Court of Appeal Case No. A142808

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

First Appellate District – Division One

GREEN VALLEY LANDOWNERS ASSOCIATION,

Appellant,

vs.

CITY OF VALLEJO,

Respondent.

Order filed August 20, 2014
Judgment filed August 20, 2014
The Honorable Arvid Johnson, Judge (Ret.)
Solano Superior Court No. FCS042938

APPELLANT'S APPENDIX [CRC 8.124]

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IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SOLANO

GREEN VALLEY LANDOWNERS ASSOCIATION, a California mutual benefit corporation, on behalf of its members and others similarly situated,

Plaintiff,

vs.

THE CITY OF VALLEJO, and DOES 1 through 1000, inclusive,

Defendants.

Case No. FCS042938

CLASS ACTION (Plaintiff Class) (CCP §382)

COMPLAINT FOR:

1. **BREACH OF IMPLIED CONTRACT;**
2. **BREACH IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING;**
3. **BREACH OF CONTRACT (THIRD PARTY BENEFICIARY);**
4. **BREACH OF DUTY TO CHARGE REASONABLE WATER RATES;**
5. **BREACH OF FIDUCIARY DUTY**
6. **INJUNCTIVE RELIEF(AGAINST SALE);**
7. **INJUNCTIVE RELIEF(AGAINST SALE WITHOUT LAND);**
8. **INJUNCTIVE RELIEF (SURCHARGE FEE);**
9. **INJUNCTIVE RELIEF(FUTURE RATES);**
10. **SPECIFIC PERFORMANCE;**
11. **DECLARATORY RELIEF;**
12. **ACCOUNTING.**

DEMAND FOR JURY TRIAL

Plaintiff GREEN VALLEY LANDOWNERS' ASSOCIATION ("Plaintiff"), on behalf of its members and all others similarly situated, complains and alleges the following against THE CITY OF VALLEJO ("Defendant") and DOES 1-1000:

NATURE OF THE CASE

1. This action involves the right of approximately 809 families, schools, churches, businesses and property owners who reside outside Defendant's city limits to receive affordable water.

2. In the late 1800's and early 1900's, Defendant created a large municipal water system for the benefit of its own residents called the Lakes Water System ("**LWS**").

3. Over the years, Defendant contractually agreed to allow approximately 809 non-resident families and property owners in rural Solano and Napa Counties to connect to the LWS and receive potable water.

4. For almost 100 years, the use and cost of operating the LWS was shared between Defendant's residents and the non-resident customers of the LWS. Plaintiff is informed and believes that from its inception until 1992, Defendant's city residents paid at least 98% of the cost of operating the LWS.

5. In 1992, Defendant unexpectedly and unilaterally breached its contractual and legal obligations to the non-resident customers of the LWS by passing an ordinance which required the approximately 809 non-resident families and property owners within the LWS to pay 100% of the cost of operating the LWS. Water rates for the non-resident customers skyrocketed as a result.

6. In 2009, Defendant passed another ordinance which further dramatically raised rates on the 809 non-resident families and property owners within the LWS. The 2009 ordinance, like the 1992 ordinance, forces the 809 non-resident families and property owners to pay 100% of the cost of the LWS. This breach continues to this date and is the subject of a tolling agreement entered into between Plaintiff and Defendant.

7. In essence, after constructing a large-scale waterworks project for its own municipal benefit, Defendant unilaterally divested itself from the LWS and left a handful of disenfranchised non-residents to pay for the cost of operating the entire municipal waterworks system.

8. To compound this harm, for the first 100 years of its existence, Defendant failed to maintain and replace the infrastructure within the LWS. As a result, not only were the 809 non-residents forced to pay for the entire cost of operating a municipal water system, but the municipal water system forced upon them was terribly outdated and in need of immediate repair and replacement.

9. Currently, the majority of the infrastructure within the LWS is thirty to fifty years or more beyond its useful life and in need of immediate replacement at an approximate cost of $24,000,000. Within the next decade, additional infrastructure will need to be replaced at an approximate cost of $6,000,000. Defendant intends to pass these deferred capital costs, plus the ordinary costs of operating the LWS, onto just 809 non-resident connections.

10. Because just 809 connections are paying to operate and maintain a municipal-sized water system, current rates for the LWS customers are among the very highest in the State. However, to make matters even worse, after neglecting to maintain or improve the LWS and after unilaterally divesting itself of any obligation to pay for the cost of the LWS, Defendant now intends on selling the LWS to a private, investor-owned utility. If such a sale were to occur, rates within the LWS (already among the highest in the state) could increase by approximately 300% over the next decade alone.

11. Plaintiff, on behalf of its members and all others similarly situated, seeks to enjoin Defendant's illegal rate structure, to force Defendant to once again share in the cost of operating the LWS, and to recover damages incurred as a result of Defendant's actions.

JURISDICTION AND VENUE

12. The Court has personal jurisdiction over Defendant because Defendant is physically present and situated in Solano County, State of California.

13. Venue is proper in this Court in accordance with California Code of Civil Procedure §394(a) because Solano County is the county in which Defendant is situated.

PARTIES

14. Plaintiff GREEN VALLEY LANDOWNERS ASSOCIATION is now, and at all times mentioned in this Complaint was a California mutual benefit corporation with its principal offices in Solano County, California.

15. Defendant CITY OF VALLEJO is an incorporated California municipality.

16. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1 through 1000, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.

17. Plaintiff is informed and believes and thereon alleges that, at all times herein mentioned, each of the defendants sued herein was the agent and/or employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and/or employment

CLASS ACTION ALLEGATIONS

18. Plaintiff brings this action on behalf of its members and all others similarly situated as a class action pursuant to California Code of Civil Procedure §382. The class that Plaintiff seeks to represent is composed of and defined as follows:

> **All persons and entities who paid for, are paying, or will pay for water service (as defined in Vallejo Municipal Code §11.04.140) from Vallejo within Vallejo's "Lakes service area" (as defined in Vallejo Municipal Code §11.48.010(B)) since July 1, 2009 (the "Class").**

19. This action has been brought and may properly be maintained as a class action against Defendant pursuant to California Code of Civil Procedure §382 because there is a well-defined community of interest in the litigation and the proposed Class is easily ascertainable.

20. *Numerosity*. Plaintiff does not know the exact size of the Class, but is informed and believes, and on that basis alleges that there are approximately 809 metered connections within the LWS. All of these metered connections are outside Defendant's city limits in unincorporated Solano and Napa Counties. Plaintiff believes that the Class is so numerous that joinder of all Class members is impracticable.

21. *Common Questions Predominate*. This action involves common questions of law and fact to the potential Class and each Class member's claim derives from Defendant's actions as described herein. The common questions of law and fact involved predominate over questions that only affect individual Class members. Thus, proof of a common or single set of facts will establish the right of each member of the Class to recover. Among the questions of law and fact common to the Class are:

a. Whether Defendant breached an implied contractual agreement with the each Class member (or their predecessors in interest) to pay for the cost of the LWS;

b. Whether Defendant breached its fiduciary duties of care and loyalty to each Class member by refusing to pay for any of the LWS and by failing to care for and maintain the infrastructure within the LWS;

c. Whether a rate structure which excludes Defendant from any obligation to pay for the cost of the LWS is unlawful and unreasonable;

d. Whether and to what extent injunctive relief should be imposed on Defendants to prevent a further breach of Defendant's contractual, fiduciary and legal obligations to pay its share of the LWS;

e. Whether and to what extent injunctive relief should be imposed on Defendants to prevent Defendant from selling the LWS to a private, investor owned utility;

f. Whether and to what extent injunctive relief should be imposed on Defendants to prevent Defendant from selling the pipes, pumps, storage tanks and water treatment plant within the LWS separately from the three reservoirs, the related watershed and non-watershed real property associated with the LWS, and water rights associated with the LWS;

g. Whether and to what extent Defendant has received money from the Surcharge and Connection Fees (as defined below) which are due and owing to the Class for the benefit of capital improvements within the LWS;

h. Whether the Class is the intended third party beneficiary of written agreements in which Defendant agreed to provide certain quantities of free water to certain customers within the LWS, and whether Defendant breached those written agreements by passing the cost of providing free water onto the Class.

22. *Typicality*. The claims of Plaintiff's members are typical of the Class. Plaintiff's members reside in Green Valley in unincorporated Solano County. Plaintiff is informed and believes and on that basis alleges that the vast majority of the non-resident customers of the LWS reside in Green Valley. Plaintiff's members sustained the same injuries and damages arising out of Defendant's conduct as did the rest of the Class which likewise receives its water from Defendant's LWS. The injuries and damages of each Class member were caused directly by Defendant's wrongful conduct as alleged herein.

23. *Adequacy*. Plaintiff will fairly and adequately protect the interest of all Class members because Plaintiff is a mutual benefit corporation formed for the purposes of protecting the interests of its members and non-members in rural Solano and Napa Counties who also receive water from the

LWS. Plaintiff has formed a series of "water committees" which, for over two decades, have protected the interests of all Class members. Money has been contributed to Plaintiff from its own members and from non-members who are a part of the Class, such as those Class members who reside in Gordon Valley and elsewhere. Volunteers from the Class, consisting of members and non-members of Plaintiff, have served on Plaintiff's water committees. In 2009, Plaintiff, on behalf of all Class members, entered into a tolling agreement with Defendant. This tolling agreement has been extended and signed by mutual agreement ten times between 2009 and 2013. Since 2009, Plaintiff's water committee has worked with and negotiated with Defendant to find a solution to the problem at hand. Plaintiff and its counsel have the necessary financial resources to adequately and vigorously litigate this class action. No conflict of interest exists between Plaintiff and the Class members because all questions of law and fact regarding liability are common to the Class members and predominate over the individual issues which may exist, such that by proving the claim of its own members, Plaintiff necessarily will establish Defendant's liability to all Class members. Plaintiff and counsel are aware of their fiduciary responsibilities to the Class members and are determined to diligently discharge those duties seeing the maximum possible recovery for the Class members.

GENERAL ALLEGATIONS

A History of the Lakes Water System – 1893-1992

24. The LWS is a large municipal water system created by Defendant in the late 1800's and early 1900's to provide potable water for municipal purposes within the City of Vallejo. The LWS was one of the very first municipal water works projects within the State of California.

25. The LWS consists primarily of three reservoirs and large, municipal-sized transmission pipes designed to convey water from the reservoirs over 20 miles to the City of Vallejo.

26. Two reservoirs, Lakes Frey and Madigan, are located in the hills above Solano County's Green Valley area. Lake Frey was completed in 1894. Lake Madigan was completed in 1908. These reservoirs hold a combined 2,819 acre-feet of water and are situated above a diversion dam constructed by Defendant in 1893.

27. In addition to Lakes Frey and Madigan, Defendant owns approximately 1,171 acres of non-watershed land and 1,400 acres of watershed land in the vicinity of Lakes Frey and Madigan in Solano County.

28. For decades, water from Lakes Frey and Madigan was transmitted to the City of Vallejo via a 14-inch transmission pipeline which brought water to Defendant's residents via Jameson Canyon (the "**Green Line**").

29. Shortly after their creation, Lakes Frey and Madigan were insufficient to meet the water needs of Defendant's growing municipal population. The increasing demand prompted Defendant to apply for a permit to store 37,000 acre-feet of water in the hills above Gordon Valley in Napa County. The permit was subsequently amended to limit storage to 10,000 acre-feet.

30. In pursuance of its permit, Defendant constructed a dam and reservoir in Napa County known as Lake Curry. Lake Curry was completed in December 1925. Lake Curry is fed by a 19-square mile watershed in Napa County owned by Defendant.

31. Until 1992, water from Lake Curry was transmitted to the City of Vallejo via a 24-inch gravity-fed transmission line (the "**Gordon Line**").

32. In order to transport the water from Lakes Frey, Madigan and Curry to the City of Vallejo, Defendant needed to acquire easements from the property owners along the Green Line, the Gordon Line and elsewhere within the LWS service area.

33. In exchange for granting the easements, Defendant contractually agreed in writing to provide a certain quantity of "free water" to the owners of the servient estates. In other instances, Defendant condemned by eminent domain the property needed for the easements, a power available to Defendant because it was putting the property to a public use for its own residents.

34. In addition to the easements, Vallejo also contractually agreed in writing to provide certain quantities of "free water" to certain non-residents in exchange for riparian water rights.

35. Plaintiff is informed and believes and on that basis alleges that Defendant contractually obligated itself in writing to provide some quantity of free water to approximately 60 non-resident customers and that these 60 customers were the first, or among the first, non-resident consumers of Defendant's LWS.

36. Over the decades, Defendant contractually agreed to provide potable water to additional non-resident customers within the LWS. The non-resident consumers were geographically located on or near the Gordon Line and Green Line. The decision to provide potable water to the non-resident customers within the LWS was incidental and auxiliary to the main purpose of providing water to Defendant's own resident municipal population. These service extensions to non-residents were done without the benefit of a master plan for the LWS and, on information and belief, were granted as a means for Defendant to raise additional revenue.

37. Plaintiff is informed and believes and on that basis alleges that but for Defendant's agreement to allow the non-resident customers to connect to the LWS, most, if not all, of the areas outside of the City of Vallejo currently served with LWS water, would never have been developed due to, amongst other things, the lack of reliable and/or adequate ground water sources and/or the lack of other sources of surface water from surrounding municipalities or otherwise. The non-residents who developed their properties did so in reliance upon the promise of adequate, reasonable priced water from Defendant's LWS.

38. In 1958, Defendant passed an ordinance (No. 324 N.C.) which required all new non-resident LWS customers to agree to annex to Defendant "upon demand."

39. From 1893 through the 1950's, the municipal water needs of Defendant were met exclusively by the LWS. In the 1950's Vallejo obtained water rights from the Sacramento River Delta (Cache Slough) and contracted for water from the Solano Project (Lake Berryessa). Vallejo never applied these water rights for the benefit of the non-resident customers within the LWS.

40. New drinking water treatment regulations were adopted by the California Department of Health Services in 1991.

41. In 1992, water quality from Lake Curry had deteriorated and the Lake Curry treatment plant could no longer provide treated water which met the new California Department of Health Services requirements.

42. Instead of fixing the water quality problem, or improving the water treatment facilities, Defendant voluntarily and unilaterally elected to shut down the Lake Curry water treatment plant and to

discontinue all municipal use of Lake Curry water. As a result of Defendant's decision, for the first time in approximately 99 years, Defendant no longer received any water from the LWS.

43. Although Defendant voluntarily stopped using LWS water within its municipal boundaries in 1992, Defendant represented to the Federal Government in 2003 that Lake Curry was "critical to the City in meeting its existing and future [water] demands." In 2008, Defendant represented to the State Water Resource Control Board that it "continues to attempt to be able to use Lake Curry water for municipal use" within the City of Vallejo.

Beginning in 1992, Defendant Passes the Full Cost of the LWS onto 809 Non-Residents

44. From 1893 through 1992, the costs of the LWS were paid for predominately by Defendant and/or Defendant's resident population. Although the non-resident consumers who did not receive "free water" paid for their share of the LWS, the overwhelming majority of the costs were paid for by Defendant's municipal population which always vastly exceeded the population of non-residents within the LWS service area.

45. Between 1893 and 1951, Defendant's residents and the non-resident customers of the LWS paid the same water rates. Beginning in 1951, Defendant began to charge all non-resident water customers water rates which were sometimes slightly higher than the rates it charged its own municipal residents. Although the non-resident customers of the LWS sometimes paid slightly higher rates beginning in 1951, at all times, Defendant continued to pay for the vast majority of the cost of the LWS.

46. Plaintiff is informed and believes, and on that basis alleges that from the creation of the LWS in the late 1800's until 1992, Defendant and/or Defendant's municipal residents paid at least 98% of the cost of the LWS and the non-resident customers of the LWS paid less than 2% of the cost of the LWS (the "**Historic Cost Sharing Ratio**").

47. At no time prior to 1992 did Defendant represent or suggest to the non-resident customers that the cost of the LWS would be paid for other than through the Historic Cost Sharing Ratio.

48. In 1992, the same year it elected to discontinue using LWS water, Defendant passed an ordinance (No. 1211 N.C. (2d), the "**1992 Ordinance**") which broke with the Historic Cost Sharing

Ratio and passed 100% of the cost of operating the LWS onto approximately 809 non-resident customers. The non-resident customers had no say and no vote in this decision.

49. To put this in perspective, in 1991, the cost of the LWS was paid for by approximately 30,809 metered connections, with approximately 30,000 of those metered connections being within the City of Vallejo. The 1992 Ordinance had the effect of shifting the cost of the LWS onto the backs of the 809 non-resident customers of the LWS. This dramatic departure from the Historic Cost Sharing Ratio represented a 98% drop in the number of connections paying for the cost of the LWS.

50. As a result of the 1992 Ordinance, water rates for the non-resident customers immediately increased by over 230%. In the same 1992 Ordinance, the municipal residents of the City of Vallejo received a significant decrease in their water rates. Plaintiff is informed and believes and on that basis alleges that the decrease in the rates charged to Defendant's resident customers was attributable to the fact Defendant was no longer contributing to the costs of the LWS.

51. Defendant raised water rates for the non-resident LWS customers again in 1995 pursuant to Ordinance No. 1334 N.C. (2d) (the "**1995 Ordinance**"). In addition to increasing water consumption charges, the 1995 ordinance increased the fixed service charges on the non-resident LWS customers by approximately 625%. A large portion of the increased fixed costs were attributable to an "upgrade surcharge" (as described below) to pay for the cost of making deferred improvements to the LWS.

52. In 2009, Defendant enacted another ordinance (No. 1619 N.C. (2d), the "**2009 Ordinance**") which substantially raised the water consumption and fixed service charges on the non-resident customers of the LWS. The 2009 Ordinance took effect on July 1, 2009 and will end on June 30, 2014.

53. Plaintiff is informed and believes and on that basis alleges that a majority of the members of the Class timely and adequately objected to the 2009 Ordinance under Article 13D, §4(e) of the California Constitution which prohibits the levying of a property related fee over the protests of a majority of the property owners. Despite the protests of the Class, Defendant maintained that a majority of all its water customers, both within and outside Defendant's city limits, needed to object to the 2009 Ordinance. In other words, a majority protest of the non-resident customers was insufficient,

and instead, a majority of Defendant's total water service customers, both its resident customers and the non-resident customers combined, were needed to block the 2009 Ordinance from taking effect.

54. Like the 1992 Ordinance and the 1995 Ordinance, the 2009 Ordinance continues the practice of shifting 100% of the cost of operating the LWS onto the approximately 809 non-resident customers.

55. Plaintiffs are informed and believe and on that basis allege that the cost of operating the LWS between July 1, 2009 and June 30, 2014 will total at least $12,241,807. The approximately 38,000 metered connections currently within the City of Vallejo will pay none of these costs.

56. As a result of the 2009 Ordinance, the non-resident customers of the LWS currently pay water consumption charges which are approximately 350% higher than the rates paid by similarly situated customers within the City of Vallejo and fixed service charges which are at least approximately 450% higher than the rates paid by similarly situated customers within the City of Vallejo. Plaintiff is informed and believes and on that basis alleges that current water rates within the LWS are among the highest in the State of California.

57. On June 9, 2009, Plaintiff, on behalf of the Class, entered into a tolling agreement with Vallejo (the "**Tolling Agreement**"). The Tolling Agreement tolls "any applicable statutes of limitations regarding a potential challenge to the rate increase [which occurred in 2009]." The Tolling Agreement was extended for a tenth time on June 13, 2013 and expired on December 31, 2013.

58. Plaintiff is informed and believes, and on that basis alleges, that Defendant is in the process of preparing a new five-year rate study for the LWS which will take effect on July 1, 2014. Like the 2009 Ordinance and the 1992 and 1995 Ordinances before that, all costs of the LWS will continue to be borne by the 809 non-resident customers.

59. Defendant's breach continues and is ongoing with each bi-monthly imposition and collection of water consumption charges and fixed service charges from the Class.

The Current Condition of the LWS

60. Between 1893 and 1992, the LWS consisted of two separate transmission systems (the Green Line and the Gordon Line, respectively) which transmitted water from two separate water sources (Lakes Frey and Madigan, on the one hand, and Lake Curry on the other) to the City of Vallejo.

Separate water treatment plants existed at Lake Curry and in Green Valley below Lakes Frey and Madigan.

61. As a result of its historic configuration, non-resident customers of the LWS who received water from one transmission line were connected to customers who received water from the other transmission line only in the sense that both customers received water from Defendant. As a practical matter, customers along the Green Line received water from a separate source and through a separate transmission system from those customers along the Gordon Line, and vice versa.

62. When Defendant unilaterally decided to abandon Lake Curry and to stop using water from the LWS in 1992, it changed the purpose and physical design of the LWS dramatically from a transmission system (which brought water to the City of Vallejo) into a distribution system (which distributed water within the LWS service area). This unforeseeable change has resulted in a number of inefficiencies which have increased costs, pose a threat to health and safety and have otherwise damaged the Class:

a. The 809 non-resident customers Defendant agreed to provide water to were geographically located upon or near the historic Gordon and Green transmission lines. The system prior to 1992 was coherent only because the non-resident customers were easily served with water along the transmissions lines which were otherwise being used to transport water to the City of Vallejo.

b. After Defendant stopped transmitting water to its own city residents, the LWS lacked any coherence as a distribution system. The current LWS has been described as an "octopus" with arms (i.e., water lines) extending across a geographically large and incoherent service area which includes Spurs Ranch in American Canyon, Old Cordelia, parts of Willotta Oaks and Gordon Valley, in addition to Green Valley. Water is distributed to these customers through miles of oversized ancient pipes as a result of Defendant's decision to so fundamentally transform the LWS.

c. Because the Gordon Line and Green Line were built to convey large quantities of water directly from the water source to the residents of the City of Vallejo, the size of the pipes and other infrastructure within the LWS greatly exceeds the needs of a water system reconfigured to serve just 809 connections. Plaintiff is informed and believes and on that basis alleges that water systems with fewer than 1,000 metered connections generally rely on ground water and/or surface water treated

and supplied by a municipality, and that it is very unusual for a system of fewer than 1,000 metered connections to contain reservoirs or a water treatment plant.

d. Due to new federal and state drinking water requirements, in 1997, Defendant installed a costly water treatment plant in Green Valley at an original cost of almost $7,000,000. The water treatment plant is operated twenty-four hours a day, seven days per week. In 2005, Defendant added a "Mi Ex" filtration system to the Green Valley water treatment plant to remove organic contaminants at a cost of almost $1,000,000. As discussed above, water systems with fewer than 1,000 connection typically do not have their own water treatment plant, but due to the fact Defendant no longer paid for or used water from the LWS, this huge infrastructure cost was paid for (and continues to be paid for) by just 809 customers within the LWS.

e. In addition, the three reservoirs within the LWS have a combined storage capacity which is approximately twenty-six times the annual water use of the non-resident LWS customers, resulting in increased maintenance costs and other inefficiencies. In order to reduce the cost of maintaining the earthen dams at Lakes Frey, Madigan and Curry, Defendant has lowered the water levels in all three lakes and has discontinued all use of Lake Curry as a drinking water resource. Plaintiff is informed and believes that the decision to lower the water levels in Lakes Frey, Madigan and Curry was done to prevent a leak or breach of the dams. Rather than fixing the underlying problem, Defendant's decision to lower the water levels in Lakes Frey and Madigan has resulted in deteriorating water quantity and quality, as well as higher water treatment costs.

f. With respect to the Gordon Line, since water was no longer being transmitted (via gravity) down the Gordon Line to the City of Vallejo, Defendant was forced to pump water almost ten miles up the oversized 24" Gordon Line to serve approximately 64 households residing in the Gordon Valley area. Because of the age of the Gordon Line and the change in its use (from a large transmission pipe which brought large quantities of water directly from the source into a reverse fed distribution line which pumps water uphill to a handful of end-use customers in Gordon Valley), service interruptions are common. The useful life of the Gordon Line expired in or about 1970 and the approximate replacement cost for this ten mile section of pipe (even after accounting for the oversized

pipe) is over $7,000,000. This means that it will cost approximately $115,500 per connection to continue to provide water to the customers in Gordon Valley.

g. In addition, because of the time it takes to transmit water from the Green Valley water treatment plant up the oversized Gordon Line, Plaintiff is informed and believes and on that basis alleges that the current configuration and distribution of water along the Gordon Line raises water quality concerns, in particular, the presence of organic chemical contaminants (specifically, trihalomethanes or "THM's") which exceed or may exceed existing or new maximum contaminant levels under federal and state water quality regulations. THM's are regulated contaminants under federal and state drinking water regulations and their presence in drinking water is linked to liver, kidney and central nervous system problems and an increased risk of cancer.

h. Today, customers as far away as Spurs Ranch in American Canyon are provided LWS water. Plaintiff is informed and believes that there are approximately twenty customers in Spurs Ranch who receive water from a single metered water connection. These customers receive water which is transmitted through approximately six miles of the oversized 14" Green Line (which previously transmitted water through Jameson Canyon to the City of Vallejo). The useful life of this particular section of the Green Line expired in or about 1960, and the replacement cost (even after adjusting for the oversized pipe) is almost $5,000,000. The approximate cost to replace the six miles of pipe to serve approximately twenty customers in Spurs Ranch is roughly $250,000 per customer.

i. As discussed above, Defendant contractually agreed to provide free water to approximately 60 non-resident connections within the LWS in exchange for easements. The incremental cost of providing this free water was previously shared by Defendant's city customers. However, when Defendant divested itself from any obligation to contribute to the LWS, there were fewer connections over which to spread the cost of providing free water. Today, in addition to the cost of operating a municipal utility, the paying customers are forced to subsidize a significant number (approximately 7.5%) of the customers who receive free water.

63. At or about the time Defendant passed the 1992 Ordinance, a meeting was held at the Green Valley Country Club. Present at the meeting were members of Plaintiff as well as City of Vallejo representatives Walt Gram (the then City Manager) and Tony Intintoli (the then City Mayor).

64. At the meeting, the City Manager and City Mayor represented to the Class that the LWS was free of liabilities and debt.

65. In reality, at the time Defendant made this representation, the vast majority of the assets within the LWS were already beyond their useful life representing a multi-million dollar unfunded liability. Plaintiff first discovered this liability when it received a copy of the appraisal (described below) in or about June 2013.

66. When Plaintiff received the appraisal in or about June 2013, Plaintiff also first learned that virtually no capital improvements had been made to the infrastructure within the LWS since its inception in the late 1800's and early 1900's. Plaintiff is informed and believes, and on that basis alleges, that between 1894 and 1992, Defendant performed virtually no capital improvements to or replacements of the infrastructure within the LWS, including the pipes, pumps, storage tanks, and the earthen reservoirs. Defendant's failure to maintain or improve the LWS was done over the objections and pleas of the chief reservoir keeper for the LWS. As a result, when Defendant unilaterally decided it would no longer honor its obligation to pay for the cost of the LWS, a significant portion of the infrastructure within the LWS was already beyond its useful life and in need of immediate replacement.

67. Plaintiff is informed and believes, and on that basis alleges, that after 1992, very few capital improvements, especially with respect to the aging pipe infrastructure, were made within the LWS. Further, of the few capital improvements that were made, most were made after 1992 and were therefore paid for by the Class exclusively.

68. The appraisal revealed that tens of millions of dollars of infrastructure within the LWS is thirty to fifty years beyond its useful life and in need of immediate replacement. It also shows that within the next ten years, millions of dollars of additional infrastructure within the LWS will have reached the end of its useful life and will need to be replaced. Defendant expects the Class to pay for 100% of these unfunded liabilities.

69. Plaintiff is informed and believes, and on that basis alleges, that as a result of Defendant's decision to pass 100% of the cost of the LWS onto the approximately 809 non-resident families and property owners, the per-connection asset cost of the LWS is the highest, or amongst the highest, in the State of California.

70. Because of the age of the pipe infrastructure within the LWS, Defendant is unable to and will not allow others to test fire-fighting facilities within the LWS for fear that the extra water pressure generated by such a test would cause a failure of the pipes.

71. Plaintiff is informed and believes, and on that basis alleges, that in order to save costs associated with maintaining and operating the earthen dams within the LWS, Defendant unilaterally elected to lower the water levels in Lakes Frey, Madigan and Curry, thereby reducing storage capacity and water quality within the LWS and making the water more expensive to treat under existing federal and state water quality regulations.

Defendant's Appraisal and Proposed Sale of the LWS to a Private Utility

72. In or about November 2009, a meeting was held between members of Plaintiff's board of directors and Robert Adams (the then City Manager), John Nagel (the then City Attorney) and Erik Nugteren (the then City Water Superintendent).

73. At the meeting, Defendant's representatives represented to Plaintiff that Defendant would negotiate in good faith with Defendant in connection with a possible sale of the LWS by Defendant to Plaintiff.

74. At the same meeting, Defendant's representatives promised that Defendant would prepare an appraisal of the LWS to serve as a basis for good faith negotiations, and that the appraisal would include all assets within the LWS, including the watershed and non-watershed land associated with the LWS, water rights, and the pipes, pumps, storage tanks, treatment plant and other infrastructure within the LWS.

75. Defendant's representatives promised to provide a copy of the appraisal to Plaintiff and to meet with Plaintiff in early 2010 to discuss a possible transfer of the LWS to Plaintiff. No such appraisal was produced and no such meeting occurred.

76. Plaintiff is informed and believes and on that basis alleges that after these representations were made, Defendant commissioned two separate appraisals. The first appraisal included only the watershed and non-watershed land surrounding Lakes Frey and Madigan and was completed on or about December 31, 2010. The second appraisal, which was completed in late 2012 or early 2013, included only the pipes, pumps, storage tanks and water treatment plant within the LWS.

77. Plaintiff received a copy of the appraisal of the pipes, pumps, storage tanks and water treatment plant in or about June 2013 – almost four years after Defendant agreed to commission an appraisal. Plaintiff was not informed of the separate appraisal of the land surrounding Lakes Frey and Madigan, and to date, has not received a copy of the land appraisal, despite Plaintiff's repeated requests for a copy of the land appraisal.

78. The appraisal of the pipes, pumps, storage tanks and water treatment plan is deeply flawed and on information and belief, was artificially inflated in order to boost the purchase price (and thereby increase the cost to the Class after a sale to a private, investor-owned utility). The flaws of the appraisal, include, amongst other things:

a. The appraised price of the LWS improperly includes millions of dollars in "capital in aid of construction" which is capital contributed to Defendant by the Class and others (as opposed to being paid for by Defendant). Examples of capital in aid of construction include the Surcharge and the Connection Fees (both defined below). Including capital in aid of construction in the valuation of the LWS means that the Class would be forced to pay for the same assets twice, once when it paid for the assets originally, and a second time when the costs of the same assets are recoupled (plus profit) from the Class by the private, investor owned utility.

b. Defendant failed to maintain historical cost records (even for recently completed components of the LWS). As a result, the appraisal relied upon substantially higher replacement cost values which further inflated the value of the LWS.

c. The appraisal improperly failed to exclude from the value the cost of the infrastructure which was overbuilt well in excess of the existing needs of the LWS customers.

d. The appraisal improperly attributed a useful life to assets which were decades beyond their useful life further inflating the alleged value of the LWS.

