IN THE SUPREME COURT OF THE STATE OF MISSOURI

No. SC83747

CHESTERFIELD VILLAGE, INC.,
Appellant,

v.

CITY OF CHESTERFIELD, MISSOURI,
Respondent.

After an Opinion by the Court of Appeals,
Eastern District (Case No. ED78444)

On Appeal from the Circuit Court of the County of St. Louis,
Division No. 14, The Honorable James R. Hartenbach

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION

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INTRODUCTION

Pacific Legal Foundation is a non-profit public interest legal foundation based in Sacramento, California, with offices in Bellevue, Washington, Miami, Florida, and Honolulu, Hawaii. Foundation attorneys litigate in support of individual and economic liberties throughout the United States. A primary focus of the Foundation is the Takings Clause to the United States Constitution. To this end, Foundation attorneys have represented landowners in takings cases across the nation and it has submitted numerous amicus briefs to the appellate courts. Foundation attorneys have directly represented the landowners in three significant property rights cases before the United States Supreme Court, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and most recently, *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001). Because of its experience with the doctrine of regulatory takings, the Foundation believes that it can contribute to this Court=s understandings of the issues presented in this case. All parties have consented to the filing of this brief.

JURISDICTIONAL STATEMENT

Amicus Pacific Legal Foundation adopts the jurisdictional statement of landowner and appellant, Chesterfield Village, Inc.

STATEMENT OF FACTS

Amicus adopts the statement of facts filed by landowner and appellant, Chesterfield Village, Inc. This brief will, however, focus on three key facts as being particularly relevant to the question before this Court: (1) that the zoning patterns in the vicinity of Chesterfield Village=s property are inconsistent with sound land use planning practices, (2) that the City=s failure to rezone the property properly was without justification and did not advance a legitimate governmental interest, and (3) that the failure to allow Chesterfield Village to put its property to a reasonable use destroyed the economically viable use of its property. These facts are found in the record below:

First, the City=s failure to rezone the property until forced to do so by an adverse court decision occurred in the context of a City engaged in an extraordinary pattern of allowing orderly suburban development on all sides while leaving Chesterfield Village=s property as an anomalous hole of undeveloped and economically undevelopable land. For example, in paragraphs 10 through 36 of the *uncontested* Judgment Order and Decree from the Circuit Court of St. Louis County in *Chesterfield Village v. City of Chesterfield*, Case Nos. 673678 and 675787, (Judgment Order) reproduced in appellant=s Legal File (LF) at 21 to 24, submitted to the Missouri Court of Appeals, as Exhibit B to First Amended Petition for Compensation for Temporary Taking, the trial court recites the history of zoning in the vicinity

of Chesterfield Village=s property. It notes that from the time of the City=s incorporation in 1988 until the date of that decision on April 6, 1996, the City had simply adopted the county=s former zoning classification of ANon-Urban@ (NU) and had resisted Chesterfield Village=s attempts to rezone its property, despite recommendations from the City=s own planning department and planning commission. *See id* && 10 - 26, LF at 21 to 23. During this same period of time, the City rezoned, and permitted the development of numerous projects on, properties in the vicinity and immediately adjacent to Chesterfield Village=s property. These new developments and some of the preexisting development in the area included a A700 unit apartment complex,@ a Apublic utility facility,@ a subdivision with a planned unit development, a commercial district, an Aoffice building and neighborhood shopping center,@ a AJewish Community Center ... recreational facility,@ and a Aday care center with the capacity for 105 children.@ *See id* && 12 - 21, LF at 22-23.

A second key fact is that the City had no justification for its refusal to allow Chesterfield Village to put its property to reasonable use. As the same trial court held, the City had Aconducted no studies relative to traffic, economic use or appropriate development of the Property.@ *Id* & 30, LF at 24. Furthermore, a Adevelopment pattern has been established in the area of the Property which is inconsistent with any development permitted pursuant to

Chesterfield=s >NU= zoning.@ *Id* & 33, LF at 24. Nonetheless, the Adevelopment pattern which has been established in the area surrounding the 46.3 acre parcel . . . is consistent with residential development as requested in plaintiffs= [Chesterfield Village=s] petition.@ *Id* & 34, LF at 24. Tellingly, the court also concluded that A[t]here is no public benefit to be derived by a continuance of Chesterfield=s >NU= Non-Urban zoning of the Properties.@ Id & 41, LF at 25. In other words, the actions by the City did not advance a legitimate governmental interest.

