

BOARD OF SUMTER COUNTY COMMISSIONERS  
EXECUTIVE SESSION  
THE VILLAGES-SUMTER COUNTY SERVICE CENTER  
SECOND FLOOR CONFERENCE ROOM  
7375 POWELL ROAD  
WILDWOOD, FLORIDA 34785  
NOVEMBER 9, 2010

ORIGINAL

KERR & ASSOCIATES  
(352) 742-3144

## PRESENT

COMMISSIONER DOUG GILPIN

COMMISSIONER DON BURGESS

COMMISSIONER RANDY MASK

COMMISSIONER RICHARD "DICK" HOFFMAN

COMMISSIONER GARRY BREEDEN

MR. BRADLEY ARNOLD, COUNTY ADMINISTRATOR

MR. DERRILL MCATEER, COUNTY ATTORNEY

## I N D E X

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## P R O C E E D I N G S

1  
2 COMMISSIONER GILPIN: I want to call to order the  
3 special meeting of the Sumter County Board of  
4 Commissioners for the purpose of holding an executive  
5 session concerning litigation expenditures.

6 If there is no objection, I will -- okay. That's  
7 at the end. All right.

8 All right. We're open.

9 MR. MCATEER: All right, sir. You ask if there is  
10 no objection and then you can close the -- this meeting  
11 and open the executive session because, under the  
12 statute, they open as a special meeting and then you  
13 close it and make it an executive session.

14 COMMISSIONER GILPIN: All right. Well, if there  
15 is no objection, I will close this special meeting and  
16 open the executive session.

17 No objection? Okay. We will move on to the  
18 executive session.

19 MR. MCATEER: And with the permission of the  
20 Board, I'll proceed. I'm Derrill McAteer with a law  
21 firm. I'm the County attorney.

22 I just wanted to have an executive session to  
23 inform you regarding the petition that's been filed by  
24 Rocking G, Inc., against the County.

25 There is also the County's September 14, 2010,

1 decision to affirm staff's finding that the alleged --  
2 I say alleged -- mine that was at issue in that hearing  
3 was not vested. And the case number is 2010 CA 1255.  
4 The style of the case is Rocking G, Inc., versus Sumter  
5 County Board of Commissioners.

6 At present at this meeting are only the sitting  
7 County Commissioners and myself and Mr. Bradley Arnold,  
8 the County Administrator. And in the notice it had  
9 noted Mr. Douglas Conway and Mr. Brad Cornelius because  
10 I was hoping we could have a more expansive discussion  
11 of greater issues. However, in our research of case  
12 law, we found that the statute governing this session  
13 does not allow attendance for anyone but those that are  
14 seated here today.

15 So, for the record, the only staff member is  
16 Mr. Arnold. And Mr. Cornelius and Mr. Conway are not  
17 present. I just wanted to make that clear.

18 From the best I can tell from the record so far,  
19 Circuit Judge Ohlman, from here, has what's called a  
20 Petition for Writ of Certiorari as an appeal for the  
21 rule of appellate procedure.

22 The filing of the appeal appears timely, and the  
23 County will respond with what will resemble an  
24 appellate brief, appellate response brief, after the  
25 circuit judge issues what's called an order to show

1 cause and tells the County how long they have to  
2 respond.

3 If the Commission's decision is affirmed by the  
4 Court, Mr. Wade can take an appeal to the 5th DCL on  
5 much narrower grounds. Those grounds go to the circuit  
6 court as opposed to the County. This hearing provides  
7 due process. The County would have the same appellate  
8 capability if the Board's decision is overturned.

9 Mr. Wade has filed a petition asking that the  
10 Court, on its own, order staff's decision -- based on  
11 the County's alleged failure to follow essential  
12 requirements of law -- base it's decision on competent  
13 essential evidence or grant due process.

14 So, those are the three prongs in a quasi judicial  
15 hearing. So, every quasi judicial appeal is going to  
16 make allegations that you have failed to follow those  
17 three prongs, whether there is any colorable arguments  
18 or not. Any lawyer is going to throw those three  
19 things out there because they, basically, have to.

20 I believe that asking the Court to reverse the  
21 decision on its own is a pretty substantial reach  
22 because under Florida case law -- to paraphrase it --  
23 the Florida case law is pretty clear -- the Court does  
24 not step in and become a zoning administrator.

