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Court of Appeal Case No. A142808

IN THE SUPREME COURT OF CALIFORNIA

GREEN VALLEY LANDOWNERS ASSOCIATION,

Plaintiff and Appellant,

vs.

CITY OF VALLEJO,

Defendant and Respondent.

On Review of the Published Decision of the Court of Appeal,
First Appellate District, Division One
Case No. A142808, Filed October 16, 2015
Solano Superior Court No. FCS042938
The Honorable Arvid Johnson, Judge (Ret.)

GREEN VALLEY LANDOWNERS ASSOCIATION'S PETITION FOR REVIEW

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STATEMENT OF ISSUES

1. If a charter city avails itself of municipal "home rule" pursuant to Article XI, Section 5(a) of the California Constitution, is the city bound by the State's general laws on matters of "municipal affairs" not addressed in the city's charter?

2. Can a court to prohibit enforcement of an implied-in-fact contract with a charter city in the absence of an express charter provision or ordinance requiring a written contract?

WHY REVIEW SHOULD BE GRANTED

The First District Court of Appeal's published decision raises a direct conflict of appellate authority concerning the binding application of the State's general laws to charter cities operating under Article XI, Section 5(a) of the California Constitution.

Supreme Court review is essential to resolve this conflict of authority which presently undermines the legality of past, present and future charter city municipal actions. There are 121 charter cities in California. More than half the state's population resides in a charter city. Others who transact business with charter cities, such the Class, rely heavily upon their actions. (Cal. Rules of Court, rule 8.5000(b)(1).)

The Court of Appeal held a charter city is automatically bound by the general laws, even on matters of municipal affairs, when the charter is silent. The Court of Appeal also created a common law rule requiring all municipal contracts to be in writing, thereby judicially limiting charter city powers with respect municipal affairs, in the absence of any such limitations in the charter.

In contrast, dozens of Supreme Court and Court of Appeal decisions spanning a century, hold a charter city operating under Article XI, Section 5(a), is completely independent of the general laws on matters concerning

municipal affairs, even if the charter is silent. These cases hold a charter city's powers are limited by the Constitution and the express language of the charter only, and restrictions on those powers may not be implied.

The Court of Appeals' decision undermines 100 years of home rule jurisprudence subjecting charter cities to the general laws and judicially created restrictions on their powers.

The decision likely means 121 charter cities will need to immediately analyze their charters and undertake the burdensome task of substantially revising those charters to cover every conceivable municipal affair. Failure to do so risks the binding application of the general laws and judicially created limitations on their powers. Charter cities may also face expensive litigation challenging the exercise of past, present and future powers in relation to general law's binding application.

With respect to Appellant and the class of 809 non-resident water customers it represents, the decision leaves these disenfranchised customers with no remedy in the face of unprecedented municipal discrimination.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case, a putative class action, affects the right of 809 non-resident customers (the "Class") to receive affordable water from their municipal water provider, the City of Vallejo ("Vallejo").

The Class receives water from Vallejo's Lakes Water System ("LWS"), a large municipal water project constructed for Vallejo's benefit over a century ago (Appellant's Appendix ("AA") 006-007, ¶¶24-31). Over time, Vallejo offered the non-resident customers the opportunity to receive water from the LWS (AA007-08, ¶¶32-36).

For 100 years, LWS water was used by Vallejo's customers and the Class (AA009, ¶42). The LWS's costs were likewise shared between Vallejo's customers and the Class (AA009-10, ¶¶44-49). By virtue of its

larger population and usage, Vallejo's customers paid the vast majority of the costs (*id.*).

In 1992, 1995 and 2005, Vallejo passed ordinances unilaterally shifting all costs onto the Class (AA009-010, ¶¶48-52). Vallejo's abandonment of financial responsibility for the LWS was total. Rates for the Class skyrocketed to some of the highest in the State (AA015, ¶69). Vallejo customers saw an immediate rate reduction (AA010, ¶50).

To compound the harm, since no improvements were made during Vallejo's 100-year use of the LWS, over75% of the infrastructure is 30-50 years beyond its useful life (AA013, ¶¶66, 69). The replacement cost is $30-60 million – an unfunded liability of $37,000 - $74,000 per customer (AA013, ¶¶66, 68, AA003, ¶9).

Further, Vallejo's stated intent is to sell the LWS to a private utility (AA017-018, ¶¶79-85). The sale proceeds will go to Vallejo's general fund (*id.*). Vallejo intends to keep all LWS real property and all LWS water rights, leaving the Class without a guaranteed water source and no means to pay for the unfunded liabilities (*id.*).

On January 23, 2014, Appellant filed a putative class action complaint comprised of 12 causes of action against Vallejo in the Solano County Superior Court. The complaint alleges Vallejo breached an implied-in-fact agreement with the Class to share in the LWS's costs. The complaint alleges the implied-in-fact agreement stems from a 100 year history of cost sharing, the purpose, design and configuration of the LWS, and decades of reliance by the Class who have no other source of water (AA006-010, 012-014, ¶¶24, 28, 31, 36-38, 44-52, 62).