The third key fact is that the City=s failure to permit Chesterfield to use its property as requested, denied Chesterfield Village economically viable use. In particular, the same trial court found Adevelopment of the Property pursuant to Chesterfield=s current >NU= Non-Urban District Zoning would not be economically feasible@ and Aany permitted or conditional use in Chesterfield=s >NU= Non-Urban District is not economically feasible.@ *Id* & 36-37, LF at 24. *Accord* & 38 LF at 25. Furthermore, AChesterfield presented no evidence at trial that any development of the Properties under its current >NU= zoning

is economically feasible.@ Id & 39, LF at 25. The court concluded that Ato leave the properties zoned >NU= is neither economically feasible, nor good land use planning.@ Id & 42, LF at 25.

POINTS RELIED UPON

THE COURT OF APPEALS HELD THAT ATHE VILLAGE HAS AVERRED FACTS, WHICH IF PROVEN TRUE, COULD ESTABLISH A TEMPORARY REGULATORY TAKING.@ *CHESTERFIELD VILLAGE, INC. V. CITY OF CHESTERFIELD,* NO. ED78444, 2001 MO. APP. LEXIS 787, AT *9 (MO. CT. APP. MAY 9, 2001). THIS HOLDING CORRECT INTERPRETS OF THE UNITED STATES CONSTITUTION.[1]

Chesterfield Village, Inc. v. City of Chesterfield, No. ED78444, 2001 Mo. App. LEXIS 787, (Mo. Ct. App. May 9, 2001)

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981)

Agins v. City of Tiburon, 447 U.S. 255 (1980)

Nollan v. California Coastal Commission, 483 U.S. 825 (1987)

Suitum v. Tahoe Regional Planning Agency, No. 96-243, 1997 U.S. TRANS LEXIS 22 (U.S. Feb. 26, 1997)

Dolan v. City of Tigard, 512 U.S. 374 (1994)

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[1] Amicus joins and adopts the discussion of other points as argued by appellant, Chesterfield Village.

City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687 (1999)

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)

Palazzolo v. Rhode Island, 121 S. Ct. 2448 (2001)

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)

Delaware, Lackawanna and Western Railroad Co. v. Town of Morristown, 276 U.S. 182 (1928)

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304 (1987)

Del Monte Dunes at Monterey v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996)

Florida Rock v. United States, 45 Fed. Cl. 21 (1999)

Formanek v. United States, 18 Cl. Ct. 785 (1989)

Selby v. City of San Buenaventura, 10 Cal. 3d 110 (1973)

Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984)

Eberle v. Dane County Board of Adjustment, 595 N.W.2d 730 (Wis. 1999)

Landgate v. California Coastal Commission, 17 Cal. 4th 1006 (1998) (cert denied, 119 S.Ct. 179 (1998))

Stelpflug v. Town Board, Town of Waukesha, 612 N.W.2d 700 (Wis. 2000)

Hensler v. City of Glendale, 8 Cal. 4th 1 (1994)

Cumberland Farms v. Town of Groton, 719 A.2d 465 (Conn. 1998)

Bass Enterprises Production Co., v. United States, 133 F.3d 893 (Fed Cir. 1998)

Yuba Natural Resources v. United States, 821 F.2d 638 (Fed. Cir. 1987)

Pettro v. United States, 47 Fed. Cl. 136 (2000)

Ali v. City of Los Angeles, 77 Cal. App. 4th 246 (1999)

Steel v. Cape Corporation, 677 A.2d 634 (Md. Ct. Spec. App. 1996)

ARGUMENT

Introduction

> **The Court of Appeals held that Athe Village has averred facts, which if proven true, could establish a temporary regulatory taking.@ *Chesterfield Village, Inc. v. City of Chesterfield*, No. ED78444, 2001 Mo. App. LEXIS 787, at *9 (Mo. Ct. App. May 9, 2001). This holding is a correct interpretation of the United States Constitution.**

At bottom this case is about whether the injuries to a landowner caused by a municipality=s textbook failure to zone and regulate property within its jurisdiction properly are compensable as a regulatory taking. This is not the usual case about whether the temporary imposition of highly restrictive zoning causes hardship upon affected property owners. Instead, from the time it incorporated in 1988 until the conclusion of earlier litigation brought by the

landowners in this case in 1996, the City of Chesterfield adopted a laissez-faire attitude towards the zoning and regulation of the subject property: The City=s density ANon-Urban@ zoning classification remained stuck in time as the suburbs of St. Louis expanded, leaving Chesterfield Village=s property as an undevelopable island surrounded by rapid growth. Despite recommendations from its own professional planners to rezone the property in a manner consistent with the surrounding neighborhoods, the City refused. *See* Judgement Order, & 19-26 LF at 23. Chesterfield Village was forced to go to court to obtain the right to make reasonable use of its property.

