss. Code Ann.* § 67-1-7 refers solely to the “possession” of alcoholic beverages and does not mention consumption. The Legislature may or may not have intended that the consumption of such beverages in wet counties should not be restricted by municipalities, but this Court is unwilling to read the statute more expansively than it is written in light of the public policy considerations in favor of the TBBO [Tupelo Brown Bag Ordinance] and similar ordinances.⁶²

Thus, it appears that the Mississippi Supreme Court will not take the position that simply because a statute addressed the same subject matter, municipalities are preempted from additional regulation.

⁶¹*Maynard v. City of Tupelo*, 1997 WL 80923, petition for rehearing pending (1997).

⁶²1997 WL 80923.

The Mississippi Supreme Court has addressed two other aspects of the restrictions on “home rule.” One case arose in the City of Greenwood over the power to appoint the city attorney. The City of Greenwood had adopted the mayor-council form of government. Under that form of government the mayor appoints the city attorney. Greenwood had an ordinance which required council confirmation of the appointment. The mayor contended that since the statute addressed the issue the ordinance was preempted. The Court said:

This is not a case in which a municipality seeks to do something that it is not authorized to do. The governing authorities of the City of Greenwood are clearly authorized to appoint a municipal judge and the other officers here involved. See, e.g., *Miss. Code Ann.* § 21-23-3 (1972). The question here involved is the apportionment of responsibility for appointments among the constituent elements of municipal authority. While the city council has no authority to appoint, nothing in our statutes or precedents denies the council an advice and consent role in the appointive process. In such circumstances, the governing authorities of Greenwood were free to adopt the ordinances here questioned. *Miss. Code Ann.* § 21-17-5 (1972) (“The governing authorities of every municipality . . . shall have the power to adopt any orders, resolutions or ordinances with respect to municipal affairs . . . which are not inconsistent with the *Mississippi Constitution of 1890*, the *Mississippi Code of 1972*, or any statute or law of the State of Mississippi . . .”). *Hattiesburg Firefighters Local 184 v. City of Hattiesburg*, 263 So. 2d 767 (Miss. 1972).

We hold that the ordinance duly adopted by the City of Greenwood requiring that the legal officers here in question should be appointed subject to council approval is not inconsistent with the statutory requirement that executive authority be vested with the mayor in the mayor-council form of government. Accordingly, the judgment of the chancellor to the contrary must be reversed. Nothing said here is intended to sanction the city council assuming any right to initiate an appointment. We approve only an ordinance duly adopted applying the confirmation power to the municipal officers here involved. Confirmation should not be withheld without good cause.⁶³

Though the Supreme Court may well take a less restrictive view than the Attorney General’s office on the issue of home rule, attorney general’s opinions have addressed a far wider range of issues than have the courts. The guidance these opinions provide should not be overlooked. See Addendum A for a summary of recent Attorney General’s opinions on subject of home rule. In addition it is important to note the legal protection municipal officials can gain by obtaining an Attorney General’s opinion. The Mississippi Code provides:

§ 7-5-25. Written opinions

The Attorney General shall give his opinion in writing, without fee, to the Legislature, or either house or any committee thereof, and to the Governor, the Secretary of State, the Auditor of Public Accounts, the State Treasurer, the Superintendent of Public Education, the

⁶³*Jordan v. Smith*, 669 So. 2d 752, 757 (Miss. 1996).

Insurance Commissioner, the Commissioner of Agriculture and Commerce, the State Geologist, the State Librarian, the Director of Archives and History, the Adjutant General, the State Board of Health, the Commissioner of Corrections, the Public Service Commission, Chairman of the State Tax Commission, the State Forestry Commission, the Transportation Commission, and any other state officer, department or commission operating under the law, or which may be hereafter created; the trustees and heads of any state institution, the trustees and heads of the universities and the state colleges, the district attorneys, the boards of supervisors of the several counties, the sheriffs, the chancery clerks, the circuit clerks, the superintendents of education, the tax assessors, county surveyors, the county attorneys, the attorneys for the boards of supervisors, mayor or council or board of aldermen of any municipality of this state, and all other county officers (and no others), when requested in writing, upon any question of law relating to their respective offices.

When any officer, board, commission, department or person authorized by this section to require such written opinion of the Attorney General shall have done so and shall have stated all the facts to govern such opinion, and the Attorney General has prepared and delivered a legal opinion with reference thereto, there shall be no liability, civil or criminal, accruing to or against any such officer, board, commission, department or person who, in good faith, follows the direction of such opinion and acts in accordance therewith unless a court of competent jurisdiction, after a full hearing, shall judicially declare that such opinion is manifestly wrong and without any substantial support. However, if a court of competent jurisdiction makes such a judicial declaration about a written opinion of the Attorney General that applies to acts or omissions of any licensee to which Section 63-19-57, 75-67-137 or 75-67-245 applies, and the licensee has acted in conformity with that written opinion, the liability of the licensee shall be governed by Section 63-19-57, 75-67-137 or 75-67-245, as the case may be. No opinion shall be given or considered if the opinion is given after suit is filed or prosecution begun.

It is however important to note the recent decision of the Mississippi Supreme Court in *City of Durant v. Laws Const. Co., Inc.*, 721 So.2d 598, 604 (Miss. 1998)

The City claims to have acted in good faith when relying on the Attorney General opinions. The City argues that even if this Court does not reach the same conclusion in regards to the interpretation of § 31-3-21 as the Attorney General opinions, the correct construction should only apply to future applications of the statute. We have in the past, when determining that an Attorney General opinion was erroneous, applied the correct construction in future cases thereby not penalizing a party's reliance. See *Meeks v. Tallahatchie County*, 513 So.2d 563, 568 (Miss.1987). However § 7-5-25 requires the party to contact the Attorney General's office in writing requesting an opinion on his particular facts. In return, the Attorney General's office will prepare and deliver a legal written opinion. In the case sub judice, the City merely spoke with the Attorney General's office over the phone. Furthermore, the Attorney General's office sent opinions regarding similar circumstances, and did not render a written opinion with regard to the particular facts in the case sub judice, as required by the statute. Therefore, the City should be held liable.

The other case dealing with “home rule” was *Nichols v. Patterson*.⁶⁴ In that case the state auditor had taken the position that certain expenditures were illegal. During the course of the investigation and at trial, the position of the auditor was that the expenditures were not authorized by statute and were thus donations. On appeal the state took a narrower view, contending that the expenditures (for the most part) were illegal because they were not properly authorized by the city. In doing so the Court said:

Olive Branch insists that all the expenditures should also be considered lawful, because the city is protected by the “home rule.” This rule, *Mississippi Code Annotated* § 21-17-5, gives municipalities discretion in managing municipal affairs. The Auditor states that *Mississippi Code Annotated* § 21-17-5 expressly prohibits donations, which all of the contested expenses were.

In 1985 the Mississippi legislature passed the state’s first municipal “home rule” statute. This statute, *Mississippi Code Annotated* § 21-17-5 states in pertinent part:

- (1) The governing authorities of every municipality of this state shall have the care, management and control of the municipal affairs and its property and finances. In addition to those powers granted by specific provisions of general law, the governing authorities of municipalities shall have the power to adopt any order, resolutions or ordinances with respect to such municipal affairs, property and finances which are not inconsistent with the *Mississippi Constitution of 1890*, the *Mississippi Code of 1972*, or any other statute or law of the State of Mississippi, and shall likewise have the power to alter, modify and repeal such orders, resolutions or ordinances.
- (2) Unless such actions are specifically authorized by another statute of law of the State of Mississippi, this section shall not authorize the governing authorities of a municipality to . . . grant any donation. . . .

Olive Branch contends that the Auditor ignores the section in the “home rule” which gives municipalities power to control the affairs of the municipality and focuses instead on the section which states that the “home rule” does not authorize donations. Olive Branch states that the difference in the positions of the Auditor and the Appellants is that the Auditor still considers any expenditure not specifically authorized by statute to be a donation. However, Olive Branch misstates the Auditor’s position. The Auditor believes that Olive Branch had the authority to expend its monies in the fashion dictated by the law. Nevertheless, Olive Branch did not follow the law, by expressly determining that the questioned expenditures were for a valid purpose and “adopted” by the Board and the Mayor in the city minutes.

