APPLICATION OF FORESTAR (USA) REAL ESTATE GROUP, INC.	§	BEFORE THE LOST PINES
	§	GROUNDWATER
FOR A PRODUCTION	§	CONSERVATION
	§	DISTRICT
PERMIT AUTHORIZING TRANSPORT	§	

FORESTAR (USA) REAL ESTATE GROUP, INC.'S SECOND MOTION FOR REHEARING

TO THE LOST PINES COUNTY GROUNDWATER CONSERVATION DISTRICT:

COMES NOW FORESTAR (USA) REAL ESTATE GROUP, INC. ("Forestar"), the applicant sponsoring applications ("Applications") for new Operating and Transport Permits authorizing the production and out of district transport of up to 45,000 acre-feet per annum from up to 10 wells (to be aggregated) of groundwater for beneficial use for public water supply (municipal) purposes both within the District in Bastrop and Lee Counties, as well as in Travis, Williamson, and Hays Counties pending before the Board of Directors of the Lost Pines Groundwater Conservation District ("Board" and "District"). Forestar filed a Motion for Rehearing of the Board's May 15, 2013, decision to limit its grant of Forestar's Applications to 12,000 acre-feet per annum, and to clarify and modify certain provisions of the permits granted to Forestar. On November 19, 2013, the Board granted Forestar's motion for rehearing, but on January 15, 2014, the Board issued an Order denying "all requests to modify or amend the terms of the" permits and adopted Findings of Fact and Conclusions of Law on Rehearing. Forestar files this Second Motion for Rehearing, and shows the Board as follows:

I.

INTRODUCTION

This Second Motion for Rehearing is filed pursuant to the District's rules (Rule 14.6) and Sections 36.251 and 36.412, Texas Water Code, relating to the requirements for exhausting Forestar's administrative remedies, including requesting rehearing following the District's issuance of Findings of Fact and Conclusions of Law. This motion is filed to address issues raised by the Board's decisions (i) on May 15, 2013 and on January 15, 2014 to wrongfully refuse to grant in its entirety Forestar's Applications by limiting the permits granted to Forestar to 12,000 acre-feet per annum, and (ii) on July 17, 2013 and January 15, 2014 to adopt erroneous, incomplete, and inaccurate Findings of Fact and Conclusions of Law[1] to attempt to justify those refusals to fully grant the Applications.[2]

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[1] The Board's initial findings and conclusions were adopted during the District's July 17, 2013 Board meeting and, thereafter, signed and issued on July 18, 2013.

[2] *EAA v. Day*, 369 S.W.3d 814 (Tex. 2012); U.S. Const. Amend V, XIV; Tex. Const. Art I, §17.; *e.g.*, *Houston and Texas Central Railroad Company v. East*, 81 S.W. 279 (Tex. 1904); *Texas Company v. Burkett*, 296 S.W. 273, 278 (Tex. 1927); *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798 (Tex. 1955); *Sun Oil Co. v. Whitaker,*

The Board's decisions violate the District's regulatory authority over Forestar's groundwater rights as delineated in Chapter 36, Texas Water Code, the District's enabling legislation[3], and the District's rules. The Board's decisions, findings, and conclusions have prejudiced Forestar's substantial rights because those decisions, findings, and conclusions are: not supported by substantial evidence; made through unlawful procedure; in violation of constitutional and statutory provisions; in excess of the District's statutory and constitutional authority; arbitrary and capricious and characterized by abuse of discretion and clearly unwarranted exercise of discretion; and affected by other errors of law; and effect a taking or damaging of Forestar's property rights in the groundwater underlying 20,000 acres of land Forestar leases in Lee County, Texas. This motion, without waiving any of the foregoing errors, will focus primarily on the following errors and harm to Forestar:

A. The Board's decisions and findings are not supported by substantial evidence. Forestar's Applications[4] were *uncontested* and thus, in addition to the General Manager's determination that the Applications satisfy all regulatory requirements and should be granted in full, constitute the sole record evidence. There is no competent evidence warranting the rejection of the majority of the production authorization sought by Forestar in its Applications, and the Board's reliance on extra-record information and factors have deprived Forestar of its property without due process of law.

B. The uncontested evidence establishes that granting the permits in full will *not* "unreasonably affect existing groundwater and surface water resources or existing permit holders." There is no competent contrary expert testimony or other evidence that in any manner justifies the Board's refusal to grant Forestar's Applications in full.

C. The uncontested evidence establishes that there are existing and projected demand and supply deficiencies for municipal water supplies within the service area described in Forestar's Applications that would be remedied by the granting in full of Forestar's Applications.

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438 S.W.2d 808, 811 (Tex. 1972); *Friendswood Dev. Co. v. Smith-Southwest Indus., Inc.*, 576 S.W.2d 21, 25-27 (Tex. 1978); *City of Sherman v. PUC*, 643 S.W.2d 681, 686 (Tex. 1983); *Moser v. United States Steel*, 676 S.W.2d 99, 102 (Tex. 1984); *Gifford-Hill & Co. v. Wise County Appraisal Dist.*, 827 S.W.2d 811, 815n.6 (Tex. 1992); *Sipriano v. Great Spring Waters of America*, 1 S.W.3d 75, 79 (Tex. 1999); *see, e.g., Pecos County WCID No. 1 v. Williams*, 271 S.W.2d 503 (Tex. Civ. App. – El Paso 1954, writ ref'd n.r.e.); *Bartley v. Sone*, 527 S.W.2d 754, 759-60 (Tex. Civ. App. – San Antonio 1974, writ ref'd n.r.e.); *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613, 617-618 (Ct. App.–San Antonio 2008, pet. denied); *Edwards Aquifer Authority v. Day*, 274 S.W.3d 742, 756 (Tex. App. – San Antonio 2008), *aff'd*, 369 S.W.3d 814 (Tex. 2012). For an in-depth historical review and analysis of the law related to groundwater as a "property right," the author commends to the reader's attention Volume 37, No. 1 of the Texas Tech Law Review. In that Volume the history of groundwater law is traced from its Greek and Roman roots through Spanish and English interpretations to Texas' adoption of the "Absolute Ownership Rule," and the corollary tort-based concept known as the "Rule of Capture." *See* Drummond, Sherman & McCarthy, *The Rule of Capture in Texas—Still Misunderstood After All of These Years*, 37 TEX. TECH L. REV. 1 (2004); *see generally* W. HUTCHINS, THE TEXAS LAW OF WATER RIGHTS, 556-572 (1961); Jones & Little, *The Ownership of Groundwater in Texas: A Contrived Battle For State Control of Groundwater*, 61 BAYLOR L. REV. 578 (2009).

[3] Tex. Spec. Dist. Local Law Code Ch. 8849.

[4] Forestar's Applications include all supplemental and supportive information and documents provided to the District in response to the District's requests prior to the General Manager determinations (i) that the Applications were "administratively complete" and (ii) the General Manager's development of his recommendation to grant Forestar's Applications in their entirety.

There is no competent evidence whatsoever that Forestar's permits would be devoted to a "speculative use."

D. The Board members' and the District's decisions and actions have deprived Forestar of its property without procedural or substantive due process and have denied Forestar equal protection of the law, in contravention of Forestar's rights under the Fourteenth Amendment to the United States Constitution. Accordingly, the Board members and the District are liable to Forestar for damages and attorney's fees under Sections 1983 and 1988 of Title 42 of the United States Code.

E. The Board members' and the District's decisions and actions also have effected a taking or damaging of Forestar's property rights in its groundwater, in violation of Section 17 of Article I of the Texas Constitution and of the Fifth and Fourteenth Amendments to the United States Constitution. The Board members' and the District's decisions, findings, and conclusions also have caused a damaging and taking of the property rights of the landowners who leased their groundwater rights to Forestar.

F. Additionally, and irrespective of whether the Board corrects the errors of law caused by its denial of the additional 33,000 acre-feet of water out of the 45,000 acre-feet for which Forestar sought permits for production and transport, the language of the permits as granted needs modification. Specifically, the language of the conditions related to the date by which Forestar must secure binding contracts, drill wells, and begin producing groundwater for beneficial purposes is confusing, inconsistent, and contrary to the Board's expressed desires to enhance conservation, avoid unnecessary groundwater production, and defer production to avoid any impact to the aquifers within its jurisdiction. Forestar seeks correction and clarification of such provisions, as well as modification of the language as necessary to provide a workable, efficient, and water conservation oriented permit scheme consistent with its Applications and publicly stated plans and intent.

II.

SUMMARY OF FACTS

In December 1999, Forestar's predecessor in interest, Sustainable Water Resources, LLC ("SWR") filed the Applications with the District seeking authorization for up to 10 wells to produce up to 45,000 acre-feet of water per year to be beneficially used both within and outside the District. The Applications sought the ability to aggregate production under the permits such that not all of the 10 wells would have to be drilled or pumped annually, and that individual pumping rates would not be required for each well so long as the total aggregated production from the well field of up to 10 wells did not exceed 45,000 acre-feet of water per year. Aggregation of production allows the efficient production of the groundwater, as well as modification of pumping schedules and wells pumped if needed to minimize localized impacts from pumping. After filing, the Board took no action on the Applications because it had adopted a moratorium on processing and acting on applications for new non-exempt permits.

