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NO. SC88710

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IN THE  
SUPREME COURT OF MISSOURI

BRUCE F. BIRD, P.E.,  
Respondent,

vs.

MISSOURI BOARD FOR ARCHITECTS, PROFESSIONAL ENGINEERS,  
PROFESSIONAL LAND SURVEYORS AND LANDSCAPE ARCHITECTS,  
Appellant.

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APPEAL FROM THE CIRCUIT COURT  
OF COLE COUNTY,  
THE HONORABLE RICHARD G. CALLAHAN,  
JUDGE

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APPELLANT'S SUBSTITUTE BRIEF FILED BY  
RESPONDENT PURSUANT TO RULE 84.05(e)

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## JURISDICTIONAL STATEMENT

This is an appeal by the Missouri Board for Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects from an Order and Judgment entered on December 30, 2005, by the Circuit Court of Cole County, Missouri, after a hearing on September 27, 2005, remanding this administrative action for rehearing and additional findings. The respondent, Bruce F. Bird, had filed a Petition for Judicial Review of the Board's Findings of Fact, Conclusions of Law and Order, entered on November 22, 2004, suspending Bird's engineering license for three years. On June 19, 2007, the Court of Appeals dismissed the appeal on the grounds that the trial court lacked jurisdiction over the action because respondent's Petition for Judicial Review did not properly raise his claims.

This appeal does not involve a challenge to the validity of a treaty or statute of the United States or provision of the Constitution of this state, nor does it otherwise fall within the exclusive jurisdiction of the Supreme Court of Missouri, and, therefore, jurisdiction of this appeal was vested in the Missouri Court of Appeals. Mo. Const. Art. V, §3. As this cause was heard and Judgment was entered in Cole County, jurisdiction was vested in the Missouri Court of Appeals, Western District. R.S.Mo. § 477.070.

## STATEMENT OF FACTS

Bruce Bird is a professional engineer, holding license no. 012144, issued by the Missouri Board for Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects (“Board”) which was current, active and in good standing when a complaint against him was filed on May 2, 2003. (Record of Agency Proceeding for Judicial Review, Vol. I [“R.I”], pp. 3-4, Petitioner’s Exh. 1). The complaint sought to discipline Bird, alleging the unlicensed practice of architecture, the signing and sealing of documents not prepared by, or not prepared under the supervision of, Bruce Bird, as well as incompetency, misconduct, gross negligence, fraud and misrepresentation. (R.I, pp. 3, 10-13).

The Administrative Hearing Commission (“Commission”) held a hearing on April 22, 2004. (Record of Agency Proceeding for Judicial Review, Vol.II [“R.II”], p. 246). The Commission denied Bird’s attorney’s request that the Board’s expert, Homer Williams, be sequestered. (R.II, p. 252, 257).

Bruce Bird testified that he had been a licensed engineer for forty years. (Record of Agency Proceeding for Judicial Review, Vol.III [“R.III”], p. 437). In addition to his Missouri engineering license, he held a civil engineering license in Kansas, as well as a land surveyor license in Missouri.

(R.III., pp. 436-37). Bird was not a licensed architect at times relevant herein. (R.I, p. 4). Prior to this action, no disciplinary proceedings had been brought against him by the Board. (R.II, p. 268).

In April of 2001, Gregory Andachter, a builder and developer employed by Landmark Builders of Blue Springs, Inc. (“Landmark”), hired Allan McInnis, of McInnis & Rundquist Architects, d/b/a Allan G. McInnis & Associates, to design a commercial building in Independence, Missouri. (R.I, p. 9; R.III, pp. 413-15). The plans would require the approval of the Independence Planning Commission. (R.III, p. 415). Andachter and McInnis entered into a written contract, dated April 4, 2001, which provided that McInnis would prepare plans that would comply with Independence city codes for a fee of \$15,906.00. (R.II, p. 272; R.III, p. 417; Petitioner’s Exh. 2). Andachter selected McInnis because McInnis was a member of the Independence Planning Commission, a factor which Andachter believed would make it easier to get city approval. (R.III, p. 415). McInnis had previously submitted plans to the City of Independence. (R.II, pp. 285-86).

Andachter initially intended that the building have a hip roof, but McInnis convinced him that a flat roof would save money and would satisfy the planning commission. (R.III, pp. 416-17). McInnis also convinced Andachter to eliminate the building’s basement, explaining that by reducing

the square footage included in the basement, Landmark could avoid the cost of a sprinkler system. (R.III, p. 418).

McInnis prepared a set of drawings labeled “Final Site Plan and Grading Plan Lot 1, Cardinal Woods Commercial,” which included site plan drawings labeled SP-1, SP-2, landscape drawings labeled L-1, architectural drawings, labeled A-1 through A-4, and structural drawings, labeled S-1 and S-2. (R.I, p. 9; R.II, pp. 274, 406-07, 481, Petitioner’s Exh. 3). Charles Pike, employed by McInnis, drafted drawings SP-1, L-1, A-1 through A-4, and S-1 and S-2. (R.II, p. 277). Pike also drafted S-1 and S-2 after consulting with Paul Miller, a structural engineer. (R.II, pp. 278-80; R.III, p. 442). Bob Stevens, a survey engineer not associated with McInnis, drafted drawing SP-1. (R.II, p. 277). McInnis did not think it was necessary that Paul Miller sign and seal the structural engineering drawings for the project. (R.II, pp. 316-17).

Before submitting the first set of plans to the city, McInnis billed Landmark more than \$5,000 for engineering services related to McInnis’ design for the flat roof. (R.III, pp. 421-22). Andachter refused to pay the amount, because he believed that those services were included in the parties’ original contract. (R.III, p. 422).

The plans were submitted to the planning commission unsealed on or about September 13, 2001, but were rejected because of the flat roof (a zoning violation), lack of footing depths (a building code violation), the design of the fire line meter pit and back flow (a water department violation), water detention (a public works violation), the lack of a sprinkler system (a fire department violation) and because the plans were not sealed. (R.II, pp. 280, 302, 341-47; R.III, p. 420, Petitioner's Exh. 3; Petitioner's Exh. 4). Andachter instructed McInnis to redesign the building with a hip roof. (R.III, p. 420).

Andachter eventually learned that the re-designed plans were approved by the planning commission, but that construction drawings would need to be submitted before the city would issue a building permit. (R.II, pp. 421, 430). McInnis completed the construction drawings, then submitted an invoice for \$17,000 to Andachter. (R.II, pp. 280-81, 314, 422-23). McInnis refused to sign the construction drawings unless Andachter paid the \$17,000 bill. (R.II, 314; R.III, pp. 422-23, 431). McInnis testified that he was never paid for the sloped roof plans shown in Exhibit 3. (R.III, p. 491).

Andachter testified:

And then he came up with a bunch of bills and demanded that I pay the whole thing or else he wasn't going to submit them.

And so he really just held me-I honestly-I felt like it was blackmail. \$16,000 that he expected me to double-double his payment for, and I wasn't going to pay it.

(R.III, pp. 422-23).

Andachter decided that, rather than sue McInnis to complete the plans, he would hire someone else to finish the project. (R.III, p. 424). Andachter hired Bruce Bird to finish the plans, get city approval and serve as the engineer of record, for a fee of \$2,300. (R.III, pp. 427, 430, 439).

When Bird accepted the project, he understood his responsibilities as involving engineering matters, including problems relating to storm water detention, sanitary sewers, water detention and fire protection. (R.III, 438). Andachter and his attorney assured Bird that Landmark owned the drawings. (R.III, p. 458). Bird contacted Paul Miller, whom he assumed had been hired by McInnis, to confirm that Bird had permission to use Miller's drawings. (R.III, pp. 442, 470). Bird believed that he would serve as the design professional of record with overall responsibility for the project, including preparation of the changes, modifications and adjustments required by the city. (R.III, p. 439). Bird had worked in this capacity in Missouri and Kansas in the past, where the governing body required only the designation of a design professional of record. (R.III, p. 441). Both

McInnis and Cathy O'Hara, plans examiner for the City of Independence, agreed that it is customary for one design professional to work with the city on large projects. (R.II, pp. 296, 323, 338-39).

Bird thoroughly reviewed the plans and made numerous calculations to ensure that they complied with the city code, including matters relating to loads, storm water runoff, storm detention and roof structure. (R.III, pp. 443-44, 466-67, 476-77). All work done was performed either by Bird or by someone under Bird's supervision. (R.III, p. 446). When his work was completed, Bird submitted a set of plans to the city that did not include his revisions, but included his signature and seal on SP-1. (R.II, pp.328-29; R.III, pp. 450-51, Petitioner's Exh. 5). This was consistent with Bird's experience, that plans were submitted for approval, then revisions placed on the final drawings. (R.III, pp. 450-51). Bird signed and sealed each page of the final set of drawings, with the intention that his signature and seal meant that the plans complied with building codes. (R.II, pp. 328-29; R.III, p. 455, Petitioner's Exh. 6).

