Eric J. Benink, Esq., SBN 187434
eric@beninkslavens.com
BENINK & SLAVENS, LLP
8885 Rio San Diego Drive, Suite 207
San Diego, CA 92108
Tel.: (619) 369-5252
Fax: (619) 369-5253

Attorneys for Claimant, Santiago Geologic Hazard Abatement District

JAMS ARBITRATION

SANTIAGO GEOLOGIC HAZARD ABATEMENT DISTRICT, a political subdivision of the state of California,

Claimant,

v.

CITY OF ANAHEIM, a California charter city,

Respondent.

JAMS Reference #1200059076

CLAIMAINT SANTIAGO GEOLOGIC HAZARD ABATEMENT DISTRICT'S OPENING ARBITRATION BRIEF

Hon. Nancy Wieben Stock (Ret.)

Arbitration Date: January 30, 2023
Time: 10:00 a.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

California Civil Code

California Code of Civil Procedure

California Public Resources Code

INTRODUCTION

Claimant Santiago Geologic Hazard Abatement District ("SGHAD") and Respondent City of Anaheim (the "City") are parties to a 1999 Agreement pursuant to which SGHAD has successfully operated Dewatering Facilities to mitigate the risk of a reactivation of the 1993 Santiago Landslide in Anaheim Hills. SGHAD filed this action to obtain a declaration stating that SGHAD is not contractually obligated to operate the Dewatering Facilities upon the depletion of its remaining funds. SGHAD is a political subdivision of the State of California with limited statutory powers to generate revenue. The City originally funded SGHAD as part of a settlement with hundreds of property owners. The City knew that funding would eventually dry up – and SGHAD would cease to operate – unless SGHAD passed a special assessment. Under the California Constitution (Proposition 218), special property[1] assessments must be approved by a majority of property owners in a duly-held election. SGHAD's two recent attempts to pass assessments failed overwhelmingly; it is out of options. The day of reckoning – where the dozens of dewatering pumps (and supporting equipment) will cease to operate – is no longer a distant problem, but an inevitability. The SGHAD boundaries encompass roughly 300 residential properties and City streets and infrastructure. Public and private property worth tens of millions of dollars is at risk.

SGHAD's volunteer board members have done everything in their power to find a solution. They are constrained by the limited powers conferred on SGHAD by the Geologic Hazard Abatement Districts statute[2] and Proposition 218. SGHAD requests that the Arbitrator enter a declaratory judgment stating that (1) the Agreement does not require SGHAD to operate, maintain or repair the Dewatering Facilities upon the depletion of its funds, or alternatively (2) SGHAD is excused from operating, maintaining, or repairing the Dewatering Facilities based on the doctrines of impossibility, impracticability, and frustration of purpose. Such a declaration will announce to the world that SGHAD cannot prevent a reactivation of the Santiago Landslide any longer and put all interested parties – property owners, the City, other government agencies and regulators – on notice to act accordingly.

---

[1] SGHAD uses "special assessments" and "property assessments" interchangeably herein.

[2] Public Resources Code §§ 26500, et seq.

FACTS

A. THE 1993 SANTIAGO LANDSLIDE

The "Santiago Landslide" refers to an area encompassing roughly 25 acres of developed and natural terrain in the Anaheim Hills area of Anaheim, California. (SOF[3] No. 1.) In January 1993, the Santiago Landslide accelerated during massive rainstorms that hit Orange County. (SOF No. 1.) The City took emergency actions including the installation (within publicly owned and privately owned properties) and operation of a system of vertical and horizonal wells to lower ground water levels for the area, as well as installation of observation wells, piezometers, manometers and other devices to measure ground water levels and ground movement as well as facilities to power the equipment and to discharge the withdrawn ground water ("Dewatering Facilities"). (*Ibid*.) The intent and result of the operation of the Dewatering Facilities was to lower groundwater levels and thereby stop further earth movement. (*Ibid*.) By February 15, 1993, gross earth movement ceased. (*Ibid*.)

The City's geological and geotechnical consultants, Eberhart & Stone ("E&S"), assisted the City with the emergency response and investigated the geological conditions. (SOF No. 2.) E&S prepared a 1996 report ("E&S Report") that concluded that: "Cessation of earth movements and associated deformation was, and remains totally dependent on control of local ground water. Continued stability of the deformation area and adjoining terrain will necessitate effective dewatering for the foreseeable future." (SOF No. 3; Ex. 1, p. 61.) The E&S Report recommended "[t]he implementation of a Geological Hazard Abatement District (GHAD) [as] **a means of raising the necessary funds** for maintaining, monitoring, and managing the dewatering system for the benefit of all properties threated by renewed landslide movement." (SOF No. 4; Ex. 1, p. 68, emphasis added.) The E&S Report further concluded: "Expenditures for operation, maintenance, and monitoring of the system will continue as long as the potential for high ground water remains. Therefore, **the existing dewatering operation and its associated costs are likely to remain necessary indefinitely**." (SOF No. 5; Ex. 1, p. 68, emphasis added.)

---

[3] SOF refers to the parties' Stipulation of Facts and Authenticity of Documents filed January 10, 2023.

B. THE LAWSUITS AND SETTLEMENT

Litigation ensued following the 1993 acceleration of the Santiago Landslide. In 1993, approximately 464 individuals, representing ownership of approximately 249 separate parcels of real property in Anaheim Hills, some within what were later found to be the Santiago Landslide boundaries and some outside of those boundaries, filed 15 separate lawsuits against the City and several other defendants for inverse condemnation, negligence, nuisance, dangerous condition of property, failure to discharge mandatory duty, fraudulent concealment and strict products liability. (SOF No. 5.) All Plaintiffs were represented by the same law firm. (SOF No. 5.) The 15 cases were consolidated as *Delmonico v. City of Anaheim.* ("Delmonico Lawsuit"). (SOF No. 5.) In 1995, the City filed a cross-complaint against 230 of the 464 plaintiffs and against the Window Hill Homeowner's Association alleging causes of action for equitable indemnity, equitable apportionment, negligence, declaratory relief and as to some of the cross-defendants, express indemnity. (SOF No. 6.) The 230 plaintiffs named in the City's cross-complaint tendered the City's claims against them to their homeowners' insurance companies for defense and indemnity. (SOF No. 7.)

