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JURISDICTIONAL STATEMENT

Respondent Jefferson County, Missouri concurs with Appellants' jurisdictional statement in this matter.

STATEMENT OF FACTS

Respondent elects to supplement Appellants' Statement of Facts. Respondent generally agrees with the statement presented by Appellant, however, some addition and clarification is necessary in order to avoid confusion.

Testimony of Dan Barczykowski

Dan Barczykowski testified that he had prior experience in determining and diagnosing causes for pavement failure. Tr. 252, 253. His first involvement on this project was in 2002. Tr. 253. Barczykowski's first act was to perform a condition survey of the subdivision streets which involved walking the streets throughout the subdivision, identifying areas of pavement distress, performing coring in 25 areas of the streets, taking samples of the subgrade and performing tests on the corings and subgrade samples. Tr. 254. Barczykowski attributes the vast majority of the concrete failures in the subdivision to poor subgrade support. Tr. 270. Barczykowski explained that there are four variables involved into the design of a pavement system; 1) design life; 2) type and volume of traffic over the design life period; 3) the quality of the materials being used (in this case, the concrete); and 4) the condition of the soil, soil support. Tr. 260, 261. Barczykowski evaluated those areas where he saw pavement distress where the streets were cracking and failing "in a matter of just a few short years after they were placed". Tr. 261. Barczykowski eventually identified 305 slabs

warranting replacement.¹ Tr. 266. Barczykowski then ruled out design life, type and volume of traffic and the materials used, including thinness of the concrete², as causes of the street failures he observed in the subdivision. Tr. 261. That left subgrade as the cause of the failures. Tr. 262.

In support of his opinion that subgrade was the primary cause, Barczykowski noted that the failing slabs exhibited a random pattern of cracking. Tr. 262. Barczykowski also noted that the types of failures he observed were displaced cracks and concrete depressed towards the cracks. Tr. 262. Barczykowski observed concrete slabs in the subdivision that were cracked but that he did not consider to be failing. Tr. 264, 265. Barczykowski defined failing slabs as slabs with cracks that have vertical separation or differentials at the cracks and slabs that have multiple cracks. Tr. 274. Barczykowski testified that residential streets have a general design life of 20 – 30

¹ Barczykowski actually testified that there were 320 failed slabs. However, County Exhibit C, [Barczykowski's determination of the total number of failed slabs] lists the same particular location with five failed slabs at the top of the list on each of the four pages of the exhibit. County concedes that this overstates the total number of failed slabs by 15.

² Barczykowski's conclusion, as first stated in 2003, that thinness was not a cause of the failures was subsequently supported by the coring results taken in 2005, where out of the 305 failed slabs identified by Barczykowski, only seven were determined to be thin.

years. Tr. 265. He further testified that the type of cracking and street conditions he observed in the subdivision was not consistent with streets that have a design life of 20 – 30 years. Tr. 269. Barczykowski testified that he viewed the streets again in 2004, and noted that slabs which were failing in his earlier observations were in “much worse condition . . .the severity of some of the cracks had become worse.” Tr. 271.

Barczykowski testified that he could not conclude that the fill and subgrade was properly compacted before the streets were poured based on the test results from Brucker Engineering because the test results did not indicate at what depth the tests were performed. Tr. 286. Barczykowski could not tell if the fill dirt in the development was properly compacted because the test results do not indicate a depth, so the test could be from the first lift of fill, the fourteenth lift or at the subgrade level. Tr. 344.

Testimony of William Koehrer

William Koehrer testified that he was involved in the discussions regarding coring the streets using St. Louis County standards. Tr. 378. He testified that to his knowledge, the St. Louis County standards were not followed in the 2000 corings. Tr. 378. Koehrer testified that he performed a visual inspection to determine the condition of the subdivision streets just prior to June 7, 2001. Tr. 374, 375. His inspection found faulting in areas of the subdivision streets. Tr. 375. He defined faulting as vertical displacement, where one side of the concrete is higher than the other. Tr. 375; 405. Koehrer testified that it was his department’s practice to have defective slabs replaced before his department would “okay the release” of the bonds. Tr. 398.

