BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WAL-MART STORES, INC.,
Petitioner,

vs.

CITY OF CENTRAL POINT,
Respondent,

and

CENTRAL POINT FIRST, INC., BECCA CROFT
JOSEPH R. THOMAS, DAVID M. PAINTER
and CAROL PUTMAN,
Intervenors-Respondent.

LUBA No. 2004-075

ORDER

MOTION TO CONSIDER EXTRA-RECORD EVIDENCE

LUBA's review is generally limited to the record that was compiled by the local government whose decision is on appeal at LUBA. ORS 197.835(2)(a).[1] However, in specified circumstances, ORS 197.835(2)(b) authorizes LUBA to consider extra-record evidence.[2] One of the specified circumstances in which LUBA may consider extra-record evidence is where there are disputed allegations regarding the existence of "actions described in [ORS 197.835](10)(a)(B)"

[1] ORS 197.835(2)(a) provides "[r]eview of a decision under ORS 197.830 to 197.845 shall be confined to the record."

[2] As potentially relevant in this appeal, ORS 197.835(2)(b) provides:

> "In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. * * *"

LUBA's administrative rule implementing ORS 197.835(2)(b) appears at OAR 661-010-0045.

"that if proved, would warrant reversal or remand" of a land use decision.[3] Petitioner filed a motion under ORS 197.835(2)(b) in which it seeks permission to engage in discovery to locate evidence that the city took action to avoid the requirements of ORS 227.178. Through the requested discovery, petitioner intends to seek documents to confirm those actions and to depose city employees and the city council.

Although the memoranda supporting and opposing petitioner's motion are numerous and the rhetoric in those memoranda has intensified as they have become more numerous, the legal issue presented by petitioner's motion is relatively straightforward and many important facts, which are discernable from the record that city has filed in this matter, are generally not in dispute. We turn first to the record.

FACTS

A. Home Depot and the Big Box Ordinance

The permit application that led to the decision that is the subject of this appeal was deemed to be complete on December 17, 2003. Before that application was filed, the city had encouraged Home Depot to locate a store in its C-4 zone. Record 669-72. Once the city was unsuccessful in that effort and Wal-Mart expressed interest in siting a store in the city, Wal-Mart contends the city has been hostile to Wal-Mart's expressed interest. Among other things, Wal-Mart cites the city's

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[3]ORS 197.835(10)(a) provides as follows:

> "[LUBA] shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
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> "* * * * *
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> "(B) That the local government's action was for the purpose of avoiding the requirements of ORS 215.427 or 227.178."

Among other things ORS 227.178 imposes a requirement that a city act on a permit application within 120 days after a complete application for permit approval is submitted. Where a city fails to do so, ORS 227.179 authorizes a permit applicant to file a petition for a writ of mandamus to compel the city to (1) approve the application or (2) demonstrate to the circuit court that approving the application would violate a "substantive provision of the local comprehensive plan or land use regulations." ORS 227.179(5).

failed effort to adopt what it refers to as a "big box" ordinance. *Naumes Properties, LLC v. City of Central Point*, 46 Or LUBA 304 (2004). Wal-Mart believes it was the real target of the big box ordinance, even though the ordinance did not take effect until after Wal-Mart's application for site design approval was submitted and even though that ordinance was remanded by LUBA.[4]

When the planning director was communicating with Home Depot's agent, he took the position that a Home Depot store could be sited in the city's C-4 zone as a permitted use with site plan review. Record 699-70. However, after Home Depot decided not to attempt to site a store in the city and Wal-Mart filed its application, the planning director took the position that a large format store such as Wal-Mart was not a permitted use in the C-4 zone and required conditional use approval, in addition to site design review.[5]