25 What the Court looks at is how's the hearing on --

1 are those three prongs present. If they find there is  
2 a due process problem, you go back and have a hearing  
3 again, but they don't tell you what the outcome is  
4 supposed to be.

5 It is error for the Circuit Court to direct the  
6 lower tribunal, being the County Commission, to grant  
7 relief or to grant relief directly.

8 And I have a lot more in the case law here that I  
9 won't drag you through, but it basically states that  
10 the Court can't step in and become the County  
11 Commission.

12 The only time is if -- the only time that could  
13 possibly happen -- there's a case out there where if no  
14 competent substantial evidence was in the record to  
15 support the Commission's decision, then they might  
16 determine, okay, then we're going Rocking G's way or  
17 the losing side's way.

18 I don't believe that to be the case because we  
19 have a staff report. We have voluminous records in  
20 this case. We have -- which I'll get to in a moment --  
21 the 1990 ordinance which was discussed ad nauseam.

22 We have some of Mr. Wade's exhibits which I think  
23 are actually beneficial to the County more than  
24 Mr. Wade.

25 So, I don't think we have a competent substantial

1 evidence problem in this. I'm not saying we have a  
2 problem in any of the three prongs, but I don't think  
3 that there is a competent substantial evidence problem  
4 that would warrant the Court making wholesale reversal  
5 and order a determination in this case, if that makes  
6 sense.

7 Was that clear?

8 COMMISSIONER BREEDEN: Yep.

9 MR. MCATEER: Just a very brief summary of where  
10 Rocking G is going -- and they bounce around a little  
11 bit -- even though they have headers that name the  
12 different prongs in the case, they tend to blend the  
13 three arguments, the three different prongs, into one  
14 brief.

15 They seem to argue that -- initially, the fact  
16 that not having a meeting before the determination  
17 would be a lack of due process.

18 I think that's a pretty weak argument because it  
19 was cured by the very long hearing that we had on  
20 Rocking G in which Mr. Wade was able to put forth  
21 anything he wanted. There was a lot of staff and legal  
22 cooperation with Mr. Wade which was evidenced in the  
23 record prior to the hearing, so I think that that's a  
24 pretty weak argument. But the attorneys tend to  
25 include everything that they can in petitions.

1           Rocking G argued that Ordinance 90-12 does not  
2           resolve the loss of the vested property right. Of  
3           course, this is where the law in the case turns.

4           I would argue that as the explicit intent to  
5           remain vested, it was to register if you were going to  
6           continue as a vested mine. I think that it was the  
7           intent for the County to try to cure a lot of the  
8           problems we have. Is it a mine? Is it not?

9           And it was properly noticed. We have that on the  
10          record, which is competent substantial evidence in the  
11          record.

12          And Mr. Wade had filed affidavits having seen  
13          continuous use and saying the continuous use preserves  
14          his vesting and that it is a property rights violation  
15          for that -- to enforce that ordinance 90-12 that  
16          required the vesting application, and, also, that,  
17          therefore, the adjacency requirement is improper  
18          because it denies Rocking G's property rights for  
19          failing the effort to -- as well as failing the effort  
20          to obtain an application as a new mine.

21          What you have here is a friction between, as we  
22          know, as we went through the hearing -- the old one  
23          that's -- and the comp plan provision that requires the  
24          adjacency.

25          What's interesting is they are arguing the

1 continuous use after 90-12, under Florida case law,  
2 that cures their vesting, cures the violation, I would  
3 say, of the vesting law passed in 1990.

4 If anything, they are actually, probably -- if  
5 they are arguing they were continuously mining -- which  
6 I'm not sure that they were -- they were doing so  
7 illegally, is one thing. I don't know that has really  
8 crossed their minds in the arguments they have made.

9 I would argue that they were doing so illegally  
10 and just -- the illegality expanded as the codes and  
11 then the -- against their favor. So, I don't know that  
12 the continuous use helps them in the extreme fashion  
13 that they are arguing it does.

14 Let me look at my notes.

15 There is a waiver issue, I believe, that any claim  
16 to vest their rights was waived as Rocking G knew or  
17 should have known and intentionally or negligently  
18 disregarded the requirements of 90-12.

