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April 23, 2013

## HAND DELIVERY

Ms. Erica Woodford, Clerk  
Superior Court of Bibb County Georgia  
601 Mulberry Street  
Macon, Georgia 31201

RE: *Lindsay D. Holliday v. Georgia Department of Transportation and Project Engineer, Clifton Ford, PE*  
Superior Court of Bibb County, Civil Action No. 12-CV-58472  
Sell & Melton File No. 11.2465.2434

Dear Ms. Woodford:


I enclose herewith for filing in the above-styled case Defendant Georgia Department of Transportation's Closing Arguments.

Please note the date and fact of filing on the enclosed copy and return same to my courier.

I am providing a courtesy copy to Judge Ennis.

Thanking you for your assistance, I am,

Sincerely yours,



JOHN A. DRAUGHON, SR.

JAD\bc

enclosures

cc: Mary Jo Volkert, Esq. (via e-mail)  
M. Devlin Cooper, Esq. (via e-mail)  
Robert Waddell, Esq. (via e-mail and First Class mail)

IN THE SUPERIOR COURT OF BIBB COUNTY  
STATE OF GEORGIA

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SUPERIOR COURT OF  
BIBB COUNTY GEORGIA

LINDSAY D. HOLLIDAY,

Plaintiff,

v.

GEORGIA DEPARTMENT OF  
TRANSPORTATION and Project Engineer,  
CLIFTON FORD, PE.,

Defendants.

Civil Action No: 12-CV-58472

**DEFENDANT GEORGIA DEPARTMENT OF  
TRANSPORTATION'S CLOSING ARGUMENTS**

Based on the evidence presented at the Friday, April 19, 2013, hearing, the Court should grant the Georgia Department of Transportation's Motion to Dismiss for the following reasons:

1. Plaintiff's stated cause of action, to enjoin the letting of the road construction contract for Forest Hill Road, is moot.
2. Subject matter jurisdiction is lacking because Plaintiff's challenge to GDOT's approved plans for the upper section of Forest Hill Road is, in essence, a challenge under NEPA and, thus, should have been brought under the federal Administrative Procedures Act.
3. The evidence before the Court supports a finding that GDOT's actions in this matter were neither arbitrary nor capricious; therefore, GDOT is entitled to sovereign immunity and subject matter jurisdiction is lacking.

**1.**

**The contract for the road improvement program on the upper section of Forest Hill Road from Wimbish Road to Northside Drive was let for construction to R.J. Haynie and Associates, Inc. on or about December 14, 2012; therefore, Plaintiff's stated cause of action, to enjoin the letting of that contract, is moot.**

A case is moot when its resolution would amount to the determination of an abstract questions not arising upon existing facts or rights. *Collins v. Lombard Corp.*, 270 Ga. 120, 122,

508 S.E.2d 653 (1998). Dismissal of moot cases is mandatory under Georgia law. *Id.* at 121. There is no public policy exception to the doctrine of mootness. *Id.* at 122.

In his Complaint for Injunction and Temporary Restraining Order, Plaintiff specifically seeks to enjoin GDOT from “letting contracts for this road project.” However, the uncontroverted evidence at the hearing before this Court, including the testimony of Plaintiff himself, was that the contract for the construction work on the upper section of Forest Hill Road from Northside Drive to Wimbish Road was let on December 14, 2012. In fact, testimony at the hearing in GDOT’s case-in-chief established that the contract was let and awarded to R. K. Hanie & Associates in December 2012; and that the contract was subsequently executed in January 2013. As a result, the Court lacks the ability to grant Plaintiff the relief sought. Therefore, Plaintiff’s case is moot and should be dismissed for that simple reason.