On May 7, 2002, McInnis sent a letter to the senior Independence building official, accusing Andachter and Bird of theft and fraud, alleging that McInnis had not authorized the use of the drawings, asking that the city not issue a building permit and stating that McInnis was taking legal action

against Andachter and bringing disciplinary proceedings against Bird. (R.II, pp. 282, 297-98; Resp. Exh. A). McInnis also filed a police report alleging that the drawings had been stolen. (R.II, p. 282). After learning of McInnis' complaints, Bird contacted the planning commission and requested that it withdraw his certification of the plans. (R.III, pp. 455-56).

McInnis filed a lawsuit against Landmark in the Jackson County Circuit Court, to which Landmark responded with a counterclaim. (R.III, p. 428, Respondent's Exh. C). Judgment was entered for Landmark, on February 10, 2004, in the amount of \$15,906. (R.III, p. 428, Respondent's Exh. C). The circuit court found that the parties' contract was unenforceable because at the time it was executed, McInnis' architectural firm was not licensed, that McInnis breached his duty to perform in a skillful or workmanlike manner, and that the plans were not completed. (Respondent's Exh. C). The judgment stated, in part, that

the purpose of the architecture services provided under the Contract was for Plaintiff [McInnis] to help the Defendant to obtain a building permit to the City of Independence. Plaintiff did not finish the plans called for under the Contract, thus Defendant could not obtain a building permit. Plaintiff did not fulfill the purpose of the contract.

(Respondent's Exh. C).

Bird testified that on projects where he had worked with an architect, he put his seal on the architect's plans "quite often." (R.III, p. 461). He testified that he had always been under the assumption that he was free to work on a set of plans as long as he had the permission of the owner. (R.III, p. 467).

Architect Homer Williams, the Board's expert witness, testified that the professional's seal is intended to protect public health, safety and welfare. (R.II, pp 356, 376). Williams testified that the practices of architecture and engineering tend to overlap, with the differences between the two sometimes being difficult to determine. (R.III, p. 379). The Board promulgates regulations for the purpose of codifying a custom, practice or procedure already followed by a profession, or for the purpose of ending a problematic custom, practice or procedure. (R.III, p. 394). Williams testified that the law provides that an engineer may seal architectural work that is incidental to the practice of engineering, or when the work is principally engineering. (R.III, pp. 400, 409).

Williams testified that a seal may only be administered by the person who prepares, or who has direct supervision over the person who prepares, the document. (R.II, pp. 356, 360-61). He testified that the original designer

should seal his own drawings, but that changes, clarifications or modifications may be made to a document as long as they are clearly reflected on the document. (R.II, p. 361; R.III, 403).

Williams testified that, in this case, the architectural drawings should have been sealed by a licensed architect. (R.II, p. 363). Williams stated that it was inappropriate for Bird to sign drawings A-1 through A-4 without providing an explanation for revisions that were made on those drawings. (R.II, p. 395).

When Williams was questioned regarding 4 CSR 30-13.010, he agreed that in order for plans, drawings or surveys to be deemed prepared under the supervision of a licensed professional, based on the client's request to the professional or employee, it must be assumed that the professional has permission to do work for the client. (R.III, p. 384). When Williams was asked if, when a licensee becomes unavailable under 4 CSR 30-113.101(1)(D), a client would have to choose to either stop work on a project or hire a successor licensee to continue the project, he responded, "[t]hat's commonly done." (R.III, p. 388). Williams testified that the successor licensee could seal the work if the successor could stand by the work. (R.III, pp. 389-90).

On August 30, 2004, the Commission handed down its Decision, finding that Bird was not subject to discipline for the unlicensed practice of architecture, but that he was subject to discipline under Mo.Rev.Stat.

§ 327.441.2(6) (2006), for violating 4 CSR 30-3.030(7), the regulation prohibiting the signing and sealing of plans not prepared by a professional engineer or under his immediate supervision. (Record of Agency Proceeding for Judicial Review, Vol.IV [“R.IV”], pp.513, 521-22). In its findings of fact, the Commission stated:

...

3. Bird proceeded according to what he believed was the proper practice for a professional engineer to certify plans as conforming with city requirements under the circumstances. He contacted the engineer who worked for McInnis for permission to use the plans. Bird reviewed the plans and the City’s grounds for rejection. Bird or persons working under his direct supervision made all the calculations necessary to certify that the plans conformed to the relevant specifications, made drawings to accompany his calculations, and made revisions and modifications to the plans. Such calculations included structural calculations and run-off calculations, and the load on

the roof. Bird revised the roof plan to add more support, moved the doorway, altered waterline drawings, and noted the depth of the footing. Bird maintained a file of all his work on the project. He did not mark his revisions and modifications to the plans.

4. On January 29, 2002, Bird signed and affixed his seal to the first site plan page (page SP-1) of the plans. He filed the plans with the City on March 7, 2002. On May 1, 2002, Bird signed and affixed his seal to all pages of another set of plans, including pages A-1 (floor plan), A-2 (exterior elevations), A-3 (roof plan and details), and A-4 (sections of fire wall, entry and wall, overhead door, load bearing exterior wall, standard roof framing, and microlam beam). The letter A on those pages stands for architecture. Bird filed the plans with the City of Independence, Missouri on May 7, 2002.

...

(R.IV, p. 573).

The Commission also found that Bird's conduct did not amount to incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty, so as to constitute a violation of R.S. Mo. 327.441.2(5), nor did it violate a professional trust in violation of R.S.Mo. 327.441.2(13). (R.IV, pp. 526-28).

On November 8, 2004, the Board held a disciplinary hearing. (R.IV, p. 534). The certified record was offered as Exhibit 1. (R.IV, p. 541). Bruce Bird represented himself at the disciplinary hearing and explained that his work on the project included correcting problems in storm drainage, storm detention, building construction, surveys, landscape plans, the parking lot plan and roof. (R.IV, pp. 538, 544-45, 550). He stated that Andachter's lawyer advised him that Landmark had paid for and owned the plans, and that, in Independence, Bird could take over the project as the engineer of record, make the appropriate changes, and supervise the construction. (R.IV, p. 544-45). Andachter's lawyer also told Bird that if he accepted the job, he would be accepting responsibility for the building design. (R.IV, p. 546). Bird testified that he received the previous engineer's permission to work on the engineer's plans. (R.IV, p. 548). After completing his work, Bird affixed his seal to the plans. (R.IV, 551). Bird stated that after the final plans were submitted, they were not rejected by the city, but then were reported stolen to the Independence police. (R.IV, pp. 553-54).

Bird stated that he had taken over projects like this one before and finished what other licensed professionals had started "numerous" times. (R.IV, p. 552). He gave an example of a Gates Barbecue Kansas City project which had involved building design, and site work done by others,

with Bird coming in to design a retaining wall, then serving as engineer of record for the entire project. (R.IV, p. 553).

The following remarks were then made by Eva Sterner, Assistant Attorney General, Board members Kathleen A. Warman, A.I.A., and Thomas J. “Jim” Mathis, P.E. & L.E.:

MS. STERNER: I think if the board were to read the transcript which is part of the certified documents that came through, Mr. an decker [sic] has basically ruined Mr. McInnis. He is now in bankruptcy over this situation. The judge not only made him—made Mr. McInnis pay the initial fees back to Mr Andecker [sic], the person that hired Mr. Bird to finish up the plans. Mr. McInnis, the injured architect, had to pay the fees for Mr. Andecker [sic]. This is all on the record. It’s not in the decision but it’s on the record, the transcript that was certified to you.

So no one has said that Mr. Bird did a bad job in what he drew. There’s not anything wrong with it. He simply had no right. This small, little bit he did,

created a maelstrom in this architect's life, and he's ruined because of this.

MS. WARMAN: I have a question. In the ruining of the architect, that's done from the lawsuit; is that correct?

MS. STERNER: Correct.

MR. MATHIS: And did I understand correctly that Mr. McInnis filed the lawsuit against Mr. Andecker [sic]...?

MS. STERNER: That's correct.

MR. MATHIS: So it kind of backfired on him?

(R.IV, pp. 536-37).

Other Board members asked questions about whether the Commission's decision was based on Bird placing his seal on all of the plans or just the plans which he had not drafted or supervised:

MR. HILL: Well, I would like to get a clarification on something here. In looking at the decision, the decision says Mr. Bird for affixing his engineering seal to plans drafted either by him or under his supervision, it really doesn't address whether those were architectural plans or engineering plans. So as I read this decision, it's for his

seal being on all the plans that he did not prepare under his direction or provision and not the architectural side.

Is that correct?

MS. STERNER: Yes.

MR. MILTENBERGER: Not just the architectural side.

MR. HILL: Not just the architectural side, but for all the plans.

MS. STERNER: It did not just include architectural plans or engineering plans. There were landscape, engineering. I'm trying to remember all the different – it was A and LA and SE and electrical.

