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SUPERIOR COURT OF ARIZONA

YAVAPAI COUNTY

HARVARD SIMON I, LLC, an Arizona limited liability company; THE PRESERVE AT THE RANCH, LLC, an Arizona limited liability company; OLD CAPITOL INVESTMENTS, LLC, an Arizona limited liability company; WHISPERING CANYON DEVELOPMENT, LLC, an Arizona limited liability company, Plaintiffs, v. INSCRIPTION CANYON RANCH SANITARY DISTRICT, an Arizona sanitary district; GENE LEASURE and SHIRLEY LEASURE, husband and wife; CHARLIE TURLEY and MICHELLE TURNEY, husband and wife; DAYNE TAYLOR and MARLESS TAYLOR, husband and wife; JOHN and JANE DOES I-X, Defendants.	Case No.: P1300 CV 201000036 **DEFENDANTS' PRE-HEARING BRIEF IN OPPOSITION TO ORDER TO SHOW CAUSE** **(Oral Argument Requested)** (Assigned to the Hon. Kenton D. Jones, Div. 4)

I. Introduction

Plaintiffs Harvard Simon I, LLC ("Harvard), Whispering Canyon Development, LLC and Old Capitol Investments, LLC (collectively "Whispering Canyon") and The Preserve at the Ranch, LLC ("The Preserve") agreed to have sewage treatment capacity available when lots were sold in their real estate developments.

The evidence shows that the sewage treatment facility has a designed capacity of 62,500 gallons per day (gpd). There is no dispute that Plaintiffs committed at least 200 gpd of treatment capacity for each subdivided residential lot. More than 440 lots have dwellings, and therefore, at least 88,000 gpd of treatment capacity is legally required to be available within the District. This is substantially more than the 62,500-gpd available treatment capacity in the District. Approximately 634 more lots have been sold that do not have dwellings. Plaintiffs have currently oversold treatment capacity by at least 152,300 gpd.

Defendants ICR Sanitary District (the "District") and its Board of Directors, Gene Leasure, Charlie Turney and Dayne Taylor, refute Plaintiffs allegation that the Open Meeting Law has been violated in any manner (except for Plaintiff-Harvard's representatives demands to meet only in private and outside of an open meeting with the Board). If any defects had occurred (which Defendants assert there were none), the resolution adopting the hookup moratorium was lawfully ratified under the Open Meeting Law and is legally enforceable. *See* A.R.S. §§38-431 *et seq.*

II. Factual Background

Initially each residential lot in the Inscription Canyon Ranch development received 330 gpd of treatment capacity at a 120,000 gpd Sequential Batch Reactor ("SBR") Plant. [Letter from ADEQ to the District (dated July 31, 1996), p. 1. **Ex. 1**.]

After annexation of lands into the District, Harvard's management contractor, Pivotal Utilities Management, LLC ("Pivotal") decommissioned and essentially abandoned the SBR

Plant. Plaintiffs now contend that those homeowners should only receive 80 gpd of treatment capacity.

Harvard hired Pivotal, who in turn contracted with its affiliate, Santec Corporation ("Santec") to construct a much smaller 62,500 gpd treatment plant, referred to as the "Santec Plant," which currently is in operation. [Wastewater Utility Facilities Development Agreement (May 15, 2001), Plaintiffs' Ex. 14.][1]

In consideration for extending the District's boundaries to encompass Harvard's Talking Rock Ranch ("TRR") development, Harvard agreed, among other things, to construct the new wastewater treatment plant at no cost to the District and to construct the new plant in accordance with all applicable standards and in strict conformance with applicable regulations of the Arizona Department of Environmental Quality ("ADEQ"), Yavapai County Environmental Services Department (the "County"), and the District. [Development Agreement and Order to Extend the Boundaries of the ICR Sanitary District (December 8, 2000) ("Harvard – District Agreement"), Plaintiffs' Ex. 7; Letter from Swayze E. McCraine to District (Lee Cochran and Jim Guth), dated November 27, 2000, **Ex. 2**]

In addition, Harvard through a predecessor entity agreed with the County that it would comply with ADEQ regulations in meeting commitments for sewage treatment capacity. The subdivision development agreement for Harvard's Talking Rock Ranch with Yavapai County provides that:

> All sewage treatment facilities and collections systems will be constructed and maintained in compliance with the regulations of the Arizona Department of Environmental Quality and all plans will be submitted for approval by the Arizona Department of Environmental Quality/County Environmental Services Department prior to the issuance of certificates of occupancy.

[1] Defendants refer to Plaintiffs' exhibit documents filed with their Statement of Facts in Support of Their Hearing Brief (December 30, 2010) to avoid duplication of documents. Exhibits referenced in bold are attached to this Brief.

[Inscription Canyon Ranch Development Agreement between Harvard Inscription Canyon Ranch Partners, L.L.C., Williamson Valley Investors II, L.L.C. and Yavapai County, dated October 25, 1999, p. 9, ¶ 6(B)(4). **Ex. 3**.]

III. Plaintiffs Failed to Comply with Arizona's Real Estate and Environmental Laws.

In developing their properties, Plaintiffs did not comply with Arizona's real estate and environmental laws with respect to assuring sewage treatment capacities for their subdivisions.

A. Plaintiffs Have Not Complied with Arizona's Real Estate Law by Not Providing Sewage Treatment Capacity for Their Lot Buyers.

Plaintiffs have sold and are selling subdivided lots without having completed sewage treatment capacity for those lots. They have not filed financial assurances for expanding sewage treatment facilities to serve their sold lots with the Commissioner of the Arizona Real Estate Department or with Yavapai County or with the District.

