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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

Judge: Hon. Nancy Wieben Stock (Ret.)

CLAIMANT SANTIAGO GEOLOGIC HAZARD ABATEMENT DISTRICT'S RESPONSE TO CITY OF ANAHEIM'S OPENING ARBITRATION BRIEF

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

RESPONSE

A. THERE IS NO LACK OF FORESEEABILITY REQUIREMENT UNDER THE DOCTRINE OF IMPOSSIBILITY

The City argues that "[f]oreseeability[1] is similarly a requirement of the defense of impossibility (and its derivative impracticability)." (City's Opening Brief ("City OB") at 14:27-24.) It is mistaken. As an initial matter, neither Civil Code sections 3531[2] nor 1511(1) reference "a lack of foreseeability" as a condition of the doctrine. Section 1511(1) excuses performance when operation of law prevents performance. Period. Here, the GHAD statute and Proposition 218 will prevent SGHAD from performing its paragraph 6(a) obligations. The arbitrator should apply section 1511(1)'s plain terms and not read into it a lack of foreseeability requirement. (See *General Development Co., L.P. v. City of Santa Maria* (2012) 202 Cal.App.4th 1391, 1395 [courts are loathe to construe a statute by adding language].)

The parties cited six cases analyzing the doctrine of impossibility: *City of Vernon v. City of Los Angeles* (1955) 45 Cal.2d 710, 719 (*Vernon*); *Kennedy v. Reece* (1964) 225 Cal.App.2nd 717, 724; *Autry v. Republic Productions* (1947) 30 Cal.2d 144, 149 (*Autry*); *Superior Court of Alameda v. County of Alameda* (2021) 65 Cal.App.5th 838, 856 (*Alameda*); *Board of Supervisors of Butte County v. McMahon* (1990) 219 Cal.App.3d 286 (*McMahon*); and *Glendale Fed. Sa. & Loan Ass'n v. Marina View Heights Dev. Co*. (1977) 66 Cal.App.3d 101, 154 (*Glendale*). (See SGHAD's Opening Brief ('SGHAD OB") at 20:22-23; City OB at 14:27-15:3.) None affirmatively state that lack of foreseeability is a condition of the doctrine of impossibility. (See also *Mineral Park Land Co. v. Howard* (1916) 172 Cal. 289, 291-292 [describing doctrine without reference to foreseeability].) In cases involving *impracticability*, a court might review whether facts caused the performance to be more "difficult or expensive *than the parties anticipated*." (See, e.g., *Kennedy*, *supra*, at p. 724, italics added [holding the inquiry depends on the "degree"].) In the context of private parties who actually have the ability to pay more, but contend that it is inequitable to do so, it makes sense to deny relief when the

[1] It presumably means "lack of foreseeability."

[2] In fairness, this code section does not offer much guidance one way or the other.

party reasonably anticipated said potential extra costs. (See *Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 445 ["One who seeks equity must do equity" is a fundamental maxim of equity jurisprudence.].)

The present case is decidedly different and unique in that it is not about the *degree* of the *additional* costs which arises in *impracticability* settings. Here it will be *literally impossible* for SGHAD to perform upon depletion of its funds; not just merely more expensive to perform. (See *McMahon*, at p. 300 [describing "encyclopedia passage" that "it is very generally held that a public body will not be required to do an act when it is impossible through a want of funds and inability to raise them..."]; 55 C.J.S, Mandamus § 14, p. 39.) This is an equitable proceeding. (See *Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 695-696 [actions in law usually seek monetary relief while equitable actions seek some form of specific relief]; *In re Claudia E.* (2008) 163 Cal.App.4th 627, 633 [declaratory relief is an equitable remedy].) The powers of a court in granting declaratory relief are as broad and extensive as those exercised in any ordinary suit in equity. (*Lachman Bros. v. Muenzer* (1956) 143 Cal.App.2d 52, 524.) To the extent that it was foreseeable that SGHAD would be unable to secure an assessment (and that this is meaningful in the context of the doctrine of impossibility), the City was equally aware of and assumed that risk. Indeed, at the time of formation, the newly constituted SGHAD had no unique insights or a body of expertise regarding future assessment prospects. (Cf. *Kennedy* at p. 723 [contractor that hit rock digging wells]; *Glendale Fed*. at p. 153 [land developer who claimed it was uneconomical to install "offsites improvements" without assumed freeway access].) The Arbitrator can apply the doctrine in light of the unique circumstances of this case.