## II.

**Plaintiff’s challenge to GDOT’s approved plans for the upper section of Forest Hill Road from Wimbish Road to Northside Drive is, in essence, a challenge to the Federal Highway Administration’s approval of the Project under NEPA, which does not provide a private right of action and under which an action can only be brought against the Secretary of the United States Department of Transportation under the Federal Administrative Procedures Act.**

The evidence presented at the hearing through the testimony of Van Etheridge established that the Forest Hill Road Project is a joint venture between Bibb County, the City of Macon, GDOT, and the Federal Highway Administration. Bibb County is paying for the design of the projects and utility relocation costs, while GDOT and the Federal Highway Administration are paying for right-of-way property costs and construction costs. Although under state and federal law, GDOT has the oversight, review, and approval authority for all aspects of a project that has state or federal funding, the final decision-making authority for a federally funded project rests with the Federal Highway Administration, which must determine whether a proposed project merits federal funding. Through the NEPA process, the Federal Highway Administration may

determine that it agrees with the proposed design; it may select a different design alternative of its choosing, or it may select the “no build” alternative, which is that the project is rejected and the road remains as is.

The Federal Highway Administration’s 2004 finding of no significant impact (evidenced by Defendant’s Exhibit 3(a)), and the Federal Highway Administration’s subsequent approval of the re-evaluations in 2006 (evidenced by Defendant’s Exhibit 4), in 2008 (evidenced by Defendant’s Exhibit 5) and in 2012 (evidenced by Defendant’s Exhibit 7), reveal that the Federal Highway Administration has approved all of the safety and environmental features of the current Forest Hill Road design on multiple occasions.

Further evidence of the Federal Highway Administration’s approval of the design was the uncontroverted testimony that, at the behest of Caution Macon and Plaintiff, the Inspector General of the Federal Highway Administration investigated GDOT, the County and Moreland Altobelli & Associates, Inc. for misuse of federal funds in February, 2011. In fact, the uncontroverted evidence is that that investigation went above and beyond the typical NEPA process. The Federal Highway Administration subsequently signed the 2012 Environmental Assessment (“EA”) Re-evaluation. In so doing, the Federal Highway Administration once again confirmed its acceptance of the traffic counts, traffic projections, accident data, and environmental mitigation plans presented by the Georgia Department of Transportation on behalf of Bibb County.

Thus, while Plaintiff casts his Complaint in terms of challenging illegal actions by GDOT, the actions that Plaintiff challenges are ultimately actions by the Federal Highway Administration, which has the final authority to determine what design alternative, if any, meets the stated Need and Purpose of a project. Testimony of L.N. Manchi and Gerald Ross established

that the Federal Highway Administration performed its own analysis of all of the data and projections, environmental impacts, and mitigation plans submitted to it, as it does in all federally funded projects. Indeed, Mr. Manchi testified that it is routine for the Federal Highway Administration to make three or four inquiries of the preparer of the Environmental Assessment, here, Moreland Altobelli & Associates, Inc., via GDOT prior to issuing its finding of no significant impact or “FONSI”, and prior to approving the project for the use of federal funds. Mr. Manchi specifically testified that such probing inquiries were made on numerous occasions by the Federal Highway Administration for Forest Hill Road.

Because Plaintiff’s claims fall under the NEPA process and Plaintiff has failed to exhaust administrative remedies before the FHWA, subject matter jurisdiction is lacking and the case should be dismissed.

### III.

**Even though federal regulations do not require the state and local governments to consider every possible alternative plan, GDOT did consider Plaintiff’s proposed road design and rejected it because it considered it unsafe.**

At the prior hearing held in this matter, the Court expressed some concern that a failure by GDOT to consider the alternative plan proposed by Rick Chellman and Caution Macon as part of the 2008 mediation process with Moreland Altobelli & Associates, Inc., the City of Macon, and Bibb County could be considered “arbitrary and capricious.” Although such a standard is not required under NEPA, the uncontroverted testimony at the hearing, including the testimony of Plaintiff and Mr. Chellman, was that the Department of Transportation considered that alternative plan. Ultimately, the plan was rejected because it did not represent a safe alternative and offered no improvement in roadway and pedestrian safety.

First, both Plaintiff and Rick Chellman testified that they communicated with GDOT about the plan. Chellman took offense when GDOT stated that it believed the plan to be “unsafe.” Moreover, the evidence clearly established that Plaintiff continuously communicated his concerns to all entities participating in the project that the traffic projections, road capacity, accident data and environmental impact were incorrect and overstated. He communicated such concerns to County officials, City officials and GDOT since as early as 2001 and as late as 2011. Plaintiff also participated in numerous neighborhood meetings, TAC meetings, RIP Executive Committee meetings, County Commission meetings and City Council meetings in which the Forest Hill Road Project was discussed.