19 The 2003 deed permit which Sumter did not object  
20 to, I will argue, did nothing to mitigate that failure  
21 that occurred much earlier.

22 It is not the best fact for the County that we  
23 didn't object to this 2003 permit. It's a little bit  
24 of an issue that I'm going to have to write around a  
25 little bit, but I believe that I can because I think

1 that failure to object to that does not wholesalely  
2 evacuate the application of the County's code and the  
3 County's comp plan.

4 So do I wish the County had objected to the deed  
5 permit back in 2003? Sure. But, that's not the facts  
6 we have to work with, so ...

7 They also claim something about takings occurring.  
8 I don't believe there's a taking. I believe there's  
9 some significant competent substantial evidence in the  
10 record to show this is not -- the actions of the County  
11 going back to the passage of 90-12 forward to  
12 Mr. Cornelius' actions do not constitute a taking under  
13 Florida law.

14 They'll make their arguments. We'll make ours.  
15 But, I don't think -- I'm sorry -- I don't think that's  
16 the case.

17 Do you have a question?

18 COMMISSIONER BURGESS: No.

19 MR. MCATEER: Okay. And the private property  
20 rights, I already touched on.

21 They touched on some other issues with regard to  
22 due process. They noted staff and legal's comments  
23 with regard to -- there was a citation, quote, actually  
24 of mine that was very shortly said. Staff or legal is  
25 in concurrence with staff recommendation.

1           And they raised case law, which I was aware of  
2           stating that an attorney may not prosecute at a quasi  
3           judicial hearing and then also advise, but I didn't  
4           prosecute that hearing.

5           If you remember, there was no -- I did not  
6           cross-examine or direct -- I didn't take direct  
7           testimony. I did not cross-examine. The only witness  
8           was Mr. Wade, and because he started testifying, we  
9           swore him in to allow him as much due process as could  
10          possibly be allowed.

11          And I did not act as a prosecuting entity.  
12          Really, the prosecuting person in this case was staff.  
13          They presented the evidence that was against --  
14          basically, the arguments between Mr. Wade and  
15          Mr. Cornelius.

16          And the only time I really said much on the record  
17          was one time Mr. Wade bled into testifying and I said  
18          he should be sworn, given the opportunity to have his  
19          full due process.

20          And at the very end, I thought that it would be  
21          appropriate for legal to take a position, I mean,  
22          really, because otherwise, why am I there.

23          I think that in the future what I will do is  
24          simply put an e-mail to Brad in writing saying legal  
25          concurs with staff recommendation. I realized I hadn't

1 done that and it wasn't in the record and I had to do  
2 it at the hearing.

3 But the worst possible case scenario from that, I  
4 believe -- and I don't believe the judge will find that  
5 as a violation of due process because I wasn't  
6 prosecuting the hearing, but -- and because there was  
7 so much breadth given Mr. Wade during the hearing to  
8 afford his due process -- however, if the judge sees it  
9 as an easy way to kick it back to the Commission, it  
10 doesn't make a dispositive change. You just have  
11 another hearing and then we will have a prosecuting  
12 attorney. And I will sit at the bench. And we'll  
13 cross-examine Mr. Wade. And it might be a longer  
14 hearing. So, you know, if that's the way they want to  
15 go, that would just be my thoughts on it.

16 I have Commissioner Gilpin's statement, which was  
17 simply taken out of context. It was applied to a  
18 remark which he is trying to use with -- the remark  
19 that he is using is thanking Mr. McAteer. You tend to  
20 give us the guidance. I appreciate your remarks.

21 He's trying to use that in a quote fashion to  
22 poison the well. I can explain the context to you.

23 He is also completely misquoting Commissioner  
24 Hoffman. He's saying that I said that Commissioner  
25 Hoffman's comments were bleeding into testimony when,

1 in fact, I was talking about Mr. Wade and saying, hey,  
2 I need to swear you in so you can talk about that. So  
3 he is completely misquoting the record on that, which I  
4 will also take him down on the responsive brief.

5 In summary, the Commission afforded Rocking G  
6 procedural due process. Mr. Wade had all the time he  
7 wanted at the hearing. He could have called witnesses,  
8 if he wished, or cross-examined staff. He did none of  
9 those things. He showed up by himself.