MR. HILL: As I understood, it specifically said here, too, that the unlicensed practice of architecture because it is within the scope of his engineering license, that wasn't an issue as far as the Administrative Hearing Commission. So the only thing we're addressing today is the sealing of documents which were not prepared by Mr. Bird.

MS. STERNER: Correct.

MR. HILL: Or under his direct personal supervision. So we're not supposed to be considering anything related to the practice of architecture.

MS. STERNER: Correct.

MR. HILL: Just the sealing of documents. Okay.

MR. BIRD: That was not my understanding, but what the administrative judge said was that it was clear that we had modified all – all but three or four sheets of the plans, and I think it was – he was claiming that there were three sheets or four sheets out of this set of plans that he could not clearly see that we had modified, and that's what he was – that's what I understood him to say.

MR. HILL: Well, sir, I wish you had read the decision, because that's not consist opportunity [sic] with what I read in the decision.

...

And we have to base our decision on what's in this document.

MR. BIRD: We did basically overhaul the entire set of plans, but there were a couple of sheets, four sheets or whatever, that it isn't clearly evident that we did that.

(R.IV, pp. 537-39).

On November 22, 2004, the Board entered its Findings of Fact, Conclusions of Law and Order, suspending Bruce Bird's license to practice as a professional engineer for three years, followed by one year of probation. (R.IV, pp. 563, 565-66, 569). Bird filed his Petition for Judicial Review on December 17, 2004, alleging that the Board's order was in violation of constitutional provisions, in excess of the statutory authority or jurisdiction of the agency, was not supported by competent and substantial evidence, was made upon unlawful procedure, was arbitrary, capricious or unreasonable and involved an abuse of discretion. (Legal File ["L.F."], pp. 6-8). On May 11, 2005, Bird's Motion to Stay Enforcement of Agency Order was granted by the circuit court. (L.F., p. 48).

On September 27, 2005, the Circuit Court of Cole County held a hearing. (Transcript on Appeal ["Tr."], p. 2. The circuit court immediately expressed its concern regarding the severity of the punishment that had been imposed by the Board:

...[M]y sense...was that from your standpoint, that while there may be a technical violation that the punishment imposed seems disproportionate to any violation.

...

[I]t just strikes me as close as this case is, the discipline does seem out of proportion.

...

I'm just looking for why this individual deserved the punishment.

(Tr., p. 2, 6, 33-34).

On December 30, 2005, the circuit court issued an order finding “the issues in favor of the Petitioner [Bird] and against Respondent,” and concluding that “the Findings of Fact, Conclusion of Law, Decision and Order of the Administrative Hearing Commission...unlawful, unreasonable and unsupported by substantial and competent evidence on the record as a whole.” (L.F., p. 120). The court then ordered that the cause be “REMANDED to the Administrative Hearing Commission for rehearing and findings not inconsistent with this order.” (L.F., p. 120).

On March 27, 2006, the circuit court denied the Board's Request for an Amended Order and Judgment Including Findings of Fact and Conclusions of Law. (L.F., p. 138).

On appeal, the Court of Appeals dismissed the action, holding that Bird did not include any of the claims he raised in the appeal in his petition for review, and that, therefore, neither the trial court nor the Court of Appeals had jurisdiction to review his claims. *Bird v. Missouri Board for Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects*, No. WD66638, 2007 WL 1742864 (Mo.App.W.D. June 19, 2007).

POINTS RELIED ON

I. THE COURT OF APPEALS ERRED IN DISMISSING BIRD'S APPEAL ON JURISDICTIONAL GROUNDS BECAUSE AN APPELLATE COURT MAY RULE ON THE SUBSTANTIVE MERITS OF AN ADMINISTRATIVE REVIEW EVEN WHEN THE PETITION FOR JUDICIAL REVIEW IS INSUFFICIENT, IN THAT BIRD'S PETITION FOR JUDICIAL REVIEW SUFFICIENTLY RAISED HIS CLAIMS, HIS CLAIMS WERE MORE THOROUGHLY RAISED IN HIS SUPPORTING MEMORANDUM AND NEITHER THE BOARD, NOR THE CIRCUIT COURT ON ITS OWN MOTION, RAISED THE ISSUE OF THE SUFFICIENCY OF BIRD'S PETITION FOR REVIEW.

*Teson v. Director of Revenue*, 937 S.W.2d 195 (Mo.banc 1996)

*Burgdorf v. Board of Police Comm'rs.*, 936 S.W.2d 227  
(Mo.App.E.D. 1996).

II. THE BOARD'S APPEAL OF THE CIRCUIT COURT'S ORDER MUST BE DISMISSED BECAUSE, PURSUANT TO MO.REV.STAT. §512.020, APPEALS MAY ONLY BE BROUGHT FROM A FINAL JUDGMENT, IN THAT THE CIRCUIT COURT'S ORDER WAS NOT A FINAL JUDGMENT, BUT, INSTEAD, REMANDED THE ACTION BACK TO THE BOARD FOR REHEARING AND ADDITIONAL FINDINGS.

Mo.Rev.Stat. § 512.020 (2006)

*Taylor v. Civil Service Comm'n.*, 969 S.W.2d 764 (Mo.App.E.D. 1998)

*Geisler v. City of Ste. Genevieve*, 943 S.W.2d 793 (Mo.App. 1997)

III. THE AGENCY'S DECISION WAS UNSUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE, WAS ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION, BECAUSE MISSOURI STATUTES AND REGULATIONS REFLECT STANDARDS IN THE ENGINEERING PROFESSION ALLOWING A DESIGN PROFESSIONAL TO FINISH , OR SUPERVISE THE COMPLETION OF, UNCOMPLETED WORK, IN THAT THE EVIDENCE SHOWED THAT BRUCE BIRD ACTED IN ACCORDANCE WITH CUSTOMS OF THE PROFESSION, THAT HE ACCEPTED RESPONSIBILITY AS DESIGNER OF RECORD AFTER THE ARCHITECT REFUSED TO FINISH THE PROJECT, AND THAT BIRD ATTEMPTED TO WITHDRAW HIS SIGNATURE AND SEAL WHEN HE LEARNED THAT THE ARCHITECT DISAPPROVED OF THE USE OF HIS DRAWINGS.

4 CSR 30-13.010 (moved to 20 CSR 2030-13.010) (2007)

Mo.Rev.Stat. § 536.140.2(1) (2006)

*Giddens v. Kansas City Southern railway Co.*, 29 S.W.3d 813 (Mo.

banc 2000)

IV. THE AGENCY'S ORDER OF A THREE-YEAR SUSPENSION WAS UNSUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE BECAUSE, FOLLOWING MO.REV.STAT. § 327.441.2(6) (2006) AND 4 CSR 30-3.030(7), THE ADMINISTRATIVE HEARING COMMISSION FOUND THAT BRUCE BIRD HAD IMPROPERLY SIGNED AND SEALED ARCHITECTURAL DRAWINGS ONLY, IN THAT THE BOARD'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER INDICATE THAT IT IMPROPERLY DISCIPLINED BIRD FOR SIGNING ALL OF THE DRAWINGS, INCLUDING THOSE PREPARED OR REVISED BY BIRD.

*Department of Social Services v. Villa Capri Homes*, 684 S.W.2d 327  
(Mo. banc 1985)

4 CSR 30-3.030(7) (rescinded 2004)

V. THE AGENCY'S ACTIONS WERE AN ABUSE OF DISCRETION BECAUSE MISSOURI LAW PROHIBITS UNSUPPORTED AND PREJUDICIAL COMMENTS DURING CLOSING ARGUMENTS, IN THAT COMMENTS MADE BY AN ASSISTANT ATTORNEY GENERAL INCLUDED FACTS NOT IN EVIDENCE, WERE INFLAMMATORY AND PREJUDICIAL TOWARD BRUCE BIRD.

*Coats v. Hickman*, 11 S.W.3d 798 (Mo.App.W.D. 1999)

VI. THE AGENCY'S ORDER OF A THREE-YEAR SUSPENSION WAS ARBITRARY, CAPRICIOUS, UNREASONABLE, AN ABUSE OF DISCRETION AND IN VIOLATION OF BRUCE BIRD'S DUE PROCESS AND EQUAL PROTECTION RIGHTS BECAUSE THE UNITED STATES AND MISSOURI CONSTITUTIONS PROTECT INDIVIDUALS' RIGHTS TO PURSUE THEIR OCCUPATIONS, IN THAT THE ADMINISTRATIVE HEARING COMMISSION FOUND NO EVIDENCE THAT BRUCE BIRD'S CONDUCT CONSTITUTED THE UNLICENSED PRACTICE OF ARCHITECTURE, DEMONSTRATED INCOMPETENCE, MISCONDUCT, GROSS NEGLIGENCE OR FRAUD.

