STATE OF MICHIGAN
IN THE SUPREME COURT

In the matter of the Complaint of the
CARRIER CREEK DRAIN DRAINAGE DISTRICT
for condemnation of private property for
drainage purposes in Eaton County, Michigan.

APPELLEE'S SUPPLEMENTAL BRIEF SUBMITTED PURSUANT TO THE COURT'S JUNE 9, 2006 ORDER

CARRIER CREEK DRAIN DRAINAGE DISTRICT,

Plaintiff-Appellee,

v

LAND ONE, L.L.C.,

Defendant-Appellant.

Supreme Court Docket No. 130125
Court of Appeals Docket No. 255609

Eaton County Circuit Court
Lower Court File No. 03-67-CC
Hon. Thomas S. Eveland

CARRIER CREEK DRAIN DRAINAGE DISTRICT,

Plaintiff-Appellee,

v

ECHO 45, L.L.C.,

Defendant-Appellant.

Supreme Court Docket No. 130126
Court of Appeals Docket No. 255610

Eaton County Circuit Court
Lower Court File No. 03-68-CC
Hon. Thomas S. Eveland

130125-6-7

CARRIER CREEK DRAIN DRAINAGE DISTRICT,

Plaintiff-Appellee,

v

LAND ONE, L.L.C.,

Defendant-Appellant,

and

STANDARD FEDERAL BANK,

Defendant.

Supreme Court Docket No. 130127
Court of Appeals Docket No. 255611

Eaton County Circuit Court
Lower Court File No. 03-69-CC
Hon. Thomas S. Eveland

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

STATEMENT OF THE QUESTION PRESENTED 2

STANDARD OF REVIEW 3

ARGUMENT 4

I. MCL 213.55(3) REQUIRES A LANDOWNER TO PROVIDE NOTICE TO THE CONDEMNING AUTHORITY OF A CLAIM FOR COMPENSATION BASED UPON THE LOST OPPORTUNITY TO DEVELOP ITS PROPERTY IN ACCORDANCE WITH A SPECIFIC ZONING CLASSIFICATION THAT HAS NOT BEEN ASSIGNED TO THAT PROPERTY 4

A. The Unambiguous Language Of MCL 213.55(3) Supports The Decisions Of The Trial Court And Court Of Appeals And No Further Judicial Review Is Required Or Justified 5

B. Reading MCL 213.55(3) Consistent With The Uniform Condemnation Procedures Act As A Whole Establishes That A Landowner's Claim For Additional Just Compensation Based Upon The Lost Opportunity To Develop Property In Accordance With A Specific But Currently Inapplicable Zoning Classification Is A Claim That Must Be Preserved By Being Timely Asserted In Writing 8

C. Even If This Court Were To Determine That The Lower Courts' Interpretation Of MCL 213.55 Was Incorrect, The Result Reached In The Trial Court Should Be Left Undisturbed And The Precedential Effect Of The Court Of Appeals' Opinion Can Be Obviated By An Appropriate Order Denying Leave To Appeal 13

RELIEF REQUESTED 15

TABLE OF AUTHORITIES

Cases

Arrowhead Development Company v Livingston County Road Commission, 413 Mich 505, 516; 322 NW2d 702 (1982) 8

Berrien Co v Michigan AFSCME Council, 454 Mich 908; 564 NW2d 46 14

Carrier Creek Drain Dist v Land One, L.L.C., 2006 Mich. LEXIS 1192 (June 9, 2006) 1

Carrier Creek Drain Dist v Land One, LLC, 269 Mich App 324; 712 NW2d 168 (2005) 1, 4