10 The Board followed the essential requirements of  
11 law. I believe that Ordinance 90-12 is valid and will  
12 so argue. It was properly noticed. We have the notice  
13 in the record of the appeal, so I can cite to it, and  
14 it was enforced.

15 The fact that Rocking G waived it's claim to  
16 vested rights is not the fault of the Board of the  
17 County Commissioners. It's Rocking G's fault.

18 The fact they went back and got an EPA permit,  
19 I'll argue, is irrelevant.

20 Now, they are going to argue, hey, why didn't  
21 Sumter pick up on this and object. They are going to  
22 raise some waiver issues. I'm going to argue around  
23 those.

24 They are going to say well why didn't Sumter  
25 object to that deed permit, but we've got the facts

1 that we have, and I believe we can argue around that.

2 I believe the competent substantial evidence  
3 exists in the record to support the Board's decision in  
4 the form of staff's determination letter and notice of  
5 90-12, as I've noted before, and the ordinance itself.

6 Rocking G's admission that it failed to register  
7 under the ordinance -- which he states in the  
8 correspondence in the record and hearing that he didn't  
9 do it -- and various ariels, some of which are poor  
10 quality -- remember those -- from both Mr. Wade and the  
11 County which, I believe, actually show a lack of mining  
12 activity more than a -- and I don't know that a judge  
13 is really going to roll those out and go, okay, this is  
14 a continuous mine.

15 COMMISSIONER BURGESS: On this issue of continuous  
16 mining, it's -- we're talking about a ten-year period,  
17 more or less, aren't we, from the time that the -- the  
18 person -- the mines had to register? When was that?  
19 What was the time?

20 MR. ARNOLD: 20 years.

21 COMMISSIONER BREEDEN: Almost 20 years, so you are  
22 talking about constant mining activity there. Do we  
23 have sales evidence and the tonnage removed?

24 MR. MCATEER: No, sir, they didn't submit that,  
25 and we didn't have any access to that. No, they did

1 not submit that in the record. They could not bring it  
2 in anew.

3 The only thing that can be used in these  
4 hearings -- much like an appellate record -- is what's  
5 already been presented. The door is locked, for lack  
6 of a better analogy.

7 And, so, there may be things I wish I could throw  
8 into it, but we can only use what we've got. And the  
9 County did it's best to put everything we can possibly  
10 find in well before the hearing. So, I believe we've  
11 got a lot to work with on a responsive brief.

12 COMMISSIONER GILPIN: The aerial photograph would  
13 not support that being an active mine. If you put an  
14 ariel photograph of an active mine and an ariel  
15 photograph of that property, there would be substantial  
16 difference.

17 MR. MCATEER: Well, that, and there are statutory  
18 definitions of active mines, and there's also, you  
19 know, what looks like the -- some rock got moved  
20 around. It got thrown up on the road and a bolder got  
21 moved here and there and things like that doesn't  
22 necessarily --

23 COMMISSIONER GILPIN: That's more agricultural  
24 activity. You would do the same thing filling in ruts  
25 in your path, or something like that.

1 MR. MCATEER: Sure. And that's going to be part  
2 of our argument in response to this brief.

3 So, you know, the issues that -- the judge can  
4 look at 90-12 and say you unfairly denied them their  
5 vested rights. I don't believe that that will happen,  
6 but it's one judge. Judge Ohlman is a good judge, but  
7 it's one judge, not a panel. So, he's not going to  
8 argue -- argue -- he's not going to argue with himself.  
9 I am saying I can't tell you exactly how one judge is  
10 going to come down on an appeal hearing like this.

11 I will tell you that it's my belief that the worst  
12 case scenario is it comes back to the Board for another  
13 hearing. That will be the worst case scenario. I'm  
14 not predicting that. I am just talking about what the  
15 worst case scenario would be. But there is enough  
16 competent substantial evidence on the record that I  
17 don't think the Court can make a dispositive finding  
18 forcing the County to grant them mining rights on the  
19 property.

20 COMMISSIONER BREEDEN: What do you say is the time  
21 line for the Court to hear this and know the results of  
22 it?

23 MR. MCATEER: That's a difficult question. I know  
24 you don't want me to dodge it. I'm not. I'll take a  
25 guess that it will be a six-month case, something like

1           that.