*Schwartz v. The Board of Bar Examiners of State of New Mexico*, 353 U.S. 238, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957)

*Tendai v. Missouri Board of Registration for the Healing Arts*, 161 S.W.3d 358 (Mo. 2005)

## ARGUMENT

I. THE COURT OF APPEALS ERRED IN DISMISSING BIRD'S APPEAL ON JURISDICTIONAL GROUNDS BECAUSE AN APPELLATE COURT MAY RULE ON THE SUBSTANTIVE MERITS OF AN ADMINISTRATIVE REVIEW EVEN WHEN THE PETITION FOR JUDICIAL REVIEW IS INSUFFICIENT, IN THAT BIRD'S PETITION FOR JUDICIAL REVIEW SUFFICIENTLY RAISED HIS CLAIMS, HIS CLAIMS WERE MORE THOROUGHLY RAISED IN HIS SUPPORTING MEMORANDUM AND NEITHER THE BOARD, NOR THE CIRCUIT COURT ON ITS OWN MOTION, RAISED THE ISSUE OF THE SUFFICIENCY OF BIRD'S PETITION FOR REVIEW.

### Standard of Review

Where facts relevant to subject matter jurisdiction are uncontested, this Court's review is *de novo*. *Missouri Soybean Ass'n. v. Missouri Clean Water*, 102 S.W.3d 10, 22 (Mo. 2003) (citing *B.C National Banks v. Potts*, 30 S.W.3d 220, 221 [Mo.App. 2000]).

In its opinion, the court of appeals ruled that neither the court of appeals nor the circuit court had jurisdiction to hear Bird's Petition for Judicial Review, because Bird failed to raise his claims pursuant to Mo.Rev.Stat. §536.110. *Bird v. Missouri Board for Architects, Professional*

*Engineers, Professional Land Surveyors and Landscape Architects*, No. WD66638, slip op. at 3, 2007 WL 1742864 (Mo.App.W.D. June 19, 2007). Neither that statute nor Mo.Rev.Stat. §536.140, however, creates any statutory requirements for what must be included in a petition for review. Other appellate opinions suggest that petitions for review, like other pleadings, should be liberally construed and may be implied to be amended to conform to evidence presented in the case.

RSMo 536.110 requires only that “[p]roceedings for review may be instituted by filing a petition in the circuit court of the county of proper venue within thirty days after the mailing or delivery of the notice of the agency’s final decision.” RSMo 536.140, cited by the court of appeals in its ruling, is entitled “Scope of judicial review-judgment-appeals,” and it outlines not what must be included in a petition for review, but what the extent of the court’s review is once a petition has been properly filed:

...The inquiry may extend to a determination of whether the  
action of the agency

(1) Is in violation of constitutional provisions;

...

(3) Is unsupported by competent and substantial evidence upon  
the whole record;

...

(6) Is arbitrary, capricious or unreasonable;

(7) Involves an abuse of discretion.

The scope of judicial review in all contested cases...shall in all cases be at least as broad as the scope of judicial review provided for in this subsection...

RSMo 536.140.2.

These statutes, governing judicial review of administrative decisions, only specifically require that the petition be timely filed, and they give the reviewing court broad authority to inquire into the agency's actions.

In this case, Bird filed his petition for review in a timely manner, pursuant to RSMo 536.110.1, on December 17, 2004. The transcripts from the AHC hearing and the Board's disciplinary hearing were filed on May 25, 2005, and were thus unavailable to Bird's counsel at the time the petition was filed. Bird's petition, however, included his contentions that he had not violated the regulations upon which the Board's decision was based, and that the decision violated various subsections of RSMo 536.140.2. After receiving the transcripts, Bird filed a 31-page detailed memorandum in support, specifying the legal and factual bases for the petition. After conducting a hearing on the matter, the circuit court ruled in favor of Bird. The circuit court obviously concluded that not only had Bird raised

legitimate issues in his petition, but that that there was insufficient basis for the Board's decision.

The sufficiency of Bird's petition for review was never raised before the circuit court, by either the Board or the circuit court itself. Thus, the Board could not have been prejudiced by the fact that the petition was allowed to proceed. Even if the petition was insufficient, however, the circuit court had the authority to decide the case, the implication being that the circuit court could have allowed an amendment of the petition to conform to the evidence.

*Teson v. Director of Revenue*, 937 S.W.2d 195 (Mo.banc 1996) was overlooked by the court of appeals when deciding this case. In *Teson*, a motorist who had had his license revoked filed a petition for review in the Franklin County circuit court. The circuit court reversed the Director's decision and the Director appealed. By way of footnote, the Supreme Court noted that the motorist's petition for review was insufficient, but the Supreme Court proceeded to rule on the merits of the case:

On its face, the petition for review does not plead facts sufficient to raise the issue upon which the trial court based its judgment, namely, that the officer did not use the words "license shall be immediately revoked." §577.041.1 The state

does not argue that the pleadings in this case are insufficient or fail the requirements of Rule 55.05. Given the state's and the record's silence on this issue, we assume that the trial court permitted an amendment of the pleadings to conform to the evidence, Rule 55.33(b), and will consider the substantive merits of the issue presented.

*Teson*, 937 S.W.2d at 196-97.

Thus, even when the Supreme Court recognized that a petition for review was insufficient, the Court still considered the merits of the case on appeal, suggesting that a timely petition for review was enough to establish jurisdiction.

*Teson* is consistent with the general rule in both administrative and civil actions, that issues may be tried by implied consent of the parties and will be treated as if raised by the pleadings, even though not formally amended to conform to the evidence. See *Friendship Village v. Public Service Comm.*, 907 S.W.2d 339, 346 (Mo.App.W.D. 1995) (citing RSMo 536.063[3]); *State ex rel. Mohart v. Romano*, 924 S.W.2d 537, 540 (Mo.App.W.D. 1996); *Watkins v. State Board of Registration for the Healing Arts*, 651 S.W.2d 582, 585 (Mo.App.W.D. 1983) (rule that pleading

and proof must conform is relaxed in administrative proceedings). This rule may be applied even on appeal. *See Mohart*, 924 S.W.2d at 540.

Not only did the court of appeals overlook the law as applied in *Teson*, the court ignored other appellate decisions which support a finding that the circuit court in this case had jurisdiction to consider Bird's petition for review on its merits. Review of an administrative decision encompasses more than just the allegations which may be included in a petition. "Judicial review of an administrative decision is limited to the petition *and the record.*" *Watkins*, 651 S.W.2d at 585 (emphasis added). In this case, the hearing transcripts and Bird's memorandum in support of his petition for review include both the factual and legal bases for his complaints. Mo.Rev.Stat. §536.114 authorizes the circuit court to conduct a broad inquiry when reviewing the action, and the circuit court had this extensive record before it when it ruled in Bird's favor.

A liberal interpretation of Bird's petition for review is also supported by case law interpreting procedure in both administrative and general civil cases. The rules of pleading are informal in the administrative process. *See Central Bank of Clayton v. State Banking Bd.*, 509 S.W.2d 175, 191, n.14 (Mo.App. 1974); *Friendship Village*, 907 S.W.2d at 345 (Mo.App.W.D. 1995) (complaints filed with the commission are to be

liberally construed and the technical rules of pleading are inapplicable). Similarly, evidentiary rules are generally less formal and structured in administrative proceedings. *See Watkins, supra*. In civil actions, a petition, although imperfectly or defectively stated, will be sustained if the allegations invoke substantial principles of law which may entitle the pleader to relief. *Schnabel v. Taft Broadcasting Company, Inc.*, 525 S.W.2d 819, 821 (1975) (citing *Ingalls v. Neufeld*, 487 S.W.2d 52, 54 [Mo.App. 1972]). In *St. Louis County v. State Tax Commission*, 515 S.W.2d 446, 452 (Mo. 1974), this Court held that, although the grounds stated in a petition for review to the tax commission were “meager and conclusory, we adhere to the general rule that technical rules of pleading are not to be applied to applications for relief filed with the state tax commission...we hold the defects in the petition for review to be irregularities merely and not jurisdictional.”

Finally, the court of appeals misinterpreted cases it relied on in its opinion dismissing Bird’s case. It cites *Britz v. Reynolds*, 895 S.W.2d 645 (Mo.App. 1995) for the proposition that the court could not acquire jurisdiction unless Bird filed his petition in accordance with Mo.Rev.Stat. §536.110.1. (Slip op. at 6). *Britz*, however, was not even an appeal of an administrative decision. The father in the case had filed a petition to satisfy judgment for child support in circuit court, and had failed to file any type of

petition for review in a related administrative action, a far different factual scenario than in the instant case.

*Citro v. City of Lee's Summit*, 658 S.W.2d 86 (Mo.App. 1983) is cited for the proposition that compliance with Mo.Rev.Stat. §536.110 and Mo.Rev.Stat. §536.140 confer jurisdiction and scope of review, yet in that case the substantive issue was raised “*for the first time* in the court of appeals...” *Citro*, 658 S.W.2d at 88 (emphasis added). Thus, *Citro* considered a claim asserted much later in the proceeding than those raised in this case, where the issues were clarified, at the very latest, in Bird’s memorandum in support.

