IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

NO. ED89230

THE CITY OF VALLEY PARK, MISSOURI
Plaintiff/Respondent

v.

MATTHEW ARMSTRONG, CHRISTINE BREDENKOETTER, MARVIN GELBER, BOB FORD, BETTY MARVER, MARY SCHUMAN, JOHNNIE SPEARS, GREG KLOEPPEL, EDWARD THIBEAULT, DONALD WOJTKOWSKI and TED ARMSTRONG as constituting the Boundary Commission, St. Louis County, and
BOUNDARY COMMISSION, ST. LOUIS COUNTY,
Defendants/Appellants

Appeal from the Circuit Court of St. Louis County
The Honorable Patrick Clifford

RESPONDENT'S BRIEF

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§ 536.150 RSMo.

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73.01

STATEMENT OF FACTS

The City of Valley Park, Missouri (hereinafter "City") is a fourth-class city located in St. Louis County, Missouri. (Exhibit 11, p.1). In 2004 the City submitted "An Official Application Submittal for Annexation" which, after a public hearing held September 20, 2004 (VP 245-277), was amended in October, 2004 (Exhibit 11), and a second public hearing was held on February 8, 2005. (VP 304-328). The Chair at both hearings announced the City had fifteen (15) minutes to make a presentation (VP 247; VP 304), as did St. Louis County. In the February 8, 2005, hearing the Chair authorized individual comments for up to three (3) minutes and organizations up to five (5) minutes. An individual acted as a "clock keeper." (VP 304). Pursuant to Boundary Commission Rules, the record of the hearing was kept open for twenty-one (21) days to receive written comments. (App. App. A-85).

At the public hearings no witnesses were sworn (VP 245-277; 304-328), no cross-examination of witnesses was authorized, and no pre-trial discovery was authorized by Rules. (App. App. A-83 to A-85). The Commission issued a "Summary of Decision Proposal for Annexation of Peerless Park Annexation Area City of Valley Park, Missouri" on April 29, 2005 (Exhibit 14), which denied the proposal based on a vote taken March 22, 2005, of eight Commissioners against, zero Commissioners for, with three Commissioners absent. (Exhibit 14, p. 6).

The City appealed the decision on May 24, 2005, to the Circuit Court, St. Louis County, Missouri, seeking review by Certiorari in Count I or, in the alternative, in Count II for Administrative Review. The Court overruled a Motion to Dismiss Amended Count I, Petition for Writ of Certiorari (LF 69) following arguments and briefing by the parties. (LF 23, 26, 34, 38). Thereafter, the City dismissed Count II seeking Administrative Review in the alternative (LF 70) and proceeded to trial on Count I of the Amended Petition. The Court heard evidence consisting of documentary evidence (Exhibits 1-16b, received at T. 3:10-11) and oral testimony of the Valley Park City Clerk (T. 8), the Valley Park Fire Protection District Chief (T. 45), and John Brancaglione, an Urban Planner (T. 55).

At trial, the following evidence was adduced:

That the area proposed for annexation is twenty-five percent (25%) contiguous to the City, is compact, and is a logical extension of existing City boundaries and that the area is not isolated from the City by either the Meramec River or Interstate 44. (T. 64-66). That the few subdivision properties split by the proposal were not impacted (T. 68-69) and that the entire area, including the City and St. Louis County, would benefit from annexation because of increases in services (T. 86:4-21), that revenue loss to the County is insignificant (T. 70:6-14). That all eleven statutory criteria were satisfied in the Valley Park Amended Plan of Intent (T. 60:6-15) and that the

decision of the Boundary Commission to deny the proposal was arbitrary and capricious, based on a reasonable degree of urban planning certainty (T. 95:21-25; T. 96:1) and prior Boundary Commission decisions and geographical factors. (T. 64:8-25; T. 65:1-15).

The Boundary Commission presented no evidence to the Court. (T. 102:10-18).

The Trial Court made Findings of Fact and Conclusions of Law and rendered judgment in favor of the City of Valley Park on December 6, 2006, remanding the matter to the Boundary Commission so the issues could be placed on the ballot in accordance with Missouri Statutes. (LF 82-88).

Appellants filed an appeal to this Court on January 9, 2007. (LF 89).