As stated above, most of the excepted expenditures, the Volunteer Appreciation Dinners, the travel advances by the Mayor, the police dinners, and the City Beautiful Commission

⁶⁴678 So. 2d 673 (Miss. 1996).

Meetings, were not in the minutes of the meetings of the municipality and did not reflect authorization for the expenditures of the funds, which falls short of the requirement of documentation. “A board of supervisors can act only as a body, and its act must be evidenced by an entry on its minutes. The minutes of the board of supervisors are the sole and exclusive evidence of what the board did.” *Board of Supervisors, Adams County v. Giles*, 219 Miss. 245, 259, 68 So. 2d 483 (1953) (quoting *Smith v. Board of Supervisors of Tallahatchie County*, 124 Miss. 36, 41, 86 So. 707, 709 (1920)). See also *Martin v. Newell et al.*, 198 Miss. 809, 23 So. 2d 796 (1945). Also, the 53rd checks were a donation by the City of Olive Branch in direct contravention of the *Mississippi Constitution of 1890*, Article 4, §§ 66, 96 and *Mississippi Code Annotated* § 21-17-5(2)(g). The Auditor’s exceptions are valid against Olive Branch.

The primary significance of this case is that many of the expenditures that Attorney General’s opinions have held to be donations were determined to be illegal by the Court only because of the lack of proper minute entries and not because they were in fact donations.

SOVEREIGN IMMUNITY

Prior the Mississippi Supreme Court’s decision in *Pruett v. City of Rosedale*,⁶⁵ the state and its subdivisions enjoyed judicially established sovereign immunity. As a matter of public policy, the courts had determined, in general, that the state was immune from suits for damages. In *Pruett*, the Supreme Court abolished the judicially created doctrine of sovereign immunity. As a result, a flurry of legislative actions and judicial proceedings have followed. *Stokes v. Kemper County Board of Supervisors*⁶⁶ contains an excellent and concise history of the legislative actions taken in response to *Pruett*.⁶⁷

At the present time, the issue of sovereign immunity is dealt with in Title 11, Chapter 46 of the *Mississippi Code*. In those statutes, the Legislature has declared that it is the policy of the State of Mississippi that the state and its political subdivisions are immune from suit “on account of any wrongful or tortious act or omission.”⁶⁸ Municipalities are specifically included within the definition of political subdivisions.⁶⁹ The statute provides that the acts or omissions from which political

⁶⁵421 So. 2d 1046 (Miss. 1982).

⁶⁶691 So. 2d 391 (Miss. 1997).

⁶⁷See Addendum B to this chapter. In addition to the maximum amounts set out in sections covered by Addendum B, insurance may be purchased. If insurance is purchased, the maximum amount of liability is increased to the policy limits of the coverage if the policy limits are more than the statutory limits.

⁶⁸*Code*, § 11-46-3.

⁶⁹*Code*, § 11-46-1.

subdivisions (including municipalities) are immune include those which are “governmental, proprietary, discretionary or ministerial in nature.”⁷⁰

The act then waives immunity (after October 1, 1993, for municipalities) to the extent of the maximum liability set out in §11-46-15.⁷¹ The act also sets up an exclusive method by which claims may be brought.⁷² New procedures which must be followed include the following:

The notice of claim required by subsection (1) of this section shall be in writing, delivered in person or by registered or certified United States mail. Every notice of claim shall contain a short and plain statement of the facts upon which the claim is based, including the circumstances which brought about the injury, the extent of the injury, the time and place the injury occurred, the names of all persons known to be involved, the amount of money damages sought and the residence of the person making the claim at the time of the injury and at the time of filing the notice.⁷³

The waiver of immunity is not absolute. Immunity is maintained in the case of actions or omission:⁷⁴

- (a) Arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;
- (b) Arising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid;
- (c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury;
- (d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused;

⁷⁰*Code*, §11-46-3.

⁷¹See Addendum B.

⁷²*Code*, §11-46-7.

⁷³*Code*, §11-46-11(2).

⁷⁴*Code*, §11-46-9.

- (e) Arising out of an injury caused by adopting or failing to adopt a statute, ordinance or regulation;
- (f) Which is limited or barred by the provisions of any other law;
- (g) Arising out of the exercise of discretion in determining whether or not to seek or provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;
- (h) Arising out of the issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any privilege, ticket, pass, permit, license, certificate, approval, order or similar authorization where the governmental entity or its employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked unless such issuance, denial, suspension or revocation, or failure or refusal thereof, is of a malicious or arbitrary and capricious nature;
- (i) Arising out of the assessment or collection of any tax or fee;
- (j) Arising out of the detention of any goods or merchandise by any law enforcement officer, unless such detention is of a malicious or arbitrary and capricious nature;
- (k) Arising out of the imposition or establishment of a quarantine, whether such quarantine relates to persons or property;
- (l) Of any claimant who is an employee of a governmental entity and whose injury is covered by the Workers' Compensation Law of this state by benefits furnished by the governmental entity by which he is employed;
- (m) Of any claimant who at the time the claim arises is an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution, regardless of whether such claimant is or is not an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution when the claim is filed;
- (n) Arising out of any work performed by a person convicted of a crime when the work is performed pursuant to any sentence or order of any court or pursuant to laws of the State of Mississippi authorizing or requiring such work;
- (o) Under circumstances where liability has been or is hereafter assumed by the United States, to the extent of such assumption of liability, including but not limited to any claim based on activities of the Mississippi National Guard when such claim is cognizable under the National Guard Tort Claims Act of the United States, 32 USC 715 (32 USCS 715), or when such claim accrues as a result of active federal service or state service at the call of the governor for quelling riots and civil disturbances;

- (p) Arising out of a plan or design for construction or improvements to public property, including but not limited to, public buildings, highways, roads, streets, bridges, levees, dikes, dams, impoundments, drainage channels, diversion channels, harbors, ports, wharfs or docks, where such plan or design has been approved in advance of the construction or improvement by the legislative body or governing authority of a governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval, and where such plan or design is in conformity with engineering or design standards in effect at the time of preparation of the plan or design;
- (q) Arising out of an injury caused solely by the effect of weather conditions on the use of streets and highways;
- (r) Arising out of the lack of adequate personnel or facilities at a state hospital or state corrections facility if reasonable use of available appropriations has been made to provide such personnel or facilities;
- (s) Arising out of loss, damage or destruction of property of a patient or inmate of a state institution;
- (t) Arising out of any loss of benefits or compensation due under a program of public assistance or public welfare;
- (u) Arising out of or resulting from riots, unlawful assemblies, unlawful public demonstrations, mob violence or civil disturbances;
- (v) Arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that a governmental entity shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care; or
- (w) Arising out of the absence, condition, malfunction or removal by third parties of any sign, signal, warning device, illumination device, guardrail or median barrier, unless the absence, condition, malfunction or removal is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice.

In addition, a governmental entity shall also not be liable for any claim where the governmental entity:

- (a) Is inactive and dormant;
- (b) Receives no revenue;
- (c) Has no employees; and

(d) Owns no property.

A one (1) year statute of limitations is imposed. However, the filing of the notice mentioned above extends the statute of limitations by 95 days.⁷⁵

Cases brought under the act are to be tried in the circuit court by a judge without a jury. The case is to be heard in the county in which the act or omission occurred. The right to have the case heard in other courts is specifically removed.⁷⁶

A Torts Claim Fund is created by the act.⁷⁷ Unless a government entity is insured, it must participate in the fund. The fund is administered by the Mississippi Torts Claim Board.⁷⁸

Though the act purports to eliminate liability for “proprietary activities,” the issue still arises because of the effective dates of the legislation. With the passage of time and the running of statutes of limitations the distinction should become less and less important.