Arizona's real estate statutes protect purchasers of lots against incomplete or inadequate subdivision improvements that have been proposed or promised to them. The laws require Plaintiffs, as subdividers, to file notices of intention to subdivide lands, A.R.S. § 32-2181, and to obtain public reports authorizing sales of subdivided lots or parcels. A.R.S. § 32-2183. Plaintiffs filed certain Public Reports with the Commissioner, representing that sewage treatment facilities were part of their subdivision improvement and that those facilities either had been constructed or would be constructed before subdivided lots would be sold.[2] [Plaintiffs' Public Reports. **Ex. 4** (complete documents are available at http://icrsd.webexone.com/default.asp?link=.)]

[2] Plaintiff Harvard claims it does not have any interest in land within the District. An affiliate, Harvard Investments, Inc. ("Harvard Investments") merely has an option to purchase lands within the District. When the

Plaintiffs however unlawfully sold lots in their subdivisions because they did not do one of the following:

1. **Complete all the proposed or promised construction of sewage treatment capacity for the subdivision lots**.

2. Provide assurances for the completion of all proposed or promised sewage treatment capacity facilities for the subdivision lots by making **financial arrangements acceptable to the real estate commissioner**.

3. By Plaintiffs agreeing with Yavapai County to **prohibit occupancy** and Plaintiffs agreeing **not to close escrow for lots in a subdivision until all proposed or promised sewage treatment capacity for those subdivision lots have been completed**.

4. By Yavapai County entering into an assurance agreement with any trustee of the Plaintiffs in which the trustee agrees not to convey lots until sewage treatment capacity has been completed within any segregated portion of the subdivision containing those lots, with that agreement being recorded with the County.

See A.R.S. § 32-2183 (F).

Plaintiffs' promised and proposed expansions of sewage treatment plant for their subdivided lots have not been completed before lots were and are being marketed for sale, in violation of A.R.S. § 32-2183 (F)(1). Harvard, The Preserve, and Whispering Canyon have not submitted to the District Board any financial arrangement approved by the Real Estate Commissioner which assures that sewage treatment capacity would be completed for their subdivided lots, as required under A.R.S. § 32-2183 (F)(2).

developer of the Inscription Canyon Ranch, who initially formed the District, negotiated with Harvard Investments to annex Talking Rock Ranch into the District, the developers agreed that Harvard Simon I, LLC would be the entity obligated to construct sewage treatment facilities to treat all sewage in the enlarged District. Although Harvard Investments filed the Public Report on behalf of Harvard Simon I, LLC, the two entities are affiliates and represented by the same individuals in this lawsuit.

Harvard, The Preserve, and Whispering Canyon have closed escrows on their subdivided lots before treatment capacity is available at the plant for those lots, in violation of A.R.S. § 32-2183 (F)(3).

The County has not agreed to prohibit occupancy of dwellings in the District until all promised and proposed sewage treatment capacity is available for those subdivided lots. A.R.S. § 32-2183 (F)(3). The County has not entered into an "assurance agreement" with any trustee of Harvard, The Preserve, or Whispering Canyon not to convey lots until the plant has been expanded to serve those subdivided lots. A.R.S. § 32-2183 (F)(4).

"The subdivision laws intend to protect the public health, safety, and welfare." *Siler v. Arizona Department of Real Estate*, 193 Ariz. 374, 378 ¶ 16, 972 P.2d 1010 (App. 1998) (citing 1992 Ariz. Sess. Laws Ch. 14, § 3); *see Alaface v. National Investment Co*., 181 Ariz. 586, 596-97, 892 P.2d 1375, 1385-86 (App. 1994) (subdivision laws are to insure that residential developments have adequate infrastructure and that land is usable and safe).

Plaintiffs, in their Public Reports, represent that sewer service presently is available from the District, without disclosing that Harvard has not yet constructed treatment facilities to serve those subdivided lots. Plaintiffs misrepresent to the public that treatment capacity is available at the plant when they sell lots.

Plaintiffs have not complied with Arizona's real estate law. A.R.S. § 32-2183. In filing this lawsuit and in seeking to void the hookup moratorium, Plaintiffs are requesting the Court to condone their flagrant disregard of the subdivision protection statutes and their unlawful sale of subdivided lots.

B. Arizona's Environmental Laws Require at Least 200 Gallons Per Day for Each Subdivided Dwelling Unit.

Initially, Harvard and Whispering Canyon assumed that each "equivalent residential unit" or "ERU" would demand 350 gpd per dwelling and used ADEQ's Engineering Bulletin No. 12 for determining non-residential sewage treatment capacity required by the District. [Plaintiffs' Exs. 14 and 15, § 4(c).]

However, Harvard's engineer, Shephard-Wesnitzer, Inc. ("SWI"), set the 200 gpd per dwelling unit for the District when it applied for an amendment to the District's prior aquifer protection permit ("APP"). Using actual fresh water flow data (of 160 gpd) and adding a 25 percent "safety factor," SWI rounded the number to 200 gpd for each dwelling lot. Now, Plaintiffs argue that it should be less than half that amount – 80 gpd. [SWI, *Talking Rock Ranch Water Balance Design Memorandum* (prepared for Harvard) (November 2001), pp. 1-7, Table 1. Plaintiffs' Ex. 18.]

There is no dispute that the Arizona Department of Environmental Quality ("ADEQ") requires at least 200 gpd per dwelling unit as proposed by Harvard's engineer, SWI and Harvard's contractors, Pivotal and Santec. Pivotal informed the District that ADEQ had agreed to the 200-gpd per residential unit as the regulatory standard for committed treatment capacity for subdivided residential lots in the District for the Santec Plant. [Meeting Notes of the District (Jennifer Bartos) with Pivotal (Jason Williamson), dated April 03, 2002. **Ex. 5**.][3]

Harvard, when it applied to ADEQ for the Santec Plant's amendment to the APP through its agents, represented to ADEQ and the District that each subdivided lot in the District would receive a commitment of 200 gpd per dwelling unit. [Plaintiffs' Ex. 16, p. 4.]