In support of its Applications, and development of its groundwater project, Forestar assembled leases over 20,000 acres of land in Lee County authorizing the exploration,

development and production of groundwater from the acreage. While the leases included authorization for right-of-way to use the surface of the property for those purposes, including the construction of treatment and/or transportation facilities, that is the limitation of Forestar's interest in the surface. Specifically, Forestar's interest in the development of the groundwater was for the sole purpose of developing a municipal water supply, rather than irrigation of the 20,000 acres of land. The amount of acreage acquired results in Forestar seeking to produce approximately two and a quarter acre-foot of groundwater per acre from the Simsboro Aquifer underlying the property. Forestar and its predecessor chose the Simsboro Aquifer because it is deep, not relied upon for local irrigation and/or domestic and livestock wells, and contains a vast quantity of water capable of being produced on a sustainable basis for hundreds of years. The Applicant undertook significant hydrogeologic studies, including "Magneto Tellurice surveys" of the property to evaluate and determine the area of the groundwater supply and its sustainability. This information was provided to the District. Forestar also undertook to drill and complete a test well on the leased properties at a location that is within the center of the proposed Forestar well field. The hydrogeologic assessments, including pump tests, were reported to the District. The Applicant also relied upon and insured that the District had access to and copies of other prior reports performed on the Simsboro Aquifer and the Carrizo-Wilcox Aquifers in the area of the proposed project including work done by the Texas Water Development Board and the San Antonio Water Systems. Prior to the Board's consideration of Forestar's application during the March 20, 2013, public hearing, Forestar had invested more than Fifteen Million Dollars in the development of its groundwater project designed to provide water to support and supply the unmet needs of municipal water users in a five county area of central Texas including Bastrop and Lee Counties within the District, and Hays, Travis and Williamson Counties along the I-35 corridor adjacent to the District.

Forestar acquired SWR's interests in the Applications, including the supporting groundwater leases. Forestar provided notice that it was the applicant, which notice was confirmed in August 2012.

In late 2012 and early 2013, following the District's lifting of its moratorium on the processing and consideration of permits, the District requested additional information from Forestar in order to process the Applications to administrative completeness. By letter dated February 20, 2013 (Exhibit "A"), the District's General Manager declared Forestar's Applications to be administratively complete, and provided Forestar with instructions for the mailing and publication of notice that a hearing would be conducted on the Applications on March 20, 2013. By letter dated February 21, 2013 (Exhibit "B"), the General Manager provided Forestar with copies of the draft permits containing terms and conditions under which he would be recommending Forestar be granted its Applications in full. Forestar completed the notice by publication requirements of the District pursuant to Rule 14.3C(3), and submitted evidence of the same to the District by letter dated March 7, 2013 (Exhibit "C").

The General Manager scheduled Forestar's Applications for consideration and action by the Board during a public hearing on March 20, 2013. According to District Rule 14.3D, any request for contested case hearing or protest of Forestar's Applications was required to be filed in the District's office on or before March 15, 2013 (the fifth day before the March 20 hearing date). No timely requests for contested case hearing or protest of Forestar's Applications were received by the District before the deadline. Accordingly, on March 20, the District's

consideration of Forestar's Applications was as an "uncontested application" pursuant to Rule 14.5. During the course of the March 20 hearing on Forestar's Applications, the Board heard "public comment" but did not receive any sworn testimony or other evidence from members of the public.[5]

Forestar's sworn Applications and supporting documentation were before the Board at the hearing. Also before the Board was the General Manager's March 20 memorandum recommending that the Board grant the permits in their entirety (Exhibit "E").

Based on the technical review performed by the General Manager, his staff, and consultants, the General Manager's memorandum summarized his recommendation to grant Forestar's request for authorization to produce and transport up to an aggregate amount of 45,000 acre-feet of water per year from the Simsboro Aquifer from 10 wells. The instantaneous rate of withdrawal for each individual well would be limited to 3,500 gallons per minute. While that authorization is capable of producing more than 45,000 acre-feet if all 10 wells are pumped, the "aggregation" provision of the permits will limit total production to 45,000 acre-feet. In his memorandum, the General Manager discussed each of the criteria in the District's rules (*see* Rules 5.2 [10 criteria for evaluating operating permit applications] and 6.3 [three additional criteria for evaluating out of district permit applications]). These criteria mirror the requirements in Sections 36.113, 36.1131 and 36.122 of the Texas Water Code. The General Manager's comments to the Board summarizing his recommendation to grant the Forestar Applications are contained at pages 3-4 and 78-81 of the transcript of the March 20 proceedings (Exhibit "D"), and pages 61-62 of the transcript of the Board's May 15 meeting (Exhibit "F")[6].

Following the closure of the public hearing on Forestar's Applications by Board President Talbot (Tr. at p. 83), Board Member Dougherty moved to table final action on the Applications to a later meeting. The motion passed. (Tr. at p. 83).

On April 10, 2013, Aqua Water Supply Corporation filed a request for a contested case hearing on Forestar's Applications. That request was made 21 days after the closure of the public hearing on Forestar's Applications and 26 days after the deadline for filing a request for a contested case hearing according to District Rule 14.3.D. By letter dated April 17, 2013 (Exhibit "G"), the General Manager advised Aqua WSC that its request was untimely and would not be presented to the Board.

During the public comment period at the next Board meeting on April 17, Aqua WSC's attorney pleaded Aqua WCS's request for a contested case hearing. Following the closure of public comment, Forestar's Applications, which were on the meeting agenda (Item No. 9), were considered. After an executive session by the Board, a motion was made to conduct a "preliminary hearing" on Aqua WSC's request for a contested case hearing on Forestar's Applications to determine its timeliness. The motion passed and further action on Forestar's Applications was tabled until the next Board meeting, to be taken up immediately following the preliminary hearing on Aqua WSC's request for contested case hearing.

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[5] The transcript of the March 20 hearing and Board proceedings relating to Forestar's Applications is on file with the District. An electronic copy is included herewith as Exhibit "D" on a CD.

[6] The transcript of the May 15 meeting is on file with the District. Like the March 20 hearing transcript, an electronic copy of the transcript is included herewith on CD as Exhibit "F."

On May 13, 2013, the District conducted a special called Board meeting during which it received a presentation from its consulting hydrogeologist, Andrew Donnelly with Daniel B. Stephens and Associates, entitled "Groundwater Modeling Results." (*See* Exhibit "H"). The agenda for that special meeting did *not* include a hearing on or consideration of Forestar's Applications. In addition, because the Applications were uncontested, as a matter of law Mr. Donnelly's presentation was not competent evidence regarding those Applications. The Board did not request, solicit, or offer any opportunity for a presentation, rebuttal, or cross-examination by Forestar regarding the May 13 presentation. Nonetheless, the content of the May 13 presentation by Mr. Donnelly is generally consistent with the hydrogeologic analysis presented to the District by Forestar as part of its Applications. Mr. Donnelly's presentation confirms that granting Forestar's request to produce and transport 45,000 acre-feet of water per year will not cause any unreasonable impact or adverse effects to the Simsboro Aquifer, other groundwater permittees, surface water in connection with groundwater, or the District's Desired Future Conditions ("DFCs"). The May 13 presentation does not contradict Forestar's data, opinions, and information analyzed and used by the General Manager to develop his recommendation (which was reiterated at the District's subsequent May 15, 2013, Board meeting) that the Board should grant Forestar permits for the entire requested 45,000 acre-foot per annum production and transport authorization.

Mr. Donnelly's May 13 presentation acknowledges that it over-predicts the potential impacts from pumping the entire 45,000 acre-feet per annum on the Simsboro Aquifer and the DFCs, in part by assuming immediate, maximum, and continuous pumping annually through the year 2060, the presentation was "qualified" by multiple limitations on both the GAM and the modeling conducted. These explanations support the General Manager's recommendation to grant Forestar's Applications in their entirety; and should have prevented the Board from denying Forestar's Applications in large part by limiting the production and transport authorization granted to only 12,000 acre-feet per annum.

The May 13 presentation also ignores the facts and legal limitations on Forestar's permits, which are protective of the District, the aquifers within the District's jurisdiction, other permittees, any surface waters, and the District's DFC's, *i.e.*:

- The production permits sought have a term limit of 5 years;

- While the permits can be renewed, renewal is not guaranteed, particularly if the actual aquifer data and condition resulting from Forestar's production show an unreasonable adverse impact to the aquifer, other permittees, or surface water conditions;

- Even before the permit renewals occur, the District would have ongoing regulatory and supervisory control over the Forestar permits, as well as other permittees and, based on good science and lawful application of its rules and statutes, could regulate Forestar's pumping, including imposing primary limitations or permit restrictions on a uniform, non-discriminatory basis to protect the aquifer;

- The language of the production permits provides that the rights granted therein are subject to subsequent production limitations that may be adopted by the District.

On May 15, 2013, the Board conducted a preliminary hearing on Aqua WSC's requests for contested case hearings as to both Forestar's Applications and the application of the Lower Colorado River Authority, which had similar facts in that the hearings on the two applications were held March 20, the deadline for filing requests for contested case hearing was March 15, and Aqua WSC did *not* file its requests until April 10, 2013. Following argument by parties, the Board voted unanimously to deny Aqua WSC's request for a contested case hearing as having been untimely filed. The Board also denied all other requests for contested case hearing filed on or after March 15, 2013 (*see* May 15, 2013 Hearing Tr., Vol. I, at pp. 26-28).[7] This Board action confirmed the "uncontested" status of Forestar's Applications.