79. Plaintiff is informed and believes, and on that basis alleges, that Defendant has engaged and is in the process of engaging in negotiations with more than one private, investor-owned utility to arrange a sale of the pipes, pumps, storage tanks and treatment plant within the LWS. Plaintiff is informed and believes, and on that basis alleges, that the inflated and flawed appraisal of the pipes, pumps, storage tanks and water treatment plant is being used as the basis for such negotiations.

80. Defendant has issued or will be issuing a request for proposals from private, investor-owned utilities to purchase the pipes, pumps, storage tanks and treatment plant within the LWS.

81. Plaintiff is informed and believes, and on that basis alleges, that Defendant has not offered to include any of the three reservoirs or any of the watershed and non-watershed real property in the proposed sale to a private, investor-owned utility.

82. Plaintiff is informed and believes, and on that basis alleges, that a sale to a private, investor-owned utility would not include the sale of the reservoirs or any water rights, meaning the LWS would be sold without any vested water rights or direct access to watershed lands.

83. Plaintiff is informed and believes, and on that basis alleges, that Defendant intends on separately selling the three reservoirs or their surrounding watershed and non-watershed real property and to keep the proceeds of such a sale for the benefit of itself, its general fund and its own residents without investing any of the proceeds into the LWS.

84. Plaintiff is informed and believes, and on that basis alleges, that Defendant intends on separately selling the water rights associated with the LWS and to keep the proceeds of such a sale for the benefit of itself, its general fund and its own residents.

85. Plaintiff is informed and believes, and on that basis alleges, that Defendant will only consider selling the LWS to Plaintiff (or a water district or service district created by Plaintiff) at a premium price of almost $3,000,000 over and above Defendant's already flawed appraised value of the LWS. The premium allegedly represents a "loan" or "subsidy" Defendant purportedly "lent" to the LWS customers prior to 2009. Plaintiff was unaware of such loan or subsidy prior to its receipt of the appraisal and never consented to nor entered into any loan transaction with Defendant.

Surcharge and Connection Fees

69. The 1995 Ordinance imposed an upgrade surcharge (the "**Surcharge**") on the non-resident customers within the LWS.

70. The express purpose of the Surcharge was "to generate sufficient revenue to construct improvements in the Lakes Water System; primarily, water treatment facilities improvements and requirements that will comply with the new surface water treatment required by the U.S. Environmental

Protection Agency and the State of California, Department of Health Services, and associated debt service" (Vallejo Municipal Code §11.48.181).

71. The 1995 Ordinance expressly required that "The moneys received [from the Surcharge fee] shall be deposited into a dedicated account, and shall be expended and/or withdrawn from said account only for the purposes herein indicated" (*id.*).

72. The 1995 Ordinance also provided that "The Lakes Water System upgrade surcharge shall expire on September 30, 2015. The surcharge shall be removed on the date of the next succeeding billing cycle" (*id.*, §11.48.183).

73. Plaintiff is informed and believes, and on that basis alleges, that money received from the Surcharge fee was not deposited into a dedicated account and was comingled with other funds maintained by Defendant.

74. Plaintiff is informed and believes, and on that basis alleges, that money received from the Surcharge fee was not used for the purposes of constructing improvements within the LWS, but was instead used for other purposes, including, but not limited to supplementing Defendant's general municipal fund or other enterprise funds.

75. Plaintiff is informed and believes, and on that basis alleges, that the debt associated with Defendant's municipal water system (including the LWS) has been refinanced on multiple occasions and will not be repaid before September 30, 2015, and that as a result, Defendant intends to continue the Surcharge after its express expiration date on September 30, 2015.

76. In addition to the Surcharge, Defendant has charged and continues to charge water connection fees for new water service connections within the LWS (the "**Connection Fee**").

77. The purpose of the Connection Fee is "is to create revenue to assist in providing for capital costs of additions and improvements to the municipal water system" (*id.*, §11.16.021).

78. The ordinance further provides that all Connection Fees "shall be deposited in the capital reserve account of the municipal water system fund" and the "shall be used, after approval of the city council, to pay for acquisition, installation, or construction of components (including easements, rights-of-way and/or land) of the municipal water system" (*id.*).

79. Plaintiff is informed and believes, and on that basis alleges, that money received from the Collection Fees were not deposited into a capital reserve account for the benefit of the LWS or otherwise, and were not used to pay for acquisition, installation, construction or other capital improvements within Defendant's municipal water system (including the LWS).

Government Claims Act Requirement

80. On December 3, 2013, Plaintiff filed and served a claim pursuant to California Government Code §910 on behalf of Plaintiff and the Class. To date, Defendant has not issued any determination as to Plaintiff's claim.

81. On December 3, 2013, Plaintiff also served Defendant with a detailed demand letter explaining the factual and legal basis for Plaintiff's claims as well as a detailed letter discussing the flaws in Defendant's appraisal of the infrastructure within the LWS. To date, Defendant has not received any response to either the demand letter or the appraisal letter.

FIRST CAUSE OF ACTION

Breach of Implied Contract

(Against Defendant and Does 1-1000)

82. Plaintiff incorporates by reference all of the allegations contained in the Paragraphs above as though fully set forth herein.

83. The relationship between Defendant and the Class is contractual.

84. Defendant and the Class (or their predecessors in interest) entered into written, oral and/or implied contracts whereby Defendant agreed to provide potable water service to the Class, and, in exchange, the Class promised to pay for such water at reasonable rates.

85. A municipality which provides water to non-residents has a duty and obligation to continue to supply water to the non-resident consumers. As a result, these contracts are binding on Defendant and its assigns and successors in interest.

86. A contract may be express or implied. A promise may be stated in words, either or written, or may be inferred wholly or partly from conduct. An implied promise is one, the existence and terms of which are manifested by the acts and conduct of the parties, interpreted in the light of the

subject-matter and of the surrounding circumstances. There is no legal difference between an express promise and an implied promise.

87. In each of the contracts between Defendant and the Class (or their predecessors in interest) there was an implied promise and/or agreement that Vallejo (and its successors and assigns) would indefinitely share in the cost of operating, maintaining and improving the LWS and that the costs would be shared according to the Historic Cost Sharing Ratio.

88. The Class performed all, or substantially all, of the significant things that the contract required the Class to do.

89. Defendant first breached the contract in 1992 when it passed the 1992 Ordinance. Defendant has continued to breach the implied contract, most recently in 2009 when it passed the 2009 Ordinance. The 2009 Ordinance violated the Historic Cost Sharing Ratio and imposed upon the Class the obligation to pay for 100% of the cost of operating, maintaining and improving the LWS.

90. Defendant cannot, by ordinance or otherwise, change, modify or alter its contracts with the Class without the consent of the Class. The Class did not consent to the 2009 Ordinance or to any rate structure which deviated from the Historic Cost Sharing Ratio.

91. This breach is a continuing and ongoing violation and occurs and repeats anew with each bi-monthly levy and assessment of the water fees upon the Class. The breach arising from the 2009 Ordinance is also subject to the Tolling Agreement.

92. The Class was damaged as a proximate result of Defendant's breach in the estimated amount of at least approximately $11,996,971, subject to proof at trial. Damages, at a minimum, equal the difference between what the Class paid under the 2009 Ordinance and what the Class should have paid had Defendant honored the contractual Historic Cost Sharing Ratio.

93. Plaintiff is further entitled to recover from Defendant its reasonable costs and attorney fees incurred in bringing this action pursuant to Code of Civil Procedure §1021.5.

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SECOND CAUSE OF ACTION

Breach of Implied Covenant of Good Faith and Fair Dealing

(Against Defendant and Does 1-1000)

94. Plaintiff incorporates by reference all of the allegations contained in the Paragraphs above as though fully set forth herein.

95. In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other party to receive the benefits of the agreement.

96. Each party to a contract has a duty to do everything that the contract presupposes that he will do to accomplish its purpose and a duty not to prevent or hinder performance by the other party.

97. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.

98. The purpose of the LWS was to supply water to the City of Vallejo and the parties justifiably expected that the costs of the LWS would be shared, according to the Historic Cost Sharing Ratio, between Defendant and the Class.

99. Defendant breached the implied covenant of good faith and fair dealing when it passed the 1992 Ordinance, the 1995 Ordinance and again when it passed the 2009 Ordinance. These ordinances violated and breached the Historic Cost Sharing Ratio and imposed upon the Class the obligation to pay for 100% of the cost of operating, maintaining and improving the LWS in violation of the common purpose of the parties' agreements and the justified expectations of the Class.

100. This breach is a continuing and ongoing violation and occurs and repeats anew with each bi-monthly levy and assessment of the water fees upon the Class. The breach arising from the 2009 Ordinance is also subject to the Tolling Agreement.

101. The Class was damaged as a proximate result of Defendant's breach in the estimated amount of at least approximately $11,996,971, subject to proof at trial. Damages, at a minimum, equal the difference between what the Class paid under the 2009 Ordinance and what the Class should have paid had Defendant honored the contractual Historic Cost Sharing Ratio.

102. Plaintiff is further entitled to recover from Defendant its reasonable costs and attorney fees incurred in bringing this action pursuant to Code of Civil Procedure §1021.5.

THIRD CAUSE OF ACTION

Breach of Contract (Third Party Beneficiary)

(Against Defendant and Does 1-1000)

103. Plaintiff incorporates by reference all of the allegations contained in the Paragraphs above as though fully set forth herein.

104. The Class were and are expressly intended beneficiaries of the written agreements entered into between Defendant and the approximately 60 non-resident property owners within the LWS who receive some quantity of "free water."

105. In its agreements with the recipients of free water, the owners of the servient estates provided to Vallejo easements and/or riparian water rights. The easements were necessary for the construction of the reservoirs, the Green Line and the Gordon Line. Without the easements and water rights, the LWS could not have been constructed and neither Defendant nor any of the non-resident customers of the LWS ever would have received water from the LWS. The non-resident customers are therefore the intended beneficiaries of these agreements.

106. Instead of paying market cash consideration for the easements and/or riparian water rights, Vallejo agreed to provide certain quantities of "free water" in lieu of cash payment. The obligation to provide free water was Defendant's and the obligation ran with the land meaning that Defendant was contractually obligated to provide free water to the servient properties in perpetuity.

107. Defendant breached its obligation to the Class when it divested itself of any obligation to pay for the LWS and forced the members of the Class to pay for and subsidize the provision of free water to the servient property owners. In essence, Defendant transferred its contractual obligation to provide and pay for the free water and has improperly shifted that obligation to the Class.

108. This breach is a continuing and ongoing violation and occurs and repeats anew with each bi-monthly levy and assessment of the water fees upon the Class and is subject to the Tolling Agreement.

109. The Class performed all, or substantially all, of the significant things that the contract required the Class to do.

110. The Class was damaged as a proximate result of Defendant's breach in the estimated amount of at least approximately $900,000, subject to proof at trial. Damages, at a minimum, equal the consumption and fixed costs associated with providing free water to the owners of the servient estates since the enactment of the 2009 Ordinance.

111. Plaintiff is further entitled to recover from Defendant its reasonable costs and attorney fees incurred in bringing this action pursuant to Code of Civil Procedure §1021.5.

FOURTH CAUSE OF ACTION

Breach of Duty to Charge a Reasonable Water Rate

(Against Defendant and Does 1-1000)

112. Plaintiff incorporates by reference all of the allegations contained in the Paragraphs above as though fully set forth herein.

113. A municipality which supplies water to non-residents has a duty to provide such water at a reasonable rate. A rate which is unreasonable, unfair or fraudulently or arbitrarily established is discriminatory and therefore unlawful. The Class has a primary right to not be charge an unreasonable rate for water service.

114. A water rate which excludes Defendant from any obligation to pay for the costs and expenses of operating the LWS is an unreasonable and unlawful rate. As alleged above, it was always implied understood and agreed that the cost of operating the LWS would be shared by Defendant and/or its resident water customers and therefore spread among a large rate paying base.

115. Defendant breached its obligation to provide water at a reasonable rate when it passed the 1992 Ordinance, the 1995 Ordinance and the 2009 Ordinance which breached the Historic Cost Sharing Ratio and imposed upon the Class the obligation to pay for 100% of the cost of operating, maintaining and improving the LWS.

116. As a result of Defendant's breach, the Class pays water rates which are almost five times higher than the rates paid for by Defendant's resident water users.

117. This breach is a continuing and ongoing violation and occurs and repeats anew with each bi-monthly levy and assessment of the water fees upon the Class. The breach arising from the 2009 Ordinance is also subject to the Tolling Agreement.

118. The Class has been damaged as a proximate result of Defendant's breach in the estimated amount of at least approximately $11,996,971, subject to proof at trial. Damages, at a minimum, equal the difference between what the Class paid under the 2009 Ordinance and what the Class should have paid had Defendant honored the contractual Historic Cost Sharing Ratio.

119. Plaintiff is further entitled to recover from Defendant its reasonable costs and attorney fees incurred in bringing this action pursuant to Code of Civil Procedure §1021.5.

FIFTH CAUSE OF ACTION

Breach of Fiduciary Duty

(Against Defendant and Does 1-1000)

120. Plaintiff incorporates by reference all of the allegations contained in the Paragraphs above as though fully set forth herein.

121. Defendant holds title to the LWS as a mere trustee and is bound to apply it to the use of the Class who are the beneficiaries of such trust.

122. The trustee-beneficiary relationship between Defendant and the Class gives rise to a fiduciary relationship between Defendant and the Class, meaning that Defendant owes fiduciary duties of care and loyalty to the Class.

123. Defendant's fiduciary duty of loyalty disallows the pursuit of self-interest. Where there are more than two beneficiaries of a trust (here, the non-resident customers and Defendant's residential customers), the trustee (here, Defendant) has a duty to deal impartially with them.

124. Defendant's fiduciary duty of care requires it to act with care, competence and diligence in the operation and maintenance of the LWS. Defendant has a duty to provide reasonably adequate facilities to serve the present and future needs of the LWS and the Class. The fiduciary duty of care requires Defendant to maintain, repair and replace existing infrastructure so that it may continue to meet the needs of the LWS customers.

125. Defendant breached its fiduciary duties to the Class by, amongst other things:

a. Putting the interests of its own residents ahead of the interests of the Class by unilaterally breaching the Historic Cost Ratio and unilaterally deciding it would no longer contribute to the cost of the LWS;

b. Failing to fund, replace or improve infrastructure which had passed the end of its useful life;

c. Failing to fund, replace or improve infrastructure which has caused a threat to health and safety to the LWS customers and their property;

d. Putting the interests of its own residents ahead of the interests of the Class by failing to fund, replace or improve infrastructure within the LWS during the time Defendant honored the Historic Cost Sharing Ratio and then passing the aged system onto the Class with the expectation that the Class would pay 100% of the cost to replace and improve the same infrastructure;

e. Not attempting to sell and not selling excess watershed and/or non-watershed real property associated with the LWS in order to fund deferred and necessary replacement and improvement projects within the LWS;

f. Putting the interests of its own residents ahead of the interests of the Class by forcing the Class to pay 100% of the cost of the LWS while simultaneously representing to the Federal and State Governments that the LWS (specifically, Lake Curry) was critical to Defendant's own municipal water supply;

g. Putting the interests of its own residents ahead of the interests of the Class by passing the 2009 Ordinance over the objections of the Class while simultaneously maintaining that the LWS was its own separate water system (distinct from Defendant's own municipal water system);

h. Misrepresenting the condition of the LWS as being free of debt and liabilities when in fact at the time such representations were made, the LWS had multi-million dollar unfunded capital improvement liabilities.

126. As a result of Defendant's breach, the Class has been damaged in the estimated amount of at least approximately $11,996,971, subject to proof at trial.

127. Plaintiff is further entitled to recover from Defendant its reasonable costs and attorney fees incurred in bringing this action pursuant to Code of Civil Procedure §1021.5.

SIXTH CAUSE OF ACTION

Injunctive Relief (Sale of LWS)

(Against Defendant and Does 1-1000)

128. Plaintiff incorporates by reference all of the allegations contained in the Paragraphs above as though fully set forth herein.

129. Plaintiff is informed and believes and on that basis alleges that Defendant presently intends to sell the pipes, pumps, storage tanks and water treatment facilities within the LWS to a private, investor owned utility.

130. Plaintiff is informed and believes and on that basis alleges that Defendant intends the sale to be free and clear of Defendant's contractual, fiduciary and legal obligations to share in the cost of the LWS according to the Historic Cost Sharing Ratio, or otherwise. As a result, Defendant intends that the transferee, assignee or successor in interest to the LWS would be allowed to pass the full cost of operating, maintaining and improving the LWS onto the Class.

131. Plaintiff has demanded and requested that Defendant refrain from selling the pipes, pumps, storage tanks and water treatment facilities within the LWS to a private, investor owned utility, but Defendant has failed and refused the request and, unless restrained by an order of this Court, will continue to attempt to sell the pipes, pumps, storage tanks and water treatment facilities within the LWS to a private, investor owned utility.

132. Defendant's wrongful conduct, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to Plaintiff, including, but not limited to the following:

a. Defendant intends that the transferee, assignee or successor in interest to the LWS would take title free and clear of Defendant's contractual, legal and fiduciary duties to the Class as detailed in this Complaint;

b. Defendant intends that the transferee, assignee or successor in interest to the LWS would be allowed to pass the full cost of operating, maintaining and improving the LWS onto the Class which would result in a significant increase in the already high water rates being paid by the Class;

c. If the LWS is sold (in whole or in part) to a private, investor owned utility, such utility would not only be allowed to recover not only the full purchase price and the full cost of operating, maintaining and improving the LWS from the Class, but it would also be entitled to earn a profit in addition to recovering the costs of operating, maintaining and improving the LWS, thereby driving costs for the Class even higher;

d. If the LWS is sold (in whole or in part) to a private, investor owned utility, water rates for the non-resident customers (already among the highest in the State) could triple, making the cost of water prohibitively expensive and causing a dramatic decline in property values within the LWS service area;

e. Because the appraised price of the LWS improperly includes millions of dollars in "capital in aid of construction", the Class would be forced to pay for the same assets twice, once when it paid for the assets originally, and a second time when the costs of the same assets are recoupled (plus profit) from the Class by the private, investor owned utility;

f. Because of the other flaws in the appraisal, as alleged above, the private, investor owned utility would recoup (plus profit) costs which should have been excluded from the value of the LWS;

g. The sale would not include any of the watershed or non-watershed land associated with the LWS and thus the proceeds of the eventual sale of that land would not be set aside for capital improvements within the LWS, but would instead be placed in Defendant's general fund for the benefit of Defendant's residents;

h. According to Defendant's appraisal, the sale would not include any water rights, meaning that there is no way of ensuring that the Class would have any vested water rights once the LWS is transferred to a private, investor-owned utility, and, even if such rights could be obtained, the Class would be forced to pay for such rights on the open market, plus profit payable to the investor-owned utility.

133. Plaintiff has no adequate remedy at law for the injuries which would be suffered in that it will be impossible for Plaintiff to determine the precise amount of damage it will suffer if Defendant's conduct is not restrained because Plaintiff is unaware what costs, plus profits, the private, investor

owned utility will recover from the Class, and Plaintiff will be forced to institute a multiplicity of suits, against Defendant and its successor, transferee or assignee to obtain adequate compensation for its injuries. Plaintiff would likewise be precluded from purchasing the system by virtue of the $3,000,000 "premium" Defendant intends to collect upon any sale of the LWS to Plaintiff or the Class.

134. Plaintiff therefore seeks injunctive relief, both preliminary and permanent, to enjoin and stop Defendant from selling all or any part of the LWS during the pendency of this litigation.

135. Plaintiff is further entitled to recover from Defendant its reasonable costs and attorney fees incurred in bringing this action pursuant to Code of Civil Procedure §1021.5.

SEVENTH CAUSE OF ACTION

Injunctive Relief (Sale of LWS without Land)

(Against Defendant and Does 1-1000)

136. Plaintiff incorporates by reference all of the allegations contained in the Paragraphs above as though fully set forth herein.

137. Plaintiff is informed and believes and on that basis alleges that Defendant presently intends to sell the pipes, pumps, storage tanks and water treatment facilities within the LWS to a private, investor owned utility.

138. Plaintiff is informed and believes and on that basis alleges that Defendant does not intend on selling any of the watershed or non-watershed excess real property associated with the LWS as a part of the threatened sale to a private, investor owned utility.

139. Rather, Plaintiff is informed and believes and on that basis alleges that Defendant intends to sell the watershed or non-watershed excess real property associated with the LWS in a separate sale and to apply the proceeds for the benefit of Defendant's general municipal fund without investing any of the proceeds into the LWS.

140. The policy of the State of California encourages the sale of excess land associated with a water system and requires that proceeds from the sale be invested for capital improvements within the water system.

141. As a trustee and fiduciary of the Class, in the event the watershed or non-watershed excess real property associated with the LWS is sold, Defendant is obligated and required to invest all

of the sale proceeds into the LWS for purposes of performing deferred maintenance and capital improvements.

142. Plaintiff has demanded and requested that Defendant refrain from selling any part of the LWS without including in the sale the watershed or non-watershed excess real property associated with the LWS which are required to be invested into the LWS for purposes of performing deferred maintenance and capital improvements. Defendant has failed and refused the request and, unless restrained by an order of this Court, will continue to attempt to sell the pipes, pumps, storage tanks and water treatment facilities within the LWS separately without including the watershed or non-watershed excess real property and without investing the proceeds of the real property into the LWS.

143. Defendant's wrongful conduct, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to Plaintiff in that the proceeds of the watershed or non-watershed excess real property associated with the LWS are desperately needed to fund over a century of deferred maintenance and capital improvements within the LWS. Without these proceeds, the Class will be obligated to fund the deferred maintenance and capital improvements by itself in amounts which are not yet known. Given the magnitude of the deferred improvements which must be made, the costs to the Class would be astronomical and financially unbearable for many, if not most, Class members.

144. Plaintiff has no adequate remedy at law for the injuries which would be suffered in that it will be impossible for Plaintiff to determine the precise amount of damage it will suffer if Defendant's conduct is not restrained because Plaintiff is unaware what costs, plus profits, the private, investor owned utility will recover from the Class, and Plaintiff will be forced to institute a multiplicity of suits to obtain adequate compensation for its injuries.

145. Plaintiff therefore seeks injunctive relief, both preliminary and permanent, to enjoin and stop Defendant from (i) selling any part of the LWS without including in that sale the watershed or non-watershed excess real property associated with the LWS and (ii) applying the proceeds of any sale of the watershed or non-watershed excess real property associated with the LWS to purposes other than deferred maintenance and capital improvements within the LWS.

146. Plaintiff is further entitled to recover from Defendant its reasonable costs and attorney fees incurred in bringing this action pursuant to Code of Civil Procedure §1021.5.

EIGHTH CAUSE OF ACTION

Injunctive Relief (Surcharge Fee)

(Against Defendant and Does 1-1000)

147. Plaintiff incorporates by reference all of the allegations contained in the Paragraphs above as though fully set forth herein.

148. The purpose of the Surcharge (which began with the 1995 Ordinance) was "to generate sufficient revenue to construct improvements in the Lakes Water System; primarily, water treatment facilities improvements and requirements that will comply with the new surface water treatment required by the U.S. Environmental Protection Agency and the State of California, Department of Health Services, and associated debt service" (Vallejo Municipal Code §11.48.181).

149. The 1995 Ordinance provides that "The Lakes Water System upgrade surcharge shall expire on September 30, 2015. The surcharge shall be removed on the date of the next succeeding billing cycle" (*id.*, §11.48.183). This promise creates a contractual and legal obligation upon Defendant to end the Surcharge on September 30, 2015.

150. Plaintiff is informed and believes, and on that basis alleges, that Vallejo intends to continue the Surcharge after its expiration on September 30, 2015.

151. Plaintiff has demanded and requested that Defendant refrain from continuing the Surcharge past September 30, 2015, but Defendant has failed and refused the request and, unless restrained by an order of this Court, will continue to impose the Surcharge after September 30, 2015.

152. Defendant's wrongful conduct, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to Plaintiff. Recovering Surcharge fees imposed after September 30, 2015 will require a multiplicity of actions against Defendant. Further, the Surcharge fees may be spent and the prospects of recovering the Surcharge fees from Defendant is questionable given its financial history.

153. Plaintiff has no adequate remedy at law for the injuries which would be suffered in that it will be impossible for Plaintiff to determine the precise amount of damage it will suffer if Defendant's conduct is not restrained because Plaintiff is unaware what Surcharge fee Defendant will attempt to

collect from the Class, and Plaintiff will be forced to institute a multiplicity of suits to obtain adequate compensation for its injuries.

154. Plaintiff therefore seeks injunctive relief, both preliminary and permanent, to enjoin and stop Defendant from continuing the Surcharge (in any form) after September 30, 2015.

155. Plaintiff is further entitled to recover from Defendant its reasonable costs and attorney fees incurred in bringing this action pursuant to Code of Civil Procedure §1021.5.

NINTH CAUSE OF ACTION

Injunctive Relief (Future LWS Rates)

(Against Defendant and Does 1-1000)

156. Plaintiff incorporates by reference all of the allegations contained in the Paragraphs above as though fully set forth herein.

157. Plaintiff is informed and believes and on that basis alleges that on July 1, 2014, new rates for the LWS Class members will go into effect. Defendant's rate structure in 2014 and beyond, like the existing rate structure, will require the Class to pay 100% of the cost of operating, maintaining and improving the LWS.

158. Plaintiff has demanded and requested that Defendant refrain from forcing the Class to pay 100% of the cost of operating, maintaining and improving the LWS and has demanded and requested that Vallejo share in the cost of operating, maintaining and improving the LWS pursuant to the Historic Cost Sharing Ratio. Defendant has failed and refused the request and, unless restrained by an order of this Court, will continue to breach its contractual, fiduciary and legal duties and obligations to the Class by not honoring the parties implied agreement and the Historic Cost Sharing Ratio and by forcing the Class to pay 100% of the cost of operating, maintaining and improving the LWS.

159. Defendant's wrongful conduct, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to Plaintiff in that the Class will be forced, in violation of their contractual and legal rights, to continue to pay 100% of the cost of operating, maintaining and improving the LWS.

160. Plaintiff has no adequate remedy at law for the injuries which would be suffered in that it will be impossible for Plaintiff to determine the precise amount of damage it will suffer if Defendant's

conduct is not restrained. Because the future costs of operating, maintaining and improving the LWS are unknown, damages, if awarded for any future rate structures, cannot be properly ascertained at this time (since they have not yet been incurred) and will be inadequate to compensate the Class. In addition, any future rate structure which exclude Defendant and its residents from paying for any of the LWS will necessitate a multiplicity of legal actions to enforce the contractual and legal rights of the Class. Further, overcharges collected from the Class may be spent and the prospects of recovering the overcharges from Defendant is questionable given its financial history.

161. Plaintiff therefore seeks injunctive relief, both preliminary and permanent, to enjoin and stop Defendant from imposing any future rate structure which excludes Defendant and/or its municipal residents from their obligation to share in the cost of operating, maintaining and improving the LWS according to the Historical Cost Sharing Ratio.

162. Plaintiff is further entitled to recover from Defendant its reasonable costs and attorney fees incurred in bringing this action pursuant to Code of Civil Procedure §1021.5.

TENTH CAUSE OF ACTION

Specific Performance

(Against Defendant and Does 1-1000)

163. Plaintiff incorporates by reference all of the allegations contained in the Paragraphs above as though fully set forth herein.

164. The relationship between Defendant and the Class is contractual.

165. Defendant and the Class (or their predecessors in interest) entered into written, oral and/or implied contracts whereby Defendant agreed to provide potable water service to the Class, and, in exchange, the Class promised to pay for such water at reasonable rates.

166. In each of the contracts between Defendant and the Class (or their predecessors in interest) there was an implied promise and agreement that Vallejo would share in the cost of operating, maintaining and improving the LWS indefinitely according to the Historic Cost Sharing Ratio.

167. The Class performed all, or substantially all, of the significant things that the contract required the Class to do.

168. Defendant breached the contract in 2009 when it passed the 2009 Ordinance. The 2009 Ordinance did not honor the Historic Cost Sharing Ratio and imposed upon the Class the obligation to pay for 100% of the cost of operating, maintaining and improving the LWS. This breach is a continuing and ongoing violation.

169. Beginning on July 1, 2014 and thereafter, Defendant will establish a new rate structure or structures for the LWS. Like the 2009 Ordinance, Defendant intends on forcing the Class to pay 100% of the cost of operating, maintaining and improving the LWS in violation and breach of the parties' implied agreement that Defendant and/or its municipal residents would share in the cost of operating, maintaining and improving the LWS for so long as the LWS was in existence according to the Historic Cost Sharing Ratio.

170. With respect to future rate structures which violate the parties' implied agreement and the Historic Cost Sharing Ratio, the Class has no adequate legal remedy. Future rate structures which exclude Defendant and its residents from paying for any of the LWS will necessitate a multiplicity of legal actions to enforce the contractual and legal rights of the Class. Further, since the future costs operating, maintaining and improving the LWS are unknown, damages, if awarded for any future rate structures, cannot be properly ascertained at this time (since they have not yet been incurred) and will be inadequate to compensate the Class. In addition, overcharges collected from the Class may be spent and the prospects of recovering the overcharges from Defendant is questionable given its financial history.

171. The Class is entitled to specific performance of the implied contract and/or agreement between Defendant and the Class (or their predecessors in interest), by court decree, among other things, ordering Defendant to share in the cost of operating, maintaining and improving the LWS according to the Historical Cost Sharing Ratio.

172. Plaintiff is further entitled to recover from Defendant its reasonable costs and attorney fees incurred in bringing this action pursuant to Code of Civil Procedure §1021.5.

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ELEVENTH CAUSE OF ACTION

Declaratory Relief

(Against Defendant and Does 1-1000)

173. Plaintiff incorporates by reference all of the allegations contained in the Paragraphs above as though fully set forth herein.

174. An actual controversy has arisen and now exists between the Class and Defendant concerning their respective rights and duties.

175. The Class contends that:

a. Defendant has contractual, fiduciary and legal obligations to share in the cost of the LWS pursuant to the Historic Cost Sharing Ratio and that Defendant must honor this obligation now and when it sets new rates for the LWS beginning on July 1, 2014 and thereafter.

b. Should Defendant sell the LWS, Defendant's contractual, fiduciary and legal obligations are binding upon any transferee, assignee or successor in interest to the LWS.

c. Should Defendant sell the excess watershed and non-watershed land associated with the LWS, it is required and to apply all proceeds of such a sale for the purposes of performing deferred capital improvements and maintenance projects within the LWS.

176. Defendant disputes the Class' contentions and contends that it has no obligation to share in or pay for the cost of the LWS pursuant to the Historic Cost Sharing Ratio or otherwise. Defendant further contends that Defendant may sell, transfer or assign the LWS free and clear of any obligation to share in or pay for the cost of the LWS pursuant to the Historic Cost Sharing Ratio or otherwise. Defendant further contends that it is under no obligation to apply the proceeds from a sale of the land associated with the LWS for the purposes of performing deferred capital improvements and maintenance projects within the LWS.

