In The

Supreme Court of Virginia

RECORD NO. 091502

AROGAS, INC.
and
PAT MANNING,

Appellants,

v.

FREDERICK COUNTY BOARD OF ZONING APPEALS
and
FREDERICK COUNTY BOARD OF SUPERVISORS,

Appellees.

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

Come now the Appellees, Frederick County Board of Zoning Appeals ("BZA") and Frederick County Board of Supervisors ("Board of Supervisors"), by counsel, and hereby submit this Brief of Appellees in response to the Appellants' Brief filed on behalf of the Appellants, Arogas, Inc. and Pat Manning (collectively, "Arogas").

STATEMENT OF THE CASE

On April 13, 2006, Arogas submitted a site plan application to Frederick County ("County") to develop a service station with a convenience market and fuel filling areas and pumps for the sale of gasoline and diesel fuel on 3.4 acres of property owned by George M. and Carol T. Sempeles ("Sempeles") (A. 87).[1] Mark Cheran, the Frederick County Zoning Administrator ("Zoning Administrator") determined that the site plan on its face showed that the proposed development included facilities for the sale of diesel fuel to over-the-road trucks, which use would be in violation of an approved zoning proffer applicable to the property, and determined that the site plan would not be accepted for review (A. 64-65).

Arogas appealed the Zoning Administrator's administrative decision to the BZA (A. 50-58). The BZA denied the appeal (A. 11).

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[1] At the time of filing the site plan, the appeal to the BZA, and the filing of the appeal of the BZA decision in the Circuit Court, Arogas had an option to purchase the 3.4 acres. (A. 87; A. 176). Prior to the filing of the Amended Petition in the Circuit Court, Arogas consummated the purchase of the 3.4 acres (A. 87).

Arogas filed a Petition for Writ of Certiorari and Declaratory Judgment ("Petition") in the Circuit Court, appealing the BZA decision pursuant to Virginia Code §15.2-2314, and, further, asking the court to declare that the subject zoning proffer is invalid and void (A. 1-4). The County demurred to the Petition as to the prayers for declaratory judgment (A. 79). By Order entered on July 6, 2007, the trial court sustained the County's demurrer, and granted Arogas leave to amend the Petition (A. 85).

Arogas filed an Amended Petition for Writ of Certiorari and Declaratory Judgment ("Amended Petition"), again appealing the BZA decision and further asking the court to declare the subject zoning proffer void (A. 87-93). The County demurred to the Amended Petition as to the prayers for declaratory judgment on the grounds that (1) Arogas had no standing to contest the zoning proffer on the property, approved in 2004, (2) no contest of the 2004 action of the Board of Supervisors in approving the rezoning with the subject proffer had been filed within thirty (30) days of the action of the Board of

Supervisors, and (3) the Amended Petition was insufficient, as a matter of law, to have the 2004 rezoning declared invalid and void ab initio (A. 110-14). By Order entered on June 2, 2008, the trial court found that the Amended Petition failed to state a cause of action to declare the zoning proffer void ab initio, that the contesting of the 2004 zoning action of the Board of Supervisors is barred for failure to file suit within 30 days, and that Arogas does not have standing to contest the zoning proffers approved in 2004. The court sustained the County's demurrer and dismissed the prayers in the Amended Petition for a declaration that the zoning proffer is void (A. 115-17).

On October 21, 2008 a hearing was held on the statutory appeal of the BZA decision. The trial court found that as a procedural matter the Zoning Administrator erred in not accepting the site plan application for review. By Final Order entered on April 27, 2009, the trial court reversed the BZA decision, the court expressly making no finding as to whether Arogas' proposed use of the property as reflected on the site

plan submitted would be in violation of the zoning proffers on the property (A. 314-16).

