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August 6, 2013

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**Via Certified Mail,
Return Receipt Request
& Telecopier & E-mail**

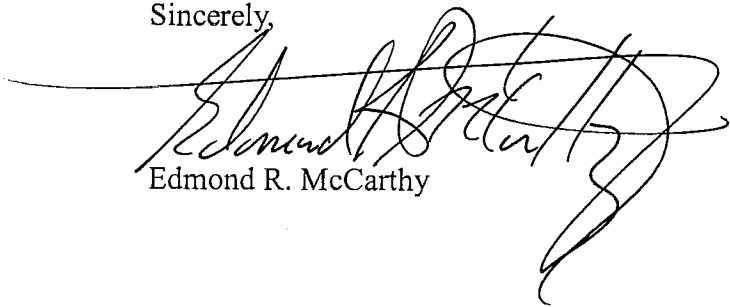
Re: Motion for Rehearing in support of Forestar (USA) Real Estate Group, Inc.'s
Applications for Drilling Permits, Operating Permits and Transfer Permits for
Well Nos. 1-10

Dear Mr. Cooper:

Enclosed please find the original and a copy of Forestar's Motion for Rehearing in support of Forestar (USA) Real Estate Group, Inc.'s Applications for Drilling Permits, Operating Permits and Transfer Permits for Well Nos. 1-10. Please file the original, and mark as filed the copy and return it to me in the enclosed postage prepaid, self-addressed envelope. By copy of this letter I am providing the Motion for Rehearing to the District's General Counsel, Robin Melvin, and Special Counsel to the Board, Greg Ellis.

Thank you for your assistance.

Sincerely,


Edmond R. McCarthy

cc: Robin Melvin, General Counsel, LPGCD
Greg Ellis, Special Counsel, LPGCD
Brent Covert, Forestar (USA) Real Estate Group, Inc.

<p>APPLICATION OF FORESTAR (USA) REAL ESTATE GROUP, INC.</p> <p>FOR A PRODUCTION PERMIT AUTHORIZING TRANSPORT</p>	<p>§ § § § § §</p>	<p>BEFORE THE LOST PINES GROUNDWATER CONSERVATION DISTRICT</p>
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FORESTAR (USA) REAL ESTATE GROUP, INC.'S MOTION FOR REHEARING

TO THE LOST PINES COUNTY GROUNDWATER CONSERVATION DISTRICT:

COMES NOW FORESTAR (USA) REAL ESTATE GROUP, INC. (“Forestar”), Applicant for new Production 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 as well as in Travis, Williamson and Hays Counties (the “Application”) pending before the Board of Directors of the Lost Pines Groundwater Conservation District (the “Board”). Forestar files this its 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/or modify certain provisions of the Production and Transport Permits granted to Forestar, and in support thereof, would show the Board as follows:

**I.
INTRODUCTION**

This Motion for Rehearing (the “Motion”) 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. The Motion is filed to address issues raised by the Board’s (i) decision on May 15, 2013, to wrongfully deny in its entirety Forestar’s Applications by limiting the permits granted to Forestar to 12,000 acre-feet per annum, and, thereafter, (ii) on July 17, 2013, to adopt erroneous and/or incomplete and inaccurate Findings of Fact and Conclusions of Law¹ to support that decision.²

¹ The Board’s Findings of Fact and Conclusions of Law were adopted during the District’s July 17th 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*, 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

The Board's errors are violative of its regulatory authority over Forestar's property rights in its groundwater leases pursuant to Chapter 36, Texas Water Code, as well as the District's enabling legislation³ and its Rules. In addition to effecting a take and damaging the Applicant's property rights in the groundwater interests, the Board's erroneous decision has the effect of damaging and taking the property rights of the landowners who leased their groundwater rights to Forestar as the Applicant in violation of Article I, §17 of the Texas Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

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 Forestar sought permits for production and transport, the language of the Permits as granted, need review. Specifically, the language of the conditions related to the date by which the Permittee (Applicant 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/or differ production to avoid any impact to the aquifers within its jurisdiction. Forestar seeks correction and/or 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 publically stated plans and intent.

II. SUMMARY OF FACTS

In December 1999, Forestar's predecessor in interest, Sustainable Water Resources, LLC ("SWR") filed its application 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 the District and outside the District. Accordingly, the application included authorization for out of district transport. Additionally, the Applications sought the ability to aggregate production under the permit issued 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 would allow the Applicant to efficiently produce the groundwater, as well as modify pumping schedules and wells pumped if needed to minimize localized impacts from pumping. The applications for production, transport and aggregation of the proposed 10 wells are collectively referred to herein as the "Applications." After filing, no action was taken on the Applications by the District because it had adopted a moratorium on processing and/or acting on applications for new non-exempt permits.

742, 756 (Ct. 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.

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 of permits to administrative completeness and, thereafter, taking action on the same, 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 separate 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 whole. Forestar completed the mailed and notice by publication requirements of the District pursuant to Rule 14.3C(3), and submitted the necessary evidence of the same to the District by letter dated March 7, 2013 (Exhibit "C").

The General Manager scheduled Forestar's Applications for consideration by the Board during the public hearing and, thereafter, for Board action on March 20, 2013. According to the District's 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 5th day prior to the March 20th hearing date). No timely requests for contested case hearing or protest of Forestar's Applications were received by the District prior to the deadline. Accordingly, on March 20th, 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.⁴

Forestar's sworn Applications and supporting documentation were before the Board at the hearing. Also before the Board was the General Manager's memorandum and recommendation to grant the permit in its entirety. The General Manager's memorandum was dated March 20th (Exhibit "E").

Based upon the technical review performed by the General Manager, his staff and consultants, the memorandum summarized the General Manager's 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 (GPM). While that authorization is capable of producing more than 45,000 acre-feet if all 10 wells are pumped, the aggregation provision of the permit would limit total production to 45,000 acre-feet. In his March 20th memorandum to the Board, the General Manager discussed each of the criteria set forth 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

⁴ The transcript of the March 20th 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.

Code, Chapter 36. 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 20th proceedings (Exhibit "D"), and pages 61-62 of the transcript of the Board's May 15th meeting (Exhibit "F")⁵.

Following the closure of the public hearing on Forestar's Applications by the 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).