During the May 15 meeting, immediately following the hearing on Aqua's hearing request, Forestar's Applications were Agenda Item No. 10. When that agenda item came up, the Board first entertained approximately an hour and twenty minutes of public comment on Forestar's Applications. Following a brief recess in the meeting, the District's General Manager again summarized his recommendation to grant the Applications in their entirety based upon his review of the Applications and all supporting documentation and staff analysis in the context of the criteria of the District's rules and Chapter 36 (*see* May 15, 2013 Hearing Tr. at pp. 61-62; *see also* March 20, 2013 Hearing Tr. at pp. 3-4, 78-81). Before acting on the Applications, the Board went into executive session for approximately 45 minutes. (Hearing Tr. at pp. 58-59). The Board also allowed Forestar's CEO, Mr. DeCosmo, to briefly address the Board and provide an overview of Forestar's philosophy and plans for implementation of the permit as applied for. (Hearing Tr. pp. 63-67).

Following Mr. DeCosmo's comments, the Presiding Officer called for a motion on Forestar's Applications (Hearing Tr. p. 67).[8] A motion was then made and seconded to grant Forestar's Applications only in part, authorizing Forestar to produce only up to 12,000 acre-feet of water per annum. There was no introduction of, discussion on, or explanation about the motion by the Board, or the basis to ignore all of the competent evidence of record. The motion passed 6-2. (*See* May 15 Hearing Tr. p. 67-68).

By letter dated June 4, 2013, filed in accordance with District Rule 14.6.A and Section 36.412, Texas Water Code, counsel for Forestar requested that the District issue findings of fact and conclusions of law regarding its decision to grant Forestar's Applications only in part and to deny them in large part. At its July 17, 2013 meeting, the Board adopted Findings of Fact and Conclusions of Law, purporting to justify its decision ("First Findings and Conclusions") (*see* Exhibit "I"). But the Findings and Conclusions, which were signed and issued on July 18, 2013, are limited to supporting the Board's action granting Forestar permits to produce up to 12,000

[7] The City of Giddings had also filed formal requests for contested case hearing of both the LCRA and Forestar applications. Those requests were filed on May 7, 2013, 48 days after the March 20 hearing and 53 days after the March 15 deadline. Untimely requests to participate in any contested case granted filed by Environmental Stewardship and other individuals were also denied.

[8] Due to unexpected illness of Board President Talbot, Board Vice President Sherrill was sitting as acting Presiding Officer. (Hearing Tr. at p. 3).

acre-feet of water per annum (Exhibit "J"). The First Findings and Conclusions do not address why or how granting Forestar's Applications in full purportedly would be contrary to law, would unreasonably harm or adversely impact or affect groundwater or the aquifers within the District, or would unreasonably impact, impair, or affect existing permit holders, or unreasonably impair, impact, or harm surface water interactions with the groundwater. Moreover, nothing in the First Findings and Conclusions supports the decision to deny Forestar's Applications, in large part, as necessary to protect the District's DFCs. Nothing in the First Findings and Conclusions contradicts, or explains the Board's refusal to follow, the recommendation of the General Manager, reiterated on numerous occasions, that Forestar's Applications should be granted in their entirety. Finally, nothing in the First Findings and Conclusions identifies any defects or deficiencies in any of the uncontested evidence in Forestar's Applications and supporting supplemental documentation.

On November 19, 2013, the Board granted Forestar's motion for rehearing. On January 15, 2014, however, the Board President signed an Order on behalf of the Board denying "all requests to modify or amend the terms of the" permits and adopting Findings of Fact and Conclusions of Law on Rehearing ("Second Findings and Conclusions") (Exhibit "K"). The Second Findings and Conclusions do not address or correct any of the infirmities in the Findings and Conclusions discussed above.

By letter dated January 16, 2014, from counsel for Forestar to Mr. Joe Cooper, Forestar gave notice that it plans to appeal the District's January 15, 2014 decision and actions. (Exhibit "L"). By letter dated January 27, 2014, from counsel for the District to counsel for Forestar, the District's counsel acknowledged that Forestar's Applications were uncontested and stated that there are no provisions for the composition of a record in an uncontested case or for a requirement that the District prepare and file a record. (Exhibit "M").

In its First Findings and Conclusions and Second Findings and Conclusions the District limited its analysis and statements to those which support the initial granting of Forestar's permit for production and transport of 12,000 acre-feet per annum. Neither the First Findings and Conclusions nor the Second Findings and Conclusions address Forestar's request to produce and transport 45,000 acre-feet per annum or the General Manager's unequivocal recommendation to grant the Applications in full.

While the District correctly concluded that there are no regulatory impediments to allowing Forestar to produce 12,000 acre-feet of water per annum, the District erred when it concluded, at least implicitly, that there are such impediments to allowing Forestar to produce the full 45,000 acre-feet of water per year. That error is highlighted by the absence of any findings or conclusions that granting Forestar's request to produce and transport 45,000 acre-feet per annum would, during the five-year term of the permits, have an adverse impact on 1) the aquifers within the District, 2) existing groundwater permittees, 3) surface water resources, or 4) the District's DFCs.

The Board's utter silence in its Findings and Conclusions and Second Findings and Conclusions about its denial of almost two-thirds of Forestar's requested authorization unambiguously signals "error." This conspicuous error is made even more glaring by the fact that Forestar's Applications were and are uncontested. The only competent evidence before the

Board compels the conclusion that the Applications should have been granted in full and that the Board committed plain, fundamental, and reversible error in failing to do so.

III.

FORESTAR'S SECOND MOTION FOR REHEARING

Groundwater rights are a valuable and essential attribute of private property ownership in Texas. An unbroken line of Texas Supreme Court decisions has recognized both the valuable nature of those rights and the reliance that Texas landowners have placed on those groundwater rights. Since 2011 the Texas Legislature and in 2012 the Texas Supreme Court both have said that groundwater is privately owned and constitutionally protected. *See EAA v. Day*, 369 S.W.3d 814 (Tex. 2012); Tex. Water Code § 36.002. Nothing in the First Findings and Conclusions or Second Findings and Conclusions supports the District's denial of the 33,000 acre-foot portion of Forestar's Applications that would have allowed Forestar to produce and transport for beneficial use within Bastrop, Hays, Lee, Travis and Williamson Counties up to 45,000 acre-feet of water per annum from the 10 wells to be completed in the Simsboro Aquifer and aggregated for operating purposes.

As a creature of statute, the District, like all groundwater and special districts, is limited to exercising those powers that have been expressly granted by the Legislature or powers necessarily implied pursuant to the express powers granted by the Legislature.[9] Accordingly, the District must look to its enabling legislation and the applicable general laws, *e.g.*, Chapter 36, Texas Water Code, as the source of and limitation upon its authority and power to operate, including the adoption of rules and rule amendments. Chapter 36 of the Texas Water Code, the statutory authority for groundwater districts such as the District, expressly recognizes and adopts the common law rule vesting ownership of groundwater in landowners. *See* TEX. WATER CODE § 36.002; *EAA v. Day*, 369 S.W.3d 814, 817 (Tex. 2012). A groundwater district's authority to adopt rules and regulate groundwater, including decisions on applications for groundwater production permits, is not unfettered. *See EAA v. Day*, *supra* at 817; *EAA v. Bragg*, *supra*. Groundwater is the property of the landowner and any order, regulation, or action by the District, including the denial of a production permit application, that "takes, damages or destroys" that property right is unlawful and tantamount to an unconstitutional taking of those property rights. *See EAA v. Day, supra* at 817; Tex. Const. Art. I, § 17.

The District's failure to grant Forestar's Applications in their entirety violated all of the District's statutory duties and obligations, and affected a damaging and/or taking of Forestar's property rights without payment of just compensation. The evidence of record does not support the District's decision on Forestar's uncontested Applications. Leaving record evidence that is controlling and uncontradicted out of the findings and conclusions does not correct the error. To the contrary, consciously ignoring the uncontested evidence exacerbates the District's errors, makes more egregious the harm to Forestar, and more plainly establishes the Board members' and the District's liability for damages to Forestar for the deprivation of its constitutional rights

[9] *See Tri-City Freshwater Supply District No. 2 v. Mann*, 142 S.W.2d. 945-948 (Tex. 1940); *South Plains La Mesa Railroad v. High Plains UWD No. 1*, 52 S.W.3d. 770 (Tex. App.-Amarillo 2001, no writ).

to procedural and substantive due process, to equal protection, and to be compensated for the taking or damaging of its property.

The key factors the District should have focused its assessment of Forestar's Applications on are found in Sections 36.113, 36.1131 and 36.122, Texas Water Code, and Sections 5 and 6 of the District's Rules. The District's action denying the 33,000 acre-foot portion of Forestar's Applications was wrong, arbitrary, and capricious. The decision was based on public comments and other information and factors that are not part of the record. It was (i) not based on the evidence of record, (ii) not based upon available science, and (iii) in violation of the District's enabling legislation, its Rules, Chapter 36 of the Texas Water Code, Articles I, Section 17 and XVI, Section 59 of the Texas Constitution, the 5th and 14th Amendments to the U.S. Constitution, and other applicable laws. The decision also was in excess of the District's powers and authority under the same.