After it succeeded, Chesterfield Village then filed the instant action for damages it has sustained during the period of time in which the City unlawfully refused to rezone Chesterfield=s Village=s property. The City=s conduct represents a paradigmatic example of a temporary taking. To the landowner, the impact of the temporary direct taking differs little from a temporary regulatory taking. As Justice Brennan once noted, AFrom the property owner=s point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.@ *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting). For this reason, compensation is appropriate for a temporary taking.

I

THE U.S. CONSTITUTION

REQUIRES DAMAGES FOR

TEMPORARY REGULATORY TAKINGS

The United States Supreme Court has articulated two independent circumstances where a taking may be present:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land.

Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (citation omitted).

Takings have been found under the first Asubstantially advance@ test in instances where unlawful or disproportionate conditions are attached to development permits, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994) , or where there is no reasonable basis for a permit denial, *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999).[2]

[2] See also *Delaware, Lackawanna and Western Railroad Co. v. Town of*

Morristown, 276 U.S. 182, 195 (1928), where the taking of railroad property for a taxi stand failed to advance a legitimate governmental interest.

With respect to the second test, courts often employ the three factor balancing test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (weighing the economic impact, investment-backed expectations, and character of regulation); to help determine whether there has been a loss of economically viable use. *Accord Palazzolo*, 121 S. Ct. at 2457. However, when a litigant can show that there has been a *categorical* take of 100% of economically beneficial or productive use, no balancing is required. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

Whenever there is a regulatory taking, compensation is due, even if the responsible governmental entity later rescinds its regulatory denial, thereby converting a potentially permanent regulatory taking into a temporary one. In other words, once the government has worked a taking, Ano subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.@ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 321 (1987).

The Supreme Court has acknowledged the potential of a temporary regulatory taking under *both* prongs of the independent *Agins* tests. *First English*, of course, was a case, like *Chesterfield Village*, where the owner

alleged a denial of economically viable use.[3]

In *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, a jury found a taking on two alternative grounds: First, the city=s denial of a development proposal allegedly deprived the landowner of economically viable use and, second, the reasons given by the city for the denial of the landowner=s development proposal failed to substantially advance a legitimate governmental interest. The Ninth Circuit reviewed and found lacking each and every justification given by the city for denying to Del Monte Dunes permission to develop its property. *Del Monte Dunes at Monterey v. City of Monterey*, 95 F.3d 1422, 1430-34 (9th Cir. 1996). *See also City of Monterey*, 526 U.S. at 700-701 (court recites the jury instructions regarding the City=s failure to advance a legitimate governmental interest.) After the city denied Del Monte Dunes permission to develop its land, the State of California

[3] AWe also point out that the allegation of the complaint which we treat as true for purposes of our decision was that the ordinance in question denied appellant all use of its property.@ 482 U.S. at 321.

acquired the property. *Del Monte Dunes*, 95 F. 3d at 1425.[4] This, however, did not obviate the taking; it merely converted a permanent taking into a temporary one.

The United States Supreme Court explained in *First English* that damages must be assessed for a temporary taking and that the remedy of merely reversing the illegitimate regulatory course is inadequate, that while Aan illegitimate taking might not occur until the government refuses to pay, the interference that effects a taking might begin much earlier, and compensation is measured from that time.@ *First English*, 482 U.S. at 320. If compensation were paid only from the time the City decided not to reverse its illegitimate regulatory action, that would lead directly to the specter of strategic behavior

[4] Two courts have found a taking even when such residual value remains. *See e.g. Florida Rock v. United States*, 45 Fed. Cl. 21 (1999) (73% diminution of value a taking; residual value from potential sale of property to investors); *Formanek v. United States*, 18 Cl. Ct. 785, 797 (1989) (potential sale to nature conservancy not enough to obviate taking).

by government. Indeed, it was this very sort of strategic behavior that led Justice Brennan to lament the cavalier fashion that some cities in California were treating their citizens:

> Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice:
>
> AIF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.
>
> AIf legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra ›goodies: contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura*, 10 C. 3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.
>
> . . . .
>
> ASee how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck.@ Longtin, Avoiding and Defending Constitutional Attacks on Land Use

> Regulations (Including Inverse Condemnation), in 38B NIMLO Municipal Law Review 192-193 (1975) (emphasis in original).