D'Annolfo v Stoneham Housing Authority, 375 Mass 650; 378 NE2d 971 (1978) 7

Euclid v Lakeshore Co, 102 Ohio App 96; 137 NE2d 750 (1956) 7

Georgia Trans Corp v Barron, 255 Ga App 645; 566 SE2d 363 (2002) 7

Gingold v Berkley Clinic, P.C., 448 Mich 930; 534 NW2d 521 14

Hietpas v State, 24 Wis 2d 650; 130 NW2d 248 (1964) 7

MDOT v Sherburn, 196 Mich App 301, 304; 492 NW2d 517 (1992) 7

MDOT v Tomkins, 270 Mich App 153, 158; 715 NW2d 363 (2006) 7

Michigan v Hurt, 450 Mich 958; 550 NW2d 524 14

Michigan v Mack, 455 Mich 864; 567 NW2d 251 14

Michigan v Premen, 450 Mich 949; 545 NW2s 592 14

Nickola v Grand Blanc Township, 47 Mich App 684, 689; 209 NW2d 803 (1973) 6

People v *Clay*, 468 Mich 261 (2003) 3

Pohutski v City of Allen Park, 465 Mich 675, 683; 641 NW2d 219 (2002) 5

Univ Underwriters Ins Co v Kneeland, 464 Mich 491, 497; 628 NW2d 491,494 (2001) 6

Valley Stream Lawns, Inc v State, 9 AD2d 149, 152; 192 NYS2d 805, 807 (1959) 8

Williams v Denver, 147 Colo 195; 363 P2d 171 (1961) 7

Statutes

MCL 213.51(i) 6

MCL 213.54(2) 9

MCL 213.55 13

MCL 213.55(2) 8

MCL 213.55(3) ..... passim

MCL 213.66(3) 9

MCL 213.70(3) 9

Other Authorities

American Heritage Dictionary, 4th Ed, p 458 6

Senate Legislative Analysis, SB 778, January 7, 1997 12

Uniform Standards of Professional Appraisal Practice, Standards 1-2 (g), (h) 10

Rules

MCR 1.105 13

MCR 7.302(G)(1) 1

STATEMENT OF FACTS

Defendants-Appellants Land One, L.L.C., Echo 45, L.L.C., Land One L.L.C., and Standard Federal Bank, f/k/a Michigan National Bank, ("Defendants-Appellants") have applied for leave to appeal from a Court of Appeals' November 3, 2005, decision, affirming the Circuit Court for the 56th Judicial Circuit's determination that Defendants-Appellants' claim for additional compensation based upon a purported loss of a possible zoning reclassification was a compensable damage claim, which was waived for failure to be disclosed pursuant to MCL 213.55(3). *Carrier Creek Drain Dist v Land One, LLC*, 269 Mich App 324; 712 NW2d 168 (2005).

On June 9, 2006, this Court issued an Order indicating that it would entertain oral argument on the Defendants-Appellants' application, pursuant to MCR 7.302(G)(1). *Carrier Creek Drain Dist v Land One, L.L.C.*, 2006 Mich. LEXIS 1192 (June 9, 2006). The parties were also invited to submit supplemental briefs which avoid a "mere restatement of the arguments made in the application papers." *Id.* Plaintiff-Appellee Carrier Creek Drainage District ("Plaintiff-Appellee") submits this Supplemental Brief in response to the Court's invitation.

STATEMENT OF THE QUESTION PRESENTED

Plaintiff-Appellee presents the following statement of the question presented:

I **DOES MCL 213.55(3) REQUIRE A LANDOWNER TO PROVIDE NOTICE TO THE CONDEMNING AUTHORITY OF A CLAIM FOR COMPENSATION BASED UPON THE LOST OPPORTUNITY TO DEVELOP ITS PROPERTY IN ACCORDANCE WITH A SPECIFIC ZONING CLASSIFICATION THAT HAS NOT BEEN ASSIGNED TO THAT PROPERTY?**

The Court of Appeals says "Yes."

The Trial Court says "Yes."

Plaintiff-Appellee says "Yes."

Defendants-Appellants say "No."

STANDARD OF REVIEW

The appropriate standard of review as to the interpretation of statutory provisions, including MCL 213.55(3), is *de novo*. *People* v *Cl*ay, 468 Mich 261 (2003).

ARGUMENT

I. MCL 213.55(3) REQUIRES A LANDOWNER TO PROVIDE NOTICE TO THE CONDEMNING AUTHORITY OF A CLAIM FOR COMPENSATION BASED UPON THE LOST OPPORTUNITY TO DEVELOP ITS PROPERTY IN ACCORDANCE WITH A SPECIFIC ZONING CLASSIFICATION THAT HAS NOT BEEN ASSIGNED TO THAT PROPERTY.