POINTS RELIED ON

RESPONDENT’S RESPONSE TO APPELLANTS’ POINT RELIED ON I:

I. THE TRIAL COURT HAD SUBSTANTIAL EVIDENCE TO SUPPORT ITS FINDING THAT ESSEX FAILED TO MEET ITS BURDEN OF PROOF THAT THE ROAD IMPROVEMENTS WERE CONSTRUCTED IN ACCORDANCE WITH THE GUARANTEE AGREEMENT, IMPROVEMENT PLANS AND IN A MANNER SATISFACTORY TO THE COUNTY

Murphy v. Carron, 536 S.W.2d 30 (Mo.banc 1976)

Ryan v. Maddox, 112 S.W.3d 476 (Mo.App. W.D. 2003)

Anchor Centre Partners, Ltd. v. Mercantile Bank,

803 S.W.2d 23 (Mo.banc 1991)

Midwest Bankcentre v. Old Republic Title Co. of St. Louis, 247 S.W.3d 116

(Mo.App. E.D. 2008).

RESPONDENT’S RESPONSE TO APPELLANTS’ POINT RELIED ON VI:

VI. THE TRIAL COURT PROPERLY ORDERED THAT THE BONDS SHALL BE USED TO PAY FOR COMPLETION OF THE ROAD IMPROVEMENTS ACCORDING TO THE STANDARDS OF THE SUBDIVISION REGULATIONS AND IN A MANNER SATISFACTORY TO THE COUNTY.

TWA v. Associated Aviation Underwriters, Inc.,

58 S.W.3d 609 (Mo.App. E.D. 2001)

City of Independence for Use of Briggs v. Kerr Const. Paving Co., Inc.,

957 S.W.2d 315 (Mo.App.W.D. 1997)

J.E. Hathman v. Sigma Alpha Epsilon Club,

491 S.W.2d 261, 264 (Mo.banc 1973)

R.S.Mo. §64.825 (2000)

ARGUMENT

RESPONDENT’S RESPONSE TO APPELLANTS’ POINT RELIED ON I:

I. THE TRIAL COURT HAD SUBSTANTIAL EVIDENCE TO SUPPORT ITS FINDING THAT ESSEX FAILED TO MEET ITS BURDEN OF PROOF THAT THE ROAD IMPROVEMENTS WERE CONSTRUCTED IN ACCORDANCE WITH THE GUARANTEE AGREEMENT, IMPROVEMENT PLANS AND IN A MANNER SATISFACTORY TO THE COUNTY

This case was tried without a jury. The judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30 (Mo.banc 1976). The evidence and all reasonable inferences therefrom are to be viewed in the light most favorable to the prevailing party. *Ryan v. Maddox*, 112 S.W.3d 476, 480-481 (Mo.App. W.D. 2003), citing *Erdman v. Condaire, Inc.*, 97 S.W.3d 85, 88 (Mo.App. E.D. 2002).

Essex began this litigation by filing a petition for declaratory judgment. The primary allegation in the petition is that “[Essex] has fully completed certain improvements and developments of Phase I, II and III of Winter Valley in compliance with the Subdivision Restrictions of Jefferson County, Missouri.” L.F. 2, p. 4. That affirmative assertion as contained in the pleadings established the burden of proof for Essex throughout the trial; a burden that never shifts. *Anchor Centre Partners, Ltd. v. Mercantile Bank*, 803 S.W.2d 23, 30 (Mo.banc 1991). If the party asserting the

affirmative of the issue doesn't meet that burden of proof upon the whole case, then the issue fails. *Downs v. Horton*, 230 S.W. 103, 108 (Mo. 1921).

Winter Valley subdivision contained roads that were to be built at two different thicknesses; some at seven inches thick, others at six inches thick. Jefferson County Subdivision Regulations, Essex Tr. Ex. 4, appendix A, Right of Way and Road Requirements; Appellants' Substitute Appendix, p. A82-85. This was also stated in the improvement plans. Tr. 42, 96, 379. Roads built thinner than those standards in the improvement plans, were also built thinner than the standards in the Subdivision Regulations because the improvement plans contained those same standards. Tr. 379, 380, 387, 388.