The 14 homeowners insurance companies to whom defense and indemnity was tendered ("Owners' Insurers") reached a conditional settlement with the City in 1995 on behalf of their insureds. (SOF No. 7.) Under that conditional settlement, in return for the City's dismissal of its cross-complaint against the 230 plaintiffs, the 14 insurers pledged to make available a fund in the amount of $3 million "for use towards the resolution of the claims asserted by the [Delmonico] plaintiffs." (*Ibid.)* The conditional settlement provided that no part of the funds could be released until there was a "Final Global Resolution" of the complaints and cross-complaints in the cases consolidated with the Delmonico Lawsuit. (*Ibid*.)

On or about March 2, 1999, the City and the plaintiffs entered into a settlement ("Delmonico Settlement") of the Delmonico Lawsuit (including consolidated cases). (SOF No. 9; Ex. 4.) The Delmonico Settlement recovered $15.5 million for Plaintiffs: $10 million directly from the City, with the balance coming from the owners' insurers ($3 million) and other cross-defendants ($2.5 million). (SOF No. 9; Ex. 4, ¶ 1.A.4.) The Delmonico Settlement was contingent on (a) the

formation of a GHAD, (b) funding the GHAD's operation with $3.5 million of the $15.5 million and (c) the newly-formed GHAD entering into an agreement with the City by April 30, 1999 under which the GHAD would accept ownership, maintenance and operational responsibilities for the Dewatering System. (Ex. 4, ¶¶ D and E.)

In anticipation of the proposed global settlement, on February 23, 1999, the City Council passed Resolution 99R-31 initiating proceedings under the Geologic Hazard Abatement District Law (Public Resources Code sections §§ 26500, et seq.) to form a GHAD. (SOF No. 11; Ex. 7.) On March 16, 1999, the City Council, after finding that it had not received written objections from property owners representing greater than 50 percent of the assessed valuation, passed Resolution No. 99R-50 approving the formation of SGHAD and appointing an initial board of directors. (SOF No. 11; Ex. 11.) Although the SGHAD statute authorized the City to seek an annual assessment concurrent with the formation of SGHAD [Public Resources Code §§ 26568.2, subd. (e), 26569.4], it did not seek such an assessment. SGHAD is a separate political subdivision of the State of California. (SOF No. 13; Public Resources Code § 26570.) It is governed by a five-person Board of Directors. (*Ibid*.) It is not a political subdivision of or an agency of the City. (*Ibid*.)

The SGHAD conducted its initial meeting on March 29, 1999. (SOF No. 14.) The attorney representing the City in the litigation, Michael Rubin (also representing the City in the present arbitration), attended this meeting and advised the SGHAD Board that the present cost of the operating the Dewatering Facilities was $230,000 per year. (SOF No. 14.) One SGHAD board member commented that the interest on $3.5 million would not cover the costs indefinitely. (*Ibid*.) The minutes do not reflect whether Mr. Rubin responded to this concern. This issue surfaced again at the SGHAD Board's May 19, 1999 meeting in connection with a motion to approve the agreement contemplated by the Delmonico Settlement Agreement. (SOF No. 15; Ex. 13.) But the SGHAD Board approved the agreement with the City. (SOF No. 15; Ex. 13.) On or about June 10, 1999, Anaheim and SGHAD entered in an "Agreement Between the City of Anaheim and the Santiago Geologic Hazard Abatement District" (the "Agreement"). (SOF No. 16; Ex. 17.) The Agreement is the subject of the dispute herein.

C. THE TERMS OF THE AGREEMENT

Under the Agreement, the City transferred to SGHAD ownership of the Dewatering Facilities that it had previously installed and operated. (Ex. 17, Recital A, ¶ 1.) It agreed to transfer (and in fact transferred) the $3.5 million from the Delmonico settlement to SGHAD for purposes specified in paragraph 5. (Ex. 17, ¶ 4.) Paragraph 5 of the Agreement provides, in part: "The GHAD Distribution, and any interest or earnings thereon, may only be expended for construction, acquisition, operation, maintenance, and repair of dewatering wells and other devices for the purpose of monitoring, abating and/or stabilizing past, present and future land movement of the Santiago Landslide and/or lowering groundwater levels..." (Ex. 17, ¶ 5.)

Paragraph 6(a) of the Agreement provides:

> *Effective upon the satisfaction of all conditions to this Agreement, the District hereby assumes sole and total responsibility for all ownership, control, operational, maintenance, and repair responsibilities relating to the Dewatering Facilities. The District shall operate, maintain, and repair all or part of the Dewatering Facilities, as well as any additional new or replacement facilities the District may construct or install, in a manner within its discretion which will control groundwater levels to prevent reactivation and/or abate movement of the Santiago Landslide. The District shall also assume sole and total responsibility for all ownership, control, operational, maintenance, and repair responsibilities for any monitoring wells or dewatering wells that the City may install in Pointe Premier or in Avenida de Santiago south of Tamarisk during the 12 months following the execution of this Agreement which the City offers to transfer to the District and shall cooperate with the City to the extent necessary to allow any such dewatering wells to be connected to the existing Dewatering Facilities.*

(Ex. 17, ¶ 6.) As discussed further below, SGHAD requests relief arising from any purported obligations set forth in this paragraph 6(a).