Accordingly, the District's decision and its findings of fact and conclusions of law adversely affect Forestar's interests and the property rights in its groundwater within the District, and violate the District's rules, as well as Chapter 36, TEXAS WATER CODE.[10]

In deciding to deny two-thirds of Forestar's Applications, the District was exercising a quasi-judicial role, and not a policy making role, in an uncontested case proceeding. The Board's task was to fairly and impartially consider the uncontested evidence and follow the lawful policies embodied in the Texas Water Code and the District's rules. Both Chapter 36 and the District's Rules explicitly prohibit discrimination against applicants seeking a permit to transport water outside the District. *See* Texas Water Code § 36.122(g); District Rule 6.3. Moreover, the Texas Water Code was not intended to authorize either the confiscation or redistribution of private land owners' rights to groundwater.[11]

For the reasons set forth herein, had the District treated Forestar's Applications in a non-discriminatory manner and applied the same standards and construction of its rules that it historically has applied to other applicants, *e.g.*, City of Bastrop, Mannville WSC, Aqua WSC, and others whose applications were granted prior to consideration of Forestar's, Forestar's Applications would have been granted in full. The new permits sought by Forestar (1) will not impair either the District's MAG (Modeled Available Groundwater) or DFCs, (2) will be dedicated to a statutorily recognized beneficial use, and (3) meet all applicable statutory and District rule criteria for the issuance of new permits, as determined by the General Manager. Moreover, the "special conditions" proposed to be included in the permits acknowledge and confirm the District's ability, through the lawful implementation of its regulations if required, to address any unreasonable adverse impacts to the Simsboro or other aquifers, existing permittees, and/or the District's DFCs, and/or other negative conditions that might arise prospectively from the use and enjoyment of Forestar's permits or the development of unforeseen aquifer conditions resulting from extreme prolonged drought that might affect the Simsboro Aquifer. This authority

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[10] *EAA v. Day*, 369 S.W.3d 814 (Tex. 2012); *South Plains La Mesa Railroad v. High Plains UWD No. 1*, 52 S.W.3d. 770 (Tex. App.-Amarillo 2001, no writ); Tex. Water Code § 36.002.

[11] *See* Texas Water Code § 36.002 (recognizing rights of owners of land and their lessees and assigns in groundwater); *see also* Texas Water Code § 36.105 (prohibiting districts from using eminent domain to acquire groundwater rights).

includes lawfully requiring the proration of or cutbacks in permitted pumping, a fact Forestar's CEO Mr. DeCosmo acknowledged during the May 15 meeting (Hearing Tr. pp. 63-67).

A. NO SUBSTANTIAL EVIDENCE

By statute, the Board's decision will be reviewed by the courts under the substantial evidence rule and thus, to be sustained on appeal, must be supported by substantial evidence. TEX. WATER CODE § 36.253 ("The review on appeal is governed by the substantial evidence rule as defined by Section 2001.174, Government Code."). But because Forestar's permit Applications were uncontested and approval of the Applications in full was supported and recommended by the General Manager, the Board's refusal to grant the Applications in full is not supported by substantial evidence.[12]

When a permit application is contested, the administrative board or other factfinder conducts a contested case or adjudicative hearing. *See* TEX. GOV'T CODE § 2001.003(1) ("contested case" defined as "a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing"). An "adjudicative hearing" means "a hearing at which the decision-making agency hears evidence and, based on that evidence and acting in a judicial or quasi-judicial capacity, determines the rights, duties, or privileges of parties before it." *Best & Company v. Texas State Board of Plumbing Examiners*, 927 S.W.2d 306, 309, n. 1 (Tex. App. – Austin 1996, writ denied); *Ramirez*, 927 S.W.2d at 772 (citing *Best* and adopting same definition); *Bacon v. Texas Historical Commission*, 411 S.W.3d 161, 180, n. 29 (Tex. App. – Austin 2013, no pet.) (citing *Best and Ramirez* and holding that no contested case hearing was held). In a contested case, all testimony is sworn, and the parties have the right to examine and cross-examine witnesses and to present evidence on all contested issues. TEX. GOV'T CODE § 2001.051 ("In a contested case, each party is entitled to an opportunity...to respond and to present evidence and argument on each issue involved in the case."); *City of Corpus Christi v. Public Utility Commission of Texas*, 51 S.W.3d 231, 262 (Tex. 2001) ("This Court has held that in administrative proceedings, due process requires that parties be accorded a full and fair hearing on disputed fact issues. This requirement includes the right to cross-examine adverse witnesses and to present and rebut evidence"); *Richardson v. The City of Pasadena*, 513 S.W.2d 1, 4 (Tex. 1974) ("The right to cross examination is a vital element in a fair adjudication of disputed facts. The right to cross examine adverse witnesses and to examine and rebut all evidence is not confined to court trials, but applies also to administrative hearings."). The "record" in a contested case hearing includes all evidence admitted during the hearing. TEX. GOV'T CODE § 2001.060 (defining the record in a contested case as including, among other items, "evidence received or considered," "questions and offers of proof, objections, and rulings

[12] Some authorities hold that a substantial evidence review of an agency record is not possible absent development of the record through a contested case or adjudicative hearing, with sworn testimony and cross-examination of witnesses. *City of Waco v. Texas Commission on Environmental Quality*, 346 S.W.3d 781, 817-19 (Tex. App. – Austin 2011), *rev'd on other grounds, Texas Commission on Environmental Quality v. City of Waco*, 413 S.W.3d 409 (Tex. 2013); *Texas Department of Insurance v. State Farm Lloyds*, 260 S.W.3d 233, 245 (Tex. App. – Austin 2008, no pet.); *Ramirez v. Texas State Board of Medical Examiners*, 927 S.W.2d 770, 773 (Tex. App. – Austin 1996, no writ). If these authorities are deemed correct, the Legislature's application of the substantial evidence rule to an uncontested case in Section 36.253 renders that statute unconstitutional under the due process clause. Under any recognized standard of review, however, the Board erred by denying Forestar's uncontested applications.

on them," and "all staff memoranda or data submitted to or considered by the hearing officer or members of the agency who are involved in making the decision"); *Ramirez*, 927 S.W.2d at 773 (holding that judicial review in a contested case under the substantial evidence rule of the APA "necessarily implies the creation of an agency 'record'" that includes the items delineated in Section 2001.060). As evidenced by the District's decision at the May 15, 2013, hearing and memorialized in the District's January 15, 2014, Order, all requests for a contested case hearing were denied as being untimely.

A contested case hearing was *not* held on Forestar's Applications. (Exhibit "M") (January 27, 2014 letter from the District's counsel to counsel for Forestar, acknowledging, "The District did not hold a contested case hearing on the Forestar applications."). In contrast to a contested case, when a permit application before an administrative body like the District is uncontested, the record on which the decision must be made and reviewed consists solely of the unopposed application and, in this instance, the General Manager's written assessment that the Applications satisfy all regulatory requirements and his recommendation that the Applications should be granted in full. Because an application is "uncontested," there is no evidence to consider other than the application itself.

For these reasons, uncontested permit applications are routinely and almost universally granted. *See West v. Texas Commission on Environmental Quality*, 260 S.W.3d 256, 259 (Tex. App. – Austin 2008, pet. denied) (after permit application was referred to administrative law judge for contested case hearing on sole granted request for contested case hearing, contestant withdrew request, administrative law judge canceled hearing and remanded application to agency's executive director, and executive director granted uncontested permit application). Although it is theoretically possible that an uncontested application contains evidence that is defective or deficient, such is not the case here. The General Manager concluded that Forestar's Applications were complete and fully satisfied all prerequisites for approval and issuance of the requested permits. Furthermore, neither the District's First or Second Findings of Fact and Conclusions of Law identify (1) any defect or deficiency in the applications or the evidence contained in the applications or (2) any failure of the applications to satisfy any prerequisite for issuance of the permits as recommended by the District's General Manager.

The District's decision to deny Forestar permits for the additional 33,000 acre-feet of groundwater as requested, therefore, is not supported by any competent evidence in the record. Instead, the erroneous decision necessarily must be predicated on the Board's unauthorized disregard of the uncontested evidence and its impermissible consideration of incompetent statements or other improper factors. The only other statements made before the Board on which the Board's refusal to grant the permits in full could have been based were public comments opposing the Applications. Those comments from members of the public, however, are not competent evidence concerning uncontested Applications and are not part of the record before the Board. Even in contested case hearings, "public comments" generally are not a part of the evidentiary record. 1 Tex. Admin. Code § 155.409(c) (2014) (State Office of Administrative Hearings, Rules of Procedure) ("Unless provided by law, public comment is not part of the evidentiary record of the case."). In an uncontested case, where by definition there are no disputed fact issues, an applicant has no reason to anticipate that the decision-maker will credit and rely on unsworn statements from people who are not expected to be and are not cross-examined – and the decision-maker has no legal basis for crediting and relying on such

statements. *See also In re Doe 4,* 19 S.W.3d 322, 326 (Tex. 2000) (holding that "unsworn testimony was not evidence"); *Rosenthal v. Boyd,* No. 03-11-00037-CV, 2013 Tex. App. LEXIS 5345, *20 (Tex. App. – Austin May 1, 2013, no pet.) (holding that unsworn testimony was not competent evidence).

If the Board gave any credence or weight to the public comments or other information outside of the record of competent evidence, as it apparently did, it plainly violated Forestar's right not to be deprived of its property without due process of law. *Rector v. Texas Alcoholic Beverage Commission*, 599 S.W.2d 800 (Tex. 1980) (denial of application for license based on statements from unsworn witnesses without right of cross-examination reversed, based on denial of due process rights). In addition, because the absence of local public opposition to a permit application is not a statutory criterion for approval, the Board's consideration of that factor is arbitrary and capricious, and constitutes a clear abuse of discretion. *Starr County v. Starr Industrial Services, Inc.*, 584 S.W.2d 352, 355-56 (Tex. Civ. App. – Austin 1979, writ ref'd n.r.e.) (agency board's denial of permit application based on local public opposition, not included as a statutory standard, was arbitrary and capricious).