The language of the Bonds (Essex Tr. Exs. 1, 2 & 3) states that the bonds are to "secure to said County the actual construction of such improvements and utilities *in a manner satisfactory to said County* . . . (emphasis added). Appellants' Substitute Appendix, p. A49-65. The Guarantee Agreement (County Tr. Ex. C) states that the bonds:

"were issued to guarantee the construction, installation and completion of the required subdivision improvements in Winter Valley Subdivision Plats I, II, III and IV, Subdivision (*sic*), *all in accordance with the Subdivision Regulations of Jefferson County*. (emphasis added.) Appellants' Substitute Appendix, p. A65-66.

While Essex claims that it has completed the improvements under the language of the Subdivision Regulations and Improvement plans, no evidence was adduced at trial establishing the completion of the subdivision streets within the standards of the plans and the Subdivision Regulations, and in a manner satisfactory to the County. The results (County Ex. B) of a full coring performed in 2005, pursuant to Appendix E of the Jefferson County Subdivision Regulations (Essex. Ex. 4) showed that 218 slabs were more than .3 inches thin from the thickness required in the Subdivision Regulations.³ Appellants' Substitute Appendix, p. 82-85. As such, "it was not the concrete foundation called for by the legislative body of the city, and that prescribed in the contract." *Traders Bank v. Payne*, 31 Mo.App. 512 (K.C.Ct.App. 1888) (Court found roads not "substantially completed" under terms of contract when poured more than 2 inches thin).⁴ Essex's own witness, Brian Oliver, testified that areas of the road that do not meet the thickness standard, did not meet the standards as stated on the plans. Tr. 161. William Koehrer, Director of Public Works for Jefferson County

³ The trial court found that street slabs constructed to a deviation of .3 inches or more from the required thickness were not in "substantial compliance" with the subdivision regulations.

⁴ County notes that a few slabs were determined to be more than 2 inches thin in the Winter Valley subdivision. However, more than one-half of the thin slabs located in the streets poured by Boling would be required to be replaced under the formula in Appendix E of the Subdivision Regulations.

stated that if the roads were built thinner than the thickness standards of the Subdivision Regulations, that such roads did not meet those standards. Tr. 379, 380. Numerous exhibits were introduced reflecting written notifications to Essex from the County, prior to the filing of the lawsuit, indicating that the road improvements, among other things, had not been constructed to the County's satisfaction. Essex Tr. Exs. 20, 25, 27; Intervenor's Tr. Exs. 8, 10, 12.

In its brief, Essex claims that thin concrete does not mean the roads were not completed. Essex asserts 4 reasons (as discussed on pages 43-45 of Appellants' Substitute Brief) in support of that claim:

1. *"All of the streets that were to be constructed, were constructed."*

Using this standard, if the roads that were to be seven inches thick had all been constructed to a thickness of three inches, but all were constructed, according to Essex, the obligations under the Subdivision Regulations and the improvement plans would have been met. If that were the case, then thickness standards would not even be necessary. Second, and more telling, was that Essex's own witness, Brian Oliver, admitted that streets not constructed to the proper thickness were not built to the standards of the improvement plans, and therefore, the Subdivision Regulations, as they both contained the same standards for street thickness. Tr. 161.

2. *"The thickness of the streets has in no way hindered anyone who, for the last nine to 12 years, was entitled to use the streets, from using the streets in the manner and for the purpose intended."*

The fact that the residents have been able to use the streets does not change the fact that the County establishes thickness standards to ensure that roads will hold up over a period of time. Dan Barczykowski testified on more than one occasion that thickness of the concrete affects the life of the street. Tr. 265, 274. The County establishes certain standards for the protection of its residents, and in the case of street standards, there is an economic protection factor as the subdivision residents, and not the County, are responsible for the maintenance of the streets. Tr. 383, 384. Barczykowski testified that “residential pavements are typically designed for 20 – 30 years”. Tr. 265. Essex failed to construct the streets to the standards established by the County and by the standards contained in their own improvement plans, which will have a negative impact on the life of the streets. Use of the roads over the past nine to 12 years does not change the impact on the design life and future costs of repair and maintenance due to thinness of the concrete.