GDOT was also a part of the public hearing process. Upon the request of Senator Robert Brown, GDOT met with Plaintiff separately in June, 2010 and listened to his issues. GDOT specifically responded to Plaintiff’s concerns in letter dated September 29, 2010, which stated, in part:

GDOT’s “project development process considers all elements collectively to make a selection based upon the best alternative. This process was completed and has considered all components . . . . It was determined that the methodology used to project the traffic volumes is consistent with GDOT policy, which was validated by GDOT. . . . [T]he updated data does represent a change in data; however, it does not change the overall results significantly, which would affect the current design.”

Plaintiff also communicated his concerns and counter proposals to then Chief Engineer Gerald Ross, and despite no legal obligation to do so, he and other high level GDOT staff reviewed the alternative plans proposed by Plaintiff, ultimately rejecting them for safety and other concerns. Ross testified that he personally considered the plan and rejected it because it explicitly permitted passing on a six foot wide shoulder on the right side of each through lane:

11' lanes beside 6' shoulders will definitely afford a slow deceleration area for right-turning cars, and *enough room for cars to pass left-turning cars at slower and more appropriate speeds for a residential neighborhood* (also see additional AASHTO support, below).

(emphasis added). See two pages of an April 5, 2008 letter from Mr. Chellman to Plaintiff, admitted into evidence as Defendant's Exhibit 13. Mr. Ross further testified that, in his vast experience in submitting projects to the Federal Highway Administration for funding, he did not think that the Federal Highway Administration would ever fund an alternative such as that proposed by Mr. Chellman and Plaintiff.

Finally, in 2011, Plaintiff met with the Federal Highway Administration, the County, Moreland Altobelli and GDOT to discuss his issues after he alleged that federal funds were being misused by the state and local participants in the project. Immediately prior to that meeting, FHWA demanded that GDOT, the County and Moreland Altobelli respond in writing to his and Caution Macon's specific allegations and concerns. FHWA then reviewed all responses, prepared by Moreland Altobelli and submitted through GDOT, and found no basis to take any action. Subsequent to that meeting, under NEPA, the EA had to be re-evaluated again using the most current data prior to letting the Project for construction. The 2012 re-evaluated EA concluded that the Project's scope should remain as planned and in accordance with the original Purpose and Need Statement.

To the extent that GDOT was required to consider Plaintiff's alternative plan or plans, which GDOT disputes is the legal standard, the evidence is undisputed that they did so and rejected the plan using generally accepted engineering standards.

#### IV.

**The evidence before the Court can only support a finding that GDOT's actions in this matter were not arbitrary and capricious; therefore, GDOT has sovereign immunity and the lawsuit must be dismissed for lack of subject matter jurisdiction.**

“Under the doctrine of sovereign immunity, the State cannot be sued without its consent.”

*State Bd. of Educ. v. Drury*, 263 Ga. 429, 430, 437 S.E.2d 290 (1993). The Georgia Constitution extends sovereign immunity to the State and to all of its departments and agencies except as specifically provided in Paragraph IX of Article I, Section II. Paragraph IX provides:

Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

1983 Ga. Const Art. I, § II, ¶ IX(e). As a department in the executive branch of government of the State of Georgia created pursuant to O.C.G.A. §32-2-1, *et seq.*, the Georgia Department of Transportation (herein, “GDOT”) is immune from suit except as specifically waived in the Constitution or except as provided by an act of the General Assembly specifically providing that sovereign immunity has been waived and the extent thereof. *Woodard v. Laurens Cnty.*, 265 Ga. 404, 405, 456 S.E.2d 581 (1995).