177. As a result of this unsettled state of affairs, Plaintiff is informed and believes and on that basis alleges that Defendant presently intends to sell the pipes, pumps, storage tanks and water treatment plant within the LWS to a private, investor owned utility free and clear of any obligation to share in or pay for the cost of the LWS pursuant to the Historic Cost Sharing Ratio or otherwise. Plaintiff is further informed and believes and on that basis alleges that Defendant intends to sell the

excess watershed and non-watershed land and water rights associated with the LWS and to keep the proceeds for the exclusive benefit of its general municipal fund. Plaintiff is further informed and believes that the new rates which will take effect on or about July 1, 2014 will continue to violate the Historical Cost Sharing Ratio by forcing the non-resident customers of the LWS to pay 100% of the cost of operating, maintaining and improving the LWS.

178. A judicial declaration is necessary and appropriate at this time under the circumstances in order that the Class may ascertain its rights and duties.

179. Plaintiff is further entitled to recover from Defendant its reasonable costs and attorney fees incurred in bringing this action pursuant to Code of Civil Procedure §1021.5.

TWELFTH CAUSE OF ACTION

Accounting

(Against Defendant and Does 1-1000)

180. Plaintiff incorporates by reference all of the allegations contained in the Paragraphs above as though fully set forth herein.

181. Money received from the Surcharge and Connection Fees is required to be placed in dedicated accounts and used for purposes of constructing capital improvements within the LWS.

182. Plaintiff is informed and believes, and on that basis alleges, that money received from the Surcharge and Connection Fees was not placed into dedicated accounts and was not used exclusively for the purposes of constructing capital improvements within the LWS.

183. As a result, Defendant has received money from the Surcharge and Connection Fees a portion of which is due to the Class (for the benefit of capital improvements within the LWS).

184. The amount of money due from Defendant to the Class is unknown to Plaintiff and cannot be ascertained without an accounting of the receipts and disbursements of the Surcharge and Connection Fees.

185. Plaintiff has demanded an accounting from Defendant, but Defendant has failed and refused, and continues to fail and refuse, to render such an accounting.

186. Plaintiff is further entitled to recover from Defendant its reasonable costs and attorney fees incurred in bringing this action pursuant to Code of Civil Procedure §1021.5.

PRAYER FOR RELIEF

THEREFORE, Plaintiff asks the Court to enter the following judgment:

1. Approving of the Class, certifying Plaintiff as the representative of the Class, and designating their counsel as counsel for the Class;
2. Granting general and compensatory damages, in the estimated amount of at least approximately $12,896,971, subject to proof at trial;
3. Granting special damages, the amount of which is to be determined at trial;
4. Granting interest at the legal rate on the foregoing sums;
5. Granting injunctive relief to:
   a. Stop Vallejo from selling all or any part of the LWS during the pendency of this litigation;
   b. Stop Vallejo from selling any part of the LWS without including the watershed and non-watershed real property in the sale and without investing the proceeds of the sale of the watershed and non-watershed real property in the LWS for purposes of deferred maintenance and capital improvements;
   c. Stop Vallejo from continuing the Surcharge fee after September 30, 2015;
   d. Stop Vallejo from imposing future rate structures which do not require Defendant to share in the cost of operating, maintaining and improving the LWS according to the Historical Cost Sharing Ratio;
6. Granting specific performance of Defendant's obligation to share in the cost of operating, maintaining and improving the LWS according to the Historical Cost Sharing Ratio;
7. Granting declaratory relief;
8. Granting reasonable attorney fees and costs pursuant to California Code of Civil Procedure §1021.5;
9. Granting costs of suit incurred; and
10. For such other and further relief that the Court may deem just and proper.

//

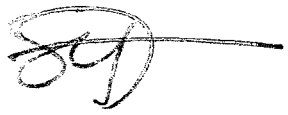
DEMAND FOR JURY TRIAL

Plaintiff and the members of the Class further request a trial by jury on all issues so triable.

Respectfully submitted,

DATED: January 22, 2014

LAW OFFICES OF STEPHEN M. FLYNN



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Exempt from Filing Fees
Government Code § 6103

FILED
Clerk of the Superior Court
FEB 24 2014
By _____ DEPUTY CLERK

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PENN VALLEY, CA 95946-9000

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SOLANO

GREEN VALLEY LANDOWNERS ASSOCIATION,

Plaintiff,

v.

CITY OF VALLEJO,

Defendant.

CASE NO. FCS042938
Unlimited Jurisdiction

(Case assigned to Hon. Scott L. Kays)

1) **NOTICE OF DEMURRER AND GENERAL DEMURRER TO PLAINTIFF'S COMPLAINT; AND**

2) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Complaint Filed:	January 23, 2014
Hearing Date:	April 1, 2014
Hearing Time:	8:30 a.m.
Dept.:	16

ORIGINAL FILED

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 1, 2014, at 8:30 a.m., or as soon thereafter as the matter will be heard in Department 16 of the above-entitled Court located at 600 Union Avenue, Fairfield, California 94533, Defendant City of Vallejo (the "City") will and hereby does demur to the Complaint filed by Plaintiff Green Valley Landowners Association in the above-captioned action.

The City demurs generally to all of Plaintiff's causes of action pursuant Code of Civil Procedure section 430.10, subd. (e), on the grounds that the Complaint fails to state facts sufficient to constitute a cause of action.

The City further demurs specially to the twelfth cause of action for accounting pursuant to Code of Civil Procedure section 430.10, subdivision (f), on the grounds that it is uncertain. The Demurrer is based on this Notice, the attached Demurrer, the attached Memorandum of Points and Authorities, the Request for Judicial Notice filed concurrently herewith, the pleadings, records and files in this action, and such argument as may be presented by the City at or before the hearing.

DATED: February 24, 2014

COLANTUONO & LEVIN, PC

MICHAEL G. COLANTUONO
JENNIFER L. PANCAKE
AMY C. SPARROW
Attorneys for Defendant
CITY OF VALLEJO

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GENERAL DEMURRER

Defendant City of Vallejo (the "City") demurs to Plaintiff's Complaint as follows:

Demurrer to First Cause of Action

(Breach of Implied Contract)

1. Defendant demurs to the First Cause of Action in the Complaint on the ground that it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10. subd. (e).) The law does not allow for the City to enter into an 'implied contract" and the statute of limitations bars any contract claims.

Demurrer to Second Cause of Action

(Breach of Implied Covenant of Good Faith and Fair Dealing)

2. Defendant demurs to the Second Cause of Action in the Complaint on the ground that it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10. subd. (e).) The law does not allow for the City to enter into an 'implied contract" and the statute of limitations bars any contract claims.

Demurrer to Third Cause of Action

(Breach of Contract [Third Party Beneficiary])

3. Defendant demurs to the Third Cause of Action in the Complaint on the ground that it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10. subd. (e).) The law does not allow for the City to enter into an 'implied contract" and the statute of limitations bars any contract claims.

Demurrer to Fourth Cause of Action

(Breach of Duty to Charge a Reasonable Water Rate)

4. Defendant demurs to the Fourth Cause of Action in the Complaint on the ground that it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10. subd. (e).)

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Proposition 218 bars Plaintiff's Fourth Cause of Action.

Demurrer to Fifth Cause of Action

(Breach of Fiduciary Duty)

5. Defendant demurs to the Fifth Cause of Action in the Complaint on the ground that it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10. subd. (e).) Proposition 218 bars Plaintiff's Fifth Cause of Action. Furthermore, Government Code section 815 bars this common law claim.

Demurrer to Sixth Cause of Action

(Injunctive Relief [Sale of LWS])

6. Defendant demurs to the Sixth Cause of Action in the Complaint on the ground that it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10. subd. (e).) The Separation of Powers Doctrine forbids an injunction against the future exercise of the City's legislative discretion.

Demurrer to Seventh Cause of Action

(Injunctive Relief [Sale of LWS without Land])

7. Defendant demurs to the Seventh Cause of Action in the Complaint on the ground that it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10. subd. (e).) The Separation of Powers Doctrine forbids an injunction against the future exercise of the City's legislative discretion.

Demurrer to Eighth Cause of Action

(Injunctive Relief [Surcharge Fee])

8. Defendant demurs to the Eighth Cause of Action in the Complaint on the ground that it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10. subd. (e).) Section 32 of Article XIII of the California Constitution precludes the Court from issuing an

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injunction against the City's current or future water rates.

Demurrer to Ninth Cause of Action

(Injunctive Relief [Future LWS Rates])

9. Defendant demurs to the Ninth Cause of Action in the Complaint on the ground that it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10. subd. (e).) Section 32 of Article XIII of the California Constitution precludes the Court from issuing an injunction against the City's current or future water rates.

Demurrer to Tenth Cause of Action

(Specific Performance)

10. Defendant demurs to the Tenth Cause of Action in the Complaint on the ground that it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10. subd. (e).) The law does not allow for the City to enter into an 'implied contract" and the statute of limitations bars any contract claims.

Demurrer to Eleventh Cause of Action

(Declaratory Relief)

11. Defendant demurs to the Eleventh Cause of Action in the Complaint on the ground that it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10. subd. (e).) Proposition 218 bars Plaintiff's Eleventh Cause of Action.

Demurrer to Twelfth Cause of Action

(Accounting)

12. Defendant demurs to the Twelfth Cause of Action in the Complaint on the ground that it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10. subd. (e).) Government Code section 815 bars Plaintiff's common law claim. Defendant further

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demurs to the Twelfth Cause of Action in the Complaint on the ground that the pleading is uncertain. (Code Civ. Proc., § 430.10, subd. (f).)

DATED: February 24, 2014

COLANTUONO & LEVIN, PC

MICHAEL G. COLANTUONO
JENNIFER L. PANCAKE
AMY C. SPARROW
Attorneys for Defendant
CITY OF VALLEJO

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff asserts twelve causes of action, none of which are viable.

First, Plaintiff seeks to establish liability under implied contract, but this theory fundamentally ignores the fact that the City of Vallejo's (the "City") relationship with its water customers is based on ordinance, not contract. Moreover, the City is not empowered to enter into an implied contract to begin with, and even if Plaintiff could establish the existence of a written contract, the allegations of the Complaint establish that any purported breach occurred in 1992. Given that the four-year statute of limitations for breach of contract under Code of Civil Procedure section 337 expired eighteen years ago, Plaintiff's contract claims are stale.

Second, Plaintiff seeks to require the City's residents to subsidize the cost of operating the Lakes Water System ("LWS"), but this effort to pool the cost of service is plainly barred by Proposition 218, which does not allow one group of customers to subsidize another. Simply put, the cost of operating the LWS must be borne by those who rely on the LWS for water service, which the City's residents do not.

Third, Plaintiff seeks to enjoin the City's future exercise of legislative discretion with respect to potentially selling LWS assets, as well as with respect to setting current and future water rates. The former claims are barred under both separation of powers principles that prevent a court from dictating the exercise of legislative discretion of a coequal branch of government and the City's statutory power to sell its public utility assets. The latter offends section 32 of Article XIII of the California Constitution, which bars the injunction of illegal rates. Accordingly, this Court does not have the power to enjoin the City's rates, and Plaintiff's exclusive remedy is a refund suit.

Finally, Plaintiff's common law claims for breach of fiduciary duty and accounting cannot be asserted against the City, because in the absence of a constitutional claim, Government Code section 815 has abolished all common law or judicially declared forms of liability for public agencies, except those governed by statute. Here, Plaintiff does not (and cannot) plead any constitutional or statutory basis for Plaintiff's breach of fiduciary duty and accounting claims, which should therefore be dismissed. With respect to the twelfth cause of action for accounting, to the extent that Plaintiff

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could plead a statutory basis for this relief, the Plaintiff fails to identify the applicable period of time for which an accounting is sought, thereby rendering Plaintiff's pleading uncertain.

Simply put, none of Plaintiff's theories against the City can survive demurrer, and this Court should sustain the City's Demurrer in its entirety without leave to amend. "Leave to amend is appropriately withheld where it is clear that Plaintiff is seeking the 'legally impossible.'" (*Inga v. City of Baldwin Park* (1970) 9 Cal.App.3d 909, 915).

II. STATEMENT OF FACTS

In the late 1890s, in order to provide potable water for its residents, the City began construction on a municipal water system, known today as the Lakes Water System ("LWS"). The LWS consists primarily of a series of dams, reservoirs, and transmission pipes designed to transport water from the Green Valley area to the City. In order to transport water over this distance, the City acquired easements from a handful of property owners along the transmission route.

The LWS operated at full capacity until 1991 when the California Department of Health Services adopted new drinking water treatment regulations for the state. As a result, the LWS treatment plants no longer met state drinking water standards and water from one of the primary LWS reservoirs, Lake Curry, became unusable. The City considered rebuilding the treatment infrastructure but determined that doing so would be prohibitively expensive. Thus, after the new treatment regulations were adopted in 1991, the City no longer received water from Lake Curry.

In November 1996, California voters approved Proposition 218, which added Articles XIII C and XIII D to the California Constitution and limited the ability of local governments to raise revenues through assessments, fees, and other general purpose taxes. (See Govt. Code, §§ 53750, et seq.) In July 1997, Prop. 218 became effective as to water rates under Article XIII D, section 6(d) of the Constitution. In 2006, Prop. 218's application to consumption-based water rates was made clear by the California Supreme Court's decision in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205. Among Proposition 218's requirements is that of Article XIII D, section 6(b)(3), which forbids cities from charging any customer more than the proportional cost of serving his or her parcel. Thus, Plaintiff's desire to force the City's residents to subsidize LWS customers has been plainly unconstitutional since 1997.

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In 2009, the City enacted Ordinance No. 1619 N.C. (2d) (the "2009 Ordinance"), which raised water rates on non-resident customers of the LWS. The 2009 Ordinance took effect on July 1, 2009. The City is in the process of preparing a new five-year rate study for the LWS which will take effect on January 1, 2015. In November 2009, City representatives met with the Green Valley Landowners Association ("GVLA") to discuss a possible sale of the LWS by the City to GVLA. In 2013, the City had the LWS independently appraised in advance of a potential sale. The appraisal placed the value of the LWS between $10.5 to 13.9 million, not including the non-watershed land GVLA has also expressed interest in acquiring. At this time, the City and GVLA have been unable to come to an agreement on the process for any potential sale of the LWS.

On December 3, 2013, the City received a demand letter from GVLA making a series of claims similar to those alleged in the Complaint. On January 10, 2014, the City responded to GVLA, explaining that 1) there is no risk of imminent sale of the LWS, 2) any sale would have to go through a Request for Proposals process, and be considered and approved by the City Council at a noticed public hearing, and 3) the City would notify GVLA when it intends to solicit offers for the LWS. Despite these assurances, on January 23, 2014, GVLA filed the instant lawsuit against the City.

III. LEGAL STANDARD FOR DEMURRER

A party may demur to a complaint that does not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) A party may also demur to a complaint if it is "uncertain." (*Id.*, § 430.10, subd. (f).) A demurrer tests the legal sufficiency of a complaint, accepting as true all facts properly pled or subject to judicial notice. (*Writers Guild of Am., Inc. v. City of Los Angeles* (2000) 77 Cal.App.4th 475, 477.) But the court need not assume the truth of contentions, deductions, or conclusions of fact or law. (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 947.) And, a court must disregard an allegation contrary to law or to a judicially noticeable fact. (*Planning & Cons. League v. Castaic Lake Water Agency* (2010) 180 Cal.App.4th 210, 225-226.) If the complaint does not state facts sufficient to constitute a cause of action, and the plaintiff cannot show a reasonable possibility of curing that defect by amendment, the demurrer should be sustained without leave to amend. (*Flying Dutchman Park, Inc. v. City & County of San Francisco* (2001) 93 Cal.App.4th 1129, 1134.)

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IV. PLAINTIFF'S VARIOUS CONTRACT-BASED CAUSES OF ACTION ARE BARRED AS A MATTER OF LAW

Plaintiff alleges numerous contract-based claims which are all founded upon an implied contract theory. Plaintiff's first cause of action for breach of implied contract, its second cause of action for breach of the implied covenant of good faith and fair dealing, its third cause of action for breach of contract on a third party beneficiary theory, and its tenth causes of action for specific performance are all prohibited as a matter of law. A private party cannot sue a public entity on an implied contract theory. (*Katsura, supra*, 155 Cal.App.4th 104, 109 (charter city could not enter into implied contract ["It is settled that 'a private party cannot sue a public entity on an implied-in-law or quasi-contract theory . . ."].)

As discussed below, the Court should sustain the City's demurrer to all of the contract-based causes of action without leave to amend, because the City has no authority to enter into an implied contract. Moreover, even if Plaintiff could establish a viable contract (whether written or oral) whereby the City agreed to forever subsidize the cost of Plaintiff's water service, Plaintiff's own allegations demonstrate that the statute of limitations on any such contract claim ran long ago.

A. A Charter City Can Only Incur Contractual Liabilities if Authorized by its Charter or Municipal Ordinance

As the foundation for all of its contract related claims, Plaintiff alleges that "there was an implied promise . . . that Vallejo . . . would indefinitely share in the cost of operating and improving the LWS and that the costs would be shared according to the Historic Cost Ratio" under which Vallejo must pay 98% of the cost. (Complaint, ¶ 87.) Plaintiff further alleges that the City has entered into oral contracts with the purported class. (Complaint, ¶ 165.) However, Plaintiff cannot properly allege an implied or oral contract against Vallejo, which is a charter city.

Charter cities cannot act in conflict with their charter, and any acts that deviate from a city's charter are unenforceable. (*Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, 108-109.) The *Katsura* case lays out the well settled law governing the ability of a charter city to contract and the inability for a litigant to bring an implied contract theory against a public entity:

> More than seven decades ago our Supreme Court . . . stated: 'Certain general principles have become well established with respect to municipal contracts. . . .

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> It is . . . settled that the mode of contracting, as prescribed by the municipal charter, is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable.'

(*Katsura, supra*, 155 Cal.App.4th at 108-09 (citations omitted).)

Furthermore, the establishment and enforcement of implied contract are absolutely prohibited.

> It is settled that "**a private party cannot sue a public entity on an implied-in-law or quasi-contract theory**, because such a theory is based on quantum meruit or restitution considerations which are **outweighed by the need to protect and limit a public entity's contractual obligations.**" . . .
>
> The reason is simple: "The law never implies an agreement against its own restrictions and prohibitions, or [expressed differently], 'the law never implies an obligation to do that which it forbids the party to agree to do.' In other words, contracts that disregard applicable code provisions are beyond the power of the city to make.

(*Id.* at 109-110 [citations omitted] [emphasis added].)

Courts have thus uniformly limited a city's authority to contract.[1] The reason is to protect the public and the public fisc. Therefore, such restrictions on a municipality's power to contract are to be strictly construed. (10 McQuillin, Municipal Corporations (3d ed. 1999 rev.) § 29.05, p. 255

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[1] The law is replete with numerous examples of this limitation. "When a statute limits a city's power to make certain contracts to a certain prescribed method and impliedly prohibits any other method, a contract that does not conform to the prescribed method is void and no implied liability can arise for benefits received by the city or for damages caused by it to the other party to the void contract . . . [T]he adoption of the prescribed mode is a jurisdictional prerequisite to the exercise of the power to contract at all and can be exercised in no other manner so as to incur any liability on the part of the municipality. (*South Bay Senior Housing Corp. v. City of Hawthorne* (1997) 56 Cal.App.4th 1231, 1235 [emphasis in original; internal quotations and citations omitted].)

If a city were to attempt to form a contract without adhering to the limits of its charter or other relevant laws, that "contract" would be unenforceable. (*Pasadena Live v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1094 ["A public entity cannot be held liable on an implied-in-law or quasi-contract theory"]; *Authority for California Cities Excess Liability v. City of Los Altos* (2006) 136 Cal.App.4th 1207, 1212 [also applicable to general law city which "may be held liable on a contract only if the contract is in writing, approved by the city council, and signed by the mayor"]; *G.L Mezzetta v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1093 [city demurred to local company's complaint alleging city failed to honor its oral agreement to provide company with a wastewater connection; order sustaining demurrer affirmed on appeal]; *Lundeen Coatings Corp. v. Dept. of Water and Power* (1991) 232 Cal.App.3d 816, 831 fn. 9 ["[A] public entity cannot be sued on an implied-in-law or quasi-contract theory, because such a theory is based on quantum meruit or restitution considerations which are outweighed by the need to protect and limit a public entity's contractual obligations."].)

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[reciting rule that restrictions on a municipality's power to contract should be strictly construed because such restrictions are designed to protect the public, not those who contract with the municipality].) Finally, the mode of contract formation does not have to be expressly prohibited in order to be invalid. "[B]ecause the statutes in question specifically set forth the ways in which the City may enter into contracts, any other methods of contract formation-even though not explicitly prohibited by the statutes-are invalid." (*G.L Mezzetta v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1093-1094. See also *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 ["The expression of some things in a statute necessarily means the exclusion of other things not expressed."]; *First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 664, fn.10 [while the city's charter did not forbid contract formation in a manner other than as specified in the charter, permitting such formation would render the contract requirements in the charter "a complete nullity"].)

Here, the Vallejo City Charter ("Charter") and its Municipal Code protect the City's residents from liability for obligations that violate express provisions for the sound budgeting of municipal expenses and revenues.[2] With respect to the City's general power to contract, Charter section 716 prohibits any expenditures without an appropriation by the Council. Charter section 717 allows the City Manager to make contracts only after authorization by the City Council, and the Council's appropriation of funds. Charter section 201 states that general laws apply unless a different procedure is required by the charter or an ordinance.[3]

Further, Municipal Code section 3.20.045 provides signature limits for the particular officials empowered to make City contracts. Municipal Code section 3.22.010 requires all bids on and proposals for City contracts to be made in writing. And, under Municipal Code section 3.22.010, the

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[2] A copy of the Charter is attached as Ex. 1 to the City's Request for Judicial Notice in Support of Demurrer ("RJN"), and a copy of applicable Municipal Code sections is attached to the RJN as Ex. 2. This Court may take judicial notice of the Charter and Municipal Code pursuant to California Evidence Code section 452, subd. (b).

[3] Other Charter provisions limit expenditure and creation of municipal obligations. Section 709 authorizes the Council to create a fund to finance capital improvements. Section 714 places express limits on the uses of water utility funds. Section 728 require a supermajority vote of the City Council in order to establish bonded indebtedness for improvements to the water utility.

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chapter applies to all City contracts. Under these sections of the Charter and Municipal Code, the City is prohibited from entering into the alleged implied or oral contract that forms the basis for Plaintiff's first, second, third and tenth causes of action, and if the issue is not specifically governed by the charter or municipal code, then general law applies.[4]

The law prohibits Plaintiff's "implied contract" theory under any conceivable circumstance, and under *Katsura*, *Mezzetta*, the plethora of other cases prohibiting the recognition and enforcement of implied contracts, as well as the City's Charter and Municipal Code provisions, Plaintiff's allegations of an implied contract in support of its quest for forcing the City to continuously subsidize the cost of its water service flies in the face of these well-established rules. Accordingly, the City's demurrer to the first, second, third, and tenth causes of action should be sustained without leave to amend.

A. The Statute of Limitations Bars All Alleged Contract Claims--Written, Oral, or Otherwise.

Even if Plaintiff could establish that the City entered a contract to forever subsidize the cost of Plaintiff's water service, Plaintiff's allegations demonstrate that the statute of limitations for any purported breach of the alleged contract, whether written or oral, has long expired.

The Complaint alleges that in 1992, the City breached its alleged contractual obligations to the non-resident customers of LWS. (Complaint, ¶¶ 41-50, 89, 99.) If there was an otherwise enforceable written contract (which there is not), the four-year statute of limitations under Code of Civil Procedure section 337 would have expired in 1996. If there was an otherwise enforceable oral contract (which there is not), the two-year statute of limitations under Code of Civil Procedure section 339 ran in 1994. Thus, even if Plaintiff could establish that the City entered into a viable contract to pay for the operation of the LWS in to perpetuity, these claims have been stale for over eighteen years, and Plaintiff is barred from enforcing its alleged contract claims. The Court should

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[4] With respect to the power to contract, the general laws of California, including Government Code section 40602, require the mayor's signature for all written contracts unless the City Council ordains otherwise. While that section, standing alone, does not require every general law city contract to be in writing, it has been found to "impliedly prohibit any other method [by a city] of contracting." (*Poway Royal Mobilehome Owners Assn. v. City of Poway* (2007) 149 Cal.App.4th 1460, 1470. See also *Mezzetta, supra*, 78 Cal.App.4th at 1093.)

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therefore grant the City's Demurrer on Plaintiff's contract-based claims without leave to amend.

V. PROPOSITION 218 REQUIRES WATER RATES TO BE PROPORTIONAL TO THE COST OF SERVING EACH PARCEL

Plaintiff's fourth, fifth and eleventh causes of action seek to require City residents to subsidize the cost of service for LWS customers. In its fourth cause of action, Plaintiff alleges that the City breached its duty to charge reasonable water rates. In the fifth cause of action, Plaintiff alleges that the City breached its fiduciary duties. And in the eleventh cause of action, Plaintiff seeks declaratory relief. As discussed below, Proposition 218 precludes Plaintiff's claims.

In November of 1996, California voters approved Proposition 218, which added to Articles XIII C and XIII D the constitution and limited the ability of local governments to raise revenues through assessments, fees, and other general purpose taxes. (See Govt. Code, §§ 53750, et seq.) In July 1997, Prop. 218 became effective as to water rates under Article XIII D. In 2006, Prop. 218's application to consumption-based water rates was made clear by the California Supreme Court's decision in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205. The application of Proposition 218 to rates for water service is therefore plain.

Article XIII D, section 6, subdivision (b)(3) provides that "[t]he amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel." Thus, if the cost of service attributable to one parcel exceeds the cost of service to another, Prop. 218 prohibits pooling rates, so that one customer class is required to subsidize another. (*Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926, 934 ["The Proposition 218 Ballot Pamphlet makes clear that the voters intended that 'No property owner's fee may be more than the cost to provide service to that property owner's land'"].)

Yet, a prohibited "pooled" rate structure is precisely what Plaintiff seeks. Notwithstanding the fact that Vallejo residents no longer obtain service through the LWS infrastructure, Plaintiff demands that Vallejo residents subsidize the cost of service to LWS customers. (Complaint, ¶¶ 114 ["it was always implied understood and agreed that the cost of operating the LWS would be shared by Defendant and/or its resident water customers and therefore spread over a large rate paying

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base"], 175 ["Defendant has . . . legal obligations to share the cost of LWS"].)

While it is understandable that Plaintiff would prefer that Vallejo residents subsidize the cost of service for nonresidents who must rely upon the LWS system, Prop. 218 plainly prohibits a rate structure that requires one group of customers to subsidize another. This Court therefore has no authority to require any such a subsidy, and the City's demurrer to the fourth, fifth and eleventh causes of action should be sustained without leave to amend.

VI. AN INJUNCTION AGAINST FUTURE SALE OF VALLEJO'S UTILITY ASSETS WOULD BE IMPROPER

A. Separation of Powers Forbids an Injunction Against a Future Act of Legislative Discretion

Plaintiff's sixth and seventh causes of action seek to enjoin the potential sale of LWS assets. As discussed below, however, fundamental separation of powers principles forbid an injunction against a future exercise of the City's legislative discretion.

Our Constitution empowers the City to operate a utility for the benefit of its residents and property owners: "A municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication." (Cal. Const. art. XI, § 9.) Were there any doubt about the scope of this authority, the Legislature has amplified upon it. (See Gov. Code, §§ 38730–38745.) The City's statutory powers include the authority to acquire water, water rights, and water facilities (Gov. Code, § 38730), the power to do so jointly with other public agencies (Gov. Code, § 38731), the power to contract with public agency partners (Gov. Code, § 38740), and the power to incur debt to finance water facilities (Gov. Code, § 38742). More generally, and at the local level, the City's charter states: "The City shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this Charter and the Constitution of the State of California." (Vallejo City Charter, § 200.)

These authorities establish the City's primacy with regard to local legislative decisions, which cannot be circumscribed by this Court nor any other authority outside the Legislature or the voters via an amendment to our Constitution. "Generally, a court is without power to interfere with

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purely legislative action, in the sense that it may not command or prohibit legislative acts, whether the act contemplated or done be at the state level or the local level. The reason for this is a fundamental one—it would violate the basic constitutional concept of the separation of powers among the three coequal branches of the government." (*Monarch Cablevision, Inc. v City Council, City of Pacific Grove* (1966) 239 Cal.App.2d 206, 211 [citations omitted].) Accordingly, for this Court to enjoin the City's future legislative discretion regarding whether or not to sell the LWS would be an improper infringement of the City's legislative powers.

B. The Common Law Remedy of Injunction Is Not Available

Even if an injunction were permitted under separation of powers principles (which it is not), "an injunction cannot be granted to prevent execution of a public statute." (*Leach v. City of San Marcos* (1989) 213 Cal.App.3d 648, 660.) Here, both the Public Utilities Code and the Vallejo City Charter grant the City the power to sell public utility assets. (Pub. Util. Code, § 10051 ["Any municipal corporation incorporated under the laws of this State may as provided in this article sell and dispose of any public utility that it owns"]; Charter, § 200 ["[The City] shall . . . have the power to exercise any and all rights, powers, and privileges heretofore or hereafter established, granted or prescribed by the general laws of the State"].) Accordingly, this Court is not empowered to enjoin the City's sale of the LWS or any of its other public utility assets, should the City decide to pursue such a course in the future.

C. Plaintiff Should Seek Relief Either at the Ballot Box or the Settlement Table

The fact that this Court may not enjoin the City from selling its public utility assets does not rob Plaintiff of its power to protest such an action, should the City move forward with it. Public Utilities Code section 10052 gives local residents supervisory control over utility sales. ("Whenever the legislative body of a municipal corporation . . . determines . . . that any public utility owned by the municipal corporation should be sold, it may . . . order the proposition of selling the public utility to be submitted to the qualified voters of the municipal corporation at an election held for that purpose.") Thus, should the City in the future choose to move forward with a sale of the LWS, Plaintiff will have the opportunity to oppose any such sale through political channels by petitioning

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the City Council to submit the issue to a vote and mustering the required opposition of over one-third of the electorate. (Pub. Util. Code, § 10055.)[5]

In summary, this Court is not empowered to enjoin the City's future exercise of legislative discretion to sell LWS assets, and Plaintiff's remedy is political rather than judicial. The demurrer to the sixth and seventh causes of action should therefore be sustained without leave to amend.

VII. THIS COURT IS NOT EMPOWERED TO ENJOIN WATER RATES

The eighth and ninth causes of action seek injunctive relief for current and future water rates. However, the "pay first, litigate later" rule embodied in section 32 of Article XIII of the California Constitution forbids an injunction:

> No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.

This well established rule is based on a public policy "to allow revenue collection to continue during litigation so that essential public services dependent on the funds are not unnecessarily interrupted. . . . The fear that persistent interference with the collection of public revenues, for whatever reason, will destroy the effectiveness of government has been expressed in many judicial opinions." (*Water Replenishment District of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1465 ("*Cerritos*") [internal quotations and citations omitted]. See also *Connolly v. County of Orange* (1992) 1 Cal.4th 1105, 1114 ["A court may not by mandate or other process enjoin the collection of a tax"]; *Western Oil & Gas Assn. v. State Bd. of Equalization* (1992) 44 Cal.3d 208, 213 ["Section 32 broadly limits in the first instance the power of the courts to intervene in tax collection matters"] .)

