No. 613PA07

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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| BARBARA GLOVER MANGUM, TERRY OVERTON, DEBORAH OVERTON and VAN EURE | ) | |
| v | ) | From Wake |
| RALEIGH BOARD OF ADJUSTMENT, PRS PARTNERS, LLC, and RPS HOLDINGS, LLC | ) | |

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PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31

(Filed 12 December 2007)
(Allowed 11 June 2008)

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TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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| BARBARA GLOVER MANGUM, TERRY OVERTON, DEBORAH OVERTON and VAN EURE,<br><br>Petitioners,<br><br>v.<br><br>RALEIGH BOARD OF ADJUSTMENT, PRS PARTNERS, LLC, and RPS HOLDINGS, LLC,<br><br>Respondents. | From Wake County<br>06 CV 004314<br>COA 06-1587 |

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PETITION FOR DISCRETIONARY REVIEW
UNDER N.C. GEN.STAT. § 7A-31(c) AND RULE 15 OF THE
NORTH CAROLINA RULES OF APPELLATE PROCEDURE

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Petitioners Barbara Glover Mangum, Terry Overton, Deborah Overton and Van Eure respectfully petition the North Carolina Supreme Court to certify for discretionary review the opinion of the North Carolina Court of Appeals filed 20 November 2007 on the grounds that the decision presents an issue of significant public interest and involves legal principles of major significance to the jurisprudence of the State. N.C. Gen. Stat. § 7A-31(c). A copy of the opinion is attached as App. pp. 1-11.

In support of this Petition, Petitioners show the following:

## STATEMENT OF THE CASE AND FACTS

### I. PROCEDURAL HISTORY

On 15 November 2005, PRS Partners LLC and RPS Holdings LLC ("Respondents") filed an application for a special use permit to operate an adult, topless establishment called "The Runway" at 6713 Mt. Herman Road, Raleigh, North Carolina ("the Property"). (R pp. 2, 26, 29) Section 10-2144 of the Raleigh City Code ("Raleigh City Code") requires a special use permit from the Board of Adjustment (the "Board") for such an establishment. (App. pp. 16-18) That code section also directs the Board to find that the applicant has presented evidence that the secondary effects from such establishments, including noise, light, stormwater runoff, parking, pedestrian circulation and safety, have been ameliorated. After the presentation of evidence at a public hearing on 9 January 2006, the Board issued Respondents a special use permit.

Petitioners Barbara Glover Mangum, Terry Overton, Deborah Overton, adjacent property owners, and Van Eure, owner of the nearby business The Angus Barn, ("Petitioners") on 24 March 2006 filed a Petition for Writ of Certiorari to the Wake County Superior Court seeking review of the special use permit granted by the Board. (R p. 111) Petitioners' central claim was that

the Board had not made the requisite findings mandated by the Raleigh City Code prior to granting a special use permit. Respondents moved to dismiss the petition for lack of subject matter jurisdiction, claiming that Petitioners have no standing because they presented no evidence at the administrative hearing of a loss of property market value. By order dated 12 September 2006, the Superior Court found that the Petitioners had standing, denied the motion to dismiss, and then reversed the decision of the Board of Adjustment because it failed to make the findings required by the Raleigh City Code before issuance of the special use permit. (R p. 140)

Respondents timely filed their Notice of Appeal on 14 September 2006. (R p. 81) In a published opinion issued 20 November 2007, the Court of Appeals reversed the judgment of the Superior Court and held that Petitioners' Writ of Certiorari should have been dismissed because Petitioners do not have standing. *Barbara Glover Mangum, Terry Overton, Deborah Overton, and Van Eure v. Raleigh Board of Adjustment, PRS Partners, LLC and RPS Holdings, LLC*, No. COA06-1587, slip op. (Nov. 20, 2007).

II. PERTINENT FACTS

The Property is a 1.75-acre tract within the City of Raleigh's Thoroughfare zoning district (R pp. 3, 27, 29) located on a dead-end street with no cul-de-sac or turnaround. (R pp.