At the next District Board meeting, conducted April 17, 2013, at City Hall in Giddings, during the public comment period the Board heard a request from Aqua Water Supply Corporation regarding the denial of its untimely request for a contested case hearing. Aqua Water Supply Corporation filed its request on April 10, 2013, 21 days after the closure of the public hearing on Forestar's Applications and 26 days after the deadline for filing of contested case hearing according to District Rule 14.3D.

By letter dated April 17, 2013 (Exhibit "G"), the General Manager had advised Aqua WSC that its request was untimely and would not be presented to the Board. During the public comment period of the April 17th Board meeting, Aqua WSC's attorney, Mike Gershon, pleaded Aqua's request for a contested case hearing. Following the closure of public comment, during the Board's hearing agenda, Forestar's Applications, which was on the Agenda (Item No. 9), was considered. At that time, following an executive session by the Board, a motion was made to conduct a "preliminary hearing" on Aqua WSC's request for hearing for contested case in connection with Forestar's Application to determine its timeliness. The motion passed and further action on Forestar's Applications was tabled until the next Board meeting, which would be held immediately following the preliminary hearing to determine whether or not Aqua WSC's request for contested case hearing was timely filed.

On May 13, 2013, the District conducted a special Board meeting during which it received a PowerPoint presentation from its consulting hydrogeologist, Andrew Donnelly with Daniel B. Stephens and Associates, entitled "Groundwater Modeling Results." (See Exhibit "H") (the "May 13th Presentation"). The agenda was not a hearing on Forestar's Application. The Board did not request, solicit or offer any opportunity for a presentation, rebuttal or cross-examination by Forestar regarding the May 13th Presentation. That said, the content of the May 13th Presentation is generally consistent with the hydrogeologic analysis presented to the District by Forestar as part of its Application which was reviewed by the District's General Manager and considered in his application of the permitting criteria prescribed by the District's Rules and Chapter 36, Texas Water Code. That content reflects 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 aquifer, other groundwater permittees or surface water in connection with groundwater, and/or the District's Desired Future Conditions (DFCs). The May 13th Presentation does not contradict the information analyzed and used by the District's General Manager to develop his recommendation, which was reiterated at the District's May 15, 2013, Board

⁵ The transcript of the May 15th meeting is on file with the District. Like the March 20th hearing transcript, an electronic copy of the transcript is included herewith on CD as Exhibit "F."

meeting, that the Board should grant Forestar the entire 45,000 acre-foot per annum production and transport authorization requested.

While the May 13th Presentation acknowledges that it over-predicts the potential impacts from pumping the entire 45,000 acre-feet per annum, in part by assuming that the entire 45,000 acre-feet per year will be pumped beginning today and continue being pumped annually through the year 2060, the Presentation was “qualified” by the multiple limitations on both the GAM and the modeling conducted. These explanations should have prevented the Board from denying Forestar’s application in part by limiting the production and transport authorization granted to only 12,000 acre-feet per annum.

The May 13th Presentation also ignores the facts and legal limitations on Forestar’s permit, 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 permit sought has a term limit of 5 years;
- While the permit can be renewed, renewal is not guaranteed particularly if the actual aquifer data and condition resulting from Forestar’s production shows an unreasonable adverse impact to the aquifer, other permittees and/or surface water conditions;
- Even before the permit renewal occurs, the District would have ongoing regulatory and supervisory control over the Forestar permit, as well as other permittees and, based upon good science and lawful application of its applicable rules and statutes can regulate Forestar’s pumping, including imposing primary limitations or permit restrictions on a uniform, non-discriminatory basis to protect the aquifer.

On May 15, 2013, the Board after having duly published notice, conducted a preliminary hearing on Aqua WSC’s requests for contested case 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 20th, the deadline for filing requests for contested case hearing was March 15th, and Aqua did not file its request 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’s motion, which passed unanimously, also denied all other requests for contested case hearing which may have been filed on or after March 15, 2013 (*see* May 15, 2013 Hearing Tr., Vol. I, at pp. 26-28).⁶

During the May 15th Board Agenda, Forestar’s Applications was Agenda Item No. 10. At the time the Agenda item came up, the District’s General Manager again summarized his recommendations to grant the Applications in its entirety based upon his review of the

⁶ 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 20th hearing and 53 days after the March 15th deadline. Untimely requests to participate in any contested case granted filed by Environmental Stewardship and other individuals were also denied.

Applications and all supporting documentation and staff analysis in the context of the criteria of the District's Rules and Chapter 36 for granting the Applications (*see* May 15, 2013 Hearing Tr. at pp. 61-62; *see also* March 20, 2013 Hearing Tr. at pp. 3-4, 78-81). Prior to acting on the Application, 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 of Forestar's Applications (Hearing Tr. p. 67).⁷ Without discussion or introduction, a motion was then made and seconded to grant Forestar's Applications to produce up to 12,000 acre-feet of water per annum from 10 wells to be aggregated with no other limitations or conditions voiced. There was no discussion or explanation on the motion by the Board. The motion passed 6-2. (*See* May 15th Hearing Tr. p. 67-68).

By letter dated June 4, 2013, filed in accordance with District Rule 14.6A. and Section 36.412, Texas Water Code, counsel for Forestar requested that the District issue formal Findings of Fact and Conclusions of Law supporting its action at the May 15, 2013, hearing to grant Forestar's Applications in part, and deny in part by limiting the grant to authorize the production and transport of 12,000 acre-feet per year, rather than 45,000 acre-feet per year, from ten wells.

At its July 17, 2013 Board meeting, the Board adopted Findings of Fact and Conclusions of Law and Order adopting the same supporting its decision to deny Forestar's Applications for 33,000 of the 45,000 acre-feet of production and transport authorization and allow Forestar only 12,000 acre-feet per annum (the "Findings and Conclusions") (*see* Exhibit "I"). The District's Findings and Conclusions, which were signed and issued on July 18, 2013, are limited to supporting the Board's action granting Forestar a Permit to produce up to 12,000 acre-feet of water per annum from the Simsboro Aquifer out of 10 wells to be produced in total amounts aggregated including special conditions and provisions set forth in the Permits signed on July 18, 2013 (Exhibit "J").