The only additional information presented to the Board, apart from the uncontested Applications, was the District's hydrologist's statements and slides presented during a special called Board meeting on May 13. While this information did not contradict the uncontested evidence in Forestar's Applications, including its expert evidence, the Board nonetheless cited the information in its findings of fact as an apparent evidentiary basis for denying the majority of Forestar's requested groundwater production authorization. The District's hydrologist's information, however, is not competent evidence in this uncontested proceeding, cannot support any finding of fact, and does not serve as substantial evidence to bolster the Board's decision. The Board cannot change the rules of the game after the fact: the Board's reliance on statements by a witness who, because this was an uncontested proceeding, was not sworn and was not expected to be cross-examined or subject to cross-examination by Forestar plainly violates Forestar's right not to be deprived of its property without due process of law. *Rector, supra*, 599 S.W.2d at 800-01.

If a board's decision lacks any necessary supporting evidence in the administrative record, that evidentiary gap cannot be filled by the board's knowledge or expertise. "A court obviously cannot review knowledge, however expert, that is only in the minds of one or more [board] members." *Dotson v. Texas State Board of Medical Examiners*, 612 S.W.2d 921, 923 (Tex. 1981). Likewise, if the administrative record contains uncontested evidence on a relevant issue, the board cannot reach a decision in contradiction to that record evidence by relying on the board members' knowledge or expertise "as a substitute for evidence and as a basis for making factual findings as to matters not supported by record evidence. ... Stated differently, the [board's] expertise cannot be a substitute for proof." *Railroad Commission of Texas v. Lone Star Gas Company*, 611 S.W.2d 908, 911 (Tex. Civ. App. – Austin 1981, writ ref'd n.r.e.). To hold otherwise in either of the foregoing instances would be "contrary to basic notions of a fair hearing requiring that a party be apprised of the evidence contrary to his position so that he may refute, test, and explain that evidence," *Lone Star*, 611 S.W.2d at 910, and would effect denial of "the right to cross-examine and rebut adverse evidence." *Dotson*, 612 S.W.2d at 923.

In short, the Board's decision (i) contradicts the uncontested record evidence and (ii) is not supported by any evidence, let alone substantial evidence.

B. NO UNREASONABLE IMPACT

Any pumping from an aquifer by any permit holder will have some effect on the aquifer. The question for this Board is not whether there will be some effect, but rather whether the permits (including the "permitted volume and other terms of a permit") will "*unreasonably* affect existing groundwater and surface water resources or existing permit holders." *See* Texas Water Code § 36.113(d)(2), District Rule 5.2 (emphasis added).

Forestar presented substantial credible scientific evidence of the hydrogeology associated with the Simsboro Aquifer and the potential effects Forestar's permits might have, including under worst case scenarios. The conclusions in those scientific studies, as articulated by Forestar's experts (Mike Thornhill and Mike Keester), established that granting Forestar's Applications would not have an "unreasonable effect" on existing groundwater and surface water resources or existing permit holders. The District staff's analysis, including the May 13 presentation, supports this conclusion, and the General Manager's March 20 recommendation memorandum agreed. There was no evidence presented that granting Forestar's Applications in their entirety would "unreasonably affect" either the existing groundwater or surface water resources or existing permit holders. Accordingly, there was no basis to deny Forestar's Applications for the full 45,000 acre-feet of water per annum pursuant to Section 36.113(d), Texas Water Code.

The hydrogeologic studies and modeling completed by both the Thornhill Group and D.B. Stephens (the consulting group hired by the District) predicted a minimal reduction in the volume of water available for production from the Simsboro Aquifer over the next 50 years. The hydrogeologic studies and modeling presented by Forestar is the only evidence in the record of the potential long term impact to the Simsboro Aquifer resulting from the granting of Forestar's Applications. The District was presented with credible and undisputed scientific data that supports approval of the Applications in full.

If (contrary to the best available scientific predictions and undisputed evidence) Forestar's permits were to start to cause an unacceptable decline in the Simsboro Aquifer, or otherwise begin to unreasonably impair the groundwater or groundwater users or the Districts DFC's, during their five-year terms, the District will have both the time to detect such decline through its well monitoring program and the regulatory authority to make appropriate modifications to pumping under Forestar's permits. Forestar has constructed and donated to the District one monitor well located in the vicinity of its proposed well field. Forestar has volunteered to construct additional monitor wells to facilitate the District's ability to identify and predict any potential adverse impacts or effects of its permits based on actual real time production data to assist the District in both its well monitoring program and to address changes in aquifer conditions that might merit mitigation.

In short, given the uncontested record, there is no legitimate scientific or technical justification for the Board's decision.

C. FORESTAR'S PROPOSED PERMITS ARE NOT FOR A "SPECULATIVE USE"

The Board heard, and apparently wrongfully credited, politically motivated public comment that Forestar's Applications for 45,000 acre-feet per annum were "speculative." The District's First Findings and Conclusions and Second Findings and Conclusions identifying existing and projected demand and supply deficiencies for municipal water supplies documented by the State Water Plan and Regions G, K and L now and by the year 2060 establish the direct opposite. There is an undisputed need for more than the 45,000 acre-feet of water Forestar seeks to permit, and Forestar adduced uncontested evidence of current interest from Hays County and the Dripping Springs WSC for more than the full 45,000 acre-feet, and in fact presented a binding contract to the District for the full 45,000 acre-feet of water described in Forestar's Applications.

In *Texas Rivers Protection Association v. Texas Natural Resource Conservation Commission*,[13] a party protesting the issuance of a surface water permit complained that the applicant's proposed use was "based on speculation" because the applicant produced no water supply contracts for the water it sought to have permitted for municipal use. The court rejected the protestant's argument that the proposed use was "speculative" and specifically held that "[t]he existence of a supply contract is not required to show that water appropriated for third parties will be put to a beneficial use." *Id.* at 155. The court further held that a letter of interest from one potential customer combined with (1) the applicant's willingness to supply water, (2) the applicant's significant investment in the project to supply water and (3) expert witnesses' projections of future population and water demand for the proposed service area were sufficient to establish a beneficial use. *Id.* at 155-156.

In this case, in addition to the uncontested evidence establishing current interest and need for more than 45,000 acre-feet, Forestar also presented undisputed evidence regarding its investment and its intended use of the requested 45,000 acre-feet, which included hydrogeologic studies, water quality studies, pipeline studies, and the monitor/test well it drilled and donated to the District.

D. VIOLATION OF FORESTAR'S RIGHTS UNDER 42 U.S.C. § 1983

The decisions and actions of Board members and of the District have deprived Forestar of its property without procedural or substantive due process and have denied Forestar equal protection of the law, in contravention of the Fourteenth Amendment to the United States Constitution. The Board members and the District took these actions and made these decisions under color of state law, thereby incurring liability to Forestar under Sections 1983 and 1988 of Title 42 of the United States Code.

(1) *Procedural Due Process*: The Board members and the District violated well established procedural due process principles concerning uncontested applications, uncontroverted evidence, unsworn statements, examination and cross-examination of witnesses, fairness and justice, and confinement of consideration to the record and to relevant statutory

[13] 910 S.W.2d 147 (Tex. App.—Austin 1995, writ denied).

requirements. These principles have been bedrock law since the inception of administrative agency decision-making, yet the Board members and the District have ignored them throughout their conduct of the proceedings and their decision-making in this uncontested matter.

(2) *Substantive Due Process*: Ownership of groundwater has been one of the most valuable and protected property interests in this state, as recognized even in the statutes providing for the District's and the Board's existence, yet the Board members and the District have deprived Forestar of meaningful production of its groundwater despite uncontested Applications that, according to the recommendations of their own general manager, completely satisfy all prerequisites and should be fully approved. The Board members' and the District's decision and findings of fact and conclusions of law are not grounded in any rational connection with the uncontested facts, are not guided by any controlling legal concept, and are arbitrary and capricious.

(3) *Equal Protection*: The Board members and the District denied almost two-thirds of the production authorization sought in Forestar's uncontested Applications, yet, both before and after their decision in this matter, they have granted all other uncontested applications in toto. If the rationale for the Board members' and the District's curtailment of Forestar's uncontested Applications for production of its groundwater rested on competent record evidence that the aquifer cannot sustain additional withdrawals – which is not the case – then the Board members and the District presumably would have imposed a moratorium on the application for and granting of any additional permits, but they have done no such thing.

The Board members and the District are "persons" within the meaning of Section 1983 of Title 42 of the United States Code. *Hart v. Walker*, 720 F.2d 1443, 1445 (5th Cir. 1983). Furthermore, the Board members possess the final authority and ultimate repository of District power. *Id.*; *Brown v. Board of the County Commissioners of Bryan County, Oklahoma*, 67 F.3d 1174, 1182-83 (5th Cir. 1995). Accordingly, the Board members and the District are subject to liability under Section 1983.

In short, under sections 1983 and 1988 of Title 42 of the United States Code, the Board members and the District are liable to Forestar for damages and attorney's fees incurred by Forestar as a consequence of the Board members' and the District's deprivation and denial of Forestar's constitutional rights to procedural and substantive due process and to equal protection.

E. DAMAGING OR TAKING OF FORESTAR'S PROPERTY

By denying Forestar the authorization to produce the 33,000 acre-foot portion of Forestar's Applications for 45,000 acre-feet, the Board and the District have effectively killed Forestar's municipal water supply project. The Board's and the District's actions and decisions constitute a taking or damaging of Forestar's property interests in violation of Section 17 of Article I of the Texas Constitution and of the Fifth and Fourteenth Amendments to the United States Constitution. Forestar is entitled to compensation from the District for this taking or damaging. *EAA v. Day*, 369 S.W.3d 814 (Tex. 2012).

F. FORESTAR'S REQUEST FOR CLARIFICATION OF PERMIT CONDITIONS

In Special Condition (2) of each of the permits granted to Forestar, the condition requires that "within 365 days of the date of issuance of the permits, Forestar shall submit to the District a binding contract to provide water in the full authorized annual withdrawal amount for the authorized purpose of use to one or more end users in the authorized places of use."