58-59) Mt. Herman Road is the only means of access for the proposed club and the businesses located on adjacent properties. (R Ex. 19, p. 15)

Petitioner Barbara Glover Mangum owns the property located at 6701 Mt. Herman Road at the end of the road and immediately adjacent to the proposed adult establishment on which Mangum owns and operates Triangle Equipment Company, Inc. (R p. 70) Petitioners Terry and Deborah Overton own properties located at 6717 Mt. Herman Road, 6719 Mt. Herman Road, and 6721 Mt. Herman Road, directly adjacent to the proposed adult establishment on which the Overtons own and operate Triangle Coatings, Inc. (R pp. 74-75) Petitioner Van Eure is the owner of The Angus Barn restaurant, located at 9401 Glenwood Avenue. (R pp. 80-81) Employees and patrons of Petitioners' businesses travel in close proximity to the proposed adult establishment. (R pp. 81-82)

At the Board's public hearing to consider whether the Respondents' proposed adult establishment complied with the requirements of the Raleigh City Code § 10-2144(b).[1] Respondents offered the testimony of the operator of the proposed adult

[1] Legislative findings embodied in the Raleigh City Code provisions recognize secondary effects from adult establishments which include noise, light, stormwater runoff, parking, pedestrian circulation and safety. (App. pp. 17-18) The Raleigh City Code mandates as a pre-condition to issuing a permit that the Board conclude that the applicant has undertaken all necessary means to ameliorate these secondary effects on neighboring landowners.

establishment, as well as testimony by two land planners and an appraiser. (R pp. 36-37, 38-42, 44-53) Respondents' evidence included statements regarding their intent to comply with Code requirements for an adult establishment with future efforts to be completed before final permitting; however, they acknowledged that several aspects of the site plan had not yet been specified and would be resolved only after the Board rendered its decision. (R pp. 31, 34, 40-41, 88-90) Details yet to be provided included evidence findings to show how Respondents complied with some of the criteria specifically enumerated by the Raleigh City Code as recognized adverse effects of adult establishments. In particular, Respondents conceded that 1) no stormwater plan or analysis had been developed; (R pp. 88-89) 2) Respondents had submitted three separate and distinct parking plans for the Property, with the final plans needing to be "nailed down" during later phases of the development; (R pp. 18, 31, 34; R Exs. 11, 11A) and 3) buffering and landscaping requirements, which could potentially impact the area available for parking or stormwater control measures, would be determined at a later time. (R pp. 40-41)

Various citizens, including Petitioners, offered evidence against the application. In addition to testimony by landowners, Lamar Bunn, a licensed landscape architect and licensed real estate broker, testified regarding the potential

adverse effect of the establishment on adjacent landowners; notwithstanding, he did not testify as to any specific loss of market value for adjoining landowners in light of the lack of specific information forthcoming from Respondents and required by the Raleigh City Code. While Respondents focused their standing argument on property values, their testimony related only to real estate values for other adult clubs and surrounding properties. Respondent did not offer evidence as to the effect of this particular proposed adult establishment, as the specific plans were not even finalized. Because plans had not been finalized and the adult establishment had not yet been constructed, Petitioners were unable to show actual effects and were not able to present testimony that the appraised value of their respective properties is diminished.

Evidence by Petitioners and other opponents focused on secondary effects, including parking and traffic associated with the proposed adult establishment. Ms. Mangum testified that, because of the narrowness of Mt. Herman Road, if even one car parked on the street between the Property and her business, the road would be impassible to tractor-trailers delivering her equipment. (R p. 71) This evidence was corroborated by Mr. Bunn, who stated that any parking spilling over onto Mt. Herman Road would impede traffic and emergency access to adjacent properties. (R pp. 59-61) The fact that Mt. Herman Road dead-

ends without a turnaround just beyond the Property was cited as a factor creating additional vulnerability for adjacent properties. (R p. 59)

Evidence also included the potential impact of stormwater runoff. Ms. Mangum and Mr. Overton testified that their respective properties are at lower elevations than the proposed adult establishment. (R pp. 71, 74) Because the plans submitted by Respondents did not contain provisions for stormwater management, runoff from the proposed adult establishment would result in flooding and water issues on their adjoining properties. (R pp. 71, 74) The absence of stormwater controls in the Respondents' plans further creates uncertainty as to the size and location of on-site parking, since the required stormwater controls will reduce the area available for parking. (R pp. 65, 69)