D. THE SGHAD'S OPERATION OF THE DEWATERING FACILITIES

The City's Resolution No. 99R-31 referenced a Plan of Control.[4] (Ex. 8.) The Plan of Control for the Santiago Landslide describes the geologic hazard and hazard potential, a mitigation plan, and other geologic hazards. (See generally, Ex. 8.) The Plan of Control states that two systems had been installed to lower the water table from 1993 maximums and maintain groundwater elevations at safe levels: an active dewatering system of dozens of vertical wells and passive dewatering system consisting of near horizontal gravity drains. (Ex. 8, p. 4.) The Plan of Control further states that the dewatering systems locations and construction details are as portrayed in the E&S Report and appendices. (*Id*. at p. 5; see also *id*. at pp. A-1 to A-4 [identifying dewatering wells].) Wells are supplied with appropriate monitoring facilities to measure discharge volumes and water levels and diagnose electro-mechanical performance. Monitoring also includes dedicated groundwater observation wells and deep piezometer installations, many equipped with automatic water level or pressure data-loggers. (*Ibid*.) Per the Plan of Control, three entities are needed to provide technical and contractual services: (1) a primary geologic/geotechnical consultant to conduct monitoring of water elevations from monitoring wells, pumps and piezometers; perform inclinometer surveys; compile pump discharge volumes; and report and analyze findings; (2) pump/well contractor to service pumps, monitor performance; and (3) a review geologic/geotechnical consultant to assist the GHAD Board in reviewing reports and activities.

SGHAD has operated, maintained, and repaired the Dewatering Facilities since approximately late 1999 or early 2000. (SOF No. 17.) ENGEO Incorporated ("ENGEO") acts as the primary geologic/geotechnical consultant and liaison to SGHAD, and acts as its day-to-day manager. (SOF No. 17.) It monitors and maintains the piezometers and inclinometers and evaluates and reports system data to SGHAD. (*Ibid*.) Charles King Company maintains and repairs dewatering wells and related equipment like pumps and electrical systems, and obtains and reports water levels

[4] The legislative body initiating proceedings must review a plan of control. (See Public Resources § 26558, subd. (b).) A "Plan of Control" is a report prepared by an engineering geologist that describes in detail the geological hazard, its location and area affected thereby, and a plan for prevention, mitigation, abatement or control thereof. (Public Resources Code § 26509.)

of, and volumes pumped from, wells. (*Ibid*.)

E. THE COSTS OF OPERATING SGHAD

The SGHAD Board has established budgets over the past four fiscal year as follows:

FY 19/20	$269,826
FY 20/21	$266,646
FY 21/22	$337,646
FY 22/23	$339,566

(SOF No. 18; Exs. 27-30.) In the past two years, those budgets have included a line item for litigation of this arbitration proceeding.[5] (SOF No. 18.) Accordingly, the *operational* budgets have been in the $260,000 - $270,000 range. But the operational budgets are woefully insufficient in that they have not included any allowances for significant deferred maintenance and repair items, monitoring/maintenance of horizontal drains, monitoring/maintenance of inclinometers, maintenance of well discharge pipes, or for emergency services; they were only intended to reflect the costs of essential services. (See Declaration of Uri Eliahu ("Eliahu Decl."), filed herewith, ¶¶ 5, 7.)

Wells have a lifespan of 30-50 years. (Eliahu Decl., ¶ 6.) Most of the SGHAD wells were constructed in the early-to-mid 90s, placing them near their end-of-life. (*Ibid*.) It costs at least $80,000 to replace a well. (*Ibi*d.) There are indications of degradation of the well casings and widespread silt deposition in the wells. (*Ibid*.) Emergencies and sudden problems can arise as well. Recently, a dewatering well that is critical to the stability of the Santiago landslide was impacted with tens of feet of silt, such that the pump could not be removed for servicing. Last year, a water discharge pipe became blocked causing water seepage and damage to one of the streets within SGHAD. While the City partially cleared the blockage at its expense, it originally demanded that SGHAD repair it (there was a dispute over responsibility). ENGEO estimated that the repairs would cost at least $75,000. (*Ibid*.)

A sounder budget for SGHAD – one that accounts for well replacement, repairs, and

[5] Prior budgets included legal expenses as well. (See Ex. 27, SGHAD 000652; Ex. 28, SGHAD 000666.) The amount allocated for litigation versus other legal expenses is not set forth in the FY 21/22 and FY 22/23 budgets.

emergencies – is the one that ENGEO recommended in connection with SGHAD's 2022 proposed assessment[6]: $466,900. (Eliahu Decl., ¶ 7.) This figure is approximately $190,00 greater than SGHAD's operational budgets in recent years. This is because the assessment budget included expenses that had not been previously budgeted, but are necessary to ensuring that the Dewatering Facilities operate properly and effectively into the future, such as:

- Annualized well replacement costs ($80,437)
- Monitoring well and piezometer replacement (annualized) ($16,200)
- Maintenance of connector pipes to public storm drains ($25,000)
- Annualized horizontal drain replacement ($13,895)
- Annualized inclinometer and pedestal replacement ($12,255)
- Miscellaneous and Contingency (i.e. for cost overruns and scope changes related to the budgeted items) ($42,317)

(*Ibid*.)

As of January 1, 2023, SGHAD had $381,210.06 in cash and cash alternatives on hand. (SOF No. 19.) SGHAD has not generated any revenue or income over the past five years other than interest earned from cash on deposit at its financial institution. (SOF No. 20.) Thus, under the best scenario SGHAD will be unable to operate the Dewatering Facilities in the next 18 months. Under the worst-case scenario (well failures, discharge blockages, equipment malfunctions, cost overruns, etc.), that day could come much sooner.

E. THE 2019 ASSESSMENT

Under the GHAD statute, a GHAD has only two funding options: it can pass an assessment or issue a bond. (Public Resources Code § 26650 [authorizing assessments]; § 26587 [authorizing use of Improvement Bond Act of 1915].) However, SGHAD has no practical ability to issue bonds without a source of repayment. (SOF No. 29.) In other words, a bond requires an assessment to service the debt.