Vallejo generally demurred to the complaint. The trial court sustained the demurrer without leave to amend, holding: (1) the manner of entering into a contract is a municipal affair, (2) nothing in Vallejo's charter

or ordinances requires a written contract, and (3) as such, Vallejo was bound by the general law, specifically, Government Code §40602, which (purportedly[1]) requires a written contract.

On October 16, 2015, the Court of Appeal affirmed, holding, "If a city's charter is silent as to a particular matter, even one concerning a municipal affair, . . . the matter will be subject to the general laws of this state" (421 Cal.App.4th 425, 435). Since Vallejo's charter did not require a written contract, the Court of Appeal held Vallejo was bound by the general laws, namely, Government Code §40602.

The Court of Appeal also held all city contracts must be in writing, even if there is no statute, charter provision or ordinance requiring a written contract. This holding imposes further judicial limitations on charter cities in matters of municipal affairs, even in the absence of charter language expressly supporting the limitation. No petition for review was filed.

LEGAL DISCUSSION

A. IS A CHARTER CITY BOUND BY THE GENERAL LAWS ON MATTERS OF MUNICIPAL AFFAIRS NOT ADDRESSED IN THE CITY'S CHARTER?

The Court of Appeal's decision gives rise to an appellate conflict of law concerning the application of general law statutes to charter cities in matters of municipal affairs on which the charter is silent.

Originally added to the Constitution in 1914, Article XI, Section 5(a) of the California Constitution, the "home rule" amendment, provides:

> Cities . . . organized under charters . . . are . . . empowered . . . to make and enforce all laws and regulations in respect to municipal affairs, subject only to restrictions and limitations

[1] Section 40602 provides: "The mayor shall sign: . . . (b) All written contracts . . . ." The statute only prescribes how written contracts are to be executed; it does not otherwise require all contracts to be in writing.

> provided in their several charters and in respect to other matters they shall be subject to and controlled by general laws (Cal. Const. Art. XI, §5(a)).[2]

1. The Traditional Interpretation of Article XI, Section 5(a)

Under the traditional home rule jurisprudence, charter cities availing themselves of Article XI, Section 5(a) have plenary powers over municipal affairs, and, as such, are independent of the general laws with respect to municipal affairs, even when their charters or municipal codes are silent (*Civic Center Ass'n of Los Angeles v. Railroad Com'n of California* (1917) 175 Cal. 441, 448-49; *City of Santa Monica v. Grub* (1966) 245 Cal.App.2d 718, 724; *West Coast Advertising Co. v. City and County of San Francisco* (1939) 14 Cal.2d 516, 522; *City of Redondo Beach v. Taxpayers, Property Owners, Citizens and Electors of the City of Redondo Beach* (1960) 54 Cal.2d 126, 137; *Bank v. Bell* (1923) 62 Cal. App. 320, 329).

As early as 1917, the Supreme Court held by electing home rule, the city's "powers over municipal affairs became all-embracing, restricted and limited by the charter 'only,' and free from interference by the state through general laws" (*Civic* Center, *supra*, 175 Cal. 441, 448).

Recently, the Supreme Court affirmed the home rule amendment, "represents an affirmative constitutional grant to charter cities of all powers appropriate for a municipality to possess and includes the important corollary that so far as 'municipal affairs' are concerned,' charter cities are supreme and beyond the reach of legislative enactment" (*State Bldg. and Const. Trades Council of Cal. AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 556, quoting *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 12, internal quotations omitted]).

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[2] California has both charter cities (including Vallejo) and "general law" cities (Gov. Code §§34100-34102). Only general law cities are subject to the general laws of the State (Cal. Const. Art. XI, Sec. 2(a)).

These principles are reflected in multiple cases. In *City of Pasadena v. Charleville* (1932) 215 Cal. 384, the city manager refused to sign a contract for the construction of a fence because the contract did not comply with the state's Public Wage Act.

The Supreme Court held the Public Wage Act was not a matter of statewide concern, and as such, was not binding on Pasadena.[3] San Francisco and Oakland both filed *amicus curaie* briefs explaining the charters of their cities did legislate on matters in the Public Wage Act, but their charter language conflicted with the act. In contrast, Pasadena's charter was silent on the topics covered by the Public Wage Act. The Supreme Court held it was a difference without a meaning:

> [I]t is not necessary that the charter specifically legislate on the subject.
>
> In order to remove the city's municipal affairs from the control of general laws it is sufficient if the city has availed itself of the offer extended to it by the Constitution as amended in 1914 . . . . Where in the one case the charter specifically legislates upon the subject it is deemed a grant of power; and where, on the other hand, the charter in general terms accepts the offer extended by the Constitution, the enumeration of powers is unnecessary and the general language of the acceptance becomes a limitation of the power of the city and is all-embracing so far as the removal of the municipal affairs of the city from the control of the legislature is concerned.
>
> The City of Pasadena has adopted the second course . . . . [¶] It necessarily follows that said statute is not effective, binding or controlling on the petitioner in connection with the

[3] *Charleville* was recently affirmed in *State Bldg. and Const. Trades Council, supra*, 54 Cal.4th 547. Here, the manner of entering into a city contract is undisputedly a municipal affair (*First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 661; *Loop Lumber Co. v. Van Loben Sels* (1916) 173 Cal. 228, 232).