B. The Procedings Before the Planning Commission

When Wal-Mart's application came before the planning commission, two hearings were held. The first hearing was limited to two issues: (1) whether the proposed Wal-Mart store qualified as a "community shopping center," and (2) whether the proposal should be "treated as a conditional use under [the city's zoning ordinance] because it 'exhibits potentially adverse or hazardous characteristics not normally found in uses of similar type and size.'"[6] Record 699. Although it is somewhat unclear from the minutes of the planning commission's March 18, 2004 hearing, a majority of the planning commission apparently agreed with Wal-Mart at the conclusion of its March 16, 2004 hearing that the proposal qualified as a community shopping center and did not

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[4]Wal-Mart relies in part on certain errors that led to that LUBA remand to support its position that the city is hostile to Wal-Mart. In particular, Wal-Mart cites the city council's decision to bypass the planning commission in adopting that big box ordinance. 46 Or LUBA at 306.

[5] According to Wal-Mart, the first time the planning director expressed this change in position directly to Wal-Mart was in the notice of the Planning Commission's hearings in this matter. Record 699.

[6] Wal-Mart complains that the legal effect of this bifurcation of the hearings process before the planning commission is that it was effectively deprived of certain rights that it would otherwise have had under ORS 197.763 at the conclusion of the *initial* evidentiary hearing on this permit application, because the main hearing on the merits of its application was the second hearing before the planning commission.

require conditional use approval.[7] Wal-Mart contends that the planning director continued to assert that the planning commission should require conditional use approval. The planning commission held its second public hearing on March 30, 2004 and voted at the conclusion of that hearing to grant the requested site plan approval without requiring conditional use approval. Record 270. The planning commission later adopted its written decision, Resolution 610, at an April 6, 2004 meeting. Resolution 610 was signed that same date.[8]

C. The Proceedings Before the City Council

Early in 2004, the city was aware that it might have trouble issuing a final decision on Wal-Mart's application within the 120-day deadline established by ORS 227.178(1).[9] Record 1272-73. The city requested that Wal-Mart waive the 120-day deadline, but Wal-Mart refused. Record 1252.[10] As explained in the challenged decision, the city council realized that if it awaited a final decision by the planning commission and an appeal of that planning commission decision to the city council, it likely would not have time to schedule and conduct an appeal hearing and issue a written decision before the 120-day deadline expired on April 16, 2004. The city council therefore took action on March 25, 2004, five days before the planning commission adopted its oral decision and

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[7] At least some of the planning commissioners had remaining questions about whether conditional use approval should be required. Record 493.

[8] Wal-Mart complains that the planning director included as Exhibit B to the planning commission's decision a "Public Works Staff Report & Recommendations" that is inconsistent with the planning commission's oral decision. Record 140-46. The parties' dispute about the nature and propriety of Exhibit B is particularly acrimonious. Whatever the merits of that dispute, the planning commission adopted Resolution 610, which has the disputed Exhibit B attached. Record 134-46.

[9] ORS 227.178(1) provides:

> "Except as provided in subsections (3) and (5) of this section, the governing body of a city or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 227.180, within 120 days after the application is deemed complete."

[10] Wal-Mart took the position that the statutory 120-day deadline for the city to issue its final decision in this matter would expire on April 16, 2004.

12 days before the planning commission adopted its written decision, to schedule the matter for city council review on April 15, 2004.[11] The city council explained its action as follows:

> "WHEREAS, the City of Central Point is reviewing an application for development of the 'Proposed Retail Pear Blossom Plaza' on property at the northwest corner of East Pine Street and Hamrick Road within the City of Central Point; and
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> "WHEREAS, the application was deemed complete on December 17, 2003, and under ORS 227.178, the City has 120 days in which to reach a final decision, which period expires on April 16, 2004, and the applicant has so far been unwilling to extend the 120 day period; and
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> "WHEREAS, the City is currently undergoing a process to evaluate the East Pine Street Corridor, which process will likely result in pertinent information that could affect the City's decision on the Proposed Retail Pear Blossom Plaza application; and
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> "WHEREAS, the results of the East Pine Street Corridor evaluation were not available for review by the Planning Commission until late March of 2004, resulting in the delay of Planning Commission consideration of this matter, and
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> "WHEREAS, the lack of availability of the East Pine Street Corridor information until late March and the applicant's unwillingness to extend the 120 day deadline have presented the City with difficulty in meeting its obligations under ORS 227.178 to make a decision within the 120 days of when the application is deemed complete, and
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> "WHEREAS, the City Council believes that the traffic information regarding the East Pine Street Corridor is important to the proper resolution of the application for development of the Proposed Retail Pear Blossom Plaza and, therefore, every effort should be made to allow the information to be considered by the Planning Commission; and

