IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NO. 2007-CA-00601

MICHAEL L. BRIDGE — PLAINTIFF/APPELLANT,

vs.

MAYOR AND BOARD OF ALDERMEN
CITY OF OXFORD, MISSISSIPPI, ET AL. — DEFENDANTS/APPELLEES,

and

LUCY LYNN ROBINSON, MARY SUE
ROBINSON, and RALPH COLEMAN — INTERVENORS.

ON APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representatives are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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Richard Howorth, Appellee
George Patterson, Appellee
Ernest Oliver, Appellee
Janice Antonow, Appellee
Ulysses Howell, Appellee
Preston Taylor, Appellee
Jon Fisher, Appellee
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Mary Sue Robinson, Intervenor

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SO CERTIFIED, this the 20th day of December, 2007.

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BRIEF OF THE APPELLEES

STATEMENT OF ISSUES

The only issue for this Court's consideration is whether the Circuit Court erred in finding that the Board of Aldermen's decision to re-zone certain property was fairly debatable.

STATEMENT REGARDING ORAL ARGUMENT

Appellee submits that the facts and legal arguments are adequately presented in the briefs and record in this case. Oral argument would not significantly aid the Court in its decisional process. Appellee respectfully suggests that the Court not schedule oral argument in this case. *See* MISS. R. APP. P. 34(a).

STATEMENT OF THE CASE

1. Nature of the case.

This case is a challenge to a decision of the City's governing authorities to re-zone certain property.

B. Course of the proceedings and statement of facts.

On May 23, 2005, certain individuals applied for an amendment to the zoning map of the City of Oxford, Mississippi. The application was made by "Lucy Robinson and Others"[1] and a petition signed by numerous interested property owners was made a part of the application. The property owners petitioning for the zoning amendment included both owners of property subject to the re-zoning and owners of property either immediately adjacent or in close proximity to the subject property. The petitioners sought to have a portion of the Price Street neighborhood that was zoned as RB (multi-family residential) re-zoned as R1A (single-family residential).

Both the north and south sides of Price Street were zoned RB in 1971. When the City adopted its Comprehensive Plan ("the Plan") in 2004, all but two lots on the south side of Price Street were zoned RA, reflecting the neighborhood's long-time composition of only single-family dwellings. However, in spite of the fact that the single-family residences on the north side of the street were indistinguishable from those on the south side, the former group erroneously remained RB. The homes immediately north of the RB-zoned strip on Price Street are zoned RE (single-family residential on large lots). As a result of the 2004 zoning, then, a thin strip of properties zoned for multi-family residential was sandwiched between two substantial single-family zones. This led to the request for re-zoning, within only six months of the adoption of the Plan.

The application was placed on the Oxford Planning Commission's June 2005 agenda. The minutes of that meeting reflect that petitioners numbered between sixty and seventy.[2] Bridge

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[1]R. at 596-618.

[2]The exact number of petitioners is unclear from the record. Within the immediate vicinity of the Price Street neighborhood, the City has identified thirty-two petitioners, consisting of property owners with property either (1) within the proposed area of re-zoning (seven), (2) immediately

opposed the application. After public comment concerning the re-zoning request, the matter was continued to the July 2005 agenda to acquire more information about the request. At the July hearing, the petitioners again presented their case. Bridge again voiced his opposition, and the matter died for lack of a motion.[3]

The matter then proceeded to the Board of Aldermen, and was first heard by the Board on September 6, 2005.[4] On September 20, 2005, the Board considered the matter again and allowed another full public hearing.[5] On October 4, 2005, the proposed re-zoning received a third reading and received another public hearing.[6] After this third reading, the Board voted to approve the request for re-zoning.[7] The minutes of the October 4, 2005, hearing were adopted on October 28, 2005. Bridge filed his Bill of Exceptions on October 27, 2005.[8] On November 10, 2005, the City filed an addendum to supplement the Bill of Exceptions. On May 18, 2006, Bridge filed a Brief in Support of his Bill of Exceptions, to which the City responded on June 22, 2006. Bridge filed a reply brief

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adjacent thereto (thirteen), and (3) in the immediate vicinity thereto (twelve). All of the foregoing property owners own property reflected on City Map 86K and constitute the approximate number of thirty-two Petitioners set forth above.