> execution and performance of the proposed contract . . . (*id.* at 392).

In *Sunter v. Fraser* (1924) 194 Cal. 337, the plaintiff sued a police officer for false arrest, alleging the officer breached the obligations of his official bond, and he, as the victim, had standing to sue for a breach.

Eureka's charter authorized the bond issuance, but was silent concerning who could sue for a breach. Because of the silence, plaintiff argued Political Code Section 961 was binding. Section 961 conferred standing on an injured party to bring suit on an official bond,.

Eureka argued (i) the general laws of the State did not apply, even if the charter did not proscribed who could sue under the bond, and, (ii) as a result, the common law rule should prevail – namely, only the bond's obligee (the city) could sue under it.

The Supreme Court agreed with Eureka, holding, by virtue of Article XI, Section 5, "section 961 of the Political Code does not apply", and the issue was governed by the common law of bonds, which precluded a private cause of action (*id.* at 342).

In *Simons v. City of Los Angeles* (1976) 63 Cal.App.3d 455, the plaintiff alleged the city's transfer of a park failed to comply with the state Park Act's requirements. The charter contained no similar requirements.

The court held, "If the charter is silent on the matter of abandonment or change in use of such park, that power nevertheless inheres in such a municipality" even if a general law of the state imposes different rules or requirements (*id.* at 468). The court reasoned, "statutes which are enacted by the state Legislature are limited in their reach to general law cities and inapplicable to charter cities" and as such, 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 general laws" (*id.* at 467-68).

2. The Court of Appeal's Decision Conflicts with the Traditional Authorities

In contrast, the Court of Appeal, relying on the previously obscure case of *McLeod v. Board of Pension Commissioners* (1971) 14 Cal.App.3d 23, held, "If a city's charter is silent as to a particular matter, even one concerning a municipal affair, . . . the matter will be subject to the general laws of this state" (241 Cal.App.4th at 435).

The issue in *McLeod* was whether Government Code §68092.5, relating to payment to expert witnesses, applied to a charter city. The court said, in dicta, "where the charter contains no special procedure concerning a municipal subject, the general law governs" (14 Cal.App.3d at 29-30).

The Court of Appeal said *McLeod*, "follows established principals in addressing charter cities and the effect of state statutes on such municipalities when their charter does not provide specific guidance on a matter of municipal affairs." According to the Court of Appeal, those principals found support *McLeod*, *City of Sacramento v. Adams* (1915) 171 Cal. 458, *Civic Center Assn. v. Railroad Com.* (1917) 175 Cal. 411, *Hyde v. Wilde* (1921) 51 Cal. App. 82, and *Armas v. City of Oakland* (1960) 183 Cal.App.2d 137, 138-39.

In *Civic Center*, 175 Cal. 411, applying the pre-1914 version of the Constitution, the court held the general laws trump a city ordinance when the charter was silent.

In *Hyde*, 51 Cal. App. 82, the City of San Diego had not yet elected home rule under Article XI, Section 5(a). The case involved the application of the general laws to street improvements. The charter expressly provided that "The mode and manner for improvement of streets . . . shall be as

prescribed by the general law of the State of California" (*id.* at 86). Applying the pre-1914 rule, the court said, "Where no particular provisions are made covering a matter falling within the classification of a 'municipal affair,' the state law controls" (*id.* at 86).

In *City of Sacramento,* 171 Cal. 458, the issue was whether Sacramento had authority to purchase land for the purpose of donating it to the state if the charter did not authorize it. The charter empowered the city to "exercise all powers and rights" under "the laws of this state", which included a state statute authorizing a city to donate land to the state (*id.* at 462). In dicta, the court, citing the pre-1914 cases of *Clouse v. San Diego* (1911) 159 Cal. 434 and *Fragley v. Phelan* (1899) 126 Cal. 395, stated a charter city "is subject to general laws, even in municipal affairs, when the subject matter is not covered by the charter" (*id.* at 463).

In *Armas,* 183 Cal.App.2d 137, both parties stipulated the general laws apply in the absence of a contrary charter provision or ordinance.

Relying on these authorities, the Court of Appeal reasoned while a charter city "has the power to enact regulations . . . that differ [from the general law]", unless and until it does so, it remains subject to the general law (241 Cal.App.4th 425, 437 ["in the absence of conflicting municipal ordinances or regulations," the general law is binding]).[4]

[4] While this language arguably suggests a city ordinance or regulation might trump the general laws of the State, other language, strongly suggests the general law applies unless there is a conflicting charter provision (241 Cal.App.4th at 435 ["If a city's *charter* is silent as to a particular matter, even one concerning a municipal affair, . . . the matter will be subject to the general laws of this state."]; *id.* at 436 [*McLeod* "follows well established principals in addressing charter cities and the effect of state statutes on such municipalities when their *charter* does not provide specific guidance on a matter of municipal affairs"]; *id.* [since "the City as not opted to create a different contracting procedure under its Charter" it is bound by the general laws]).