Unfortunately, it appears that *Citro* was cited by *Dino v. State Board of Pharmacy*, 909 S.W.2d 755 (Mo.App.W.D. 1995), also cited by the court of appeals in its opinion in this case, for the proposition that the circuit court in *Dino* could not review a claim raised in the appellant’s memorandum, but not raised in the petition for review. As noted above, however, the substantive issue in *Citro* appears not to have been raised for the first time until the appeal. *Citro* did not specifically hold that the circuit court would not have jurisdiction when the issue was raised in a supporting memorandum, and to the extent *Dino* makes that proposition in reliance on *Citro*, *Dino* appears to simply make an incorrect statement of the law.

Finally, and most significantly, the court of appeals misinterpreted *Burgdorf v. Board of Police Comm'rs.*, 936 S.W.2d 227 (Mo.App.E.D. 1996). In its opinion, the court of appeals cites *Burgdorf* for the proposition that "...we can look only to the face of [Bird's] petition and cannot look to his memorandum filed in support of his petition." *Burgdorf*, however, says no such thing. To the contrary, although *Burgdorf* criticized the appellant for not including the specific claim in his petition for review, the Court of Appeals in *Burgdorf* considered the merits anyway, stating: "Although [appellant's] petition for review did not contain the subject matter jurisdiction claim, *we will address that issue since it was raised before the circuit court via his suggestions in support of his petition.*" *Id.* at 231 (emphasis added).

II. THE BOARD'S APPEAL OF THE CIRCUIT COURT'S ORDER MUST BE DISMISSED BECAUSE, PURSUANT TO MO.REV.STAT. §512.020, APPEALS MAY ONLY BE BROUGHT FROM A FINAL JUDGMENT, IN THAT THE CIRCUIT COURT'S ORDER WAS NOT A FINAL JUDGMENT, BUT, RATHER, REMANDED THE ACTION BACK TO THE BOARD FOR REHEARING AND ADDITIONAL FINDINGS.

#### Standard of Review

The appellate court in a contested case reviews the administrative decision and not the judgment of the circuit court. *Tendai v. Missouri Board of Registration for the Healing Arts*, 161 S.W.3d 358, 365 (Mo. 2005) (citations omitted).

The right to appeal does not exist in the absence of statutory authorization. *Taylor v. Civil Service Comm'n.*, 969 S.W.2d 763, 764 (Mo.App.E.D. 1998) (citing *McDowell v. City of Springfield*, 906 S.W.2d 908, 909 [Mo.App.1995]). R.S.Mo. §512.020 provides for an appeal from any "final judgment in the case." *Taylor*, 969 S.W.2d at 764 (citing *Giesler v. City of Ste. Genevieve*, 943 S.W.2d 793 [Mo.App. 1997]). Generally, a final, appealable judgment is one which disposes of all parties and all issues in the case. *State ex rel. Fletcher v. New Amsterdam Cas. Co.*, 430 S.W.2d

642, 644-45 (Mo.App. 1968) (citations omitted). “Finality” is found when “the agency arrives at a terminal, complete resolution of the case before it.” *City of Park Hills v. PSC*, 26 S.W.3d 401, 403 (Mo.App.W.D. 2000).

An order lacks finality where it remains tentative, provisional, or contingent, subject to recall, revision or reconsideration by the issuing agency. *Geisler*, 943 S.W.2d at 793-94 (citing *State ex rel. Dussault v. Board of Adjustment, City of Maryland Heights*, 901 S.W.2d 318, 320 [Mo.App.E.D. 1995]); *See also McCoy v. Schweiker*, 683 F.2d 1138 (8<sup>th</sup> Cir. 1982) (orders remanding cases for further proceedings are not final judgments appealable under 28 U.S.C. §1291).

What is or is not a final judgment or order depends on the circumstances of each case. *Fletcher*, 430 S.W.2d at 645 (citations omitted). The *Giesler* court, however, noted the significance in the fact that section 512.020 specifically does not authorize an appeal from an order remanding to an administrative tribunal for additional proceedings. *Geisler*, 943 S.W.2d at 793. *McDowell v. City of Springfield*, 906 S.W.2d 908 (Mo.App.S.D. 1995) also implies that a remand, even without an order for additional hearings, is not an appealable order. In *McDowell*, a suspended police officer sought judicial review in the circuit court, arguing, among other things, that the city’s personnel board unlawfully approved his

suspension following a hearing on the merits, and that the Board's attitude and procedures violated his right to due process. The circuit court remanded the case back to the personnel board for findings of fact and conclusions of law. The Missouri Court of Appeals dismissed the action as not a final judgment. *McDowell*, 906 S.W.2d at 909. *McDowell*, as well as *Geisler's* narrow interpretation of Mo.Rev.Stat. §512.020, suggests that in the absence of specific legal authority, orders for remand which do not clearly and finally resolve an action should not be allowed to proceed on appeal.

In this case, the appeal must be dismissed as a non-final order. Here, the circuit court remanded the cause "for rehearing and findings...." At the circuit court's hearing on the Petition for Judicial Review, the court repeatedly expressed its concerns with the severity of the discipline imposed by the Board in light of the relatively minor technical violation found by the Commission. The circuit court ordered the agency to rehear the case and make findings consistent with the circuit court's order. Clearly, the case was not completely or finally resolved by the court's order; rather, the court intended that the case be sent back to the agency for additional consideration. Until the agency has an opportunity to reconsider its actions and orders in light of the circuit court's order, this action is "tentative...and subject to revision or reconsideration by the issuing agency," as described by

*Geisler.* As such, the circuit court's order is not a final, appealable order pursuant to Mo.Rev.Stat. §512.020 (2006) and it must be dismissed.

III. THE AGENCY'S DECISION WAS UNSUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE, WAS ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION, BECAUSE MISSOURI STATUTES AND REGULATIONS REFLECT STANDARDS IN THE ENGINEERING PROFESSION ALLOWING A DESIGN PROFESSIONAL TO FINISH , OR SUPERVISE THE COMPLETION OF, UNCOMPLETED WORK, IN THAT THE EVIDENCE SHOWED THAT BRUCE BIRD ACTED IN ACCORDANCE WITH CUSTOMS OF THE PROFESSION, THAT HE ACCEPTED RESPONSIBILITY AS DESIGNER OF RECORD AFTER THE ARCHITECT REFUSED TO FINISH THE PROJECT, AND THAT BIRD ATTEMPTED TO WITHDRAW HIS SIGNATURE AND SEAL WHEN HE LEARNED THAT THE ARCHITECT DISAPPROVED OF THE USE OF HIS DRAWINGS.

#### Standard of Review

On review of an administrative action, the appellate court's review is limited to a determination of whether the agency's action was supported by competent and substantial evidence upon the whole record or whether it is

arbitrary, capricious, unreasonable, unlawful, or in excess of its jurisdiction. *Charles F. Vatterott Const. v. Rauls*, 170 S.W.3d 47, 50 (Mo.App.E.D. 2005); *Nance v. State Tax Comm’r.*, 18 S.W.3d 611 (Mo.App.W.D. 2000); *Bean v. Commission on Human Rights*, 913 S.W.2d 419, 423 (Mo.App.E.D. 1996).

In a contested case, the appellate court does not review *de novo*; rather, it reviews the decision of the agency, defers to the administrative adjudication and must sustain the agency decision unless the contestant by cogent evidence proves that the determination does not rest on competent and substantial evidence or is otherwise not valid. *See Phipps v. School Dist.*, 645 S.W.2d 91 (Mo.App.W.D. 1982). The Court of Appeals in a contested case reviews the administrative decision and not the judgment of the circuit court. *Tendai v. Missouri Board of Registration for the Healing Arts*, 161 S.W.3d 358, 365 (Mo. 2005) (citations omitted); *Phipps*, 645 S.W.2d at 96. The appellate court defers to the commission as fact finder if the conclusions are supported by competent and substantial evidence when considering the record as a whole. *Tendai*, 161 S.W.3d at 365 (citations omitted).

After working as a professional engineer for forty years, Bruce Bird’s license was suspended by the Board for improperly signing and sealing

drawings that were not prepared or supervised by him. Bird now seeks review of that decision on the grounds that the Commission and Board's findings, conclusions and orders were without competent and substantial evidence, were arbitrary, capricious, were an abuse of discretion, and violated constitutional provisions. The evidence showed that Bird was properly completing the project when the architect was unavailable, that Bird had performed substantial work of his own on the project, and that the Board's decision was based on inflammatory and prejudicial comments made at the disciplinary hearing.

An administrative agency has the burden of proof on matters pertaining to the suspension or revocation of professional licenses. *See Tonkin v. Jackson County Merit System Commission*, 599 S.W.2d 25, 31 (Mo.App.W.D. 1980). Petition for review of an administrative agency decision is provided for in Mo.Rev.Stat. § 536.100-140 (2006); *Department of Social Services v. Villa Capri Homes*, 684 S.W.2d 327, 329 (Mo. banc 1985). Pursuant to R.S.Mo. 536.140.2, relief may be granted if suspending the license was in violation of constitutional provisions, was unsupported by competent and substantial evidence upon the whole record, was arbitrary, capricious or unreasonable, or involved an abuse of discretion. *Department of Social Services*, 684 S.W.2d at 333. If the reviewing court finds that

actions taken against the licensee were not in accordance with Mo.Rev.Stat. §536.140, it may reverse the judgment of discipline, and remand the case back to the Board with directions to set aside the order of discipline. *See Gard v. Board of Registration for the Healing Arts*, 747 S.W.2d 726 (Mo.App.W.D. 1988).