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[11]Wal-Mart and the city disagree over whether Central Point Municipal Code (CPMC) 1.24.080 allows the city council to schedule a planning commission matter for a hearing before the city council before the planning commission has adopted its written decision. CPMC 1.24.080(A) provides:

> "Any party aggrieved by the action of city staff, the planning commission or city council may request review of such action by the council, or the council may on its own motion schedule any matter for review. In the case of a request for review, the same must be filed in writing with the city administrator no more than seven days after the date the city mails or delivers the decision being appealed from to the parties, and in the case of own-motion review, the council motion shall be made no later than the next regularly scheduled council meeting. Review shall be held at the earliest regularly scheduled council meeting that allows for compliance with the notice requirements."

"WHEREAS, in order to meet notice requirements for a city council review of the Panning Commission decision, the City Council must initiate this request for review of the Planning Commission decision prior to it being rendered by the Planning Commission; and

"WHEREAS, CPMC 1.24.080 allows the City Council to schedule any matter for review on its own motion, and does not limit such a motion to decisions that have already been made.

"NOW, THEREFORE, BE IT RESOLVED by the Central Point City Council as follows:

"Section 1. The Planning Commission's decision on the application for the Proposed Retail Pear Blossom Plaza is hereby called up for review by the Central Point City Council upon the Planning Commission's reaching a final decision.

"Section 2. The review of the Planning Commission's decision on the Proposed Retail Pear Blossom Plaza will occur at a special meeting of the City Council on Thursday April 15, 2004 * * *.

"Section 3. The City Council will not exercise its discretion to allow new evidence at the review hearing. Instead, the review will be limited to the existing record with an opportunity for all parties to submit arguments to the City Council. However, all criteria will be at issue." Record 48-49.

The city council held its hearing on April 15, 2004. At the conclusion of that hearing, the city council adopted a written decision in which it reversed the planning commission decision and denied the requested site plan approval.

THE LEGAL ISSUE

The legal issue that must be decided to resolve Wal-Mart's motion is relatively straightforward. We return to key statutory language to set out the key legal issue.

A. Action to Avoid the Requirements of ORS 227.178

As we have already noted, ORS 197.835(10)(a) authorizes LUBA to reverse a city action that was taken "for the purpose of avoiding the requirements of * * * ORS 227.178." The requirement of ORS 227.178 that forms the basis for Wal-Mart's motion is the ORS 227.178(1) requirement that the city take final action on Wal-Mart's application within 120 days after its application was deemed complete. *See* n 9.

ORS 227.178 and 227.179 envision essentially three potential routes to a final decision on a permit application. The first route is followed when the city takes final action on an application within 120 days after the application is deemed complete. Unless that decision is appealed to LUBA, that city decision is the endpoint of the permit proceeding. A variation on the first route is taken when the local government fails to make a decision within 120 days. The applicant may choose to continue to seek a decision from the local government after the 120-day deadline has expired. Under ORS 215.427(7) and 227.178(8), a county or city that makes a decision on an application after the 120-day deadline has expired must refund half of the application fee. The third route is taken when the city fails to take final action on the permit application within 120 days, and the applicant files a petition for a writ of mandamus. The city then only has the option of (1) approving the permit application or (2) demonstrating to the circuit court that the "approval would violate a substantive provision of the local comprehensive plan or land use regulations." ORS 227.179(5); *State ex rel Compass Corp. v. City of Lake Oswego*, 319 Or 537, 878 P2d 403 (1994).