In a deviation from the traditional jurisprudence, the Court of Appeal placed unusual emphasis on the "other matters" language in Article XI, Section – *i.e.*, charter cities may make laws in respect to municipal affairs "*and in respect to other matters they shall be subject to and controlled by general laws* (241 Cal.App.4th at 435, italics in original, quoting Art. XI, Sec. 5(a)). The Court of Appeal interpreted the italicized language to mean in "other matters" not addressed in the charter, the general law is binding.

Under the traditional cases, the "other matters" language means matters other than municipal affairs, namely, matters of statewide concern (*County of Santa Barbara v. City of Santa Barbara* (1976) 59 Cal.App.3d 364, 374; *State Bldg. and Const. Trades Council, supra,* 54 Cal.4th at 532; *Wilkes v. City and County of San Francisco* (1941) 44 Cal.App.2d 393, 395). This traditional understanding has given rise to a substantial body of jurisprudence concerning the distinction between municipal affairs and statewide affairs (*see, e.g., California Fed. Savings, supra*, 54 Cal. 3d at 16-17; *State Bldg. and Const. Trades Council*, *supra*, 54 Cal.4th at 537-44; *Johnson*, *supra*, 4 Cal.4th at 399-400).

3. The Statewide Impact of the Court's Decision

a. Impact on Charter Cities

Without guidance from this Court as to the binding application of general laws, the Court of Appeal's decision, and its reliance on *McLeod*, will likely have an enormous impact on every charter city in the state.

On the one hand, charter cities can rely upon the traditional cases interpreting Article XI, Section 5, hoping the courts will ignore *McLeod*, the Court of Appeal's decision, and the cases cited therein.

Or, without the benefit of the constitutional "home rule" principle as traditionally construed, charter cities could substantially revise their charters to add provisions covering every conceivable municipal affair.[5] This process may involve redrafting every charter in the State, at enormous cost, and would result in the "bulky" charters seen prior to 1914 (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 396).

In redrafting the charters, cities will need to legislate in significant detail to fully remove themselves from the general laws. For example, in *Sunter*, 194 Cal. 337, the charter authorized the bond issuance, but did not specify who had standing to sue. In *Bellus*, the ordinance authorized a pension plan, but did not specify the scope of the city's liability. Under the Court of Appeal's decision, the general laws would control those specific topics even though the charter generally addressed the subject matter.

Further, all municipal actions – past, present and future – are potentially subject to attack because the city failed to comply with the general laws in cases where the charter was silent or insufficiently detailed. The conflict created by the decision is likely to lead to expensive and timely litigation. For example, under the Court of Appeal's decision, in a case like *Simons, supra*, 63 Cal.App.3d 455, a plaintiff could challenge the present or even the past transfer of a public park on the ground the transfer violated the general laws.

b. Impact on the Class

The Class, like any non-resident utility customer, cannot vote, has no governing regulatory body to turn to, and, as a result of the Court of Appeal's decision, has no legal redress (Cal. Civ. Code §3523 ["for every wrong there is a remedy"]). Consequently, 809 customers will be indebted

[5] Simply doing this by ordinance alone may be risky given the language in both the Court of Appeal's decision and in *McLeod, see*, fn. 4, *supra*.

for $30-60 million in deferred capital improvements, plus the cost of operating a large water system designed for an entire city. Rates, already among the highest in the state, could easily triple under the most conservative estimates (AA003, ¶10). Home values will decline and many, especially those on fixed incomes, will be forced to move (AA028, ¶132.d).

B. CAN A COURT TO PROHIBIT ENFORCEMENT OF AN IMPLIED-IN-FACT CONTRACT WITH A CHARTER CITY IN THE ABSENCE OF A CHARTER PROVISION REQUIRING A WRITTEN CONTRACT?

The Court of Appeal went a step further than the trial court, holding "*all* implied contracts against public entities are barred," even in the absence of any statute (like §40602), or any charter provision or ordinance requiring a written contract (241 Cal.App.4th at 438, italics in original).

In so holding, the Court of Appeal relied upon *Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104. In *Katsura*, the court correctly held an oral contract made in violation of a charter provision requiring a written contract could not be enforced in *quantum meruit* as an implied-in-law contract. "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" (*id.* at 109-10, internal quotations omitted).

The Court of Appeal dramatically extended *Katsura*, saying it is not limited "to cities with charters that expressly require all contracts to be in writing (241 Cal.App.4th at 438). The Court of Appeal held, a city cannot be liable on an "implied contract" [6] even in the absence of a charter

[6] The Court of Appeal made no distinction between implied-in-law and implied-in-fact contracts. An implied-in-fact contract entails an actual contract, but one manifested in conduct rather than expressed in words" (*Maglica v. Maglica* (1998) 66 Cal.App.4th 422, 455) and is "just as valid as contracts formed with words" (CACI 305; *Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1977) 69 Cal.App.3d 268,

provision or ordinance requiring a written contract because "[l]imiations on a municipality's power to contract should be strictly construed" (*id.*).