[3]The City's Land Development Code requires that any zoning change be considered first by the Planning Commission before action is taken by the Board of Aldermen. See LDC § 223.02; R. at 342.

[4]R. at 18-145.

[5]R. at 146-161.

[6]R. at 166-67.

[7]*Id.*

[8]Bridge's filing of a Bill of Exceptions before adoption of the minutes was premature. However, to save Bridge the trouble of withdrawing the Bill of Exceptions and refiling, the City agreed to waive this defense.

on July 18, 2006. By order of the Circuit Court on August 11, 2006, Lucy Lynn Robinson, Mary Sue Robinson, and Ralph Coleman (collectively, "Intervenors") were granted leave to intervene. After a hearing held on February 27, 2007, the Circuit Court affirmed the City's decision on March 19, 2007.

SUMMARY OF ARGUMENT

This Court should affirm the Circuit Court's order upholding the City's decision to re-zone certain property from RB to R1A. The record reflects that this decision was fairly debatable. During the hearings held on the issue, substantial evidence was presented that there was a mistake in the original zoning of the subject property, that the character of the neighborhood has changed to such an extent as to justify reclassification and there existed a public need for re-zoning. Furthermore, there is no legal support for Bridge's argument that the City must correct a mistake in its Comprehensive Plan and/or its future land use map as a prerequisite to re-zoning a certain parcel of property.

ARGUMENT

A. Standard of review.

This Court may not act as a "super-zoning commission."[9] It is the well-settled law of this State that "[t]he classification of property for zoning purposes is a legislative matter rather than a judicial matter."[10] This Court has recently reminded litigants that it "may not perform a de novo review" of a municipal re-zoning decision.[11] Rather, the Court must "give deference to the zoning

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[9] *McWaters v. City of Biloxi*, 591 So. 2d 824, 828 (Miss. 1991).

[10] *Heroman v. McDonald*, 885 So. 2d 67, 70 (Miss. 2004).

[11] *City of Ridgeland v. Estate of Lewis*, 963 So. 2d 1210, 1214 (Miss. Ct. App. 2007).

decision of the local governing board, as the decision is presumed valid."[12] Because of this presumption, a person seeking to set aside a re-zoning decision is burdened to show that the decision was "arbitrary, capricious, discriminatory, illegal, not supported by substantial evidence, and not fairly debatable."[13]

In order to establish that the City's decision is arbitrary, Bridge must show that it was made in the absence of reason or judgment, and based solely on "the will alone."[14] The City's decision may only be considered capricious if Bridge can show that it was made "in a whimsical manner" evidencing a lack of understanding or disregard for relevant facts and circumstances.[15] A decision that is "fairly debatable" cannot also be arbitrary and capricious.[16] The presentation of evidence and testimony contrary to the City's decision does not render the decision arbitrary and capricious. In fact, this Court has recently held that "[s]uch conflicting testimony only means that the issue was fairly debatable."[17]

This Court has also held that "before a zoning board reclassifies property from one zone to another, there must be proof either (1) that there was a mistake in the original zoning, or (2) that the character of the neighborhood has changed to such an extent as to justify reclassification, and that

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[12] *Id.*

[13] *Id.; see also Gillis v. City of McComb*, 860 So. 2d 833, 835 (Miss. Ct. App. 2003).

[14] *Gillis*, 860 So. 2d at 836.

[15] *Id.* (citing *Briarwood, Inc. v. City of Clarksdale*, 766 So. 2d 73, 80 (Miss. Ct. App. 2000)).

[16] *City of Ridgeland*, 963 So. 2d at 1214; *Gillis*, 860 So. 2d at 835-36.