The Findings and Conclusions, however, do not contain any findings or conclusions by the Board that granting Forestar's Applications would be contrary to law, would unreasonably harm or adversely impact or affect groundwater or the aquifers within the District, or that granting Forestar's Applications as recommended by the District's General Manager would reasonably impact, impair or affect existing permit holders, and/or unreasonably impair, impact or harm the surface water interactions between the groundwater produced from the Simsboro and surface water flowing within the District. Moreover, nothing in the Findings or Conclusions evidenced that the decision to deny Forestar's Applications, in large part, was necessary to protect the District's Desired Future Conditions. Nothing in the District's Findings and Conclusions contradict the recommendation of the General Manager dated March 20, 2013, and reiterated on multiple occasions before the Board during open and public meetings, that Forestar's Applications to produce and transport the entire 45,000 acre-feet per annum should be granted in their entirety. Finally, nothing in the District's Findings and Conclusions contradicts

⁷ Due to unexpected illness of Board President Talbot, Board Vice President Sherrill was sitting as acting Presiding Officer. (Hearing Tr. at p. 3).

any of the findings, recommendations or conclusions set forth in Forestar's Applications and supporting supplemental documentation.

In its Findings of Fact and Conclusions of Law 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 Findings nor the Conclusions substantively address Forestar's request to produce and transport 45,000 acre-feet per annum, nor the District's General Manager's unequivocal recommendation to grant the sum.

While the District correctly concluded that there would not be any issues in allowing Forestar to produce 12,000 acre-feet of water per annum, the District erred when it failed to conclude that there would not be any issues in allowing Forestar to produce the full 45,000 acre-feet of water per year. That error is highlighted by the absence of any findings and/or conclusions that granting Forestar's request to produce and transport 45,000 acre-feet per annum would in fact during the term of the five (5) year permits requested have an adverse impact on 1) the aquifers within the District, 2) existing groundwater permittees, 3) surface water resources, and/or the District's DFCs.

The silence of the District's adopted Findings and Conclusions screams "Error" in the District's failure to acknowledge that by its action to grant Forestar a permit for 12,000 acre-feet per annum, the District denied Forestar's request for the balance of the 45,000 acre-feet, *i.e.*, 33,000 acre-feet per annum. Moreover, the Findings and Conclusions are both equally and conspicuously silent with respect to articulating any lawful basis for denying Forestar the right to a Permit authorizing the production and transport of the additional 33,000 acre-feet per annum for a total production and transport authorization of 45,000 acre-feet per annum.

Additionally, as evidenced by the PowerPoint Presentation given by the District's hydrogeologist on May 13th (Exhibit "H"), the Groundwater Availability Model or "GAM" relied upon heavily in the Findings and Conclusions has "limitations," including, *inter alia*, the following:

- 1) It includes multiple aquifers and does not focus exclusively on the Simsboro Aquifer to be pumped by Forestar;
- 2) It is a "regional model" covering 40+ counties and is not designated or intended for small scale, specific analyses;
- 3) The Report on the GAM upon which the Model Runs were based contains ten (10) pages of limitations on how the GAM should and should *not* be used appropriately;
- 4) The modeling work the District did was based upon limited supporting data;

The May 13th Presentation also notes that the "aquifer properties" of the Simsboro Aquifer that Forestar seeks to develop, as determined by "local" more site specific testing such as conducted by Forestar's hydrogeologist, differ from the aquifer properties used in the GAM.

II. FORESTAR's 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 have both expressly indicated 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 Findings nor Conclusions support the District's denial, in part, of the 33,000 acre-foot portion of Forestar's Applications that would have allowed it to produce and transport 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, LPGCD, like all groundwater and special districts, is limited to exercising those powers that have been expressly granted by the Legislature or powers necessarily applied pursuant to the express powers granted by the Legislature.⁸ Accordingly, LPGCD 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. 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 may be 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 its statutory duties and obligations. The evidence of record does not support the District's May 15th decision. Leaving evidence of record out of its Findings of Fact and Conclusions of law does not correct the error. Moreover, consciously ignoring the evidence exacerbates the District's error and makes more egregious the damages to Forestar and its landowner's real property interests in the groundwater wrongfully taken from them because the Applications were denied in substantial part (two-thirds), rather than granted in their entirety.

The key factors LPGCD 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 LPGCD's Rules. As evidenced by the District's action on May 15, 2013, denying the 33,000 acre-foot portion of Forestar's Applications was wrong, arbitrary and capricious. The decision was based upon public comments and NIMBY Politics. It was (i) not based on the evidence of record, (ii) not based upon available science, but was in violation of the District's enabling

⁸ *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).

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 of the U.S. Constitution, and other applicable laws. Alternatively, the decision was in excess of the LPGCD's powers and authority under the same.

Accordingly, LPGCD's decision, its Findings of Fact and Conclusions of Law and Order dated July 18, 2013, adversely affect Forestar's interests and the property rights in its groundwater within the District, and violates the District's rules, as well as Chapter 36, TEXAS WATER CODE.⁹

In deciding to deny two-thirds Forestar's Applications, LPGCD 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 evidence and follow the lawful policies embodied in the Texas Water Code and the LPGCD's rules. Both Chapter 36 and the LPGCD's Rules explicitly prohibit discrimination against applicants seeking a permit to transport water outside the District. *See* Texas Water Code § 36.122(g); LPGCD 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.¹⁰

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, Forestar's Applications would have been granted in full on May 15th. The new Production and Transport Permits sought by Forestar (1) will not impair either the District's MAG (Modeled Available Groundwater) or DFC (Desired Future Conditions), (2) will be dedicated to a recognized beneficial use, and (3) meets all applicable statutory and District Rule criteria for the issuance of a new production permit as stated by the District's General Manager. Moreover, the "special conditions" proposed to be included in its permit acknowledge and confirm the District's ability, through the lawful implementation of its regulations has the authority, 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 resulting from the use and enjoyment of Forestar's Permits or the development of unforeseen aquifer conditions resulting from extreme prolonged drought that affect the Simsboro Aquifer. This authority includes lawfully requiring the proration of or cutbacks in permitted pumping, to include Forestar's Permits, a fact Forestar's CEO Mr. DeCosmo acknowledged during the May 15th meeting (Hearing Tr. pp. 63-67).

A. NO UNREASONABLE IMPACT

Any pumping from an aquifer by any permit holder will have some effect on the subject 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

⁹ *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.