B. The City's Position

Returning to the facts of this case, it is undisputed that the city issued its decision within 120 days after Wal-Mart's application was deemed complete. The city asks how its decision, which was rendered within 120-days after the application was deemed complete, could possibly be a decision that was taken for the purpose of "avoiding the requirements" of ORS 227.178(1). The city contends that the actions it took to speed the city council review of the planning commission's decision were taken to *comply* with ORS 227.178(1), not to *avoid* that statute's requirement for a final decision within 120 days.[12] If the city's position is stated in its most extreme form, the steps

[12] We concede at this point that our description of the city's position is not entirely accurate because the city's position in this matter, like Wal-Mart's, has evolved as the many responses and replies have been filed. We set out each party's more extreme reading of the statute, both of which we reject, to assist in understanding our interpretation of what the legislature intended when it authorized LUBA to reverse a city action that is taken for the purpose of avoiding the ORS 227.178(1) requirement that the city issue its decision on a permit application within 120 days.

that the city takes to issue a final decision within 120 days and its purposes for doing so are irrelevant, so long as the decision is rendered within the statutorily required 120 days.

C. Wal-Mart's Position

Even if the city's reading of ORS 197.835(10)(a) is facially plausible, Wal-Mart contends that it is incorrect. Wal-Mart appears to take the position that any city action to deviate from its local appeal procedures, to accelerate the local appeal process in order to allow time for the ultimate city review authority (in this case the city council) to review the decision of a lower decision maker and issue a final appealable decision within 120 days, constitutes an action that "was [taken] for the purpose of avoiding the requirements of ORS * * * 227.178(1)." Stating Wal-Mart's position in its most extreme form, if a city council wishes to review a planning commission decision that it has substantive concerns about, ORS 197.835(10)(b)(B) does not allow the city council to deviate in any way from adopted local procedures, even if such deviation is necessary to expedite the local review schedule to reach a final decision within the statutory 120-day deadline.

There is a second, related part of Wal-Mart's argument. Throughout Wal-Mart's memoranda it suggests that the city's action in this case was taken to prevent petitioner from filing a petition for writ of mandamus in circuit court and thereby forcing the city council to (1) approve its application as the planning commission had already done or (2) oppose the petition in circuit court and carry the burden required by ORS 227.179(5) before it could ask the circuit court to deny a peremptory writ ordering the city to approve the application. *See* n 3. Given the planning commission's decision that its application complies with local land use laws, Wal-Mart contends it ultimately would have been successful in any such writ of mandamus proceeding. Wal-Mart believes the city's action to expedite its review of the planning commission's decision was motivated by its desire to avoid having to defend itself in a writ of mandamus proceeding.

D. ORS 197.835(10)(a)

The legislature's intent in adopting ORS 197.835(10)(a) is ambiguous. We conclude that it is highly unlikely that the city's literal reading of the statute accurately expresses the legislature's

intent in adopting ORS 197.835(10)(a). If the city's reading of the statute is correct, and if the legislature's intent in adopting ORS 197.835(10)(a) was to prevent cities from taking actions to frustrate or avoid the 120-day rule, ORS 197.835(10)(a) miserably fails to achieve that intent. A one-sentence, *pro forma* denial of an application on the 120th day would literally comply with ORS 227.178(1) and preclude the remedy provided by ORS 197.835(10)(a), 215.428 and 227.179.