Introduction

This Court's Order of June 9, 2006, has limited the issue to be addressed at oral argument on Appellants' Application for Leave to "whether a landowner is required, under MCL 213.55(3), to provide written notice to the condemning authority of the landowner's claim of compensation for the "possibility of rezoning" of the condemned property." It is important to note, however, that the issue presented by this case focuses not upon some abstract possibility of rezoning both apparent and inherent in all real property, but rather upon a specific land use reclassification posited by the property's owner. As the Court of Appeals correctly noted in its opinion, Defendants-Appellants are "claiming that a willing buyer would have purchased this ***residentially zoned property for a professional office use*** and, thus, it was deprived of the increased value associated with ***that*** possible zoning change as a consequence of the taking." *Carrier Creek Drain Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168, (2005) (Emphasis added).

In order for a condemning agency to consider a claim for just compensation predicated upon a land use neither currently permitted by a controlling zoning ordinance nor contemplated by a future land use map, the agency would, at a minimum, have to know: (1) What does the landowner believe is an appropriate zoning classification to be assigned the property, and; (2) What facts, data, or other information exists to render such a rezoning a realistic possibility. Only

with this information could the agency be expected to ascertain whether its offer of just compensation should include damages for the lost opportunity to develop the subject property consistent with the landowner's intent.

It is against this background that the trial court and the Court of Appeals were called upon to decide whether the statutory obligation imposed upon landowners to notify a condemning agency that its good faith written offer did not include, or fully include, items of compensable property or damage requires timely disclosure of the information set forth above. Both courts held that it does. Plaintiff-Appellee submits that the literal language of MCL 213.55(3), the legislative intent underlying its adoption and the objectives the statute was intended to advance all support the results reached below.

A. The Unambiguous Language Of MCL 213.55(3) Supports The Decisions Of The Trial Court And Court Of Appeals And No Further Judicial Review Is Required Or Justified

When called upon to construe a statute, courts first examine the specific statutory language to determine the intent of the Legislature. If that language is unambiguous the court presumes the Legislature intended the meaning clearly expressed and no further judicial construction is required or permitted. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002).

MCL 213.55(3), in pertinent part, provides: " If an owner believes that [the condemning agency's] good faith written offer...did not include or fully include 1 or more items of compensable property or damage for which the owner intends to claim a right to just compensation, the owner shall, for each item, file a written claim with the agency. The owner's written claim shall provide sufficient information and detail to enable the agency to evaluate the

validity of the claim and to determine its value." The term "property" is specifically defined elsewhere in the Uniform Condemnation Procedures Act ("UCPA") to include "tangible and intangible property and property rights whether real, personal or mixed". MCL 213.51(i).

In *Nickola v Grand Blanc Township*, 47 Mich App 684, 689; 209 NW2d 803 (1973), the Court of Appeals observed that in this country, people have a constitutionally protected right to pursue any lawful use of their real property, and this right may not be impinged upon except by the valid exercise of police powers. Because the term "property" when used in the context of the UCPA encompasses "property rights" and those rights include the right to dedicate property to any lawfully permissible use, the lost opportunity to pursue such a use is an item of compensable property under MCL 213.55(3).

Significantly, the Legislature did not limit a landowner's obligation to preserve his claims for items missed in a condemning agency's good faith offer solely to "items of compensable property". Using the disjunctive "or" it expanded this obligation to equally apply to missed items of "damage". While the word "damage" is not defined in the UCPA, including such a definition in the Act was wholly unnecessary. The word's common meaning is "harm or injury to property or a person resulting in loss of value or usefulness". *American Heritage Dictionary*, 4th Ed, p 458. Similarly, in a legal setting, "damage" means "[a] pecuniary compensation or indemnity, which may be recovered in courts by any person who has suffered a loss, detriment, or injury." *Univ Underwriters Ins Co v Kneeland*, 464 Mich 491, 497; 628 NW2d 491,494 (2001).

Appellants' claim for additional compensation in this case was based upon the lost opportunity to dedicate property to a specific, albeit currently prohibited, use. This lost

opportunity constituted an alleged detriment or injury for which money was sought from Appellee. As such it was clearly an "item of damage" within the meaning of MCL 213.55(3).