Plaintiffs argued, for the first time in their Pre-Hearing Brief, that Santec informed ADEQ on June 25, 2002 that the plant might be "generally" expanded in phases when the average monthly flow rate in the treatment plant exceeds 85% of designed capacity for two consecutive months. [Plaintiffs' Ex. 20.]

[3] Pivotal also mentioned that "Harvard was loosing [sic] $20,000,000 by constructing this treatment plant." *Id.*

Plaintiffs have not produced any evidence that ADEQ approved an application for the arrangement suggested by Santec for phasing in construction of plant expansion, or that ADEQ modified in any way it regulatory requirement that each subdivided residential lot shall have 200 gpd capacity at the plant. In fact after receiving Santec's letter suggesting its phasing in plant construction, ADEQ expressed concern that issuance of subdivision approvals by the County would get ahead of actual plant constructed capacity.

ADEQ "hoped" that if the permit is approved for phasing in the plants' expanded capacity that "subdivision approvals will not be issued beyond the capacity of each [constructed] phase." In an internal email exchange from Kathleen Carson, P.E. to Matthew Hodge of ADEQ, Ms. Carson recognized the disconnection between subdivision approvals (by Yavapai County) and the expansion of treatment plant capacities in phases (by Harvard):

> One of the main concerns of the Inscription Canyon project is the issue of subidivision [sic] approvals, which is really not your concern, as the permit writer, but it is a problem anyway. The design for Inscription Canyon is based upon flow from 2500+ residential units. **Hopefully, if the APP is issued for a phased [treatment plant] project, subdivision approvals will not be issued beyond the capacity of each phase**.

[ADEQ email exchange between Matthew Hodge and Kathleen Carson, re: Inscription Canyon, dated August 26, 2002 (emphasis added). **Ex. 6**.]

ADEQ's Ms. Carson also observed that there was not much communication between ADEQ and Yavapai County's subdivision approval process to resolve this problem, and the "prototype" Santec plant being proposed by Harvard did not "leave for a whole lot of room for mistakes at this site." *Id.*

The first phase 62,500-gpd Santec Plant has been greatly exceeded by the committed capacity from dwellings within the District, not to mention the additional committed capacity for sold lots and even much more committed capacity for subdivided and unsold lots.

C. ADEQ Consistently Interprets Its Regulations as Requiring Available Capacity Be Measured by Subdivided Lots.

In seeking approval of the District's first sewage treatment plant in 1996, ADEQ informed the District of the linkage between the plant's actual constructed capacity and the number of approved lots that may be served by the District. At that time ADEQ required 360 gpd for each dwelling lot for the 120,000 gpd plant that was then installed in the District, call the SBR Plant. ADEQ explained its requirements in its July 31, 1996 letter to the District:

> It is the Department's policy that design criteria is based on 360 gallons per day per house. The plant is designed to have 120,000 gpd [gallons per day] capacity, then only 333 lots will be able to hookup. According to the Design Report, 174 lots will connect to the treatment system, therefore, the 120,000 gpd plant is capable to treat the flow from 174 lots. If the Subdivision Application shows 174 lots served by the proposed plant, the plant sizing is not a concern. But, if the Subdivision Application shows more than 333 lots or total connections over 333 lots in the future, the Department will not approve additional connections until the treatment plant expands. Be aware that the proposed [application] does not include the plant expansion.[4]

Subsequently, ADEQ adopted regulations that are the subject of this litigation which require 200 gpd for each dwelling unit. *See* A.A.C Title 18, ch. 9.

ADEQ advised the District that it would not approve connections for more lots than the plant's constructed- and approved-capacity would allow. The plant would have to be expanded before more subdivided lots would be approved or additional hookups would be allowed by ADEQ. It is important to keep in mind that initially the District had built 120,000 gpd of treatment facilities and had permitted capacity of 46,000 gpd. For the present Santec Plant, it has a built capacity of 62,500 gpd and permitted capacity of 445,500 gpd. Thus the District has the

[4] [Letter from ADEQ (Dorothy Hains, P.E.) to the District (Swayze McCrain[sic], President) dated July 31, 1996, p. 1., **Ex. 1**]

authority and is required to regulate flows to the plant through hookup as ADEQ performed previously. [*See* Plaintiffs' Ex. 13.]

In May 2006 the District inquired of ADEQ as its regulatory requirements for treatment capacity in the District and compliance under the APP. ADEQ advised the District that capacity at the treatment facility is required for compliance with the APP: "The capacity of a sewage treatment facility is necessary to satisfy the requirement of AAC R18-9-E301.C.1." [Email message from ADEQ to District (May 10, 2006). **Ex. 7**.]

ADEQ also advised the District that it must use the design flow for available sewage treatment capacity based upon **80 gpd per person** for each dwelling unit using the most recent statewide census. ADEQ said it assumes 2.34 persons per dwelling unit. Thus, the minimum required capacity per dwelling is **187.2 gpd per dwelling** (plus a peaking factor which significantly increases that amount). ADEQ then informed the District that "[i]f an application submitted to ADEQ uses a lower number of persons/dwelling, additional supporting documentation will be required." *Id*. *See* Table 1, A.A.C., Title 18, ch. 9.

The use of historic flow data or current unused plant capacity as proposed by Plaintiffs is not authorized by ADEQ or included its regulations. In limited situations ADEQ allows for a couple alternative methods of calculating treatment capacity requirements. However, none apply here.