## REASONS WHY CERTIFICATION SHOULD ISSUE

Petitioners respectfully request that the Court certify this case for review because the Court of Appeals' decision has significant public interest and involves legal principles of major significance to the jurisprudence of the State as provided by N.C. Gen. Stat. § 7A-31(c). The Court of Appeals' decision effectively limits standing in quasi-judicial proceedings to only those individuals who can demonstrate a monetary loss of value to their property, making irrelevant other forms of damage

which adjacent property owners may suffer. This Court has not previously announced such a standard and such a standard is not required by N.C. Gen. Stat. § 160A-388(b)'s reference to "aggrieved parties." This standard is particularly inappropriate where the very adjacent owners that the Raleigh City Code specifically recognizes will suffer adverse effects are foreclosed from seeking judicial review of the determination or lack of determination of whether Respondents have done all that is necessary to ameliorate the secondary effects associated with adult establishments. As a result, Petitioners, and all adjacent property owners, are excluded from the zoning process due to this higher standard which effectively forecloses judicial review.

## I. THE COURT OF APPEALS' EXTREMELY RESTRICTIVE INTERPRETATION OF "AGGRIEVED PARTY" AND STANDING UNDER N.C. GEN. STAT. § 160A-388 INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THIS STATE BECAUSE IT CONSTRAINS THE LEGISLATURE'S INTENT TO ALLOW AFFECTED CITIZENS TO LIBERALLY CHALLENGE ZONING DECISIONS.

Adjacent property owners whose properties have suffered monetary loss of value or those whose use and enjoyment of their properties have been impaired are, beyond doubt, the individuals best suited to challenge the outcome of a zoning decision. Such adjacent property owners have a direct and vested interest in the impact a zoning decision will have on their properties. That impact need not be measured solely by loss of market value

to be bona fide; however, the Court of Appeals' decision unnecessarily limits standing to only those who can establish a diminished monetary loss in value to their property. This extremely restrictive interpretation of "aggrieved party" and standing under N.C. Gen. Stat. § 160A-388 was not contemplated by the General Assembly. The statute makes a reference to "pecuniary loss." Foreclosing judicial review by adjacent property owners under such a standard thwarts public policy and involves legal principles of major significance to the jurisprudence of this State and its citizens.

The purposes of standing are served when a person having a direct and personal stake in the controversy invokes the jurisdiction of the courts. This Court has articulated the following rationale behind the standing requirement:

> [O]nly one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue. The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.

*Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 27, 199 S.E.2d 641, 650 (1973) (internal quotation omitted).

The decision by the Court of Appeals unnecessarily limits application of this rationale in the context of zoning.

Although adjoining landowners eventually may face clear injury to their properties' use and enjoyment distinct from others in the general community, the Court of Appeals accords them standing only if they are able to plead and prove pecuniary loss. Under this standard, a zoning decision becomes immune from review if no party, other than an applicant, can assert a monetary loss in property value. This is a particularly acute restriction where the adjoining landowners must prove pecuniary loss even before the contested use has come into existence.

This recent decision by the Court of Appeals is another of the opinions the Court of Appeals has issued narrowing standing in the fifteen years since this Court last reviewed the nature and degree of special damages that a neighboring land owner must show to have standing to challenge a zoning decision. *See County of Lancaster, S.C. v. Mecklenburg County, N.C.*, 334 N.C. 496, 434 S.E.2d 604 (1993); *see also Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 489 S.E.2d 898 (1997); *Sarda v. City/County of Durham Bd. Of Adjustment*, 156 N.C. App. 213, 575 S.E.2d 829 (2003). The Court of Appeals' opinion in this case purportedly did not address the merits of the zoning action but rested its disposition on a lack of subject matter jurisdiction flowing from a lack of standing by Petitioners. However, in reaching its decision, the Court of Appeals did, in fact, make a merits determination when it imposed a requirement that the

Petitioners actually plead proof of pecuniary harm. The Court of Appeals' position is that if Petitioners fail to plead pecuniary harm, they cannot satisfy an essential element of becoming "aggrieved parties" as the Court of Appeals interprets N.C. Gen. Stat. 160A-388(e2) into which the Court has grafted its "pecuniary harm" requirement. That requirement, however, is not mandated by the statute's language or its logic.