[17] *Id.* at 836-37.

there was a public need for re-zoning."[18] The applicant bears the "initial burden" of showing one of these two prongs by clear and convincing evidence.[19] When considering the factual issues involved in a re-zoning petition, Board members may "consider not only information obtained at the hearing but also their own common knowledge and the familiarity with the ordinance area."[20] Mississippi courts have "recognized the duty of municipal zoning authorities, acting legislatively, to assess their needs by 'looking out the window' and acting on the basis of what they see happening in their community."[21]

B. The City was not required to amend its Comprehensive Plan prior to re-zoning the Price Street Property.

Bridge argues that the City's decision to re-zone the north side of Price Street was improper because the re-zoning "does not comply with the comprehensive plan."[22] Bridge's only support for this contention is the fact that the future land use map that was part of the City's 2004 Plan "clearly shows the subject property as RB."[23] Because the re-zoning is consistent with the stated goals of the Plan, and because the City was not required to amend its future land use plan before it amended its zoning ordinances, this argument must fail.

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[18]*Kuluz v. City of D'Iberville*, 890 So. 2d 938, 940 (Miss. Ct. App. 2004) (quoting *Board of Aldermen, City of Clinton v.* Conerly, 509 So. 2d 877, 883 (Miss. 1987)).

[19]*Cockrell v. Panola County Bd. of Supervisors*, 950 So. 2d 1086, 1092 (Miss. Ct. App. 2007).

[20]*Faircloth v. Lyles*, 592 So. 2d 941, 943 (Miss. 1991).

[21]*McWaters*, 591 So. 2d at 828 (quoting *Luter v. Hammon*, 529 So.2d 625, 629 (Miss. 1988)).

[22]Appellant's Brief, at 4.

[23]*Id.*

One of the primary objectives of the Plan was to "[p]rotect the physical character and social fabric of Oxford's neighborhoods."[24] The Plan further stated that "the neighborhoods that surround the Square or touch the Ole Miss campus" were "[o]f particular concern ...."[25] The re-zoned property falls within this "Neighborhood Conservation Zone."[26] The first "guiding principle" considered in the implementation of the Plan was a directive to "[r]ecognize Oxford's historic ways of town building and use those traditions to provide a framework for future growth."[27] The Plan also stated that:

> [t]he residential neighborhoods adjacent the Square, the Central Business District and the University are the oldest, most historically important residential areas of the community. They are a significant asset in defining the character of Oxford and yet they are the most vulnerable. Demand for off-campus housing and pressure for expansions at the edge of the business district threaten these neighborhoods with development conversions, increased traffic and other associated impacts.[28]

The record is replete with evidence that the City's decision to re-zone the subject property was in keeping with these principles.[29] At the very least, the issue of whether the City's decision to re-zone was in keeping with the principles espoused in its Comprehensive Plan is fairly debatable.

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[24]R. at 980.

[25]*Id.*

[26]R. at 981. Price Street runs east and west in the northwestern-most corner of this Zone.

[27]R. at 976.

[28]R. at 979.

[29]For example, Alderman Jon Fisher, who made the motion to re-zone the property, stated that the re-zoning would "protect the single family character of Oxford." R. at 428. Alderman Ulysses Howell stated that the City "should protect old neighborhoods like" the Price Street neighborhood. R. at 429. Alderman Preston Taylor stated that his support for the motion was in the interest of "preserving the neighborhoods ...." R. at 431.

Furthermore, there is no principle of legislative or judicial law that requires municipalities to amend their comprehensive plans (or, more specifically, their future land use maps) prior to hearing a petition for re-zoning. While the City concedes that it has not yet corrected the zoning error on its future land use map, the City effects changes to its zoning designations through amendment to its *ordinances*, not its Plan.[30] On a practical level, it is hardly surprising that the City would elect to wait until Bridge's appeal was resolved before engaging its consultants to correct the Plan and the future land use map.[31] Despite Bridge's colorful (yet vague) warning that "Oxford has placed the cart before the horse", the proposition that the City may not re-zone without first amending its Plan is unsupportable.