1. The Decision Conflicts with Charter City Jurisprudence

The Court of Appeal's holding, which imposes judicial limitations on the powers of charter cities in the absence of any such limitation in the charter, conflicts with well-established jurisprudence. If allowed to stand, charter cities will face not only the general law's binding application, but judicially created limitations as well.

Under Article XI, Section 5(a), charter cities have, "all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter" (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161,170-71, italics added). "[R]estrictions 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" (*id.* at 170-71).

For example, in *Taylor v. Crane* (1979) 24 Cal.3d 442, the City of Berkeley sought to overturn an arbitration award suspending, but not terminating a police officer. The city argued its agreement to arbitrate was in violation of its charter which vested in the city manager the right to "discipline or remove" all subordinate employees (*id.* at 451).

The Supreme Court, recognizing, "all powers not expressly limited by the charter" may be exercised, and, "[r] on a charter city's powers may not be implied," held even though the charter gave the city manager the

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275). An implied-in-law contract "operates without an actual agreement of the parties" (*Maglica*, 66 Cal.App.4th at 455) and "is not actually a contract, but instead a remedy that allows the plaintiff to recover a benefit conferred on the defendant" (Blacks' Law Dictionary (8th Ed.), pp. 345-46)

power to terminate employees, the arbitration did not violate the charter because "there is no provision in the charter barring the creation of an alternative form of appeal, such as arbitration," (*id.*).

Likewise, in *Miller v. City of Sacramento* (1977) 66 Cal.App.3d 863, taxpayers challenged the city council's appointment of a budget analysist. They argued the charter prohibited the council from interfering with the city manager or preventing him from appointing officers or employees.

The court rejected the argument saying, "In the absence of an express prohibition on the power or authority of the council to employ its own budget analyst to report to it, plaintiffs have sought to raise an implied one through a possible conflict in charter provisions . . ." (*id.* at 869). The court stated, "the law is to the contrary. No restriction is to be implied" with respect to the powers of a charter city (*id.*).

2. The Decision Overrules Cases Holding the Relationship between a City and its Non-Resident Water Customers

For the Class, the Court of Appeal's decision voids the implied-in-fact contracts *ab initio*, and silently overrules a significant body of appellate law holding the relationship between a city and its non-resident water customers is, by definition, contractual (*Hobby v. City of Sonora* (1956) 142 Cal.App.2d 457 ["any right [the non-resident customers] might acquire to use the system could only arise out of and be predicated upon a contractual relationship with the city"]; *Elliot v. City of Pacific Grove* (1975) 54 Cal.App.3d 53, 56 ["since the city could not compel residents outside the city to connect with the city's system . . . 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 Cal.App.2d 735, 737-48 ["The right-of-way across plaintiff's land could only have been acquired in one of two ways-either by condemnation

or by contract . . . ."]; *Durant v. City of Beverly Hills* (1940) 39 Cal.App.2d 133, 138).[7]

The Court of Appeal's holding throws into doubt the legal relationship between a city and its non-resident utility customers, begging the question, if the relationship is not contractual, what is it? These cases, which the Court of Appeal ignored, are also important because they recognize the fact non-resident utility customers are uniquely vulnerable to discrimination in the setting of rates and thus in need of a judicial remedy.[8]

CONCLUSION

This case involves a conflict of appellate authority concerning Article XI, Section 5(a) and the binding application of general laws on the State's 121 charter cities. Without review by this Court, these cities face immediate uncertainty and probable litigation relating to the legality of past, present and future municipal actions.

By accepting this Petition, this Court can afford the Class the opportunity to enforce its right to affordable water, and in so doing, simultaneously provide needed guidance to the State's 121 charter cities as to the binding application of the general laws where the charter is silent.

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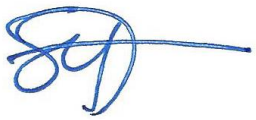
[7] At oral argument, Appellant requested leave to amend to allege breach of an implied covenant stemming from a written contract as in *Tronslin*. Appellant can allege the existence of a written contract in the form of "will serve" letters to each member of the Class whereby Vallejo agreed to provide water subject to certain conditions. The will serve letters, like the agreement in *Tronslin*, are silent as to costs. Appellant's request for leave to amend was ignored by the Court of Appeal.

[8] The Court of Appeal seriously called into doubt *County of Inyo v. PUC* (1980) 26 Cal.3d 154, 159, *Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172,1189-90 and *Durant, supra*, 39 Cal.App.2d 133, 139, all recognizing a trustee-beneficiary relationship between a city and its non-resident customers, and all holding non-residents may sue to enjoin unreasonable water rates (*Green Valley*, 241 Cal.App.4th at 442).

Respectfully submitted,

LAW OFFICES OF STEPHEN M. FLYNN



November 25, 2015

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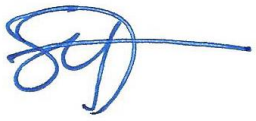
STEPHEN M. FLYNN
Attorney for Petitioner and Appellant,
Green Valley Landowners Association

CERTIFICATE OF WORD COUNT

I hereby certify this brief, exclusive of tables, consists of 4,678 words.