POINTS RELIED ON

I. THE TRIAL COURT CORRECTLY HELD THAT PROCEEDINGS FOR BOUNDARY CHANGES HELD PURSUANT TO § 72.400 ET SEQ. RSMo. WERE UNCONTESTED INASMUCH AS THERE WAS NO ADVERSARIAL HEARING REQUIRED OR PROVIDED AND NO LEGAL RIGHTS OF SPECIFIC PARTIES WERE DETERMINED.

Cases:

Furlong Companies, Inc., v. City of Kansas City, 189 S.W.3d 157 (Mo. 2006)

Midland Township v. State Boundary Commission, 401 Mich. 641, 259 N.W.2d 326 (Mich. 1977)

Cade v. State Department of Social Services, Division of Family Services, 990 S.W.2d 32 (Mo. App. 1999)

II. THE TRIAL COURT DECISION SHOULD BE AFFIRMED INASMUCH AS THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT IT, IT IS SUPPORTED BY THE WEIGHT OF THE EVIDENCE, AND IT CORRECTLY DECLARED AND APPLIED THE LAW.

Cases:

Phipps v. School District, 645 S.W.2d 91 (Mo. App. W.D. 1982)

State ex rel Clark v. Board of Trustees, Kansas City, Employees, 728 S.W.2d 562 (Mo. App. W.D. 1987)

State v. Straatman Enter., Inc., v. County of Franklin, 4 S.W.3d 641 (Mo. App. W.D. 1999)

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

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT PROCEEDINGS FOR BOUNDARY CHANGES HELD PURSUANT TO § 72.400 ET SEQ. RSMo. WERE UNCONTESTED INASMUCH AS THERE WAS NO ADVERSARIAL HEARING REQUIRED OR PROVIDED AND NO LEGAL RIGHTS OF SPECIFIC PARTIES WERE DETERMINED.

The Boundary Commission, St. Louis County, et al. (hereinafter "Appellants" or "Boundary Commission"), contend that the trial court erred when it determined that proceedings before the Boundary Commission constituted an uncontested case and therefore judicial review was appropriate pursuant to § 536.150 RSMo. Appellants argue that all elements of § 536.010 RSMo. defining a contested case were met in the case at bar, to wit: (a) that the case was a proceeding before an agency; (b) seeking to affect legal rights of specific parties rather than the public at large; (c) after an adversarial hearing required by state or federal statute, rule, local ordinance, or other provision of law. Appellants rely primarily on statements in Cade v. State Department of Social Services, Division of Family Services, 990 S.W.2d 32 at 36 (Mo. App. 1999) that the "key to the classification of a case as contested or non-contested is the requirement of a hearing." Appellants point out that the organic statute for the Boundary Commission, § 72.400 et seq. RSMo. at

72.403(2), (App. App. 8-36) specifically provides for a public hearing wherein ". . . the county, the proposing agent and affected municipalities shall be parties . . ." Appellants assert this provision and others in § 72.403 and the Rules [of the Boundary Commission] require an adversarial hearing. (App. Br. p. 13).

Respondent concedes that the Boundary Commission is an agency and that its submission of a Plan of Intent to annex constituted a proceeding. However, Respondent disagrees with Appellants' assertion that the statute or Boundary Commission rules require an adversarial hearing. Rather, the only statutory requirement is that the hearing be public, notice to be published within twenty-one (21) days with written notice sent to the county clerk, city and village clerk, and any other political subdivision materially affected in the Commission's opinion, and held not less than fourteen (14) days nor more than sixty (60) days after publication. 72.403(2) RSMo. See also Article VII, Public Hearing, Boundary Commission Rules, (App. App. A-83).

Appellants make the same arguments to this Court that were made before the Missouri Supreme Court in the recent case of Furlong Companies, Inc., v. City of Kansas City, 189 S.W.3d 157 (Mo. 2006). In Furlong, supra, the Supreme Court sustained a motion to transfer, after opinion of the Court of Appeals, in 2005 WL 405852, unpublished (Mo. App. W.D.) and reviewed the decision of the Trial Court in determining that certain proceedings pertaining to a preliminary plat application to the city council, accompanied by a hearing

were uncontested. The Court of Appeals had held, in its review, that the matter was contested and that the sole determiner was whether a hearing was required:

> "It is a contested case if the law required a hearing; all other cases are non-contested." Furlong, 2005 WL 405852 at p. 8.