Bridge further argues that the City's decision is rendered invalid by the fact that it was made just a year after the Plan was adopted, citing *Town of Florence v. Sea Lands, Ltd.*[32] Nothing in *Town of Florence*, however, suggests that the City may not correct mistakes contained in its Plan at any time after their discovery. If the City has the authority to re-zone certain property that was mistakenly designated, it certainly has the authority to correct a Comprehensive Plan and a future land use map that contain the same mistake. Bridge's argument to the contrary lacks merit.

C. The Circuit Court did not err in holding that the issue of mistake was fairly debatable.

Bridge argues that the mistake that was made during the original 2004 zoning was not "a

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[30]*See* R. at 166-67.

[31]Bridge's intentions to appeal any decision to re-zone were clear from his threats of litigation during the Board's consideration of the potential re-zoning. R. at 182.

[32]759 So. 2d 1221 (Miss. 2000).

mistake that would justify a re-zoning."[33] This argument must fail. It is true that, in Mississippi, "a mistake within the meaning of the law is not a mistake of judgment, but, rather, a clerical or administrative mistake."[34] As the Circuit Court correctly held, however, the error raised by the petitioners and relied upon by the City was not such a mistake of judgment.[35] The Mississippi Supreme Court has held that a re-zoning based on a mistake is proper when the record shows that the original zoning classification was not consistent with the actual use of the subject property.[36] The issue of whether a "clerical or administrative" mistake existed in the 2004 Plan is fairly debatable. In fact, the minutes of the July 18, 2005 meeting of the Oxford Planning Commission reflect that Bridge stated that the matter arose because of "an administrative mistake."[37]

Bridge glibly argues that "if a mistake was made by members of the Board of Aldermen it was either: (1) The [sic] didn't know what they were voting for, or (2) The [sic] changed their minds about how they should have voted."[38] The first part of this argument is a red herring - if a zoning authority knowingly approves of a "mistake" in its comprehensive plan, it is not a mistake at all. Bridge's refrain that the Board was "ignorant" of the contents of the Plan is partially correct - the City was ignorant of the fact it had made an error. While it is certainly true that a City's zoning

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[33]Appellant's Brief, at 9.

[34]*Town of Florence v. Sea Lands, Ltd.*, 759 So. 2d 1221, 1225 (Miss. 2000) (quoting *City of New Albany v. Ray*, 417 So. 2d 550, 552 (Miss. 1982)).

[35]R. at 1073.

[36]*Faircloth*, 592 So. 2d at 944.

[37]R. at 390.

[38]Appellant's Brief, at 9.

ordinances carry a presumption of validity and accuracy, that presumption is rebuttable.[39] If the presumption were not subject to rebuttal, Mississippi counties and municipalities would be unable to correct zoning errors at all. Our Supreme Court has long held that a municipality has a "***duty*** ... to correct a [zoning] mistake that it had formerly made".[40]

The second part of Bridge's argument - that Board members simply "changed their minds" about the zoning on Price Street - is flatly contradicted by the record. Evidence and testimony was presented showing that the twenty lots included in the petition for re-zoning are used for single-family residences and have been so used for many years.[41] As noted above, a zoning authority may properly re-zone upon a finding that the zoning classification is not consistent with the subject property's actual use. Because there is substantial evidence in the record to support a finding that an RB classification was inconsistent with the subject property's long-time actual use for single-family residences, the issue of mistake is fairly debatable.

The record reflects that, but for an administrative mistake, the strip of land in question would have been zoned R1A rather than RB. During the consideration of the petition for re-zoning, several aldermen who were involved in the original consideration of the Plan noted that the RB zoning was a mistake. Alderman Janice Antonow noted that the RB zoning did not match the property's actual use, stating that: "[i]f I had seen this, I never would have allowed an RB zoning to be sandwiched between RA and RE. It doesn't even make any sense."[42] Alderman Ulysses Howell stated that "if

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[39]*See Town of Florence*, 759 So. 2d at 1225.