¹⁰ *See* Texas Water Code § 36.002 ("rights of owners of land and their lessees and assigns in groundwater are hereby recognized"); *see also* Texas Water Code § 36.105 (prohibiting Districts from using eminent domain to acquire groundwater rights).

affect existing groundwater and surface water resources or existing permit holders.” See Texas Water Code § 36.113(d), LPGCD 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), clearly 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 13th Presentation support this conclusion, and the General Manager’s March 20th “Recommendation memorandum” both 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 and corroborated by the City’s expert D.B. Stephens represents the only credible and reliable evidence of the potential long term impact to the Simsboro Aquifer related to Forestar’s Applications in the record before the District. The District was presented with a lot more credible scientific data than it normally receives in support of the other permit applications it received prior to granting said permits.

If (contrary to the best available scientific predictions and evidence of record) 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 (5) year terms, LPGCD will have both the time to spot 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 upon 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.

B. FORESTAR’S PROPOSED PERMIT IS NOT FOR A “SPECULATIVE USE”

The Board heard, and apparently wrongfully followed, politically motivated public comment that Forestar’s Applications for 45,000 acre-feet per annum were “speculative.” The District’s 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 not only a need for the 45,000 acre-feet of water Forestar seeks to permit, Forestar presented evidence of current interest from Hays County and the Dripping Springs WSC for more than the full 45,000 acre-feet.

In *Texas Rivers Protection Association v. Texas Natural Resource Conservation Commission*,¹¹ 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." (emphasis added.) *Id.* 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, Forestar also presented evidence regarding its investment and supporting 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, in addition to the evidence showing current interest and need for more than the 45,000 acre-feet applied for by Forestar.

C. FORESTAR'S REQUEST FOR CLARIFICATION OF PERMIT CONDITIONS:

In Special Condition (2) of each of the Operating Permits granted to Forestar, the condition requires that "within 365 days of the date of issuance of the Permit, Permittee 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 the Applicant's proposal to "stage" or "phase" its production under the Permit. As Forestar indicated during the various public meetings at which its Applications were considered, Forestar desires to increase the amount of water pumped over time, and plans to develop its contracts with end users in that same manner. By phasing or staging its permits, Forestar promotes water conservation, reduces the 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, if needed, regulate its production. Accordingly, Forestar requests that the Special Condition be modified to reflect its 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 prior to the date the actual increased production, or moving to the next phase or stage, occurs. For example, "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 Permit that provides that the permit will "automatically terminate if, within 180 days of the date of issuance of the permit, (1) the permitted well has not been

¹¹ 912 S.W.2d 147 (Tex. App.—Austin 1995, writ denied).

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 inconsistency arises from requiring Forestar to begin drilling wells prior to 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. Again, Forestar has indicated its desire to efficiently, and with minimal impact, 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. Accordingly, Forestar would request that paragraph (1) of the “Term” section of its Production Permits be modified to postpone the deadline for drilling of the wells until after the date that the firm contract is executed. Forestar would recommend that the 180 day period run not from the date of issuance of the permit, but rather from the date Forestar submits its binding contract to the District.

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 would request that the Production Permits be modified to reflect that Forestar has been granted the right to aggregate production and, therefore, drilling of a single well, capable of producing the water needed to serve its third party customers, and thereby consistently implement its proposed phasing or staging of the project will satisfy the requirements of the District. Drilling 10 wells, and thereafter, producing from 10 wells, would 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 Operating Permits, specifically, paragraph (2), the language provides that the Operating Permit “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 would also ask the District to modify the language in paragraph (2) to be consistent with Forestar’s proposed phasing or staging of the development of its 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 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 the Applicant/Permittee 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.

In the Transport Permits granted to Forestar, Forestar would also request clarification. Specifically, in the "Term" section of the Permit, specifically paragraph (1) the Permit provides 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 would request that its Transport Permits be clarified to provide that the various "triggers" of the alternative terms of the Permit 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 Transport 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 pursuant to the Operating and Transport Permits granted by the District.

D. FORESTAR CARRIED ITS BURDEN

Forestar carried its burden to demonstrate that its applications for permits authorizing the production and transport of 45,000 acre-feet for municipal purposes satisfies the requirements of Chapter 36, and LPGCD's Rules and should have been granted in their entirety.

Forestar has attached Proposed Findings of Fact and Conclusions of Law that accurately reflect the evidence of record and support the Board making the lawful, and proper, decision to grant Forestar's Applications in their entirety – the decision the District should have made on May 15, 2013. *See* Appendix "A."

III. **CONCLUSION**

Article XVI, Section 59 of the Constitution provides for the development and enhancement of the state's natural resources, including its groundwater, as well as the conservation and preservation of the same. The objective of the Constitutional provision is to insure that the beneficial use of these resources can be maximized. Senate Bill 1 furthered that objective in 1997 through the identification and utilization of the state's available water reserves,

including groundwater, to meet demands for the same 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 and/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, supported by all of the competent and credible evidence of record and the criteria prescribed by Chapter 36, the District's enabling legislation and rules was wrong, effected damage to and/or a taking of Forestar's and its Lessor's real property rights, violated Texas law and was arbitrary and capricious.

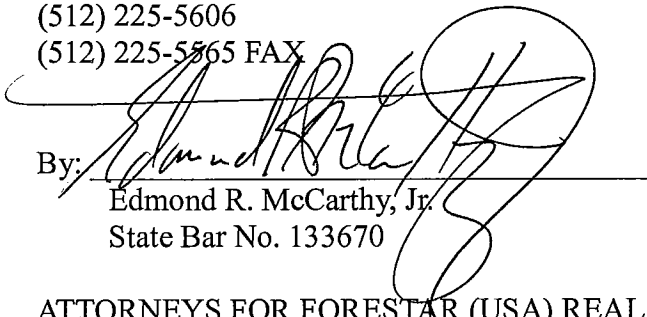
Forestar's Applications, which complied with all of the requirements of the District's statutes and Rules, and Chapter 36, Texas Water Code, would have implemented and furthered the objectives of both the Constitution and Senate Bill 1 had it been granted in full as it should have. LPGCD's decision to deny two-thirds of Forestar's Applications on May 15, 2013, and its adoption of an Order with erroneous and incomplete Findings and Conclusions on July 17, 2013, 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 its Motion for Rehearing, reconsider its decision on May 15, 2013, and the erroneous Findings of Fact and Conclusions of Law adopted on July 17, 2013, and, thereafter, (i) grant Forestar's permits for the full 45,000 acre-feet per annum production and transport consistent with its Applications, (ii) adopt Findings of Fact and Conclusions of Law supplementing that decision consistent with those attached hereto as Appendix "A," which are based upon the evidence of record presented during the hearing on Forestar's Application, and (iii) clarify and/or modify the provisions of the production and transport permits identified in Section II., C., above.