The Western District Court of Appeals discounted the procedural conduct of the hearing mandated:

> "Issues concerning whether procedural formalities required by statute were adhered to, whether the hearing was 'adversarial' in nature, or the fact that no record was made, are not relevant when classifying the contested or non-contested nature of a case. FN 3. Even when depriving an aggrieved party of a statutorily required hearing altogether would have no bearing how to classify the case at issue." Furlong, 2005 WL 405852 at p. 8.

In its decision, the Western District Court of Appeals declined to follow a host of cases, cited in Footnote 2 of the Furlong Court of Appeals decision.

The Missouri Supreme Court, in its review of Furlong, supra, declined to adopt the new standard espoused by the Court of Appeals. Without mention of the Western District opinion, the Supreme Court held:

> "Contested cases provide the parties with an opportunity for a formal hearing with the presentation of evidence, including sworn testimony of witnesses and cross-examination of witnesses, and require written findings of fact and conclusions of law . . ." (Citing cases) Furlong, supra, 189 S.W.3d at 167.

The Missouri Supreme Court went beyond the Western District's simplistic analysis of whether a requirement for hearing existed or not, stating:

> "The driving idea behind administrative law in Missouri is that the citizen is entitled to a fair opportunity to present the facts of his or her case. If this occurs in the context of the procedural formality and protection of a 'contested case' before the administrative agency, the review of the courts can be limited to the record. If the citizen is denied this opportunity before the agency, then he or she is entitled to present such evidence as is necessary before the courts to determine the controversy." Furlong, 189 S.W.3d at 167.

The Trial Court in this action found that during the hearing(s):

> "The City was limited to a 15-minute presentation at each hearing, no witnesses for or against the proposal were sworn, no cross-examination of witnesses was permitted, no pre-hearing discovery was authorized. Letters from interested parties were entered in the record without a requirement of an appearance before the Commission." (Findings of Fact, Conclusions of Law and Judgment, LF 83).

Such fact findings are supported by the hearing transcripts of the proceedings before the Boundary Commission. (VP 243-407). The Court also noted that the "Commission held the record open for twenty-one (21) days after each hearing, receiving written comments from any person or entity." (Findings of Fact, Conclusions of Law and Judgment, LF 83). It should also be noted that the "Notice of Annexation Proposal" at VP 222 omits the required language of whether a written answer is required pursuant to § 536.067(2)(d) RSMo. (Res. App. A-6)

The hearings were held precisely in the manner contemplated by the Boundary Commission pursuant to their own rules in Article VII, Public Hearing A-D, Boundary Commission Rules (Exhibit 16, App. App. A 83-85).

Obviously, the proceedings were not consistent with the requirements of § 536.070 RSMo. (Res. App. A-8) and were not adversarial.

The remaining element of a contested case is that "legal rights, duties or privileges of specific parties are required by law to be determined after hearing." § 536.010(4) RSMo. (emphasis added) (Res. App. A-1). Appellants address this issue in their brief, stating:

> "Further, the Commission affects the legal rights and interests of the specific parties involved. The City's interest in this case is dramatically different from the public at large, given the potential for receipt of additional tax revenue if the boundary is changed. Each individual whose property is within the area to be annexed also has a special interest in the Commission's decisions, as does the County government, which stands to lose revenue if the annexation is approved." (App. Br. p. 13).

While the character of proceedings for annexation before a Boundary Commission as contested or non-contested appears to be a case of first impression in Missouri, at least one other jurisdiction has considered the issue and determined those proceedings to be non-contested. See Midland Township v. State Boundary Commission, 401 Mich. 641, 259 N.W.2d 326 (Mich. 1977). Michigan's definition of a contested case states:

> "'Contested case' means a proceeding, including but not limited to, rate-making, price-fixing and licensing, in which a determination of the legal rights, duties or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing . . ." MCLA 24.203(3).