Because of the nature of municipalities as a “municipal corporation” they are vested with powers of two types. One is governmental and the other proprietary. The distinction has been important in the past because of the difference in the potential for municipal liability. The Mississippi Supreme Court addressed the distinction in *Thomas v. Hilburn*, 654 So. 2d 898, 901 (Miss. 1995), as follows:

A city or municipality is immune from suit when the injury stems from the performance of a governmental function; however, the city does not enjoy such immunity when it is responsible for an injury arising from the performance of a proprietary function. *Morgan v. City of Ruleville*, 627 So. 2d 275, 279 (Miss. 1993); *Webb v. Jackson*, 583 So. 2d 946, 952 (Miss. 1991). As we noted in *Morgan*, the line between governmental and proprietary functions has been best drawn in *Anderson v. Jackson Municipal Airport Authority*, 419 So. 2d 1010 (Miss. 1982). In *Anderson*, the Court explained:

The classifications are broad, very general, and the line between the two is quite frequently difficult to define. Nevertheless, there are certain activities which courts choose to call “governmental” for which no liability is imposed for wrongful or tortious conduct. These are activities or services which a municipality is required by state law to engage in and perform.

⁷⁵*Code*, §11-46-11(3).

⁷⁶*Code*, §11-46-13.

⁷⁷*Code*, §11-46-17.

⁷⁸*Code*, §21-46-19.

On the other hand, there are activities in which a municipal corporation engages, not required or imposed upon it by law, about which it is free to perform or not. Such activities the courts call “proprietary or corporate.” This Court has judicially construed other permissible “public and governmental” activities to be “corporate or proprietary.” 419 So. 2d at 1014-1015.

The *Anderson* Court further enumerated those municipal activities which have been determined to be governmental as distinguished from proprietary functions. In holding that the operation of a swimming pool was a proprietary function, the Court in *Morgan* resolved the dichotomy between governmental and proprietary functions by stating simply, “[p]roprietary activities are those which, while beneficial to the community and very important, are not vital to a City’s functioning (zoo, football stadium).” *Id.* at 279.

Though the list may not be totally complete, the Supreme Court footnoted functions which fall into each of the classifications. The Court said:

The *Anderson* Court found that the following had been held to be governmental functions:

the decision whether to place traffic control devices at an intersection; establishment and regulation of schools, hospitals, poorhouses, fire departments, police departments, jails, workhouses, and police stations; the adoption and enforcement of ordinances and regulations for the prevention of the destruction of property by fire and flood, and the manner and the character of the construction of the buildings.

Morgan, 627 So. 2d at 279 n. 2, quoting *Anderson*, 419 So. 2d at 1014 n. 1 (citations omitted).

The *Anderson* Court listed the following as having been held to be proprietary functions: The operation of a city dump; the construction and maintenance of sewage outlets to and from buildings; the maintenance and repairing of streets; the construction and maintenance of sidewalks; the operation and management of an electrical power plant by a municipality; the construction of a nuisance, such as a hog pond, close to the plaintiff’s residence; the operation by the city of a fair, baseball park, or football stadium; the operation of a fire hydrant; the hauling of dirt and trash by the city; the operation and maintenance of a zoo; the creation of a dangerous situation regarding trees near sidewalks, streets or neutral areas; the operation of river landings for ingress and egress by boats; the construction and maintenance of a bridge over a gully or ditch near a sidewalk or street; the construction and maintenance of a drain to provide for controlling rainfall; the offensive odors from a negligently operated sewage system; the supervision of the construction of a wall of a building not owned by the city; the overhead traffic control signal lights and stop signs at intersection[s].

CLASSIFICATION, CREATION, ABOLITION, AND EXPANSION

In compliance with the mandates of § 88 of the *Mississippi Constitution of 1890*, the Legislature adopted statutes related to the classification, creation, abolition, and expansion of municipalities.

Though the original statutes have been amended on numerous occasions, Title 21 Chapter 1 of the *Mississippi Code* contains those statutes today.

Classification

All municipalities in the state are divided into three (3) classes. Municipalities with a population of two thousand (2,000) or more are classified as cities. Those with a population of less than two thousand (2,000) but more than three hundred (300) are classed as towns. A village has three hundred (300) or fewer inhabitants.⁷⁹ If a new federal census changes the population so that a municipality is in a different class, the governing authorities are required to enter an order on the minutes changing the municipality to the proper class. This order is to be filed with the secretary of state. The census is conclusive as to the class of a municipality.⁸⁰ Municipalities are to operate under the corporate name of “The City of _____,” “The Town of _____,” or the “Village of _____” according to the proper classification.⁸¹

Creation

General Requirements. A new municipality may be created in Mississippi provided the area has the following characteristics:⁸²

- (a) one square mile of territory;
- (b) population of at least 300;
- (c) at least one (1) mile of hard surface streets (either existing or under construction);
- (d) at least six (6) streets making up the one (1) mile of hard surfaced streets; and
- (e) there is a public utilities system (water and/or sewer) existing or under construction.

⁷⁹*Code*, § 21-1-1.

⁸⁰*Code*, § 21-1-3.

⁸¹*Code*, § 21-1-5. The municipal authorities have the option of changing the name of the municipality itself by complying with § 21-1-7 of the *Code*. To do so, they must prepare in writing the proposed change. The proposed change must be published (or posted if there is no newspaper). If 1/10th of the qualified electors protest the change within ten (10) days after completion of publication or posting the proposed change, approval of the change by a majority vote is required. Otherwise, the change will go into effect after approval by the governor.

⁸²*Code*, § 21-1-1.

The Petition. If an area possesses these characteristics, it may incorporate as a town or city on the petition of at least two thirds (b) of the qualified electors residing in the area. The petition must meet the following requirements:

- (a) describe that area proposed to be incorporated;
- (b) contain a map or plat of the area to be incorporated;
- (c) set forth the corporate name of the new municipality;
- (d) set forth the number of inhabitants in the new municipality;
- (e) set forth the assessed valuation of the real property in the area according to the latest available assessment;
- (f) state the aims of the petitioners in seeking to incorporate;
- (g) set forth the municipal and public services the municipality proposes to provide;
- (h) set forth the reasons that the public convenience and necessity requires a new municipality and contain a statement of the names of the persons the petitioners desire to be appointed as officers of the new municipality; and
- (i) be sworn to by at least one (1) of the petitioners.

Once the necessary signatures are obtained the petition must be filed in Chancery Court.⁸³

Notice. After the petition is filed in the Chancery Court, a date is set for the hearing by the Chancellor. Notice of the time of the hearing must be given by publication in a newspaper, to all persons interested in, affected, or having objections to the proposed annexation.⁸⁴ If there is an existing municipality within three (3) miles of the area to be incorporated, process must be served on it at least 30 days prior to the hearing.⁸⁵

⁸³*Code*, § 21-1-13.

⁸⁴*Code*, § 21-1-13. This notice must meet the following requirements: be in a newspaper published in or having a general circulation in the area to be incorporated; be published once each week for three consecutive weeks; the first publication must be at least 30 days prior to the date of the hearing; and the publication must contain a full legal description of the territory to be incorporated.

⁸⁵*Code*, § 21-1-13.

Hearing. At the time set forth in the notice,⁸⁶ a hearing is to be held in chancery court. At the hearing, any evidence related to the issues of “public convenience and necessity” or reasonableness may be presented. If the proposed incorporation is found to be reasonable and required by the public convenience and necessity, the chancellor is to grant the incorporation as requested. If not, the incorporation is to be denied. Additionally, the chancellor may allow only a part of the area to be incorporated.⁸⁷

If the chancellor grants the incorporation, in whole or part, a decree is to be entered which shall contain the following:⁸⁸

- (a) a declaration that the municipal corporation is created;
- (b) an accurate description of the boundaries of the new municipality;
- (c) classification of the new municipality as a town or city; and
- (d) the names of the officers of the municipality.

A map of the new municipality must be filed with the chancery clerk.⁸⁹

Public Convenience and Necessity. Factors that the court should look to determine whether the incorporation is required by the public convenience and necessity were summarized by the Mississippi Supreme Court in *City of Pascagoula v. Scheffler*, 487 So. 2d 196 (Miss. 1986). The Court said:

The power vested in the chancery court is the judicial function of deciding that a petition is sufficient and that the statutory jurisdictional conditions have been met. To determine public convenience and necessity, this Court sets forth the following factors as some to be considered: the governmental services presently provided; the quality and adequacy of all services provided, *Lowe v. City of Jackson*, 336 So. 2d 490 (Miss. 1976); the services expected from other sources, e.g. neighboring municipalities, water districts, county services, etc.; the impairment of an immediate right vested in an adjoining city, See *Schatzman v. Town of Greenfield*, 273 Wis. 277, 77 N.W. 2d 511 (1956) (city proper party to object only

⁸⁶As a practical matter, if the case is contested, there will usually be a continuance.