Respectfully submitted,

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

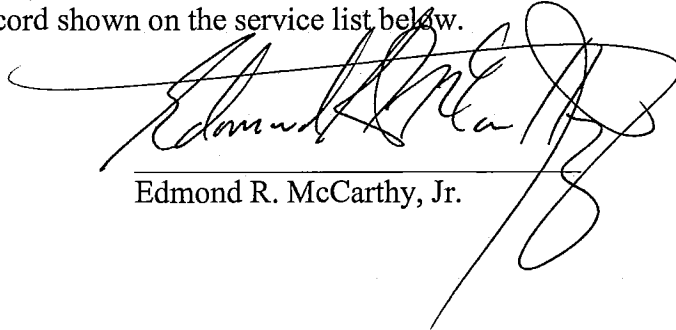
LIST OF EXHIBITS¹²

- “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

¹² All of the cited “Exhibits” are on file with the Lost Pines GCD. Electronic copies of the referenced are included in a CD included with the 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 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 6th day of August, 2013, 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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Representing the General Manager of the Lost
Pines Groundwater Conservation District

APPENDIX “A”

Forestar’s Proposed Findings of Fact and Conclusions of Law

**LOST PINES GROUNDWATER CONSERVATION DISTRICT
FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON APPLICATIONS OF FORESTAR (USA) REAL ESTATE GROUP, INC.
FOR OPERATING PERMITS AND TRANSPORT PERMITS**

FINDINGS OF FACT

PROCEDURAL HISTORY

1. In December 2009, Sustainable Water Resources L.P. submitted applications to the District for 10 wells in Lee County seeking authorization to withdraw an aggregate of 45,000 acre-feet per year from the Simsboro Aquifer to be used for drinking water supply purposes in Bastrop, Hays, Lee, Travis and Williamson Counties (the "Applications").
2. By letter dated August 13, 2012, Forestar (USA) Real Estate Group, Inc. ("Applicant") notified the District that it had purchased all of the assets of Sustainable Water Resources L.P., including the Applications.
3. On January 8, 2013, the General Manager sent a letter to Applicant notifying the Applicant that the District intended to treat the Applications as applications for Well Registration, Operating Permits, and Transport Permits under the District rules in effect as of January 1, 2013. The letter also requested additional information on the Applications.
4. On January 17, 2013, Applicant sent a letter to the General Manager agreeing to the treatment of the Applications as applications for Well Registration, Operating Permits, and Transport Permits under the District rules in effect as of January 1, 2013, and submitted the additional information requested in the General Manager's letter.
5. By letter dated February 20, 2013, the General Manager: (a) notified the Applicant that the Applications were Administratively Complete; and (b) provided the Applicant with the notice described in District Rule 14.3.C, setting the Applications for a public hearing on March 20, 2013.
6. By letter dated February 21, 2013, the General Manager provided the Applicant with a written summary of the General Manager's recommendation on the Applications to the Applicant, pursuant to District Rule 14.3.B(2).
7. On February 25, 2013, Applicant mailed the notice of public hearing as provided in District Rule 14.3.C(3)(a) and provided the District with proof of the mailing of notice on March 7, 2013.
8. On February 28, 2013, Applicant published the notice of public hearing in The Bastrop Advertiser, the Lexington Leader, and the Giddings Times and News and provided the District with proof of that publication on March 7, 2013.

9. The fifth day prior to the March 20, 2013, hearing on and Board consideration of, Forestar's Applications was March 15, 2013.
10. The Board of Directors of the District (the "Board") held a public hearing on the Applications at 7:00 p.m. on March 20, 2013, at the Bastrop City Hall in Bastrop, Texas.
11. The agenda for the March 20 Board meeting provided for: "Consideration and possible action on applications of Forestar (USA) Real Estate Group, Inc. for Operating Permits and Transfer Permits for Well Nos. 1-10."
12. The Board did not receive a request for a contested case hearing on the Applications before the March 20 public hearing.
13. The Board had Forestar's Applications and the General Manager's March 20th memorandum recommending granting Forestar's Applications in full when it heard comments from the Public and the District's General Manager's recommendation on the Applications at the March 20 public hearing, and then the President closed the public hearing.
14. The District's General Manager recommended both in his March 20th Memorandum and in his oral remarks that the Board grant Forestar's Applications authorizing the production and transport of 45,000 acre-feet of water for beneficial use in Bastrop, Lee, Hays, Travis and Williamson Counties in its entirety and presented a memorandum dated March 20th to the Board supporting his recommendation.
15. The Board considered, but tabled to a future Board meeting action on the Forestar Applications on March 20th.
16. On April 10, 2013, Aqua Water Supply Corporation filed a request for a contested case hearing on the Applications on April 10, 2013.
17. On May 7, 2013, the City of Giddings filed a request for a contested case hearing on the Applications.
18. On May 8, 2013, Environmental Stewardship filed a request for a contested case hearing and/or a request for party status in any contested case hearing on the Applications.
19. On May 9, 2013, Andrew Meyer, Bette Brown, Rhonda Brown Hosea, Phillip A. Brown, Darwyn Hanna, Frank D. Brown, Madeline Brown Stifflemire, and Walter Richard Brown filed requests for party status in any contested case hearing on the Applications.
20. On May 15, the City of Giddings withdrew its request for a contested case hearing on the Applications.
21. On May 15, 2013, the Board held a hearing to determine whether the requests for contested case hearings on the Applications filed by Aqua Water Supply Corporation and others were timely filed under the District Rules.

22. At the hearing on May 15, 2013, the Board voted to deny the Aqua Water Supply Corporation's and all other requests for contested case hearing on the ground that they were not timely filed under the District Rules.

23. Forestar's Applications were uncontested at the time they were presented to the Board for final action with the General Manager's recommendation to grant the same for 45,000 acre-feet per annum.