3. *“Thickness of the streets is not related to the issue of cracking or displacement of the streets.”*

Summarizing this point, Essex claims that the displaced slabs were not caused by a lack of thickness in the concrete, and therefore, Essex is not liable for repairs and maintenance where thickness is not the cause of the problem. This argument as phrased by Essex makes no sense unless they are admitting that they do have a

responsibility for maintenance and repair issues due to thinness of the concrete. Such an argument supports the trial court's conclusion that Essex is liable for the thin slabs.⁵

4. *“Variations in street thickness is a common problem for which the County provides a remedy, which was enforced by the Court.”*

In support of this point, Essex makes a most amusing assertion; “Variations in thickness are not a failure to properly construct the street, but are rather an anticipated occurrence for which the County has provided a remedy”. Remedy, as defined by Black's Law Dictionary, is “The means of enforcing a right or preventing or *redressing a wrong.*” *Black's Law Dictionary*, 1296 (7th Ed., 1999) (emphasis added.) There is no need to redress a wrong if you did it right. Essex, Berra and Boling did not do it right when constructing the streets in the Winter Valley subdivision.

It is ironic that Appellants begin the discussion of their Point Relied on I with the bold caption “The Big Picture”. Appellants' Substitute Brief, p. 27. It is Appellants who have disregarded and missed the big picture in this case. As stated above, the purpose of the Jefferson County Subdivision Regulations is to protect the public health and welfare, and in this specific instance, the subdivision residents who are ultimately responsible for the maintenance of the streets. This is reflected in the

⁵ The trial court did then pass through those costs for the thin slabs to the subcontractors who actually constructed the streets. If there was no liability on the part of Essex, then there would be no pass through of that liability to the subcontractors.

actual language of the bonds, which each state, in part, that the bonds “shall be construed to cover the interest of....and shall be available for the protection of...any resident of Jefferson County.” Essex Tr. Exs. 1,2 and 3; Appellants’ Substitute Appendix, p. A49-65. Essex pursuant to the bonds, and the Subdivision Regulations was required, before release of the bonds could be accomplished, to construct, install and complete streets according to the County’s standards and to the County’s satisfaction. Until the County deemed the streets to be properly constructed, the streets were not completed. Tr. 373-374, 396-398. This does not amount to a warranty, as Essex suggests, but rather a guarantee that the roads were properly constructed before the County would deem them completed.

While Appellants believe this approach to be absurd, Jefferson County simply performed the duty it owed to the residents of Winter Valley by ensuring that prior to releasing Essex of its obligations, the subdivision roads were not in such a condition that the degree and extent of deterioration was abnormal and excessive. Tr. 427. The trial court correctly recognized the big picture, finding that the premature failures of the streets should not fall to the homeowners until Essex had been released of its obligations. Judgment of the Trial Court, p. 23; L.F. 29, p. 23; Appellants’ Substitute Appendix, p. A23. The trial court further concluded, based on the testimony of the County’s officials, William Koehrer and Fred Dishner, that failure of the streets to achieve the intended design thickness was a violation of the Subdivision Regulations and Approved Plans. Judgment of the Trial Court, p. 11; L.F. 29, p. 11; Appellants’ Substitute Appendix, p. A11. Finally, the trial court concluded that the only credible

evidence as to breach of duties and the premature street failures came from the County's witnesses, Daniel Barczykowski and William Koehrer. Judgment of the Trial Court, p. 25; L.F. 29, p. 25; Appellants' Substitute Appendix, p. A25.

Appellants argue that the credibility of witnesses at trial is not at issue in this case. Respondents wholeheartedly agree. So did the trial court, who clearly found that the only credible evidence before the Court came from the County's witnesses. Because of the trial court's superior ability to assess the credibility of witnesses, this Court defers to any of the trial court's findings of fact. *Midwest Bankcentre v. Old Republic Title Co. of St. Louis*, 247 S.W.3d 116, 122 (Mo.App. E.D. 2008).

Essex provided no evidence that it fully completed the improvements in the Winter Valley subdivision either in a manner satisfactory to the County or in accordance with the Subdivision Regulations. There is no ambiguity as whether the road improvements were "fully completed"; they were not. Essex did not meet its burden of proof that the road improvements were completed. Therefore, Essex's assertion that it "fully completed" the road improvements in the Winter Valley Subdivision fails. The trial court ruled properly in finding against Essex and in favor of the County and the Intervenors.