Assessments are difficult to pass. Proposition 218, passed by voters in 1996 (adding articles XIII C and D to the California Constitution), is one of a series of voter initiative restricting the

[6] This proposed assessment is discussed, *infra*, at paragraph G of the Facts section.

ability of state and local governments to impose taxes, fees, and assessments. (See generally *Hill RHF Housing Partners, L.P. v. City of Los Angeles* (2021) 12 Cal.5th 458, 473; see also *ibid*. [describing section 4 of article XIII D's substantive and procedural restrictions on assessments].) The stated purpose of Proposition 218 is to *limit* the methods by which local governments exact revenues from taxpayers without their consent. (See *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838.)

Section 4 of article XIII D (hereafter "section 4") requires that the amount of the assessment be proportionate to the special benefit derived by each identified parcel and shall be determined in relationship to the entirety of the costs of the public improvement or the maintenance and operation expenses of a public improvement. (§ 4, subd. (a).) A detailed engineer's report must be prepared by a registered professional engineer supporting the assessment. (§ 4, subd. (b).) The local agency must mail to the owners of the properties to be assessed, a notice of the proposed assessment and a ballot to vote for or against the assessment. (§ 4, subds. (c) and (d).) A public hearing is conducted at least 45 days thereafter at which ballots are tabulated. (§ 4, subd. (e).) Ballots are weighted based on the proposed assessment amounts. (*Ibid*.) The local agency cannot impose the assessment if the weighted ballots against the assessment exceed the weighted ballots in favor. (*Ibid*.; see also SOF No. 24.)

In 2019, the SGHAD sought to pass a special assessment in the amount of $923 per residential unit. (SOF No. 21; Ex. 20 [SGHAD Resolution 19/03], ¶ 8; see also Exs. 21, 22, and 23 [Exhibits A [Engineer's Report], B [Notice], and C [Ballot] to Resolution 19/03 respectively].) There are approximately 303 assessor parcels of land within SGHAD's boundaries. (SOF No. 24.) Property owners voted against the proposed 2019 assessment by a margin of 136 to 41. (SOF No. 25; see also Ex. 26 [March 28, 2019 minutes], SGHAD 000291.)

F. THE 2022 ASSESSMENT

SGHAD sought to initiate this arbitration in May 2021. After the City refused to arbitrate the dispute, SGHAD filed a petition to compel arbitration in Orange County Superior Court, which the Court granted on September 2, 2021. Following the initiation of this matter before JAMS, the City indicated to SGHAD (through their respective attorneys) that SGHAD should make an attempt to

pass another assessment before this arbitration was adjudicated. SGHAD was not optimistic that property owners would in fact approve an assessment. But in light of the dire financial situation, it believed that it was worth a shot. Moreover, SGHAD sought to dispense with the City's potential defense in this arbitration that it had not exhausted all potential options to fund the Dewatering Facilities. In order to give SGHAD time to attempt to pass an assessment, the parties requested four continuances of this arbitration, which the Arbitrator granted.

SGHAD held **four**[7] public meetings regarding the potential assessment and to allow property owners to weigh in on drafts of the Engineer's Report (prepared by ENGEO): on June 23, 2022, July 14, 2022, August 4, 2022, and September 8, 2022. (See Ex. 32 [June 23, 2022 Agenda], Items 7c and d; Ex. 44 [June 23, 2022 Minutes], SGHAD 005155-005118; Ex. 33 [Powerpoint presentation for June 23, 2022 Board Meeting]; Ex. 35 [July 14, 2022 Agenda Package], Items 6A and B and SGHAD 004256-004274 [Powerpoint presentation]; Ex. 45 [July 14, 2022 Minutes], SGHAD 005123-005127; Ex. 36 [August 4, 2022 Agenda], Items 6A, B and C and SGHAD004492-004510 [Powerpoint presentation]; Ex. 46 [August 4, 2022 Minutes], SGHAD 005129-005134; Ex. 38 [September 8, 2022 Agenda], Items 6A, B, C, and D; Ex. 37 [September 8, 2022 Staff Report re: approval of Draft G of Engineer's Report]; Ex. 47 [September 8, 2022 Minutes], SGHAD 005138-005141.)

Beyond board members, representatives from ENGEO, the City's Public Works Director Rudy Emami, and the City's counsel, approximately 46 persons attended the June 23, 2022 meeting (Ex. 44, SGHAD 005114); 105 persons attended the July 14, 2022 meeting (Ex. 45, SGHAD 005121); 49 persons attended the August 4, 2022 meeting (Ex. 46, SGHAD 005129); and 48 persons attended the September 8, 2022 meeting (Ex. 47, SGHAD 5138). ENGEO gave Powerpoint presentations describing its draft Engineer's Reports. (See, e.g., Ex. 33.) The minutes of each meeting reflect active and robust community engagement. (Exs. 44-47.) At the June 23, 2022 meeting, Mr. Emami commented that 50 people attending was a "good response." (Ex. 44, SGHAD 005118.) At the September 8, 2022 meeting, Emami stated that the Board had made good

[7] The GHAD statute requires that the board of directors adopt a resolution of its intention [Public Resources Code § 26651] but this only requires a single board meeting.

efforts to address the issues and it was fairly well understood that no one would be happy with any amount of assessment and that no one would completely agree on this matter. (Ex. 47, SGHAD 005140.) Various drafts of the Engineer's Report were provided to Emami. (SOF No. 26.)