24. On May 15, 2013, prior to voting on Forestar's Applications, the Board went into Executive Session.

25. On May 15, 2013, following its Executive Session the Board made a motion and voted to grant Forestar's Applications, in part, by limiting production and transport to 12,000 acre-feet per annum.

26. On May 15, 2013, no explanation accompanied the Board's motion to grant Forestar's Applications, in part, by limiting the authorization for production and transport to 12,000 acre-feet per annum.

27. There was no discussion or explanation by the Board for its decision to deny Forestar's request to produce and transport the full 45,000 acre-feet per annum.

COMPLETENESS OF APPLICATION

28. The Applications included all of the information required by Chapter 36, Texas Water Code, including section 36.113, and District Rules, including Rules 4.2, 5.1, and 6.2.

29. By letter dated February 20, 2013, the General Manager notified the Applicant that the Applications were administratively complete.

DEDICATION TO BENEFICIAL USE

30. Applicant proposes to produce and use the water for municipal water supply purposes to customers located in Bastrop, Hays, Lee, Travis and Williamson Counties.

31. Regional water plans demonstrate the following needs for additional water for municipal purposes within those counties:

(a) The 2011 Region K and Region L plans indicate that Hays County will need approximately 35,600 acre-feet per year of additional municipal water supply in 2060.

(b) The 2011 Region G and Regional K Plans predict a 33,797 acre-feet per year municipal water shortage in Williamson County in 2030 and a 112,609 acre-feet per year shortage in 2060.

(c) The 2011 Region K plan predicts an 11,053 acre-feet per year municipal water shortage in Travis County in 2020, a 13,897 acre-feet per year shortage in 2030, a 16,964 acre-

feet per year shortage in 2040, a 50,264 acre-feet per year shortage in 2050, and an 85,794 acre-feet per year shortage in 2060.

(d) The 2011 Region K plan predicts an approximately 2,392 acre-feet per year municipal water shortage in Bastrop County in 2020, an approximately 5,722 acre-feet per year shortage in 2030, an approximately 12,731 acre-feet per year shortage in 2040, an approximately 18,083 acre-feet per year shortage in 2050, and an approximately 25,288 acre-feet per year shortage in 2060.

(e) The 2011 Region G plan predicts a 480 acre-foot per year municipal water shortage in Lee County in 2030 and a 797 acre-feet per year shortage in 2060.

32. The combined shortage of water available for application to municipal purposes in Hays, Williamson, Travis, Lee and Bastrop counties identified in the 2011 Region 6, K and L Plans by the year 2060 is in excess of 260,000 acre-feet per annum.

33. As additional evidence of need for the water it sought to produce and transport pursuant to its Applications for 45,000 acre-feet per annum, Applicant submitted a non-binding letter of intent dated August 1, 2011 for the negotiation and execution of a Wholesale Water Supply Contract on or before September 30, 2013, pursuant to which Applicant would deliver 25,000 to 45,000 acre-feet of water per year to Hays County.

34. As additional evidence of need for the water it sought application to produce and transport pursuant to its Applications for 45,000 acre-feet per annum, Applicant submitted a non-binding letter of intent dated January 13, 2013 for the negotiation and execution of a Water Supply Contract on or before June 30, 2013, pursuant to which Applicant would supply 1,000 to 5,000 acre-feet of water per year to the Dripping Springs Water Supply Corporation in Hays County.

35. Special Condition (2) of the Operating Permit for each of the proposed wells provides:

Within 365 days from the date of issuance of the permit, Permittee 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. For purposes of this section, a "binding contract" means a contract that sets forth in detail the terms, provisions and conditions for the sale and purchase of water produced under this permit and that is binding and will continue in effect for so long as may be agreed to by the parties. If Permittee fails to submit a binding contract or contracts in the aggregated annual withdrawal amount of 12,000 acre-feet per year within 365 days from the date of issuance of this permit, then the aggregated annual withdrawal amount in this permit shall be automatically reduced to the amount for which Permittee has submitted a binding contract or contracts; and the General Manager is authorized to issue an amendment to this permit reflecting the reduced amount.

36. The production of 45,000 acre-feet of groundwater by Forestar for application to municipal purposes would address a portion of the projected need in Bastrop, Lee, Hays, Travis and Williamson Counties.

CONSISTENCY WITH DISTRICT MANAGEMENT PLAN

37. The Operating Permits are consistent with the District Management Plan.

WATER CONSERVATION

38. The Applicant has submitted a water conservation plan that provides for conservation of water in the Applicant's operation of the wells and water transportation facilities.

39. The applicant submitted drought contingency and water conservation plans of several potential customer entities operating in Hays, Travis and Williamson Counties.

40. Special Condition (3) of the Operating Permit provides:

At the time that Permittee submits a binding contract with an End User to the District, Permittee shall provide the District with the End User's water conservation plan and drought contingency plan, which must comply with the relevant provisions of the Texas Water Code and rules of the Texas Commission on Environmental Quality or successor agency.

41. Standard permit provision (2) provides: "Water withdrawn under the permit must be put to beneficial use at all times, and operation of the permitted well in a wasteful manner is prohibited."

42. The Applicant has agreed to use reasonable diligence to promote water conservation and to require any third party customer it sells water to develop drought contingency plans contractually, and will provide copies of the same to the District.

WATER QUALITY

43. The Applicant has agreed to use reasonable diligence to protect groundwater quality.

WELL PLUGGING

44. The Applicant has agreed to follow the well plugging guidelines at the time of a well's closure.

LONG-TERM MANAGEMENT TO ACHIEVE DESIRED FUTURE CONDITION

45. Groundwater Management Area 12 has adopted and the Texas Water Development Board has approved the following Desired Future Condition ("DFC") for the Simsboro aquifer in the District: a District-wide average drawdown between January 2000 and December 2059 of 237 feet.

46. The District Management Plan adopts the following county DFCs for the Simsboro aquifer: (a) a Bastrop County-wide average drawdown between January 2000 and December 2059 of 145 feet; and (b) a Lee County-wide average drawdown between January 2000 and December 2059 of 345 feet.

47. The Central Queen City-Sparta Groundwater Availability Model ("GAM") was developed by the Texas Water Development Board ("TWDB") to estimate the regional impact of the withdrawal of groundwater from the Simsboro and other aquifers.