⁸⁷See *Code*, § 21-1-17. The Chancellor cannot enlarge the area.

⁸⁸*Code*, § 21-1-17.

⁸⁹*Code*, § 21-1-17.

where showing of impairment of immediate right); the substantial or obvious need justifying incorporation, *Hamilton v. Incorporation of Petal*, 291 So. 2d 190 (Miss. 1974).⁹⁰

Reasonableness. The following factors have been identified as indicating reasonableness in an incorporation case:

The following factors, although by no means exhaustive, are examples of those to be considered by the chancery court when making a determination of reasonableness. These factors may overlap with those determinative of public convenience and necessity. No one factor per se determines reasonableness, but a consideration of all pertinent factors gives guidance to reach an ultimate conclusion. Factors are: whether a proposed area has definite characteristics of a village, *In Re Incorporation of Village of Twin Lakes*, 226 Wis. 505, 277 N.W. 373 (1938); whether the residents of the proposed area for incorporation have taken initial steps toward incorporation and whether a nearby city has initiated preliminary proceedings toward annexation, *Fields v. City of Jackson*, 280 So. 2d 837 (Miss. 1973); *Application of Fernan Lake Village*, 80 Idaho 412, 331 P. 2d 278 (1958); *In Re Town of Waconia*, 248 Iowa 863, 82 N.W. 2d 762 (1957); *Couch v. City of Forth Worth*, 287 S.W. 2d 255 (Texas 1956); whether there has been any financial commitments toward incorporation or annexation proceedings; whether a neighboring city has the prerogative to contest incorporation, although consent of nearby city not required under *Miss. Code Ann.* 21-1-17 (1972); *Contra: Tenn. Code Ann.* 6-1-205 (1985); *Corporation of Collierville v. Fayette County Election Comm'n.*, 539 S.W. 2d 334 (Tenn. 1976); *Town of Godfrey v. City of Alton*, 33 Ill. App. 3d 978, 338 N.E. 2d 890 (1975); whether incorporation effects an existing city within three miles, *City of Jackson & Pearl v. City of Richland Incorporated*, 318 So. 2d 843 (Miss. 1975); *City of Meridian v. Marion*, 255 So. 2d 906 (Miss. 1971); whether population of area shows an increase and continuity of settlement, *Hamilton v. Incorporation of Petal*, 291 So. 2d 190 (Miss. 1974); *Bd. of Supervisors of Norfolk County v. Duke*, 113 Va. 94, 73 S.E. 456 (1912); whether a community has a separate identity, *Hamilton, supra*; whether natural geographical boundaries separate an area from other municipalities; whether transportation is affected; whether incorporation will affect the interest of landowners in the affected area, *Western Line Consol. v. City of Greenville*, 465 So. 2d 1057 (Miss. 1985); whether cost of operating the municipality is prohibitive, *In Re City of Pearl*, 279 So. 2d 590 (Miss. 1973); whether an estimated tax base of proposed area will support incorporation; whether the overall welfare of residents of affected area is improved by incorporation, *City of Meridian v. Town of Marion*, 255 So. 2d 906 (Miss. 1971).⁹¹

⁹⁰487 So. 2d 200-201.

⁹¹*Pascagoula v. Scheffler*, 87 So.2d 196, 201-202 (Miss. 1986).

Effective Date. The decree creating a new municipality becomes effective ten (10) days after it is entered.⁹² However, if there is an appeal within that ten (10) day period, the effective date is stayed until the Supreme Court rules.⁹³

Annexation

Annexation may be accomplished in one of two ways with the most common method being initiation by the municipality.⁹⁴ However, the citizens of the area sought to be annexed may directly petition the chancery court for inclusion into the municipality.⁹⁵

Annexation Ordinance. In annexations initiated by the municipality, the first step in the process is the passage of the ordinance. The territory to be annexed must be contiguous to the municipality.⁹⁶ Obviously, it must not be a part of another city. The ordinance must set out the following:

- (a) a legal description of the territory sought to be annexed;

⁹²*Code*, § 21-1-17.

⁹³See *Code*, § 21-1-21. In both incorporations and annexations there is a potential inconsistency in the appeal procedures. Section 21-1-21 sets out the manner and time (10 days) in which the appeal is to be taken. However, the Mississippi Supreme Court adopted Rule 4 of the Rules of Appellate Procedures which states in pertinent part:

RULE 4. APPEAL AS OF RIGHT – WHEN TAKEN

(a) Appeal and Cross-Appeals in Civil and Criminal Cases. In a civil or criminal case in which an appeal or cross-appeal is permitted by law as of right from a trial court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. If a notice of appeal is mistakenly filed in the Supreme Court, the clerk of the Supreme Court shall note on it the date on which it was received and transmit it to the clerk of the trial court and it shall be deemed filed in the trial court on the date so noted.

At this point there is no reported decision with respect to the inconsistency.

⁹⁴Though the basic concepts related to annexation are relatively simple, the implementation of a successful annexation planning effort requires considerable planning. Attached as Addendum C to this chapter is a checklist of factors which should be considered prior to undertaking a major annexation.

⁹⁵*Code*, § 21-1-27 *et seq.*; *Code*, § 21-1-45.

⁹⁶There is one exception to this rule related to airports.

- (b) a legal description of the city as it will exist if the annexation is granted;
- (c) a description, in general terms, of the proposed improvements to be made in the annexed territory;
- (d) the manner and extent of the proposed improvements;
- (e) the approximate time in which the improvements are to be made; and
- (f) a statement of the public services the municipality proposes to render in the annexation area.

The Petition. After the ordinance is adopted, the municipality must file a petition in the chancery court of the county in which the property sought to be annexed is located. The petition must contain the following:⁹⁷

- (a) a statement of the fact that the ordinance has been adopted;
- (b) a request for the enlargement of the municipality;
- (c) a certified copy of the ordinance of annexation; and
- (d) a map or plat of the municipality as it will exist if the annexation is approved.

Notice. After the petition is filed, notice must be provided in the same time and manner as is required for an incorporation.⁹⁸

⁹⁷*Code*, § 21-1-31.

⁹⁸*Code*, § 21-1-33. See also *Code*, § 21-1-15 [Publication in the newspaper, posting in the annexation area and service of process on municipalities within three (3) miles of the territory to be annexed].

Hearing. At the hearing all persons having an objection may appear and present evidence.⁹⁹ The chancellor is to hear the case based on the issue of reasonableness.¹⁰⁰ If the chancellor finds the annexation reasonable, a decree is to be entered granting the annexation. As in incorporation cases, if the burden of proof is not met, the annexation should be denied. The chancellor has the option of granting the annexation in part. No territory not described in the ordinance may be added by the chancellor. The decree of the chancellor is effective ten (10) days after entry if no appeal is taken.¹⁰¹

Reasonableness. In a series of cases arising since the adoption of the current annexation statutes in 1950 the Mississippi Supreme Court has dealt with the issue of what is a reasonable annexation. The Court recently summarized the factors to be considered as follows:

This Court has stated:

In a series of cases beginning with *Dodd v. City of Jackson*, 238 Miss. 372, 396-97, 118 So. 2d 319, 330 (1960) down through most recently *McElhaney v. City of Horn Lake*, 501 So. 2d 401, 403-04, (Miss. 1987) and *City of Greenville v. Farmers, Inc.*, 513 So.2d 932, 941 (Miss. 1987), we have recognized at least eight indicia of reasonableness. These include (1) the municipality's need for expansion, (2) whether the area sought to be annexed is reasonably within a path of growth of the city, (3) the potential health hazards from sewage and waste disposal in the annexed areas, (4) the municipality's financial ability to make the

⁹⁹Unlike other litigated matter, it is not necessary that written pleadings be filed to allow a party to object. The Mississippi Supreme Court deliberately choose to preserve this right when they adopted the Mississippi Rules of Civil Procedure. That rule states in part:

RULE 81. APPLICABILITY OF RULES

(a) Applicability in General. These rules apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures.

... (11) creation of and change in boundaries of municipalities; ...