RESPONDENT'S RESPONSE TO APPELLANTS' POINT RELIED ON II:

II. THE TRIAL COURT DID NOT ERR IN FAILING TO ENTER JUDGMENT IN FAVOR OF ESSEX AND AGAINST BOLING ON ESSEX'S THIRD PARTY CLAIM.

Respondent does not believe that Appellants' Second Point Relied On relates in any way to Respondent's case. However, to the extent this point does relate to Respondent's case or the Court believes a response is appropriate, the judgment of the trial court is supported by competent and substantial evidence and should be affirmed.

RESPONDENT'S RESPONSE TO APPELLANTS' POINT RELIED ON III:

III. THE TRIAL COURT DID NOT ERR IN AWARDING INTERVENORS \$219,277.00 IN ATTORNEY'S FEES FROM ESSEX BECAUSE THE AWARD IN NOT EXCESSIVE, AND THE AWARD SHOULD NOT BE REDUCED.

Respondent does not believe that Appellants' Third Point Relied On relates in any way to Respondent's case. However, to the extent this point does relate to Respondent's case or the Court believes a response is appropriate, the judgment of the trial court is supported by competent and substantial evidence and should be affirmed.

RESPONDENT'S RESPONSE TO APPELLANTS' POINT RELIED ON IV:

IV. THE TRIAL COURT'S JUDGMENT IN AWARDING ESSEX \$7,088.00 IN ATTORNEY'S FEES AGAINST BERRA AND \$17,013.00 IN ATTORNEY'S FEES AGAINST BOLING IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE.

Respondent does not believe that Appellants' Fourth Point Relied On relates in any way to Respondent's case. However, to the extent this point does relate to Respondent's case or the Court believes a response is appropriate, the judgment of the trial court is supported by competent and substantial evidence and should be affirmed.

RESPONDENT'S RESPONSE TO APPELLANTS' POINT RELIED ON V:

V. THE TRIAL COURT DID NOT ERR IN AWARDING INTERVENORS' COSTS IN THE AMOUNT OF \$35,875.00 BECAUSE THE COSTS AWARDED WERE COSTS PAID BY THE TRUSTEES, WHO ARE PARTIES TO THIS ACTION, AND THE COSTS AWARDED WERE FOR REPAIRS OF THE PREMATURELY FAILING STREETS.

Respondent does not believe that Appellants' Fifth Point Relied On relates in any way to Respondent's case. However, to the extent this point does relate to Respondent's case or the Court believes a response is appropriate, the judgment of the trial court is supported by competent and substantial evidence and should be affirmed.

RESPONDENT’S RESPONSE TO APPELLANTS’ POINT RELIED ON VI:

VI. THE TRIAL COURT PROPERLY ORDERED THAT THE BONDS SHALL BE USED TO PAY FOR COMPLETION OF THE ROAD IMPROVEMENTS ACCORDING TO THE STANDARDS OF THE SUBDIVISION REGULATIONS AND IN A MANNER SATISFACTORY TO THE COUNTY.

The obligations of the surety “are measured by those of the principal.” *City of Independence for Use of Briggs v. Kerr Const. Paving Co., Inc.*, 957 S.W.2d 315 (Mo.App. W.D. 1997). As previously cited, the language of the Guarantee Agreement states that Essex guaranteed the completion of the road improvements. County Ex. C; Appellants’ Substitute Appendix, p. A65-66. Essex did not complete the improvements, and the condition of the streets is not acceptable to the County. The Trial Court found that the streets were not in a condition that is normal for a subdivision of that age. Judgment of the Trial Court, p. 23; L.F. 29, p. 23; Appellants’ Substitute Appendix, p. A23.