In a recent decision, the Court of Appeals noted that "[a] condemnee's damages are generally measured by the fair market value of the property taken." *MDOT v Tomkins*, 270 Mich App 153, 158; 715 NW2d 363 (2006). The court went on to explain that "[a]n owner should not be enriched because of the condemnation; thus, 'the total damages awarded may not exceed the fair market value of the ... parcel before the taking.'" *Id.* (citing *MDOT v Sherburn*, 196 Mich App 301, 304; 492 NW2d 517 (1992)). Since fair market value is calculated using the term "damages", it is apparent the same term relates to the possibility of rezoning as it may affect market value.

Other jurisdictions have undertaken cases involving the issue of whether the speculative possibility of rezoning is a proper consideration in valuing real property, conveying the view that a private and reasonably informed purchaser would probably not give substantial consideration to such unknown, provisional, and tentative information. See *Williams v Denver*, 147 Colo 195; 363 P2d 171 (1961), *D'Annolfo v Stoneham Housing Authority*, 375 Mass 650; 378 NE2d 971 (1978), *Euclid v Lakeshore Co*, 102 Ohio App 96; 137 NE2d 750 (1956), *Hietpas v State*, 24 Wis 2d 650; 130 NW2d 248 (1964). Moreover, in a condemnation procedure dispute, the Georgia appellate court, in *Georgia Trans Corp v Barron*, 255 Ga App 645; 566 SE2d 363 (2002), barred testimony relating to the prospect of property being rezoned from residential use to commercial use. *Id.* at 647. In that case, the court equated the terms "the value of property taken" and "consequential damages". *Id.* In New York, the court has referred to an appraisal estimating the increase in market value based on possible rezoning as "a theory of damage based on rezoning

which depended on future official action." *Valley Stream Lawns, Inc v State*, 9 AD2d 149, 152; 192 NYS2d 805, 807 (1959).

By now it should be apparent to all that the current Michigan Supreme Court has not, and will not, assume the role of judicially rewriting unambiguous legislative enactments. Because engaging in such an extraordinary function would be a necessary prerequisite to reversing the decision of the Court of Appeals, Appellants' Application for Leave to Appeal should be denied.

B. Reading MCL 213.55(3) Consistent With The Uniform Condemnation Procedures Act As A Whole Establishes That A Landowner's Claim For Additional Just Compensation Based Upon The Lost Opportunity To Develop Property In Accordance With A Specific But Currently Inapplicable Zoning Classification Is A Claim That Must Be Preserved By Being Timely Asserted In Writing

To paraphrase this Court's language in *Arrowhead Development Company v Livingston County Road Commission*, 413 Mich 505, 516; 322 NW2d 702 (1982), MCL 213.55(3) does not stand alone. It exists and must be read in context with the entire Uniform Condemnation Procedures Act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute, construed in light of history and common sense.

The statute called under scrutiny by Appellants' Application for Leave is not the only one in the UCPA relating to pre-filing disclosures by a landowner or the potential impact of zoning considerations upon determinations of just compensation.

By way of example, MCL 213.55(2) grants a condemning agency the right to secure from a landowner "tax returns, financial statements or other relevant financial information for a period not to exceed 5 years before the agency's request". Once obtained, the agency may use these documents to determine an appropriate offer of just compensation. By gathering such

information before making its good faith offer the agency is given an opportunity to avoid the potential that post-filing disclosures of the same information could significantly increase the amount of just compensation ultimately obtained by the landowner and, concomitantly, increase the agency's exposure for payment of the landowner's attorney's fees. See MCL 213.66(3).

MCL 213.54(2) authorizes a condemning agency in "partial take" cases to seek zoning variances from governmental entities even before the agency has acquired a landowner's property and left what would have otherwise been a remainder that did not conform to local zoning ordinances. Once again, the legislative intent of mitigating the potential costs and exposure of condemning agencies is here apparent.