LAW OFFICES OF STEPHEN M. FLYNN



November 25, 2015

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STEPHEN M. FLYNN
Attorney for Petitioner and Appellant,
Green Valley Landowners Association

PROOF OF SERVICE

Green Valley Landowners Association v. City of Vallejo
Supreme Court Case No. S_____

I, STEPHEN M. FLYNN, declare as follows:

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, 71 Stevenson Street, Suite 400, San Francisco, California 94105.

On **November 25, 2015**, I served **GREEN VALLEY LANDOWNERS ASSOCIATION'S PETITION FOR REVIEW** on the below parties BY OVERNIGHT DELIVERY SERVICE by placing the document 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:

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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: November 25, 2015

_____
Stephen M. Flynn

COURT OF APPEAL'S OPINION

COPY

Filed 10/16/15

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

GREEN VALLEY LANDOWNERS ASSOCIATION,

Plaintiff and Appellant,

v.

CITY OF VALLEJO,

Defendant and Respondent.

A142808

(Solano County
Super. Ct. No. FCS042938)

In this class action comprised of nonresident water customers, plaintiff Green Valley Landowners Association filed a complaint seeking to preserve its alleged right to continue receiving water at reasonable rates from an historical water delivery system owned and operated by defendant City of Vallejo (City). The trial court sustained the City's demurrer as to all 12 causes of action contained in the complaint without leave to amend. Plaintiff contends the court's rulings are legally erroneous. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Factual Background[1]

The Lakes Water System (LWS) was created in the late 1800's through the early 1900's to provide the City with potable water. The City first constructed a diversion dam coupled with a 14-inch transmission pipeline, which brought water from Solano County's Green Valley to the City (the Green Line). After completing the dam, the City created

[1] We take the facts from the allegations in the complaint.

of LWS water to the City. The City then passed an ordinance (the 1992 Ordinance) shifting 100 percent of the cost of operating the LWS to its approximately 809 nonresident customers. Prior to 1991, these nonresidents had shared the cost of the LWS with approximately 30,000 metered connections within the City. As a result of the 1992 Ordinance, water rates for the nonresident customers increased by over 230 percent.

The City passed additional water rate increases by ordinances enacted in 1995 (the 1995 Ordinance) and 2009 (the 2009 Ordinance). In addition to increasing water consumption charges, the ordinances increased the fixed service charges to the nonresident customers of the LWS. Plaintiff alleges in its complaint that current water rates within the LWS are among the highest in the state.[3]

On June 9, 2009, plaintiff, on behalf of the purported class of nonresident LWS customers (the Class), entered into a tolling agreement with the City (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 has been extended 10 times, and expired on December 31, 2013.

According to plaintiff, the City has grossly mismanaged and neglected the LWS, placing the burden on the Class to fund a deteriorating, inefficient, and costly water system that is spread over an "incoherent service area." In addition to water treatment plant improvements made between 1997 and 2005 that cost almost $8 million, replacement cost for a 10-mile section of the Gordon Line and a six-mile section of the Green Line are expected to be over $12 million. All of these costs have been, or will be, passed on to the LWS's nonresident customers. Plaintiff did not become aware of these unfunded liabilities until June 2013. Previously, the City had represented that the LWS

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[3] According to plaintiff's opening brief, the average bimonthly water bill for residential members of the Class is now over $400, or approximately 400 percent more than the average City customer water bill.

On August 21, 2014, plaintiff filed its notice of appeal.[5]

On August 22, 2014, the trial court filed its order affirming its tentative ruling, granting the demurrer without leave to amend.

On October 1, 2014, the trial court filed its order dismissing the lawsuit and entered final judgment for the City.

DISCUSSION

I. Standard of Review

"Because this case comes to us on a demurrer for failure to state a cause of action, we accept as true the well-pleaded allegations in plaintiff's . . . complaint. ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.' " (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

"While the decision to sustain or overrule a demurrer is a legal ruling subject to de novo review on appeal, the granting of leave to amend involves an exercise of the trial court's discretion. [Citations.] When the trial court sustains a demurrer without leave to amend, we must also consider whether the complaint might state a cause of action if a defect could reasonably be cured by amendment. If the defect can be cured, then the judgment of dismissal must be reversed to allow the plaintiff an opportunity to do so. The plaintiff bears the burden of demonstrating a reasonable possibility to cure any defect

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[5] Although plaintiff's appeal was premature because it was taken from the nonappealable order sustaining the demurrer without leave to amend, we treat it as being from the subsequently entered final judgment of dismissal. (See, e.g., *Maxwell v. Dolezal* (2014) 231 Cal.App.4th 93, 96, fn. 1 ["We deem appellant's premature appeal, filed after the nonappealable order sustaining the demurrer without leave to amend and before the judgment of dismissal was entered, to be an appeal from the subsequent judgment of dismissal."].)

Historic[al] Cost Sharing Ratio," a promise that it allegedly breached when it passed the 1992, 1995, and 2009 Ordinances.

