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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 <u>contractual</u> 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 not measured on an individual basis. Rather, it is measured collectively, considering all 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).

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[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:

Claudia M. Quintana Donna R. Mooney City of Vallejo 555 Santa Clara Street Vallejo, CA 94590	Michael G. Colantuono Jennifer L. Pancake Colantuono & Levin, PC 11364 Pleasant Vallejo Road Penn Valley, CA 95946-9000

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

STEPHEN M. FLYNN