QUESTIONS PRESENTED

1. Did the trial court err in sustaining the demurrer to the declaratory judgment relief requested? (Assignments of Error 1 and 2)

2. Did the trial Court err in not interpreting the proffer? (Assignment of Error 3)

STATEMENT OF FACTS

On April 27, 2004, the Frederick County Board of Supervisors approved the rezoning application of Sempeles to rezone 10.3 acres from Rural Areas (RA) to Business General (B-2) and 101.92 acres from RA to Industrial (M-1). The rezoning application was for a conditional rezoning, with proffers, and the rezoning ordinance adopted by the Board of Supervisors approving the rezoning was "subject to the attached conditions voluntarily proffered in writing by the applicant and the property owner" (A. 324-25). Among the numerous proffers to which the rezoning was subject was a proffer which stated:

> "Any use involving the retail or wholesale sale of diesel fuel for over the road truck carriers shall not be conducted or performed on this site either in the commercial or industrial zones." (A. 328)

Arogas was not an owner of any portion of the Sempeles property at the time of the Sempeles rezoning and was not involved in the Sempeles rezoning (A. 176).

On April 13, 2006 Arogas submitted a site plan application to the County for the development of a service station with a convenience market and fuel filling areas for the sale of gasoline and diesel fuel on 3.4 acres of the Sempeles property (A. 87). The Zoning Administrator, in reviewing the submitted site plan, observed that "it is clear that the commercial use is, in fact, a gasoline service station (SIC 5541) with fuel islands and parking spaces appropriately sized to accommodate over-the-road trucks. Additionally, the commercial entrance detail on Drawing Number C-14, and the pavement details on Drawing Number C-13, are designed to accommodate heavy truck traffic." (A. 64) (Site Plan at A. 66-67). The Zoning Administrator determined that the proposed use as depicted on the site plan would be prohibited by the zoning proffer on the property, and returned the site plan to the applicant (A. 64-65).

Arogas appealed the Zoning Administrator's decision to the BZA, which upheld the Zoning Administrator's decision (A.

11). Arogas then filed the Petition for Writ of Certiorari and Declaratory Judgment in the Circuit Court (A. 1-4).

PRINCIPLES OF LAW AND ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN SUSTAINING THE DEMURRER TO THE DECLARATORY RELIEF REQUESTED.

A. Introduction.

In 2004, the Board of Supervisors approved the conditional rezoning of the 112 acre Sempeles property. Subsequently, Arogas obtained an option on, and then purchased, 3.4 acres of the property, with full knowledge of the proffer on the property that it could not be used for the sale of diesel fuel to over-the-road trucks (a truck stop). Arogas wants to use the property for a truck stop, and sought to accomplish that by asking the trial court to declare the subject proffer (but not the ordinance adopted by the Board of Supervisors approving the rezoning with the proffers)[2] void ab

[2] In acting on the rezoning, the Board of Supervisors adopted a single ordinance which rezoned the 112 acres to the B2 and M1 zoning districts, subject to the conditions voluntarily proffered by the property owner (A. 324-325). The Board did not vote separately on the proffers, or on individual proffers, and the Board did not take action to amend the proffer, as that was done by the property owner. If the fact that a proffer was amended by the property owner after the public hearing should result in the action of the Board being declared void ab initio,

initio, based upon an allegation that a minor wording change was made in the subject proffer after the public hearing and

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the entire ordinance would be void ab initio, not just the proffer that was amended. Arogas contends that just the one proffer would be void ab initio, citing cases on severability (Appellants' Brief, p. 24-28). However, the severability doctrine, and all of the cases cited in the Appellants' Brief (Appalachian Voices v. S.C.C., 277 Va. 509, 675 S.E.2d 458 (2009); Elliott v. Commonwealth, 267 Va. 464, 593 S.E.2d 263 (2004); King v. Arlington County, 195 Va. 1084, 81 S.E.2d 587 (1954); Sons of Confederate Veterans, Inc. v. Commissioner of Va. Dept. of Motor Vehicles, 288 F.3d 610 (4th Cir. 2002); and the circuit court case of Clark v. Town of Middleburg, 26 Va. Cir. 472 (1990)), involve provisions in legislative enactments which provisions were themselves determined to be invalid. Likewise, Virginia Code §1-243, also cited by Arogas, addresses the severability of provisions in acts of the General Assembly which are held invalid, not the invalidity of the process by which entire acts are adopted. (Also, §1-243 does not apply to local ordinances in any event.) The basis of Arogas' contention before this Court is that the proffer is invalid because of the process by which the Board of Supervisors adopted the ordinance, not that the proffer is substantively illegal or invalid. Neither the severability doctrine or any of the cases cited by Arogas stand for the proposition that if the process by which legislation is adopted is fatally flawed, portions of the legislation can be deemed valid and portions invalid. Therefore, if this Court should reverse the trial court's sustaining of the demurrer, and if on remand (see footnote 4, infra.) and after a hearing, it is decided by the trial court that the process by which the Board of Supervisors adopted the ordinance was fatally flawed, the rezoning ordinance adopted by the Board would be voided, and the zoning on the entire 112 acres would revert to the Rural Areas (RA) zoning district, regardless of who may now own the parcels comprising the 112 acres.