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[5] Moreover, the City has already attempted to gauge GVLA's interest in purchasing the LWS for its fair market value. The City remains ready to enter into negotiations with GVLA for that purpose, if and when GVLA is amenable to doing so.

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As discussed below, the application of section 32 has been extended both to taxes imposed by local government and to water charges, and it bars this Court from issuing an injunction against the City's water rates.

A. The "Pay First, Litigate Later" Rule Applies to Local Government

As noted by the *Cerritos* court, the "pay first, litigate later" rule has been extended to taxes imposed by local government:

> *Chodos v. City of Los Angeles* . . . offers guidance as to the applicability of the doctrine to local governments. In that case, without first availing himself of the administrative procedure set forth in the Los Angeles Municipal Code or making a tax payment and then suing in superior court for a refund, the plaintiff sued the City of Los Angeles for declaratory relief, challenging the City of Los Angeles's assessment of business taxes against him. . . . The *Chodos* court affirmed the trial court's sustaining the demurrer to the plaintiff's complaint on the ground that the plaintiff did not comply with the "pay first, litigate later" rule. *Chodos* holds that the "pay first, litigate later" doctrine applies to local governments as a matter of public policy.

(*Cerritos*, *supra*, 220 Cal.App.4th at 1465 [referencing *Chodos v. City of Los Angeles* (2011) 195 Cal.App.4th 675, 676-677, 679-680.)

This common sense application of the "pay first, litigate later" rule recognizes that the underlying policy of protecting public revenue applies at every level of government. (*Woosley v. State of California* (1992) 3 Cal.4th 758, 789 ["strict legislative control over the manner in which tax refunds may be sought is necessary so that governmental entities may engage in fiscal planning based on expected tax revenues"]. See also *Volkswagen Pacific v. City of Los Angeles* (1972) 7 Cal.3d 48, 62 ["the filing of claims for money or damages against California government units is an area of statewide concern in which the Legislature has occupied the entire field"].)

Thus, whether a tax is state or local, refunds can be made only "in such manner as may be provided by the Legislature" under section 32, Article XIII of the California Constitution, and the remedy of injunction is not available.

B. The "Pay First, Litigate Later Rule Applies to Water Rates

The *Cerritos* court recognized that the "pay first, litigate later" rule applies to water rates. There, the plaintiff was a groundwater agency that sought to enjoin the City of Cerritos to either pay delinquent groundwater assessment charges or stop pumping groundwater, and the court recognized that the rule is not limited to tax collection, but instead applies broadly to all sources of public

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revenue. Thus, the court included tax, assessment and fees for service (such as water rates) within the scope of the "pay first, litigate later" rule, while noting that the legislative history of Proposition 218 supports this approach:

> Proposition 218 recited: "FINDINGS AND DECLARATIONS. The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent."

(*Cerritos*, 220 Cal.App.4th at p. 1469 – 1470.)

The *Cerritos* court thus recognized that water assessments are subject to the "pay first, litigate later" rule, and it held that the Cerritos was required to pay the disputed assessments before challenging their validity. However, even if that rule were strictly limited to taxes, Proposition 26 deems a water rate in excess of the cost of service as a tax requiring voter approval.[6] Thus, even if the "pay first, litigate later" rule is limited to tax, rather than being broadly applicable to all sources of public revenue, it applies here to prohibit the injunctive relief that Plaintiff seeks. The Complaint's eighth and ninth causes of action should therefore be dismissed without leave to amend.

VIII. PLAINTIFF'S COMMON LAW CLAIMS ARE BARRED BY GOVERNMENT CODE SECTION 815

In its fifth and twelfth causes of action for breach of fiduciary duty and accounting, respectively, Plaintiff asserts common law claims against the City. (Complaint, ¶¶ 120-127, 180-186.) California law plainly disallows this. As noted by the California Supreme Court:

> Under the Government Claims Act, there is no common law tort liability for public entities in California; instead, such liability must be based on statute. . . . [The] intent of the act is not to expand the rights of plaintiffs in suits against governmental

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[6] In November 2010, California voters approved Proposition 26, which added subdivision (e) to section 1 of Article XIII C of the California Constitution. That provision states that every charge imposed by a local government is a tax, unless one of seven stated exceptions applies. The second enumerated exception is relevant to charges for water service, which are deemed taxes unless the charge is "imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." (Cal. Const., Art. XIII C, § 1, subd. (e)(2).)

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> entities, but to confine potential governmental liability to rigidly delineated circumstances.

(*Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897 [internal quotations and citations omitted]. See also *In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 688 ["Of course there is no common law tort liability for public entities in California; such liability is wholly statutory."].)

This rule is embodied in Government Code section 815, subd. (a), which in relevant part provides that "[a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity." Nor is the rule limited to tort claims. As stated in Section 815's legislative history:

> [Section 815] abolishes all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the state or federal constitution. . . . In the absence of a constitutional requirement, public entities may be held liable only if a statute . . . is found declaring them to be liable.

(Legis. Com. comment, 32 West's Ann. Gov. Code (1995 ed.), p. 167.)

Since the only allowable common law causes of action against public entities are purely based on statute, the rule that statutory causes of action must be pleaded with particularity applies. "Every fact essential to the existence of statutory liability must be pleaded." (*Susman v. City of Los Angeles* (1969) 269 Cal.App.2d 803, 809.) A plaintiff must allege every fact material to the existence of a statutory liability with particularity. (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795 [requiring specific pleading in claim alleging breach of bus driver's duty to protect riders]; *Peter W. v. San Francisco Unified School Dist.* (1976) 60 Cal.App.3d 814, 819 [requiring negligence claim against public school district to be pleaded with particularity].) In addition, a plaintiff must specifically plead the applicable statute or regulation. (*Washington v. County of Contra Costa* (1995) 38 Cal.App.4th 890, 896). Plaintiff's fifth and twelfth causes of action fail to meet these rudimentary pleading requirements.

Moreover, even if there were a statutory basis for Plaintiff's twelfth cause of action for an accounting (which there is not), that cause of action should be independently rejected on the basis of uncertainty, because the entire history of the City's treatment of the surcharge and connection fee proceeds that have been collected since 1995 cannot be in issue. While Plaintiff alleges that the surcharge and connection fees were first instituted in 1995 (Complaint, ¶¶ 69-79), Plaintiff does not

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specify the time frame for which it seeks an accounting. Without clarification, the City cannot determine the parameters of an accounting or whether such a claim would be barred by the statute of limitations. Instead, in the event that this Court allows Plaintiff to amend its claim, Plaintiff should identify the appropriate time period for which it seeks an accounting, and restate its claim in a manner that can be fairly evaluated by both the City and this Court.

In summary, because Plaintiff does not (and cannot) cite statutory authority for its common law breach of fiduciary duty and accounting claims, the fifth and twelfth causes of action are barred and should be dismissed. Moreover, even if the accounting claim has a statutory basis, Plaintiff should amend the Complaint to state the period of time for which it demands an accounting.

IX. CONCLUSION

As discussed above, the relationship between the City and its water customers is based on ordinance, not contract, and in any event, there can be no implied contract under these circumstances. Moreover, Plaintiff's desire to force the City's residents to subsidize its cost of service is barred by Proposition 218, injunction is not available (either as to the exercise of the City's legislative discretion to sell LSW assets or as to the collection of allegedly excessive rates), common law claims are barred under Government Code section 815, and the demand for an accounting is uncertain as to the time period for which Plaintiff seeks an accounting. For these reasons, the City's demurrer should be sustained in its entirety without leave to amend.

DATED: February 24, 2014

Respectfully submitted,

COLANTUONO & LEVIN, PC

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CITY OF VALLEJO

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 300 S. Grand Avenue, Suite 2700, Los Angeles, California 90071.

On February 24, 2014, I served the within document(s):

NOTICE OF DEMURRER AND GENERAL DEMURRER TO PLAINTIFF'S COMPLAINT

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

☐ **BY FACSIMILE**: By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date.

☐ **BY ELECTRONIC MAIL**: By transmitting via electronic mail the document(s) listed above to those identified on the Proof of Service listed below.

☒ **BY MAIL**: By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☐ **OVERNIGHT DELIVERY**: By overnight delivery, I placed such document(s) listed above in a sealed envelope, for deposit in the designated box or other facility regularly maintained by United Postal Service for overnight delivery, caused such envelope to be delivered to the office of the addressee via overnight delivery pursuant to C.C.P. §1013(c), with delivery fees fully prepaid or provided for.

☐ **PERSONAL SERVICE**: I caused such envelopes to be delivered by hand to the addresses indicated on the attached list.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on February 24, 2014, at Los Angeles, California

Pamela Jaramillo

BY FAX

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Attorney for Plaintiff GREEN VALLEY LANDOWNERS ASSOCIATION

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SOLANO

GREEN VALLEY LANDOWNERS ASSOCIATION, a California mutual benefit corporation, on behalf of its members and others similarly situated,

Plaintiff,

vs.

THE CITY OF VALLEJO, and DOES 1 through 1000, inclusive,

Defendants.

Case No. FCS042938

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S DEMURRER TO COMPLAINT

Dept: 16
Judge: Hon. Scott L. Kays
Date: April 1, 2014
Time: 8:30 a.m.

Action Filed: January 23, 2014
Trial Date: Not Scheduled

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INTRODUCTION

In the late 1800's, Vallejo constructed the Lakes Water System (LWS) which was at the time, one of the first and largest municipal water projects in California (¶¶2, 24-31). Over the decades, Vallejo agreed to allow several hundred non-resident customers to connect to the LWS and receive water (¶¶36, 83). Some of these non-resident customers exchanged easements or riparian water rights in exchange for certain quantities of "free water" (¶¶32-35). In all other instances, Vallejo contractually agreed to allow certain non-residents living along the main transmission lines (the Gordon Line and Green Line) to connect to the LWS (¶36). Today, approximately 809 non-resident connections receive water from the LWS (¶5).

From the late 1800's through the 1950's, the LWS was Vallejo's only source of potable water (¶39). Without the LWS, there would be no Vallejo. In the late 1950's, Vallejo obtained new water rights which it did not share with the non-resident customers (*id.*). Even with the new water, Vallejo continued to use and depend upon LWS water until 1992.

From 1893 through 1992, Vallejo, by virtue of its size and customer base, paid at least 98% of the cost of the LWS (¶¶44-46, the "Historic Cost Sharing Ratio"). In 1992, Vallejo's City Council unilaterally passed an ordinance which breached the Historic Cost Sharing Ratio by shifting 100% of the cost of operating the LWS onto the non-voting, non-resident customers (¶¶41-43, 48). Additional ordinances were passed in 1995 and 2009 which also breached the Historic Cost Sharing Ratio. The 2009 ordinance is subject to a tolling agreement (¶57).

Vallejo did not just shift the costs of operating a municipal-sized water system onto just 809 non-resident, non-voting households. It divested itself of an obsolete, poorly maintained, century-old water system which Vallejo failed to properly maintain or improve during the time it relied on LWS (¶¶66-68, 70-71). Vallejo now seeks to profit by selling the LWS in pieces (¶¶79-85). By so doing, the City could reap a windfall profit of $30 million *or more*. The non-resident customers would not fare as well (¶¶10, 78.a, 140-143).

If this sounds unfair, unjust, unreasonable and discriminatory, it is and the Complaint so alleges. It its demurrer, Vallejo claims there is no remedy for this discrimination. It is a city, and

as such, cannot be sued, for breach of contract, for breach of its duty to charge a reasonable rate, for breach of fiduciary duty, for injunctive relief, for declaratory relief, or for an accounting of the very records it is obligated to keep. Vallejo's arguments are without merit.

LEGAL ARGUMENT

A. Vallejo's Demurrer to the Contract Claims

Vallejo demurs to the 1st, 2nd, 3rd, and 10th causes of action on the grounds its Charter prohibits it from entering into an implied agreement and the claims are barred by the statute of limitations.

1. The Parties' Relationship Is Contractual as a Matter of Law

The relationship between Vallejo and its non-resident customers is, by definition, *contractual* (¶3). The court in *Hobby v. City of Sonora* (1956) 142 CA2d 457, 459, discussing the relationship between a municipal utility and its non-resident customers explained:

> **The city of Sonora could no more compel the plaintiffs, as residents of the county, to connect with the city's sewer system than could plaintiffs compel the city to extend its lines into county territory and allow the county residents to connect therewith**. The system is owned wholly by the taxpayers of the city of Sonora. The area is not embraced within a sewage district wherein plaintiffs would be placed upon a parity with the residents of the city of Sonora, thereby affording plaintiffs such equality of right as to service and charges as would be available to persons constituting a class within such a district. In other words, **since the city owns the system and the plaintiffs do not, nor as noted do they have any interest whatsoever therein, any right they might acquire to use the system could only arise out of and be predicated upon a contractual relationship with the city** (emphasis added).

(*See also, Elliot v. City of Pacific Grove* (1975) 54 CA3d 53, 56 ["since the city could not compel residents outside the city to connect with the city's system which was wholly owned by the taxpayers of the city any right they might acquire to use the system could only arise out of and be predicted upon a contractual relationship with the city"]; *Tronslin v. City of Sonora* (1956) 144 CA2d 735, 738; *Durant v. City of Beverly Hills* (1940) 39 CA2d 133, 138).

Since Vallejo was not obligated to provide water to the non-resident customers, and the non-resident customers could not compel the city to provide them water, the parties relationship is contractual, by definition. *Whether* (as alleged) Vallejo agreed to share in the cost of the LWS is an issue of fact.

2. Vallejo's Charter Does Not Prohibit the Implied-in-Fact Agreements

The City claims Section 716 and 717 of the City's Charter (the "Charter") and Sections 3.20.045, 3.20.222, and 3.22.010 of the City's Municipal Code (the "Code") prohibit the City from impliedly agreeing to share in the cost of the LWS, rendering any such agreements void because "charter cities cannot act in conflict with their charter, and any acts that deviate from a city's charter are unenforceable" (at 4:24-25). The majority of the Charter or Code sections were enacted after 1992 and none prohibit the City from impliedly agreeing to share in the cost of the LWS.

All but two of the Charter and Code sections were enacted after 1992, when Vallejo first breached the implied agreements and Vallejo is constitutionally prohibited from passing a law which impairs, alters or abrogates an existing contract (U.S. Const., Art. 1, Sec. 10, Cl. 1; Cal. Const. Art. 1, Sec. 9; *Williams v. City of Stockton* (1925) 195 Cal. 743, 753 ["It is competent to provide by law that the organization or government of municipal corporations may be changed at any time, but when so changed existing contractual obligations may not thereby be impaired."]). Section 102 of the Charter recognizes that the City "shall be subject to all of its debts, obligations, liabilities and **contracts**" which existed prior to the Charter. Therefore, the implied agreements are unaffected by subsequent amendments to the Charter or Code.[1]

Even if the City could abrogate an existing contract, none of the Charter or Code sections remotely prohibit the City from impliedly agreeing to share in the cost of the LWS. Section 716 of the Charter (effective *November 2000*) provides, "No expenditure of City funds shall be made except for the purposes and in the manner specified in an appropriation by the Council." This section does not require a written agreement and only applies to expenditures. To the extent a rate structure is an "expenditure" (it is not), the Council approved all rate structures at issue.

[1] Section 716 of the Charter became effective November 7, 2000. Section 717 of the Charter became effective November 7, 1989 (three years before the first breach, by which point all, or virtually all, of the implied agreements were already made). Section 3.22.010 of the Code became effective in 2005. Section 3.20.045 of the Code became effective on November 11, 2011. .

Section 717 of the Charter (effective *November 1989*) concerns contracts to purchase personal property and contracts for services to be provided to the City. It provides, "The City Manager shall purchase or contract for the **equipment, materials, supplies and services required by the City**, for which expenditures have been authorized in the budget or by other action of the Council." This has nothing to do with sharing in the cost of the LWS.

Section 3.22.010 of the Code (effective *2005*) falls under Chapter 3.22 of the Municipal Code entitled "Disqualification of Contractors." It provides that the intent of Chapter 3.22 is "to determine in advance of submittal of bids or proposals on city contracts whether a person has the necessary qualifications, fitness, capacity, integrity and trustworthiness to perform city contracts." Sections 3.20.045 and 3.20.222 fall under Chapter 3.20 entitled "Purchase and Disposition of Property." Section 3.20.045 (effective November *2011*) simply allows the City Manager and others to enter into certain contracts to buy or sell property without publication or City Council approval. Section 3.20.045(C) provides, "Award of bids or contracts for items over one hundred thousand dollars, for which there are appropriated funds in the city council-approved budget, shall be made by the city council." Section 3.20.222 (effective 1976) sets forth requirements for bids to purchase City property. It provides, "All bids or offers shall be in writing and shall be accompanied by a bank cashier's check or by a check certified by a responsible bank, payable to the city, in an amount as specified in the notice inviting bids."

3. Plaintiffs Are Not Suing on an Implied-in-*Law* or Quantum Meruit Theory; They Are Suing to Enforce an Implied-in-*Fact* Contract

Because the Charter does not prohibit Vallejo from impliedly agreeing to share in the cost of the LWS, the City's argument that "a private party cannot sue a public entity on an **implied-in-law or quasi-contract** theory, because such a theory is based on quantum meruit or restitution considerations," necessarily fails (*Katsura v. City of San Buenaventura* (2007) 155 CA4th 104, 109, emphasis added). However, an implied-in-***law*** or quantum meruit theory of recovery only applies if the contracts were void because they conflicted with the Charter. Since the alleged contracts do not conflict with the Charter, Plaintiffs are suing to enforce an implied-in-***fact*** **contract** (*see,* CACI 305).

The distinction between suing on an implied-in-**law** theory of recovery versus suing to enforce an implied-in-**fact** contract is critical. An implied-in-law or quasi-contract theory "operates **without an actual agreement** of the parties" (*Maglica v. Maglica* (1998) 66 CA4th 422, 455, emphasis added). "An implied-in-law contract is not actually a contract, but instead a **remedy** that allows the plaintiff to recover a benefit conferred on the defendant" (Blacks' Law (8th Ed.)). *Katsura* and the cases cited by Vallejo only hold there is no quantum meruit recovery for a benefit conferred under a void agreement made in violation of a city charter.

In contrast, "an implied-in-fact contract entails an **actual contract**, but one manifested in conduct rather than expressed in words" (*Maglica*, 66 CA4th at 455, emphasis added.). Unlike an implied-in-law theory (where there is no agreement), an implied-in-fact contract is "just as valid as contracts formed with words" (CACI 305; *Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1977) 69 CA3d 268, 275 ["there is no difference between an express and implied [in fact] contract"]).

Since the relationship between the LWS customers and Vallejo is contractual, and since nothing in the Charter or the Code prohibits an implied agreement concerning the sharing of costs for the LWS, *Katsura* and the entire line of cases cited by the City are inapposite.

4. Plaintiffs Can Sue on a Third Party Beneficiary Basis

The 3rd Cause of Action alleges, "The Class were and are expressly intended beneficiaries of the written agreements entered into between Defendant and the approximately 60 non-resident property owners within the LWS who receive some quantity of 'free water'." (¶104; *see also*, ¶¶33-35 [alleging written agreements for the provision of "free water"].) Even if the non-resident customers cannot sue to enforce an "implied agreement", nothing precludes them from suing *as third party beneficiaries* to enforce valid **written and recorded contracts** entered into between Vallejo and certain LWS customers (*see, Lundeen Coatings Corp. v. Department of Water & Power* (1991) 232 CA3d 816, 833-34).

5. Vallejo's Breach is Continuing and Not Barred by the Statute of Limitations

Vallejo's statute of limitations argument does not apply because, as alleged, the breach of contract "is a continuing and ongoing violation and occurs and repeats anew with each bi-

monthly levy and assessment of the water fees upon the Class" (¶¶91, 100, 108, 117, 168). Under the theory of continuous accrual "Where the wrong complained of is *continual or recurring*, the cause of action is subject to continuous accrual for statute of limitations purposes; i.e., a cause of action *accrues each time a wrongful ac occurs, triggering a new limitations period*" (Rylaarsdam, *et al., Civil Procedure Before Trial Statutes of Limitation* (Rutter) §3:70.5, italics in original; *Hogar Dulce Hogar v. Community Development Commission* (2003) 110 CA4th 1299, 1295 ["an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period"]).

The continuing accrual rule applies to claims for breach of contract, especially where, as here, the Complaint alleges Vallejo had a continuing obligation to pay for the LWS according to the Historic Cost Sharing Ratio. As explained by one court:

> Thus, where performance of contractual obligations is severed into intervals, as in installment contracts, the courts have found that an action attacking the performance for any particular interval must be brought within the period of limitations after the particular performance was due. The situations in which this rule has been applied include not only installment contracts, but also such diverse contractual arrangements as leases with periodic rental payments, and contracts calling for periodic, pension-like payments on an obligation with no fixed and final amount.

(*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 CA4th 1375, 1388 [net revenue interest in oil and gas production were divisible and claims accrued each monthly performance, not when payment was first not made]; *Wells Fargo Bank v. Bank of America* (1995) 32 CA4th 424, 439, fn. 7 [landlord's failure to pay rent at rate agreed in lease is "a new breach [which] occurs each month the bank persists in its refusal to pay"]; *Abbott v. City of Los Angeles* (1958) 50 C2d 438, 463 [right to receive pension payments is continuing and statute of limitations accrues when each pension installment falls due].)

The theory of continuing accrual was applied to similar facts by the Supreme Court in *Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 C4th 809. In *Howard Jarvis*, plaintiffs filed a complaint in March 1996 challenged the imposition and collection of "utility users tax" which was first enacted in December 1992. The defendant filed a demurrer claiming

the lawsuit was barred by the statute of limitations. The Supreme Court reversed the Superior Court and Court of Appeal. It held the complaint withstood a demurrer because it alleged a continuing violation which accrued with each collection of the tax. The Supreme Court explained, "if, as alleged, the tax is illegal, its continued imposition and collection is an ongoing violation, upon which the limitations period begins anew with each collection" (*id.* at 815).

Vallejo passed ordinances in 1992, 1995 and 2009 which each breached the Historic Cost Sharing Ratio. Each bi-monthly collection of the water rates (which Vallejo alleges are a "tax", just as in *Howard Jarvis*) is a continuing violation of the Historic Cost Sharing Ratio. The Complaint alleges Vallejo has an obligation to pay for the cost of owning, operating, and maintaining the LWS, and this obligation is breached every time Vallejo sends bills to the customers forcing them to pay 100% of the LWS's costs (¶¶54, 55). This obligation did not end in 1992; it continued in 1993, 1994 and to the present date. The violation accrues when a water bill is collected. Further, the Tolling Agreement tolls all claims back to July 2009 (¶¶54, 55, 57).

B. Proposition 218 Has No Bearing on Plaintiffs' Claims

Proposition 218 imposes certain procedural and substantive requirements with respect to "property related fees and charges" (including water fees). The City claims the 4th, 5th and 11th causes of action are barred by Proposition 218 which the City claims prohibits a "pooled" water rate structure in which Vallejo residents would be assessed property related fees and charges to pay for the City's share of the LWS costs. The argument is a red herring and must be rejected.

1. Proposition 218 Cannot Compel a Breach of Contract

Proposition 218 took effect on July 1, 1997 – five years after the City first breached its contractual obligation to share in the cost of the LWS. However, to the extent Proposition 218 could be read as allowing (or forcing) the City to breach or impair its existing contracts, it is unconstitutional. Article 1, Section 10, Clause 1 of the United States Constitution provides, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." If Plaintiff's contract claims survive, it follows that Vallejo's Proposition 218 argument must be rejected.

2. Proposition 218 Is Irrelevant

Proposition 218 is also irrelevant. The City mischaracterizes the Complaint as seeking "to require City residents to subsidize the cost of service for LWS customers" through "property related fees or charges" which would be added to City water bills.

This is simply not true. The Complaint alleges the City has an obligation to share in the cost of the LWS (¶¶89, 92). The Complaint does not specify **how** the City must satisfy this obligation, nor does it seek to force the City to impose "property related fees and charges" in the form of higher water bills to "subsidize" or pay for the LWS.

Assuming for purposes of argument Proposition 218 prohibits the City from funding its obligations by means of "property related fees and charges" imposed on the City's water customers, there are still **numerous other ways** the City could honor its obligations (*e.g.*, money from its general fund, sales taxes, general bonds, a reduction in services, cuts to its payroll, the sale of assets – to name just a few). **None of these methods trigger Proposition 218.** Plaintiffs do not care (or specify) **how** the City honors its obligations – only that it does honor them.

3. Proposition 218 Does Not Prohibit a "Pooled" Rate Structure

In any event, Proposition 218 does not prohibit the City from honoring its obligations to Plaintiffs by increasing "property related fees and charges" on its residents in the form of nominally higher water bills.

Article 13D, §6(b)(3) provides, "The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional **cost of the service** attributable to the parcel" (emphasis added). The City interprets §6(b)(3) to mean proportionality must be measured on an individual parcel-by-parcel basis. (Motion at 8:19-20 ["if the cost of service attributable to **one parcel** exceeds the cost of service to **another**, Prop. 218 prohibits pooling rates, so that one customer class is required to subsidize another"].)

However, this **individual** parcel-by-parcel proportionality determination was expressly rejected in favor of a **collective** proportionality determination in *Griffith v. Pajaro Vallejo Water Management Agency* (2013) 220 CA4th 586. In *Griffith*, the Pajaro Valley Water Management

Agency ("Pajaro Valley") implemented a strategy to prevent saltwater intrusion into its ground water supply. The strategy involved using recycled wastewater, supplemental wells, and storm runoff and to distribute these new water sources through new distribution pipes to certain customers nearest to the coast. The costs of this project were recovered through a three tiered "augmentation charge" which was imposed on *all* parcel owners, **even those who did not receive water from the new water sources or through the new distribution system**.

The plaintiff challenged the rate structure under Article 13D, §6(b)(3). He argued that Proposition 218 "compels a parcel-by-parcel proportionality analysis" and since he received no new water "services," the augmentation charge was disproportionate under §6(b)(3). Vallejo makes the same argument here – *i.e.*, since the City does not use LWS water, City residents cannot be forced to pay for the LWS.

The court in *Griffith* rejected the argument saying, "**The question of proportionality is <u>not</u> measured on an individual basis. Rather, it is measured <u>collectively</u>, considering <u>all</u> rate payers**' (220 CA4th at 601, quoting *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 C4th 421, 438, emphasis added). The court expressly approved the Pajaro Valley's revenue requirement model which budgeted rates by: "(1) taking the total costs of chargeable activities, (2) deducting the revenue expected from other sources, and (3) apportioning the revenue requirement among [all] the users" (*id.* at 600).

The court in *Griffith* also rejected the notion the coastal water customers were receiving a different "service" than the inland customers simply because they received water from a different source and through different distribution pipes (220 CA4th at 602 [the plaintiff's "complaint stems from his erroneous premise that the only property owners receiving services from defendant are the coastal landowners receiving delivered water"]). Pajaro Valley's water service would be considered a single "service" for purposes of Proposition 218, even if there were separate components of the service.

As affirmed in *Griffith*, the proportionality requirement in §6(b)(3) only requires the total cost of the "service" – i.e., the cost of operating Vallejo's **entire water system** – be apportioned

among the customers regardless of whether they technically drink or use water from a particular water source or through a particular distribution system.[2] Coincidentally, this is exactly how the Vallejo Municipal Code defines its water service.[3]

Finally, even if Proposition 218 were relevant, and even if Proposition 218 precluded the City from increasing City water rates to pay for the cost of the LWS, the Complaint alleges facts which estop the City from relying on Proposition 218 as a defense (¶¶43, 53).

C. The Separation of Powers Doctrine Does Not Apply

The "separation of powers" doctrine does not bar the 6th and 7th causes of action. An injunction is needed *to prevent Vallejo from violating State law*. In *Cooper v. Los Angeles County* (1946) 75 CA2d 75, plaintiffs sued Los Angeles County to prevent it from constructing a prison in an area zoned residential. The court granted the injunction to prevent the county from violating zoning laws prior to a trial on the merits saying it was the court's "plain duty" to do so:

> The Superior Court has the right to maintain the status quo by injunctive relief, and plaintiffs are entitled to a trial upon the merits and an injunction if they prove their allegations. . . . In that regard, **the superior court not only has "the right to maintain the status quo"** of the property involved but, in the circumstances, **it is the court's plain duty to do so**. Appellants merely seek to prevent the county of Los Angeles from establishing what is alleged to be a penal institution in a district long established as exclusively residential . . . . Fundamental doctrines of law and equity guarantee this right to plaintiffs. **Neither public officials nor political subdivisions possess rights of privileges superior to the individual in the administration of the law** (*id.* at 79, emphasis added).

Here, the 6th cause of action seeks an injunction "to enjoin and stop Defendant from selling all or any part of the LWS during the pendency of this litigation" (¶134). Vallejo cites several general statutes as well Public Utilities Code ("PUC") §10051 which provides, "Any

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[2] *But for* the City's existing contractual obligations to the LWS customers, Vallejo's practice of separating the municipal customers from the LWS customers would not necessarily violate Prop. 218. However, it is an entirely different matter to say that anything *other than* the current segregation of the customers is *required* by Prop. 218.

[3] The Code defines "service" to mean "the delivering or receiving of water, a water service connection or an act or duty performed by the water system" (§11.04.120). The term "water service" is defined to mean "the delivery and/or receipt of water or a water service connection" (§11.04.140). The term "water system" means "the water division of the public works department of the city of Vallejo, and the entire physical plant of the water division, including but not limited to real property, reservoirs, treatment plants, pumping stations, transmission and distribution pipelines, and appurtenances thereto" (§11.04.160). As in *Griffith*, there is a single "service" and a single "system" – not multiple services or multiple systems requiring the City to separately charge LWS customers from the municipal customers.

municipal corporation incorporated under the laws of this State may **as provided by this article** sell and dispose of any public utility it owns," for the proposition that selling the LWS is *discretionary*. However, PUC §10061(b) – part of the same Article – addresses the current situation precisely and **prohibits** a transfer of a municipal utility *outside the municipal boundaries* unless the terms of the sale are "just and reasonable" and do not "unreasonably discriminate" against the non-resident customers.[4] The Complaint alleges numerous facts showing a sale of the LWS during this litigation would be unjust, unreasonable and discriminatory (¶¶10, 56, 78, 132; *see also*, *Elliott v. City of Pacific Grove* (1975) 54 CA3d 53 [complaint alleging non-resident users paying rates four times more than city users stated a valid cause of action for discriminatory water charges]). An injunction is needed to ensure Vallejo does not violate §10061(b) until the parties rights are determined in this litigation.

The 7th cause of action seeks an preliminary and permanent injunction prohibiting the City "from (i) selling any part of the LWS without including in sale the watershed or non-watershed excess real property associated with the LWS and (ii) applying the proceeds of any sale of the watershed or non-watershed excess real property associated with the LWS to purposes other than deferred maintenance and capital improvements within the LWS." The Complaint alleges State law **requires** the proceeds of excess land sales to be invested in capital improvements within the water system (¶140) and this policy applies to the City as "a trustee and fiduciary of the Class" (¶141) (Cal. Pub. Util. Code §789.1(e)). The City's demurrer does not challenge these allegations. The injunction is needed to ensure the City does not sell parts of the system during the lawsuit or using the proceeds from such a sale for its general fund.