As the City notes, plaintiff's third cause of action is also based on an implied contract theory.[7] The City also correctly observes that the complaint's 10th claim, which is for specific performance of the alleged implied agreement, actually constitutes a remedy and is not itself a cause of action.[8]

B. Implied Contracts

"The terms of an express contract are stated in words. [Citation.] The existence and terms of an implied contract are manifested by conduct. [Citation.] The distinction reflects no difference in legal effect but merely in the mode of manifesting assent." (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1178.) The essential elements of a claim of breach of contract, whether express or implied, are the contract, the plaintiff's performance or excuse for nonperformance, the defendant's breach, and the resulting damages to the plaintiff. (*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830; *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1332.) The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied term in the contract. (See *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683–684, 690;

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[7] The third cause of action for breach of contract (third party beneficiary) focuses on the LWS's easements and asserts the City "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, [the City] transferred its contractual obligation to provide and pay for the free water and has improperly shifted that obligation to the class."

[8] There are no separate causes of action for specific performance or injunctive relief, which are instead remedies. (See, e.g., *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1360, fn. 2 [specific performance and injunctive relief are equitable remedies and not causes of action for injuries]; *Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, 162 [injunctive relief].)

was never memorialized in writing." It contends section 40602 does not apply because charter cities "are independent of the general laws of the State on all matters of municipal affairs." This is true, according to plaintiff, even as to matters on which the charter is silent. In so arguing, plaintiff construes cases that favor charter city ordinances over conflicting general law provisions as standing for the proposition that general laws have no application to charter cities in the absence of ordinances or charter provisions that expressly invoke those general laws. This construction is not supported by case law.

C. General Law and Charter Cities

" 'The Government Code classifies cities as either "general law cities" (cities organized under the general law of California) or "chartered cities" (cities organized under a charter).' " (*City of Orange v. San Diego County Employees Retirement Assn.* (2002) 103 Cal.App.4th 45, 52.) It is well settled that the method by which a city has power to enter into a contract may be controlled by its charter. (*Loop Lumber Co. v. Van Loben Sels* (1916) 173 Cal. 228, 232; *First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 661 (*First Street*).) Further, unless the city charter authorizes such, no implied contract rights can arise. (*Reams v. Cooley* (1915) 171 Cal. 150, 153–154; *First Street,* at p. 667.)

Section 201 of the City's charter states: "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."[9] The court below correctly noted that the manner in which a city may form a contract is a municipal affair, and that the City's charter, which could have validly included contract formation provisions, "does not specifically prescribe how its contracts must be executed." The court concluded the City could thus rely on section 40602 for guidance. Plaintiff contends charter cities are *never* subject to general laws,

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[9] The City adopted its charter in 1970.

other municipal-based approach to government contracts. Simply stated, the City has not opted to create a different contracting procedure under its Charter.[10]

We concur with the holding of *McLeod, supra*, 14 Cal.App.3d 23. That decision follows established principles in addressing charter cities and the effect of state statutes on such municipalities when their charter does not provide specific guidance on a matter of municipal concern. We disagree with plaintiff's characterization of *McLeod* as an isolated decision. (See *Civic Center Assn. v. Railroad Comm.* (1917) 175 Cal. 441, 445 ["With respect to matters not municipal, or municipal affairs upon which the charter [is] silent, the provisions of any general law [i.e. state statute] pertaining thereto would control the subject."]; *Armas v. City of Oakland* (1960) 183 Cal.App.2d 137, 138–139 ["Although Oakland is a charter city, plaintiffs concede that its charter and ordinances prescribe no procedure for street closing and that thus the procedural provisions of state law must be followed, even if the function be municipal in character"]; *Hyde v. Wilde* (1921) 51 Cal.App. 82, 86 ["Where no particular provisions are made covering a matter falling within the classification of a 'municipal affair,' the state law controls."])

In arguing otherwise, plaintiff relies on *Butterworth v. Boyd* (1938) 12 Cal.2d 140 (*Butterworth*) for the proposition that charter cities are not bound by the general laws of this state with respect to municipal affairs, even as to matters that the charter does not address. In *Butterworth,* a proposed charter amendment to the charter of the City and

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[10] The Vallejo charter contains express language dealing with contracting that is compatible with section 40602. These charter provisions ensure City taxpayers are protected from implied obligations. Charter section 716 prohibits any City expenditures without the approval of the city council. Also, section 717 allows the city manager to make contracts only with the approval of the council and an appropriation. The Municipal Code of Vallejo has similar express restrictions. Section 3.20.045 allows particular officials of the City to make contracts in stated dollar amounts. Written bids and proposals in contracting are required under section 3.20.222. Additionally, section 3.22.010 mandates chapter 3.22 of the Vallejo Municipal Code applies to all government contracts. These charter provisions and municipal ordinances facilitate the operation of section 40602 and its requirements for express contracts.

general law (state law) could not *preempt* a charter amendment passed by the voters of San Francisco specifically addressing the topic of *city employee* health insurance practices.

D. Cities Cannot Be Sued Under An Implied Contract Theory

Even if plaintiff is correct that section 40602 does not apply to this case, as explained by the Court of Appeal in *Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104 (*Katsura*), "[i]t 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.' [Citations.] [¶] . . . 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.' " ' [Citation.] In other words, contracts that disregard applicable code provisions are beyond the power of the city to make." (*Id.* at pp. 109–110.)