48. DFC's are planning tools developed based upon historic groundwater production and modeling and not absolute criteria for issuing permits.

49. The GAM is the best tool available for estimating the regional drawdown of water levels in the Simsboro aquifer as a result of groundwater withdrawals within the District, although it has limitations.

50. Using the GAM, the TWDB executive administrator has determined that the Modeled Available Groundwater for the Simsboro aquifer is: 29,556 acre-feet per year in 2010, 32,731 acre-feet per year in 2020; 31,362 acre-feet per year in 2030; 34,916 acre-feet per year in 2040; 36,544 acre-feet per year in 2050; and 37,249 acre-feet per year in 2060.

51. The TWDB executive administrator's estimates of the current and projected amount of groundwater produced under exemptions granted by District Rules and Texas Water Code section 36.117 for all aquifers in the District are: 11,666 acre-feet per year in 2010; 13,022 in 2020; 19,876 acre-feet per year in 2030; 20,423 acre-feet per year in 2040; 20,796 acre-feet per year in 2050; and 21,162 acre-feet per year in 2060.

52. The District has authorized the withdrawal of 50,638 acre-feet per year from the Simsboro aquifer under permits previously issued.

53. The District's hydrologist ran the GAM assuming that 10,000 acre-feet per year will be withdrawn from Applicant's 10 proposed wells in every year from 2014 to 2060, and that withdrawals from existing wells completed in the Simsboro aquifer will be as follows: (a) 20,298 acre-feet per year in 2010; (b) 28,184 acre-feet per year in 2020; (c) 31,240 acre-feet per year in 2030; (d) 34,295 acre-feet per year in 2040; (e) 37,361 acre-feet per year in 2050; and (f) 40,406 acre-feet per year in 2060.

54. The 2010 withdrawal of 20,298 acre-feet per year is a reasonable estimate, based on District records, of the amount of groundwater that was actually produced from the Simsboro aquifer in 2010 under existing District Operating Permits and under exemptions granted by District Rules and Texas Water Code section 36.117.

55. The 2020, 2030, 2040, 2050 and 2060 projected withdrawals are consistent with the withdrawals authorized under existing District Operating Permits and the 2012 State Water Plan Projected Net Water Demands within the District summary in the District Management Plan.

56. The 2020, 2030, 2040, 2050 and 2060 projected withdrawals are a reasonable estimate of the amount of groundwater that may actually be produced from the Simsboro aquifer under existing District Operating Permits and under exemptions from permitting granted by the District Rules and Texas Water Code section 36.117.

56. The District hydrologist also ran the GAM assuming that 20,000 acre-feet per year will be withdrawn from Applicant's 10 proposed wells in every year from 2014 to 2060, plus the same 2020, 2030, 2040, 2050 and 2060 projected withdrawals.

57. The average drawdown in feet projected by these two model runs in 2060 are as follows:

	Bastrop County	Lee County	District-wide
10,000 afy + projected 2010-2060 pumping	140	336	232
20,000 afy + projected 2010-2060 pumping	150	380	258

58. The two GAM runs project that the current DFC for the Simsboro aquifer can be achieved if Applicant is authorized to withdraw something more than 10,000 acre-feet per year, but substantially less than 20,000 acre-feet per year.

59. Consistent with District Rule 9.1, Special Condition (4) of the Operating Permit for each of the proposed wells provides:

This permit is issued subject to any future production limits adopted by the District under the District Rules.

60. District Rule 9.1 provides: "To accomplish the purposes of Texas Water Code chapter 36, and to achieve the stated purposes and goals of the District, including managing the sustainability of the aquifers and preventing significant, sustained water-level declines within the aquifers, the district shall manage total groundwater production on a long-term basis to achieve the applicable Desired Future Condition. The District may establish production limits on all permits for this purpose following the procedures in Rule 14.1 and 14.2. All Operating Permits are issued subject to any future production limits adopted by the District under this Rule."

61. No evidence was presented in the record that established that granting Forestar's Applications for the full 45,000 acre-feet per annum would unreasonably harm, or adversely affect the District's long term Management to achieve its DFCs.

EFFECT ON EXISTING WATER RESOURCES AND PERMIT HOLDERS

62. The nearest permitted well completed in the Simsboro aquifer is located approximately 10 miles from one of Applicant's proposed wells.

63. The nearest exempt registered well completed in the Simsboro aquifer is located approximately 10 miles from one of Applicant's proposed wells.

64. Although the GAM is not intended to predict drawdowns at a particular point, the two model runs discussed in Findings of Fact Nos. 39-45 project that the drawdown in the area of the nearest permitted well and the nearest exempt registered well will be approximately 200 feet in December 2059.

65. The District's hydrologist ran the GAM assuming that 11,250 acre-feet will be withdrawn from the Applicant's wells and that there will be no other withdrawals in the Simsboro aquifer in order to determine the amount of drawdown caused by withdrawal from the Applicant's proposed wells only.

66. Although the GAM is not intended to predict drawdowns at a particular point, this model run projects that drawdowns in the area of nearest permitted well and nearest exempt registered well caused by Applicant's withdrawal of 11,250 acre-feet per year will be 0 to 50 feet in December 2059.

67. Withdrawal of 12,000 acre-feet of water per year from the proposed wells will not unreasonable affect existing permitted wells or existing exempt registered wells.

68. In adopting a DFC for the Simsboro aquifer, Groundwater Management Area 12 and the District considered, as required by Texas Water Code section 36.108(c), the hydrological conditions of the Simsboro aquifer, other environmental impacts of the adoption of the DFC, including impacts on spring flow and other interactions between groundwater and surface water, and the impact on private property rights.

69. Withdrawal of 12,000 acre-feet per year from the proposed wells will not unreasonably affect existing groundwater and surface water resources, because the GAM predicts that the current DFC for the Simsboro aquifer can be achieved if Applicant is authorized to withdraw that amount from the proposed wells.

70. No evidence was presented in the record that established that granting Forestar's Applications for the full 45,000 acre-feet per annum would unreasonably harm or adversely affect either existing groundwater or surface water reserves or permit holders.