In addition, The Human Right to Water Bill provides that, "It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, *affordable*, and

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[4] Section 10061(b) provides: "Any municipal corporation owning and operating a public utility for furnishing water service, a part of which or all of which public utility is operated and used for furnishing water service **outside the boundaries of the municipal corporation, may** lease, **sell** or transfer, for just compensation all or any part of the portion of the public utility located outside the boundaries of the municipal corporation . . . **if**, . . . **the acquiring entity will be bound to render water service to the persons formerly served through the system being sold on terms and conditions which are just and reasonable and which do not unreasonably discriminate against the customers of the acquired entity.**"

accessible water . . ." (Cal. Water Code §106.3). The bill emphasizes "that access to safe and *affordable* water is a fundamental human right essential to our health, the environment and the economy." (Assembly Floor Analysis of AB 685, May 31, 2011.) Paragraph 1 of the Complaint alleges that "This action involves the right of approximately 809 families, schools, churches, businesses and property owners who reside outside Defendant's city limits to receive affordable water." There are numerous allegations in the Complaint that a sale of the LWS would result in unaffordable water (¶¶10, 78, 132, 143). Vallejo has no discretion to violate the "fundamental human right" to affordable water and an injunction is property to prevent such a violation.

Vallejo relies on *Monarch Cablevision, Inc. v. City Council of City of Pacific Grove* (1966) 239 CA2d 206, for the proposition this Court "may not command or prohibit legislative acts" (at 10:1). In *Monarch*, the plaintiff asked for a writ of mandate (not an injunction) to invalidate a cable television franchise the city issued to a different party and to compel the city to issue the franchise to the plaintiff. Under CCP §1085, a writ of mandate may be issued "to compel the performance of an act which the law specially enjoins" (*i.e.*, which the law requires). The court held the plaintiff was not entitled to the writ on the grounds the granting of a cable TV franchise is not compulsory, but was "a legislative act involving the exercise of discretion." No such discretion is involved here, as demonstrated above, a sale would violate State law.

The City cites *Leach v. City of San Marcos* (1989) 213 CA3d 648 for the proposition "an injunction cannot be granted to prevent execution of a public statute" and since PUC §10051 *permits* (as opposed to *requires*) a municipality to sell a public utility, no injunction can be issued. As discussed above, §10061(b)(1) *prohibits* a sale of a utility located outside the municipalities boundaries if the sale would be unjust, unreasonable or discriminatory, so the duty involved here is compulsory, not discretionary. Further, *Leach* is referring to CCP §528(b)(4) which prohibits an injunction "To prevent the execution of a public statute **by officers of the law for the public benefit.**" The City failed to include the bolded language in its moving papers. The City Council members are not "officers of the law" and §528(b)(4) applies to actions to *enforce* a statute (Witkin, *Cal. Proc.* (5th Ed.), Ch. VI, §331). The statutes cited by Vallejo are

permissive and selling the LWS would not be "executing" or "enforcing" those statutes within the meaning of §528(b)(4).

D. The Pay First, Litigate Later Rule Does Not Apply

The 8th and 9th causes of action are not barred by the "pay first, litigate late" rule.

1. The Pay-First, Litigate Later Rule Does Not Apply to City Water Charges

The "pay first, litigate later" prohibits an action "to prevent or enjoin the collection of any **tax**" (Cal. Const. Art. 13, §32). Because water charges are not a tax, the rule is inapplicable.

A tax is defined to mean "any levy, charge, or exaction of any kind imposed by a local government **except the following**: . . . (7) Assessments and **property-related fees imposed in accordance with the provisions of Article 13D**" (Cal. Const. Art. 13C, §1(e)(7); *see also,* Cal. Const. Art 13A, §3(b)(1)).[5] Water charges are "property related fees" under Article 13D (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 C4th 205), and thus, are specifically excluded from the definition of a "tax."

The case of *Water Replenishment District of Southern California v. City of Cerritos* (2013) 220 CA4th 1450, relied upon by the City, is legally questionable. The court in *Cerritos* found an assessment on groundwater production was a "tax" based on certain "findings and declarations" found in the legislative history (but not the text) of Proposition 218. The court's cursory analysis failed to mention Article 13C, §1(e)(7), Article 13A, §3(b)(1), or Article 13C, §1(e)(2) –passed in November 2010 as a part of Proposition 26 – expressly state property related fees are **not** a tax. "The absence of ambiguity in the statutory language dispenses with the need to review the legislative history" (*McWilliams v. City of Long Beach* (2013) 56 C4th 613, 623).

Water rates are not a tax, and hence, not subject to the pay-first, litigate later rule finds further support in *County of Inyo v. PUC* (1980) 26 C3d 154, 159, where the California Supreme Court said a non-resident water consumer may "sue to enjoin rates which are themselves

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[5] In addition, Article 13C, §1(e)(2) excludes from the definition of a "tax" any "charge imposed for a specific government service or product . . . *which does not exceed the reasonable costs to the local government of providing the service or product.*" (*See also,* Art. 13A, §3(b)(1) [same].) Under Proposition 218, property-related fees and charges (including water charges) "shall not exceed the funds required to provide the property related service" (Art. 13D, §6(b)(1)). Therefore, property-related fees and costs are, by definition, not a tax.

'unreasonable, unfair, or fraudulently or arbitrarily established'" (26 C3d at 159, quoting, *Durant*, 39 CA2d at 139). The Complaint makes the same allegations (¶¶113, 114, 161).

2. No Case Has Applied the Pay-First, Litigate Later Rule to a City Which Did Not Have Either a "Pay First" Requirement or a Refund Procedure

The pay-first rule in Article 13, §32 applies to actions against the *State*. Courts have extended the rule to local governments, but only where the local government has either a pay first requirement or a refund procedure (*City of Anaheim v. Superior Court* (2009) 179 CA4th 825, 831-32).[6] Vallejo has "pay first" requirements and/or refund procedures with respect to sales taxes (§3.04.150), transaction taxes (§3.08.100), and real property conveyance taxes (§3.10.220), but has no similar requirements for water rates and charges under Chapter 11.48.

Further, the City is estopped from relying on the pay-first rule. The Complaint *does* seek a "refund" of $11,996,971 arising from water charge overpayments since 2009 under the Tolling Agreement (¶¶92, 101, 118, 126). Since the City claims it can do by ordinance what it wants (at 1:5-6), and no action can be maintained for breach of contract (or, apparently, any other theory), Vallejo essentially wants the customers to "pay first", but when the claim for refund is made, the City will deny the existence of a legal procedure or theory to obtain a refund.

3. Both Causes of Action State a Cause of Action for a <u>Permanent</u> Injunction

Even if the pay-first, litigate-later rule were applied to water charges, for purposes of a demurrer, the 8th[7] and 9th claims state a cause of action for a *permanent* injunction. As explained by the Supreme Court in *Ardon v. City of Los Angeles* (2011) 52 C4th 241, 252:

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[6] The courts of appeal are divided on the issue of whether the rule applies on public policy grounds alone, even in the absence of a pay first requirement or a refund procedure. In *City of Anaheim v. Superior Court* (2009) 179 CA4th 825, 831-32, the court held that rule does not apply – even on public policy grounds – when the city has "neither a 'pay first' requirement nor a refund procedure." The court in *Cerritos* called into doubt this holding, however, the *Cerritos* court acknowledged that the City of Los Angeles *did* have a tax refund procedure, rendering its opinion on the subject dicta. *Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 CA4th 1129, the only First District case addressing the issue, said that "pay first, litigate later" applies on public policy grounds, but, as in *Cerritos*, acknowledged that San Francisco did have a tax refund procedure. Plaintiff is unaware of a single case where the pay-first, litigate later rule was applied in favor of a city which had no pay first requirement or no refund procedure for the "tax" at issue.

[7] The 8th Cause of Action seeks to stop the imposition of the "surcharge fee." The complaint alleges pursuant to City Ordinance §11.48.182, "the upgrade surcharge **shall** expire on September 30, 2015" and "**shall** be removed on the date of the next billing cycle" (¶72). At the very least, a writ of mandate is appropriate to compel Vallejo to comply with its own ordinances (CCP §1085), especially.

> [A]rticle XIII, section 32 simply prohibits courts from 'preventing or enjoining the collection of any tax "*during the pendency of litigation challenging the tax.*" In fact, article XIII, section 32 does not purport to limit a court's authority to fashion a remedy if it determines a tax is illegal, including its authority to issue an injunction against further collection of the challenged tax (italics in original).

E. Government Code Section 815 Does Not Apply

The city claims the 5th and 12th causes of action are barred by Government Code §815 which Vallejo claims prohibits common law claims not based on statute (at 14:13-14). The 12th cause of action[8] seeks an accounting of the Surcharge and Connection Fees levied by the City upon the LWS customers. This claim seeks nothing more than an accounting to ensure money from the Surcharge and Connection Fees were properly segregated and applied as required by §§11.48.181, 11.48.183 and 11.16.021 of the Code (¶¶70-79, 149, 181) and §714 of the Charter.

The 5th cause of action is for breach of fiduciary duty. The basis of the claim stems from the trustee-beneficiary relationship between Vallejo and the non-resident customers. The California Supreme Court in *City of South Pasadena v. Pasadena Land and Water Company* (1908) 152 Cal. 379, 394, said a municipality supplying water to non-residents holds "title as a mere trustee, bound to apply it to the use of those beneficially interested" (*see also, B.H. Leavitt v. Lassen Irrigation Co.* (1909) 157 Cal. 82, 87). In *Durant, supra*, 39 CA2d at 138, the court built upon *South Pasadena* and said in providing water to non-residents, the municipality "is impressed with a trust" for the benefit of the non-residents.

Vallejo does not challenge the trustee-beneficiary relationship or the existence of a fiduciary duty *per se*; only that a breach of fiduciary duty is not based on statute. However, the law of trusts is statutory and "defines the nature of the fiduciary duties arising out of a particular fiduciary relationship with considerable precision" (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 CA4th 257, 272). As a trustee, Vallejo's fiduciary duties of care and loyalty are codified in Probate Code §§16002 (loyalty) 16003 (conflicts of interest) and 16040 (care).

[8] As to the claim, the 12th cause of action is "uncertain" because the Complaint does "not specify the time from for which it seeks an accounting", Plaintiff wants an accounting of *all* LWS Connection Fees and *all* LWS Surcharge Fees.

CONCLUSION

For the foregoing reasons, Plaintiff asks the Court to deny Defendant's demurrer, or, in the alternative, grant leave to amend. Attached is a chart for the Court's convenience showing the twelve causes of action and the basis for Vallejo's demurrer to each.

Respectfully submitted,

DATED: March 18, 2014

LAW OFFICES OF STEPHEN M. FLYNN

Stephen M. Flynn
Attorney for Plaintiff GREEN VALLEY LANDOWNERS ASSOCIATION

No.	Cause of Action	Basis for Demurrer #1	Basis for Demurrer #2
1	Breach of Implied Contract	City cannot enter into an implied in law contract	Statute of limitations
2	Breach of Covenant of GF and Fair Dealing	City cannot enter into an implied in law contract	Statute of limitations
3	Breach of Contract (Third Party Beneficiary)	City cannot enter into an implied in law contract	Statute of limitations
4	Breach of Duty to Charge Reasonable Water Rates	Prop. 218	
5	Breach of Fiduciary Duty	Prop. 218	Gov. Code §815
6	Injunction (Against Sale)	Separation of powers doctrine	
7	Injunction (Against Sale without Land)	Separation of powers doctrine	
8	Injunction (Surcharge Fee)	Pay first, litigate later rule	
9	Injunction (Future Rates)	Pay first, litigate later rule	
10	Specific Performance	City cannot enter into an implied in law contract	Statute of limitations
11	Declaratory Relief	Prop. 218	
12	Accounting	Gov. Code §815	Uncertainty

PROOF OF SERVICE

Matter: *Green Valley Landowners Association v. City of Vallejo*

Document Names:

1. **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S DEMURRER TO COMPLAINT**

I, STEPHEN M. FLYNN, declare as follows:

1. I am over the age of 18 years and am not a party to the above-mentioned matter. My business name and address is the LAW OFFICES OF STEPHEN M. FLYNN, 70 Stevenson Street, Suite 400, San Francisco, California 94105.

2. On **March 18, 2014**, I served the above document as follows:

   BY OVERNIGHT DELIVERY SERVICE (FEDERAL EXPRESS) by placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express or similar next-day courier service agent (or drop box by the deadline for next-day delivery) for delivery as set forth below.

3. Each envelope was addressed and mailed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: March 18, 2014

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Government Code § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

GREEN VALLEY LANDOWNERS ASSOCIATION, a California mutual benefit corporation, on behalf of its members and others similarly situated,

Plaintiff,

v.

CITY OF VALLEJO, and DOES 1 THROUGH 1000, INCLUSIVE,

Defendants.

CASE NO. FCS042938
Unlimited Jurisdiction

(Case assigned to Hon. W. Arvid S. Johnson)

REPLY TO PLAINTIFF'S OPPOSITION TO DEMURRER

Complaint Filed: January 23, 2014

Hearing Date: April 23, 2014
Time: 10:00 a.m.
Dept.: 4

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INTRODUCTION

Plaintiff's quest to establish liability through implied contracts is refuted both by state and local law requiring the observance of formalities in the creation of municipal contracts and the statute of frauds.

Moreover, Plaintiff does not qualify as a third party beneficiary of written easement contracts, because well-established case law limits third party beneficiary status in the context of government contracts, and the contracts at issue were clearly intended to further broader public purposes, namely the provision of water service to the residents of Vallejo.

Finally, Plaintiff wildly mischaracterizes case law in its attempt to avoid Proposition 218, and its arguments cannot withstand the authority of *Water Replenishment District of Southern California v City of Cerritos* (2013) 220 Cal.App.4th 1450 (prohibiting the injunction of water rates) or Government Code section 815 (requiring a statutory basis for government liability).

For all of these reasons, the City's Demurrer should be sustained.

I. THE CITY CANNOT ENTER INTO IMPLIED-IN-FACT CONTRACTS.

A. Government Code Section 40602 Prohibits All Implied Contracts

The City of Vallejo is a charter city empowered to establish "home rule" charter provisions, none of which authorize implied contracts.[1] Moreover, section 201 of the Vallejo City Charter ("Charter") provides that general laws apply unless a different procedure is required by the Charter or by ordinance. Given that neither the Charter nor any ordinance supplants the general rule established under Government Code section 40602 governing municipal contracts, the City's power to contract is limited by that general law provision.[2]

Government Code section 40602 provides in relevant part that "[t]he mayor shall sign … [a]ll written contracts and conveyances made or entered into by the city." Courts have uniformly interpreted this provision as a limitation on a city's authority to contract. As noted by the Second Appellate District:

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[1] As discussed at length in the Demurrer, all Charter and Vallejo Municipal Code provisions governing the City's contracts require written agreements.

[2] It is telling that Plaintiff does not respond to the City's argument regarding Government Code section 40602, or even mention that provision in its Opposition.

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> *[w]hen a statute limits a city's power to make certain contracts to a certain prescribed method and impliedly prohibits any other method*, a contract that does not conform to the prescribed method is void and no implied liability can arise for benefits received by the city or for damages caused by it to the other party to the void contract ... the adoption of the prescribed mode is a jurisdictional prerequisite to the exercise of the power to contract at all and can be exercised in no other manner so as to incur any liability on the part of the municipality. (*South Bay Senior Housing Corp. v. City of Hawthorne* (1997) 56 Cal.App.4th 1231, 1235 [emphasis in original; internal quotations and citations omitted].)

Thus, California courts have recognized that Government Code section 40602 prohibits any method of municipal contracting that does not involve a written and signed agreement. (*Authority for California Cities Excess Liability v. City of Los Altos* (2006) 136 Cal.App.4th 1207, 1212 [a city "may be held liable on a contract only if the contract is in writing, approved by the city council, and signed by the mayor"]; *G.L Mezzetta v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1093 [citing Gov. Code, § 40602 for the proposition that "contracts with the City [must] be in writing, approved by the city council, approved as to form by the city attorney, and signed by either the Mayor or the city manager"]; *McIntosh v. Northern California Universal Enterprises Co.* (E.D. Cal. 2009) 670 F.Supp.2d 1069, 1092-1093 [California city may be held liable on a contract only if the contract is in writing, approved by the city council, and signed by the mayor or by another city officer designated by the city council in an ordinance].)[3]

Plaintiff prefers to interpret this limitation as a bar to contracts that are implied-in-law, as opposed to contracts that are implied-in-fact, but whether a contract is implied-in-law or implied-in-fact is a distinction without a difference. Pursuant to Government section 40602, as incorporated under Charter section 201, the City is not empowered to enter into any implied contract, and that prohibition is fatal to Plaintiff's implied contract claims. It is therefore unsurprising that Plaintiff fails to cite a single case in which a municipal implied-in-fact contract has been deemed

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[3] It is noteworthy that Plaintiff makes no effort to distinguish these cases in its Opposition. Instead, Plaintiff relies upon irrelevant case law stating in dicta that the only rights that a non-resident has for municipal water service could arise only out of contract. (See *Hobby v. City of Sonora* (1956) 142 Cal.App.2d 457, 460 [concluding that no contract existed, but merely "a continuing, revocable permit for the right to connect with the city's sewage system"].) This issue of whether water service rights can arise under contract is not under dispute here, and in any event, the City's rates are set by ordinance, not contract.

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enforceable.[4]

Moreover, Plaintiff's effort to distinguish *Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104 is unpersuasive, because that case broadly recognizes "the need to protect and limit a public entity's contractual obligations," including contracts that are implied-in-fact. (*Id.* at p. 109-110 [recognizing that pleading common counts does not abrogate this limitation, but is instead an "alternative theory of recovery based on a contract that is either 'implied in fact' or 'implied in law'].) This limitation is grounded in public policy that requires cities to observe formalities "in order to ensure that expensive decisions are not hastily made," so that "[n]o single individual has absolute authority to bind the municipality; many parts of the government must work together ... [promoting] a 'checks and balances' system, the key to which is ensuring that many different individuals are privy to and approve of a contract" that establishes municipal liability. (*First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 669.) This limitation is also supported by the policy to make public obligations clear and transparent, to avoid giving staff power to make binding commitments without the knowledge and consent of elected officials, and the prevention of corruption that might otherwise occur. The requirement of formality is particularly compelling here, given the scope of Plaintiff's desire to force the City to subsidize its water service in perpetuity.

For all of these reasons, Plaintiff's attempt to establish contracts that are implied-in-fact should be rejected on its face.

B. The City Council Has Not Authorized Implied Contracts

Section 307 of the Charter provides that "[a]ll powers of the City shall be vested in the Council except as otherwise provided by law or in this Charter." As noted in the Demurer, section 717 of the Charter requires formal action by the City Council before the City Manager is permitted to enter into contracts, and Municipal Code sections 3.20.045 and 3.20.222 provide restrictions on

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[4] In theory a charter city could allow implied contracts if specifically authorized to do so by its Charter, but Plaintiff does not, and cannot, allege any such provision in the Vallejo Charter or any ordinance. Plaintiff instead argues that the absence of a Charter prohibition against implied contracts renders an implied-in-fact contract enforceable. This turns the law on its head, however, because Charter section 201 provides that general laws apply unless a different procedure is required by the Charter or an ordinance. Here there are no local provisions that supplant Government Code section 40602, and the Charter's silence on this issue indicates that general law applies.

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signature authority and contract bids, respectively. While these provisions do not by their terms govern contracts for water service, they evidence the City Council's intent to require formally authorized, written documents to bind the City. Plaintiff's desire to enforce purported implied contracts flies in the face of the City Council's intent to require formality, which is based on the public policy concerns discussed above.

C. Plaintiff's Impairment of Contract Theory Ignores the Statute of Frauds

Plaintiff argues that under the Contract Clause (U.S. Const., art. 1, § 10, cl. 1), the Charter and Vallejo Municipal Code provisions discussed above cannot apply to implied contracts that pre-date the enactment of those provisions. This ignores the fact that the statute of frauds, an ancient fixture in Anglo-American jurisprudence that was enacted as section 1624 of the Civil Code in 1872, also prohibits the alleged implied contracts.[5] In particular, subdivision (a)(1) provides — as every first year law student knows — that "[a]n agreement that by its terms is not to be performed within one year" must be in writing. Thus, no implied contract for subsidized water service into perpetuity could exist to begin with, and there were no valid implied contracts to impair when the Charter and Municipal Code provisions were enacted.

Similarly, when Government Code section 40602 was adopted, it could not have impaired any then-existing implied contract for a subsidy in perpetuity, because any such contract would have been independently barred under the statute of frauds. Thus, the Contract Clause does not prohibit the application of local rules against implied contracts, which are supported by Government Code section 40602, Civil Code section 1624, and the historical application of the statute of frauds.

II. PLAINTIFF IS NOT A THIRD PARTY BENEFICIARY.

Perhaps recognizing that a theory of implied contract for subsidized water service in perpetuity is unsound, Plaintiff seeks to sue as a third party beneficiary of unspecified written and recorded contracts. Any such contracts, however, would fall squarely within an established line of cases that do not recognize third party beneficiaries in government contracts.

The leading case on this issue is *Martinez v. Socoma* (1974) 11 Cal.3d 394, a dispute in

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[5] As recognized by the subheading "A History of the Lakes Water System — 1893-1992" on p. 6 of the Opposition, the LWS did not exist prior to 1893.

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which a government agency contracted with the defendant to hire and train "hard core unemployed" residents of a "Special Impact Area" in East Los Angeles. Plaintiffs, who were residents of East Los Angeles and indisputably members of the class that the government intended to benefit, sued as third party beneficiaries of the contract. There, the California Supreme Court noted that third party beneficiaries are categorized as either creditor beneficiaries or donee beneficiaries, and that "[a] person cannot be a creditor beneficiary unless the promisor's performance of the contract will discharge some form of legal duty owed to the beneficiary by the promisee." (*Martinez*, *supra*, 11 Cal. 3d at p. 400.) Here, as in *Martinez*, there is no allegation that property owners who entered into easement contracts for the development of the LWS owed any legal obligation to Plaintiff, or that those property owners were seeking to discharge a legal obligation to Plaintiff. Plaintiff therefore cannot qualify as a creditor third party beneficiary.

Although the *Martinez* Court recognized that the plaintiffs there were among those whom the government intended to benefit through the defendant's performance of the contract, it rejected donee third party beneficiary status:

> [T]he fact that a Government program ... confers benefits upon individuals who are not required to render contractual consideration in return does not necessarily imply that the benefits are intended as gifts ... **The benefits of such programs are provided not simply as gifts to the recipients but as a means of accomplishing a larger public purpose** ... The Government may, of course, deliberately implement a public purpose by including provisions in its contracts which expressly confer on a specified class of third persons a direct right to benefits, or damages in lieu of benefits ... But a governmental intent to confer such a direct right cannot be inferred simply from the fact that the third persons were intended to enjoy the benefits. (*Martinez*, *supra*, 11 Cal.3d at p. 401 [emphasis added].)

Here, there is no allegation that the written contracts at issue expressly confer benefits on Plaintiff, and the development of the LWS clearly served a larger public purpose, namely the provision of water to the City's residents. Thus, *Martinez* instructs that Plaintiff is not a third party beneficiary of the City's easement contracts.

III. PLAINTIFF'S CONTRACT CLAIMS ARE NOT SUBJECT TO CONTINUING ACCRUAL

Plaintiff relies upon *Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 Cal.4th 809 in support of its position that continuing accrual applies in a contract action against a public

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agency. That case, however, involved the continuing imposition and collection of a tax, as to which the California Supreme Court explained, "if, as alleged, the tax is illegal, its continued imposition and collection is an ongoing violation, upon which the limitations period begins anew with each collection." (*Id.* at p. 815.)

Here, Plaintiff's claims are based upon a purported breach of contracts for water service that allegedly began in 1992, and Plaintiff cites no authority for the proposition that contracts for water service are subject to continuing accrual. Moreover, the theory of continuing accrual ignores the sound policy reasons underlying the four-year statute of limitations for breach of contract set forth in Code of Civil Procedure section 339. As recognized by the Second Appellate District:

> The purpose of statutes of limitations is to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation, and the right to be free of stale claims in time comes to prevail over the right to prosecute them. (*Cutujian v. Benedict Hills Estates Ass'n* (1996) 41 Cal.App.4th 1379, 1387-1388.)

While Plaintiff claims that the alleged breach dates back to 1992 when the water from Lake Curry became unusable due to new drinking water regulations, it alleges no inability to discover the purported breach in a timely manner, and no action taken in response until 2009. (Complaint, ¶ 57.) Under these circumstances, Plaintiff's breach of contract claims are time barred.

IV. PROPOSITION 218 FORBIDS THE SUBSIDY THAT PLAINTIFF SEEKS.

Plaintiff's Proposition 218 argument should be rejected for three reasons. First, as discussed above, its Contract Clause position ignores that the statute of frauds, codified in 1872 under Civil Code section 1624, invalidates the alleged implied contracts under which Plaintiff seeks recovery. Therefore, given that no enforceable implied contract for perpetual water service subsidies existed when Proposition 218 became effective in November of 1996, no such implied contract could have been impaired by the measure.

Second, Plaintiff wildly misconstrues *Griffith v. Pajaro Vallejo Water Management Agency* (2013) 220 Cal.App.4th 586.[6] In Plaintiff's view, *Griffith* affirmed that "the proportionality

[6] Colantuono & Levin, outside counsel for the City of Vallejo here, represented the Pajaro Water Management Agency in that matter.

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requirement in § 6(b)(3) [of Article XIII D of the California Constitution] only requires that the total cost of the 'service' — i.e., the cost of operating Vallejo's **entire water system** — be apportioned among customers regardless of whether they technically drink or use water from a particular source or through a particular distribution system." (Opposition, 9:26 – 10:2 [emphasis in original].) This is nonsense, because the requirement that "[r]evenues derived from the fee or charge shall not exceed the [entire] funds required to provide the property related service" is set forth in section 6(b)(1). Section 6(b)(3), in contrast, provides that "[t]he amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel." Thus, pooling the cost of service is plainly illegal.

The *Griffith* opinion did not question, much less abrogate, the proportionality requirement set forth under section 6(b)(3). Instead, it merely stated:

> Given that Proposition 218 prescribes no particular method for apportioning a fee or charge other than the amount shall not exceed the proportional cost of the service attributable to the parcel, defendant's method of grouping similar users together for the same augmentation rate and charging the users according to usage is a reasonable way to apportion the cost of service. That there may be other methods favored by plaintiffs does not render defendant's method unconstitutional. Proposition 218 does not require a more finely calibrated apportion. (*Griffith*, *supra*, 220 Cal.App.4th at p. 601.)

In other words, the *Griffith* court recognized that it is administratively infeasible to determine the proportional cost of service on a parcel-by-parcel basis, and that Proposition 218 permits a proportionality determination to be made on the basis of groupings determined by customer class. This is exactly what the City did in determining that the cost of service for the customer class that relies on the LWS distribution system is higher than the cost of service for City residents, and the proportional cost of service for each customer class was be determined accordingly. In contrast, pooling the cost of service among different customer classes is prohibited under subdivision 6(b)(3) of Article XIII D.

Third, while Plaintiff's position that it does not seek subsidies through rate revenue — but is instead willing to accept recovery through the City's general fund — might satisfy Proposition 218, the suggestion that the City's alleged obligation to subsidize Plaintiff's water service into perpetuity is a general fund obligation highlights the City's concerns about unbounded, implied agreements that

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apply in perpetuity. Plaintiff has cited no authority for the position that water utility staff can bind the general fund through an implied contract, and that conclusion runs afoul of state and local rules requiring the observation of formalities in municipal contracting.

For all of these reasons, Plaintiff's position on the impact of Proposition 218 should be rejected.

V. SPECULATION THAT A FUTURE SALE OF LWS ASSETS MIGHT BE UNLAWFUL DOES NOT SUPPORT INJUNCTIVE RELIEF

Plaintiff is entitled to the presumed truth of well-pleaded facts, but not facts that are contrary to judicially noticeable facts or to law. As plaintiff admits, no sale of LWS assets has yet occurred, and this Court need not predict, as Plaintiff does, that the City will violate statute in the conduct of a future sale, and therefore bar it from acting at all. Instead, the judicial power should await the exercise of legislative discretion and determine its legality after the fact, not before.

Moreover, Plaintiff's claim that Public Utilities Code provisions regarding the sale of water utility assets grants the City no discretion is plainly incorrect. In fact, Public Utilities Code section 10061 sets standards for the exercise of legislative discretion, and should the City exceed its discretion, a remedy will be then available.

Similarly, the claim that City officials are not "officers of the law" within the meaning of Code of Civil Procedure section 526(b)(4), which prohibits an injunction to prevent the execution of a public statute (incorrectly cited as section 528(b)(4) in the Opposition at 12:24), is simply wrong. (*Sundance Saloon v. City of San Diego* (1989) 213 Cal.App.3d 807, 812 [recognizing that section 526(b)(4) applies to city officials].)

Furthermore, as discussed in the Demurrer, the constitutional prohibition against enjoining the collection of a tax under section 32 of Article XIII extends to injunctions against water rates under *Water Replenishment District of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450. While Plaintiff's desire that this Court disregard *Water Replenishment District* is understandable, judicial disapproval must be reserved for the Court of Appeal. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 454 [trial court exceeded its jurisdiction in refusing to follow appellate decision].) Plaintiff's dissatisfaction with *Water Replenishment District* therefore cannot be

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resolved or even considered before this Court, where the holding of that case must be presumed correct.

Likewise, Plaintiff's theory that the "pay first, litigate later" rule cannot apply here, because there is purportedly no refund procedure available, should be rejected out of hand, because Government Code section 910 provides procedural rules applicable to a municipal refund claim.

Finally, Plaintiff's reliance upon *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241 is misplaced, because the language quoted in the Opposition brief at 15:1-3 indicates merely that the prohibition against an injunction set forth under section 32 of Article XIII does not limit a court's ability to fashion a remedy for a charge that is determined to be illegal. Here, the legality of the City's water rates has yet to be resolved, and injunctive relief is therefore unavailable.

VI. ESTOPPEL DOES NOT APPLY

Plaintiff argues that the City is estopped both from relying on Proposition 218 (Opposition, 10:4-6) and the "pay first, litigate later" rule (Opposition, 14:11-16). As discussed below, this argument ignores the limitations on applying the doctrine of estoppel against a government agency.

Estoppel against a public agency "requires some affirmative representation or acts by the public agency or its representatives inducing reliance by the claimant." (*Peterson v. City of Vallejo* (1968) 259 Cal.App.2d 757, 767; See *City of Goleta v. Superior Court* (2006) 40 Cal.4th 270, 279 ["Equitable Estoppel will not apply against a government body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy"] [internal quotations and citations omitted].) Here, Plaintiff has not alleged, and cannot allege, any affirmative act by the City that induced reliance on a purported ability to violate Proposition 218, or a disregard of the "pay first, litigate later" rule. In fact, Plaintiff has not even alleged the elements of an estoppel claim, much less that these elements, and the limitations of asserting estoppel against a government agency, are satisfied.