Sovereign immunity is an issue of subject matter jurisdiction. *C.E.G. Welch v. Georgia Dep't. of Transp.*, 276 Ga. App. 664, 664-665, 624 S.E.2d 177 (2005). Unless there has been a waiver of sovereign immunity, the Court does not have subject matter jurisdiction over the claim. *See Dep't. of Transp. v. Dupree*, 256 Ga. App. 668, 671, 570 S.E.2d 1 (2002). Therefore, the issue of sovereign immunity is properly addressed as a motion to dismiss pursuant to O.C.G.A. § 9-11-12(b)(1). When ruling on jurisdictional grounds, the trial court must make the determination acting as the trier of fact. *Derbyshire v. United Builders Supplies*, 194 Ga. App. 840, 842, 392 S.E.2d 37 (1990). The submission of evidence with a motion based on sovereign immunity does not convert it into a summary judgment motion, and the trial court may then



properly consider matters outside the pleadings. See *Int'l Indem. Co. v. Blake*, 161 Ga. App. 99, 100-102, 289 S.E.2d 303 (1982).

Sovereign immunity is not an affirmative defense, and the burden of establishing a waiver of sovereign immunity is not on the party asserting immunity, but, rather, the burden of establishing such waiver is on the party seeking to benefit from that waiver. See *Dupree*, 256 Ga. App. at 671 (citing *Board of Regents v. Daniels*, 264 Ga. 328, 329 446 S.E.2d 735 (1994); *Sherwin v. Dep't of Human Res.*, 229 Ga. App. 621, 625, 494 S.E.2d 518 (1997)). In fact, the courts may interfere with an exercise of the State's statutory and regulatory authority only where the state has acted wholly outside its authority; has acted arbitrarily and capriciously in its decision-making; has rendered the decision that is clearly erroneous; or has acted in violation of constitutional rights. *IBM v. Georgia Dep't of Admin. Serv.*, 265 Ga. 215, 217, 453 S.E.2d 706 (1995). Plaintiff failed to meet his burden to show that there has been an express waiver of sovereign immunity for his claim for an injunction; therefore, this Court lacks the subject matter jurisdiction to hear Plaintiff's complaints.

First, the evidence is that, under NEPA and its regulations, where an EA is performed for any construction project that does not clearly require the preparation of an Environmental Impact Statement, the state and/or local governments are not required to analyze every engineering plan put forth by the public. Rather, it should, *inter alia*, "rely on information, studies, or analyses provided by MPOs [Metropolitan Planning Organizations] for portions of the transportation system located in metropolitan planning areas" and "[c]onsider the concerns of local elected and appointed officials with responsibilities for transportation in non-metropolitan areas. 23 C.F.R. 450.208(a)(1) and (4).

The Forest Hill Road projects began in 1995 as part of Bibb County's Road Improvement Program ("RIP"). The RIP formed an Executive Committee, made up of a Technical Advisory Committee ("TAC") and a Citizens Advisory Committee ("CAC") and hired a Project Manager, Moreland Altobelli. Moreland developed a Concept Report and Need and Purpose Statement in conjunction with the local MPO, the Macon Area Transportation Study ("MATS"), and it was this Concept Report and Need and Purpose Statement that were presented to and approved by the TAC, the RIP's Executive Committee, and GDOT. Subsequently, numerous recommendations were made by citizens through public meetings and written comments, many of which were incorporated into the final plans.

Additionally, the overwhelming weight of the evidence presented at the hearing established that GDOT's actions in this matter were entirely consistent with its own operating policies as well as those generally accepted in the engineering profession and those required by the Federal Highway Administration. Indeed, the only evidence presented at the hearing that GDOT acted arbitrarily and capriciously was Plaintiff's expert Rick Chellman's unsupported testimony that GDOT's design was capricious because the plans for the northern or "upper" portion of Forest Hill Road did not support the addition of a center turn lane for purposes of safety and operational efficiency.

Mr. Chellman's opinion, however, is directly contradicted by the evidence before the Court. Under cross-examination, Mr. Chellman stated that he had no personal knowledge about GDOT's decision-making in this instance. When asked by the Court itself whether GDOT's plan were "inept," Chellman said "no". Chellman also could not find any criticism that GDOT's plan violated any safety design guidelines under the policies and guidelines set forth in the American Association of State Highway and Transportation Officials ("AASHTO") *Green*

*Book.* Most importantly, however, Chellman's only significant criticism of the project plans ended up being that the design plan for upper Forest Hill Road was overstated because the accident data for upper Forest Hill Road did not warrant a center turn lane. This opinion was based on the fact that the EA did not present the accident data, traffic data and traffic projections for each section of Forest Hill Road independently. When Chellman made his own separate calculation, he incorrectly calculated the accident rate for rear-end accidents on upper Forest Hill Road to be only 25%.