2           We don't even have the order to show cause back  
3           from the Court as to how long I have to respond. There  
4           will be briefs and there will be an oral argument, just  
5           like an appellate court, so I will throw six months out  
6           there. It could be slightly shorter or slightly  
7           longer. I hope that helps.

8           COMMISSIONER MASK: The County was notified to the  
9           deed being permitted. What type of interaction did we  
10          have with the mine, if any?

11          MR. MCATEER: I don't know of -- offhand, I don't  
12          know. That's something we can look into.

13          COMMISSIONER BURGESS: Other than the  
14          documentations that have already been presented?

15          MR. MCATEER: Right.

16          MR. ARNOLD: I mean, within the documentation that  
17          has been presented, I don't think there was any  
18          interaction.

19          COMMISSIONER MASK: But we were notified?

20          MR. ARNOLD: Typically, the deed goes through --  
21          and even at that time in 2003, rules were already set  
22          as to how they provided notice, so I'm sure that they  
23          would have a record of some type of notification of the  
24          County even if it's simply the advertisement  
25          requirements for the notice of a permit pending.

1           COMMISSIONER BREEDEN: This process will be  
2 handled by, basically, our attorney and staff? Is that  
3 all we expect?

4           MR. MCATEER: Yes, sir. What I can do is -- I  
5 wanted to have this -- because I didn't want to have  
6 this long of an explanation in a public meeting, I  
7 wanted to advise you and get direction from you  
8 which -- to proceed with the defense of the litigation  
9 which would require a motion and vote, and I was  
10 getting to that.

11           And then we'll let you know -- we can give updates  
12 more informally in the public record. But, I just  
13 wanted to have this in the executive session so that it  
14 doesn't give rise to attorney-client privilege issues  
15 where we get questions out in the open and strategies  
16 and things that I've mentioned earlier and the way that  
17 I intend to approach things are not printed in the  
18 press.

19           That's the purpose of these kind of meetings,  
20 because attorney-client privilege for public entities  
21 like counties is miserable. It's not even a tenth of  
22 what a private party or corporation has. Really, this  
23 is about the only way you can get total attorney-client  
24 privilege, is to call a special executive session like  
25 this and be really careful too.

1 MR. ARNOLD: But, I want to say from a staff  
2 standpoint and from the County attorney's standpoint,  
3 you know, Hogan Law Firm needs a directive to defend  
4 the Board of County Commissioners in this case and,  
5 obviously, those costs incurred in that. And I have to  
6 prepare, from a budgetary standpoint, to -- to receive  
7 those invoices.

8 COMMISSIONER BREEDEN: That was my next question,  
9 is have we evaluated the cost and staff time involved  
10 that it is going to take to defend this case?

11 MR. MCATEER: The cost -- I don't see a whole lot  
12 of Sumter County staff time involved. I may meet a  
13 couple times with Brad Cornelius, but I don't  
14 anticipate -- but as far as legal time, it is a  
15 several-thousand-dollar matter to write a brief and  
16 research -- research is really what eats you up, and  
17 then writing it and cleaning it up and filing it and  
18 preparing for the oral arguments, having the oral  
19 arguments. It can be, you know, a ten- to  
20 fifteen-thousand-dollar issue.

21 MR. ARNOLD: But there is more, obviously, than  
22 just the direct attorney costs and the time associated  
23 with supporting the defense of the Board in this case.

24 One of the things that, obviously, is the "what  
25 if" scenario, is if you did not pursue the defense.

1 Derrill has told you the worst case scenario in  
2 defending of the Board and what the judge may rule, but  
3 to not defend it, I think, is a -- there's a couple  
4 things that I think the Board needs to be concerned  
5 about. One is if you don't defend it, and, let's say,  
6 by not defending it --

7 MR. MCATEER: Well, let me narrow that real fast.  
8 If you don't defend it, it would leave the competent  
9 substantial evidence allegations he makes in here open  
10 which means that the judge, if you don't respond, could  
11 unilaterally grant everything he wants and tell the  
12 Commission what to do. That's not what you want to  
13 happen, in my strong opinion.

14 My suggestion would be to allow us to defend this  
15 petition after the order to show cause is issued.

16 MR. ARNOLD: Let's go through that. If he gets  
17 everything he's asked for, then, basically, that would  
18 entail granting permission to move forward in mining  
19 the property.

