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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

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

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

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

INTRODUCTION

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

LEGAL ARGUMENT

A. Government Code §40602 Does Not Apply

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

DATED: April 4, 2014

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