One alternative is for "seasonal or summer dwellings" in which ADEQ permits the use of **100 gpd per resident**, provided that the developer has "recorded [a] seasonal occupancy restriction." Table 1, A.A.C., Title 18, ch. 9. Factually, this regulation is inapplicable. Harvard's consultant, Aqua Engineering, represented under its professional seal to ADEQ that "[a]s most of the residencies and public buildings served by the WWTP [wastewater treatment plant in the District] are occupied year round, large seasonal fluxes are not anticipated." [Letter from Aqua Engineering, Inc. to ADEQ (December 19, 2008), p. 7. **Ex. 8**.]

Legally, this regulation also does not apply in this case because Plaintiffs have not recorded restrictions limiting their approved subdivisions to seasonal or summer occupancy.

Nevertheless, the 80-gpd per **dwelling** approach Plaintiffs request in this lawsuit is less than what ADEQ requires 100 gpd per **person** for seasonal or summer dwellings.

Another alternative in which ADEQ may lower the residential unit capacity rate is available for retirement communities. To qualify as retirement communities, under A.R.S. § 32-2181(J), the communities in the District should have record deed restrictions limiting residency to adults or senior citizens and advertize those communities as such. Plaintiffs have not recorded deed restrictions that restrict their developments exclusively as retirement communities or limit residency to adults or senior citizens. Therefore ADEQ's regulatory standard for treatment capacity is based on 80 gpd per person for "residential dwellings," with the number of residents in a dwelling based on Arizona's most recent census, which is 2.34 people (plus a peaking multiple factor).

D. ADEQ Would Not Accept Less than 200 gpd.

The District worked to resolve the Plaintiffs' insufficient treatment capacity issue. It even hired an environmental consultant to explore ways in which Plaintiffs might comply with ADEQ regulations. Fann Environmental, LLC ("Fann") advised the Board that ADEQ would not accept less than 200 gpd per household lot and Fann recommend the District adopt 250 gpd per dwelling unit because of some higher commercial sewage treatment demands in the District. Fann stated:

> We believe that the use of 450 gpd is not prudent based on current flows to the existing plant and actual flows in similar communities in northern Arizona. We also believe the use of 165 gpd is not prudent based on fixture counts and average number of bedrooms per house within the district**. Our experience and recent discussions with ADEQ suggests that ADEQ will not accept a flow rate of less than 200 gpd**. We recommend that the facility design be based on a per household flow rate of 250 gpd with expected use and fixture counts used for all commercial type facilities. We believe that this rate will be palatable to ADEQ and represents a reasonable estimate of flow.

[Fann Environmental LLC letter to District (September 06, 2006) (emphasis added). **Ex. 9.]**

E. Plaintiffs' Scheme to Use Historic Flow Data and 80 Gallons Per Day for Each Subdivided Dwelling Unit Violates ADEQ Regulations.

Instead of using ADEQ's regulatory-approved 200-gpd per dwelling unit standard, Plaintiffs have come up with a scheme to seek more hookups by suggesting that the Court look at past sewage flows to the plant. Plaintiffs have neither sought, nor are likely to receive, approval from ADEQ for their creative effort to re-market over-committed treatment capacity by using historical data or a number less than 200 gpd per dwelling unit.

Plaintiffs argue that the Court order the District to adopt **80 gpd per dwelling unit** as the basis for available treatment capacity for subdivisions in the District. This low figure is absurd for several reasons. First, it violates the 200-gpd regulatory standard agreed upon between Harvard and ADEQ in permitting the Santec Plant. Second, ADEQ regulations require that a minimum of **80 gpd per person** be available for treatment capacity. It would mean that someone would have to impose occupancy restrictions to one person per household, which of course cannot be done. Third, the average historic flows rise and fall depending upon the number of dwelling completed or occupied. Fourth, past average flow figures ignore the peak flows which of course the plant must treat, such as on weekends and holidays. Fifth, the untenable 80-gpd figure is inapplicable to the much higher sewer treatment demand required for non-residential units, such as Harvard's TRR Compound. In additional to residential units in TRR, Harvard requires a significant amount of wastewater treatment for its Compound. Using Harvard's architectural plans, Civiltec Engineering, Inc. meticulously calculated the Compound's designed effluent treatment capacity demand of **19,869 gpd**. [Civiltec Engineering, Calculation for Talking Rock Ranch Compound (April 4, 2007), **Ex. 10**.]

F. The District's Expert Opined That 200 Gallons Per Day Should Be Available for Subdivided Lots.

Mr. Paul Hendricks, a long-time professional in the sanitation field, reported that the Santec Plant is overcommitted whether one used the 80 gpd per dwelling unit proposed by Plaintiffs or the 200 gpd per dwelling unit authorized by ADEQ. He opined that:

> The ICR District is committed under law to serve the lots that have been sold which have sewer services capacity commitments, before they can provide guaranteed services to new lots which have not received sewer service commitments. Based upon either 80 gpd per EDU [equivalent dwelling unit] or 200 gpd per EDU [equivalent dwelling unit], the existing 62,500 gpd capacity of the facility has been over committed.

[Paul Hendricks, EUSI, "ICR Sanitary District and Wastewater Treatment Facility Expert Opinion Report (November 16, 2010), p. 3. **Ex. 11**.]

IV. The Districts Past Efforts to Resolve the Treatment Capacity Issue

For years the District has attempted to resolve the committed treatment capacity issued caused by Plaintiffs in their subdividing and sale of their lots which results without an expanded wastewater treatment plant.

A. Plaintiffs Were Aware Since 2002 that the District Was Concerned about Unavailable Capacity.

On June 04, 2002, the District informed Harvard that it needed to "monitor capacity [of the treatment plant] in a proper manner." In addition, the District expressed concern that "[Pivotal] . . . has not explained fully how they plan to arrange the expansion of the treatment plant as the District grows and how they intend to collect the money from Talking Rock and Whispering Canyon to cover the cost of construction." [Email from District to Harvard (June 04, 2002). **Ex. 12**.]