[40]*Dicks v. City of Natchez*, 319 So. 2d 214, 217 (Miss. 1975) (emphasis added).

[41]R. at 861-62; 1032-33.

[42]R. at 55.

I had known that this was zoned like this, I would never - - would never have went and I'm willing to - - when the time come, I'm willing to make the motion to re-zone it."[43]

Alderman Jon Fisher discussed six other areas within the City boundaries that were "down-zoned" in order to "protect the single family character of Oxford" in accordance with the Plan.[44] Alderman Fisher further stated that:

> The neighborhoods that we down-zoned, for the most part, we did so because the homes there or the structures there did not comply with the zoning, single family homes in a multi-family zone. ... We should have done the same thing to Price Street.[45]

Bridge cites *Town of Florence* and *City of New Albany v. Ray*[46] for the proposition that the City's decision to re-zone part of the Price Street neighborhood is based on a "mistake of judgment".[47] In *Town of Florence*, the "mistake" cited by the Town as justification for a re-zoning was a "failure to follow statutory requirements"in the original zoning.[48] In *City of New Albany*, the only evidence in the record as to mistake was a suggestion that "some members of the Zoning and Planning Commission may not have realized the full import of the zoning classification."[49] Neither of these situations is applicable here. The City did not rely upon procedural deficiencies as the "mistake" that justified re-zoning (and there is no suggestion that there were any such deficiencies

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[43]54.

[44]R. at 52.

[45]R. at 52-53.

[46]417 So. 2d 550 (Miss. 1982).

[47]Appellant's Brief, at 3, 7, 8.

[48]759 So. 2d at 1225.

[49]417 So. 2d at 552.

in the original zoning process). Furthermore, the record does not indicate that the Board was unaware of the import of the RB classification, but rather that its members were unaware that the RB classification had survived the zoning process.

Upon reviewing the evidence and testimony before it, the Board concluded that there was sufficient evidence to conclude that the RB zoning classification of the subject property in 2004 was the result of an administrative oversight. This mistake is not *presumed* in the absence of evidence, as Bridge would have the Court believe. The record contains substantial evidence of an *actual* mistake and a resulting inconsistency between the Plan and the zoning on Price Street. The City's attempt to correct the error and bring its ordinance in line with the tenets of its Plan do not render the ordinance a "meaningful scrap of paper", and it is certainly not evidence of "elected officials not doing their jobs".[50] To the contrary, Oxford's elected officials have admitted their mistake and now seek to perform their duties by correcting it.

Bridge paints a picture of a slippery slope and warns that, if the City is allowed to correct its error, "it will indeed become easy to re-zone."[51] The City respectfully submits that, when errors are discovered in a comprehensive plan and/or a zoning ordinance, the courts should not place obstacles in the path of a zoning authority which would see them corrected. The law does not shackle the City to its prior errors - it is for that precise reason that an administrative mistake is one of the two limited justifications upon which a municipality may rely in re-zoning property.

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[50]Appellant's Brief, at 9.

[51]*Id.*

D. The Circuit Court did not err in holding that the issues of substantial change and public need were fairly debatable.

While the primary basis for the City's decision to re-zone the Price Street property was the mistake in the original zoning ordinance, the Circuit Court also held that the issues of change in character and public need were fairly debatable. Bridge correctly states that land use in accordance with an original zoning plan is not a sufficient change in the character of a neighborhood to justify a re-zoning. However, as discussed above, the classification of part of the Price Street neighborhood as RB in 2004 was due to an administrative mistake on the City's part. As indicated by the evidence and testimony in the record, the property was supposed to be zoned R1A after the adoption of the Plan.