Rather, the purpose of requiring a legal challenge to be brought only by "aggrieved parties" is to assure that the challenge is brought by those with a personal and legal interest in the subject matter being affected and who are directly and adversely affected. *County of Lancaster, S.C. v. Mecklenburg County, N.C.*, 334 N.C. 496, 504 n.4, 434 S.E.2d 604, 610 n.4 (1993). Clearly, those who actually own the property subject to the permit have a legal interest. However, adjoining property owners must present evidence of some reduction of their property values to establish a similar interest. *Id.* The diminishment of property value, however, need not be measured solely by market values or rise to the level of any pecuniary measurement. The use and enjoyment of land free of interference is a long recognized property right. *See Hildebrand v. Southern Bell Telephone & Telegraph Co.*, 219 N.C. 402, 14 S.E.2d 252, 256 (1941) (stating property rights include the right to possess, use, enjoy, and dispose of property). Here, Petitioners have

raised issues regarding inherent secondary effects attendant to adult establishments-secondary effects which the Raleigh City Code recognizes on its face. The Court of Appeals' decision, however, renders such limitations on the use and enjoyment of property wholly outside the permissible power of judicial review.

The Court of Appeals couches much of its discussion in the context of a failure "to plead sufficient special damages." Effectively, the Court of Appeals held that impacts from uses on adjacent property including inadequate parking, diminished safety and security, increased stormwater runoff, trash, and noise, cannot be "special" or distinct from the general community until they rise to the level of, and are measured by, decreased market value established by expert testimony. Otherwise, reference to such effects is only "general and speculative" absent a pecuniary impact. This, of course, flies in the face of the legislative findings in the specific Raleigh City Code provisions.[2]

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[2] On a broader level, the North Carolina Senate recently addressed the issue of standing in quasi judicial matters. In May of 2007 the Senate approved Senate Bill 212 which, among other things, would add a new section to Part 3 of Article 19 of Chapter 160A to clarify the law regarding appeals of quasi-judicial proceedings, such as the instant case. Of significance, this bill would confer standing on "[a]ny person with an ownership interest or leasehold interest in property or any portion of which is located within 100 feet of the boundary

By requiring Petitioner to prove pecuniary loss as the sole means of establishing special damages, the Court of Appeals has unfairly and unnecessarily narrowed the definition of standing in all quasi-judicial challenges. In so doing, it has restricted the scope of North Carolina General Statute § 160A-388 beyond the legislature's intent, and its decision merits this Court's corrective attention.

II. THE COURT OF APPEALS DECISION INVOLVES A MATTER OF SIGNIFICANT PUBLIC INTEREST BECAUSE BY REQUIRING PROOF OF MONETARY VALUE BEFORE ALLOWING CITIZENS TO CHALLENGE ZONING DECISIONS, THE COURT OF APPEALS EFFECTIVELY EXCLUDES THE CITIZEN PROTECTIONS AND JUDICIAL REVIEW THAT IS ESSENTIAL TO LAND USE REGULATION.

By narrowly defining standing, the Court of Appeals has created an unworkable standard which excludes aggrieved property owners whose property is damaged in a non-pecuniary way from participating in the informal community-oriented zoning process and challenging zoning decisions. The limiting of the class of individuals who have "standing" to challenge a zoning decision is a matter of substantial significance to all North Carolinians. For many, the zoning process represents the only opportunity for an aggrieved party to be heard and to thwart adverse impacts to their property.