before the Board adopted the ordinance. However, the adoption of the ordinance with the amended proffer was in accordance with state law and did not violate the County zoning ordinance, and the trial court correctly sustained the County's demurrer to the requested declaratory relief.

As this issue comes before this Court for review of the sustaining of the County's demurrer, the facts before the Court on this issue are the facts alleged in the Amended Petition. It is well-settled that while a demurrer "admits the truth of the facts contained in the pleading to which it is addressed, as well as any facts that may be reasonably and fairly implied and inferred from those allegations", it "does not, however, admit the correctness of the pleader's conclusions of law". Blake Construction Co., Inc./Poole & Kent v. Upper Occoquan Sewage Authority, 266 Va. 564, 570-71, 587 S.E.2d 711, 714-15 (2003). Therefore, Arogas' legal conclusions alleged in the Amended Petition that the amendment of the proffer violated the County zoning ordinance and that the action of the Board of Supervisors in approving the Sempeles rezoning with the

amended proffer renders the proffer void ab initio, are not taken as admitted for purposes of the demurrer.

B. The Amended Petition failed to state a cause of action to declare void ab initio action of the Board of Supervisors in approving the rezoning with the amended proffer, as the action by the Board was in accordance with state law and not in violation of the County zoning ordinance.

The 2004 rezoning of the Sempeles property was a conditional rezoning (rezoning with proffers). The proffers submitted by the property owner (Sempeles) and approved by the Board of Supervisors consisted of three pages of proffers (A. 326-328). Arogas contends that the action by the Board of Supervisors was invalid and void ab initio. The entire basis of that contention is that one sentence in the three page proffer statement was amended by the landowner after the public hearing and before the Board voted on the rezoning.

The Amended Petition alleges that the original proffer would have prohibited the "wholesale or retail sale of diesel fuel", and that the proffer as amended prohibited the "wholesale or retail sale of diesel fuel for over-the-road truck

carriers" (A. 88). Arogas contends that this change in the wording of the proffer violated §165-13(A) of the County zoning ordinance, which provides:

> "A. Procedures. Proffers shall be presented to the Planning Commission at the advertised public hearing for the rezoning. The Planning Commission shall make a recommendation on the acceptance of the proffers and the rezoning to the Board of Supervisors following the procedures described for amendments to this chapter. Final proffers shall be received in writing, signed by the owner and applicant, at least five (5) days prior to the advertised hearing of the Board of Supervisors." (A. 252).

As this zoning ordinance provision indicates, proposed proffers for a conditional rezoning are first presented to the Planning Commission for the Planning Commission public hearing on the rezoning. As there may be revisions in the proposed proffers after the Planning Commission public hearing and Planning Commission action, this zoning ordinance provision requires that the final proffers to be considered at the Board of Supervisors public hearing be provided at least 5 days

prior to that public hearing. There is no allegation in the Amended Petition that this requirement was not met.

Clearly, the purpose of the ordinance provision is to have the specific written proffers being proposed available to the members of the Board and the public prior to the public hearing. The ordinance does not provide that the proffers cannot be amended after the applicant and the Board hear comments at the public hearing.