Appellant goes to great lengths to point out how the trial court determined that Essex was not negligent in the construction of the roads, and that the court improperly ruled the case on the theory of Res Ipsa Loquitor. This would be a fine argument if those were the issues in this case. This is a contract case. Essex signed a contract guaranteeing completion of the improvements within one year of the guarantee agreement, which was dated July 26, 2000. County Tr. Ex. C; Appellants’ Substitute Appendix, p. A65-66. Additionally, the bonds use the language that the streets are to

be constructed in a manner satisfactory to the County. Appellate courts “must enforce” the contract if the language of the contract is unambiguous. TWA v. Associated Aviation Underwriters, Inc., 58 S.W.3d 609 (Mo.App. E.D. 2001)(The court determined that the language of an insurance policy was unambiguous, and therefore, the duty of the court was to enforce the ordinary language of the agreement.) Essex and the County disagree that the roads have been completed. However, an agreement is not rendered ambiguous merely because the parties disagree upon the construction of the language in a contract. J.E. Hathman v. Sigma Alpha Epsilon Club, 491 S.W.2d 261, 264 (Mo.banc 1973). The clear, unambiguous language of the bonds says that the bonds are to ensure the completion of the improvements in a manner satisfactory to the County. Additionally, Section 64.825 RSMo (2000) (this was the same statutory language in effect when the three bonds were provided to the County) states that:

“...the county planning commission may accept bond for the county commission in the amount and with surety and conditions satisfactory to the county commission, providing for and securing to the county commission the actual construction of the improvements . . . and the county commission shall have power to enforce the bond by all proper remedies.”

This has not been done, and therefore, the terms for release of the bonds have not been met, and so the bonds should be made available to the County to complete the road

improvements in Winter Valley in a manner satisfactory to the County. This would include repair and/or replacement of the slabs determined to be failing by Dan Barczykowski, as his definition of a failed slab was never challenged at trial.

Essex makes a great deal about the County being able to “hold” the bonds, which is in violation of the bond language. This appears to be a matter of semantics. Essex, in its Conclusion, requests this court, *inter alia*, to order the bonds released. How can you release something if you are not holding it?⁶ The Trial Court’s Order and Judgment is that “Essex and Federal, jointly and severally, are ordered to pay the entire remainder of the Bonds in the amount of \$1,015,838.00 to the County *pursuant to the terms of the Bonds, the Guarantee Agreement and Subdivision Regulations...*” Judgment of the Trial Court, p. 32; L.F. 29, p. 32; Appellants’ Substitute Appendix, p. A32. County interprets this language as an effort by the Trial Court to ensure that the bond proceeds are available to the County for all expenses incurred for the repairs on the roads without a second line of litigation arising. This, otherwise, would leave the County and/or the Intervenor sitting with a liability for correcting problems of Essex, and not being able to receive their just compensation for the costs of the repairs.

⁶Following the language of Section 64.825 RSMo (2000) above, the County has “accepted” the bonds, and thereby, are holding them.

CONCLUSION

Essex presented no evidence that the streets were completed in accordance with the Subdivision Regulations nor that they were completed in a manner satisfactory to the County to meet the language of the bonds. Essex failed to meet the burden of proof and the trial court properly ruled that Essex was liable for remedies and repairs necessary for the streets to be in proper condition and properly maintained.

The trial court's ruling was based on sound contract principles relying on the language of the Guarantee Agreement and the bonds. The trial court did not error in directing the County to hold the bonds to ensure that the County and Intervenors have sufficient monies to make the necessary repairs as a result of Essex not meeting the terms of its contract. Accordingly, the judgment of the trial court should be upheld and affirmed.

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CERTIFICATE PURSUANT TO
SUPREME COURT RULE 84.06(c)

The undersigned counsel for Respondent hereby certifies that the Substitute Brief of Respondent Jefferson County complies with the limitations contained in Supreme Court Rules 84.06(a) and 84.06(b) and contains all information required by Rule 55.03. Counsel for Respondent further certifies that pursuant to a word search performed using Microsoft Word, Respondent's Substitute Brief contains 4,772 words. Counsel further states that the diskette filed with this Court containing the Substitute Brief of Respondent Jefferson County has been scanned for viruses and is virus free

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CERTIFICATE OF SERVICE

The undersigned counsel of record for Respondent hereby certifies that one copy of the Substitute Brief of Respondent Jefferson County in the form specified by Rule 84.06(a) and one copy of Respondent’s Brief in the form specified by Rule 84.06(g) were mailed to the following counsel on this ____ day of October, 2008:

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APPENDIX TO RESPONDENT’S SUBSTITUTE BRIEF

PAGE

RELEVANT PORTION OF JEFFERSON COUNTY

SUBDIVISION REGULATIONS APPENDIX A

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