¹⁰⁰Section 21-1-33 of the *Code* provides that the chancellor is also to determine the issue of "public convenience and necessity." The Mississippi Supreme Court struck this requirement down in annexation case in 1953 in the case of *Ritchie v. Brookhaven*, 217 Miss. 860, 65 So. 2d 436, *sugg. of error* overruled 217 Miss. 876, 65 So. 2d 832 (1953). The Court held that the issue of "public convenience and necessity" was legislative in nature and not subject to judicial review. It is important to contrast the Court's holding in annexations with incorporations. In the case of annexations, the issue of public convenience and necessity is considered by the municipality's legislative body and a determination is made. In incorporation cases the same is not true. Thus, it would appear that "public convenience and necessity must still be proven in incorporation cases.

¹⁰¹*Code*, § 21-1-33.

improvements and furnish municipal services promised, (5) the need for zoning and overall planning in the area, (6) the need for municipal services in the area sought to be annexed, (7) whether there are natural barriers between the city and the proposed annexation area, and (8) the past performance and time element involved in the city's provision of services to its present residents.

Other judicially recognized indicia of reasonableness include (9) the impact (economic or otherwise) of the annexation upon those who live in or own property in the area proposed for annexation; *Western Line [Consol. v. City of Greenville]*, 465 So. 2d 1057, 1059 (1985); (10) the impact of the annexation upon the voting strength of protected minority groups, *Enlargement of Boundaries of Yazoo City [v. Yazoo City]*, 452 So. 2d 837 at 842-43 (1984); (11) whether the property owners and other inhabitants of the areas sought to be annexed have in the past, and for the foreseeable future unless annexed will, because of their reasonable proximity to the corporate limits of the municipality, enjoy the (economic and social) benefits of proximity to the municipality without paying their fair share of the taxes, *Texas Gas Transmission Corp. v. City of Greenville*, 242 So. 2d 686, 689 (Miss. 1971); *Forbes v. Mayor & Board of Alderman of City of Meridian*, 86 Miss. 243, 38 So. 676 (1905); and (12) any other factors that may suggest reasonableness vel non. *Bassett v. Town of Taylorsville*, 542 So. 2d 918, 921 (Miss. 1989).¹⁰²

The Impact of Annexation on Schools. Prior to 1986 Section 37-7-611 of the Mississippi Code of 1972 provided that in municipalities having a municipal school district, school district boundaries expanded with the limits of the municipality. That section of the code was repealed in 1986. However, questions arose over the preclearance of the matter under the Voting Rights Act of 1965. After one trip to the Mississippi Supreme Court and three to the United States Supreme Court the issue was finally settled when the United States Department of Justice precleared the repeal of 37-7-611. Now municipal annexation has no impact on school district lines.

Appeal. The same rules apply to annexation appeals as to appeals in incorporation cases.¹⁰³

¹⁰²*Extension of Boundaries of City of Ridgeland v. City of Ridgeland*, 651 So. 2d 548, 551 (Miss. 1995).

¹⁰³*Code*, § 21-1-37 and *Code*, § 21-1-21. The Mississippi Supreme Court has recently emphasized the obligation of the municipality to make certain that the record of the proceedings is complete in the court below. In *Norwood v. In Matter of Extension of Boundaries of City of Itta Bena*, 2001 WL 723234, (Miss. 2001) the court permitted parties who had not participated in the trial to appeal on the issue of jurisdiction. In the absence of a record showing proper posting of notice the Court held that the annexation was void.

Post Annexation. If the annexation is successful, a certified copy of the decree must be sent to the secretary of state.¹⁰⁴ A map of plat of the approved boundaries is to be submitted to the chancery clerk for recordation in the official plat book.¹⁰⁵

Citizen Initiated Annexation. Citizens in unincorporated areas¹⁰⁶ may initiate an annexation under the provisions of § 21-1-47 of the *Mississippi Code*. The following requirements must be met:

- (a) the territory sought to be included must be contiguous to the municipality and
- (b) a petition must be filed and signed by two thirds (b) of the qualified electors of the area sought to be included.¹⁰⁷

A petition cannot be filed within two (2) years of the date of an adverse determination of any proceedings for the inclusion of the same territory.¹⁰⁸

Deannexation

The same statute which grants citizens of an adjoining territory the right to initiate an annexation gives citizens of existing cities the right to seek deannexation.¹⁰⁹ The procedures are the same as

¹⁰⁴*Code*, § 21-1-39.

¹⁰⁵*Code*, § 21-1-41.

¹⁰⁶Section 21-1-45 of the *Code* mistakenly utilizes the word “incorporate.” The Mississippi Supreme Court resolved the issue in *In Re Ridgeland*, 494 So. 2d 348 (Miss. 1986).

¹⁰⁷The petition must: accurately describe the territory to be included; set forth the reasons the territory should be included; be sworn to by at least one (1) of the petitioners; and have attached a plat of the municipality as it will exist if the territory is added.

¹⁰⁸*Code*, § 21-1-45.

¹⁰⁹*Code*, § 21-1-45 provides:

The qualified electors of any territory contiguous to and adjoining any existing municipality and the qualified electors of any territory which is a part of an existing municipality, may be included in or excluded from such municipality, as the case may be, in the manner hereinafter provided. Whenever the inhabitants of any incorporated territory adjacent to any municipality shall desire to be included therein, and whenever the inhabitants of any territory which is a part of an existing municipality shall desire to be excluded therefrom, they shall prepare a petition and file same in the chancery court of the county in which such municipality is located, which said petition shall be signed by at least two-thirds of the qualified electors residing in the territory proposed to be included in or excluded from such

for citizen-initiated annexations and are covered by the same statutes. This has been a little used remedy in the state. The Mississippi Supreme Court recently rendered a decision in one of the few deannexation cases to arise since the adoption of the 1950 statutes.¹¹⁰ The Court held that the test of reasonableness is the same for annexations and deannexations – reasonableness.

Combination

Two (2) or more cities may combine by following the procedures set out in § 21-1-43 of the *Code*. The following requirements must be met:

- (a) the municipalities must be adjacent;
- (b) the governing authorities of each city must adopt an ordinance;¹¹¹
- (c) a petition must be filed in the chancery court;¹¹²
- (d) the ordinance must state the name of the new city; and
- (e) the chancellor must find the combination reasonable.

municipality. Said petition shall describe accurately the metes and bounds of the territory proposed to be included in or excluded from such municipality, shall set forth the reasons why the public convenience and necessity would be served by such territory being included in or excluded from such municipality, as the case may be, and shall be sworn to by one or more of the petitioners. In all cases, there shall be attached to such petition a plat of the municipal boundaries as same will exist in the event the territory in question is included in or excluded from such municipality. No territory may be so excluded from a municipality within two years from the time that such territory was incorporated into such municipality, and no territory may be so excluded if it would wholly separate any territory not so excluded from the remainder of the municipality. No petition for the inclusion or exclusion of any territory under this section shall be filed within two years from the date of any adverse determination of any proceedings originated hereinafter under this chapter for the inclusion or exclusion of the same territory.

¹¹⁰See *In re Exclusion of Certain Territory from City of Jackson*, 698 So.2d 490,(Miss. 1997).

¹¹¹The ordinance must meet the same requirements as an ordinance for annexation.

¹¹²The petition must meet the same requirements as a petition for annexation.

The decree of the chancellor shall properly classify the new municipality as a town or city¹¹³.

Post Combination Operation. After the combination, the governing authorities of both cities continue to serve until the next regular election. The mayor of the larger city becomes the mayor of the new city. Tax assessments and levies continue until the next time they would be set by law. The ordinances of the larger city become effective for the new city.¹¹⁴

Abolition

Though a new municipality must have at least 300 persons, existing villages may continue to operated.¹¹⁵ However, if a municipality drops below 50 inhabitants according to the latest U.S. Census, it will be automatically abolished.¹¹⁶ Additionally, a municipality is automatically abolished if it fails to hold official meetings for a period of twelve (12) consecutive months or if it fails to hold municipal elections for two (2) consecutive elections.¹¹⁷

Municipalities of fewer than 1,000 inhabitants may voluntarily abolish the town or village by taking the following steps:

- (a) an ordinance must be adopted setting forth the reasons for dissolution;
- (b) a petition must be filed in the chancery court seeking to abolish the municipality;
- (c) a hearing must be set;
- (d) notice of the hearing must be properly given;¹¹⁸
- (e) a hearing must be held with those opposed being given the right to appear; and
- (f) the chancellor must determine that the abolition is reasonable.