OTHER PERMIT CONDITIONS AND LIMITATIONS

71. The Operating Permits have a term of five years.

72. District Rule 5.7.C(6) provides that, in deciding whether to grant an application for renewal of the Operating Permit, deny it, or approved renewal with amended terms and conditions, the Board may consider, among other things, "whether any changes in the District's Desired Future Conditions or the District Management Plan that were approved after the permit was granted require any changes in the permit conditions."

COMPLIANCE HISTORY

73. The Applicant does not have a history of non-compliance with District Rules or the Water Code.

CONCLUSIONS OF LAW

1. District Rule 14.3.D. provides that: "A request for a contested case hearing on the Application, to be conducted under Rule 14.4, must be made in writing and filed with the District

no later than the 5th day before the date of the Board meeting at which the Application will be considered."

2. The Applications were considered at the Board meeting held on March 20, 2013.

3. The requests for a contested case hearing on the Applications were not timely under the District rules because they were not filed five days before March 20, 2013.

4. The Applications conform to the requirements prescribed by chapter 36 of the Texas Water Code and the District Rules.

5. Under the terms and conditions of the Operating Permits, the proposed use of water will be dedicated to a beneficial use.

6. Under the terms and conditions of the Operating Permits, the proposed use of water is consistent with the District Management Plan.

7. Under the terms and conditions of the Operating Permits, Applicant will be required to avoid waste and achieve water conservation.

8. Under the terms and conditions of the Operating Permits, Applicant will be required to follow well plugging guidelines at the time of the closure of the proposed wells.

9. Under the terms and conditions of the Operating Permits, Applicant will use reasonable diligence to protect groundwater quality.

10. Granting the Applications for the full 45,000 acre-feet per annum for production and transport under the terms and conditions provided in the Operating Permit is consistent with the District's duty to manage total groundwater production on a long-term basis to achieve the applicable DFC, considering: the Modeled Available Groundwater determined by the TWDB executive administrator; the TWDB executive administrator's estimate of the current and projected amount of groundwater produced under exemptions granted by District Rules and Texas Water Code section 36.117; the amount of groundwater authorized under permits previously issued by the District; a reasonable estimate of the amount of groundwater that is actually produced under permits issued by the District; and yearly precipitation and production patterns.

11. Under the terms and conditions of the Operating Permits, the proposed use of the full 45,000 acre-feet of groundwater per annum does not unreasonably affect existing groundwater and surface water resources or existing permit holders.

12. The terms and conditions of the Operating Permit prevent waste, achieve water conservation, minimize as far as practicable the drawdown of the water table or the reduction of artesian pressure, or lessen interference between wells.

13. The Applicant does not have a history of non-compliance with District Rules or the Texas Water Code.

14. The terms and conditions of the Transport Permits are consistent with the Texas Water Code and District Rules.
15. Applicants for groundwater production and transport permits, such as Forestar, are not required to have a binding contract to supply water to a third party as a condition to being granted a permit to produce and/or transport for municipal purposes.
16. The production of groundwater for application to municipal use without waste is a beneficial purpose as a matter of law, Texas Water Code § 36.001(9)(A); *cf.*, *Id.* § 36.01(8) (defining “waste” of groundwater).
17. Evidence of a drawdown of groundwater levels in an aquifer does not equate to an unreasonable effect or harmful impact to a groundwater reservoir or aquifer.
18. Evidence of a drawdown of groundwater levels in an aquifer does not equate to an unreasonable impact or harmful effect on the volume or quality of water available in the aquifer. No credible evidence was presented that granting Forestar’s Application for the full 45,000 acre-foot per annum production and transport from the Simsboro Aquifer would have an unreasonable adverse effect or harmful impact on the Simsboro Aquifer or any other aquifer within the District’s jurisdiction.
19. No credible evidence was presented that granting Forestar’s Applications for the full 45,000 acre-foot per annum to produce and transport groundwater from the Simsboro Aquifer would have an unreasonable, adverse or harmful effect or impact on any existing groundwater permittee subject to the District’s jurisdiction.
20. No credible evidence was presented that granting Forestar’s Applications for the full 45,000 acre-feet per annum production and transport from the Simsboro Aquifer would have an unreasonable, adverse or harmful effect or impact on any surface water in communication with groundwater subject to the District’s jurisdiction.
21. No credible evidence was presented that granting Forestar’s Applications for the full 45,000 acre-feet per annum for production and transport from the Simsboro Aquifer would have an unreasonable, adverse or harmful effect or impact on the District’s desired future conditions (DFCs).
22. No credible evidence was presented that granting Forestar’s Applications for the full 45,000 acre-feet per annum for production and transport from the Simsboro Aquifer would impair the District’s ability to achieve its DFCs.
23. No credible evidence was presented that granting Forestar’s Applications for the full 45,000 acre-feet per annum of water for production permits with a five-year term will adversely effect, harm or otherwise impact the District’s DFCs or prevent the District from achieving its DFCs during the term of the permits.
24. The desired future conditions for GMA 12 and for the District are to be reviewed at least every five years and are subject to amendment.

25. Forestar's Applications for production of the full 45,000 acre-feet per annum will be required to be renewed at least nine times before 2060.
26. Data based upon actual drawdown resulting from pumping to an aquifer, if any, the available volume of water in storage and for production, and similar properties of an aquifer can be better calculated based upon the site specific results from actual groundwater production than regional groundwater models such as the GAM relied upon for the model groundwater impacts by the District's staff.
27. The Central Queen City-Sparta Groundwater Availability Model, or GAM, did not use any wells completed in the Simsboro Aquifer in Lee County when it was calibrated according to the final technical report prepared by Alan R. Dutton, et al (Austin: Bureau of Economic Geology, 2003) at p. 202.
28. According to the District's records there are no Simsboro Aquifer wells registered with or permitted by the District located within five miles of the locations proposed for the Forestar wells in the Applications filed with the District by Forestar.
29. Forestar's Applications reflect long term leases from at least 46 landowners covering approximately 20,000 acres of land within the District subject to the Applications.
30. Forestar's Applications anticipate that the per-acre production of only 2.5 acre-feet per acre per annum once Forestar achieves full production of the requested 45,000 acre-feet of groundwater per year.
31. Failure to grant Forestar's Applications was a violation of Forestar's and its Lessors' property rights in the groundwater interests supporting the Applications, was contrary to Texas law, and in excess of the District's legal authority, as well as being arbitrary and capricious.