On September 8, 2022, the SGHAD Board passed Resolution 2022/06 which adopted "Draft G" of the Engineer's Report, ordered the GHAD Manager (ENGEO) to mail notice and ballots to property owners, and set a public hearing for November 3, 2022. (Ex. 41.) The proposed assessment was based on a budget of $466,900. (Ex. 50, SGHAD 005187.) The Engineer's Report recited a finding in City Council Resolution 99R-50:

> *The GHAD boundaries are larger than the Santiago landslide. The Plan of Control identifies potential geologic hazards for areas outlying the Santiago landslide other than those defined as exist for the Santiago landslide. Inclusion of the outlying properties in the GHAD is beneficial to those properties in that residents may have concerns regarding geologic hazards due to the proximity to the Santiago landslide, and the GHAD provides a mechanism to address and mitigate such future geologic hazards.*

(*Id*. at SGHAD 005170; Ex. 11, § 5.) The Engineer's Report identified the special benefits conferred by SGHAD and applied formulas for determining relative special benefits conferred on 303 separate residential parcels (plus City streets) depending on a number of different factors, such as whether the property was within, in close proximation, or outside the landslide, and the lot and home sizes. (Ex. 50, SGHAD 005170-005174.) Applying these factors and utilizing the $466,900 budget, ENGEO calculated annual assessment amounts ranging from $567.46 to $3,606.63 per parcel. (*Id*. at SGHAD 005179-005185.) The Engineer's Report determined that City facilities (streets, sidewalks, and public utility conveyance systems) within the SGHAD boundaries also stood to specially benefit from SGHAD's operations. (*Id*. at SGHAD 005171.) It assigned an annual assessment to City streets totalling $59,558.14. (*Id*. at SGHAD 005180.) It determined that SGHAD's operations conferred no general benefits (i.e., benefits to the public at large). (*Id*. at SGHAD 005170.) The Engineer's Report complied with Proposition 218's requirements: it was prepared by a registered professional engineer (Uri Eliahu), identified the special benefits

conferred on each parcel, and assessed each parcel based its relative share of SGHAD's annual costs. (See § 4, subds. (a) and (b).)

Mr. Emami raised concerns about assessing *City streets*. (SOF No. 26.) But the City never lodged any written objections to the formulas used to allocate assessments as between *the residential parcels*. And the SGHAD minutes do not reflect that Mr. Emami criticized these formulas during his public comments either. The City expressed its apparent dissatisfaction with the proposed assessment against City streets by not voting for or against the assessment. (SOF No. 27.) Its ballots represented approximately 12.7% of the potential weighted vote ($59,558.14 / $466,900).

At the November 3, 2022 public hearing, assessment ballots were tabulated. (Ex. 49, SGHAD 005149.) The assessment failed miserably. Property owners voted against the assessment by a margin of 149 to 38. (SOF No. 28.) The weighted vote total (based on the proposed assessment amount against the property) was 90.78% to 9.22%. (*Ibid*.; see also Ex. 49, SGHAD 005149.)

Proposing a special assessment against 303 properties is time-consuming and expensive. The entire process consumed more than six months of SGHAD time. ENGEO prepared seven drafts of the Engineer's Report (not to mention internal iterations) based on board member and public feedback and comments (i.e., "Draft G" was finally approved by the Board.) ENGEO billed SGHAD $88,178.41 in connection with the proposed assessment and for conducting the mail-in ballot election. (SOF No. 23.) SGHAD's initial pessimism about the prospects for a successful assessment was warranted; property owners in the SGHAD will not approve an assessment. Securing an assessment in the face of Proposition 218's constitutional demands is always difficult. In this particular case, where significant system costs must be allocated amongst a relatively small number of properties, it is not possible. SGHAD has no means to solve to this urgent problem.

ARGUMENT

As set forth above, there can be no reasonable dispute that SGHAD has no means of funding the operation of the Dewatering Facilities after the balance of its funds are depleted. There are two questions for the Arbitrator to decide:

1. Does the Agreement require, in the first instance, that SGHAD operate, maintain, and repair Dewatering Facilities as set forth in paragraph 6(a) upon the depletion of its funds?
2. If the answer to question one is in the affirmative, is SGHAD nevertheless excused from performing this contractual duty under the doctrines of impossibility, impracticability, and/or frustration of purpose upon the depletion of its funds?

The answer to question 1 is "no" and the answer to question 2 is "yes." SGHAD addresses each in turn below.

A. THE AGREEMENT EMBODIES AN IMPLIED CONDITION THAT SGHAD SECURE ASSESSMENT FUNDING

The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the "mutual intention" of the parties. (*Waller v. Truck Ins. Exch., Inc*. (1995) 11 Cal. 4th 1, 18, as modified on denial of reh'g (Oct. 26, 1995), quotation marks and citation omitted.) "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation..." (*Id*. citing Civ. Code § 1636, additional citation omitted.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id*. citing § 1639.) And the contractual language must be interpreted as a whole with various individual provisions interpreted together so as to give effect to all, if reasonably possible or practicable. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc*. (1998) 68 Cal.App.4th 445, 472.)

What was the mutual intent with respect to paragraph 6(a) here? The City will contend that it bargained for SGHAD to operate the Dewatering Facilities in perpetuity. In fairness to the City, there is no explicit temporal or other limitation on SGHAD's paragraph 6(a) obligations. Read in isolation, the City might make a good point. But that provision must be reconciled with another provision, the overall nature and purpose of the Agreement, SGHAD's limited statutory powers, and Proposition 218's restrictions. Paragraph 4 of the Agreement required the City to fund SGHAD a single time with a fixed amount: $3.5 million. As discussed above, the idea of forming a GHAD had sprung from the 1996 E&S Report. (SOF No. 4; Ex. 1, p. 68.) The E&S Report warned

that Dewatering Facilities would need to be operated "indefinitely." (SOF No. 5; Ex. 1, p. 68.) SGHAD can only generate revenue by assessing property owners. So it begs the question: what caused the City to believe that SGHAD could fulfill its paragraph 6(a) obligations after it depleted the $3.5 million? The only explanation is that the City believed and understood that SGHAD could only perform if it successfully secured an assessment in the future. Indeed, the E&S Report recommended "[t]he implementation of a Geological Hazard Abatement District (GHAD) [as] **a means of raising the necessary funds** for maintaining, monitoring, and managing the dewatering system for the benefit of all properties threated by renewed landslide movement." (SOF No. 4; Ex. 1, p. 68, emphasis added.) This term was implied in the Agreement.