San Diego Gas and Electric, 450 U.S. at 655 n. 22 (Brennan, J. dissenting). Justice Brennan=s reasoning was expressly adopted by the majority in *First English*. See *First English*, 482 U.S. at 316.

Moreover, the present case does not involve Anormal [regulatory] delay[ ]@ that might excuse a city from liability. *First English*, 482 U.S. at 321. While one errant court has suggested that this exception must swallow the rule, holding that there can be no liability for the period of time in which an invalid regulation is applied before it is overturned in court,[5] this is contrary to the express holding of the Supreme Court that A no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.@ *First English*, 482 U.S. at 321. Put another way

> compensation is measured from that time [of the take,] *See Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984) (Where Government physically occupies land without

[5] *Landgate v. California Coastal Commission*; 17 Cal. 4th 1006 (1998) (cert denied 119 S. Ct. 179 (1998)).

> condemnation proceedings, Athe owner has a right to bring an >inverse condemnation= suit to recover the value of the land *on the date of the intrusion by the Government*@). (Emphasis added.)

First English, 482 U.S. at 320. Indeed, this constitutionally sound rule has also been adopted by the Wisconsin Supreme Court in *Eberle v. Dane County Board of Adjustment*, 595 N.W.2d 730, 742 n. 25 (Wis. 1999) (court rejects California=s *Landgate* decision); *accord Stelpflug v. Town Board, Town of Waukesha*, 612 N.W.2d 700 (Wis. 2000).

A.

Chesterfield Village Has Properly Alleged a Temporary Taking Because theCity=s Actions Failed To Substantially Advance a Legitimate Governmental Interest

Good land use planning ensures a community=s orderly and coordinated development to maximize the health, safety, and welfare of its residents. While legitimate debate often centers on questions of how much growth is appropriate, whether Asmart growth@ is a viable concept,[6] and whether land use controls protect societal values or adversely stifle economic growth, no sector supports the type of derelict land use planning engaged in

[6] *See e.g.*, Jane Shaw and Ronald Utt, ed., *A Guide to Smart Growth*, Heritage Foundation and Public Economy Research Foundation (2000).

by the City in this case. Here, the City rezoned neighboring properties without any clear plan or vision. And then, when confronted by Chesterfield Village=s reasonable request to make its land compatible with the uses adopted by the surrounding area, the City refused, apparently at the behest of an objecting neighbor. *See* Judgment Order, & 45, LF at 25.

As noted in the recitation of the facts above, particularly from the uncontested judgment of the trial court in Chesterfield Village=s suit challenging the City=s actions, the City was unable to provide any justification for its decision not to rezone Chesterfield Village=s property. As a result, the court found that the maintenance of the ANU= Non-Urban District zoning classification as applied to the properties is unreasonable, arbitrary, capricious and unconstitutional in that it is totally inconsistent with the character of development in the surrounding area and is not required to promote public safety, health, convenience, comfort, morals, prosperity or general welfare of Chesterfield.@ Judgment Order, Conclusion of Law & 5, LF at 26. Little more can be added other than to note that if this is not a textbook example of a governmental action that fails to substantially advance a legitimate governmental interest, then nothing is.

Having established that a taking has occurred, the next question is whether liability should attach. Until the City rectified the situation by

granting Chesterfield Village permission to develop its property in a reasonable manner, there was no way of determining whether the take would be permanent or not, nor what the appropriate measure of damages might be. With the corrective action by the City, it is now clear that the take was temporary and it is appropriate for the trial court to assess the damages in this case.[7]

For purposes of the present action on a motion to dismiss, of course, the allegations of Chesterfield Village must be taken as true. In its First Amended Petition for Compensation for Temporary Taking, e.g. & 25 -28, LF at 8-9, Chesterfield Village alleged that the trial court=s ruling in the earlier

[7] The City suggests that the question of a taking and damages is res judicata because it could have been decided in the prior action. However, there is no adequate explanation for why this must be so. Indeed, other courts, even those in California, actually require the challenge to the regulatory action to *precede* the resolution of the question of taking. *See e.g. Hensler v. City of Glendale* 8 Cal. 4th 1 (1994). Similarly, the Supreme Court of Connecticut held that the filing of an action challenging a regulatory act did not preclude the landowner from filing a separate action for a regulatory taking and that success in the first would merely convert an alleged permanent take into a temporary one. *Cumberland Farms v. Town of Groton*, 719 A.2d 465 (Conn. 1998).

proceeding demonstrated that the City=s actions failed to substantially advance a legitimate governmental interest. Thus, the landowner adequately alleged the basis of a temporary taking based upon the City=s failure to substantially advance a legitimate governmental interest.