The Michigan Supreme Court determined that no legal rights of parties are determined, holding at 259 N.W.2d 340:

> "We have already expressed our conclusion, based on the Hunter [Hunter v. Pittsburgh, 207 U.S. 161, 28 S.Ct. 40 (1907)] principle, that no governmental authority or person has any legal right in the boundaries of a city, village or township. An annexation proceeding is not a 'contested case' even though the Commission must hold a public hearing and representatives of a city, village or township and other persons have a right to be heard at such hearing before the Commission makes its determination. That procedural right does not create any substantive legal right in a 'named party' and, hence, the 'legal rights' of a 'named party' are not required by the 1968 Act and the 1970 amendment to be determined after an opportunity for an evidentiary hearing within the meaning of the Administrative Procedures Act. The Administrative Procedures Act was designed to provide procedural protection where a personal right, duty or privilege is at stake. Affording the public at large an opportunity to be heard does not create a personal right in the decision; certain decisions are so largely legislative in character, affecting the populace at large without differentiation and not fundamentally a particular person or persons, that no substantive right is to be implied from the opportunity to be heard." (emphasis added).

The Hunter principle referred to by the Michigan Supreme Court was further elaborated as follows in Midland, supra:

> "These contentions ignore the unique nature of annexation proceedings. No city, village, township or person has any vested right or legally-protected interest in the boundaries of such governmental units. The Legislature is free to change city, village, and township boundaries at will. This was settled for Federal Constitutional purposes in Hunter v. Pittsburgh, 207 US 161, 178-179; 28 S Ct 40; 52 L Ed 151 (1907), and the principles there established have been observed in subsequent litigation in the courts of this and other states. See Village of Kingsford v. Dudlip, supra, p. 148. Similarly, see Lansing School District v. State Board of Education, 367 Mich 591; 116 N.W.2d 866 (1962); [p. 665]. The Detroit Edison Co. v. East China Twp School Dist. No. 3, 247 F Supp 296 (ED Mich, 1965), aff'd 378 F2d 225 (CA

6, 1967); 56 Am Jur 2d, Municipal Corporations, §50, p. 108, and §57, p. 113. Id. pp. 178-179. Midland, supra, 259 N.W.2d at 337.

The City submits that Midland's analysis and characterization of the proceedings before the Michigan Boundary Commission as non-contested are equally applicable to proceedings before the Boundary Commission in this matter.[1]

Finally, Appellants argue that the City waived its rights to procedural formalities contained within § 536.063 to 536.090 RSMo. for contested cases when "it made no objections to the form of the hearing or procedures provided to it." (App. Br. p. 20). As authority, Appellants rely on Weber v. Firemen's Retirement System, 872 S.W.2d 477 (Mo. Banc 1994). Weber is inapposite to the instant case inasmuch as it was determined that a fireman's claim for disability retirement benefits is a contested case. Weber, supra, at 479. This case, as has been demonstrated, is uncontested. However, the City believes that a waiver argument proposed by Appellants undercuts its argument that the City received a contested hearing consistent with the requirements of the

[1] The Michigan Boundary Commission Statute, MCLA 24.201, unlike the Missouri Boundary Commission Act, specifically provides that final decision of the commission shall be subject to judicial review in a manner prescribed in the Michigan Administrative Procedures Act (now the Administrative Procedure Act of 1969, superceding the 1952 Act called out in the statute). That Act is substantially similar to § 536.140.2, RSMo., providing for review of a contested case. See the Michigan Administrative Procedure Act, MCLA 24.306, set forth in footnote 33 of Midland, supra, at 259 N.W.2d 341.

Administrative Procedure Act and is a tacit admission that the proceedings were not conducted as a contested case.

SUMMARY OF ARGUMENT

POINT I

The Trial Court was correct in characterizing the proceedings before the Boundary Commission as non-contested. No proceedings consistent with § 536.070 RSMo. were authorized by Boundary Commission Rules nor were any hearings conducted consistent with that section. Further, the requisite elements of § 536.010(4) RSMo. are lacking inasmuch as no entity or person has legal rights to be determined in an annexation proceeding.

The Summary of Decision issued by the Boundary Commission did not comply with § 536.090 RSMo. which requires written Findings of Fact and Conclusions of Law to be stated separately. Further, the Boundary Commission's organic statute is silent as to the form of the hearing, other than it be public and that notice be published. There is no guidance in the statute for the scope of judicial review. It is clear that the Trial Court followed the law and acted appropriately in ordering an evidentiary hearing.