Chellman's opinion was directly contradicted by the testimony of Mr. Manchi. Mr. Manchi testified that the accident rate for the upper section of Forest Hill Road, when considered in relation to the lesser volume of traffic on that section only, supports the Need and Purpose, which is to improve roadway and pedestrian safety and operational efficiency. While crash, injury, and fatality rates for 2006-2008 were included in Table 6 of Appendix III of the 2012 Re-evaluation, for the entirety of the Forest Hill Road Corridor, Mr. Manchi testified that, upon reading Chellman's deposition the day before the hearing, he directed his employees to use the underlying data contained in Table 7 and Table 8 to calculate the crash rate, injury rate, and fatality rate separately for the *upper section* and the *lower section* of Forest Hill Road. Those calculations clearly support the Need and Purpose of the project. In fact, the crash rate on the upper section of Forest Hill Road was above the state wide accident rate in 2007 and 2008,<sup>1</sup> and the injury rate was above the statewide average in 2006 and 2007,<sup>2</sup> while the fatality rate was

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<sup>1</sup>The crash rate on the upper section of Forest Hill Road, as testified to by Mr. Manchi, was 559 in 2007 and 412 in 2008, versus statewide crash rate averages of 413 in 2007 and 383 in 2008.

<sup>2</sup>The injury rate on the upper section of Forest Hill Road, as testified to by Mr. Manchi, was 137 in 2006 and 186 in 2007, versus statewide crash rate averages of 132 in 2006 and 186 in

above the state average in 2008.<sup>3</sup> Even though all of the information necessary to make those calculations was included in the documents submitted to the Federal Highway Administration and could have easily been used by Mr. Chellman to come to the same conclusion, Chellman never took that extra step. Under cross-examination, Mr. Chellman acknowledged that Attachment 3 to the 2012 Re-Evaluation, which dealt with the traffic data and accident rates, included all of the relevant underlying data for both the upper section of Forest Hill Road from Northside Drive to Wimbish Road in Table 8 and the same underlying data for the lower section of Forest Hill Road from Wimbish Road to Vineville Avenue in Table 7. Those tables would allow anyone checking the traffic data and accident data for whether it supported the need and purpose of this project to make the necessary calculations to determine accident rates for both sections of the road separately. Although the volume of cars on the upper portion is lower than the volume of cars on the lower portion, the rate of accidents on the upper was still substantially high.

Similarly, Mr. Chellman testified that Table 5 in Attachment 3 to the 2012 Re-Evaluation showed that 53% of all traffic crashes *on the entirety* of the Forest Hill Road corridor were rear-end collisions. He found it of great significance that GDOT did not consider the percent of rear-end collisions only for the upper section of Forest Hill Road, since the Need and Purpose of that phase of the project is to improve roadway and pedestrian safety and operational efficiency on upper Forest Hill Road. While Mr. Chellman subsequently assembled the accident data solely for the upper section in Table 2 of Plaintiff's Exhibit 1, he failed to calculate what percentage of

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2007.

<sup>3</sup>The fatality rate on the upper section of Forest Hill Road, as testified to by Mr. Manchi, was 7.2 on the upper section of Forest Hill Road versus 1.82 as the statewide average in 2007.

the accidents in relation to the actual number of vehicles on the upper section was rear-end collisions. Mr. Chellman testified that he prepared his demonstrative exhibit to separate out the relevant upper section accident statistics from the purportedly conflated and allegedly skewed numbers presented by GDOT in its section of Attachment 3 dealing with crash data. However, under cross-examination, Mr. Chellman admitted that the percentage of accidents on the upper section of Forest Hill Road occurring as a result of rear-end collisions between 2004 and 2010 was still over 52 percent, slightly more than 0.6 percent less than the percentage of rear-end collisions occurring on the entirety of the Forest Hill Road corridor. Further, Mr. Manchi, who admitted as an expert witness to testify upon the NEPA process at the hearing, testified that, beginning in 2009, the Federal Highway Administration no longer allowed environmental assessments and re-evaluations to present only one phase of construction on a larger road project. As a result, the Federal Highway Administration required GDOT to submit traffic data, traffic data, traffic projections, accident data, environmental studies, and mitigation plans for the entirety of the Forest Hill Road corridor, not merely the upper section. While GDOT could have also presented separate data analysis for the upper and lower sections of Forest Hill Road, it was not required to do so, and the uncontroverted testimony of the witnesses, including Mr. Chellman, established that all of the underlying data needed to perform such analyses was included in the 2012 Re-Evaluation documents.