Under these circumstances, Plaintiff's estoppel argument must be rejected.

VII. GOVERNMENT CODE SECTION 815 SUPPLANTS THE OUTDATED CASES PLAINTIFF RAISES AGAINST IT

Government Code section 815 dates from 1963 and was adopted in response to the

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abrogation of sovereign immunity declared in *Muskopf v. Corning Hospital District* (1961) 55 Cal.2d 211. Section 815's rule that all liability against a public agency must arise by statute is fundamental, applied in countless cases, and cannot be disregarded because of the cases cited by Plaintiff that predate the modern rule. Moreover, Plaintiff's reliance statutory provisions that define the nature of fiduciary duties begs the question, because there is no statutory basis for imposing fiduciary liability to begin with.

Therefore, because Plaintiff fails to articulate the required statutory basis for its fiduciary and accounting claims, those claims should be rejected as a matter of law.

VIII. CONCLUSION

For the reasons discussed above, the City's Demurrer should be sustained.

DATED: March 28, 2014

COLANTUONO & LEVIN, PC

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PROOF OF SERVICE

Green Valley Landowners Association v. City of Vallejo

Case No. FCS042938

I, Martha C. Rodriguez, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 300 S. Grand Avenue, Suite 2700, Los Angeles, California 90071-3137. On March 28, 2014, I served the document(s) described as **REPLY TO PLAINTIFF'S OPPOSITIION TO DEMURRER** on the interested parties in this action as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 28, 2014, at Los Angeles, California.

MARTHA C. RODRIGUEZ

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Green Valley Landowners Association v. The City of Vallejo
Solano County Superior Court, Case No. FCS042938

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IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SOLANO

GREEN VALLEY LANDOWNERS ASSOCIATION, a California mutual benefit corporation, on behalf of its members and others similarly situated,

Plaintiff,

vs.

THE CITY OF VALLEJO, and DOES 1 through 1000, inclusive,

Defendants.

Case No. FCS042938

SUR-REPLY IN OPPOSITION TO DEFENDANT'S DEMURER TO COMPLAINT

Dept: 4
Judge: Hon. Arvid W. Johnson
Date: April 23, 2014
Time: 10:00 a.m.

Action Filed: January 23, 2014
Trial Date: Not Scheduled

INTRODUCTION

Pursuant to this Court's April 7, 2014 Order Granting Leave to File a Sur-Reply Brief, this brief is being submitted to address the following issues: (i) whether Government Code §40602 precludes the Implied Agreements alleged in the Complaint, (ii) whether the Implied Agreements fall within the statute of frauds, specifically, Civil Code §1624(a)(1), and (iii) whether the Class are third party beneficiaries of certain written easements relating to the Lakes Water System ("LWS").

LEGAL ARGUMENT

A. Government Code §40602 Does Not Apply

Nothing in Vallejo's Charter or Code prohibit it from entering into the Implied Agreements alleged in the Complaint. In its reply brief, Vallejo raised a new argument that Government Code §40602 requires all city contracts be in writing. Section 40602 applies to *general law* cities. Vallejo is a *charter* city. As will be demonstrated below, Section 40602 does not apply to charter cities, in general, or Vallejo, in particular. Further, unlike general law cities, restrictions on a charter city's power *may not be implied* and their powers are construed *in favor of the exercise of power* over municipal affairs and *against the existence of any limitation.* Construing §40602 to apply to Vallejo would violate these principals. Notably, Vallejo fails to cite a single case holding (or implying) that §40602 requires all charter city contracts to be in writing.

1. The Powers and Limitations of Charter Cities Charter Cities Are Substantially Different From General Law Cities

There are two classes of cities: charter cities (like Vallejo) and "general law" cities (Cal. Gov. §§34100-34102). Government Code §40602 only applies to general law cities. However, before addressing the §40602 argument, it is important to distinguish between a charter city and a general law city because their powers and limitations differ **substantially**.

A general law city may only do what the Government Code says it can do (*Irwin v. City of Manhattan Beach* (1966) 65 C2d 13, 20 ["A general law city has only those powers expressly

conferred upon it by the Legislature, together with such powers as are necessarily incident to those expressly granted or essential to the declared object and purposes of the municipal corporation."]; *California Jurisprudence* (3d) Municipalities §12 ["a general law city is generally limited to those powers that are expressly conferred by the legislature, together with the powers necessarily incident to those expressly granted or essential to the declared object and purposes of the city"]).

Charter cities, on the other hand, can generally do as they wish, provided they do not act in conflict with the charter (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal. 4th 161, 170 [a charter city "has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter"]; *California Jurisprudence* (3d) Municipalities §13[a charter city "may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in the charter").

In other words, a general law city may only act if the act is *expressly allowed* by the legislature, whereas a charter city may act unless *expressly disallowed* by the charter. Given this difference, the powers and limitations of a general law city and a charter city are construed in the **opposite** manner.

The powers of a general law city are *strictly construed against* the exercise of the city's power (*Irwin*, 65 Cal. 2d at 20-21 ["The powers of such a [general law] city are strictly construed, so that any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation."]; *California Jurisprudence* (3d) Municipalities §12 ["The powers of a general law city are strictly construed, so that any fair, reasonable doubt concerning the exercise of a power is resolved against the city."]).

In contrast, the powers of a charter city are *liberally construed in favor of* the city's exercise of power (*Domar*, 9 C4th at 171 ["Charter provisions are construed in favor of the exercise of the power over municipal affairs and against the existence of any limitation or restriction thereon which is not expressly stated in the charter. Thus, restrictions on a charter

city's power may not be implied."]). Unlike a general law city, "the charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation" (*id.* at 170).

Vallejo turns these rules of construction on their head. It argues that unless the Charter *specifically allows* Vallejo to enter into the Implied Agreements, such agreements are void (Reply at 2:1-6, 2:20-22, 3:26-28, 4:1-5; *see also*, Demurrer at 6:4-11). This is a reversal of the law, and, incidentally, of Vallejo's own Charter. Section 200 of the Charter provides "The enumeration in this Chapter of any particular power ***shall not be held to be exclusive of or any limitation upon this general grant of power***" (emphasis added). Thus, unless the Charter specifically *disallows* the Implied Agreements, they are enforceable. As explained in *Domar*, "the enumeration of powers [in the city's charter] does not constitute an exclusion or limitation" and "restrictions on a charter city's power may not be implied" (*id.* at 170, 171).

2. Section 40602 Does Not Apply to Charter Cities Like Vallejo

Vallejo claims Government Code §40602 – which applies to *general law* cities – requires contracts entered into by a *charter city* to be in writing. The general law is only *binding* on a charter city with respect to matters ***other than*** "municipal affairs" (Cal. Const. Art. 11, §5(a)). The construction, financing, ownership, maintenance and operation of a public waterworks project like the LWS is unquestionably a municipal affair (*Domar*, 9 C4th at 170-71). Accordingly, the general law, including §40602, does not apply to this dispute. Notably, Vallejo fails to cite a single case holding (or even implying) that §40602 applies to charter cities, or that §40602 requires that all contracts entered into by a charter city to be in writing.[1]

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[1] Vallejo selectively quotes from *Authority for California Cities Excess Liability v. City of Los Altos* (2006) 136 CA4th 1207, 1212 (Reply at 2:9-10) but omits from the quote the beginning of the sentence, which provides "**As a general law city**, Los Altos may be held liable on a contract only if the contract is in writing . . . ." *G.L. Mezzetta v. City of American Canyon* (2008) 78 CA4th 1087, involved a general law city and the decision was based almost exclusively on the strict construction *against* the exercise of power by a general law city.

3. Even if §40602 Applied, Its Strict Construction is Limited to General Law Cities

Government Code §40602 provides, "The mayor shall sign: . . . (b) All written contracts . . . ." On its face, §40602 only prescribes *how* written contracts are to be executed; it does not otherwise *require* all contracts to be in writing. In *G.L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 CA4th 1087, the court held that §40602 *implicitly* required all contracts made by the City of American Canyon (a *general law* city) to be in writing.

The court's finding of an "implicit" intent that all contracts be in writing was based on (i) an analysis of §40602 in relation to certain municipal code provisions adopted by the City of American Canyon, and (ii) the limited power and nature of *general law* cities.

As to the former, the court in *G.L. Mezzetta* placed special emphasis on §2.20.030C of American Canyon's municipal code which defined the function of the city attorney to include the preparation and approval of all city contracts. As explained by the court:

> [W]e agree with the City that ***implicit*** in the relevant statutes, ***when read together***, is the requirement that contracts with the City be in writing, approved by the city council, approved as to form by the city attorney, and signed by either the mayor or the city manager. (See, §40602, Mun. Code §§2.08.060M, 2.20.030C.) Although the City could have been more explicit about its requirement that all contracts be in writing, nonetheless, the terms of the three statutory provisions in question, particularly Municipal Code section 2.20.030C, make clear the City's intent that all contracts it enters into be in writing (*id.* at 1093, emphasis added).

Vallejo's Charter does not have anything like the municipal code sections relied upon in *G.L. Mezzetta*. Section 401 of Vallejo's Charter simply says, "There shall be a City Attorney, appointed by the Council, who shall serve as legal advisor to the Council, the City Manager, and all City departments, offices and agencies, shall represent the City in legal proceedings, and shall perform other duties as directed by the Council." Thus, it is doubtful that the same holding would be extended to Vallejo even if it were a general law city.

As to the later, the court's holding that §40602 required all contracts to be in writing was based primarily on the *limited* powers of general law cities and the *strict construction* of those powers by the courts. In support of the quote excerpted above, the court citied and quoted *Martin v. Superior Court* (1991) 234 CA3d 1765, 1768, for the proposition that the "powers of a

general law city are strictly construed, so that any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation" (*id.* at 1093). The court explained further:

> The powers of a general law city include only those powers expressly conferred upon it by the Legislature, together with such powers as are necessarily incident to those expressly granted or essential to the declared object and purposes of the municipal corporation. **The powers of such a city are strictly construed, so that any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation. American Canyon is *a general law city* and, as such, it must comply with state statutes that specify requirements for entering into contracts** (*id.* at 1092, citing *Martin v. Superior Court* (1991) 234 CA3d 1765, 1768, citations and quotations omitted, emphasis added).

As discussed above, unlike general law cities, "restrictions on a charter city's power **may not be implied**" and their powers are "construed **in favor of the exercise of power** over municipal affairs and **against the existence of any limitation** or restriction thereon which is not expressly stated in the charter" (*Domar*, 9 Cal. 4th at 170-71). Thus, even if §40602 could be applied to charter cities, the *implied limitation* the courts have found on the mode in which general law cities can contract would not apply to charter cities.

4. Section 201 of the Charter Does Not Require Vallejo to Follow General Law Procedures

Vallejo believes §201 of its Charter changes the result. The City *claims* §201 "provides that general laws apply unless a different procedure is required by the Charter or by ordinance" (at 1:17-18). The *actual text* of Section 201 says no such thing.[2] It provides, "The City *shall have the power* to act pursuant to procedure established by any law of the State unless a different procedure is required by this Charter." The "*shall have the power*" language is permissive. It *allows* the City to act pursuant to certain procedures. It does not *require* the City to do so, and it certainly does not say that the City is *restricted* by the general law in the exercise of its powers.

Rather, the powers of the City are set forth in §200 of the Charter, entitled "Powers." The only *limitations* and *restrictions* on the City's powers are the Charter and the State Constitution. Section 200 provides "The City shall have the right and power to make and

[2] As it did in its moving papers, Vallejo continues to cite Charter and Code sections while "summarizing" what they allegedly say instead of actually quoting the language from the Charter and Code. Given the continuing disparities between Vallejo's "summary" of the Charter and Code sections and their actual text, skepticism is warranted.

enforce all laws and regulations in respect to municipal affairs, ***subject only to*** the restrictions and limitations provided in this Charter and the Constitution of the State of California" (emphasis added). Section 200 also provides that the City "shall have the *power* to exercise any and all rights, powers and privileges" under the "general laws of the State." As with §201, this reference to the "general law" is a *grant* of power to the City; it is not a *restriction* on the City's powers. Section 200 further provides that "The enumeration in this Chapter of any particular *power* shall not be held to be exclusive of or any limitation upon this general grant of power." The **only** *restriction* on the City's powers are the Charter and the State Constitution (§200).

Further, to the extent there is an ambiguity, the Charter must be "construed in favor of the exercise of power over municipal affairs and against the existence of any limitation or restriction thereon which is not expressly stated in the charter" (*Domar*, 9 Cal. 4th at 171, quoting *City of Grass Valley v. Walkinshaw* (1949) 34 Cal. 2d 595, 599; *see also*, Vallejo Charter §200 ["The enumeration in this Charter of any particular power shall not be held to be exclusive of or any limitation upon this general grant of power"]). "[R]estrictions on a charter city's power may not be implied" (*id.*). Vallejo's reading of §201 would flip this rule of construction on its head and would invite the court to find an implied intent that the City be restricted not only by its Charter, but by the Government Code as well. Section 200 of the Charter is clear that there was no such intent; in fact, the opposite is true.

In sum, while a general law city may be "bound" by Government Code §40602, a charter city (like Vallejo) can contract any way it chooses, provided that the mode of contracting does not conflict with the Charter or the State Constitution. Section 201 does not alter this rule.

B. The Implied Agreements Are Not Barred by the Statute of Frauds

The Implied Agreements do not fall within the statute of frauds as set forth in Civil Code §1624(a)(1) for three separate reasons: (i) the Implied Agreements do not *by their terms* preclude performance within one year, (ii) the Implied Agreements may be terminated by the customers thereby making performance within one year possible, and (iii) the Complaint alleges facts giving rise to an estoppel to plead the statute of frauds.

1. Section 1624(a)(1) Only Applies to Contracts Which *By Their Terms* Cannot Possibly be Performed within One Year

Civil Code §1624(a)(1) provides that an "agreement that *by its terms* is not to be performed within a year from the making thereof" is invalid (not void), unless it is in writing. As explained by one commentator "The important words are 'by its terms'; i.e., only those contracts which expressly preclude performance within a year are unenforceable. And these words have been literally and narrowly interpreted" (Witkin, *Summary of California Law* (10th Ed.) Contracts §363). The Supreme Court, discussing §1624(a)(1) has said that:

> In its actual application, however, the courts have been perhaps even less friendly to this provision (the 'one year' section) than to the other provisions of the statute (of frauds). They have observed the exact words of this provision and have interpreted them **literally and very narrowly**. To fall within the words of the provision, therefore, the agreement must be one of which it can truly be said At the very moment it is made, "This agreement is not to be performed within one year"; in general, the cases indicate that **There must not be the slightest possibility that it can be fully performed within one year**. (*White Lighting Co. v. Wolfson* (1968) 68 C2d 336, 343, fn. 2, quoting 2 *Corbin on Contracts* §444, emphasis added).

Further, a contract of an indefinite duration does not fall within §1624(a)(1). As explained by Witkin, "A contract is unenforceable only where *by its terms* it is *impossible* of performance in the period. If it is merely unlikely that it will be so performed, or the period of performance is *indefinite*, the statute does not apply" (Witkin, *Summary of California Law* (10th Ed.) Contracts §365, italics in original; 3 *Cal. Affirmative Def.* (2d Ed.) §53:20 ["This aspect of the statute of frauds cannot be invoked to invalidate a contract unless the agreement very clearly provides by its very terms that the contract is not to be performed within the year. The fact that performance within one year is not likely or probable is not sufficient."]).

The Complaint does not allege that Vallejo agreed to pay in the cost of the LWS for 1 year, 2 years, 10 years or 200 years. Rather, the Complaint alleges that Vallejo's obligation to share in the cost of the LWS is indefinite (¶¶87, 167, 169). Given the literal and very narrow construction given to §1624(a)(1), the Implied Agreements are not within its terms.

2. Section 1624(a)(1) Does Not Apply Because Plaintiffs Could Have Terminated Their Performance

Section 1624(a)(1) also does not apply because Plaintiffs could have terminated their performance under the Implied Agreements by, for example, discontinuing their receipt of water from Vallejo. In California, ***either*** party's "election to terminate takes the contract out of the statute [of frauds]" (Witkin, *Summary of California Law* (10th Ed.) Contracts §367). In *White Lighting*, *supra*, 68 C2d 336, the plaintiff alleged the breach of an oral employment agreement whereby the defendant agreed to employ him on a "permanent" basis and to pay him a commission based on the annual sales of the company. The Supreme Court held the alleged oral agreement was not within §1624(a)(1) because nothing in the oral agreement "foreclose[d] the employee's completion of the performance of the contract within one year" (*id.* at 341).

White Lighting was followed in *Foley v. Interactive Data Corp.* (1988) 47 C3d 654. In *Foley*, the plaintiff argued that his employer's conduct and policies over the period of seven years gave rise to an "oral contract" not to fire him without good cause (*id.* at 671). Trial court granted the employer's demurrer without leave to amend and the court of appeal, relying on *Newfield v. Insurance Co. of the West* (1984) 156 CA3d 440, affirmed. In *Newfield*, the court of appeal held that if *only the employee* had the right to terminate the contract, "there was a reasonable expectation of employment for more than one year (in which case the statute of frauds does apply, barring this action)."

The Supreme Court, relying on *White Lighting*, overruled *Newfield* holding that it was "irreconcilable with the rule in *White Lighting*" (*id.* at 672). The Court held:

> Even if the original oral agreement had expressly promised plaintiff "permanent" employment terminable only on the condition of his subsequent poor performance or other good cause, such an agreement, if for no specified term, *could* possibly be completed within one year. **Because the employee can quit or the employer can discharge for cause**, even an agreement that strictly defines appropriate grounds for discharge can be completely performed within one year—or within one day for that matter (47 C3d at 672-73, italics in original, emphasis added).

The court in *Abeyta v. Superior Court* (1993) 17 CA4th 1037, further extended the holdings in *White Lighting* and *Foley*. In *Abeyta*, the court held that an oral contract for a term

of three years was not subject to §1624(a)(1) because it could have been terminated by either the employee or the employer within that three year term. The court explained, "If performance under a contract could be terminated within one year under some contingency it makes no difference whether the contract has a definite outside term of two years, three years or five years—or whether it is for the employee's lifetime or some other 'indefinite' period" (*id.* at 1044).

Here, as in *White Lighting*, *Foley* and *Abeyta*, Plaintiffs could have terminated their side of the Implied Agreement by withdrawing from the LWS and discontinuing further water service (*see also*, 3 *Cal. Affirmative Def.* (2d Ed.) §53:20 ["Oral contracts that may be terminated at will by either party typically escape the bar of the statute of limitations because such contracts can be performed within a year even though they may actually continue for many years. In this respect, California's statute of frauds differs from the rule applied in many other jurisdictions."]).

3. Plaintiff Alleges Facts Giving Rise to an Estoppel to Plead the Statute of Frauds

It has long been held that "equitable estoppel may preclude the use of a statute of frauds defense" (*Byrne v. Laura* (1997) 52 CA4th 1054, 1068). As explained by Justice Traynor:

> The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract . . . (*Monarco v. Lo Greco* (1950) 35 C2d 621, 623).

Plaintiff has alleged facts giving rise to an estoppel to assert the statute of frauds (¶37). "Whether the doctrine of equitable estoppel should be applied in a given case is generally a question of fact" (*Byrne*, 52 CA4t at 1068) and therefore is not a grounds for granting the demurrer.

Further, it is commonly said that an estoppel to assert the statute of frauds is inappropriate where the remedy of quantum meruit is available (*Monarco*, 35 C2d at 625; *Ward v. Wrixon* (1959) 168 CA2d 642, 655). Since Vallejo claims a city cannot be sued on a quantum meruit theory of recovery (*see*, Demurrer at 4:16-7:11), there is a compelling reason to find that

Vallejo is estopped to assert the statute of frauds as a defense to the Implied Agreements resulting in an *enforceable* contract. In any event, it is an issue of fact.

C. The Class Is An Intended Beneficiary of the Written Easements

Plaintiff's third cause of action is for breach of contract on a third party beneficiary basis (¶¶103-111). The Complaint alleges (i) Vallejo entered into approximately 60 written agreements with certain non-resident property owners (¶104) whereby the non-resident property owners granted to Vallejo easements which were necessary for the construction of the LWS and delivery of water to Vallejo and the Class (¶105), (ii) such easements were given in exchange for Vallejo's obligation to provide the servient owners with free water (¶106), (iii) Vallejo breached this obligation by passing onto the Class the financial obligation of providing the free water to the servient property owners (¶107), and (iv) the Class is the intended beneficiary of such agreements (¶105).

Vallejo relies exclusively on *Martinez v. Socoma* (1974) 11 C3d 394, claiming there is "an established line of cases" holding there can be no "third party beneficiaries in government contracts" (Reply at 4:24-25).

Martinez only held that the *government contractor* in that particular case could not be sued on a third party beneficiary basis. It has no application to the present case. Indeed, the "established lines of cases" Vallejo eludes to all involve the issue of whether the *contractor* in a government contract may be sued on a third party beneficiary basis. The Restatement (2d) of Contracts §313(2) sets forth the general rule (subject to certain exceptions[3]) that "a *promisor* who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public." The third cause of action is against *Vallejo*, not a government contractor. *Martinez* simply does not apply and Vallejo has put forth no other reason why the third cause of action fails to state a cause of action.

[3] There is no blanket rule against suing even a contractor as a third party beneficiary, and numerous cases have allowed such a claim (*Shell v. Schmidt* (1954) 126 CA2d 279, 290-91; *Zigas v. Superior Court* (1980) 120 CA3d 827, 835-40; *Amaral v. Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1194; *Tippett v. Terich* (1995) 37 CA4th 1517, 1533).

Respectfully submitted,

DATED: April 4, 2014

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

GREEN VALLEY LANDOWNERS ASSOCIATION, a California mutual benefit corporation, on behalf of its members and others similarly situated,

Plaintiff,

v.

CITY OF VALLEJO, and DOES 1 THROUGH 1000, INCLUSIVE,

Defendants.

CASE NO. FCS042938
Unlimited Jurisdiction

(Case assigned to Hon. W. Arvid S. Johnson)

RESPONSE TO SUR-REPLY

Complaint Filed: 1/23/14

Hearing Date: April 23, 2014
Time: 10:00 a.m.
Dept.: 4

Trial Date: not set
Motion Cut-Off: not set
Discovery Cutoff: not set

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I. GOVERNMENT CODE § 40602 GOVERNS CONTRACT FORMATION IN VALLEJO

Plaintiff spills a lot of ink over differences between charter and general law cities, but this Court need not be distracted by that distinction. The law is clear that — in the absence of a charter provision or charter-city ordinance to the contrary — the California Constitution provides that charter cities are subject to general law. The city cites ordinances it views as barring oral agreements; Plaintiff interprets those ordinances otherwise but cites no charter provision excluding the general law rule. Accordingly, whether the City's or Plaintiff's view of its ordinances is correct, the law is plain that Vallejo may make only written contracts. Furthermore, no court has ever held section 40602 to apply differently to charter and general law cities in the absence of an express charter provision or charter-city ordinance to the contrary.

Subdivision (a) of section 5 of Article 11 of the California Constitution:

> It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters **and in respect to other matters they shall be subject to general laws.**

(Emphasis added.) Thus, "where the charter contains no special procedure concerning a municipal subject, the general laws govern." (*McLeod v. Board of Pension Commissioners* (1971) 14 Cal.App.3d 23, 29.) Plaintiff does not allege a Charter provision limiting application of Government Code section 40602 or permitting oral contracts. Thus, general law applies — lock, stock and barrel. The Charter's general grant of power to the City serves to authorize ordinances that vary from general laws but, in absence of such ordinances, general law applies.

Plaintiff's cites Article 11, section 5, subdivision (a) for the proposition that "general law is only *binding* on a charter city with respect to matters ***other than*** 'municipal affairs' " (Sur-Reply, 3:16-17 [original emphasis]), but that ignores the constitution's preservation of the general law for issues not governed by charter.[1] Further, the rationale for the constitutional preservation of general

[1] Moreover, it is unclear that the requirement of written contracts is in fact a "municipal affair" that is protected under the home rule doctrine. Notwithstanding Plaintiff's position that the "construction, financing ownership, maintenance and operation of a public waterworks project like the LWS is unquestionably a municipal affair" (Sur-Reply, 3:18-19) those activities are not in issue. Instead, this dispute involves the ability of the City to enter into implied contracts, which implicates the policy to

law not displaced by a charter is evident: the Legislature anticipated that general law would be needed to supplement (rather than contradict) charter provisions and ordinances they authorize. Thus, whether or not this Court is inclined to accept Plaintiff's construction of Charter section 201 and its distinction of the ordinances on which the City relies for a requirement that City contracts be in writing (Sur-Reply, 5:16-22), the constitution preserves the general law, and Plaintiff concedes (as it must) that the City's authority is subject to constitutional limitations. (Sur-Reply, 5:24-25.)

Nor do the requirements of Government Code section 40602 differ as between charter and general law cities; when the statute applies, it terms mean what they say. While *G.L. Mezzetta v. City of American Canyon* (2000) 78 Cal.App.4th 1087 involved a general law city, that makes no difference for its construction of section 40602 because no California court has ever found that section to establish different requirements for charter and general law cities. Accordingly, its requirements are fatal to Plaintiff's implied contract claims.

II. THE STATUTE OF FRAUDS PRECLUDES THE ALLEGED IMPLIED CONTRACTS

A. Contracts for Perpetual Performance Are Within the Statute of Frauds

"Indefinite" can mean "uncertain" or "forever." Plaintiff exploits this ambiguity to misstate the law as to contracts to be performed in perpetuity. Citing Witkin, Plaintiff argues:

> a contract of indefinite duration does not fall within [Civil Code] § 1624(a)(1). As explained by Witkin, "A contract is unenforceable only where *by its terms* it is *impossible* of performance in the period. If it is merely unlikely that it will be so performed, or the period of performance is *indefinite*, the statute does not apply" (Witkin, *Summary of California Law* (10th Ed.) Contracts § 365, italics in original ...) (Sur-Reply, 7:15-18.)

Conflating "indefinite" with "in perpetuity," Plaintiff argues:

> The Complaint does not allege that Vallejo agreed to pay the cost of the LWS for 1 year, 2 years, 10 years or 200 years. Rather the Complaint alleges that Vallejo's obligation to share in the cost of the LWS is **indefinite**. (Sur-Reply, 7:23–25 [emphasis added].)

Thus, it is Plaintiff's view that the statute of frauds bars an oral contract to be performed for

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make public obligations clear and transparent, to avoid giving staff power to make binding commitments without the knowledge and consent of elected officials, and the prevention of corruption that might otherwise occur.

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200 years but not a contract that must be performed in perpetuity because the latter is "indefinite." The authorities cited by Witkin, however, do not support this nonsensical distinction. Instead, the quote from Witkin indicates that when the period of performance is "indefinite" in the sense of uncertain, a contract would not be subject to the statute of frauds if the reasonable period of performance were within one year:

> This rule is illustrated by cases dealing with agreements to refrain from doing something. In *Long v. Cramer Meat Packing Co.* (1909) 155 C. 402 … the oral agreement was that certain land should "always" be used for certain purposes. ***Held*, the contract called for performance forever, and violated the statute** … However, in *San Francisco Brewing Corp. v. Bowman* (1959) 52 C.2d 607 … the court held that an oral agreement of unspecified duration giving an exclusive distributorship might be brought within the statute of frauds, on the following analysis: The law implies its continuance for a reasonable period; the trier of fact … must therefore determine what period was reasonable under the particular circumstances; and, if the period so determined is in excess of 1 year, it is unenforceable .. (Witkin, Summary of California Law (10th Ed.) Contract § 365 [emphasis added].)

Nothing in the authorities Witkin summarizes bears the second meaning of "indefinite" — as an uncertain, but apparently perpetual, term. The core meaning of the statute of fraud has meant since the time of King Henry that perpetual promises must be written, and Plaintiff's efforts to avoid the rule come hundreds of years too late.

B. The City May not Terminate the Alleged Implied Contracts In a Year or Ever

Plaintiff also cites Witkin for the proposition the statute of frauds does not bar an oral contract terminable in a year "by its terms." Plaintiff is unconstrained by the actual terms of any agreement, and instead assumes the alleged class "could have terminated their performance under the Implied Agreements by … discontinuing their receipt of water from Vallejo." (Sur-Reply, 8:2-5.)

This argument should be rejected for three reasons. First, the Complaint does not allege any performance required of Plaintiff or the alleged class, but instead asserts only that they are entitled to subsidized water forever and can transfer that privilege with title to their land. Under these circumstances, there are no obligations for LWS customers to terminate and no rational beneficiary of this promise would ever surrender the entitlement.

Second, even in the absurd hypothetical that every LWS customer were to terminate service

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within one year of the 19th century making of the allegedly implied oral agreements, the Complaint does not allege the City would be absolved of a duty to perform or that the implied agreements would terminate. Instead, the perpetual term of the alleged agreements suggests that the City would be required to perform whenever a class member or a transferee of his or her land decided to turn the water back on. In other words, under the alleged agreements, customers hold all the cards, and the City is on the hook forever.

Third, Plaintiff cites employment cases in which both employers and employees could terminate an oral agreement within one year. *White Lighting Co. v. Wolfson* (1968) 68 Cal.2d 336 involves a cross-complaint alleging an oral contract obliging White Lighting to employ Wolfson on a "permanent" basis. The court held the statute of frauds inapplicable, because "the alleged oral contract may be terminated at will [by] either party, it can, under its terms, be performed within one year. When Wolfson's employment relationship with White [Lightning] was terminated, Wolfson had completely performed; White [Lightning]'s performance consisted of nothing more than compensating Wolfson." (*Id.* at p. 344.) This case is unhelpful here as the alleged oral agreements state no grounds under which either party may terminate.

In *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654 the parties disputed whether "the company's own conduct and personnel policies gave rise to an 'oral contract' not to fire [Plaintiff employee] without good cause." (*Id.* at p. 671.) The Court of Appeal found the alleged contract outside the statute of frauds, because "the employee can quit or the employer can discharge for cause" and therefore the contract could be performed in a year. (*Id.* at p. 673.) Again, either party could terminate the alleged oral agreement. *Abeyta v. Superior Court* (1993) 17 Cal.App.4th 1037 is to the very same effect. (*Id.* at p. 1044–1045.)

None of these authorities apply here, because according to Plaintiff, the City has no means to terminate its alleged oral commitment to subsidize LWS water service forever, and the benefited class has no performance obligation that could be terminated.

C. The High Bar to Estop A City is Not Met

Plaintiff ignores the Reply's authorities limiting the scope of estoppel against government perhaps hoping the Court will, too. However, estoppel against a public agency "requires some

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affirmative representation or acts by the public agency or its representatives inducing reliance by the claimant." (*Peterson v. City of Vallejo* (1968) 259 Cal.App.2d 757, 767; See *City of Goleta v. Superior Court* (2006) 40 Cal.4th 270, 279 ["Equitable Estoppel will not apply against a government body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy"] [internal quotations and citations omitted].)

Plaintiff alleges no affirmative City act that induced reliance on a purported obligation to subsidize the cost of water service into perpetuity. In fact, Plaintiff has not even alleged the elements of ordinary estoppel claim, much less the additional elements of such a claim against government.