¹¹³A new village cannot be created in this manner because two villages may not combine unless the combined population is at least 500. *Code*, § 21-1-43.

¹¹⁴*Code*, § 21-1-43.

¹¹⁵*Code*, § 21-1-1.

¹¹⁶*Code*, § 21-1-49.

¹¹⁷*Code*, § 21-1-51.

¹¹⁸Notice is given in the same manner as for annexations or incorporations.

ADDENDUM A

Home Rule Does Not Permit:

A fee to insurance companies to reimburse the municipality for its cost of fighting fires

“We do not find authority for a municipality to charge a fee of \$500.00 to an insurance company providing fire insurance coverage to its insured in the event of a fire within the municipality to reimburse the municipality for the costs of fighting the fire.” [Opinion No. 2001-0198; excerpt from page 134.]

Municipal expenditure to “hold” a certain piece of property

“We find no authority for a municipality to expend funds in order to “hold” a certain piece of property for the future benefit of a private, nonprofit organization which does not yet have other funds with which to purchase the property.” [Opinion No. 2001-0113; excerpt from page 224.]

Prohibiting professional engineers from approving individual on-site wastewater systems.

Therefore, a board of supervisors does not have authority pursuant to the home rule statute, Section 19-3-40, to prohibit professional engineers from approving individual on-site wastewater systems. [Opinion No. 2000-0761; excerpt from page 313.]

Cleaning or making repairs on private property

“...we opine that cleaning or making repairs on private property would not be authorized under the county “home rule” statute, and therefore, such action would constitute an unauthorized donation.” [Opinion No. 2000-0735; excerpt from page 337.]

Remediation of health hazards on private property

“You state that Neshoba County has received numerous requests to remove or bury various articles of garbage which were illegally dumped on private property. This potential health hazard is located on private property, and you ask whether there is any authority under “home rule” or state law to remediate or eradicate a potential health hazard.”

“We find no authority for such a request under the County home rule statute. See MS AG Op., Thaxton (October 16, 1997). We find qualified authority to perform remediation of health hazards on private property. This authority is restricted to circumstances and procedures set forth in certain statutes.” [Opinion No. 2000-0732; excerpt from page 350.]

No authority for county to make contribution of funds to municipality

“We find no authority under the county home rule statute authorizing a county to make a contribution of funds to a municipality.” [Opinion No. 2000-0703; excerpt from page 370.]

Creation of independent commissions

“The home rule statute, Miss. Code Ann. Section 21-17-1(Supp. 1999), does not allow governing authorities to create an independent commission because it provides that governing authorities may not change the form or structure of municipal government.” [Opinion No. 2000-0127; excerpt from page 933.]

Providing free food or drinks to anyone

“... we opine that the Columbus-Lowndes Recreational Authority may not provide food and drinks at no charge to anyone.” [Opinion No. 98-0359; excerpt from page 2156.]

Change liquor sales statutes

“The home rule statute, Miss. Code Ann. Section 21-17-5(2)(Supp. 1996) provides that a municipality may not regulate the sale of alcoholic beverages without specific statutory authority. The state legislature has addressed the area of regulation of the sale of alcoholic beverages in Miss. Code Ann. Section 67-1-1 et seq. and has provided that regulation of the manufacture, sale, distribution, possession and transportation of alcoholic beverages falls within the jurisdiction of the State Tax Commission. Local ordinances may not impede this jurisdiction. MS AG Op., Carson (November 27, 1991); MS AG Op., Diaz (October 23, 1991). [Opinion No. 97-0139; excerpt from page 3112.]

Contributions of finances or equipment to church athletic teams

“We find no statute or law of the State of Mississippi that permits a municipality to contribute finances or equipment to an independent church league with participating church teams and with membership limited to church members, and not open to participation by the general public.” [Opinion No. 1999-0391; excerpt from page 1317.]

Enact seat belt standards more stringent than state law

“...we must conclude that the matter of seat belt usage has been addressed by state law and the city is therefore preempted from enacting more stringent regulations through local ordinances on the same topic.” [Opinion No. 98-0335; excerpt from page 2180.]

Adopt landscaping ordinance for developed property

“We are of the opinion that a municipality does not have authority under home rule or other statutes to adopt a landscaping ordinance which sets forth requirements for landscaping for previously developed property in commercial and industrial zones.” [1997 WL 693831; excerpt from page 2667.]

Home Rule Permits:¹¹⁹

Certain credit card use

“Specific statutes and home rule flexibility give municipal and county governments the authority to use credit cards within the bounds of existing purchase laws.” [Opinion No. 2000-0654; excerpt from page 421.]

Contracting for animal control and animal sheltering

“We also call your attention to a former opinion of this office which stated that the county home rule statute authorized a county to contract for animal control and animal sheltering.” MS AG Op., Gamble (August 14, 1995)(citing Miss. Code Ann. Section 19-3-40, county home rule law). [Opinion No. 2000-0581; excerpt from page 490.]

Donated Employee Leave

Subsequent to the enactment of subsection 25-3-95(8) which created the donated leave program for state employees, an opinion was issued authorizing the City of Batesville to adopt a similar policy for their municipal employees. This opinion was based upon such policy “not being inconsistent” with state law under the provisions of “home rule”, Section 21-17-5(1) M.C.A. 1972, as amended. [Opinion No. 2000-0475; excerpt from page 620.]

Ownership and operation of a historical museum

“. . . pursuant to home rule, a municipality “may own and operate a historical museum . . . and may lease the museum property to a non-profit historical society to maintain and operate the museum on behalf of the city with a lease and management agreement.” [Opinion No. 2000-0403; excerpt from page 688.]

To sell advertising on public web sites

“Counties and municipalities, on the other hand, have home rule powers. MCA Sections 19-3-40 and 21-17-5. Pursuant to these statutes it is our opinion that counties and municipalities may sell advertising on their public web sites and may regulate the content, subject and identity of its advertisers to promote the public safety, health or welfare.” [Opinion No. 2000-0278; excerpt from page 788.]

¹¹⁹The danger of relying on Attorney General’s opinions without seeking a written opinion cannot be overemphasised when taking an affirmative action. Likewise great care must be used to review in detail the specifics of each opinion.

To Impose Impact Fees

As you note, the Home Rule statutes, Section 21-17-5 of the *Mississippi Code* allows municipalities broad regulatory authority over municipal affairs and finances but specifically does not authorize a municipality “to levy taxes of any kind or increase the levy of any authorized tax.” As we have opined before, this same prohibition in the county Home Rule statute (19-3-40) prohibits a county from levying a tax but does not prohibit it from imposing a fee. An assessment which will be used to benefit only the assessed property is not a tax and may be allowed under the Home Rule statute. However, such fees must benefit the assessed property and cannot be used for general public purposes. See MS AG Op., Caldwell (August 9, 1996) and the cases cited therein. [Opinion No. 2000-0148; excerpt from page 897.]

Advertise the fact that a particular business has donated a vehicle by placing the name of the donating business on the vehicle

“. . . this office is of the opinion that pursuant to home rule a municipality may advertise the fact that a particular business or other organization has donated a vehicle to the municipal police department by placing the name of the donating entity upon the vehicle.” [Opinion No. 1999-0401; excerpt from page 1384.]

Enter contract for analysis of utility bills on a contingent fee basis

“We are of the opinion that a municipality may contract with a firm to analyze the city’s utility bills for improper charges and to compensate the contractor by a contingent fee based upon refunds or rebates actually received by the city pursuant to Section 21-17-1(Supp. 1998) so long as the contract complies with the requirements of the section and any additional rules and regulations established by the Mississippi Department of Audit.” [Opinion No. 1999-0137.]

Hire a police Chaplain

“. . . we are of the opinion that the governing authorities of a code charter municipality may hire an individual to serve as a police chaplain and perform specific duties, such as supporting the police department, providing ministry and counsel to criminal defendants in municipal court, and providing assistance to officers in notifying next of kin when motor vehicle accidents result in death.” [Opinion No. 99-0098; excerpt from page 1673.]