In this case, a review of the testimonial and documentary evidence presented at the Commission hearing on April 22, 2004, and at the Board's disciplinary hearing on November 4, 2004, indicates that there was a lack of competent and substantial evidence to support the suspension of Bruce Bird's engineering license, and that the agency action was arbitrary, capricious and unreasonable. The Commission found that Bird violated 4 CSR 30-2.010, 4 CSR 30-3.030(7), and 4 CSR 30-13.010, by signing and sealing drawings which were prepared by Alan McInnis and which had not been prepared by Bird or someone under his supervision. 4 CSR 30-13.010 states:

- (1) Plans, specifications, drawings, reports, engineering surveys or other documents will be deemed to have been prepared under the immediate personal supervision of an individual licensed with the board only when the following circumstances exist:

(A) The client, requesting preparation of plans, specifications, drawings, reports, engineering surveys or other documents makes the request directly to the individual licensed with the board or an employee of the individual licensed with the board so long as the employee works in the licensed individual's place of business and not a separate location;...

...

(D) In circumstances where a licensee in responsible charge of the work is unavailable to complete the work...a successor licensee may take responsible charge by performing all professional services to include developing a complete design file with work or design criteria, calculations, code research, and any necessary and appropriate changes to the work. The non-professional services, such as drafting, need not be re-done by the successor licensee but must clearly and accurately reflect the successor licensee's work. The burden is on the successor licensee to show such compliance. The successor licensee shall have

control of and responsibility for the work product and the signed and sealed originals of all documents.

Subpart (1)(D) of the regulation became effective on June 30, 2003, after the conduct which was the subject of the complaint. 27 Mo.Reg. 2145 (Dec. 2, 2002); 28 Mo.Reg. 567 (Mar.17, 2003).

The facts of this case indicate that Bird was acting with the permission, and under the direction, of the owner of the plans, Landmark Builders, so as to place him within the requirements of the regulations. The client, Greg Andachter, on behalf of Landmark Builders, approached Bruce Bird requesting his professional assistance to complete plans which Andachter advised Bird, and which Andachter's attorney confirmed, that Landmark owned. Bird was requested to revise and complete the plans in order that they be approved by the City of Independence. Bird understood that Alan McInnis, the original architect, was either unable or unwilling to complete the plans as desired by the client, so Bruce Bird accepted responsibility for completing the project. As Bird testified, he was willing to accept responsibility for all of the drawings as well as make the numerous modifications needed to satisfy the Independence Planning Commission. His significant experience with other engineering and architectural professionals led him to assume that he could perform the needed work and

legally sign and seal the final set of plans submitted to the city. Bird thoroughly reviewed every aspect of the plans to ensure accuracy and compliance with city codes, and Bird, or his employees, performed all the necessary revisions and modifications. The evidence showed that Bruce Bird had significant experience in Missouri serving as the design professional of record on projects involving architects. He described a number of projects in which he had performed various engineering tasks and had made revisions or changes to architectural drawings. On some occasions, he signed a final set of drawings and served as the design professional on the entire project. Bird's testimony demonstrates that, within the engineering profession, it was accepted and customary that an engineer could work on and sign other's drawings as part of an overall construction project.

As provided in Mo.Rev.Stat. §536.140.2(1) (2006), the reviewing court may consider whether agency action is in violation of constitutional provisions. Constitutional rights may be violated if a professional has his license suspended for conduct which he had no reason to believe was a violation of professional standards. In an Idaho case, *H & V Engineering v. Board of Professional Engineers*, 113 Idaho 646, 747 P.2d 55 (1988), engineers who had their licenses suspended and revoked had the decision

reversed by the Idaho Supreme Court on the grounds that the misconduct alleged against the engineers violated their due process rights because regulations failed to adequately warn them that the conduct would subject them to discipline. The Board of Engineers had alleged misconduct in matters of design, supervision of construction, and administration, as well as the engineers' adversarial relationship with governing agencies. The Idaho Supreme Court agreed that the engineers' constitutional rights were violated when their licenses were suspended or revoked for conduct that was not clearly prohibited by statutes or regulations. *H & V Engineering*, 747 P.2d at 60-61.

As explained by the court in *H&V Engineering*, a statute or regulation is unconstitutionally vague when its language does not convey sufficiently definite warnings as to the prescribed conduct, and its language is such that men of common intelligence must necessarily guess at its meaning. *H&V Engineering*, 747 P.2d at 58 (citations omitted). In reversing the disciplinary orders, the Idaho Supreme Court stated:

...Instead of articulating clear standards of discipline, the Boards appear to prefer that their standards need not be declared, but rather that their "expertise and experience" and "collective knowledge" be applied on an ad hoc basis. This not

only fails to warn the professional as to which acts are unlawful, but it renders judicial review superfluous. Without clearly articulated standards as a backdrop against which the court can review discipline, the judicial function is reduced to serving as a rubber stamp for the Board's action. "Such a procedure would be an intolerable state of affairs, and not in compliance with requirements of due process.

*H&V Engineering*, 747 P.2d at 59 (citations omitted).

The Idaho court also criticized the board's argument that promulgating regulations of all possible misconduct was an impossible task:

[I]f the Board enunciates standards of discipline, engineers will have notice to guide them and warn them in advance of conduct which may be grounds for discipline. Disciplinary standards cannot be kept secret from the professionals or the courts. In this case, the phantom of unknown standards robbed the engineers of notice as to what conduct was prescribed...

*H&V Engineering*, 747 P.2d at 60.

As explained in *H&V Engineering, supra*, an engineer cannot be disciplined for conduct which he had no previous warning of would amount

to misconduct. As Bird testified, he had undertaken these types of design projects many times in the past, with no consequences, and, in this case, he believed he was performing a necessary service for the client. Customs and practice in his profession led him to believe that he could perform these tasks, and suspension of his license for this minimal violation is a denial of his due process rights.

The Commission held that 4 CSR 30-13.010, was violated because Bird had improperly signed and sealed architectural plans even though neither he, nor one of his employees, performed or supervised the work at McInnis' office. Bird's testimony, however, demonstrated that Bird was requested to perform the tasks needed to finalize the entire set of plans by Greg Andachter, that he, or his staff, under his supervision, performed the necessary work, and that his signature and seal on the full set of drawings was Bird's intention to take full responsibility for the sufficiency of the plans with the city. These facts suggest that the public policies of the regulation were served by Bird's conduct.

Moreover, even if 4 CSR 30-13.010(1)(D) did not apply to Bird's conduct because its effective date came after the events described in the complaint, that portion of the regulation should have been considered by the Commission as evidence of customs and practice already recognized in the

profession. The Board's own expert, Homer Williams, testified that regulations were often enacted for this purpose.

The Commission noted the case of *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. banc 2003), where, in his concurring and dissenting separate opinion, Judge Wolff opined that a regulating board ought to be bound by its own standards, even when the standard is enacted after the date of the alleged misconduct. *See McDonagh*, 123 S.W.3d at 166 (Wolff, J., concurring and dissenting). The Missouri courts have held that evidence of regulations is admissible to establish standards. *See Giddens v. Kansas City Southern Railway Co.*, 29 S.W.3d 813, 821 (Mo. banc 2000). In interpreting statutes and regulations that govern the licensing of professionals, courts have recognized that standards of acceptable practice develop by custom and tradition over a period of years. *See Eckley v. Colorado Real Estate Commission*, 752 P.2d 68 (Colo. 1988); Kevin R. Sido, *Architect and Engineer Liability: Claims Against Design Professionals*, § 5.02[B] (3d ed. 2006).

Although 4 CSR 30-13.010(1)(D) may not have been effective at the time Bird signed the Landmark plans, its enactment should have been considered by the Commission as evidence of unwritten standards that already existed in the profession. These facts fall squarely under the

exception created by 4 CSR 30-13.010(1)(D), whether the regulation applied to this case, or simply codified existing professional customs. Here, Alan McInnis, the original drafter of plans completed by Bruce Bird, intentionally, deliberately and unjustifiably refused to complete the plans he had agreed to produce, thus making himself unavailable to the client, Landmark Builders and Greg Andachter. This refusal was without legal basis, as noted by the Jackson County Circuit Court, which ruled that McInnis had no legal grounds to collect additional monies from Landmark, and had breached the design contract he had entered into with the developers. Although “unavailable” is undefined in the regulation, and has not yet been interpreted by the courts, McInnis’ refusal to complete the work would appear to make him unavailable under the common meaning of the term.