B. THE EQUITIES FAVOR APPLYING DOCTRINE OF FRUSTRATION OF PURPOSE

The City is correct that cases analyzing the doctrine of frustration of purpose hold that the risk of the frustrating event cannot be reasonably foreseeable. (See, e.g., *Lloyd v. Murphy* (1994) 25 Cal.2d 48, 54; *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1336 [citing *Lloyd*].) But foreseeability is part of weighing the equities of the case. As the California Supreme Court held:

> 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 risk of not securing assessment funding should not be thrown on SGHAD for four reasons: (1) it was *possible* to secure assessment funding; as a new-formed entity, SGHAD could not have appreciated at the time the Agreement was executed, just how difficult (or impossible) it might be; (2) the City received the benefit of SGHAD's successful operation of SGHAD's Dewatering Facilities for 24 years; (3) the City orchestrated and implemented the entire GHAD concept and understood at least as well as SGHAD that this lack-of-funding scenario might arise; and (4) SGHAD has undertaken significant efforts to head off this disaster. SGHAD is not attempting to shirk its contractual duties. In fact, the exhaustion of funds is effectively a death knell to this public entity. SGHAD would have preferred to continue in existence to provide these vital public services.

C. AN ACTUAL CONTROVERSY WORTHY OF ADJUDICATION EXISTS

The City claims that there is no actual controversy because there is "no allegation that the City has threatened to sue SGHAD if SGHAD fails to continue the operation of the Dewatering Facilities after SGHAD's funds run out." (City OB at 16:11-13; see also 11:15-16 [same].) It suspects that such a suit might be an "idle act." (*Id*. at 16:14-15.) But it admits that the decision to sue is for a future city council to make. (*Id*. at 11:17-18.) This is not reassuring. The City cannot have it both ways. Either the controversies here are consequential enough for the Arbitrator to decide on ***or*** there is no reason to be concerned because the City will, if fact, not sue. If it is the latter, then the City should have no objection to an award relieving SGHAD from any paragraph 6(a) contractual duties. Only a judicial declaration will legally foreclose a lawsuit; anything short of that leaves the decision in the hands of seven future city council members. For whatever reason, the City has been determined to fight this arbitration – first in Superior Court and now in this JAMS proceeding. SGHAD is rightfully concerned. And the City cites no authority that suit must be threatened before an actual controversy arises. This is because that is not the law. Declaratory relief may be issued before there is a breach (and thus, before any claim could possibly accrue.) (Code Civ. Proc. § 1060.)

The City also argues that SGHAD "conjectures" that property owners will not seek and approve

assessment at lower levels.[3] (City OB at 13:8-9.) It does not say how property owners could "seek" such without SGHAD support. What is plain is that SGHAD will not spend any more of its remaining funds on this futile endeavor. It is the City who is conjecturing here.

SHGAD's five-member volunteer board takes SGHAD's responsibilities seriously. Operating the facilities is a solemn undertaking with dire consequences if neglected. It is understandable that SGHAD's board members would seek, on behalf of SGHAD, assurances that SGHAD (and they) cannot be held liable for the destruction of property after the pumps cease operating due to a breach of the Agreement. This alone provides reason for the Arbitrator to provide relief. A declaration will also guide SGHAD in winding up its affairs. For example, without a declaration, it may feel compelled to reserve funds to defend a potential lawsuit (by the time the City sues, it may have no resources to fight back.) GHAD board members are elected to four-year terms. (See Public Resources Code § 26583.) This potential liability may discourage citizens from joining the board to help guide it through its final days. A declaration will lift the pall of uncertainty cast by this unsettled issue.