On February 19, 2003, the District informed Harvard that building permits would not be approved by the District until the plant had adequate capacity. The District informed Harvard: "We (the District) cannot authorize building permits for dwellings that do not have capacity in the treatment plant." The District further informed Harvard: "So, if there is something that may prevent the continued expansion of the plant (such as money) then I (the District) should definitely be kept apprised of the situation." [Email message from District to Harvard (February 19, 2003). Defendants' Verified Answer (February 01, 2010), Ex. 9.]

A previous District Board member informed Harvard's development engineer SWI in February 2006 that the District "has the . . . challenge of trying to figure out how it is going to meet the influent demands of the District going forward with the number of lots that have been developed versus the amount of capacity presently online for waste-treatment processing. Without a plan, the District is nearing its maximum existing housing and building permit allowance in order to safely serve the District. This puts the District in an unenviable position of restricting building permits for existing lots as well as freezing additional development phases until a plan exists that can be supported by the District." [Email message from District to SWI (dated February 23, 2006). **Ex. 13**.]

With respect to Whispering Canyon, the District in November 2006 notified it that the District was concerned about inadequate treatment capacity and the District requested financial assurances to guarantee that Whispering Canyon would contribute towards the plant's expansion. The District also requested a copy of Whispering Canyon's agreement with Harvard for payment of Whispering Canyon's portion of the plant's expansion. [Letter from District to Whispering Canyon (November 14, 2006). **Ex. 14**.]

In December 2006, the Board discussed "being unable to provide capacity for full build-out of the lots that have already been approved," noting that completion of a new plant is at least 18 months out. The Board further discussed sending a letter to the County "to inform people

getting new building permits of the possibility of lack of service until the new plant is functional." [District Board Minutes of December 14, 2006, p. 3. **Ex. 15**.]

B. Sewer Service Agreements Required Plaintiffs to Construct Treatment Capacity for Lots Described in Those Agreements.

Plaintiffs attempt to twist the District's signing of "sewer service agreements" as meaning that the District admits there is available uncommitted capacity for sewage treatment in the District. Legally and factually, Plaintiffs' argument is incorrect. Sewer service agreements are signed for the sole purpose of Plaintiffs being able to receive subdivision plat approvals from the County so that they may obtain Public Reports (as explained earlier) and begin selling lots and building the sewer infrastructure, **including Harvard's expansion of committed sewage treatment capacity for those lots**.

The standard form "sewer service agreements," as provided by Yavapai County, are subject to the regulatory powers of the District and the terms and conditions contained in several other documents, including (a) the provisions in the District's Ordinance, (b) the recorded Harvard-District Agreement, (c) the recorded Whispering Canyon annexation resolution for Harvard and Whispering Canyon, and (d) the 2009 hookup moratorium. [*See* Plaintiffs Exs. 3,4, 7 and 8.]

Other standard form documents referenced by Plaintiffs have nothing to do with the sewage treatment capacity. These documents refer to "sanitary facilities" or "sewage facilities" for construction and operation of the sewer collection system, not the treatment plant or its capacity. [*See* Plaintiffs Exs. 10.]

The County claims it has no authority or procedure to determine sewage treatment capacity in the District. Also, the County said it no authority involving treatment plant issues because it was not delegated that authority by ADEQ because the designed capacity of the plant in the District is in excess of 24,000 gpd. [Letter from Yavapai County to District (January 10, 2010). **Ex. 16**.]

Separately from the County's documents, the District required Plaintiffs to submit Capacity Assurance forms to the District for the District to examine and determine if treatment capacity is available at the plant. Plaintiffs did so and the District determined capacity was **not** available and thus the Capacity Assurance forms have not been approved by the District Board. The Board has never assured Plaintiffs that the Santec Plant has capacity to treat wastewater from the Plaintiffs' subdivisions.

C. Plaintiffs Did Not Object to the Prior 2006 Moratorium.

In July 2006 the District adopted a moratorium and requested Plaintiffs to document their expected sewage treatment demands in compliance with ADEQ regulations (A.A.C. R18-9-E301 (C) (1) and (2)). [District's Resolution No. 2006-01, Defendants' Verified Answer (February 01, 2010), Ex. 12; *See* District Board Minutes, August 10, 2006, pp. 2-3. **Ex. 17**.]

Plaintiffs provided their expected sewage treatment demands in response to the District's request without objection. At that time Plaintiffs did not question the Board's legal authority in managing the flows of sewage to the treatment plant or the Board's enforcement of ADEQ regulations. Consequently, Plaintiffs have waived any right to challenge the powers of the Board to enforce the health, safety and environmental requirements under ADEQ regulations in the adoption of the 2009 hookup moratorium.

D. Plaintiffs Represented to the District They Needed 165 to 250 gpd per Dwelling Lot for their Communities.

In 2006 Plaintiffs reported the sewage treatment capacity they would each need from the plant in the District. For each of their residential lots, Harvard requested 165 gpd, The Preserve requested 200 gpd, and Whispering Canyon requested 250 gpd. [District Board Minutes, August 10, 2006, pp. 2-3. **Ex. 17**; Letter from Whispering Canyon's Engineer (Scott Lyon) to District, dated August 11, 2006. Letter from SWI to District (October 11, 2006). **Ex. 18**.]

Now, in this lawsuit, Plaintiffs illogically assert that the committed sewage capacity for each dwelling unit should be cut more than in half – to 80 gpd per unit. This illustrates the manipulation of numbers that can occur by not following the regulations of ADEQ, as applied by the District.