We have previously considered the meaning of ORS 197.835(10)(a) in a case that turned on very different facts. *Miller v. Multnomah County*, 33 Or LUBA 644 (1997), *aff'd* 153 Or App 30, 956 P2d 209 (1998).[13] Despite those factual differences, our discussion of the legislative history of ORS 197.835(10)(a)(B) (Oregon Laws 1995, chapter 812, section 5 (SB 245)) and our reasoning in that case concerning the types of actions that are targeted by the statute is helpful in this case as well and we set out that discussion below:

> "As initially proposed, Senate Bill 245 would have eliminated the mandamus remedy at ORS 215.428(7) and replaced it with automatic approval if the local government failed to take final action by the 120th day. Subsequent revisions softened this approach in favor of the requirement, now codified at ORS 215.428(7)(a), that the county must refund 50 percent of the application fee if the county exceeds the 120-day period.
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> "Senate Bill 245, section 5, amending ORS 197.835(10), was added later in response to a concern that counties would begin denying applications 'when they reached the 118th day' to avoid refunding the fees. Testimony of Kelly Ross, Oregon Association of Realtors, before the Senate Water and Land Use Committee, February 8, 1995, Tape 24, Side A, 326. The chairman of the committee commented that the amendments to ORS 197.835(10) are 'a way of putting some teeth' into the refund incentive for counties to meet the 120-day requirement. *Id*. at 390. The committee adopted those amendments without further

[13] *Miller* concerned a county decision that was subject to ORS 215.428(1), which imposes a 120-day permit decision deadline on counties and is the statutory analogue of ORS 227.178(1), which applies to cities. In *Miller*, the county adopted an oral decision *before* the 120-day deadline expired, but did not adopt its written decision until *after* the 120-day deadline expired. In adopting its written decision it purported to adopt it *nunc pro tunc* to the earlier oral decision date. 33 Or LUBA at 650. The issue on appeal was whether the county's innocent but erroneous view that it could backdate its final written decision, and thereby avoid the requirement of ORS 215.428(7)(a) to refund one-half of the application fee when a final decision is not made within 120 days, constituted an "action * * * for the purpose of avoiding the requirements of ORS 215.427 or 227.178," thus triggering the remedial actions authorized by ORS 197.835(10). *See* n 3.

> discussion, and the bill passed the House and Senate and in conference without discussion or amendment relevant to this case.
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> "The scenario that prompted the amendments to ORS 197.835(10), and their connection with the refund provision, indicate that the purpose of ORS 197.835(10)(a)(B) is to discourage counties from spuriously denying applications to avoid refunding application fees. The legislative history does not suggest that ORS 197.835(10)(a)(B) is intended to apply where the local government makes a decision, timely or untimely, based solely on the merits of the application. In other words, we agree with intervenor that ORS 197.835(10)(a)(B) is not intended to apply to good faith denials on the merits.
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> "* * * * *
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> "For the same reasons we conclude that the county's backdating of the final decision *nunc pro tunc* under these circumstances is not an action within the ambit of ORS 197.835(10)(a)(B). The legislative history indicates that ORS 197.835(10)(a)(B) is intended to discourage spurious, bad faith denials. The record indicates that the county board issued the order *nunc pro tunc* in the good faith belief that it had already complied with ORS 215.428, not in an attempt to avoid the requirements of that statute." 33 Or LUBA at 651-53 (footnotes omitted).

It is hard to believe that the legislature did not intend that the ORS 215.429 and 227.179 mandamus remedies would provide at least some motivation for cities and counties to issue decisions on applications for permits, limited land use decisions and zone changes within the ORS 215.427 and 227.178 deadlines. The statutory mandamus remedy is a potential consequence that cities and counties avoid by complying with the ORS 215.427 and 227.178 deadlines. However, there is a potential practical flaw in those statutes, which is addressed somewhat obliquely by ORS 197.835(10)(b)(B). A timely decision on an application is worthless to an applicant if that timely decision is a *pro forma* denial rather than a timely decision on the merits of the application. Expanding slightly on the above discussion in our decision in *Miller*, we conclude that if a city or county adopts a "spurious, bad faith" denial of a "permit, limited land use decision or zone change application" under ORS 215.427 or 227.178 for the purpose of avoiding one of the statutory consequences for failing to take timely action on an application, such a decision constitutes an

"action * * * for the purpose of avoiding the requirements of ORS 215.427 or 227.178," within the meaning of ORS 197.835(10)(b)(B).