Additionally, the testimony of both L. N. Manchi and Gerald Ross was that the Federal Highway Administration performed its own analysis of all of the data and projections and environmental impacts and mitigation plans submitted to it, both in this instance and in all others. Indeed, Mr. Manchi testified that it was routine for the Federal Highway Administration to make three or four inquiries of Moreland Altobelli & Associates, Inc. via GDOT prior to

issuing its finding of no significant impact and prior to approving this project for the use of federal funds. Mr. Manchi testified that these probing inquiries by the Federal Highway Administration were made about the upper section of Forest Hill Road, and Moreland Altobelli and Associates, Inc. and GDOT responded to the same.

Finally, Chellman acknowledged that he has never submitted any road designs or supporting documentation to the Federal Highway Administration for approval, that he has limited knowledge on the Federal Highway Administration's requirements for such proposals, and that he could not authoritatively state whether the Federal Highway Administration, in fact, requires NEPA documents for projects such as Forest Hill Road to include the data for the entire corridor, not each section separately.

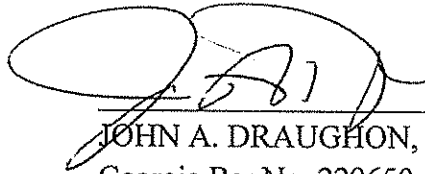
Ultimately, the uncontroverted evidence presented at the hearing shows that GDOT, through either its own employees or through the required prequalified consultants, conducted several thorough and sifting examinations of all of the data and projections and plans presented to GDOT by Moreland Altobelli & Associates, Inc. for all phases of the Forest Hill Road project, including the upper section, and that the Federal Highway Administration also conducted its own thorough and sifting and independent examination of the same materials.

Plaintiff's allegation that there has been a vast conspiracy to build the currently designed Forest Hill Road three lane portion for the upper section in the face of a complete lack of support for those plans and the Need and Purpose thereof is simply not supported by the evidence and it is clear that neither GDOT, the Federal Highway Administration nor Bibb County through its consultant Moreland Altobelli acted arbitrarily and capriciously in developing this project. Indeed, it is the Federal Highway Administration that determines whether this project qualifies for federal funds; in so finding, it has determined that GDOT has met its burden to qualify for

such funds. The Federal Highway Administration employs, as noted by Mr. Manchi under oath, traffic engineers, civil engineers, and other appropriate experts to determine whether the need and purpose of a proposed project is supported by the underlying data, and in this instance, it determined that the Need and Purpose of increasing roadway and pedestrian safety and operational efficiency on the upper section of Forest Hill Road is in fact met and supported in this instance under the currently approved and let design plans. This Court cannot substitute its judgment for that of the Federal Highway Administration and should therefore find that GDOT did not act arbitrarily and did not act capriciously. By so finding, the Court must dismiss Plaintiff's Complaint as it is barred by GDOT's sovereign immunity.

Respectfully submitted,

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JOHN A. DRAUGHON, SR.  
Georgia Bar No. 229650  
Special Assistant Attorney General  
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Attorneys for Defendants

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served the within and foregoing **DEFENDANT GEORGIA DEPARTMENT OF TRANSPORTATION'S CLOSING ARGUMENT** by electronic mail and U.S. mail delivering a true and correct copy of the same to :

Robert J. Waddell, Jr.  
McGuire Woods, LLP  
Suite 2100, Promenade  
1230 Peachtree Street, NE  
Atlanta, GA 30309  
rwaddell@mcguirewoods.com

This 23<sup>rd</sup> day of April, 2013.



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JOHN A. DRAUGHON, SR.  
Georgia Bar No. 229650