MCL 213.70(3), which addresses the determination of fair market value, provides that "The value of each parcel, and of a part of a parcel remaining after the acquisition of a part of the parcel, ***shall be determined with respect to the condition of the property*** and the state of the market ***on the date of valuation***." (Emphasis added). The mandate contained in this provision is directed to the appraisal process used to arrive at a condemning agency's determination of just compensation. That process, in turn, is one subject to the Uniform Standards of Professional Appraisal Practice ("USPAP") promulgated by the Appraisal Standards Board of the Appraisal Foundation. USPAP recognize the concept of "hypothetical conditions". These are conditions, including a property's legal characteristics, which are contrary to what exists but are nevertheless assumed for purposes of an analysis. USPAP also recognizes "extraordinary assumptions" or nontypical instances of accepting circumstances as true. Appraisers who employ either "hypothetical conditions" or "extraordinary assumptions" may properly do so only if they are fully disclosed and result in a credible analysis. Further, the use of a "hypothetical condition" can

only be used if "***required*** for legal purposes, for purposes of reasonable analysis, or for purposes of comparison."(Emphasis added). And an "extraordinary assumption" ***cannot*** be used unless the appraiser has a reasonable basis for doing so. *Uniform Standards of Professional Appraisal Practice, Standards* 1-2 (g), (h).

When considered in light of the forgoing provisions of the UCPA, Appellants' interpretation of MCL 213.55(3), if accepted, would lead to an absurd result. Consider the following:

- In cases where, based upon readily observable facts (i.e., a commercial or rental improvement exists on the subject property) an income or cost approach to valuation may be indicated, the condemning authority can obtain from the landowner tax returns, financial statements and other records to assist in formulating its determination of just compensation. MCL 213.55(2).

- In cases where an item of tangible property is to be taken and is available for analysis but overlooked by the condemning agency the landowner is required to bring that item to the agency's attention. The agency then has the opportunity to revise its original offer of just compensation to include the item MCL 213.55(3).

- In cases where resort to readily accessible public records discloses that a condemning agency's proposed acquisition will render the part of a parcel not taken nonconforming to applicable zoning ordinances the agency can, itself, seek a variance to negate the impact of the nonconformity before making its determination of just compensation. MCL 213.54(2).

- In all cases, the statutory rule is that the fair market value of a parcel to be acquired by a condemning agency must be determined in light of the condition of the property as of the date of valuation. MCL 213.70(3).

- Under Appellants' view, in cases where a landowner intends to advance a claim--unsupported by any future land use map, past or present applications for rezoning or other public records on file with the local zoning authority--that his property should be valued as though developable pursuant to a specific zoning classification it does not have, he may conceal that claim and thereby deprive the condemning agency of any opportunity to consider if it has enough merit to be included in a determination of just compensation.

If a landowner intends to advance a claim for compensation dependent upon the lost opportunity to develop his property in accordance with a zoning classification it does not have he must give the condemning agency written notice of that claim and provide sufficient information and detail to enable the agency to evaluate that claim's validity and determine its value. Otherwise, the agency will be required to pursue multiple appraisals taking into account numerous zoning classifications. Surely, condemning agencies cannot be required to appraise every property as if it was zoned in each and every classification contained in the local municipality's zoning ordinance.

By way of illustration, Delta Township, the municipality where the property at issue in this case is located, has thirteen zoning classifications or districts.[1] See attached Exhibit 1. (Appellee asks this Court to take judicial notice of these various classifications pursuant to MRE 202.[2]) Thus, Appellants' position would have compelled Appellee to conduct thirteen valuation analysis in order to insure it "hit" the one zoning classification the landowner might be harboring for trial.

The Legislature amended the UCPA in 1996 to allow condemning authorities to minimize their exposure for increased awards of just compensation and attorney fees by giving them more access to pre-filing information than was previously available. In doing so it

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[1] These zoning classifications include: Natural Resources, Agricultural, Agricultural / Residential, Very Low Density Residential, Low Density Residential, Moderate Density Residential, Medium Density Residential, High Density Residential, Office, Local Service Commercial, Community Commercial, Limited Industrial, and General Industrial.