20 MR. MCATEER: Well, if he got -- if the Court  
21 flatly overturned the Board saying that 90-12 was no  
22 good and that the enforcement of the adjacency  
23 requirement was a private property right violation in  
24 the taking, then, yes, you would have mining and  
25 therefore the parcel adjacent to that would then be

1 opened up to a -- to possible mining under the owner  
2 provision, this adjacency requirement in the code.

3 So, yes, there is a Pandora's box risk to not  
4 responding to this.

5 COMMISSIONER BURGESS: It goes beyond that --  
6 doesn't it -- because our staff needs to be very clear  
7 on this because if the judge ruled in his favor, that  
8 rules against our statutes.

9 COMMISSIONER BREEDEN: I think the bottom line is  
10 that we, as a Board, listened to it. I don't think we  
11 all agreed on the decision, but the Board made a  
12 decision and I think we should defend that decision.

13 MR. ARNOLD: And that's my recommendation to the  
14 Board, is that you do defend the position that the  
15 Board has ruled on because to do otherwise really makes  
16 suspect all of your decisions that you make in the  
17 quasi judicial fashion.

18 COMMISSIONER HOFFMAN: Mr. McAteer, I believe I  
19 understood you to say that if they had continuous  
20 mining ongoing, they may have been doing this  
21 illegally.

22 MR. MCATEER: That's an argument I would make.  
23 I'm not necessarily saying that's the case. I'm just  
24 going to -- you know, I would like to throw that back  
25 at him as a kind of, oh, really, so you -- you are

1 saying it was continuous after the ordinance was  
2 passed. And I would argue to the judge not only did  
3 they fail and waive their right to continue, but by  
4 this affidavit, it's not competent substantial evidence  
5 that they preserved their vested rights. It is  
6 competent substantial evidence that they have operated  
7 illegally. Whether the judge wants to get into that, I  
8 don't know, but I am going to put it in there. I would  
9 like to put it in there as an argument.

10 COMMISSIONER HOFFMAN: Do we need to do the motion  
11 in an open meeting once more or can we --

12 MR. MCATEER: What I would look for tonight is I'm  
13 going to read this -- one of my reports. I would like  
14 for a motion and vote this evening --

15 COMMISSIONER HOFFMAN: During the meeting later?

16 MR. MCATEER: -- the meeting -- to fund  
17 expenditures to defend this petition.

18 COMMISSIONER HOFFMAN: Okay.

19 MR. MCATEER: That's the only -- there would be no  
20 discussion of any -- the reason we have the executive  
21 discussion is we don't discuss all the strategy --

22 COMMISSIONER GILPIN: No one else should go into  
23 any commentary, just we vote.

24 COMMISSIONER BREEDEN: We're going to authorize  
25 the attorney to defend the action that was taken and

1 authorized the expenditures of the funds necessary for  
2 that defense.

3 MR. ARNOLD: That would be the motion, yes, sir.

4 MR. MCATEER: That would be the beginning and the  
5 end of the discussion.

6 COMMISSIONER GILPIN: That would be it. We vote  
7 and move on.

8 MR. ARNOLD: And just a reminder, again, you may  
9 be approached by Mr. Wade or anybody from Rocking G.  
10 Please don't interact with them. Since this is an  
11 active litigation, please direct them to the County  
12 attorney.

13 COMMISSIONER GILPIN: Does that take care of our  
14 businesses for today?

15 MR. MCATEER: Yes, sir, it does. I think we  
16 can --

17 COMMISSIONER GILPIN: Well, if there are no  
18 objections, we will now close this executive session

19 MR. MCATEER: Thank you, sir.

20 (The Executive Session concluded 1:34 p.m.)

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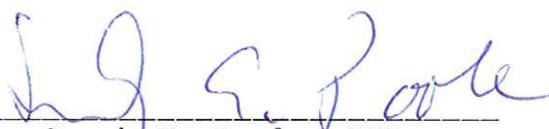
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## CERTIFICATE OF COURT REPORTER

I, Sarah E. Poole, Registered Professional Reporter, do hereby certify that I was authorized to and did report the foregoing proceedings; and that the transcript, pages 1 through 23, is a true and correct record of my stenographic notes.

DATED this 30th day of November, 2010.



\_\_\_\_\_  
Sarah E. Poole, RPR  
Court Reporter