A contractual term may be implied when (1) the implication arises from the language used or is indispensable to effectuate the intention of the parties; (2) it appears from the language that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) is justifiable on the grounds of legal necessity; and (4) when it can be rightfully assumed that it would have been made if attention had been called to it. (*Kessler v. General Cable Corp*. (1979) 92 Cal.App.3d 531, 541.) But a term cannot be implied when the subject is completely covered by the contract. (*Ibid*.) Furthermore, "[w]here from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing, condition or state of things, to which it relates, the subsequent perishing of the person or thing, or cessation of existence of the condition, will excuse the performance, a condition to such effect being implied, in spite of the fact that the promise may been unqualified." (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1343 (*Habitat Trust*) citing *Johnson v. Atkins* (1942) 53 Cal.App.2d 430, 434, internal quotations omitted.)

The parties did not affirmatively state in the Agreement that SGHAD would need to secure an assessment before it could perform its paragraph 6(a) obligations. There was no need. Passing an assessment was the sole activity that would allow SGHAD to perform the dewatering activities upon depletion of the $3.5 million and obvious to both sides. Indeed, the City was plainly aware that funds might be depleted in the future as reflected in language in the Delmonico Settlement executed a few months earlier:

*Nothing in this Agreement creates an obligation for the City to operate the Dewatering System **after the GHAD Distribution is depleted**, nor does anything in this Agreement eliminate any such obligation to the extent that such an obligation might exist independent of this Agreement.*

(Ex. 4, ¶ I.E, emphasis added.)

Implying this condition is a legal and practical necessity because SGHAD's funding options are limited by statute. There is no reason why the parties would have refused to include this obvious condition in the Agreement had attention been given to it – it merely reflects the reality of SGHAD's statutory powers and Proposition 218's restrictions. And the Agreement does not impose a contrary term. Thus, the Arbitrator can fairly imply this condition in the Agreement.

Accordingly, GHAD respectfully requests that the Arbitrator enter a declaratory judgment that states that SGHAD's contractual duties under paragraph 6(a) are subject to an implied term that the SGHAD have access to assessment funding.

B. SGHAD'S PERFORMANCE IS EXCUSED

If the Arbitrator does not agree with SGHAD that the Agreement includes an implied term as set forth above, SGHAD is nevertheless excused from performing under paragraph 6(a) upon the depletion of SGHAD's remaining funds under the doctrines of impossibility / impracticability and frustration of purpose.

1. Impossibility / Impracticability

The law never requires impossibilities. (Civ. Code § 3531.) Similarly, a party's performance is excused where the operation of law prevents or delays performance. (Civ. Code § 1511(a).) "The controlling principles as to legal impossibility excusing performance have been long recognized in this state..." (*City of Vernon v. City of Los Angeles* (1955) 45 Cal.2d 710, 719 (*Vernon*).) "A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at any excessive and unreasonable cost." (*Id.* at p. 720, quotation marks and citation omitted; see also *Kennedy v. Reece* (1964) 225 Cal.App.2nd 717, 724 [meaning of impossibility has been enlarged to include impracticability]; *Autry v. Republic Productions* (1947) 30 Cal.2d 148, 149 (*Autry*) [holding impossibility is not only strict

impossibility, but also impracticability due to extreme and unreasonable difficulty, expense, injury, or loss involved]; *Superior Court of Alameda v. County of Alameda* (2021) 65 Cal.App.5th 838, 856 (*Alameda*) [impracticability does not require literal impossibility].)

SGHAD has identified three cases in which a public entity has sought to excuse duties (contractual or statutory) based on a lack of funding.

In *Alameda*, the County of Alameda and its Sheriff (hereafter together as "Sheriff") entered into a memorandum of understanding ("MOU") with the Alameda County Superior Court to provide court security services. (*Alameda, supra*, 65 Cal.App.5th at p. 842.) The Sheriff argued that the MOU allowed it to reduce staffing levels after the expiration of the MOU if state funding was insufficient. (*Ibid*.) The court of appeal disagreed with the Sheriff's interpretation. (*Ibid.)* But the court recognized that the Sheriff might have a viable impossibility defense citing the Sheriff's declaration that the costs of personnel had outstripped state funding. (*Id*. at p. 856; see also *ibid*. [affirming that impracticability applies when performance requires excessive and unreasonable expense].) It remanded the matter for further proceedings. (*Id*. at p. 857.) In other words, the court of appeal acknowledged that a lack of third-party funding can serve as a basis to invoke the doctrine of impossibility. SGHAD's predicament is much more dire in that funding here is not "insufficient"; it will be non-existent. (As a reminder, SGHAD requests to be excused from performance *upon the depletion of funds*, not any sooner.)

In *Sutro Heights Land Co. v. Merced Irrigation Dist*. (1931) 211 Cal. 670 (*Sutr*o), the California Supreme Court reviewed a landowner's claim seeking to compel a public entity (irrigation district) to perform its statutory duty to drain his land. (*Id*. at p. 673.) The Supreme Court explained that if the irrigation district were compelled to drain one parcel, then the balance of the landowners would likewise be entitled to the same relief. (*Id*. at p. 703.) It held:

> We do not believe that, under this state of facts, it was ever intended by those responsible for the enactment of the Drainage Act of 1907 that an irrigation district, situated as is the defendant in this action, should be compelled to work its own destruction by undertaking to provide drainage facilities for the district, the expense of which is beyond its financial ability to meet or pay for. In fact, before a writ of

> mandate will issue to compel a public corporation or agency to perform an act involving the expenditure of money, it must affirmatively appear that there are funds available for that purpose.

(*Ibid*.)