Section 160A-388 (e2) authorizes an "aggrieved party" to seek review of a board of adjustment decision made under a

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of the property that is the subject of the decision being appealed."

zoning ordinance. In the case of a nearby property owner, the Court of Appeals has defined an "aggrieved party" as one who "'[shows] some special damage, distinct from the rest of the community, amounting to a reduction in value of [that owner's] property.'" *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 350, 489 S.E.2d 898, 900 (1997) (alteration in original) (quoting *Allen v. City of Burlington Bd. of Adjustment*, 100 N.C. App. 615, 618, 397 S.E.2d 657, 659 (1990); *see also Northeast Concerned Citizens, Inc. v. City of Hickory*, 143 N.C. App. 272, 276, 545 S.E.2d 768, 772 (2001) ("[S]tanding exists to challenge a zoning ordinance by writ of certiorari when the plaintiff is an 'aggrieved party,' *i.e.*, the plaintiff will suffer damages 'distinct from the rest of the community' as a result of the zoning ordinance")(quotation omitted).

Special damages have been defined as "a reduction in the value of his [Petitioners'] own property." *Sarda v. City/County of Durham Bd. of Adjustment*, 156 N.C. App. 213, 215, 575 S.E.2d 829, 831 (2003) (internal quotation omitted). However, value of property is not measured solely by market value. Instead, a reduction in value may consist of diminished market value *or* impairment of the use and enjoyment of property. The Court of Appeals in *Kentallen, Inc. v. Town of Hillsborough* stated that a petition for certiorari must "allege the manner in which the value *or enjoyment* of [petitioner's] land has been or will be

adversely affected." 110 N.C. App. 767, 769, 431 S.E.2d 231, 232 (1993) (quotation omitted) (emphasis added). "Examples of adequate pleadings include allegations that the rezoning would cut off light and air to the petitioner's property, increase the danger of fire, increase the traffic congestion and increase the noise level." *Id.* at 769-70, 431 S.E.2d at 232. *Kentallen* makes clear that special damages may be shown through non-pecuniary factors that diminish the use or enjoyment of property. *See also, Taylor Home of Charlotte Inc. v. City of Charlotte*, 116 N.C. App. 188, 192, 447 S.E.2d 438, 441 (1994) (finding sufficient evidence of special damages based on the petitioners' testimony regarding "increased traffic," "the safety of children," "access for emergency vehicles" and "potentially bio-hazardous material"); *Massey v. City of Charlotte*, No. 99-CVS-18764 (N.C. Super. Ct. Apr. 17, 2000 (unpublished) (App. pp. 19-21) (evidence of increased amount of noise, light, odors, and traffic, which will diminish the value of their property and reduce their enjoyment of it was sufficient to establish damages unique from or to a greater extent than other members of the community).

The Court of Appeals' opinion not only ignores these "non-pecuniary" impairments, it demands that Petitioners demonstrate proof of actual loss in measurable market value. This standard becomes particularly problematic where the use that will create

loss has not yet occurred. The Raleigh City Code mandates that the Board find that the applicant has undertaken necessary steps to ameliorate secondary affects of adult establishments that are proven capable of impacting adjacent properties. The Respondents, however, have not even completed their plans intended to address those impacts cited by Petitioners as impacting their properties. Respondents assert that no permit will be issued if Code requirements are not met. But, the Raleigh City Code does not rely on partial compliance. It mandates that the Board approve a special use permit only upon special findings. By allowing the process to proceed with no judicial review of such special findings, the Court of Appeals essentially gives the Board unfettered and unreasonable discretion.

Until a project is completed, an adjacent property owner will be unable to establish the impact of a project. The restrictive standing formulation set forth by the Court of Appeals precludes there ever being any effective review of a city's quasi-judicial action by an adjacent property owner.

## III. THE COURT OF APPEALS' DECISION INVOLVES A LEGAL PRINCIPLE OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THIS STATE BECAUSE IT UNDERMINES THE POWER OF A LOCAL GOVERNMENT TO REQUIRE ITS LOCAL BOARDS OF ADJUSTMENT TO COMPLY WITH PROCEDURAL REQUIREMENTS BEFORE ISSUING SPECIAL USE PERMITS.