Perhaps the most compelling reason why the Arbitrator should award declaratory relief here is that this case "is of great public interest." (See *Natl Audubon Soc'y v. Superior Court* (1983) 33 Cal.3d 419, 433, fn. 14 [collecting cases]; see also *ibid*. [it is in the interest of the public that a determination be made "even if that determination be but one step in the process, it is a useful one"], citation omitted.) The public has an extraordinary interest in the operation of the Dewatering Facilities. City residents own private land and structures that will be placed in jeopardy in the near future. Taxpayers funded the public properties and structures (and Dewatering Facilities) within the SGHAD that are likewise at risk. The initial landslide in 1993 activated state and federal responses. (SOF No. 1.) It behooves SGHAD and the City to advise the public that SGHAD is not legally responsible for operating the Dewatering Facilities when funds are depleted. It also may force the *City* to step in to protect its own property and operate the Dewatering Facilities. The Delmonico Settlement left open this possibility. (See Ex. 4, ANA000421 ["Nothing in this Agreement creates an obligation for the City to operate the Dewatering System after the SGHAD 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.].) This potential responsibility (unresolved in the Delmonico litigation) may explain the City's staunch

[3] The 2019 assessment budget was $291,122. (Ex. 21, SGHAD 000055.)

resistance to this arbitration.

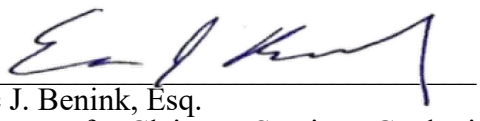
Finally, *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634 (*Meyers*) and *Lee v. Silverira* (2016) 6 Cal.App.5th 527 (*Lee*) are easily distinguished. (City OB at 10:14 - 11:13; 12:5-13:5.) *Meyers* involved Unfair Competition Law (UCL) claims and a claim for declaratory relief asserted by phone customers who alleged that Sprint's terms of service were illegal and unconstitutional. (*Id*. at pp. 638-639.) The terms related to how potential disputes were to be adjudicated, including, *inter alia*, waivers of a jury trial, class actions, and discovery; the cost of arbitration; and termination fees. (*Id*. at p. 639.) The glaring flaw with plaintiffs' claims was that they had never actually had a dispute with Sprint. (*Id*. at p. 639.) In other words, it was speculative whether plaintiffs would ever be subjected to any of the allegedly illegal provisions. With respect to the declaratory relief claims, the Supreme Court held that the trial court did not err by refusing to grant relief. It noted that Code of Civil Procedure section 1060 provides that a court "*may* make a binding declaration" and that the decision is discretionary. (*Id*. at p. 647, italics in original.) Under the particular facts of that case – where there were no pending disputes causing the remedial provisions to come into play – the trial court had not abused its discretion in denying relief. (*Id*. at p. 648.) Speculative phone charge disputes cannot be seriously equated with SGHAD's responsibility for the Dewatering Facilities.

In *Lee,* the court held that the plaintiffs had not made a showing of actual controversy over HOA board member disputes for numerous reasons. Some were based on lack of evidence. (*Lee*, *supra*, 6 Cal.App.5th at p. 548 ["verbatim notes" and "majority block" issues].) Others stemmed from the fact that the *current* HOA managerial contract was not in question, but plaintiffs had sought to compel board members action regarding *future* contracts. (*Id*. at pp. 548-549.) SGHAD seeks to resolve an Agreement in effect today.

The Arbitrator has "considerable discretion," as the City points out. (See City OB at 11:7 citing *Meyer*.) The Arbitrator should ask why should she *not* exercise her discretion in this unique case. If the City is unlikely to sue (as it claims), then it should have no objection to relieving SGHAD from its purported contractual duties under the Agreement.

Dated: January 27, 2023

BENINK & SLAVENS, LLP



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