Harvard's own engineer SWI reported that it informally polled other neighboring communities to obtain their daily flows per dwelling and determined that Sedona experienced 150 gpd per dwelling and Prescott Valley experienced 156 to 168 gpd per dwelling. [**Ex. 18**.] Sedona and Prescott Valley dwellings have approximately double the actual treatment capacity demands per dwelling than what Plaintiffs suggest is an appropriate basis for committing treatment capacity to those lots.

V. District Has Legal Authority to Adopt the Hookup Moratorium.

In legally adopting the Hookup Moratorium, the Board acted on behalf of the District under its powers granted by A.R.S. § 48-2011. It provides in pertinent part:

> In addition to powers specifically granted, a sanitary district, acting through its board of directors, may:
>
> 1. Construct, maintain and operate within or without the district a sewerage system and necessary sewage disposal and treatment plants.
>
> 10. Formulate and adopt rules governing . . . connections to the sewer lines of the district . . .
> 11. Require permits for any and all connections described by paragraph 10 and for installation and maintenance of private sewage disposal systems.
> 12. Formulate and adopt rules governing . . . the operation and utilization of . . . treatment plants of the district.
> 18. Manage and conduct the business and affairs of the district, and do all other things incidental to exercising the powers granted by this article, . . .

The Legislature granted the District Board the legal authority to adopt resolutions to "govern connections to sewer lines" in the District and require permits for such connections. The

Hookup Moratorium is a rule setting forth the governmental policy and conditions for allowing additional connections to sewer lines in the District contingent upon the expansion of treatment facilities, in accordance with the provisions set forth in the moratorium.

In addition, the District is "a body corporate with the powers, privileges and immunities generally granted to municipal corporations by the constitution and laws of this state for the purposes prescribed by [the sanitary district statutes]." A.R.S. § 48-2001 (D). All of the alleged facts complained of by Plaintiffs constitute actions taken by the Board in their official capacity and were taken in furtherance of the purposes for which the District was formed, namely to regulate, manage and operate the sewerage system, including among other things the available and committed capacities of the sewage treatment plant in the District.

The Board's moratorium is clearly not arbitrary or capricious as alleged by Plaintiffs. Although Defendants assert that is not the legal standard for determining the actions of the District Board, Plaintiffs have not even met the threshold of the arbitrary or capricious standard.[5] Plaintiffs have over-committed treatment capacity in violation of Arizona's real estate and environmental laws.

All of the Board's actions alleged in the Complaint were administrative functions involving fundamental governmental policy of the District, including all policy-making decisions leading up to and the adoption of the rule set forth in the Hookup Moratorium. *See Kohl v. City of Phoenix*, 215 Ariz. 291, 294-95, 160 P.3d 170, 173-74 (2007) (finding that the City's decision to use a certain program to prioritize intersections was "fundamental policymaking" because it involved the exercise of discretion and the determination of whether to seek or whether to provide the resources for . . .[t]he construction or maintenance of facilities."); *see also Myers v. City of Tempe*, 212 Ariz. 128, 130, 128 P.3d 751, 753 (2006) (finding the City's decision to enter into an agreement was a fundamental governmental policy because it "involved weighing risks

[5] Defendants have filed a Motion for Summary Judgment, in the event the Court grants the Order to Show Cause, in which Defendants assert the standard for review of the Board's action is limited solely to bad faith or fraudulent activities. Defendants incorporate by reference those arguments in this Brief.

and gains, concerned the distribution of resources and assets, and required consulting the city's subject matter experts.").

VI. The Board's Residential Sewage Flow Rate Requirement Is Rational and Reasonable.

The Board has employed environmental consultants, engineers and an expert to review treatment capacity for Plaintiffs' subdivisions on several occasions. A level as unreasonable as 80 gpd per dwelling unit would never be approved by ADEQ because it requires a minimum of 80 gpd per person. As explained previously, an application must be submitted to ADEQ to prove that a lower number than 2.34 people per dwelling must be submitted to the environmental agency for consideration. As pointed out repeatedly by professionals hired by the District, ADEQ would not accept a level lower than 200 gpd. Consequently, the Board exercised its discretionary duty in a reasonable manner by adopting the Hookup Moratorium.

The 80 gpd per dwelling unit claimed by Plaintiffs is irrational and absurd under any criterion, assumption or analysis, as summarized below:

- Each residential lot in the Inscription Canyon Ranch development received 330 gpd which was approved by ADEQ.
- Harvard and Whispering Canyon assumed 350 gpd per home when they contracted with Pivotal in building the Santec Plant.
- ADEQ regulations require that plant in the District have the sewage treatment capacity to serve approved subdivision lots.
- ADEQ regulations require that the treatment plant be large enough to handle the capacity of all mainline sewer pipes connected to the plant, with a peaking factor.
- Harvard used 270 gpd per dwelling (excluding peak flows) in sizing the sewer mainline to the plant for County approval, an amount larger than the plant's existing 200 gpd per dwelling capacity.
- ADEQ requires a minimum of 80 gpd per person (before considering peaking requirements).
- ADEQ requires that the most recent Arizona census figures per household be used in determining the number of persons living in each dwelling which is 2.34 people.

- ADEQ's "seasonal or summer dwelling" regulation, although inapplicable here, would require 100 gpd per person, or 200 gpd for a 2-person dwelling.
- Harvard's engineer SWI recommended that 200 gpd per dwelling be used in sizing the Santec Plant and ADEQ approved that committed capacity per residential lot in issuing the APP for the Santec Plant.
- Santec built the existing plant using 200 gpd per dwelling in determining how many lots may be connected to the Santec plant, which equates to 312.5 residential lots that could be served (which does not include the Talking Rock Ranch Compound's sewage treatment demands).
- Civiltec advised the District that ADEQ would not approve less than 200 gpd per dwelling, and it recommended 250 gpd per dwelling, because of additional sewage commitments requested by the Talking Rock Ranch Compound.
- Plaintiffs reported to the District in 2006 that 165 to 250 gpd per dwelling unit would be required for sizing committed capacity at the treatment plant.