ARGUMENT

II. THE TRIAL COURT DECISION SHOULD BE AFFIRMED INASMUCH AS THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT IT, IT IS SUPPORTED BY THE WEIGHT OF THE EVIDENCE, AND IT CORRECTLY DECLARED AND APPLIED THE LAW.

The standard of judicial review of a non-contested administrative proceeding was well stated in Phipps v. School District, 645 S.W.2d 91 (Mo. App. W.D. 1982), discussed in State ex rel Clark v. Board of Trustees, Kansas City, Employees, 728 S.W.2d 562 at 564 (Mo. App. W.D. 1987):

> "In a non-contested case the Circuit Court has no record to review, but rather hears evidence on the merits, finds the facts and makes a record . . . This Court observed that in such a proceeding the Circuit Court does not review the agency's findings on evidence, but makes such findings itself and then passes on the validity of the administrative decision in light of the Court's findings. The Court pointed out that the Circuit Court owes no deference to the facts found or to the assessment of credibility made by the agency, but is bound only to refrain from substituting its discretion from that vested in the agency."

Stated in another manner, the Circuit Court need not conform doubtful evidence to the Agency's decision. State v. Straatman Enter., Inc., v. County of Franklin, 4 S.W.3d 641, 645 (Mo. App. W.D. 1999).

On appeal, the Appellate Court reviews this as a court-tried case, reviewing the decision of the Circuit Court, not the decision of the administrative agency. Straatman Enter., supra, 4 S.W.3d at 645. The review by this Court [Appellate Court] of the Circuit Court decision is governed by

Rule 73.01 and Murphy v. Carron, 536 S.W.2d 30 (Mo. Banc 1976) Phipps, supra, 645 S.W.2d at 96-97.

At the Circuit Court trial, the City of Valley Park had introduced and the Trial Court had received into evidence ten prior decisions of the Boundary Commission (T. 3:10-11; Exhibits 1-10), the Valley Park Amended Plan of Intent submitted to the Boundary Commission (T. 3:10-11; Exhibit 11), a Petition for Annexation signed by residents of the proposed area (T. 3:10-11; Exhibit 12), a map and photograph of the area (T. 3:10-11; Exhibits 13 and 15), and the Boundary Commission Rules. (T. 3:10-11; Exhibit 16). Also received was the curriculum vitae of an Urban Planner, John Brancaglione (Exhibits 16A and 16B), and the Boundary Commission decision appealed from. (Exhibit 14) (T. 3:10-11).

The City also presented oral testimony from the City Clerk (T. 8-44), Valley Park Fire Protection District Chief (T. 45-54), and the Urban Planner, John Brancaglione. (T. 55-101). The Boundary Commission offered no evidence and requested the Court take judicial notice of the record before the Boundary Commission. (T. 102:10-18).

From the evidence adduced by the City, the record supports those findings that the proposed area, depicted by both legal description and map form, is compact and meets contiguity requirements and is a logical extension of the City boundaries and that the area is not isolated by either the Meramec

River or Interstate 44, that the few subdivision properties split by the annexation were not impacted, that both the City and St. Louis County areas would benefit from the annexation due to proposed infrastructure improvements and that the financial impact to the County, the City, the proposed areas, and the abutting areas was not significant. (T. 64-72; T. 83-86; Exhibit 11, p. 3-12). That all eleven (11) statutory criteria were satisfied in the Plan of Intent. (T. 60:6-15).

The Court had ample evidence, including expert evidence, to conclude that the denial by the Boundary Commission of the Valley Park proposal was unreasonable, arbitrary, and capricious (T. 95:21-25; T. 96:1), and that the City could and would serve the new area immediately with police; planning; infrastructure, including water and sewer; library and that much of the monies derived by the City in revenue would go directly back to the area and that new tax rates would be relatively inexpensive. (T. 22-31; Exhibit 11, p. 9). There was ample evidence in the Plan of Intent as to the existing zoning of the area and the reasonableness of zoning proposed by the City. (Exhibit 11, p. 10). No evidence was presented to the contrary to the Trial Judge by Appellants.

Appellants argue that this Court should uphold the decision of the Boundary Commission, even in light of the evidence presented at the Trial Court because the Commission properly decided "the Proposal was not in the best interest of the parties, was neither impulsive nor based upon a 'gut feeling'

. . . [The] Circuit Court erred . . . because the evidence at trial established a reasonable basis for the denial." (App. Br., 31).