A rezoning application constitutes an application to amend the zoning ordinance by amending the zoning map. The process for zoning ordinance and map amendments is set forth in Virginia Code §15.2-2285. Subsection C of §15.2-2285 includes the following provision:

> "Before approving and adopting any zoning ordinance or amendment thereof, the governing body shall hold at least one public hearing thereon, . . . **after which the governing body may make appropriate changes or corrections in the ordinance or proposed amendment.**" (emphasis added)

The approval of the rezoning by the Board of Supervisors with the revised wording in one sentence of the proffers

constituted an appropriate change in the proposed zoning ordinance amendment, which, pursuant to Virginia Code §15.2-2285(C), the Board was clearly authorized to make.[3]

Arogas contends that the amended proffer allows a "more intensive use" of the property (Appellant's Brief, p. 21, 22), and based thereon, suggests that the Board was without authority to approve the rezoning with the amended proffer. Arogas cites no authority for that contention, but presumably has in mind a further provision of subsection C of §15.2-2285, which states, "However, no land may be zoned to a more intensive use classification than was contained in the public notice without an additional public hearing after notice required by §15.2-2204". That provision does not apply to the action taken by the Board in this case. The Board did not zone the

[3] By a 2006 amendment, Virginia Code §15.2-2298(A) provides that "[t]he governing body may also accept amended proffers once the public hearing has begun if the amended proffers do not materially affect the overall proposal". There having been no language in §15.2-2298(A) which prohibited amendment of proffers at or after a public hearing, this amendment clarifies §15.2-2298(A), consistent with §15.2-2285(C), that proffers may be amended at or after the public hearing, and further confirms that the approval of the rezoning amendment by the Board of Supervisors in this case was consistent with state law.

property "to a more intensive use classification than was contained in the public notice". The rezoning application upon which the advertised public hearing was held was to rezone the property from RA to B-2 and M-1. The Board rezoned the property from RA to B-2 and M-1, and not to any other more intensive use classification.

The action taken by the Board of Supervisors to rezone the Sempeles property with the amended proffer was authorized by Virginia Code §15-2-2285(C) and did not violate §165-13(A) of the zoning ordinance. Therefore, the Amended Petition failed to state a cause of action to have the Court declare the proffer invalid and void ab initio, and the Court correctly sustained the County's demurrer to that portion of the Amended Petition.

Arogas, in support of its argument on this issue, relies upon cases involving the failure to give proper notice of proposed legislative action as required by the Code of Virginia. Gas Mart Corp. v. Loudoun County Board of Supervisors, 269 Va. 334, 611 S.E.2d 340 (2005) and Glazebrook v. Board of

Supervisors of Spotsylvania County, 266 Va. 550, 587 S.E.2d 589 (2003) both involved the inadequacy of the published notice required by Virginia Code §15.2-2204(A), this Court finding that the published notices did not sufficiently describe the nature of the proposed zoning ordinance amendments or the areas of the county which would be affected by the amendments, with the result that a citizen reading the advertised notice could not reasonably determine if he or she would be affected by the amendments. In Potomac Greens Associates v. City Council of the City of Alexandria, 245 Va. 371, 429 S.E.2d 225 (1993), the City altogether failed to give one of the two advertised notices required by §15.1-431 (now §15.2-2204).

No such issue is presented by the facts alleged in the Amended Petition. There is no allegation that the published notice of the public hearing for the rezoning was not in conformity with Virginia Code §15.2-2204(A). There is no allegation that written proffers were not provided at least five (5) days prior to the public hearing as required by §165-13(A)

of the County zoning ordinance. Both the Code of Virginia and the County zoning ordinance provisions give citizens the opportunity to know the nature of the proposed rezoning action, including the associated proffers. As indicated by Virginia Code §15.2-2285(C), neither the Code of Virginia nor the zoning ordinance notice provisions prohibit appropriate changes in the proposed rezoning ordinance after the public hearing.

Arogas also cites Dick Kelly Enterprises v. City of Norfolk, 243 Va. 373, 416 S.E.2d 680 (1992), Town of Jonesville v. Powell Valley Village, 254 Va. 70, 487 S.E.2d 207 (1997), and the circuit court case of Chang v. Board of Supervisors of Fairfax County, 26 Va. Cir. 456 (1988) to the effect that the governing body must comply with local ordinances as well as state law. However, there was compliance with §165-13(A) of the County zoning ordinance, as the final proffers upon which the Board of Supervisors public hearing was held were filed at least 5 days before the public hearing. Section 165-13(A) does

not prohibit appropriate changes to the proffers after the public hearing, made pursuant to Virginia Code §15.2-2285(C).