[2] This evidentiary rule provides:
(a) When discretionary. A court may take judicial notice without request by a party of... (2)...ordinances...of governmental subdivisions...of Michigan.... (b) When conditionally mandatory. A court shall take judicial notice of each matter specified in paragraph (a) of this rule if a party requests it and (1) furnishes the court sufficient information to enable it properly to comply with the request and (2) has given each adverse party such notice as the court may require to enable the adverse party to prepare to meet the request.

intended to "expedite the condemnation process, reduce litigation, and save money for both the government and property owners." Senate Legislative Analysis, SB 778, January 7, 1997; See attached Exhibit 2. Reducing governmental costs was a legislative objective of considerable importance:

> "According to the Michigan Department of Transportation (MDOT), which often must acquire private property for highway purposes, a lawsuit was not necessary in 90% of its acquisitions for highway rights-of-way between fiscal years 1991-92 and 1995-96. The remaining 10%, however, accounted for 64% of the funds spent by the DOT to acquire land for right-of-way purposes (excluding professional fees) over that five-year period.

The Legislature expected the amendments would provide expedience and economic efficiency to both landowners and condemning agencies. "With this additional information, agencies will be able to make more accurate, often larger, good faith offers." *Id.* Additionally, and most importantly, the Legislature hoped that, given these amendments, "[a]n agency w[ould] no longer be surprised by new claims at trial, or be confronted with the owner's one-third attorney fee claim on items left out of the offer due to mistake or lack of information." *Id.*

Appellants' interpretation of MCL 213.55(3) could only be adopted by this Court if the literal language of the statute were ignored, the legislative intent giving rise to its enactment thwarted and the otherwise harmonious provisions of the UCPA deemed irrelevant. The decision of the Court of Appeals in this matter was correct and should be left undisturbed.

C. Even If This Court Were To Determine That The Lower Courts' Interpretation Of MCL 213.55 Was Incorrect, The Result Reached In The Trial Court Should Be Left Undisturbed And The Precedential Effect Of The Court Of Appeals' Opinion Can Be Obviated By An Appropriate Order Denying Leave To Appeal

Plaintiff-Appellee firmly believes that the trial court and the Court of Appeals correctly identified, considered and decided the issue presented by this case. Appellant's Application for Leave to Appeal should be denied. However, if this Court disagrees, reversal of the result reached in the trial court would be unnecessary and unwarranted.

Michigan's Court Rules "are to be construed to secure the just, speedy and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." MCR 1.105.

The trial court determined that Appellants' claim for compensation predicated upon a lost opportunity to develop the subject property pursuant to a zoning classification it did not have was waived for failure to be timely disclosed. Fully enforced, this ruling would have prohibited Appellants from presenting evidence to support such a claim at trial. In this case, however, the judge sat as trier of fact and it was made apparent both before and during the trial that Appellant had no evidence to support his claim. See Appellee's Brief In Opposition to Application for Leave to Appeal at pp.16-17. Accordingly, any error in the circuit court's interpretation of MCL 213.55(3) "did not affect the substantial rights" of Appellants. For that reason further review by this Court is unwarranted.

Granting leave to appeal solely for the purpose of rejecting the Court of Appeals' analysis of the statute at issue is also unnecessary. In any order denying Appellants' Application this Court could include language that strips the Court of Appeals' opinion of its precedential force

or effect. See *Michigan v Mack*, 455 Mich 864; 567 NW2d 251, *Berrien Co v Michigan AFSCME Council*, 454 Mich 908; 564 NW2d 46, *Michigan v Hurt*, 450 Mich 958; 550 NW2d 524, *Michigan v Premen*, 450 Mich 949; 545 NW2s 592, *Gingold v Berkley Clinic, P.C.*, 448 Mich 930; 534 NW2d 521.

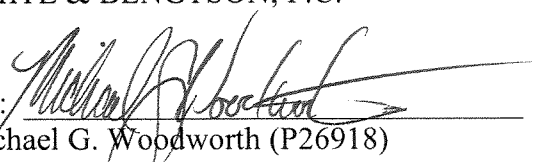
RELIEF REQUESTED

The Eaton County Circuit Court and the Court of Appeals correctly interpreted and applied MCL 213.55(3) to the Appellants' unpreserved claim for additional just compensation. Defendants-Appellants' Application for Leave to Appeal seeking further review of those decisions should be denied. In no event is a reversal of the result reached in the trial court justified. The amount of money Appellants received for the property at issue was fairly determined and they are entitled to no additional relief.

Respectfully submitted,

HUBBARD, FOX, THOMAS,
WHITE & BENGTSON, P.C.

July 20, 2006

BY: 

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