The principle set forth in *Katsura*, *supra*, 155 Cal.App.4th 104, is well established (see, e.g., *Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 830; see also *Seymour v. State of California* (1984) 156 Cal.App.3d 200, 204–205.) Limitations 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. (10 McQuillin, Municipal Corporations (3d ed. 2009 rev.) § 29:6, p. 336.)

Plaintiff seeks to distinguish *Katsura*, *supra*, 155 Cal.App.4th 104, because the operative charter in that case expressly required all city contracts to be in writing. Plaintiff asserts that if the City had "wanted the benefit of the *Katsura* rule, it could have adopted similar charter language." However, the holding in *Katsura* was that *all* implied contracts against public entities are barred because, by definition, they have not formally

relief alleges that the City presently intends to sell the LWS to a private utility and claims the July 2014 rates "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."

The trial court found what it referred to as the " 'pooled-rate' structure" proposed by plaintiff in these claims to be prohibited by article XIII D, section 6, subdivision (b) of the California Constitution, which provides that "[a] fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements: [¶] (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property-related service. [¶] (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed. [¶] (3) 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.*" (Italics added.) The court cited to *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586 (*Griffith*) in support of its ruling, concluding that Proposition 218 "prohibits a rate structure as alleged in Plaintiff's complaint that requires one group of customers to essentially subsidize another . . . ."

In *Griffith,* the objectors appealed from judgments in favor of a water management agency challenging an ordinance enacted by the agency that increased groundwater augmentation charges for the operation of wells within the agency's jurisdiction. The Court of Appeal held that the augmentation charges were expressly exempt from Proposition 218's fee/charge voting requirement. "Given that Proposition 218 prescribes no particular method for apportioning a fee or charge other than that 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." (*Griffith, supra,* 220 Cal.App.4th at p. 601.)

10051[13] grant the City the power to operate and to sell its public utility assets. (See *Leach v. City of San Marcos* (1989) 213 Cal.App.3d 648, 660–661 ["Under Code of Civil Procedure section 526 . . . and Civil Code section 3423 an injunction cannot be granted to prevent execution of a public statute. Nonetheless an injunction may issue where the statute or ordinance is invalid *and* a showing is made of irreparable injury to property or business."].) Here, plaintiff offers nothing persuasive to show that Public Utilities Code section 10051 is invalid.[14] Accordingly, the two claims for injunctive relief fail.

V. Injunctive Relief Against Surcharge Fee and Future Rate Structures

Plaintiff's eighth cause of action asked for an injunction to stop the City from continuing a surcharge fee enacted as a part of the 1995 Ordinance after September 30, 2015, when it is set to expire. In the ninth cause of action it seeks 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.

As the trial court correctly found, the speculative allegation that the City may violate the provision that discontinues the surcharge fee after September 30, 2015, was premature. Additionally, the court noted that under *Water Replenishment Dist. of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1469–1470, water assessments are subject to the " 'pay first, litigate later' " rule. Plaintiff challenges this ruling. Regardless, the injunction claims are based on the same implied contract theory that we have already found lacking in merit.

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[13] Public Utility Code section 10051 provides: "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."

[14] Plaintiff claims that the sale would violate Public Utilities Code sections 10061 [prohibiting the acquiring entity from unreasonably discriminating against existing customers] and 789.1 [proceeds from sale of public utility land by a "water corporation" must be invested in "necessary or useful" water infrastructure]. The claims are premature, as there are no allegations in the complaint that the City has approved a sale to an identified buyer on known terms.

South Pasadena, at pp. 587–588, is founded on the following principle: "A city *which acquires the water system of another community* incurs an obligation to deal fairly with its customers in that community and to provide them with service at reasonable rates." (*Hansen*, at p. 1180, italics added.) Here, the City did not acquire the LWS from plaintiff or plaintiff's predecessors. Again, *Hansen* is also distinguishable because it was decided prior to the passage of Proposition 218. Additionally, none of the cases cited by plaintiff in this regard discuss section 815, subdivision (a).

Finally, the accounting cause of action seeks an accounting of the surcharge and connection fees levied by the City upon the LWS customers based on the allegation that the fees were not placed in dedicated accounts and were not used exclusively for constructing capital improvements to the LWS, as required by City regulations.

"An accounting is an equitable proceeding which is proper where there is an unliquidated and unascertained amount owing that cannot be determined without an examination of the debits and credits on the books to determine what is due and owing. [Citations.] Equitable principles govern, and the plaintiff must show the legal remedy is inadequate. . . . Generally, an underlying fiduciary relationship, such as a partnership, will support an accounting, but the action does not lie merely because the books and records are complex. [Citations.] Some underlying misconduct on the part of the defendant must be shown to invoke the right to this equitable remedy." (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1136–1137.) As we have already concluded plaintiff cannot state any viable claims alleging misconduct on the part of the City, the cause of action for an accounting fails.

DONDERO, J.

We concur:

MARGULIES, Acting P.J.

BANKE, J.

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