This provision is in conflict with Forestar's proposal to "stage" or "phase" its production under the permits. As Forestar indicated during the various public meetings at which its Applications were considered, Forestar is willing to increase the amount of water pumped over time to address concerns expressed by the Board Members (albeit without any scientific or legal basis), and has worked to develop its contracts with end users such as Hays County in that same manner. By phasing or staging its permits, Forestar addresses all of the issues raised by the Board, *e.g.*, promotes water conservation, reduces the prospect of any immediate and/or instantaneous impacts of pumping to the Simsboro Aquifer, and provides the District with greater ability to review and detect impacts (if any) and, thereafter, if needed, regulate its production. Accordingly, Forestar proposed that the Special Condition be modified to reflect the staging or phasing concept and require Forestar to periodically provide notice to the District of its intent to move to the next phase or stage of production. Forestar is amenable to having that notice be required a reasonable period of time before the date the actual increased production, or moving to the next phase or stage, occurs. For example, the condition may state, "Forestar must give 30 days prior written notice to the District."

Additionally, the one year requirement to secure a contract contained in Special Condition (2) is also inconsistent with, or in apparent conflict with, the condition under the "Term" in paragraph 1 of the permits that provide that the permits will "automatically terminate if, within 180 days of the date of issuance of the permit, (1) the permitted well has not been completed or (2) the well log required by Texas Occupations Code section 1901.251 has not been filed with the District, unless the permittee files a request for an extension of time to drill the well as provided in the District Rules." The requirement is also inconsistent with the Permit term of five (5) years and appears to be imposed solely to make it impossible for a permittee to satisfy the condition and be forced to forfeit a permit and all of the investments made to secure the permit.

The inconsistency arises from requiring Forestar to begin drilling wells before the date it has secured the firm written contracts. If no contracts are signed within the one-year period prescribed by Special Condition (2), then there is no need to drill a well and begin producing water from the aquifer. In light of the erroneous Findings of Fact No. 39 adopted by the Board on January 15, 2014, providing that Forestar's Agreement with Hays County for 45,000 acre-feet of water is not a "binding contract," the Board has exacerbated the problem. Again, Forestar has indicated its desire to efficiently, and with minimal impact to the Simsboro Aquifer, begin to develop its groundwater project. It makes hydrogeologic, legal, and economic sense to either postpone the date by which Forestar is required to drill the well and/or file the well log until after the date Forestar has secured its binding contract with its end users. Chapter 36 has no provision that supports the District's rule. Accordingly, Forestar would request that paragraph (1) of the "Term" section of its permits be deleted or, in the alternative, be revised to simply require the

drilling of the wells within the five-year permit term subject to the requested modification of the "aggregation" language of the permit described below.

Additionally, the language of paragraph 1 of the "Term" section contemplates an applicant only having a single permit and drilling a single well. Forestar has applied for and been granted 10 permits and authorization to drill 10 wells. Forestar has also applied for and been granted the right to aggregate production under its wells. Again, as a matter of efficiency, both economic and hydrogeologic, Forestar requests that the permits be modified to reflect that Forestar has been granted the right to aggregate production and, therefore, is only required to drill as many wells as it needs to be capable of producing the water needed to serve its third party customers. This modification would allow Forestar, and any similarly situated permitted, to implement its proposed phasing or staging of the project to satisfy the various requirements of the District, including conservation of groundwater and mitigation (prophylactically) of any potential impacts to the aquifer. Drilling 10 wells, and thereafter, producing from 10 wells, will have a greater and more instantaneous, or premature, impact and effect on the aquifer than is necessary under Forestar's proposed phasing or staging of the development of the project.

Also in the "Term" section of the permits, specifically, paragraph (2), the language provides that the permits "shall automatically terminate if, within 24 months of the date that the permitted well is completed, the permittee has not used water from the permitted well for a purpose authorized in the Operating Permit, unless the permittee requests an extension of time to operate the well as provided in the District Rules."

Similar to the rationale and analysis provided with respect to Forestar's request to modify the language in paragraph (1) of the "Term" section, Forestar also asks the District to modify the language in paragraph (2) to be consistent with Forestar's proposed phasing or staging of the development of its "municipal supply" groundwater project. Again, it makes economic, hydrogeologic, policy, and legal good sense to postpone the drilling and, thereafter, production from as many of the 10 wells Forestar has been authorized to permit as possible. To the extent that Forestar is able to produce groundwater in volumes adequate to meet the present and, thereafter, growing needs of its third party customers, allowing Forestar to phase in its production first by postponing the obligation to drill wells and, thereafter, the volume to be produced from the wells over time is consistent with the District's objectives of achieving water conservation, minimizing production from the aquifer and deferring any potential ultimate impacts from permits. Additionally, granting Forestar's request would be consistent with and recognize the authorization granted to Forestar to aggregate production from one or more of the 10 wells it has been authorized to drill.

Like paragraph (1), paragraph (2) contemplates that Forestar has only applied for, and been granted, a right to drill and produce from a single well. If Forestar can accomplish its objectives and meet the demands of its third party customers by drilling less than 10 wells as a result of the aggregated production, and the need for additional wells is not presented based upon the impacts of Forestar's production on the aquifer, the District, its permittees, and its aquifers would be well served to allow Forestar to postpone pursuant to its staging/phasing concept the drilling and, thereafter, production from multiple wells. Accordingly, Forestar requests that the District modify the language of paragraph (2) as described herein.

Forestar also requests clarification of the permits. Specifically, in paragraph (1) of the "Term" section, the permits provide that the "term of this Transport Permit shall be three years if construction of a conveyance system has not been initiated prior to the issuance of the Permit." Paragraphs (2) and (3) of the "Term" section also speak in terms of "construction of a conveyance system." As Forestar representatives have discussed with the District's management, Forestar is investigating prospects of conveying its water using existing conveyance systems constructed by third parties. Forestar requests that its permits be clarified to provide that the various "triggers" of the alternative terms of the permits can be affected by (i) the construction of a new conveyance system by Forestar, (ii) the extension of an existing conveyance system by Forestar, or (iii) Forestar's acquiring access and the right to use an existing conveyance system. Forestar is amenable to having the permits require that Forestar provide notice of which of these mechanisms, or combination thereof, Forestar may utilize once it begins implementation of its groundwater project.

G. OBJECTIONS AND ERRORS SPECIFIC TO THE SECOND FINDINGS OF FACT AND CONCLUSIONS OF LAW

In addition to its other objections, and errors asserted with respect to the District Board's actions on January 15, 2014 and May 15, 2013, granting Forestar's Applications for 10 wells to be drilled in Lee County authorizing the withdrawal of an aggregate 45,000 acre-feet of groundwater per annum from the Simsboro Aquifer to be used for municipal (drinking water supply) purposes in Bastrop, Hays, Lee, Travis and Williamson Counties in part, *i.e.*, granting the applications for 12,000 acre-feet per annum but denying the balance of the Applications for 33,000 acre-feet per annum, Forestar submits the following objections and errors by District with respect to specific to the Second Findings of Fact and Conclusions of Law adopted on January 15, 2014 set forth below:

(a) Objections and Specifics to Findings of Fact ("FOF") adopted on January 15, 2014:

1. First and foremost, Forestar objects to the Board's failure to include a finding of fact acknowledging the General Manager's filing of a memorandum dated March 20, 2013 summarizing his actions, findings and recommendations on Forestar's Applications, which specifically recommended that the Board grant the Applications in their entirety. Similarly, Forestar objects to the Board's failure to include a specific finding of fact to the effect that at the March 20, 2013 Board proceedings, the General Manager publicly reaffirmed to the Board his recommendation that Forestar's Applications be granted in their entirety.

2. Forestar also objects to the Board's failure to include a finding of fact that the only evidence before it as of the commencement of the public hearing on March 20, 2013 was Forestar's Applications, together with all supporting documents filed with the District in response to requests for additional information or clarification from Forestar, as well as the General Manager's determinations of administrative completeness, recommendation to grant Forestar's permits in their entirety, and evidence of the notice duly published for the March 20th hearing.

3. Forestar objects to the District's failure to include a finding of fact that Forestar's Applications were planned and designed to create a long-term groundwater project to provide for municipal water supplies through the year 2060 and that such long-term projects and planning require the granting of substantial quantities sufficient to warrant the economic investment for construction of pipelines and other facilities necessary to move the water to the projected customers in all of the five counties authorized by the permits and contemplated by Forestar's Applications from the project site in Lee County.

4. Forestar objects to the District's failure to include a finding of fact that it is reasonable for long-term water supply projects to predict and secure quantities of water in excess of those needed immediately, but which provide for growth over the period of the project life.

5. FOF No. 37 fails to explain that Forestar's proposal to phase-in its production over a period of time was offered as a compromise to address the concerns expressed by the Board over the possible impacts of pumping the entire 45,000 acre-feet applied for immediately upon granting of the project. Forestar's offer to phase the project is not indicative, as suggested by the Finding adopted by the Board, that the water supply sought through the Applications of 45,000 acre-feet was not necessary and/or would not be put to beneficial use.

6. FOF No. 39 is erroneous in the conclusion that the contract between Forestar and Hays County is not a "binding contract" for purposes of Special Condition (2) or otherwise. The agreement between Hays County and Forestar is clearly a binding contract subject to one or more provisions for termination including the possibility of the Attorney General's failure to provide the desired opinion. The contract is subject to amendment among other things and, until it terminates, is a binding agreement between the parties. FOF No. 39 also fails to acknowledge the information provided by Forestar that reflects the deposit of one million dollars for the first year payment by Hays County into escrow pending delivery of the Attorney General's Opinion. The District lacks statutory and/or constitutional authority to adjudicate the validity of a contract. Accordingly, the finding is in error.