III. PLAINTIFFS ARE NOT THIRD PARTY BENEFICIARIES

Plaintiff asserts a curious new twist on its third party beneficiary argument:

> The Complaint alleged (i) Vallejo entered into approximately 60 written agreements with certain non-resident property owners ... whereby the non-resident property owners granted to Vallejo easements which were necessary for the construction of the LWS and delivery of water to Vallejo and the Class ..., (ii) such easements were given in exchange for Vallejo's obligation to provide the servient owners with free water ..., (iii) Vallejo breached this obligation by passing onto the Class the financial obligation of providing the free water to the servient property owners ..., and (iv) the Class is the intended beneficiary of such agreements ... . (Sur-Reply, 10:5–12.)

Thus, Plaintiff argues it is an intended third party beneficiary of agreements to provide free water to approximately 60 LWS property owners. It does not, however, suggest how one property owner would benefit from provision of free water to another. Accordingly, this theory should be rejected.

Moreover, while it is understandable that Plaintiff would prefer to avoid *Martinez v. Socoma Companies, Inc.* (1974) 11 Cal.3d 394, its cursory effort to distinguish the case because the government contractor rather than the government agency was sued, is unconvincing. The Court's reasoning did not depend upon the identity of the defendant. Rather, the Court concluded that the disputed benefits were "a means of accomplishing a larger public purpose," rather than simply to provide a gift to plaintiffs. (*Id.* at p. 401.) The written easement contracts here were made to serve the larger public purpose of providing water to City residents, as opposed to simply gifting water to owners of property outside the City who provided easements necessary to serve City residents.

Martinez controls and Plaintiff's third party beneficiary argument therefore fails.

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DATED: April 11, 2014

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 300 S. Grand Avenue, Suite 2700, Los Angeles, California 90071.

On April 11, 2014, I served the within document(s):

RESPONSE TO SUR-REPLY

☐ **BY FACSIMILE**: By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date.

☐ **BY ELECTRONIC MAIL**: By transmitting via electronic mail the document(s) listed above to those identified on the Proof of Service listed below.

☐ **BY MAIL**: By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☒ **OVERNIGHT DELIVERY**: By overnight delivery, I placed such document(s) listed above in a sealed envelope, for deposit in the designated box or other facility regularly maintained by FEDERAL EXPRESS for overnight delivery, caused such envelope to be delivered to the office of the addressee via overnight delivery pursuant to C.C.P. §1013(c), with delivery fees fully prepaid or provided for.

☐ **PERSONAL SERVICE**: I caused such envelopes to be delivered by hand to the addresses indicated on the attached list.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on April 11, 2014, at Los Angeles, California

Pamela Jaramillo

Pamela Jaramillo

SERVICE LIST

Green Valley Landowners Association v. The City of Vallejo
Solano County Superior Court, Case No. FCS042938

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IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SOLANO

GREEN VALLEY LANDOWNERS ASSOCIATION, a California mutual benefit corporation, on behalf of its members and others similarly situated,

Plaintiff,

vs.

THE CITY OF VALLEJO, and DOES 1 through 1000, inclusive,

Defendants.

Case No. FCS042938

SUPPLEMENTAL BRIEF RE: APPLICATION OF "GENERAL LAW" IN OPPOSITION TO DEFENDANT'S DEMURER TO COMPLAINT

Dept: 4
Judge: Hon. Arvid W. Johnson
Date: April 23, 2014
Time: 10:00 a.m.

Action Filed: January 23, 2014
Trial Date: Not Scheduled

A. With Respect to Municipal Affairs, a Charter City Is Never Subject to the General Law – Even if the Charter is Silent on the Subject

The court's ruling on the breach of contract claims stems from a single false premise – namely, that a charter city is bound by the general law on municipal affairs upon which the charter is silent.[1] The first line of the tentative rulings provides that: "A chartered city remains subject to state statutes [i.e., the "general law"], except for 'municipal affairs' governed by the charter."

This has not been the rule in California for 100 years. It was only under the 1896 version of the California Constitution that the general law would control where the charter was silent (*City of Pasadena v. Charleville* (1932) 215 Cal. 384, 388 [Under the 1896 version of the California Constitution, with respect to "municipal affairs upon which the charter was silent, the provisions of any general law thereto would control the subject").

In 1914, the California Constitution was amended and the powers of charter cities were liberalized. Its current iteration is found in Article 11, §5(a) which provides that a charter city "may make and enforce all ordinances and regulations in respect to municipal affairs, *subject only to restrictions and limitations provided in their several charters* and in respect to *other matters* [i.e. matters other than municipal affairs] they shall be subject to the general laws." The "other matters" language modifies "municipal affairs" – *i.e.*, in matters *other than municipal affairs*, the general law applies. **In all other matters, a charter city is limited *only by* its charter.**

The difference between the pre- and post-1914 versions of the Constitution was explained by the Supreme Court as follows:

> In the early stages of municipal home rule in California, the charter prevailed only where it expressly covered the particular power exercised. Under the liberalizing constitutional amendment of 1914, the charter is not a grant of power but a restriction only, and the municipality is supreme in the field of municipal affairs ***even as to matters on which the charter is silent***" (*Butterworth v. Boyd* (1938) 12 C2d 140, 146, emphasis added).

[1] In its Response to Sur-Reply, Vallejo argued (for the first time) that "where the charter contains no special procedure concerning a municipal subject, the general laws govern" (Response to Sur-Reply at 1:15-16).

"*The result* [of the 1914 amendment] *is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force*" (*Wiley v. City of Berkeley* (1955) 136 CA2d 10, 13, italics in original, quoting *Bank v. Bell*, 62 CA 320, 329; *Charleville*, 215 C at 388-89 ["The result [of the 1914 amendment] is that the city has become independent of general laws upon municipal affairs."]; *Wiley v. City of Berkeley* (1955) 136 CA2d 10, 13 ["Under the liberalizing constitutional amendment of 1914, the charter is not a grant of power but a restriction only, and the municipality is supreme in the field of municipal affairs *even as to matters on which the charter is silent*" [italics in original]). Pursuant to the 1914 amendment, "the power of a charter city over exclusively municipal affairs is all embracing, restricted and limited **only by the city's charter, and free from any interference by the state through the general laws**" (*Simons v. City of Los Angeles* (1976) 63 CA3d 455, 468(emphasis added); *Charleville*, 215 Cal. at 388-89).

In its tentative ruling the Court correctly observes that (1) "the manner in which a city may form a contract is a municipal affair", and (2) Vallejo's Charter "does not specifically prescribe how its contracts must be executed." **This is the beginning and end of the inquiry**. If Vallejo's Charter does not prescribe the manner in which municipal water contracts are entered into, the court may not create or imply a restriction on the City's power to contract (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal. 4th 161, 170 [a charter city "has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter"]). Further, since "charter provisions are construed in favor of the exercise of the power over municipal affairs and against the existence of any limitation or restriction thereon which is not expressly stated in the charter . . . **restrictions on a charter city's power may not be implied**" (*id.* at 171, emphasis added). [2]

[2] Against this weight of authority, Vallejo pulls a single quote from a case entitled *McLeod v. Board of Pension Commissioners* (1971) 14 CA3d 23, 29) in its Response to Sur-Reply. The issue in *McLeod* was whether Government Code §68092.5, which relates to payment to expert witnesses, applied to a charter city. The court, without elaboration, stated that "where the charter contains no special procedure concerning a municipal subject, the general law governs." The single quote from *McLeoad* should be ignored because: (1) it is incorrect, (2) it has never been cited by a single case for the same proposition, (3) the court relied on *pre-1914* case law with respect to charter

B. Section 201 of the Charter Are Permissive – Not Mandatory

Section 201 of the Charter says the "City shall have the power to act pursuant to procedure established by any law of the State unless a different procedure is required by this Charter." The court seeming interprets this as a mandatory directive – *i.e.*, where the charter is silent, the City is bound by the general law. However, the language in §201 is permissive, not mandatory. Thus, the City *may* act pursuant to the general law, but it is not *required to do so*.

The Supreme Court addressed virtually identical charter language in *City of Glendale v. Trondsen* (1957) 48 C2d 93, 100-101. There, the Glendale charter provided that nothing "shall prevent the Council from proceeding under general laws." The Supreme Court held that this language was "**obviously** . . . nothing more than a permissive method" (*id.*, emphasis added). The *Trondsen* case was followed in *Redwood City v. Moore* (1965) 231 CA2d 563. The Redwood City charter provided that the city "shall have all the powers granted to cities by the constitution and general laws of this state" (*id.*at 573). The court held:

> Accordingly, pursuant to section 74 the City may still invoke the procedure provided by general law. It is apparent from a reading of section 74 that the City **may follow the general laws** in the making of improvements. However, **it is not required to do so** because by its very language section 74 is **permissive and not mandatory**" (*id.*, emphasis added).

There is nothing in Vallejo's charter indicating or suggesting that it is *bound by* the general law on municipal affairs. In fact, §200 of the Charter provides that "The enumeration in this Charter of any particular power shall not be held to be exclusive of or any limitation upon this general grant of power." [3]

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cities, namely, *Civic Center Assn. v. Railroad Com.* (1917) 175 C 411, *City of Sacramento v. Adams* (1915) 171 C 458, and *Hyde v. Wilde* (1921) 51 CA 82, and (4) the court ignored Article 11, Section 5 of the Constitution and the extensive case law holding that under the 1914 amendment, the general law is not binding, even if the charter is silent.

[3] Compare the language *Trondsen*, *Moore* and §§200 and 201 of the Charter to the language in *City of San Jose v. Lynch* (1935) 4 C2d 760, 762-63, where the San Jose charter provided that "where the general laws of the State provide a procedure for the carrying out and enforcement of any rights or powers belonging to the City, **said procedure shall control and be followed** unless a different procedure shall have been provided in this charter or by ordinance."

C. The Court May Not Imply Limitations on the Powers of a Charter City

As in *G.L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 CA4th 1087 (a case involving a general law city), the Court "read together" Article 11, §5 of the Constitution, §201 of the Charter and §3.20.045 of the City Code[4] to imply a requirement that all city contracts be in writing. However, as discussed above (and at length in the Sur-Reply at 1:20-3:13), unlike a general law city, "the enumeration of powers [in the city's charter] does not constitute an exclusion or limitation" and "**restrictions on a charter city's power may not be implied**" (*Domar*, 9 C4th at 170-71). This implied limitation on the power of the City to enter into contracts is inconsistent with the rights of charter cities in California. If the Charter does not prohibit a certain mode of contracting, the City necessarily has the power to contract in any manner not prohibited by the Charter.

D. Conclusion

The general law, and in particular Government Code §40602, is not binding on Vallejo with respect to the manner of entering into municipal water contracts. Since the Charter does not address how municipal water contracts are entered into, the Court cannot imply a limitation on the power of City enter into contracts. As a result, the 1st, 2nd and 10th causes of action necessarily survive the demurrer (as should the 4th cause of action[5]).

DATED: June 10, 2014

LAW OFFICES OF STEPHEN M. FLYNN

Stephen M. Flynn
Attorney for Plaintiff GREEN VALLEY LANDOWNERS ASSOCIATION

[4] Section 3.20.045 of the City Code was not even enacted until *2011* – decades after the implied agreements at issue were entered into. Plaintiff fails to see how a 2011 municipal code provision can alter the enforceability of contracts entered into decades earlier.

[5] As explained in the Opposition (and as recognized by the Court), to the extent the implied agreements are valid, Proposition 218 cannot abrogate or impair those agreements (U.S. Const., Art. 1, Sec. 10).

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

GREEN VALLEY LANDOWNERS ASSOCIATION, a California mutual benefit corporation, on behalf of its members and others similarly situated,

Plaintiff,

v.

CITY OF VALLEJO, and DOES 1 THROUGH 1000, INCLUSIVE,

Defendants.

CASE NO. FCS042938
Unlimited Jurisdiction

(Case assigned to Hon. W. Arvid S. Johnson)

REPLY TO PLAINTIFF'S SUPPLEMENTAL BRIEF RE: APPLICATION OF GENERAL LAW

Complaint Filed: January 23, 2014

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I. INTRODUCTION

Plaintiff's third brief opposing this demurrer argues this syllogism: the City of Vallejo ("City") has not exercised its home rule authority to specify how City contracts must be formed; state law cannot reduce the City's power to legislate on this subject; and, therefore, common law rules applicable to private parties control.

Only the second point is correct. The City has legislated, and even if it had not, there is ample authority that a government contract cannot be formed by mere implication. All government contracts must be written. The question is whether the City's Charter evidences intent to follow general law until such time as the City exercises its home rule authority to provide contrary local rules. It does, and therefore no implied contract may be enforced against Vallejo.

II. VALLEJO'S LOCAL LAW REQUIRES ALL CONTRACTS TO BE IN WRITING

Section 201 of the City's Charter ("Charter") states that general laws apply unless a different procedure is required by the Charter or ordinance.[1] The Charter includes no provision allowing the City to make implied contracts. In turn, Government Code section 40602 requires the Mayor's signature on all contracts unless the City Council ordains otherwise, which courts have interpreted to "impliedly prohibit" any non-written contract. (*Poway Royal Mobilehome Owners Assn. v. City of Poway* (2007) 149 Cal.App.4th 1460, 1470; *see also G. L. Mezzetta v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1093.) Thus, by clear implication, the Charter expresses intent that all contracts binding the City be written. Simply put, if the City had intended to allow itself to be bound by implied contracts — in

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[1] The City did not raise this issue for the first time on reply as Plaintiff has repeatedly alleged, even after having been corrected by the City's response to its sur-reply. The City originally cited Government Code section 40602 at page 7 of its demurrer. Moreover, even if the City had not done so, the issue has now been thoroughly briefed in Plaintiff's sur-reply, the City's reply to it, the additional brief to which the City now replies, orally at the demurrer hearing on June 11, 2014, and here.

the teeth of contrary state law and public policy — the Charter would plainly say so. It does not.

The City's ordinances underscore that all City contracts must be written. Vallejo Municipal Code section 3. 20. 045[2] provides limited authority to particular City officials to contract for the City — allowing the City Manager, for example, to sign contracts valued at up to $100,000 provided the Council has appropriated funds for the purpose. (*Ibid.*, subd. A). Municipal Code section 3.20.222 requires all bids for the purchase of City real estate to be written.[3] Municipal Code section 3.22.010 makes the contractor qualification process applicable to all City contracts (with certain exceptions) and requires written bids.[4] Plaintiff argues that the relatively recent enactment of Section 3.20.045 in 2011 prevents the ordinance from affecting the enforceability of the implied contract alleged here. (*See* Supp. Brief, fn. 4.) But this argument elides the fact that Section 3.20.222 dates from 2005 and both sections are expressions of the City's continuing intent over decades to require that all City contracts be written. The City's policies are consistent on this point and must be considered holistically, rather than piecemeal as Plaintiff suggests. (*Domar Electric, Inc. v. City of Los Angeles* (1944) 9 Cal.4th 161, 169–72 (Court ascertained legislative intent and public policy to validate outreach program not expressly authorized by charter.)

III. POLICY REQUIRES GOVERNMENT CODE SECTION 40602 CONTROL ABSENT CONTRARY HOME RULE LEGISLATION

Plaintiff's desire to insert common law, rather than state statutory law, into the void it finds in the City's local law is frustrated by both precedent and public policy. First, Plaintiff assumes without argument or explanation that any void should be filled by

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[2] The text of this ordinance appears in the City's RJN as Exhibit 2 at page 2. They may also be viewed online at: https://library.municode.com/index.aspx?clientId=16106&stateId=5&stateName=California&customBanner=16106.jpg&imageclass=L&cl=16106.txt <as of June 15, 2014>.

[3] City's RJN, Exhibit 2 at p. 3.

[4] *Ibid.* at p. 4.

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common law applicable to contracting by private parties. However, why should our law provide one rule for general law cities and another for charter cities unless that charter city has itself established that differing rule? That would create needless complexity for plaintiffs, defendant governments, and courts alike.

Second, why should a judge developing the common law reject a statutory rule the Legislature saw fit for statewide application? As between general common law rules for contract formation and the more specific rules for contract formation applicable to cities contained in Government Code § 40602, the specific controls over the general. (*E.g., Action Apartment Ass'n, Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1246; Code Civ. Proc., § 859.)

Third, if judge-made law were to apply, it should not impose rules developed with private parties in mind, given the policy justifications for clear rules regarding government contracting, which include:

- Transparency in the commitment and handling of public funds,
- Preventing city staff[5] from binding the City without the knowledge and consent of elected officials or voters, and
- Avoiding corruption or its temptation by ensuring that fiscal decisions are made in the open by those who can be held accountable and not by low-level staff who might profit by their "mistakes."

(*See Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, 109–110 [noting "the need to protect and limit a public entity's contractual obligations"]; *First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 669 [contracting formalities required so "[n]o single individual has absolute authority to bind the municipality; many parts of the government must work together ... [promoting] a 'checks and balances'

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[5] Plaintiff argued at oral argument that the conduct from which it would imply a contract here is that of the City Council and higher level staff. Perhaps, but the rule of law Plaintiff urges makes no such distinction and would allow contracts to be implied from the mere conduct of staff.

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system, the key to which is ensuring that many different individuals are privy to and approve of a contract"].)

Accordingly, sensible public policy supports application of the rule of Government Code section 40602 even to charter cities like Vallejo unless they expressly disclaim it.

IV. EVEN IF VALLEJO HAD NOT INDICATED INTENT TO APPLY GOVERNMENT CODE SECTION 40602, THE RULE REQUIRING WRITTEN CONTRACTS WOULD APPLY STILL

Plaintiff criticizes *McLeod v. Board of Pension Commissioners* (1971) 14 Cal.App.3d 23, on which the City relies, arguing it cites authority under the first (now superseded) home-rule provision of our Constitution. However, *McLeod*'s citation to earlier authority cannot obscure that it does construe the Constitution's current home-rule provision — article XI, section 6, since renumbered and non-substantively amended as article XI, section 5 in the 1970 recodification of our Constitution. Thus, *McLeod*'s holding that "where the charter contains no special procedure concerning a municipal subject, the general laws govern" remains good law. (*McLeod, supra,* 14 Cal.App.3d at 29.) Moreover, *McLeod* is binding on this Court under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455 ("Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. ")

Plaintiff's construction of the article XI, section 5 language is neither supported by the law nor sensible. Plaintiff states without foundation that "[t]he 'other matters' language modifies 'municipal affairs' – *i. e.,* in matters *other than municipal affairs,* the general law applies." (Supp. Brief, at 1:17 [orig. emphasis].)

However, the correct construction of section 5 is that the "other matters" language modifies "all [charter city] ordinances and regulations in respect to municipal affairs," and "the restrictions and limitations provided in their several charters." In other words, in matters other than the City's express charter provisions, restrictions and limitations or any

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ordinances or regulations with respect to municipal affairs, the general law applies. Thus, state law applies to matters of statewide concern and to matters as to which a charter city has not yet legislated. This reading is consistent with modern case law.

First Street Plaza Partners v. City of Los Angeles (1998) 65 Cal. App. 4th 650 confirms this distinction:

> A city that has adopted a charter also remains subject to state statutes, except with regard to "municipal affairs" **governed by the charter**. (Cal. Const., art. 11, § 5.) The purpose of adopting a city charter is to move control over 'municipal affairs' from the state legislature to the local government. When a city adopts a charter, state statutes are generally displaced as to "municipal affairs" **covered by the charter**. Such 'municipal affairs' are then 'unaffected by general laws **on the same subject matters**. (*Ibid.*, at 660 [emphasis added, citations omitted].)
>
> . . . .
>
> Thus, **if a city charter specifies** the manner in which that city may enter into a contract, the terms of the charter control over **otherwise applicable state law**. " (*Ibid.*, at 632 [emphasis added, citations omitted].)

Earlier cases recognized this distinction, too. *Klench v. Board of Pension Fund Com'rs of City of Stockton* (1926) 79 Cal.App. 171, 179 was decided just twelve years after the 1914 constitutional amendment which Plaintiff claims is critical to its argument and stated:

> It is also to be conceded that the settled rule is that a city operating under a freeholders' charter is exempt from the operation of general laws with respect to all "municipal affairs" **as to which such charter speaks**. (See sec. 6, art. XI, Const.) On the other hand, the converse of that proposition is equally well settled, viz.: That "a city **cannot claim to be exempt from general laws relating to municipal affairs if there is no provision relating to such affairs in the charter under which it is acting**." (*Ibid.*, [emphasis added; citing *Fragley v. Phelan* (1899) 126 Cal. 383, 395 and *Civic Center Assn. of L. A., etc., v. Railroad Com.* (1917) 175 Cal. 441, 445].)

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Plaintiff's cases for its claim that Government Code section 40602 does not govern are off point. Each involve arguments for preemption of charter city ordinances or charter provisions by state law. None deals with the situation asserted here: a void in local law on an issue — i.e., an issue not addressed by charter or ordinance. At issue in *Butterworth v. Boyd* (1938) 12 Cal.2d 140 was whether an amendment to San Francisco's charter establishing health insurance for city employees conflicted with state law. *Wiley v. City of Berkeley* (1955) 136 Cal.App.2d 10 involved a decision to place a firehouse in a city park. The plaintiff argued state park-preservation statutes ought to preempt local legislation as a matter of statewide concern. *Simons v. City of Los Angeles* (1976) 63 Cal.App.3d 455 involved the same preemption claim. *City of Pasadena v. Charleville* (1932) 215 Cal. 384, later overturned on equal protection grounds, involved a claim a city contract was not bound by state laws setting wages and forbidding employment of aliens on public works projects and concluded the alien employment ban was a matter of statewide concern binding on charter cities. These cases employ a completely different analysis of a different issue than how to fill a void in local law.

And, as previously stated, *Domar Electric, Inc. v. City of Los Angeles, supra,* 9 Cal.4th 161, actually supports the City's position. That case challenged a requirement that bidders on city contracts conduct outreach to minority- and women-owned businesses, a requirement allegedly in conflict with the city's charter and a state outreach statute. The California Supreme Court applied the guiding principles of local legislative intent and public policy to interpret the charter provision. Because none of Plaintiff's cases involve the application of general law in the absence of a contrary home-rule provision, they are entirely unhelpful.

The cases cited at page 3 of Plaintiff's Supplemental Brief are similarly unhelpful. *City of Glendale v. Tronsdsen* (1957) 48 Cal.2d 93 is a taxation case involving a waste collection ordinance. *Redwood City v. Moore* (1965) 231 Cal.App.2d 563 involves the issuance

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of municipal bonds. In both cases, relevant charter sections gave those cities the option to execute the ordinances in issue under local laws or general state laws.

In *City of San Jose v. Lynch* (1935) 4 Cal.2d 760, the City had adopted an ordinance modeled on state law, which the Court found applicable under the charter. The case does not address a void in local law.

Vallejo's charter evidences intent to follow general law unless and until Vallejo exercises its home rule power to legislate a different rule. (See Charter, § 201 ["The City shall have the power to act pursuant to [state] procedure ... unless a different procedure is required"]; see also Charter § 307 ["All powers of the City shall be vested in the Council except as otherwise provided by law or in this Charter," including the power to contract not delegated by ordinance or charter provision], Charter § 310 requiring that the "Council shall act by ordinance, resolution or motion," and Charter § 717 [requiring Council to establish purchasing authority by ordinance].)[6]

Thus, Plaintiff's assertion the City is not bound by general state law (Supp. Brief, p. 3) is correct, but insufficient to save the Complaint from demurrer. The question is whether its Charter evidences intent to follow general law until such time as the City exercises its home rule authority to provide contrary local rules. It does and therefore no implied contract may be enforced against Vallejo.

V. THE CONTRACT CLAIMS WOULD FAIL EVEN IF GOVERNMENT CODE SECTION 40602 DID NOT REQUIRE THAT RESULT

As discussed at length in the extensive prior briefing on this demurrer, Plaintiff's contract claims would fail even if the City's ordinances or Government Code section 40602 did not apply to bar implied City contracts. In particular, these claims are barred by the

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[6] These Charter provisions appear in the City's RJN as Exhibit 1, pages C-4, C-5, C-6 and C-12, respectively, and are available online at: http://www.ci.vallejo.ca.us/UserFiles/Servers/Server_13423/File/CityClerk/charter.pdf <as of June 15, 2015>.

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four-year statute of limitations of Code of Civil Procedure section 337 (four years for written contract) or the two-year rule of Code of Civil Procedure section 339 (two years for oral contract) (Demurrer, p. 7–8; Opposition, p. 5–7) and the statute of frauds, as a contract that cannot be performed in one year under Civil Code section 1624, subdivision (a)(1) (*see* Reply, p. 4; Sur-Reply, pp. 6–9; Reply to Sur-Reply, pp. 2–4). These issues have been thoroughly briefed and need not be reargued here.

VI. CONCLUSION

This dispute over the financial relationship between Lakes Water System customers and the City belongs in the political sphere, not in court. To the extent there are ripe judicial questions here, they are purely questions of law and will not benefit from further pleading or motion practice. Let this case be efficiently resolved by the Court of Appeal sooner rather than later to spare the public fisc and the private homeowners who must bear their counsel's fees.

DATED: June 23, 2014

COLANTUONO, HIGHSMITH & WHATLEY, PC

MICHAEL G. COLANTUONO
JENNIFER L. PANCAKE
LEONARD P. ASLANIAN
Attorneys for Defendant
CITY OF VALLEIO

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 300 S. Grand Avenue, Suite 2700, Los Angeles, California 90071.

On June 23, 2014, I served the within document(s):

REPLY TO PLAINTIFF'S SUPPLEMENTAL BRIEF RE: APPLICATION OF GENERAL LAW

☐ **BY FACSIMILE**: By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date.

☒ **BY ELECTRONIC MAIL**: By transmitting via electronic mail the document(s) listed above to those identified on the Proof of Service list attached hereto.

☐ **BY MAIL**: By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☐ **OVERNIGHT DELIVERY**: By overnight delivery, I placed such document(s) listed above in a sealed envelope, for deposit in the designated box or other facility regularly maintained by FEDERAL EXPRESS for overnight delivery, caused such envelope to be delivered to the office of the addressee via overnight delivery pursuant to C.C.P. §1013(c), with delivery fees fully prepaid or provided for.

☐ **PERSONAL SERVICE**: I caused such envelopes to be delivered by hand to the addresses indicated on the attached list.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on June 23, 2014, at Los Angeles, California

P. Jaramillo

Pamela Jaramillo

SERVICE LIST

Green Valley Landowners Association v. The City of Vallejo
Solano County Superior Court, Case No. FCS042938

Stephen M. Flynn Law Offices of Stephen M. Flynn 71 Stevenson Street, Suite 400 San Francisco, CA 94105 Phone: (415) 655-6631 Fax: (415) 655-6601 smflynn@smflynn-law.com www.smflynn-law.com	Attorneys for Plaintiff GREEN VALLEY LANDOWNERS ASSOCIATION
Claudia M. Quintana, City Attorney Donna R. Mooney, Chief Assistant City Attorney City of Vallejo City Hall 555 Santa Clara Street, P.O. Box 3068 Vallejo, CA 94590 Phone: (707) 648-4545 Fax: (707) 648-4687	Defendant City of Vallejo

ORIGINAL

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Attorneys for Defendant
CITY OF VALLEJO

FILED
SOLANO COUNTY SUPERIOR COURT
2014 AUG 29 AM 10: 17
BY _____ DEPUTY CLERK

Exempt from Filing Fees
Government Code § 6103

Colantuono Highsmith & Whatley, PC
300 S. GRAND AVENUE, SUITE 2700
LOS ANGELES, CA 90071-3137

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

GREEN VALLEY LANDOWNERS ASSOCIATION, a California mutual benefit corporation, on behalf of its members and others similarly situated,

Plaintiff,

v.

CITY OF VALLEJO, and DOES 1 THROUGH 1000, INCLUSIVE,

Defendants.

CASE NO. FCS042938
Unlimited Jurisdiction

(Case assigned to Hon. W. Arvid S. Johnson)

NOTICE OF ENTRY OF ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND

Complaint Filed: 1/23/14

FAXED

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTCE THAT on August 22, 2014, the Order on Demurrer, sustaining the Demurrer in its entirety without leave to amend, was filed with the Court. A copy is attached hereto as Exhibit "1."

DATED: August 28, 2014

COLANTUONO, HIGHSMITH & WHATLEY, PC

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AMY C. SPARROW
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EXHIBIT 1

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Attorneys for Defendant
CITY OF VALLEJO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

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GREEN VALLEY LANDOWNERS ASSOCIATION, a California mutual benefit corporation, on behalf of its members and others similarly situated,

Plaintiff,

v.

CITY OF VALLEJO, and DOES 1 THROUGH 1000, INCLUSIVE,

Defendants.

CASE NO. FCS042938
Unlimited Jurisdiction

(Case assigned to Hon. W. Arvid S. Johnson)

ORDER ON DEMURRER

[PROPOSED]

Hearing Date: June 11, 2014
Time: 1:30 p.m.
Dep't: 23

Complaint Filed: 1/23/14

The Demurrer of Defendant CITY OF VALLEJO to the Complaint of Plaintiff GREEN VALLEY LANDOWNERS ASSOCIATION came on regularly for hearing on June 11, 2014 in Department 23 of the above-entitled Court.

Michael Colantuono appeared on behalf of Defendant CITY OF VALLEJO. Stephen Flynn appeared on behalf of Plaintiff GREEN VALLEY LANDOWNERS ASSOCIATION.

Having read and considered all of the papers filed by the parties in this matter, and having heard argument of counsel,

IT IS HEREBY ORDERED THAT:

The Demurrer to the Complaint is sustained in its entirety without leave to amend on the grounds stated in the Court's Tentative Ruling, a copy of which is attached hereto as Exhibit "A."

The Demurrer to the First Cause of Action is sustained without leave to amend on the grounds stated in the Court's Tentative Ruling.

The Demurrer to the Second Cause of Action is sustained without leave to amend on the grounds stated in the Court's Tentative Ruling.

The Demurrer to the Third Cause of Action is sustained without leave to amend on the grounds stated in the Court's Tentative Ruling.

The Demurrer to the Fourth Cause of Action is sustained without leave to amend on the grounds stated in the Court's Tentative Ruling.

The Demurrer to the Fifth Cause of Action is sustained without leave to amend on the grounds stated in the Court's Tentative Ruling.

The Demurrer to the Sixth Cause of Action is sustained without leave to amend on the grounds stated in the Court's Tentative Ruling.

The Demurrer to the Seventh Cause of Action is sustained without leave to amend on the grounds stated in the Court's Tentative Ruling.

The Demurrer to the Eighth Cause of Action is sustained without leave to amend on the grounds stated in the Court's Tentative Ruling.

The Demurrer to the Ninth Cause of Action is sustained without leave to amend on the grounds stated in the Court's Tentative Ruling.

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The Demurrer to the Tenth Cause of Action is sustained without leave to amend on the grounds stated in the Court's Tentative Ruling.

The Demurrer to the Eleventh Cause of Action is sustained without leave to amend on the grounds stated in the Court's Tentative Ruling.

The Demurrer to the Twelfth Cause of Action is sustained without leave to amend on the grounds stated in the Court's Tentative Ruling.