Accordingly, the Amended Petition failed to state a cause of action to have the court declare the rezoning ordinance invalid, and the trial court did not err in sustaining the County's demurrer.

C. An action to contest the 2004 rezoning ordinance adopted by the Board of Supervisors had to be filed within thirty (30) days of the Board action.

Virginia Code §15.2-2285(F) requires that every action contesting a decision of a local governing body in adopting a zoning ordinance amendment shall be filed in the circuit court within thirty (30) days of the decision.

The Amended Petition does not allege, nor does Arogas now contend, that it filed an action within 30 days of the 2004 decision of the Board of Supervisors. Arogas contends, however, that its action contests the validity of the rezoning ordinance adopted by the Board of Supervisors, and that the 30-day provision does not apply.

However, as previously discussed in this brief, the Amended Petition failed to state a cause of action for the court to declare invalid the rezoning ordinance adopted by the Board of Supervisors. Therefore, the contesting of the Board's action was required to be filed within 30 days. The action not having been filed within 30 days, it is barred, and the trial Court correctly set forth this as an additional ground for the sustaining of the County's demurrer.

D. Arogas did not have standing to contest the 2004 rezoning ordinance adopted by the Board of Supervisors.

The trial court found, as an additional ground for sustaining the County's demurrer, that Arogas did not have standing to contest the 2004 rezoning ordinance adopted by the Board of Supervisors. While the trial court's sustaining of the demurrer on other grounds was correct, as previously discussed in this brief, the trial court was also correct in finding lack of standing as an additional ground for the sustaining of the demurrer.

Arogas was not involved in the Sempeles rezoning, did not own any portion of the Sempeles property at the time of the rezoning, and only years later, in 2007, acquired title to 3.4 acres of the Sempeles property. The Amended Petition contains no allegation that Arogas had any standing in 2004 to contest the rezoning action. Clearly, Arogas was not an "aggrieved party" in 2004 so as to contest the rezoning action.

As stated by this Court:

> "The term 'aggrieved' has a settled meaning in Virginia when it becomes necessary to determine who is a proper party to seek court relief from an adverse decision. In order for a petitioner to be 'aggrieved,' it must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks to attack. The petitioner 'must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest'." Virginia Beach Beautification Comm'n v. Board of Zoning Appeals, 231 Va. 415, 419-20, 344 S.E.2d 899, 903 (1986) (citations omitted).

Arogas contends that it became an "aggrieved party" when it purchased the 3.4 acres in 2007, even though it purchased the property with knowledge of the proffers on the

property. However, a contract interest, or an ownership interest, in a portion of land which is the subject of a rezoning action does not give standing to contest the rezoning action as to the land, as that would lead to the "anomalous result" that the relief sought by Arogas "would encompass property it did not own, thereby profoundly affecting the interests" of the owner of the rest of the property (Sempeles). Braddock, L.C. v. Board of Supervisors of Loudoun County, 268 Va. 420, 425, 601 S.E.2d 552, 554 (2004).

Further, as a purchaser of 3.4 acres of the Sempeles property, Arogas stands in the shoes of Sempeles with respect to the rezoning of the 112 acre Sempeles property. Sempeles applied for the rezoning, voluntarily submitted the proffers, and voluntarily amended the subject proffer after the public hearing and before the Board of Supervisors acted on the rezoning request. Sempeles would have no standing, years later, to attack the validity of the proffer to which they voluntarily agreed. Likewise, Arogas, standing in the shoes of Sempeles, has no standing to attack the validity of the action

by the Board of Supervisors in approving the rezoning with the amended proffer.

Accordingly, the trial court correctly set forth lack of standing as an additional ground for sustaining the County's demurrer.