Board of Supervisors of Butte County v. McMahon (1990) 219 Cal.App.3d 286 (*McMahon*) considered *Sutro* in connection with the doctrine of impossibility.[8] There, Butte County challenged a state mandate compelling it to fund certain programs. It claimed that inadequate revenues made it impossible to pay for both the state-mandated programs and local programs. (*Id*. at p. 300.) The court of appeal recognized the possible application of the impossibility doctrine [*id*. at pp. 299-301] but ultimately rejected it, distinguishing *Sutro*. It explained that *Sutro* "noted that each case depends on the facts of that particular case." (*Id*. at p. 302, internal quotation marks omitted.) It cited that fact that Butte County's complaint was about funding both state *and* local programs (i.e., having to choose between them) and in the event there was a need to prioritize, state programs prevailed. (*Id.* at pp. 300-301.) It found compelling the fact that the evidence actually revealed that there was no "literal impossibility" because "revenue projections do not show that the Court will *ever* be unable to make the AFDC payments at the heart of the dispute." (*Id*. at p. 300, italics in original; see also *id*. at p. 301 [testimony revealed at least a five-year runway before state program costs would halt local program].) And the court of appeal pointed out that "the record contains absolutely no evidence suggesting that the County has done anything to increase its own locally generated revenues." (*Id*. at p. 301.) Critical here, *McMahon* explained:

> While Proposition 13 severely limited the County's ability to raise new taxes, it did not eliminate that ability entirely. For example, California Constitution article XIII A, section 4, allows imposition of "special taxes" by a county upon a two thirds vote of the electorate. While we recognize that getting two thirds of the electorate to agree to a new tax may prove difficult, we cannot say that it is impossible **until it has been tried**.

[8] To be clear, at issue in *McMahon* was compliance with a statutory duty, not a contractual obligation. But the same principles apply. (See *id*. at p. 300 [describing doctrine].)

(*Ibid*., emphasis added.)

These cases teach that a public entity's financial inability to pay is a recognized basis on which the doctrine of impossibility may be invoked to excuse performance. As *Sutro* held, each case must be examined on its own facts. Here, none of the concerns raised in *McMahon* are present. SGHAD is not arguing that it cannot fund the Dewatering Facilities because it wishes to prioritize some other program. There is no evidence that SGHAD has a long runway during which its financial condition may improve. And most important, SGHAD has made *two* attempts to generate income via the sole statutory mechanism available to it; unlike Butte County **it has tried**. By operation of law, it is unable to perform. (See Civ. Code § 1151(1).) The facts here are stark. SGHAD cannot avoid the inevitable. It has less options that the irrigation district in *Sutro* in that it does not even have any control over "its own destruction." (*Sutro*, at p. 703.) When funds are depleted, it will already be, for all intents and purpose, destroyed.

SGHAD respectfully requests that the Arbitrator, upon the depletion of its funds, excuse SGHAD's performance under the doctrine of impossibility / impracticability and Civil Code sections 3531 and 1151(1).

2. Frustration of Purpose

Alternatively, SGHAD's performance is excused under the doctrine of frustration of purpose. Frustration of purpose arises when performance remains possible but is excused because a fortuitous event supervenes to cause a failure of consideration or a practically total destruction of the expected value of performance. (*Autry*, *supra*, 30 Cal.2d at p. 148.). "The question in cases involving frustration is whether the equities of the case, considered in light of sound public policy, require placing the risk of a disruption or complete destruction of the contract equilibrium on defendant or plaintiff under the circumstances of a given case [citations] and the answer depends on whether an unanticipated circumstance, the risk of which should not be fairly thrown on the promisor, has made performance vitally different from what was reasonably to be expected [citations]." (*Lloyd v. Murphy* (1944) 25 Cal.2d 48, 53-54.)

The supervening event here is SGHAD's inability to pass an assessment. Under the Agreement, the City transferred Dewatering Facilities and $3.5 million to SGHAD, but that

consideration will no longer have any value to SGHAD. To the extent the City contends that it was not foreseeable that SGHAD would be unsuccessful in passing an assessment before funds were exhausted, the Arbitration should apply this doctrine in favor of SGHAD because the equities favor it. The City formed SGHAD as a way to unload responsibility for the Dewatering Facilities. This concept was introduced to the City years before SGHAD even existed. It is unjust to blame SGHAD for the statutory and constitutional restrictions that will prevent the Agreement from being performed.

SGHAD respectfully requests that the Arbitrator, upon the depletion of its funds, excuse SGHAD's performance under the doctrine of frustration of purpose.

C. THE ARBITRATOR IS AUTHORIZED TO AND SHOULD PROVIDE DECLARATORY RELIEF

SGHAD seeks a declaratory judgment pursuant to Code of Civil Procedure section 1060. (See Demand for Arbitration, ¶¶ 38-43, Prayer for Relief.) A complaint for declaratory relief must demonstrate: (1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party. (*City of Tiburon v. Northwestern Pac. R.R. Co*. (1970) 4 Cal.App.3d 160, 170.) A contract is the proper subject of declaratory relief. (See Code Civ. Proc. § 1060, ["Any person interested ... under a contract ... may, in cases of actual controversy ... bring an original action or cross-complaint in the superior court for a declaration or his or her rights and duties in the premises..."].) Code of Civil Procedure section 1060 does not require a breach of a contract in order to obtain declaratory relief, only an "actual controversy." (*Meyer v. Sprint Spectrum LP* (2009) 45 Cal.4th 634, 647.) "The purpose of a declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation." (*Id*., citation omitted.) Another purpose is to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation. (*Ibid.,* quotation and citation omitted.). A declaration may be issued before there has been any breach of the obligation in respect to which said declaration is sought. (Code Civ. Proc. § 1060.)

There is an actual controversy over the Agreement. The City has affirmatively asserted that

SGHAD is not excused from performance under the doctrines of impossibility, impracticability and/or frustration of purpose. (SOF No. 31.) Moreover, the City has never indicated that it agrees with SGHAD's interpretation that paragraph 6(a) does not, in the first instance, obligate SGHAD to operate, maintain, and repair the Dewatering Facilities upon a depletion of funds. If it agrees with SGHAD's interpretation, then it should formally stipulate to such and put an end to this litigation.