Appellants' "gut feeling" criteria appears to be derived from language in Barry Service Agency Co. v. Manning, 891 S.W.2d 892 at 893 (Mo. App. W.D. 1995) cited in Missouri National Education Association v. Missouri Board of Education, 34 S.W.3d 266 at 281 (Mo. App. W.D. 2000). In Barry Service Company, supra, the Court reviewed an interest rate determination for loans under $500.00 by the Director of the Department of Economic Development. On review, the Appellate Court held that while the statutory provision gives the Director some discretion to decide whether a requested rate is ". . .appropriate, however, it does not extend an open invitation to act in a totally subjective manner without guidelines or criteria or without substantial evidence to support such a determination." Barry, supra at 894.

Respondent submits that after a review of the evidence at Trial Court, the Trial Court properly found a dearth of substantial evidence to support the conclusions of the Boundary Commission. Several illustrative conclusions found in its Summary of Decision include the following:

> "The Amended proposal would create an elongated boundary and decrease the City's compactness." (Exhibit 14, p. 2) . . .
>
> "That the Meramec River is the more logical southern boundary for the City in that it is a natural geographic feature. Highway 141 is the only means to cross the Meramec River in the area. Thus, the northern area

is physically isolated by the Meramec River." (Exhibit 14, p. 2) . . .

> "The configuration of the annexation area also impedes access to St. Louis County to the surrounding unincorporated area. Service to these areas could not be provided without traversing the City." (Exhibit 14, p. 3).

These conclusions without any attendant or complete factual support are obvious examples of the finding of the Trial Court that the Commission's decision was arbitrary and capricious, inasmuch as the organic statute, definitions, 72.400 RSMo., only requires a 15% contiguity between the proposed area and existing City and the Commission found the proposal of Valley Park had 25% contiguity. (Exhibit 14, p. 2; T.18:14-17). No testimony at the trial level was ever introduced that "compactness" of the City was compromised. In fact, evidence was that City Hall with all City services was immediately adjacent to the proposed area. (Testimony of City Clerk, T. 14-18; map of City, Exhibit 13; Plan of Intent, figure 2; showing location of community facilities, Exhibit 11). No testimony at the trial level was adduced that crossing the Meramec River was arduous or treacherous or that somehow access to the area was deficient in permitting access to the proposed area. In fact, there was ample evidence that other districts cross the Meramec, without detriment to either service area (Testimony of Fire Chief, T. 45-54) and from expert John Brancaglione, and that even our capitol city extends on both sides of a river. (T. 64-68).

How this proposed annexation ". . .impedes access to St. Louis County to the surrounding unincorporated area" (Exhibit 14, p. 2) was never demonstrated by any evidence, nor was the statement that averred "Services to these areas could not be provided without traversing the City" (Exhibit 14, p. 3) ever supported by evidence. These statements, not only were conclusionary without factual basis, they would appear to have no value in forming an informed decision in whether this annexation proposal satisfied statutory criteria. No physical barriers were shown to impede travel or access.

Much of Appellants' Summary of Decision is replete with conclusions that are unsupported by factual findings.

SUMMARY OF ARGUMENT

POINT II

Under Murphy v. Carron, supra, this Court will sustain the Trial Court's judgment absent a finding of substantial judgment to support it unless it is against the weight of the evidence or unless the Trial Court erroneously declares and applies the law. The evidence adduced by the City and Trial Court coupled with no evidence to the contrary adduced by Appellants, supports the Findings of Fact, Conclusions of Law and Judgment of the Trial Court.

CONCLUSION

The decision of the Circuit Court should be affirmed, as the Trial Court correctly found the matter was uncontested, held a de novo trial, and made Findings of Fact, Conclusions of Law and a Judgment that was supported by the evidence.

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the requirements of Supreme Court Rule 84.06 and Local Rule 360 of this Court. Respondent's Brief contains 3,961 words as determined by Microsoft Word. The diskette filed herewith contains a copy of Respondent's Brief and has been scanned for viruses and is virus free.

A copy of the foregoing Brief and diskette were sent by first-class mail on August 8, 2007, to the following attorneys of record:

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