Require employee reimbursement of education expense

“We have previously opined that a municipality may, under the home rule statute for municipalities which is similar to the home rule statute for counties, implement a policy which provides for an employee receiving education at the expense of the municipality to complete a reasonable period of employment thereafter, with the municipality to be reimbursed if the required term of employment is not completed. See MS AG Op., Skinner (September 5, 1997), copy of which is enclosed.” [Opinion No. 98-0667; excerpt from page 1866.]

Enter a contract to develop a computer program and sell rights to the program

“Therefore, it is our opinion that Harrison County may enter into a contract with a computer company to develop a computer program, and the county may sell its rights to such program pursuant to Section 19-7-5 or Section 31-7-13(m)(iv) of the Code. Please also note however that, in our opinion, a county cannot develop computer programs solely for the purpose of sale for profit. [1998 WL 56464; excerpt from page 2523.]

ADDENDUM B

Legislative Sovereign Immunity in Mississippi

YEAR	STATUTE	DESCRIPTION	EXPOSURE LIMITATIONS
1984	Ch. 495, Laws 1984 (S.B. 2441)	Original law, providing sovereign immunity to State and political subdivisions, with waiver under certain circumstances; new law applicable only to claims against the State accruing after 7/1/85 and against political subdivisions accruing after 10/1/85	No exposure beyond \$500,000
1985	Ch. 474, Laws 1985 (H.B. 983)	Reenacted 1984 Act and postponed effective date of law to 7/1/86 and 10/1/86, respectively	No exposure beyond \$500,000
1986	Ch. 438, Laws 1986 (S.B. 2166)	Reenacted 1985 Act and postponed effective date of law to 7/1/87 and 10/1/87, respectively	No exposure beyond \$500,000
1987	Ch. 483, Laws 1987 (S.B. 2454)	Reenacted 1986 Act and postponed effective date of law to 7/1/88 and 10/1/88, respectively; repealed § 4 of 1984 Act, as reenacted and amended in 1985 and as amended in 1986 (removing language later found to be unconstitutional); added § 6, which brought language back	For cause of action accruing between 7/1/88 and 7/1/89, not beyond \$25,000; 7/1/89 and 7/1/90, not beyond \$200,000; after 7/1/90, not beyond \$500,000
1988	Ch. 442, Laws 1988 (H.B. 937)	Reenacted 1987 Act and postponed effective date of law to 7/1/89 and 10/1/89, respectively	7/1/89-7/1/90 \$25,000 7/1/90-7/1/91 \$200,000 after 7/1/91 \$500,000
1989	Ch. 537, Laws 1989 (H.B. 339)	Reenacted 1988 Act and postponed effective date of law to 7/1/90 and 10/1/90, respectively	7/1/90 - 7/1/91 \$25,000 7/1/91-7/1/92 \$200,000 after 7/1/92 \$500,000
1990	Ch. 518, Laws 1990 (H.B. 945)	Reenacted 1989 Act and postponed effective date of law to 7/1/91 and 10/1/91, respectively	7/1/91-7/1/92 \$25,000 7/1/92-7/1/93 \$200,000 after 7/1/93 \$500,000
1991	Ch. 618, Laws 1991 (S.B. 3242)	Reenacted 1990 Act and postponed effective date of law to 7/1/92 and 10/1/92, respectively	7/1/92-7/1/93 \$25,000 7/1/93-7/1/94 \$200,000 after 7/1/94 \$500,000
Source: <i>Stokes v. Kemper County Bd of Sup'rs</i> , 691 So. 2d 391 (Miss. 1997)			

ADDENDUM C

I. Overview of Annexation

A. Why Annex

1. Inadequate Land Resources
2. Control Peripheral
 - a. Sub-standard Development
 - b. Incompatible Land Use
 - c. Traffic Arteries
3. Expansion of Tax Base
4. Need for Municipal Services

B. Overview of Legal Process

1. Two Ways City Boundary Can Be Expanded
 - a. City Initiated Annexation
 - b. Citizen Initiated Inclusion
2. Deannexation
3. Incorporation
4. “Reasonableness” Is the Common Thread

C. What Is Reasonable?

1. *Dodd* “Criteria”
 - a. *Dodd v. City of Jackson*, 238 Miss. 372, 118 So. 2d 319 (1960)
2. *Horn Lake* “Criteria”
 - a. *Horn Lake v. Renfro*, 365 So. 2d 623 (Miss. 1978)
3. *Greenville* “Criteria”
 - a. *Western Line v. City of Greenville*, 465 So. 2d 1057 (Miss. 1985)
4. *Taylorville* “Indica”
 - a. *Bassett v. Taylorville*, 542 So. 2d 918 (Miss. 1989)

II. Pre-Annexation Planning

A. Annexation Study

1. Formal Written Report
2. Informal Report
3. Type of Annexation
 - a. Incremental
 - b. Phased
 - c. Comprehensive

B. Planning Team

1. Urban Planners
 - a. In House
 - b. Outside Consultant

2. Attorneys
 - a. City Attorney
 - b. Special Counsel
3. City Staff
4. Engineer
5. Financial Planner

C. Indicia of Reasonableness

1. Municipality's Need for Expansion
2. Path of Growth
3. Potential Health Hazards
4. Municipality's Financial Ability
5. Need for Zoning and Overall Planning
6. Need for Municipal Services
7. Natural Barriers
8. Past Performance
9. Social and Economic Impact
10. Impact on Minority Voting Strength
11. Fair Share
12. Other Factors

D. Need for Expansion

1. Population Changes
 - a. Inside City
 - b. In Surrounding Area
2. Population Projections
3. Land Use Absorption
 - a. Land Use Patterns
 - b. Household Size
 - c. New Construction
 - d. Demolitions
 - e. Vacant Land
 - (1) Developable Land
 - (2) Undevelopable Land
 - (3) Constrained Land
 - f. Transportation Corridors

E. Path of Growth

1. Spillover Growth
 - a. Residential
 - b. Commercial
 - c. Industrial
2. Extension of Public Facilities and Utilities
3. Transportation Corridors
4. Contiguous Nature of Annexation Area

5. Barriers to Paths of Growth
 - a. Natural
 - b. Geopolitical
 - c. Developmental

F. Potential Health Hazards

1. Sewerage Disposal
 - a. Existence of Septic Tanks
 - b. Soil Conditions
 - c. Central Sewer
2. Solid Waste Disposal
 - a. Curbside Collection
 - (1) Frequency of Collection
 - b. Central Collection (Dumpsters)
 - c. No Collections
 - d. Open Dumping
3. Pest Control
 - a. Mosquito Control
 - (1) Spraying
 - (2) Breeding Site Control
 - b. Rat Control

G. Financial Ability

1. Financial Reserves
2. Bonding Capacity
3. Revenue Structure
4. Capital Improvements Plan for Existing City
5. Capital Improvements Plan for Annexation Area
6. Cost of Providing Additional Services in Annexation Area
7. Revenues from Annexation Area

H. Need for Zoning and Overall Planning

1. Planning Capability of City
 - a. Personnel
 - b. Ordinances
 - (1) Zoning
 - (2) Subdivision Regulations
 - (3) Standard Codes
2. Planning Capability of County
 - a. Personnel
 - b. Ordinances
 - (1) Zoning
 - (2) Subdivision Regulations
 - (3) Standard Codes
3. Transportation Planning

4. Utility Planning
- I. Need for Municipal Services
 1. Level of Urbanization in the Annexation Area
 - a. Existing
 - b. Reasonably Anticipated
 2. Level of Existing Services in the Annexation Area
 - a. Services Already Provided by City
 - b. Services Provided by Another Governmental Entity
 - c. Services Provided by Private Entities
 3. Cost of Existing Services in the Annexation Area
 4. Level of Usage of City Services by Annexation Area Residents
 - a. Parks and Recreation
 - b. Public Facilities
 - J. Natural Barriers
 1. Natural
 - a. Rivers, Bays, and Other Bodies of Water
 - b. Flood Plains
 - c. Ridge Lines
 - d. Topography
 2. Geopolitical
 - a. Another Municipality
 - b. County Line
 - c. Water, Sewer, Garbage Collection, or Fire District Boundaries
 - d. Certificated Area
 3. Man Made
 - a. Limited Access Highways
 - b. Existing Development
 - K. Past Performance
 1. Time Frame for Providing Services to Areas Annexed in the past
 2. Promises Made in Prior Annexations
 3. Excuses for Bad past Performances
 - a. Natural Disasters
 - (1) Hurricane
 - (2) Floods
 - b. Funding
 - c. Changes of Conditions
 - d. War or Military Preparedness
 - L. Diminution of Minority Voting Strength
 1. The Annexation Should Not Illegally Diminish the Voting Strength of a Protected Minority under Section Five of the Voting Rights Act of 1965