Under any of the above scenarios, the Board's decision in adopting the hookup moratorium was reasonable and rational.

VII. The District and Its Board Complied with the Open Meeting Law.

The District, through its Board of Directors, properly noticed the meetings and agendas before any final decision was made to adopt the resolution to prohibit additional hookups in the District. Plaintiffs have the burden of proving that the District violated the open meeting laws. *City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 803 P.2d 891 (1990).

Plaintiff-Harvard opening admits that it urged the District to discuss matters involving Harvard and its lack of funding the expansion of the treatment plant by requesting that such communications be conducted outside of an open meeting. Plaintiffs have unclean hands in now claiming that the open meeting laws have been violated when they initiated violations of those laws. [Affidavit of Craig L. Krumwiede (February 17, 2010) **Ex. 19**.][6]

[6] Plaintiff Harvard attached this Affidavit as Exhibit 4 to its Response to Defendants' Motion to Compel Financial Disclosure by Harvard (December 29, 2010).

A. The September 28, 2009 Letter to Yavapai County Was Discussed During the Open Meeting on August 13, 2009.

On August 13, 2009, the District Board held a duly noticed meeting with the agenda item of "Harvard Investments/Whispering Canyon status regarding plant design progress discussion and possible action: Update on ADEQ review of plant expansion discussion and possible action." During that open meeting, Board member Charlie Turney said "that the Board needs to discuss with Doug [Nelson] about reinstatement of the building moratorium in the event the plant does not get approved by ADEQ and/or Whispering Canyon does not pay their outstanding bills." [Minutes of the Regular Meeting of the I.C.R. Sanitary District, August 13, 2009, Ex. 6 to Plaintiffs' Verified Amended Complaint (January 29, 2010).]

In response to the Board's inquiry the District wrote a letter to Yavapai County seeking ways in which to resolve the over commitment of treatment capacity in the District. Plaintiffs falsely assert that the content of such letter must be read and discussed and approved during an open meeting which the law clearly does not require and Plaintiffs cite no authority such.

B. The December 9, 2009 Board Meeting Properly Noticed and Adopted the Hookup Moratorium.

The December 9, 2009 properly noticed that Resolution No. 2009-01 that was the subject of the August 13, 2009 open meeting and the September 28, 2009 letter to Yavapai County would be up for discussion and possible action. Plaintiff-Harvard's representative was at the open meeting and discussed the resolution with the Board. The Board deliberated and adopted the hookup moratorium resolution and distributed the resolution on the District's website as admitted by Plaintiffs. [Plaintiffs' Ex. 76.]

C. The January 6, 2010 Board Meeting Properly Noticed and Properly Adopted the Hookup Moratorium.

A special meeting to the District Board was held specifically to address the moratorium on hookups. Following the December 9, 2009 Board meeting, the District received a letter from

Plaintiffs dated December 21, 2009 indicating that Plaintiffs believe the adoption of the resolution had not complied with the open meeting laws. Defendants reviewed the circumstances and thus re-notice a meeting of the widely distributed hook resolution which was on its website.

Defendants provided Plaintiffs with a detailed explanation of the deliberations, consultations and decision, as well as background facts underpinning the hookup resolution in their December 29, 2009 letter (with attachments, including a memorandum on the effluent flow and treatment of the District) to Plaintiffs. [Defendants' Verified Answer (February 01, 2010), Ex. 1. **Ex. 20** (excluding all attachments)]

In response to Plaintiffs claimed violation of the open meeting laws, the Board notice and called a special meeting on January 06, 2010, in which some of Plaintiffs' representatives discussed in detail the resolution on hookups. [Plaintiffs' Ex. 76.]

No "unnoticed closed door meeting" occurred on January 06, 2010 "with selected members of the public" as asserted by Plaintiffs. The allegation made by one of the Plaintiffs has not been corroborated by anyone except by general and unsubstantiated allegations contained in his affidavit. For good reason, no such meeting occurred. [Plaintiff's Pre-hearing Brief, p. 5, lines 7-9; Plaintiff's Ex. 100.]

D. The January 13, 2010 Board Meeting Properly Noticed and Ratified the Hookup Moratorium.

On January 8, 2010, the District Board again gave the public notice and the agenda of an open meeting for the discussion and ratification of the hookup moratorium. [Plaintiffs' Ex. 87.]

The District posted and disseminated two notices for the January 13, 2010 open meeting: the usual regular meeting public notice which listed the agenda item of "ratify resolution 2010" and the "Notice of Public Meeting of the ICR Sanitary District for the Purpose of Ratifying Past Action Taken in Potential Violation of Open Meeting Law." The District noticed the regular public meeting of the District for the additional "purpose of ratifying past action taken in

potential violation of open meeting law" on January 13, 2010. [Plaintiffs' Verified Amended Complaint (January 29, 2010), Exs. 11 and 12.]

The District's notice for ratifying past actions of the Board was patterned after the form prepared by the Arizona Attorney General's Office. The notice and agenda for ratifying the moratorium resolution complied in all respects with Arizona law. [*Arizona's Open Meeting Law* (revised May 2001), printed from Arizona Attorney General's Office website, Chapter 7 of *Arizona Agency Handbook* (excerpts), cover page and p. 7-39, Form 7.12. **Ex. 21**.]

Plaintiffs requested and previously received a detailed explanation of the deliberations, consultations and decision of the District Board's actions in their December 29, 2009 letter (with attachments, including a memorandum on the effluent flow and treatment of the District) to Plaintiffs. [Defendants' Verified Answer (February 01, 2010), Ex. 1.]