The record reflects that Cowart Properties applied for site plan approval by the Oxford Planning Commission in July 2005 for the construction of six (6) multi-unit condominiums at 317 Price Street.[52] This parcel of property was not included in the petition for re-zoning because it was in a planning phase for development.[53] In light of the mistake contained in the Plan, the planning and development of six multi-family residences in this traditionally single-family neighborhood constitutes a "change in character" sufficient to justify the City's re-zoning of the subject property. The Supreme Court has held that such a substantial change need not be "drastic".[54]

With respect to public need, this Court recently recognized that "substantial weight could be given to the concerns of [a City's] citizenry in determining whether a public need exists for re-

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[52]R. at 117-18.

[53]R. at 596.

[54]*McWaters v. City of Biloxi*, 591 So. 2d at 828.

zoning."[55] In addition to the numerous concerned citizens who signed and/or approved the application for re-zoning,[56] residents (individually and through counsel) expressed their strong desire for the re-zoning to take place in order to preserve the neighborhood.[57] Furthermore, the overall objectives espoused by the Plan provided a basis upon which the Board could reasonably have relied to find a public need for the re-zoning at issue.[58] It can not be disputed that substantial evidence existed to support a finding of public need, and Bridge does not dispute the existence of this evidence. The issue of public need is fairly debatable.

E. There is no appearance of impropriety on the part of any City official.

Bridge states that a duplex has been constructed on the Price Street property of an Oxford alderman.[59] This is false. As the City has pointed out before, Alderman George Patterson sold his interest in the subject property in June 2005, before the Planning Commission completed its hearings on the issue and before the Board ever heard the petition.[60] Furthermore, Alderman Patterson recused himself each time the issue was considered by the Board.[61] The insinuation of some unspecified impropriety on the part of Alderman Patterson, the Board, or the City is baseless and should be ignored by this Court.

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[55]*City of Ridgeland v. Estate of Lewis*, 963 So. 2d 1210, 1216 (Miss. Ct. App. 2007).

[56]R. at 596-618.

[57]R. at 35-49.

[58]*See supra* footnotes 24-28 and accompanying text.

[59]Appellant's Brief, at 11.

[60]The deed of sale for the property was not included in the Bill of Exceptions, but is a matter of public record.

[61]R. at 22, 147, 166.

F. Bridge has waived any argument regarding spot zoning.

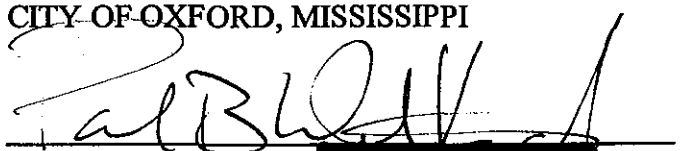
In his briefs to the Circuit Court, Bridge argued that the exclusion of the land formerly owned by Alderman Patterson and a lot owned by the City from the re-zoning constituted spot zoning. The Circuit Court correctly found these arguments to be without merit. Bridge has chosen not to raise the issue of spot zoning in his appeal to this Court and, thus, has waived those arguments.

CONCLUSION

The record in this matter contains substantial evidence to support the Board's decision to re-zone the subject property. The decision to re-zone was not inconsistent with the City's Comprehensive Plan, and the City was not required to amend its future land use map prior to considering the petitioners' request. The record supports a finding that a mistake was made in the Plan with respect to the zoning classification of the subject property. The issues of change in character and public need are fairly debatable. Because this Court must afford great deference to the findings and actions of a zoning authority, the City's decision to re-zone, and the Circuit Court's Order affirming that decision, should be upheld.

Respectfully submitted,

CITY OF OXFORD, MISSISSIPPI



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CERTIFICATE OF SERVICE

I, Paul B. Watkins, Jr., one of the attorneys for Appellee, the City of Oxford, do certify that I have this date delivered by United States mail, postage fully prepaid, a true and correct copy of the above and foregoing Brief of Appellees to:

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THIS, the 20th day of December, 2007.

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