8. FOF No. 41 is erroneous on the grounds there is no basis for determination that the Board's consideration of the amount of water to be beneficially used during the term of an operating permit is reasonable. During the term of an operating permit, the amount of water to be actually used for beneficial purposes is subject to modification either by the permittee or pursuant to an amendment to the permit sought by the permittee. The Finding of Fact also confuses the terms and requirements related to beneficial use and those related to beneficial use and actual use without waste. Municipal purposes or municipal water supply by statute, as a matter of law, is a beneficial use for the water whether or not it is actually used during the term of the permit. Again, the District in the case of Forestar's Applications, in this Finding of Fact, has failed to acknowledge that long-term water supply planning requires securing water supplies in excess of those immediately demanded, but that will be necessary over the life of the water supply project. The District has issued multiple permits to other parties, including local entities such as the City of Bastrop and Aqua Water Supply Corporation, granting permits far in excess of the amounts currently used. In fact, in the case of Aqua Water Supply Corporation, the permits issued by the District are three times the amount of water currently being pumped and used by Aqua Water Supply Corporation. Again, Forestar believes that it is prudent and a matter of common application for municipal water supply projects to secure water supply inventory in

excess of immediate demands in order to meet the long-term needs of the water supply customer base.

9. FOF No. 42 is erroneous in the statement that the "Applicant [Forestar] projects that no more than 12,000 acre-feet of water will be beneficially used during the initial term of the operating permits and the first five-year renewal term, if Applicant seeks to renew these operating permits." Forestar, as a matter of compromise, in an effort to address the concerns of the Board regarding what the Board considered to be high pumping rates, offered to phase-in its project over time. As part of the proposed phase-in, Forestar offered to limit the production to 12,000 acre-feet of water per year and during the first five-year renewal. To state that the offer was Forestar's projection of a ceiling on the demand or on Forestar's Applications is inaccurate and erroneous. Forestar believes that the entire 45,000 acre-feet of water could be utilized much earlier based upon the demands projected in the State Water Plan, and the demands that are a matter of common knowledge in the central Texas I-35 corridor area. Forestar's willingness to limit initial production to 12,000 acre-feet was an offer for the short term, not a projection of demand, or a curtailment of Forestar's uncontested.

10. To the extent that FOF No. 43 is accurate, Forestar objects to the District's failure to include a finding of fact that Forestar's Applications for the 45,000 acre-feet of production and transport for beneficial use for municipal purposes is also consistent with the District's Management Plan, as recognized by the General Manager in his recommendation of March 20, 2013.

11. In addition to FOF No. 44 regarding Forestar's submission of a Water Conservation Plan, the Finding of Fact should be modified, or an additional Finding of Fact included that provides that the Applicant Forestar also committed to require that any customer it sells water to would provide a Water Conservation Drought Management Plan acceptable to the District and require in any resale contracts of the water that their customers provide such Water Conservation Plans consistent with the District's requirements.

12. FOF No. 46 is erroneous in the statement that Forestar did not submit Hays County's Water Conservation Plan and Drought Management Plan to the District at the time it submitted the agreement with Hays County to the District. As part of the agreement between Forestar and Hays County, the contract provides that Hays County will comply with the District's rules and requirements related to water conservation and drought management and contingency plans. The contract also requires Hays County, as part of its contracts, require all of its customers to fully comply with the Rules of the District, and to provide copies of the Water Conservation and Drought Management Plans adopted by its customers so that they can be filed with the District to ensure compliance.

13. FOF No. 47 is erroneous in that it asserts that Forestar failed to submit any other potential end users' Water Conservation and Drought Contingency Plan to the District. By letter dated January 17, 2013, Forestar provided the District with copies of the Drought Contingency Plans for the Dripping Springs Water Supply Corporation, the West Travis County Public Utility Agency and the City of Georgetown. Those plans were attachments "5," "6," and "7" to Forestar's January 17, 2013 letter hand-delivered to Mr. Joe Cooper, General Manager.

14. FOF No. 48 imposing the standard permit provision to require that water withdrawn under the permit to be put to beneficial use and to not operate the permitted well in a wasteful manner is evidence of the fact that there is no requirement to produce water during the term of the permit, however, when water is produced it must be used for a beneficial purpose and must be produced in a manner that is not wasteful. This language highlights the error in the standard provision of the District's permits requiring contracts be supplied and/or water used other than at some point during the term of the permit as a condition to the permit actually lasting for the full five years.

15. FOF No. 54 is erroneous to the extent that it fails to acknowledge that while considered "the best tool available for estimating the regional drawdown of water level in the Simsboro Aquifer," the GAM is known to be highly erroneous, as well as not a proper tool for site specific or project specific drawdown determinations. The GAM contains approximately 12 pages of "disclaimers" with respect to the errors known in the GAM as well as the limitations on its proper use.

16. FOF No. 55 is erroneous to the extent that it does not acknowledge that the TWDB Executive Administrator's determination is in fact an "estimate," rather than an accurate prediction, and that it is intended to be used for planning purposes and not necessarily site specific project determinations.

17. FOF No. 57 acknowledges that the District, prior to acting upon Forestar's Applications, had granted permits in excess of the predicted volumes described in FOF No. 56, which permits totaled almost 51,000 acre-feet of water per annum from the Simsboro Aquifer. That volume includes multiple permits granted by the District on March 20 and between May 15 to other parties.

18. FOF No. 61 is erroneous in its statement that it is "reasonable" to use 1999 actual pumping as a conservative estimate of future withdrawals from the Simsboro Aquifer.

19. FOF Nos. 59 through 74 were related to long-term water management of the Simsboro Aquifer are erroneous to the extent that they, among other things, fail to acknowledge that the use of the GAM is a planning tool and not an accurate reflection of aquifer conditions based upon actual groundwater production. The District's failure to manage the District based upon actual production, rather than modeled production using the model that itself delineates the numerous errors contained in the model, does not support assertions of fact related to the Board's decision making process, particularly when projecting periods of time beyond the five-year term of the permit. Section 36.1132, Texas Water Code, mandates that the District issue permits up to the point that the total volume of exempt and permitted groundwater will achieve the applicable desired future condition under Section 36.108, Texas Water Code and that the District manage total groundwater production on a long-term basis to achieve the desired future condition considering not just the modeled available groundwater determined by the TWDB Executive Administrator, or his estimate of the current and projected amount of groundwater produced under exempt uses, but also the amount of groundwater authorized under permits previously issued and a reasonable estimate of the groundwater that is actually produced under permits issued. This section allows the District to grant permits in excess of the volume of modeled groundwater that is predicted to "bust" the DFCs. The District, until its consideration of

Forestar's Applications did exactly that as acknowledged by FOF No. 57 where the District admits to having permitted more than 170 percent of the volume of water it permitted in 2010 and almost 140 percent of the amount of water predicted to be available in the year 2060 according to FOF No. 55.

20. Forestar objects to FOF No. 74 to the extent it fails to acknowledge either (i) that approval of a withdrawal of greater than 12,000 acre-feet of water from Forestar's wells would be consistent with the District's duty to manage total groundwater protection on a long-term basis to achieve the applicable DFC, or (ii) the District's acknowledgement that the 12,000 acre-feet of water granted to Forestar for permits to withdraw from its wells is the maximum amount of water that can be withdrawn from the Simsboro Aquifer going forward consistent with the District's duty to manage total groundwater production on a long-term basis to achieve the applicable DFCs. In other words, the Finding of Fact fails to acknowledge that the District's denial of the 33,000 acre-feet of additional water requested by Forestar was not a denial on the basis that the water was not available but simply an arbitrary denial of that additional water to Forestar.

(b) Comments on Conclusions of Law ("COL"):

21. COL Nos. 1 and 2 fail to indicate that Forestar's Applications were "uncontested" at the time they were presented to the Board on March 20 with the General Manager's recommendation that they be granted in their entirety.

22. The Conclusions of Law should include a conclusion that states that Texas law does not require, nor does it authorize a District to require that a groundwater permit applicant have in hand binding contracts for the beneficial use of water at the time it makes application for water. This is particularly true with respect to municipal water supply permits which necessarily contemplate long-term planning and the development of a project over a period of time.

23. The Conclusions of Law should include a conclusion acknowledging that Texas law does not require, nor does it even suggest, that all of the wells authorized by a permit be drilled within a specific period of time other than at some point in time during the term of a permit. With respect to a project such as Forestar's, which contemplates development of a well field with multiple wells, the production of which is to be aggregated under the permits, the requirement that all wells authorized by permits be drilled during the term of the permit is not a requirement of Texas law. Moreover, it is not consistent with either conservation or preservation principles and policies of the State with regard to the protection of natural resources where development of the groundwater authorized by a permit can be accomplished with fewer wells in a manner which will allow for the management of the aquifer with reduced impacts due to the reduced number of wells drilled.

24. While the Conclusions of Law are correct to the extent that the 12,000 acre-feet may be consistent with the District's Management Plan, that is not the same as the result suggested by the Conclusions of Law that granting *only* 12,000 acre-feet of water would be consistent. The District's Conclusions of Law are also erroneous to the extent that they fail to include a conclusion of law that to the extent that the Board has considered all applicable laws and regulations and has applied the same and as a matter of law, there is no more water available

for permitting in the Simsboro Aquifer after the 12,000 acre-feet of permits granted Forestar. Alternatively, there should be a conclusion of law that provides that after evaluating all of the applicable laws and regulations, the District has determined that there is more water than 12,000 acre-feet available for production from the Simsboro, however, it has on a discriminatory basis denied Forestar the use of more than 12,000 acre-feet of water despite Forestar's having satisfied all of the requirements of the District's Rules and Texas law for securing permits for 45,000 acre-feet of water.