B.

Chesterfield Village Has Properly Alleged a Temporary Taking Because the City=s Actions Denied It the Economically Beneficial Use of Its Property

As alleged by Chesterfield Village, the City=s actions forced Chesterfield Village to leave its land Aeconomically idle,@ deprived it of Aall [sic] economically beneficial or productive use,@ and denied its Areasonable and distinct investment-backed expectations.@ First Amended Petition && 40 - 42, LF at 12. As such, Chesterfield Village has adequately alleged a regulatory taking based upon the second independent Aeconomically viable use@ prong of the *Agins* test. Furthermore, it alleged a both a categorical taking under *Lucas* (100% loss of economically beneficial and productive use) and a taking under the balancing test of *Penn Central* (weigh economic impact, investment-backed expectations, and character of regulation).

There are numerous cases where courts have found the actual or

potential existence of a temporary regulatory taking when landowners alleged that government has destroyed the economically viable use of property for a

limited period of time. *See e.g.*, *Bass Enterprises Production Co., v. United States*, 133 F.3d 893 (Fed Cir. 1998) (oil leases); *Yuba Natural Resources v. United States*, 821 F.2d. 638 (Fed. Cir. 1987) (temporary takings of mining claims)*; Pettro v. United States*, 47 Fed. Cl. 136 (2000) (minerals); *Ali v. City of Los Angeles*, 77 Cal. App. 4th 246, 248 (1999) (temporary taking damages of $1,199,327); *Steel v. Cape Corporation*, 677 A.2d 634, 643 (Md. Ct. Spec. App. 1996) (relegation of property to passive recreational use for six years a temporary take); *Stelpflug*, 612 N.W. 2d 700. The court below was correct when it found that Chesterfield Village has stated a claim for a temporary taking. There is ample support for the doctrine a temporary taking has occurred when a government action denies a landowner all economically viable use for a limited period of time.

CONCLUSION

The landowner in this case has endured enough. It is entitled to its right to go to court and have its takings claim heard.[8] More than enough has been alleged to prove a taking under any theory of takings law; it is time that Chesterfield Village be given an opportunity to prove its allegations.[9]

DATED: September __, 2001.

Respectfully submitted,

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[8] Or, as Justice O=Connor put it in the oral argument in *Suitum v. Tahoe Regional Planning Agency*: AMy goodness. . . . I mean, why not give this poor, elderly woman the right to go to court and have her takings claim heard?@ No. 96-243, 1997 U.S. TRANS LEXIS 22, at *43 (U.S. Feb. 26, 1997).

[9] Alternatively, because the legal bases of finding a taking have already been ruled upon the by the trial court action in case numbers 673678 and 675787, it would be appropriate for a remand solely on the issue of damages.

Attorneys for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE PURSUANT TO RULE 84.06(C) and (g)

I, Alan Kohn, hereby depose and state as follows:

1. I am an attorney amicus curiae.

2. I certify that the foregoing Brief Amicus Curiae of Pacific Legal Foundation, contains 4941 words and thereby complies with the word limitations contained in Supreme Court Rule 84.06(b).

3. In preparing this Certificate, I relied upon the word count function of the WordPerfect 9.0 word processing software.

4. I further certify that the accompanying floppy disk containing a copy of the foregoing Brief Amicus Curiae of Pacific Legal Foundation, required to be filed by Rule 84.06(g), has been scanned for viruses and is virus-free.

_____
Alan Kohn

CERTIFICATE OF SERVICE

I, Alan Kohn, hereby depose and state as follows:

1. I am an attorney amicus curiae.

2. On September 17, 2001, I served two copies of the foregoing Brief Amicus Curiae of Pacific Legal Foundation upon Douglas R. Beach by hand-delivering same to Douglas R. Beach, BEACH, STEWART,

HEGGIE & MITTLEMAN, LLC, 222 South Central Avenue, Suite 900, St. Louis, Missouri 63105, attorney for Respondent City of Chesterfield; and Peter W. Herzog, Michael A. Vitale, Tammy S. King, HERZOG, CREBS & McGHEE, LLP, 515 North Sixth Street, 24th Floor, St. Louis, MO 64101, attorneys for Appellant Chesterfield Village, Inc.

3. At that time, pursuant to Supreme Court Rule 84.06(g), I further served upon Mr. Beach; Mr. Herzog, Mr. Vitale, and Ms. King one copy of a floppy disk containing the foregoing Brief Amicus Curiae of Pacific Legal Foundation.

_____
Alan Kohn