Without McInnis’s cooperation, the project had been brought to a standstill. It is difficult to conceive of conduct by a architect which would make a client any more justified in seeking out a second professional to complete a project that required technical expertise and code compliance.

Having been wrongfully placed in this situation by McInnis, Landmark had little choice but to bring in another design professional to do the work which McInnis refused to do. Greg Andachter had been made

aware of the deficiencies in McInnis's drawings, and the changes needed could be made by Bruce Bird. As noted throughout the record, Bird's work was accurate and professional. He reviewed all the drawings, made the necessary revisions and ensured that they would be approved by the City of Independence. The client's needs were satisfied and he was able to complete his project despite the unreasonable demands asserted by the architect.

Clearly 4 CSR 30-13.101(1)(D) was intended to allow for clients like Landmark to hire the professionals needed to have their work completed in a fair and equitable manner. The fact that regulations had not been enacted until later should not have prevented the Commission from considering it as evidence of an appropriate standard on an issue before the Commission. Bruce Bird should have the benefit of the policy codified by the regulations, and should not be disciplined simply because a regulation codifying his conduct had not yet been promulgated.

Statutory provisions make clear that Missouri has established a stringent set of requirements for professional engineers practicing in the state. *Duncan v. Missouri Board for Architects*, 744 S.W.2d 524, 535-36 (Mo.App.E.D. 1988). The thrust of the requirements is professional accountability by a specific individual certified engineer. *Duncan*, 744

S.w.2d at 536. These requirements establish the public policy of the state for the protection of the public. *Id.* They require that plans for construction of structures in Missouri which require engineer expertise be prepared by or under the direct supervision of a specified certified engineer and that the engineer bear personal and professional responsibility for those plans. *Id.* Chapter 327 imposes upon the engineer a nondelegable duty of responsibility for projects to which he affixes his seal. *Duncan*, 744 S.W.2d at 537 (citations omitted).

In this case, Bruce Bird thoroughly reviewed the plans, as well as prepared the additional engineering tasks needed. By certifying all the plans, he accepted liability for any professional errors which could have arisen, even though none were present here. Thus, in this case, statutes and regulations ensured that the plans were completed appropriately and discipline was simply not warranted.

The unique facts of this case indicate that Bruce Bird acted appropriately, and in accordance with professional standards under the circumstances. He accepted responsibility to step in and complete a design project which the architect had no legal grounds to abandon. The evidence showed that, thanks to the efforts of Bruce Bird, the client was able to obtain an approved set of plans. The Commission's Decision, ordering discipline

in this situation was not supported by competent and substantial evidence, was arbitrary and capricious, as well as an abuse of discretion. For these reasons, the Commission's Decision, as well as the Board's resulting Disciplinary Order, must be reversed.

IV. THE AGENCY'S ORDER OF A THREE-YEAR SUSPENSION WAS UNSUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE BECAUSE, FOLLOWING MO.REV.STAT. § 327.441.2(6)(2006) AND 4 CSR 30-3.030(7), THE ADMINISTRATIVE HEARING COMMISSION FOUND THAT BRUCE BIRD HAD IMPROPERLY SIGNED AND SEALED ARCHITECTURAL DRAWINGS ONLY, IN THAT THE BOARD'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER INDICATE THAT IT IMPROPERLY DISCIPLINED BIRD FOR SIGNING ALL OF THE DRAWINGS, INCLUDING THOSE PREPARED OR REVISED BY BIRD.

#### Standard of Review

On review of an administrative action, the appellate court's review is limited to a determination of whether the agency's action was supported by competent and substantial evidence upon the whole record or whether it is arbitrary, capricious, unreasonable, unlawful, or in excess of its jurisdiction.

*Charles F. Vatterott Const. v. Rauls*, 170 S.W.3d 47, 50 (Mo.App.E.D. 2005).

The Commission concluded that Bird violated 4 CSR 30-3.030(7), which prohibited “[t]he signing and sealing of plans, specifications, estimates, reports and other documents or instruments not prepared by the professional engineer or under [his] immediate supervision...,” as well as 4 CSR 30-13.010. The Commission found that Bird signed and affixed his seal to the first site plan, page SP-1 of the plans, then he filed a set of plans later, wherein he signed and affixed his seal to all the remaining pages, which included architectural drawings labeled A1-A4. The Commission’s lengthy findings regarding the work Bird performed, imply that it recognized that Bird conducted numerous tasks which were non-architectural in nature and which were done by Bird, or under his supervision. Thus, the Commission’s findings of improper conduct appear to be limited to the signing and sealing of the architectural drawings which were not prepared or revised by Bird. The Commission’s findings and conclusions as a whole indicate that it intended for discipline to be based on Bird’s signing and sealing of architectural drawings, not the entire set of plans, since Bird had performed numerous other tasks and made various engineering revisions.

Thus, discipline should have been limited to the signature and seal on the architectural drawings and not on the entire set of drawings as a whole.

The Board's disciplinary hearing transcript, however, indicates that the members of the Board may have misunderstood the nature of the Commission's findings, and improperly disciplined Bird for signing and sealing all of the drawings. Pages 24 through 26 of the transcript demonstrate the Board's misunderstanding, where Board members Hill and Miltenberger question whether the Commission's findings were based on all or just some of the drawings. Despite Bird's arguments to the contrary, Assistant Attorney General Sterner, as well as other Board members, convinced the Board that discipline was to be based on Bird's signing and sealing of all the plans, and it appears that the Board acted accordingly, and entered a harsh, three-year suspension based on conduct beyond what the Commission had found was subject to discipline under the regulations.

The Commission's findings that Bird believed he was acting properly, and that he and his employees made numerous drawings and revisions regarding structure, run-off and roof load, all suggest that the Commission's conclusion of a violation was limited to the signing and sealing of the architectural drawings only. Clearly the Commission did not intend to discipline Bird for non-architectural drawings and matters which he was

legally authorized to perform. Without the Commission's clear order that Bird be disciplined for improperly signing all of the drawings, the Board's ultimate discipline was unsupported by competent and substantial evidence upon the whole record, was arbitrary, capricious or unreasonable, or involved an abuse of discretion, pursuant to *Department of Social Services*, 684 S.W.2d at 333. For these reasons, the Board's Order should be reversed.

V. THE AGENCY'S ACTIONS WERE AN ABUSE OF DISCRETION BECAUSE MISSOURI LAW PROHIBITS UNSUPPORTED AND PREJUDICIAL COMMENTS MADE DURING CLOSING ARGUMENTS, IN THAT COMMENTS MADE BY AN ASSISTANT ATTORNEY GENERAL INCLUDED FACTS NOT IN EVIDENCE, WERE INFLAMMATORY AND PREJUDICIAL TOWARD BRUCE BIRD.

#### Standard of Review

An appellate court will not disturb a trial court's ruling on closing arguments unless it finds the trial court abused its discretion. *Morgan Publications, Inc. v. Squire Publishers, Inc.*, 26 S.W.3d 164, 170; (Mo.App.W.D. 2000) (citations omitted).

Although most administrative hearings are conducted in an atmosphere much less formal than proceedings before the courts,

administrative proceedings are bound by basic evidentiary principles and limits. *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 154 (Mo. banc 2003); *Ruffin v. the City of Clinton*, 849 S.W.2d 108, 113 (Mo.App. 1993) (citing *Dickenson v. Lueckenhoff*, 598 S.W.2d 560, 563 [Mo.App. 1980]); *Smith v. Morton*, 890 S.W.2d 403, 406 (Mo.App.E.D. 1995). Informality is not a practice to be encouraged because for a reviewing court, whether the circuit or appellate court, it presents a fragmentary and incomplete picture of the evidence. *Ruffin*, 849 S.W.2d at 111. Such informality makes it most difficult for a reviewing court to obtain a clear understanding of the facts. *Id.* (citing *McIntyre v. McIntyre*, 377 S.W.2d 421, 423 [Mo. 1969]).

Applying these general principles of evidence to administrative proceedings leads to the conclusion that general rules concerning the propriety of arguments should also be applied. Regarding comments made during closing arguments, it has been held that a trial court abuses its discretion in allowing closing argument when the challenged comments are plainly unwarranted and clearly injurious to the adverse party. *Coats v. Hickman*, 11 S.W.3d 798, 802 (Mo.App.W.D. 1999) (citations omitted). Counsel should neither argue nor draw inferences from matters not in

evidence and a trial court errs in permitting such a discourse. *Coats*, 11 S.W.3d at 804 (citations omitted).

In this case, the evidence at the Commission hearing was that McInnis had been unsuccessful in his lawsuit to recover additional amounts he claimed were due from his client, Landmark Builders. Moreover, Landmark had been awarded \$15,906, the amount it had paid McGinnis, in its counterclaim for breach of contract, the circuit court finding that McInnis had failed to provide architectural drawings which would be approved by the City of Independence, as McInnis had agreed to do. The circuit court judgment was admitted as Respondent's Exhibit C.