The Raleigh City Code mandates that the Board examine the intended property use to assure that adjoining landowners are

protected from harm arising from secondary effects of an adult establishment. (App. pp. 17-18) The Superior Court held that if the Board did not conduct the examination, then necessarily the adjoining landowners are "aggrieved" and have suffered special damages sufficient to assert standing. (R. pp. 138-40) What is being reviewed judicially is not the ultimate property use, but more specifically the question of whether the Board has yet undertaken the quasi-judicial obligations imposed upon it by issuing a special permit without the express findings the Raleigh City Code requires before such issuance. By conditioning a review of the issue upon a pecuniary interest standard, the Court of Appeals has made unreviewable the Board's determination regarding the secondary effects of an adult establishment. The Raleigh City Code mandates that the Board conclude that the applicant has undertaken all necessary means to ameliorate the enumerated secondary effects on adjacent properties. The Superior Court held that the Board had not made this finding and that it could not issue the special permit until it did so.

The state statute allows "aggrieved parties" to challenge zoning decisions; the Raleigh City Code did not seek to overrule that statute. The City Code's specific direction to mandate findings to protect adjacent landowners is not inconsistent with the state statute. The Court of Appeals' limitation of a right

of adjacent landowners to seek judicial review to mandate those findings unnecessarily limits the ability of local government to mandate procedures in their land ordinance and condition the grant of special use permits on special findings.

The exacting standard set forth in the Court of Appeals' opinion will practically eliminate judicial review of all cases which do not involve a direct financial impact, and for that matter, all cases involving a financial impact but where the parties are unable to secure expert witnesses to support their cause. Clearly, such a standard, and the implications of such a standard, involves legal principles of major significance to the jurisprudence of the State.

## CONCLUSION

For all of the foregoing reasons, this appeal satisfies the criteria of N.C. Gen. Stat. § 7A-31(c), and the Court should allow the Petition for Discretionary Review to determine what constitutes special damages for purposes of establishing standing under N.C. Gen. Stat. § 160A-388.

## ISSUES TO BE BRIEFED

Should the Court allow this Petition for Discretionary Review, Petitioners intend to present the following issues in their brief to the Court:

I. Did the Court of Appeals err in reversing the decision of the Superior Court which denied a special use permit which by

Code must be conditioned on special findings the Board failed to make?

II. Is the Court of Appeals' decision demanding evidence of loss of pecuniary value and ignoring other property invasions in the case, property inconsistent with the standing requirements set forth in North Carolina General Statute § 160A-388?

III. Did the Court of Appeals erroneously limit standing to challenge quasi-judicial proceedings exclusively to those who can allege and establish a pecuniary loss to their property?

IV. Can special damages sufficient to confer standing be established by evidence of impairment of the use or enjoyment of an individual's property?

V. Does the decision of the Court of Appeals unfairly limit the power of local government to allow for citizen review?

Respectfully submitted, this the 21st day of December, 2007.

SMITH MOORE LLP

By: _____
James L. Gale
State Bar No. 6160
jim.gale@smithmoorelaw.com

By: _____
David L. York
State Bar No. 16905
david.york@smithmoorelaw.com

By: _____
Marc C. Tucker
State Bar No. 25722
marc.tucker@smithmoorelaw.com

2800 Two Hannover Square
Raleigh, NC 27601
Telephone: (919) 755-8700

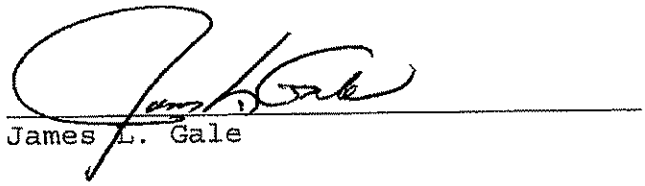
*Attorneys for Petitioners Appellants*

CERTIFICATE OF SERVICE

This is to certify that the foregoing PETITION FOR DISCRETIONARY REVIEW was duly served upon Respondent-Appellants by depositing a copy in the United States mail, first-class, postage prepaid, addressed to the following counsel of record:

Robin Tatum Currin
Keith H. Johnson
POYNER & SPRUILL LLP
P.O. Box 10096
Raleigh, NC 27605-0096

This the 21st day of December, 2007.



James L. Gale