The Tentative Ruling is the Order of this Court.

DATED: 6-20, 2014

Judge of the Superior Court

Colantuono Highsmith & Whatley, PC
300 S. GRAND AVENUE, SUITE 2700
LOS ANGELES, CA 90071-3137

EXHIBIT A

DEPARTMENT TWENTY-THREE
JUDGE ARVID JOHNSON
707-207-7323
TENTATIVE RULINGS SCHEDULED FOR WEDNESDAY, JUNE 11, 2014

GREEN VALLEY LANDOWNERS ASSOCIATION v. THE CITY OF VALLEJO
Case No. FCS042938

Demurrer of The City of Vallejo

TENTATIVE RULING

The Court *sustains* defendant THE CITY OF VALLEJO's ("CITY" or "Defendant") demurrer to plaintiff GREEN VALLEY LANDOWNERS ASSOCIATION's ("GREEN VALLEY" or "Plaintiff") Complaint, *without leave to amend*, as follows:

> **First Cause of Action for Breach of Implied Contract;**
> **Second Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing;**
> **Third Cause of Action for Breach of Contract (Third Party Beneficiary); and**
> **Tenth Cause of Action for Specific Performance**

A chartered city remains subject to state statutes, except for "municipal affairs" governed by the charter. (Cal. Const. art. XI, §5.) The manner in which a city may form a contract is considered a municipal affair, which can be controlled by the terms of the city's charter. Moreover, a contract made without regard to the method prescribed by the city charter is unenforceable. (*First St. Plaza Partners v City of Los Angeles* (1998) 65 Cal.App.4th 650.)

Here, the CITY's Charter does not specifically prescribe how its contracts must be executed. However, its Charter states that, "The City shall have the power to act pursuant to procedure established by any law of the State unless a different procedure is required by this Chapter." (Charter at Article II, Section 201 attached as Exhibit 1 to the Request for Judicial Notice.) Without particular guidance from the Charter, the CITY would turn to Government Code section 40602. This is because the California Constitution, Article 11, section 5(a) states that while a charter city "may make and enforce all ordinance and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."

Thus, the language of the California Constitution, along with the CITY's Charter, combined with the CITY's ordinance requiring City Manager Authorization limits for the execution of contracts all point to requirements not met for implied contracts. Therefore, like *G.L. Mezzetta, Inc. v. City of Am. Canyon* (2000) 78 Cal.App.4th 1087 and *First St. Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, when all the statutes are read together, the CITY cannot be bound by an alleged implied-in-fact *or* implied-in-law contract, thus failing to state facts sufficient to constitute the breach of contract based causes of action.

Additionally, Plaintiff has failed to state facts sufficient to constitute a cause of action based upon third party beneficiary theory for a breach of contract cause of action. The CITY correctly argues that the leading case in an established line of cases that do not recognize third party beneficiaries in government contracts is *Martinez v. Socoma* (1974) 11 Cal.3d 394. Here, as in *Martinez*, there is no allegation that property owners who entered into easement contracts for the development of the LWS owed any legal obligation to Plaintiff or that those property owners were seeking to discharge a legal obligation to Plaintiff. (*Martinez, supra*, 11 Cal.3d 394, 400 ["A person cannot be a creditor beneficiary unless the promisor's performance of the contract will discharge some form of legal duty owed to the beneficiary by the promise"].) Additionally, there is no allegation that the written contracts at issue expressly confer benefits on Plaintiff and the development of the LWS actually served a larger public purpose [providing water to the CITY's residents] rather than a specific purpose for the benefit of the proposed Class. (*Id.* at 401 [". . .the fact that a Government program for social betterment confers benefits upon individuals who are not required to render contractual consideration in return does not necessarily imply that the benefits are intended as gifts. . . . The benefits of such programs are provided not simply as gifts to the recipients but as a means of accomplishing a larger public purpose"].)

Plaintiff likewise fails to present this Court with facts that would cure the defects by amending the Complaint.

Fourth Cause of Action for Breach of Duty to Charge Reasonable Water Rates;
Fifth Cause of Action for Beach of Fiduciary Duty; and
Eleventh Cause of Action for Declaratory Relief

Despite GREEN VALLEY's argument that Proposition 218 has no bearing on its claims because it took effect five (5) years after the CITY first breached the Historic Cost Sharing Ratio contractual obligation, and in light of the fact the Court is sustaining the demurrer as to Plaintiff's breach of implied contract causes of action, Defendant correctly asserts that Proposition 218 prohibits that which is sought in the Fourth, Fifth and Eleventh causes of action, namely a "pooled-rate" structure.

Prop. 218's application to consumption-based water rates was made clear by the California Supreme Court in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205.

A "pooled-rate" structure, like the one proposed by GREEN VALLEY, is prohibited as set forth in Article XIII D, section 6, subdivision (b)(3) which provides that "[t]he amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel." (See *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 601 ["defendants method of grouping similar users together for the same augmentation rate and charging the users according to usage is a reasonable way to apportion the cost of service"].)

Because Prop. 218 prohibits a rate structure as alleged in Plaintiff's complaint that requires one group of customers to essentially subsidize another, the Court lacks authority to require such a subsidy and Plaintiff has failed to present the Court with facts that would cure the defects in the allegations of the Fourth, Fifth, and Eleventh causes of action.

Sixth Cause of Action for Injunctive Relief (Against Sale); and Seventh Cause of Action for Injunctive Relief (Against Sale Without Land)

The CITY correctly contends that this Court cannot prevent the execution of a public statute. (*Leach v. City of San Marcos* (1989) 213 Cal.App.3d 648, 660.) Indeed, the California Constitution empowers the CITY to operate a utility for the benefit of its residents and property owners: "A municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat transportation, or means of communications." (Cal. Const. art. XI, §9.) The CITY is also granted the power to sell its public utility assets through its charter and the Public Utilities Code. (Pub. Util. Code §10051 ["Any municipal corporation incorporated under the laws of this State may as provided in this article sell and dispose of any public utility that it owns"]; CITY Charter §200 ["[The City] shall . . . have the power to exercise any and all rights, powers, and privileges heretofore or hereafter established, granted or prescribed by the general laws of the State"].)

Moreover, the CITY correctly points out that GREEN VALLEY has a remedy through the Public Utilities Code section 10052 that gives local residents supervisory control over utility sales. ("Whenever the legislative body of a municipal corporation. . . determines. . . that any public utility owned by the municipal corporation should be sold, it may . . . order the proposition of selling the public utility to be submitted to the qualified voters of the municipal corporation at an election held for that purpose.")

As such, the Sixth and Seventh causes of action fail to state facts sufficient to constitute the same. Additionally, GREEN VALLEY has failed to provide this Court with facts showing it can cure the defects by amendment.

Eighth Cause of Action for Injunctive Relief (Surcharge Fee); and Ninth Cause of Action for Injunctive Relief (Future Rates)

In its Eighth and Ninth causes of action, Plaintiff is requesting this Court to issue an injunction to stop the CITY from continuing its Surcharge Fee after September 30, 2015, and to stop the CITY from imposing future rate structures that do not require it to share in the cost of operating and maintaining the LWS pursuant to the Historical Cost Sharing Ratio. First, the speculative allegation that the CITY *may* violate the statute that discontinues the Surcharge Fee after September 30, 2015, is premature and does not state facts sufficient for this Court to issue a permanent injunction requiring the CITY to comply with its own 1995 Ordinance. Additionally, the CITY correctly argues that *Water Replenishment District of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450 ("*Cerritos*") recognized that water assessments are subject to the "pay first, litigate later" rule. (*Cerritos, supra*, 220 Cal.App.4th 1450 at pp. 1469-1470.)

Moreover, the CITY correctly argues that a water rate in excess of the cost of service is essentially a tax, subjecting it to the "pay first, litigate later" rule. (See Proposition 26; see also *Cerritos, supra*, 220 Cal.App.4th 1450 at p.1465.) Thus, Plaintiff has failed to state facts sufficient to constitute the Eighth and Ninth causes of action for injunctive relief. Nor, has Plaintiff provided the Court with the reasonable possibility that the defects in the allegations can be cured by amendment.

Fifth Cause of Action for Breach of Fiduciary Duty; and Twelfth Cause of Action for Accounting

As to Plaintiff's two common law causes of action: breach of fiduciary duty and accounting, the CITY correctly asserts that there is no common law tort liability for public entities in California; instead, such liability must be based on statute. (Gov. Code § 815(a) ["Except as otherwise provided by statute: [¶] ... A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity ... ."]; *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897.)

Here, Plaintiff has failed to allege any statutory basis for asserting a breach of fiduciary duty or seek an accounting against the CITY. Thus, Plaintiff has failed to state facts sufficient to constitute causes of action for the same, nor has Plaintiff shown it can cure such defect by amendment.

Ultimately, as to all causes of action sustained by the Court without leave to amend, Plaintiff has not met its burden of showing that it is reasonably possible to cure the defects. (*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1040-1041; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 300 S. Grand Avenue, Suite 2700, Los Angeles, California 90071.

On August 29, 2014, I served the within document(s):

NOTICE OF ENTRY OR ORDER

☐ **BY ELECTRONIC MAIL**: By transmitting via electronic mail the document(s) listed above to those identified on the Proof of Service list attached hereto.

☐ **BY MAIL**: By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☒ **OVERNIGHT DELIVERY**: By overnight delivery, I placed such document(s) listed above in a sealed envelope, for deposit in the designated box or other facility regularly maintained by FEDERAL EXPRESS for overnight delivery, caused such envelope to be delivered to the office of the addressee via overnight delivery pursuant to C.C.P. §1013(c), with delivery fees fully prepaid or provided for.

☐ **PERSONAL SERVICE**: I caused such envelopes to be delivered by hand to the addresses indicated on the attached list.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on August 29, 2014, at Los Angeles, California

Martha C. Rodriguez

SERVICE LIST

Green Valley Landowners Association v. The City of Vallejo
Solano County Superior Court, Case No. FCS042938

Stephen M. Flynn Law Offices of Stephen M. Flynn 71 Stevenson Street, Suite 400 San Francisco, CA 94105 Phone: (415) 655-6631 Fax: (415) 655-6601 smflynn@smflynn-law.com www.smflynn-law.com	Attorneys for Plaintiff GREEN VALLEY LANDOWNERS ASSOCIATION
Claudia M. Quintana, City Attorney Donna R. Mooney, Chief Assistant City Attorney City of Vallejo City Hall 555 Santa Clara Street, P.O. Box 3068 Vallejo, CA 94590 Phone: (707) 648-4545 Fax: (707) 648-4687	Defendant City of Vallejo

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Jennifer L. Pancake (138621)
Colantuono, Highsmith & Whatley, PC
300 S. Grand Ave., Ste. 2700
Los Angeles, CA 90071

TELEPHONE NO.: (213)542-5708 FAX NO. (Optional): (213)542-5710
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ATTORNEY FOR (Name): City of Vallejo

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Solano
STREET ADDRESS: 600 Union Ave.
MAILING ADDRESS:
CITY AND ZIP CODE: Fairfield, CA 94533
BRANCH NAME: Hall of Justice

PLAINTIFF/PETITIONER: Green Valley Landowers Association
DEFENDANT/RESPONDENT: City of Vallejo

NOTICE OF ENTRY OF JUDGMENT OR ORDER

CASE NUMBER: FCS042938

(Check one): [x] UNLIMITED CASE (Amount demanded exceeded $25,000) [ ] LIMITED CASE (Amount demanded was $25,000 or less)

TO ALL PARTIES :

1. A judgment, decree, or order was entered in this action on *(date)*: October 1, 2014

2. A copy of the judgment, decree, or order is attached to this notice.

Date: October 20, 2014

JENNIFER L. PANCAKE
(TYPE OR PRINT NAME OF [X] ATTORNEY [ ] PARTY WITHOUT ATTORNEY)

(SIGNATURE)

Form Approved for Optional Use
Judicial Council of California
CIV-130 [New January 1, 2010]

PLAINTIFF/PETITIONER: Green Valley Landowers Association	CASE NUMBER:
DEFENDANT/RESPONDENT: City of Vallejo	FCS042938

PROOF OF SERVICE BY FIRST-CLASS MAIL
NOTICE OF ENTRY OF JUDGMENT OR ORDER

(NOTE: You cannot serve the* Notice of Entry of Judgment or Order *if you are a party in the action. The person who served the notice must complete this proof of service.)

1. I am at least 18 years old and **not a party to this action.** I am a resident of or employed in the county where the mailing took place, and my residence or business address is *(specify):*

2. I served a copy of the *Notice of Entry of Judgment or Order* by enclosing it in a sealed envelope with postage fully prepaid and *(check one):*
   a. ☐ deposited the sealed envelope with the United States Postal Service.
   b. ☐ placed the sealed envelope for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

3. The *Notice of Entry of Judgment or Order* was mailed:
   a. on *(date):*
   b. from *(city and state):*

4. The envelope was addressed and mailed as follows:
   a. Name of person served:
      Street address:
      City:
      State and zip code:
   b. Name of person served:
      Street address:
      City:
      State and zip code:
   c. Name of person served:
      Street address:
      City:
      State and zip code:
   d. Name of person served:
      Street address:
      City:
      State and zip code:

   ☐ Names and addresses of additional persons served are attached. *(You may use form POS-030(P).)*

5. Number of pages attached _____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME OF DECLARANT) ▶ (SIGNATURE OF DECLARANT)

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Penn Valley, California 95946-9000
Telephone: (530) 432-7357
Facsimile: (530) 432-7356

Attorneys for Defendant
CITY OF VALLEJO

Exempt from Filing Fees
Government Code § 6103

FILED
Clerk of the Superior Court

OCT - 1 2014

BY: DEPUTY CLERK

ORIGINAL

Colantuono Highsmith & Whatley, PC
300 S. GRAND AVENUE, SUITE 2700
LOS ANGELES, CA 90071-3137

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

GREEN VALLEY LANDOWNERS ASSOCIATION, a California mutual benefit corporation, on behalf of its members and others similarly situated,

Plaintiff,

v.

CITY OF VALLEJO, and DOES 1 THROUGH 1000, INCLUSIVE,

Defendants.

CASE NO. FCS042938
Unlimited Jurisdiction

(Case assigned to Hon. W. Arvid E. Johnson)

[PROPOSED] JUDGMENT GRANTING DEMURRER

Complaint Filed: 1/23/14

FAXED

The Demurrer filed by Defendant City of Vallejo for each of the twelve causes of action stated in the Complaint for (1) Breach of Implied Contract; (2) Breach of Implied Covenant of Good Faith and Fair Dealing; (3) Breach of Contract [Third Party Beneficiary]; (4) Breach of Duty to Charge a Reasonable Water Rate; (5) Breach of Fiduciary Duty; (6) Injunctive Relief [Sale of LWS]; (7) Injunctive Relief [Sale of LWS Without Land]; (8) Injunctive Relief [Surcharge Fee]; (9) Injunctive Relief [Future LWS Rates]; (10) Specific Performance; (11) Declaratory Relief; and (12) Accounting, brought by Plaintiff Green Valley Landowners Association came on regularly for hearing on June 11, 2014, in Department 23, the Honorable W. Arvid S. Johnson presiding. Stephen M. Flynn appeared on behalf of Plaintiff Green Valley Landowners Association. Michael G. Colantuono of Colantuono, Highsmith & Whatley, PC, appeared on behalf of Defendant City of Vallejo.

On August 20, 2014, the Court sustained the City of Vallejo's Demurrer for each of the twelve causes of action set forth in the Complaint without leave to amend and granted the City's oral motion to dismiss. Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This action is dismissed in its entirety, with prejudice;
2. That judgment be entered against Plaintiffs and in favor of Defendant; and
3. Defendant is entitled to recover its costs.

DATED: 9-17-14

By: _____
Hon. W. Arvid S. Johnson
Judge of the Superior Court

Colantuono Highsmith & Whatley, PC
300 S. GRAND AVENUE, SUITE 2700
LOS ANGELES, CA 90071-3137

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 300 S. Grand Avenue, Suite 2700, Los Angeles, California 90071.

On October 20, 2014, I served the within document(s):

[PROPOSED] JUDGMENT GRANTING DEMURRER

☐ **BY ELECTRONIC MAIL**: By transmitting via electronic mail the document(s) listed above to those identified on the Proof of Service list attached hereto.

☒ **BY MAIL**: By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☐ **OVERNIGHT DELIVERY**: By overnight delivery, I placed such document(s) listed above in a sealed envelope, for deposit in the designated box or other facility regularly maintained by FEDERAL EXPRESS for overnight delivery, caused such envelope to be delivered to the office of the addressee via overnight delivery pursuant to C.C.P. §1013(c), with delivery fees fully prepaid or provided for.

☐ **PERSONAL SERVICE**: I caused such envelopes to be delivered by hand to the addresses indicated on the attached list.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on October 20, 2014, at Los Angeles, California

Pamela Jaramillo

Pamela Jaramillo

SERVICE LIST

Green Valley Landowners Association v. The City of Vallejo
Solano County Superior Court, Case No. FCS042938

Stephen M. Flynn Law Offices of Stephen M. Flynn 71 Stevenson Street, Suite 400 San Francisco, CA 94105 Phone: (415) 655-6631 Fax: (415) 655-6601 smflynn@smflynn-law.com www.smflynn-law.com	Attorneys for Plaintiff GREEN VALLEY LANDOWNERS ASSOCIATION
Claudia M. Quintana, City Attorney Donna R. Mooney, Chief Assistant City Attorney City of Vallejo City Hall 555 Santa Clara Street, P.O. Box 3068 Vallejo, CA 94590 Phone: (707) 648-4545 Fax: (707) 648-4687	Defendant City of Vallejo

CLAUDIA M. QUINTANA, State Bar No. 178613
City Attorney
DONNA R. MOONEY, State Bar No. 189753
Chief Assistant City Attorney
CITY OF VALLEJO, City Hall
555 Santa Clara Street, P.O. Box 3068
Vallejo, CA 94590
Tel: (707) 648-4545
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Telephone: (530) 432-7357
Facsimile: (530) 432-7356

Attorneys for Defendant
CITY OF VALLEJO

FILED
SOLANO COUNTY
Exempt from Filing Fees
Government Code § 6103
2014 SEP -2 AM 10:38
BY _____ DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

GREEN VALLEY LANDOWNERS ASSOCIATION, a California mutual benefit corporation, on behalf of its members and others similarly situated,

Plaintiff,

v.

CITY OF VALLEJO, and DOES 1 THROUGH 1000, INCLUSIVE,

Defendants.

CASE NO. FCS042938
Unlimited Jurisdiction

(Case assigned to Hon. W. Arvid S. Johnson)

NOTICE OF RULING ON ORAL MOTION TO DISMISS

Complaint Filed: 1/23/14

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on August 20, 2014, the Court granted Defendant CITY OF VALLEJO's oral motion to dismiss after the Court sustained the City's Demurrer in its entirety without leave to amend. A copy of the Court's minute order is attached hereto as Exhibit "1."

DATED: August 29, 2014

COLANTUONO, HIGHSMITH & WHATLEY, PC

MICHAEL G. COLANTUONO
JENNIFER L. PANCAKE
AMY C. SPARROW
Attorneys for Defendant
CITY OF VALLEJO

Colantuono Highsmith & Whatley, PC
300 S. GRAND AVENUE, SUITE 2700
LOS ANGELES, CA 90071-3137

EXHIBIT 1

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SOLANO

Case No. FCS042938

☒ CASE MANAGEMENT CONF. ☒ ONE ☐ TWO
☐ DISMISSAL ☐ SETTLEMENT CONFERENCE
☐ REVIEW re: ☐ Mediation ☐ Bankruptcy
☐ OSC ☐ Arbitration ☐ U.M.
☐ Default Judgment

GREEN VALLEY LANDOWNERS ASSOCIATION, a California mutual ben

vs

THE CITY OF VALLEJO

Date: 20-AUG-2014
Judge: W. ARVID JOHNSON
Reporter: THERESA PERRY
Clerk: FA'ANAPE DANIELSON

APPEARANCES:
☐ Plaintiff ☐ CtCall ☐ with ☒ thru counsel STEPHEN FLYNN ☐ in pro per
☒ Defendant ☐ CtCall ☐ with ☒ thru counsel DONNA MOONEY ☐ in pro per
☒ Other: ATTORNEY AMY SPARROW APPEARS BY COURTCALL FOR DFT CITY OF VALLEJO

IT IS SO ORDERED:
☐ **Arbitration** is ordered, ☐ non-binding ☐ binding. ☐ **Mediation** is ordered.
☐ Arbitrators/Mediators: _____.
☐ Counsel shall notify the court within _____ days, in writing, of arbitrator/mediator, or nomination or court will select.

☐ **Last date** for: Arbitration / mediation hearing to be completed within/by _____.
Arbitration decision within _____ days of hearing.
Trial de Novo request within 30 days after the date of arbitrator award to the Court.
☐ Parties advised to submit any arbitration / mediation stipulation to the Court to vacate next hearing date.

☐ All non-expert discovery to be completed within / by _____.

☐ **Case assigned** to Judge Dept. for all purposes.

☐ Mandatory/Voluntary **Settlement Conference** date _____, at _____, Dept..

☐ Mandatory **Trial Management Conference** date _____, at _____, Dept..

☐ Trial call: _____, at _____, Dept. ☐ Deemed 1st day of trial for cut-off purposes.

☐ Jury ☐ Court **trial** is set _____, at _____ am, Dept..

☐ Estimated **time** of trial: _____.
☐ **Jury** is ☐ not demanded; demanded by ☐ plaintiff ☐ defendant(s) _____
☐ $150 jury **deposit** due 25 days prior to trial;
☐ **Notice** of trial and conferences is ☐ waived ☐ to be given by _____
☐ **Expedited jury trial** stipulated

☐ **Sanctions** are against ☐ plaintiff's ☐ defendant's, counsel _____
in the **amount** of $_____ for _____ to be paid within 30 days from today.

☐ _____ is ordered to **appear** on _____ and show cause why
sanctions should not be imposed in the sum of $_____ for failure to appear, failure to file a Case Management Conference 1-2 Report, failure to serve summons and complaint, failure to properly prosecute the case.
☐ **OSC** ordered on _____ against _____

☐ **ADR** ☐ **Mediation** ☐ **Arbitration,** to be discussed at the next hearing.

☐ **Conference reports** are to be filed 15 calendar days prior to next hearing.

☒ Other: COURT NOTES RECEIPT OF BRIEFS SUBMITTED BY COUNSEL. NO ARGUMENTS REQUESTED. THE COURT SIGNED AND RETURNED THE ORDER ON DEMURRER FOR FILING WITH THE CLERK'S OFFICE. ORAL MOTION MADE BY ATTORNEY MOONEY TO DISMISS IS GRANTED.

☐ Continued to _____ at _____ a.m. Dept. 1 for _____

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 300 S. Grand Avenue, Suite 2700, Los Angeles, California 90071.

On August 29, 2014, I served the within document(s):

NOTICE OF RULING ON ORAL MOTION TO DISMISS

☐ **BY ELECTRONIC MAIL:** By transmitting via electronic mail the document(s) listed above to those identified on the Proof of Service list attached hereto.

☐ **BY MAIL:** By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☒ **OVERNIGHT DELIVERY:** By overnight delivery, I placed such document(s) listed above in a sealed envelope, for deposit in the designated box or other facility regularly maintained by FEDERAL EXPRESS for overnight delivery, caused such envelope to be delivered to the office of the addressee via overnight delivery pursuant to C.C.P. §1013(c), with delivery fees fully prepaid or provided for.

☐ **PERSONAL SERVICE:** I caused such envelopes to be delivered by hand to the addresses indicated on the attached list.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on August 29, 2014, at Los Angeles, California

Martha C. Rodriguez

SERVICE LIST

Green Valley Landowners Association v. The City of Vallejo
Solano County Superior Court, Case No. FCS042938

Stephen M. Flynn Law Offices of Stephen M. Flynn 71 Stevenson Street, Suite 400 San Francisco, CA 94105 Phone: (415) 655-6631 Fax: (415) 655-6601 smflynn@smflynn-law.com www.smflynn-law.com	Attorneys for Plaintiff GREEN VALLEY LANDOWNERS ASSOCIATION
Claudia M. Quintana, City Attorney Donna R. Mooney, Chief Assistant City Attorney City of Vallejo City Hall 555 Santa Clara Street, P.O. Box 3068 Vallejo, CA 94590 Phone: (707) 648-4545 Fax: (707) 648-4687	Defendant City of Vallejo

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*:
Stephen M. Flynn (SBN 245823)
Law Offices of Stephen M. Flynn
71 Stevenson Street, Suite 400
San Francisco, CA 94105
TELEPHONE NO.: 415-655-6631 FAX NO. *(Optional)*: 415-665-6601
E-MAIL ADDRESS *(Optional)*: smflynn@smflynn-law.com
ATTORNEY FOR *(Name)*: Green Valley Landowners Association

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Solano
STREET ADDRESS: 600 Union Avenue
MAILING ADDRESS: 600 Union Avenue
CITY AND ZIP CODE: Fairfield 94533
BRANCH NAME: Civil (Unlimited)

PLAINTIFF/PETITIONER: Green Valley Landowners Association

DEFENDANT/RESPONDENT: City of Vallejo

CASE NUMBER: FCS042938

☑ **NOTICE OF APPEAL** ☐ **CROSS-APPEAL**
(UNLIMITED CIVIL CASE)

Notice: Please read *Information on Appeal Procedures for Unlimited Civil Cases* (Judicial Council form APP-001) before completing this form. This form must be filed in the superior court, not in the Court of Appeal.

1. NOTICE IS HEREBY GIVEN that *(name)*: Green Valley Landowners Association
appeals from the following judgment or order in this case, which was entered on *(date)*: August 20, 2014
   - ☐ Judgment after jury trial
   - ☐ Judgment after court trial
   - ☐ Default judgment
   - ☐ Judgment after an order granting a summary judgment motion
   - ☐ Judgment of dismissal under Code of Civil Procedure sections 581d, 583.250, 583.360, or 583.430
   - ☑ Judgment of dismissal after an order sustaining a demurrer
   - ☐ An order after judgment under Code of Civil Procedure section 904.1(a)(2)
   - ☐ An order or judgment under Code of Civil Procedure section 904.1(a)(3)–(13)
   - ☐ Other *(describe and specify code section that authorizes this appeal)*:

2. For cross-appeals only:
   a. Date notice of appeal was filed in original appeal:
   b. Date superior court clerk mailed notice of original appeal:
   c. Court of Appeal case number *(if known)*:

Date: August 21, 2014

Stephen M. Flynn
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-002 [Rev. July 1, 2010]

NOTICE OF APPEAL/CROSS-APPEAL (UNLIMITED CIVIL CASE)
(Appellate)

Cal. Rules of Court, rule 8.100
www.courts.ca.gov

CASE NAME:	CASE NUMBER:
Green Valley Landowners Association v. City of Vallejo	FCS042938

NOTICE TO PARTIES: A copy of this document must be mailed or personally delivered to the other party or parties to this appeal. A PARTY TO THE APPEAL MAY NOT PERFORM THE MAILING OR DELIVERY HIMSELF OR HERSELF. A person who is at least 18 years old and is not a party to this appeal must complete the information below and mail (by first-class mail, postage prepaid) or personally deliver the front and back of this document. When the front and back of this document have been completed and a copy mailed or personally delivered, the original may then be filed with the court.

PROOF OF SERVICE

☑ **Mail** ☐ **Personal Service**

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**

2. My residence or business address is *(specify):*

   71 Stevenson Street, Suite 400, San Francisco, CA 94105

3. I mailed or personally delivered a copy of the *Notice of Appeal/Cross-Appeal (Unlimited Civil Case)* as follows *(complete either a or b):*

   a. ☑ **Mail.** I am a resident of or employed in the county where the mailing occurred.

      (1) I enclosed a copy in an envelope **and**

      (a) ☑ **deposited** the sealed envelope with the United States Postal Service, with the postage fully prepaid.

      (b) ☐ **placed** the envelope for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

      (2) The envelope was addressed and mailed as follows:

      (a) Name of person served: 1. Donna Mooney 2. Jennifer Pancake

      (b) Address on envelope:

      1. 555 Santa Clara Street, Vallejo, CA 94590
      2. 300 South Grand Avenue, Suite 2700, Los Angeles, CA 90071-3137

      (c) Date of mailing: August 21, 2014

      (d) Place of mailing *(city and state):* Fairfield, CA

   b. ☐ **Personal delivery.** I personally delivered a copy as follows:

      (1) Name of person served:

      (2) Address where delivered:

      (3) Date delivered:

      (4) Time delivered:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: August 21, 2014

Stephen M. Flynn ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

ENDORSED FILED
Clerk of the Superior Court

AUG 2 1 2014

G. ROBINS
By _____ DEPUTY CLERK

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SOLANO

NOTICE OF FILING APPEAL **CASE NO. FCS042938**

GREEN VALLEY LANDOWNERS ASSOCIATION	**CITY OF VALLEJO, and DOES 1 THROUGH 1000, INCLUSIVE**
(Plaintiff/Appellant)	(Defendant/Respondent)

YOU ARE HEREBY NOTIFIED that Plaintiff **GREEN VALLEY LANDOWNERS ASSOCIATION,** appeals to the Court of Appeal, State of California, First Appellate District, from the Judgment of dismissal after an order sustaining a demurrer, which was entered on August 20, 2014.

Dated: August 21, 2014

By: G. ROBINS
GILLIAN ROBINS, DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SOLANO

[X] 600 Union Ave, Fairfield, CA 94533 [ ] 321 Tuolumne St, Vallejo, CA 94590

CERTIFICATE AND AFFIDAVIT OF MAILING **CASE NO: FCS042938**

I, the undersigned, certify under penalty of perjury that I am employed as a deputy clerk of the above-entitled court and am not a party to the within-entitled action; that I served the attached document:

NOTICE OF FILING APPEAL; COPY OF NOTICE OF APPEAL; CHECK #1149 IN THE AMOUNT OF $775 (TO DCA ONLY)

By causing to be placed a true copy thereof in an envelope which was then sealed and postage fully prepaid on the date shown below; that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; that the above stated document will be deposited in the Superior Court of California, County of Solano's outgoing mailbox for collection by county mail carriers on the date indicated. Said envelope was addressed to the attorneys for the parties, or the parties, as shown below:

COURT OF APPEAL
FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102

ATTORNEY FOR PLAINTIFF/APPELLANT
STEPHEN M. FLYNN, SBN 245823
LAW OFFICES OF STEPHEN M. FLYNN
71 STEVENSON STREET, SUITE 400
SAN FRANCISCO, CA 94105

ATTORNEYS FOR DEFENDANT/RESPONDENT
DONNA R. MOONEY, SBN 189753
CHIEF ASSISTANT CITY ATTORNEY
CITY OF VALLEJO, CITY HALL
PO BOX 3068
VALLEJO, CA 94590

JENNIFER L. PANCAKE, SBN 138621
COLANTUONO HIGHSMITH & WHATLEY, PC
11364 PLEASANT VALLEY ROAD
PENN VALLEY, CA 95946-9000

Dated: 8/21/14

By: G. ROBINS ----------
Deputy Clerk

-CERTIFICATE AND AFFIDAVIT OF MAILING