E. All Executive Sessions Were Duly Noticed and Complied with the Open Meeting Law.

Plaintiffs falsely assert that executive session on January 13, 2010 was not duly noticed and the reference to the statutory authority was contained in detail in the meeting agenda by reference to the statutes of the open meeting law on page three. [*See* Plaintiffs' Verified Amended Complaint (January 12, 2010), Ex. 12 "Public Notice – Regular Meeting of the I.C.R. Sanitary District (January 13, 2010)." **Ex. 22**.]

F. Any Alleged Defects in Any Notices, Agendas or the Process in Adopting the Hookup Moratorium Were Duly Ratified under Arizona Law.

Untimely or ineffective actions by a public body may be ratified as the District did on two occasions, after providing proper notice and detailed information leading up to the hookup moratorium. In *Cooper v. Arizona Western College District Governing Board*, 125 Ariz. 463, 610 P.2d 465 (App. 1980), the Appellate Court held that a prior violation of the open meeting law did not forever preclude the public body from legally taking the action which occurred in the

void meeting was presented. Plaintiffs have presented no legal or factual basis for asserting that the District and its Board's actions violated the open meeting law.

Because the District Board properly ratified the moratorium resolution, Plaintiffs do not state a legitimate cause of action. There is no merit to Plaintiffs' arguments that the District Board's ratification of the hookup moratorium was either untimely or ineffective. *See Tanque Verde Unified School Dist. v. Bernini*, 206 Ariz. 200, 76 P.3d 874 (App. 2003) (a board's timely ratification in a condemnation action was found and the board's actions were not void.).

VIII. Plaintiffs Have Not Established Any Factual or Legal Bases for Relief or Attorneys' Fees.

Despite filing volumes of paper, Plaintiffs have not proven there is any factual basis or legal foundation for the relief they seek. The evidence shows that the proceedings for adoption of the resolution establishing the moratorium hookups complied with the Arizona Open Meeting Law, A.R.S. §§ 38-431 to 38-431.09.

Plaintiffs proffered no evidence that ADEQ would waive its 200-gpd per dwelling unit committed treatment capacity requirement. They are in essence asking the Court to assume the role of ADEQ by ordering the District to adopt the regulatory standard of 80-gpd per dwelling unit when ADEQ regulations clearly require a minimum of 80-gpd per person.

IX. Plaintiffs Are Urging the Court to Validate Their Violations of Arizona Laws.

By urging the removal of the hookup moratorium, Plaintiffs are actually requesting the Court to sanction their illegal sale of subdivided lots in violation of the Arizona Real Estate law. In requesting Court relief, Plaintiffs are in reality seeking the Court's approval of their violation of Arizona's environmental laws that require 200 gallons per day per dwelling subdivided unit.

In seeking more hookups, Plaintiffs are urging the Court to reallocate the over-committed sewage treatment capacity among more dwellers, which further reduces the entitlements of those lot owners who have already purchased and paid for 200 gallons per day of capacity.

X. Plaintiffs' Claims Should Be Denied.

Plaintiffs allege a potpourri of claimed violations of the open meeting law in hopes that one might stick. Despite filing voluminous documents and numerous baseless allegations, Plaintiffs have not proven any significant violation of that law or that the moratorium resolution was improperly adopted or not timely ratified.

The hookup moratorium does not preclude the sale or development of lots or the issuance of building permits. However, the Moratorium must remain in place until a reasonable time (160 days) before a larger-capacity plant will be on line to handle more planned influent.[7] The Board lawfully adopted the moratorium to protect the health, safety and public welfare, as well as the environment, of those within the District. Furthermore, the Board legitimately adopted the moratorium in the District's efforts to comply with ADEQ statutes and regulations and its APP, as advised by ADEQ and the Districts environmental consultants, engineers and expert.

Plaintiffs seek to squeeze more hookups while it continues to sell more lots without complying with Arizona's real estate laws and ADEQ's laws and regulations. Clearly, Plaintiffs have not proven the likelihood of success in going to trial on voiding the hookup moratorium. The actions of the District Board were extremely patient and reasonable under the circumstance. After spending countless hours over several years, and spending considerable funds, the Board has sought ways in which to resolve Plaintiffs' problem of over-committing treatment capacity for their subdivided lots. The District has hired a respected environmental consultant, a

[7] Plaintiffs mistakenly construe the moratorium as being lifted 160 days after the expanded capacity is available at the enlarged treatment plant. Plaintiffs' Pre-hearing Brief in Support of Order to Show Cause (December 30, 2010), p. 18, lines 17-19.

professional engineering firm, and an experienced expert to investigate and opine on solutions to Plaintiffs' self-imposed problem. None of them advised the Board to consider Plaintiffs' approach in determining sewage treatment capacities for Plaintiffs' subdivision or when the Plaintiffs' suggest that the treatment plant might be expanded.

Defendants respectfully request that Plaintiffs' claims be denied, the request for Order to Show Cause be rejected, and Defendants' be awarded their attorneys' fees.

Dated this ___ day of January, 2011.

_____

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ORIGINAL HAND-DELIVERED
on January 03, 2011 to:

Yavapai Superior Court
Yavapai County Courthouse
Clerk of the Court
120 South Cortez
Prescott, Arizona 86303

COPY HAND-DELIVERED
on January 03, 2011 to:

The Honorable Kenton D. Jones
Yavapai Superior Court
Yavapai County Courthouse
120 South Cortez
Prescott, Arizona 86303

TRANSMITTAL BY E-MAIL on
January 03, 2011 and MAILED
January 03, 2011 to:

Andrew M. Federhar/Dawn Meidinger
Fennemore Craig, P.C.
3003 North Central Avenue
Suite 2600
Phoenix, Arizona 85012-2913

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