The City may attempt to argue that this controversy is not ripe because SGHAD has not yet exhausted its funds and there is still a possibility (however remote) that assessment funding will appear. The Arbitrator should reject any such argument. "The ripeness requirement ... prevents courts from issuing purely advisory opinions. [Citation.] It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion." (*Stonehouse Homes LLC v. City of Sierra Madre*) (2008) 167 Cal. App. 4th 531, 540.) "A controversy is ripe when it has reached but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." (*Ibid*, quotation marks and citation omitted].) To determine if a controversy is ripe, a two-pronged test is employed: (1) is the dispute sufficiently concrete that declaratory relief is appropriate and (2) will withholding judicial consideration result in the parties suffering hardship. (*Ibid*.) There is no reasonable possibility that any future development will save SGHAD from the inevitable. Members of the public (and the City) count on SGHAD to prevent a reactivation of the landslide. They should be advised in a binding legal decision that SGHAD has no legal obligation to operate the Dewatering Facilities when the approximately $380k on hand is expended and that such a day is on the horizon. Indeed, "[i]f the issue of justiciability is in doubt, it should be resolved in favor of justiciability in cases of great public interest." (*Nat'l Audubon Soc'y v. Superior Ct.* (1983) 33 Cal. 3d 419, 433, fn. 14.)

SGHAD is entitled to a declaratory judgment stating that (1) the Agreement does not require, in the first instance, that SGHAD operate, maintain, and repair the Dewatering Facilities as set forth in paragraph 6(a) upon the depletion of its funds because the Agreement embodies an implied term that such performance is conditioned on assessment funding, or in

the alternative (2) SGHAD is excused from performing its contractual duties under paragraph 6(a) under the doctrines of impossibility, impracticability, and/or frustration of purpose upon the depletion of its funds.

D. PRE-DELOMINCO SETTLEMENT DISCUSSIONS ARE IRRELEVANT AND INADMISSIBLE

The City will submit the Declaration of Michael Rubin with its opening arbitration brief. The purpose of this testimony is to support an argument that plaintiffs in the *Delmonico* action had an opportunity to secure more money for the SGHAD, but declined to do so. The Arbitrator should disregard this testimony as irrelevant and inadmissible. First, it can be reasonably assumed that the parties engaged in *extensive* settlement negotiations in an effort to globally resolve the six-year litigation; presumably the parties discussed many scenarios under which the sprawling litigation might be resolved. But ultimately, both sides agreed to settle on terms they thought were in their best interests and memorialized them in a written agreement. Cherry-picking one discussion point is not enlightening. And in the Delmonico Settlement, the parties agreed that "[a]ll prior and contemporaneous discussions and negotiations with respect to the subject matter of this Agreement have been and are merged and integrated into, and are superseded by, this Agreement." (See Ex. 4, ANA000432.)

More important, settlement terms offered, accepted, or rejected as between *property owners* and the City leading to the Delmonico Agreement have no bearing on *SGHAD*'s obligations under the present Agreement – SGHAD did not even exist when the Delmonico Agreement was executed. Indeed, individual property owners are distinct from SGHAD; the reasons they settled their claims against the City are immaterial. The only terms relevant to this arbitration are the ones memorialized in the Agreement which was executed months later. On this point, SGHAD asks that the Court be cognizant of the City's attempts in this arbitration to impute to SGHAD, the actions, goals, and motivations of property owners back in 1999. While property owners were constituents of the City and later, SGHAD, they speak for neither.

CONCLUSION

In the wake of the devasting landslide in Anaheim Hills in 1993, the City constructed and began operating Dewatering Facilities to fend off a reactivation. It became embroiled in extensive and presumably costly litigation over the next six years. Property owners blamed the City for the disaster (and the City blamed some of them) and ultimately the City settled. As part of the settlement, the City understandably sought to unload responsibility for the Dewatering Facilities. It formed a brand-new government entity, SGHAD, transferred the Dewatering Facilities to it, and funded it with $3.5 million.

No doubt it was a relief to the City to put the litigation behind it. Unfortunately, the settlement included a ticking time bomb that a future generation of property owners, attorneys, council members, and SGHAD board members would have to contend with: what happens to the Dewatering Facilities upon the inevitable depletion of the $3.5 million if SGHAD is unable to pass an assessment? The parties declined to directly confront this question in 1999 apparently content to kick the can down the road (with the hope that an assessment would pass someday). But the question lingered and grew in importance each year as SGHAD's funds dwindled. Nearly twenty-four years later, the parties are now forced to grapple with this urgent matter.

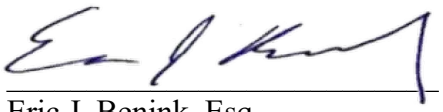
Paragraph 6(a) of the Agreement purportedly requires SGHAD to operate, maintain, and repair the Dewatering Facilities. But soon, it will have no more funds to perform these functions. SGHAD attempted to pass two assessments in the past three years and failed miserably both times. Another attempt is futile and will only accelerate the depletion of SGHAD's meager funds on hand.

SGHAD respectfully requests that the Arbitrator enter an award that declares that (1) the Agreement does not require, in the first instance, that SGHAD operate, maintain, and repair the Dewatering Facilities as set forth in paragraph 6(a) upon the depletion of its funds because the Agreement embodies an implied term that such performance is conditioned on assessment funding or in the alternative, (2) SGHAD is excused from performing its contractual duties under paragraph 6(a) under the doctrines of impossibility, impracticability, and/or frustration of purpose upon the depletion of its funds.

The requested arbitration award is not a magic bullet and will not save the Dewatering Facilities or prevent a future landslide. But it will put all interested parties on notice that SGHAD has been formally relieved of its contractual duties, preclude the City from suing SGHAD for breach of contract, and put to rest the uncertainties arising from the faulty Agreement.

DATED: January 23, 2023

BENINK & SLAVENS, LLP



Eric J. Benink, Esq.
Attorneys for Claimant
Santiago Geologic Hazard
Abatement District