The evidence from the circuit court case was offered to establish that McInnis had no legal justification for refusing to complete the designs he had agreed to prepare for Landmark Builders, and that his refusal to complete the drawings made him "unavailable" as contemplated in 4 CSR 30-13.010(D). There was no evidence beyond that of the circuit court proceeding as to how the judgment, the disciplinary proceeding or the overall dispute had impacted McInnis' financial condition or his professional status.

Despite this limited evidence, Assistant Attorney General Sterner made dramatic assertions at the Board hearing in support of McInnis. Her

comments went beyond the facts in evidence, the circuit court judgment or the Commission's findings. She argued that McInnis' career had been "ruined" by this case. These comments were clearly outside the general scope of argument, were totally unsupported by evidence and were highly damaging and prejudicial to Bruce Bird. Such evidence would have been irrelevant on matters of Bruce Bird's engineering license, but more importantly, there is simply no evidence to support them. To the contrary, the Jackson County circuit court's ruling, that McInnis' action against Landmark had no legal basis, indicated, instead, that it was McInnis' wrongful conduct that created his own professional difficulties. It was McInnis' wrongful conduct that created unnecessary problems for Greg Andachter, Landmark Builders, the City of Independence and Bruce Bird. Although it was Bruce Bird's conduct that was being considered by the Board, McInnis hardly had clean hands in these events. To have him portrayed before the Board as an innocent victim simply misstates the evidence.

Sterner's comments not only violate basic evidentiary principles, they also suggest a dangerous prejudice toward Bruce Bird by those sitting in judgment of him. This conduct is clearly improper and prejudicial, but its effect on the Board's decision-making authority cannot be underestimated.

Sterner's comments demonstrate an overall disrespect for Bruce Bird, and suggest a Board decision based not on the facts and the law, but based on prejudice and a desire to punish an engineer who dared to challenge an architect who failed to do his job. These inappropriate comments indicate that the Board's disciplinary orders were arbitrary, capricious, an abuse of discretion, and must be reversed.

VI. THE AGENCY'S ORDER OF A THREE-YEAR SUSPENSION WAS ARBITRARY, CAPRICIOUS, UNREASONABLE, AN ABUSE OF DISCRETION AND IN VIOLATION OF BRUCE BIRD'S DUE PROCESS AND EQUAL PROTECTION RIGHTS BECAUSE THE UNITED STATES AND MISSOURI CONSTITUTIONS PROTECT INDIVIDUALS' RIGHTS TO PURSUE THEIR OCCUPATIONS, IN THAT THE ADMINISTRATIVE HEARING COMMISSION FOUND NO EVIDENCE THAT BRUCE BIRD'S CONDUCT CONSTITUTED THE UNLICENSED PRACTICE OF ARCHITECTURE, DEMONSTRATED INCOMPETENCE, MISCONDUCT, GROSS NEGLIGENCE OR FRAUD.

#### Standard of Review

A reviewing court may grant relief when an agency action violated constitutional provisions, was unsupported by competent and substantial evidence upon the whole record, if the agency action was arbitrary,

capricious or unreasonable, or if it involved an abuse of discretion. Mo.Rev.Stat. § 536.140.2(1) (2006); Mo.Rev.Stat. § 536.140.2(3) (2006); Mo.Rev.Stat. § 536.140.2(6) (2006); Mo.Rev.Stat. § 536.140.2(7) (2006); *Nance v. State Tax Comm'n.*, 18 S.W.3d 611, 615 (Mo.App.W.D. 2000) (citations omitted).

A state cannot exclude a person from his occupation in a manner or for reasons that contravene the due process or equal protection clause of the 14<sup>th</sup> Amendment. *Schware v. The Board of Bar Examiners of State of New Mexico*, 353 U.S. 238, 239, 77 S.Ct. 752, 756, 1 L. Ed.2d 796 (1957). The right to practice a chosen profession is a valuable property right which cannot be deprived unless one is provided with the safeguards of due process. *H&V Engineering*, 747 at 58.

In this case, the Board's sanction of a three-year suspension was unusually harsh based on the facts of the case. The Board's initial complaint charged Bruce Bird with numerous violations, including the unlicensed practice of architecture, incompetence, misconduct, gross negligence and fraud, as well as a violation of Mo.Rev.Stat. § 327.441.2(6), based on his signing and sealing of the architectural plans. Except for the limited violation in signing and sealing, the Commission specifically found that Bruce Bird acted appropriately in almost all of his professional tasks. His

drawings, revisions, modifications, structural calculations, run-off calculations, calculations on the load of the roof, revisions to add more roof support, alterations to a doorway, alterations to waterline drawings and note footing depth were all found to constitute structural design and planning, engineering works, systems, plans and specifications all within the scope of engineering. The evidence, including the Board's expert's testimony, showed that a number of these activities may be properly performed by architects or engineers and that a certain amount of overlap between the two professions has been recognized in the field.

These findings by the Commission indicate the tasks Bird performed on the Landmark project were appropriate, within the practice of professional engineering and could be customarily performed by an engineer as well as an architect. The evidence indicated that Bruce Bird had the experience and expertise to properly perform professional engineering tasks. The Commission found that Bird's conduct was not intentionally wrongful. The Commission's findings were limited to Bird's affixing his signature and seal on certain pages of the plans which had been prepared by an architect, even though reviewed by Bird.

Thus, the totality of the evidence suggests that Bird's misconduct amounted to a violation of a specific, technical provision, that of placing his

signature and seal on certain documents without proper authority. For the Board to discipline him by literally taking away his entire livelihood for three years simply goes beyond the discipline needed to effectively punish Bird or to protect the general public. Bird's own testimony made it clear that he understood his error in signing the architectural plans. He assured the Commission and the Board that he would never make the mistake again. In light of his lengthy and successful career, it is difficult to understand how a three-year suspension can be justified on these narrow facts.

The severity of the three-year suspension, particularly in light of the inappropriate comments during the disciplinary hearing, suggests that Bruce Bird is being singled out for more severe punishment in a manner which may violate his constitutional rights. The Missouri Supreme Court has allowed an equal protection claim in an agency action based on an allegation that a party has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment. *See Board of Registration for Healing Arts v. Brown*, 121 S.W.3d 234, 36-37 (Mo. 2003). Since an aggrieved party cannot plead or prove that other punishment are disparate until punishment for that party has been imposed, equal protection claims of this kind must be heard and decided in the first instance by the Circuit Court who becomes the fact finder on that issue.

*Board of Registration for the Healing Arts*, 121 S.W.3d at 237. In this situation the circuit court has authority to reopen the case for a hearing and presentation of additional evidence based on R.S. Mo. 536.140.4, which states: "the Court may in any case hear and consider evidence of...unfairness by the agency, not shown in the record." *Id.*

As noted in *Brown*, a complaint that the discipline ordered by an administrative agency violates constitutional protections does not arise until the final order entered by the agency. Thus, a complaint of a constitutional violation in the manner of discipline is timely brought when raised in the Petition for Review. *See Tendai v. Missouri Board of Registration for the Healing Arts*, 161 S.W.3d 358 (Mo. 2005) (equal protection claim raised before circuit court).

In this case, Bruce Bird has been harshly sanctioned, prohibited from making a living in his chosen profession. Bird could have been reprimanded, and the public adequately protected, by more lenient punishment. Thus, the Board's Disciplinary Order is arbitrary and capricious. Bird properly raised the issue of this constitutional violation in his Petition for Judicial Review to the circuit court, and made factual and legal arguments that his due process and equal protection rights had been

violated in his memorandum brief to the circuit court. Bruce Bird respectfully requests this Court to reverse the Board's Order of Discipline.

CONCLUSION

In conclusion, respondent Bruce F. Bird respectfully requests that this Court reverse the Disciplinary Order of the Missouri Board for Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects, and reinstate petitioner's engineering license, on the grounds that the Commission and Board's actions were without the support of competent substantial evidence, were arbitrary and capricious, an abuse of discretion and violative of constitutional provisions, and for such other and further relief as this Court deems just and appropriate.

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CERTIFICATION OF SERVICE  
AND OF COMPLIANCE WITH RULE 84.06(b) and (c)

The undersigned hereby certifies that on this \_\_\_\_ day of November, 2007 one true and correct copy of the foregoing brief and one disk containing the foregoing brief were hand delivered to the following:

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The undersigned certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 13,072 words. The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus free.

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NO. SC88710

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IN THE  
SUPREME COURT OF MISSOURI

BRUCE F. BIRD, P.E.,  
Respondent,

vs.

MISSOURI BOARD FOR ARCHITECTS, PROFESSIONAL ENGINEERS,  
PROFESSIONAL LAND SURVEYORS AND LANDSCAPE ARCHITECTS,  
Appellant.

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APPEAL FROM THE CIRCUIT COURT  
OF COLE COUNTY,  
THE HONORABLE RICHARD G. CALLAHAN,  
JUDGE

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APPENDIX TO APPELLANT'S SUBSTITUTE  
BRIEF FILED BY RESPONDENT PURSUANT TO  
RULE 84.05(E)

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