H. ARBITRARY AND CAPRICIOUS EFFECTS OF THE BOARD'S DECISION ON A HYDROGEOLOGIC BASIS

As is scientifically proven by multiple ground-water evaluations including the state-approved Central Queen City-Sparta Groundwater Availability Model (GAM), there is an abundance of ground water available for long-term production in the Simsboro aquifer within the District. The GAM and other independent studies document that the total estimated recoverable storage in the Simsboro aquifer within the District boundaries is more than 46 million acre-feet, and more than 229 million acre-feet within Groundwater Management Area (GMA) 12. *See* Table 15 at 32, GAM Task No. 13-035: Total Estimated Recoverable Storage for Aquifers in Groundwater Management Area 12 (TWDB August 30, 2013).

Numerous model simulations, including those utilizing the GAM, show that with continuous pumping exceeding the currently approved Modeled Available Groundwater (MAG) for GMA 12 by more than 119,000 acre-feet per year for 50 years would reduce the amount of water in storage by less than 1.25 percent (*see* End Op's handout from a presentation to GMA 12 on October 30, 2008, available on-line at http://www.posgcd.org/wp-content/uploads/2011/11/ENDOPS_Handout.pdf). Modeling also shows that water levels in the Simsboro Aquifer, while deep, would remain several hundred feet above the top of the Simsboro Aquifer in the center of the Forestar well field. This demonstrates that pumping at the Forestar Well Field could be sustained for hundreds of years. Importantly, available "real-world" data demonstrate, and most hydrogeologists agree, that the Queen City-Sparta GAM overstates drawdown in the Simsboro (and other aquifers). Therefore, the GAM provides a conservative estimate of ground-water availability.

Since all hydrogeologic evidence convincingly shows that the Simsboro Aquifer can yield an amount equal to at least all of the requested permits for centuries, the proposed limitations to pumping are premised upon the District's regulatory decisions and are not based upon actual hydrogeological (or engineering) premises. The Desired Future Conditions (DFCs) for the Simsboro Aquifer in the District was set to equal the average amount of primarily artesian drawdown (reduction in pressure within the Aquifer, rather than a reduction in the water volume in storage) modeled by projected in-district pumping as set forth the 2007 State Water Plan. The DFC made no provision for any additional water being developed and transported outside of the district. Based on the District's DFCs as set forth by GMA 12, the current MAG ranges from 29,556 acre-feet per year in 2010 to 37,249 acre-feet per year in 2060. The District has stated that it has granted permits for total withdrawals of more than 62,638 acre-feet per year, including the recently approved 12,000 acre-feet per year for Forestar, Inc. Total current Simsboro permits exceed the 2010 MAG by 112 percent (i.e., more than double), and exceed the 2060 MAG by 68 percent based on the District's Management Plan.

The District's decision to only approve approximately a third (1/3) of Forestar's requested permit amount apparently was based upon a belief that (1) the DFCs cannot be impaired, and (2) that the GAM can be effectively used to predict future water levels. The District then used the GAM to support its conclusion that the DFCs would be impaired by not approving Forestar to produce any amount of ground water more than the 12,000 acre-feet per year granted. The erroneous action of the Board, which is unsupported by the competent evidence in Forestar's uncontested Applications, not only damages Forestar as described above, it has significant unintended consequences which Forestar has warned the Board about on several previous occasions.

Specifically, by utilizing the approach the District adopted to deny Forestar's application for the entire 45,000 acre-feet in permits, the Board has in essence drawn a "line in the sand" or created a "tipping bucket" with respect to future permits to produce groundwater from the Simsboro Aquifer. Specifically, if the District is consistent and utilizes the same background assumptions and DFC considerations it adopted to wrongfully deny Forestar's uncontested Applications in their entirety, in evaluating future Simsboro Aquifer permit applications, then the only logical conclusions that can be drawn will be that there is no more water available for permitting from the Simsboro aquifer within The District. Alternatively, The District will have to admit that there is additional water available for permitting as the competent evidence of record in support of Forestar's uncontested Applications demonstrated, which establishes that the District, acting through its Board of Directors, wrongfully chose to deny to grant to Forestar without justification, and any future decisions on who gets permits to produce groundwater from the Simsboro will necessarily be arbitrarily determined by the District in contravention of the rights of Forestar.

I. FORESTAR CARRIED ITS BURDEN

Forestar's Applications were uncontested and Forestar unquestionably carried its burden to demonstrate that its Applications for permits authorizing the production and transport of 45,000 acre-feet for municipal purposes satisfy the requirements of Water Code Chapter 36 and the District's rules. The Applications therefore should have been granted in their entirety.

Forestar has attached Proposed Findings of Fact and Conclusions of Law that accurately analyze the uncontested record evidence and support the only lawful and proper decision, the granting of Forestar's Applications in their entirety – the decision the District should have made on May 15, 2013 and on January 15, 2014. *See* Appendix "A."

IV.

CONCLUSION

Article XVI, Section 59 of the Constitution provides for the development and conservation of the state's natural resources, including its groundwater. The objective of this Constitutional provision is to ensure that the beneficial use of these resources can be maximized. Senate Bill 1 furthered that objective in 1997 through the identification and direction for use of the state's available water reserves, including groundwater, to meet demands through at least the year 2060. The Legislature and Supreme Court have both confirmed in the last two years that

groundwater is a constitutionally protected property right that can be damaged or taken by the wrongful regulation of a governmental entity such as the Lost Pines Groundwater Conservation District. The District's failure to grant Forestar's uncontested Applications for the full 45,000 acre-feet per annum -- despite all of the competent, uncontested, and credible evidence proving satisfaction of all of the criteria prescribed by Water Code Chapter 36 and the District's enabling legislation and rules -- was wrong, was not supported by substantial evidence, effected violations of Forestar's federally protected rights and damage to or a taking of Forestar's and its lessors' real property rights, violated Texas law, and was arbitrary and capricious.

Forestar's Applications, which complied with all of the requirements of the District's rules and Chapter 36, would have implemented and furthered the objectives of both the Constitution and Senate Bill 1 had they been granted in full as they should have been. The District's decision to deny two-thirds of Forestar's Applications on May 15, 2013 and January 15, 2014, and its adoption of unsupported, erroneous, and incomplete findings and conclusions was a violation of Forestar's rights, contrary to Texas law, in excess of its legal authority, and arbitrary and capricious. *See EAA v Day*, 369 S.W.3d 814 (Tex. 2012); Texas Water Code §36.002.

WHEREFORE, PREMISES CONSIDERED, Forestar prays that the District grant this Second Motion for Rehearing, reconsider its decisions of May 15, 2013 and January 15, 2014, and the erroneous Findings of Fact and Conclusions of Law adopted on July 17, 2013 and on January 15, 2014, and, thereafter, (i) grant Forestar's permits for the full 45,000 acre-feet per annum production and transport consistent with the Applications, (ii) adopt Findings of Fact and Conclusions of Law consistent with the uncontested record evidence on Forestar's Applications, and (iii) clarify and modify the provisions of the production and transport permits identified herein.

Respectfully submitted,

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ATTORNEYS FOR FORESTAR (USA) REAL ESTATE GROUP, INC., APPLICANT

LIST OF EXHIBITS[14]

"A" General Manager's February 20, 2013, letter declaring Forestar's Applications to be administratively complete, and providing instructions for the mailing and publication of "notice" that a hearing would be conducted on the Applications on March 20, 2013

"B" General Manager's February 21, 2013, letter providing Forestar with copies of the draft permits

"C" March 7, 2013 letter to the District evidencing Forestar completed the mailed and notice by publication requirements of the District pursuant to Rule 14.3C(3)

"D" Electronic copy of the transcript of the March 20th hearing and Board proceedings relating to Forestar's Applications

"E" General Manager's March 20th memorandum to the Board recommending the permit be granted in its entirety

"F" Electronic copy of the transcript of the Board's May 15th meeting

"G" General Manager's April 17, 2013 letter advising Aqua WSC that its request for contested case hearing was untimely and would not be presented to the Board

"H" The May 13th PowerPoint presentation to the District entitled "Groundwater Modeling Results" by consulting hydrogeologist, Andrew Donnelly with Daniel B. Stephens and Associates

"I" Findings and Conclusions adopted by the Board on July 17, 2013

"J" Permits signed on July 18, 2013

"K" Second Findings and Conclusions (January 15, 2014)

"L" January 16, 2014 letter giving notice that Forestar plans to appeal the District's January 15, 2014 decision and actions

"M" January 27, 2014 letter from counsel for the District to counsel for Forestar, acknowledging that Forestar's Applications were uncontested and that there are no provisions for a record in an uncontested case or for a requirement that the District prepare and file a record.

[14] All of the cited "Exhibits" are on file with the Lost Pines GCD. Electronic copies of the referenced Exhibits are included in a CD included with the Second Motion for Rehearing for the readers' convenient reference.

CERTIFICATE OF SERVICE

I hereby certify, by my signature below, that a true and correct copy of the above Second Motion for Rehearing was forwarded via Certified Mail, Return Receipt Requested and, where available to the undersigned, via e-mail and/or telecopier, on the 4th day of February, 2014, to those entities, persons, parties and/or their counsel of record shown on the service list below.

Edmond R. McCarthy, Jr.

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