Turning to Wal-Mart's motion, it does not appear to us that Wal-Mart seriously argues that the city's decision was a "spurious, bad faith" denial to avoid the statutory consequences of a failure to issue a final decision within the 120-day deadline. Even if Wal-Mart intends to advance that argument, the record neither supports such an argument nor provides a sufficient basis for authorizing the discovery and extra-record evidence that Wal-Mart seeks in this appeal.

The parties disagree whether the city council violated CPMC 1.24.080(A) by accelerating its local appeal process and expediting its decision. *See* n 11. However, even if the city council did commit procedural error, the city council's decision explains that it did so to allow it to review the planning commission's decision within the 120-day deadline and at the same time allow time for interested parties to be given adequate notice so that they would have a fair opportunity to participate in that review. Without reaching the question of whether that procedural error, if it was procedural error, prejudiced petitioner's substantial rights to an adequate opportunity to prepare and present its position on the merits before the city council, we note that nowhere in its arguments on the pending motion does Wal-Mart argue that the allegedly improper expedited procedure the city council followed denied Wal-Mart or any other party an adequate opportunity to present its arguments on the merits.

Wal-Mart does suggest in several places that the city decided to deny its application before Wal-Mart ever submitted its application. Even if one could speculate from the ill-fated big box ordinance and the city council's decision on March 25, 2004 to initiate review of the planning commission's decision that the city council was biased in this case, that speculation does not come close to providing an adequate basis for authorizing an evidentiary hearing in this appeal. While it appears the planning director in particular never viewed the application favorably, there is simply nothing in the record that suggests the city decision makers (the planning commission and the city

council) were motivated by anything other than their views about whether Wal-Mart's application complies with applicable city land use laws.

As we have explained on many occasions, local quasi-judicial decision makers, who frequently are also elected officials, are not expected to be entirely free of any bias. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, 141-44, *aff'd* 183 Or App 581, 54 P3d 636 (2002); *Halverson-Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710 (2001); *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440, 445-47 (2000), *aff'd* 172 Or App 361, 19 P3d 918 (2001). To the contrary, local officials frequently are elected or appointed in part *because* they favor or oppose certain types of development. *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 82-83, 742 P2d 39 (1987); *Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745, 750-52, 588 P2d 640 (1978). Local decision makers are only expected to (1) put whatever bias they may have to the side when deciding individual permit applications and (2) engage in the necessary fact finding and attempt to interpret and apply the law to the facts as they find them so that the ultimate decision is a reflection of their view of the facts and law rather than a product of any positive or negative bias the decision maker may bring to the process.

A request for permission to seek and present extra-record evidence under OAR 661-010-0045, particularly one that includes a request to depose the city council, can significantly slow LUBA's review and can easily be burdensome for local government decision makers if such requests are routinely allowed without a substantial showing that there is real reason to suspect that granting the request will lead to extra-record evidence of decision maker bias. The evidence and events cited by Wal-Mart, viewed individually or as a whole, do not in our view raise a significant question about the ability of the city council to render a decision in this case that is based on its view of the merits, as opposed to a bias against Wal-Mart. The cited evidence and events do not warrant an order that would allow petitioner to engage in discovery and present extra-record evidence that the challenged decision is a product of the city's council's bias rather than a product

of the city's council's view concerning whether Wal-Mart's application complies with applicable local land use laws.

Petitioner's Motion to Take Evidence not in the Record and for an Evidentiary Hearing is denied.

RECORD OBJECTION

The Second Supplemental Record that LUBA received on October 29, 2004 appears to resolve petitioner's Precautionary Objection to the Supplemental Record that was filed the same date. Accordingly the record is settled as of the date of this order.

DEADLINES FOR FUTURE EVENTS

The petition for review shall be due 21 days from the date of this order. The response brief shall be due 42 days from the date of this order. The Board's final opinion and order shall be due 77 days from the date of this order.

Dated this 17th day of March, 2005.

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Michael A. Holstun
Board Chair