- a. Applies to the Existing Population of the City and the Annexation Area and the Projected Population as a Result of the Annexation of Uninhabited Areas
- M. The Impact on Those Who Live or Own Property in the Annexation Area
- 1. Economic Impact
 - a. Tax Increases
 - b. Utility Rate Reduction or Increase
 - c. Reduction in Fire Insurance Rates
 - d. Income Tax Deductions for Property Tax
 - e. Increased or Decreased Value of Land
 - 2. Social Impact
 - a. Impact of Increased Regulations
 - (1) Positive or Negative
 - (2) Restrictions on Personal Freedoms (i.e. Animal Control Ordinance)
 - 3. Enhanced Governmental Services and Facilities
 - 4. Any Other Impact
- N. Fair Share
- 1. Whether the Property Owners and Other Inhabitants of the Annexation Area Enjoy the Benefits of Proximity to the City Without Paying Their Fair Share in Taxes
 - a. Community of Interest
 - b. Dependence on the City for Social and Economic Opportunities
 - c. Benefit from Reduced Fire Insurance Rates Because of Proximity to City
 - d. Utilization of the City's Public Facilities
- O. Other Factors
- 1. "Central City Blues"
 - 2. Anything Else That Impacts "Reasonableness"
- P. Open Meetings Act
- 1. Annexation Is "Litigation" Which May Be Discussed in Executive Session on Properly Closing of Meeting
- Q. Public Hearings
- 1. A Municipality Is Not Required to Hold a Public Hearing or Give Notice of its Intent to Annex. *Jackson v. Flowood*, 331 So. 2d 909 (Miss. 1976)
 - 2. Gulfport Decision
- R. Water and Sewer Systems
- 1. Certificates of Public Convenience and Necessity
 - 2. Value of System
 - a. Facilities
 - b. Certificate of Public Convenience and Necessity
 - 3. Farmers Home Indebted System
 - 4. Fire Protection vs. Domestic Service

5. Other Municipalities
 - a. One Mile Corridor
 - b. Five Mile Corridor
6. Municipal Utility Commissions

S. Review and Revision

1. Fine Tuning
 - a. Financial
 - b. Program of Services and Facilities
 - c. Identity of Opposition
 - d. Discovery
2. Adoption of Five-Year Plan
 - a. Plan of Services
 - b. Plan for Capital Improvements

T. Impact of Schools

1. *Code*, § 37-7-611
2. Repeal of *Code*, § 37-7-611 (July 1, 1987)
3. *Code*, § 21-1-59
4. *Greenville Municipal School District v. Western Line Consolidated School District*
5. Dupree I
6. Dupree II

III. Legal Requirements

A. Sources of Annexation Law

1. Section 88 of the *Mississippi Constitution*
2. Title 21 Chapter 1 of the *Code*
3. Mississippi Supreme Court Cases
4. Mississippi Rules of Civil Procedure
5. *United States Code*
6. Federal Court Cases
7. Section Five of the Voting Rights Act of 1965

B. The Legal Process

1. Adoption of the Ordinance
2. Petition Filed in the Chancery Court
3. Publication of Notice
4. Summons on Surrounding Cities
5. Application for a Hearing Date
6. Hearing
7. Decision
8. Appeal

C. The Ordinance – Legal Requirements

1. Legal Description of the Area to Be Annexed
2. Legal Description of the City as Enlarged
3. Describe the Improvements to be Made
 - a. The Manner and Extent of Improvements
 - b. The Approximate Time in which the Improvements Are to be Made
4. A Statement of the Services to Be Rendered

D. The Petition – Legal Requirements

1. Recite the Fact of Adoption of the Ordinance
2. Ask for Enlargement of the City
3. Have Attached a Certified Copy of the Ordinance
4. Have Attached a Map or Plat of the Boundaries as They Will Exist in the Event the Annexation Is Approved

E. Parties

1. “. . . All Parties, Interest In, Affected By, or Being Aggrieved By . . .”
 - a. Individuals
 - b. Industry
2. Municipalities Within Three Miles of Any of the Territory Annexed
3. Counties
4. School Board

F. Process

1. Publication
 - a. Number of Times
 - b. Where Published
 - c. When Published
2. Posting
 - a. How Many Postings
 - b. Where Posted
 - (1) Public Place
 - (2) What If There Is No Public Place
3. Summons

IV. Trial Preparation

A. Discovery

1. Interrogatories
2. Request for Admissions
3. Request for Production of Documents
4. Depositions

B. Exhibit Preparation

1. Maps

2. Charts
3. Photos
4. Documents
5. Tables

C. Potential Settlement

1. Objectors Identified
2. Deletion of Portions of Annexation Area
 - a. Sperry Rand Decision
 - b. Examples
 - (1) Gulfport
 - (a) Mississippi Power – Tax Exemptions
 - (b) North Gulfport – Enhanced Plan
 - (c) HCDC Agreements
 - (2) Southaven
 - (a) Utility Agreements – Horn Lake Water Association

D. Witnesses

1. Identification
2. Selection
3. Preparation

V. Trial

A. Procedure

1. Statutory
2. Rule 81, Mississippi Rules of Civil Procedure
 - a. Written Pleadings Not Required
 - b. Appeal Bond of \$500 Stays Proceedings
3. Appeal Time
 - a. Statute – Ten (10) Days after Decree Entered
 - b. Mississippi Supreme Court – Rules 30 Days after Decree Entered

B. Burden of Proof

1. The Burden of Proving the Annexation Is Reasonable Is on the City

C. Path of Growth

1. Spillover Growth
 - a. Residential
 - b. Commercial
 - c. Industrial
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 - b. Dependence on the City for Social and Economic Opportunities
 - c. Benefit from Reduced Fire Insurance Rates Because of Proximity to City
 - d. Utilization of the City's Public Facilities

M. Witnesses

1. Mayor
2. Department Heads
 - a. Chief Financial Officer
 - b. Police Chief
 - c. Fire Chief
 - d. City Engineer
 - e. Public Works Directors
3. Urban Planner
4. Financial Consultant
5. Mississippi Rating Bureau Representative
6. Public Health Officer
7. Insurance Agents
8. Private Citizens

N. Options of the Court

1. Approve the Annexation in Full
2. Approve a Part of the Annexation and Delete Portions of the Territory
3. Deny the Annexation in Full
4. The Chancery Court Cannot Increase the Size of the Annexation

VI. Post Trial

A. Effective Date

1. An Annexation Is Effective
 - a. Ten (10) Days after the Date of the Chancellor's Decree If There Is No Appeal
 - b. Ten (10) Days after the Date of the Final Determination by the Supreme Court If There Is an Appeal
2. Note the Conflict Caused by the Change in the Time for Appeal

B. Appeal

1. The Record
2. Briefing
 - a. Appellant's Brief
 - b. Appellee's Brief
 - c. Reply Brief
3. Motion for Expedited Appeal
4. Oral Argument

C. Tax Liability

1. Subjecting Newly Annexed Citizens to Taxation for Debt of the Existing City Is Not Unconstitutional. *Bridges v. Biloxi*, 253 Miss. 812, 178 So. 683, 180 So. 2d 154, 180 So. 2d 641, App. Dism'd 383 US 574, 16 L.Ed. 2d 106, 86 S. Ct. 1077 (1965)
2. Annexations Completed by June 20 Are Taxed for the Entire Year

D. Post Trial Notifications

1. Secretary of State
2. Chancery Clerk
3. United States Census Bureau
4. State Rating Bureau
5. State Tax Commission

E. Preclearance

1. Annexation
2. Wards
3. Other Affected District