2. THE TRIAL COURT DID NOT ERR IN NOT INTERPRETING THE PROFFER.

Arogas submitted a site plan (A. 56-57) to the County for development of the 3.4 acre property. The Zoning Administrator determined that the site plan, on its face, demonstrated a proposed use of the property which included the sale of diesel fuel to over-the-road truck carriers, which violated the proffer on the property. Based thereon, the Zoning Administrator did not accept the site plan for review, and returned the site plan to Arogas (A. 64-65), rather than having the site plan go through the normal review process of having the site plan sent out for agency review and comments and thereafter a decision being made by the Zoning Administrator as to whether the site plan should be approved, with the Zoning Administrator and the Planning Commission

having the option of having the site plan submitted to the Planning Commission for review and recommendation regarding approval. Arogas appealed the Zoning Administrator's determination to the Board of Zoning Appeals, and the Board of Zoning Appeals affirmed the determination of the Zoning Administrator.

At the hearing in the trial court on the appeal of the Board of Zoning Appeals decision (A. 168-247), the Zoning Administrator testified as to the basis of his determination to reject the site plan for review (A. 193-240). After hearing the testimony and argument of counsel, the trial Court found the Zoning Administrator should have accepted the site plan for review and the normal process followed before making a determination as to whether the proposed use of the property violated the proffer. The trial court reasoned that Arogas was entitled to the normal protocol for reviewing the site plan, which would give Arogas the opportunity for input and to try to show that its planned use of the property does not violate the proffer (A. 241-42; 245). Therefore, finding as a procedural

matter that the Zoning Administrator erred in not accepting the site plan for review, the trial court reversed the decision of the Board of Zoning Appeals on that basis.

Arogas contends that the trial court erred because it did not "interpret the proffer", and that this Court should now "interpret the proffer" on appeal because the trial court did not. Clearly, the trial Court was not required to pontificate, in the abstract, on the wording of the proffer. Any "interpretation" of the proffer in this case would be in the context of determining whether the proffer contains provisions which would prohibit the proposed use of the property. The trial court decided that the site plan should go through the review process, with Arogas having input on the issue, before that determination is made, and reversed the Board of Zoning Appeals decision on that basis. The decision of the trial court was pursuant to its authority under Virginia Code §15.2-2314 to "reverse or affirm, wholly or in part, or . . . modify the decision brought up for review". The trial court was not required to go further and to make the decision the Zoning Administrator would be called

upon to make after the administrative review process is completed, and the trial court did not err in not doing so. Likewise, it would not be proper for this Court to undertake to step into the shoes of the Zoning Administrator, and upon reviewing the site plan submitted, undertake to make a determination as to whether the proffer prohibits the proposed use.

Accordingly, the trial court, having reversed the BZA decision on the basis that the site plan should have been accepted for the normal review process before a determination made as to whether the proposed use of the property violated the proffer, did not err in not interpreting the proffer.

CONCLUSION

The adoption of the rezoning ordinance by the Board of Supervisors was authorized under state law and did not violate the County zoning ordinance, and the trial court did not err in sustaining the County's demurrer.[4]

In the statutory appeal of the BZA decision, the trial court did not err in not interpreting the proffer, the trial court having reversed the Board of Zoning Appeals decision on the basis that the site plan should have been accepted for the normal review process before a determination made as to whether the proposed use of the property violated the proffer.

Accordingly, the decision of the trial court in this case should be affirmed.

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[4] In any event, this Court cannot grant Arogas' alternative prayer for relief to have this Court declare the proffer invalid. As this issue was decided on demurrer based solely on Arogas' allegations in the amended Petition, if this Court should reverse the trial court's sustaining of the demurrer it must remand the case to the trial court to give the Board of Supervisors an opportunity to present evidence on this issue and the process by which the rezoning ordinance was adopted.

FREDERICK COUNTY BOARD OF
ZONING APPEALS and
FREDERICK COUNTY BOARD OF
SUPERVISORS

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RULE 5:26(d) CERTIFICATE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I hereby certify that I have hand-filed fifteen (15) paper copies of this Brief of Appellees in the Office of the Clerk of this Court, together with an electronic copy on CD of this Brief of Appellees, and have mailed three (3) paper copies of this Brief of Appellees to Mark E. Stivers, Esquire, P. O. Box 1737, Winchester, VA 22604, Counsel for Appellants, and to Curt G. Spear, Jr., One County Complex Court, Prince William, VA 22192, Counsel for Local Government Attorneys of Virginia, Inc., this 11th day of January, 2010.

Robert T. Mitchell, Jr., Esquire