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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CITY OF CLAREMONT, a general law city, Plaintiff, vs. GOLDEN STATE WATER COMPANY, a California corporation; DOES 1-1000; and ALL PERSONS UNKNOWN CLAIMING AN INTEREST IN THE PROPERTY, Defendants.	Case No. BC566125 Assigned to Judge Richard Fruin, Dept. 15 Trial Date: June 13, 2016 Time: 8:30 a.m. Dept: 15 Complaint Filed: December 9, 2014 Legal Issues Trial Date: June 13, 2016

GOLDEN STATE'S RESPONSIVE TRIAL BRIEF

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INTRODUCTION

Buzz words cannot justify the exercise of eminent domain. The City's Opening Trial Brief declares itself to be "a highly-educated, socially conscious community" focused on "environmental sustainability" and desirous of "local accountability," "transparency" and "coordinated and comprehensive municipal decision making." (City Opening Brief, at pp. 4:3, 4:7, 13:13-14.) It decries Golden State's status as the subsidiary of "a for profit corporation traded on the New York Stock Exchange." (City Opening Brief, at p. 4:12.)

This is the framework the City adopts to justify the taking of Golden State's private property. But eminent domain has been described as the sovereign's "most awesome grant of power." (*City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 419 [1985].) Much more than flowery prose and name-calling must exist before the City's effort here is allowed to proceed.

There will be plenty of days ahead to fight about the evidence that will be presented at trial. Rather than spending time and paper taking apart the City's factual assertions advanced in its Opening Brief, Golden State opts instead to focus on a few legal disagreements.

Actually, much of the law cited by the two parties is consistent. A few of the City's propositions, however, need to be corrected upfront.

NOT ALL PROPERTY IS CREATED EQUAL

A glaring omission in the City's Brief is any citation to Code Civ. Proc. §1235.193. The City tries to glide over the fact that Golden State's property is treated differently from all other property under the Eminent Domain Law.

Section 1235.193 sets forth a definition of "electric, gas, or water public utility property" thusly:

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"Electric, gas, or water public utility property" means property appropriated to a public use by a public utility, as defined in Section 218, 222, or 241 of the Public Utilities Code."

Golden State is a "water corporation" under Public Utilities Code §241. Its Claremont Water System is appropriated to public use by a public utility, so its property is "electric, gas, or water public utility property."

This status is extremely significant under the Eminent Domain Law, and distinguishes the City's effort to take Golden State's property from practically every other eminent domain case. As explained by Golden State in its Opening Brief:

- In all other eminent domain cases, a public entity's adoption of a resolution of necessity "conclusively establishes" the three statutory elements of necessity in Code Civ. Proc. §1240.030. (Code Civ. Proc. §1245.250(a).) **But not so in this case**. Because Golden State's property is "electric, gas, or water public utility property," the City's resolution creates only a rebuttable presumption affecting the burden of proof. (Code Civ. Proc. §1245.250(b).)

- In all other eminent domain cases, when a public entity tries to condemn private property appropriated to public use, it is conclusively presumed that the public entity's acquisition "for the same or any other public use" is considered "more necessary." (Code Civ. Proc. §1240.650(a).) **But not so in this case**. Because Golden State's property is "electric, gas, or water public utility property," the presumption is only a rebuttable presumption affecting the burden of proof. (Code Civ. Proc. §1240.650(c).)

Golden State reviewed the legislative history of SB 1757 in its Opening Brief, the 1992 statute which created special treatment in the Eminent Domain law for "electric, gas, or water public utility property" and set forth the more favorable burdens of proof applicable to cases involving such property. The Legislature, for reasons clearly explained in the history, created a unique right to challenge proposed condemnation of "electric, gas, or water public utility property."

The fact that Golden State's property is "electric, gas, or water public utility property" means this case is different from nearly every other eminent domain case.

THE REBUTTABLE PRESUMPTION IS NOT SUBJECT TO AN "ARBITRARY AND CAPRICIOUS" STANDARD

The City argues that the "rebuttable presumptions" established by Code Civ. Proc. §1245.250(b) and Code Civ. Proc. §1240.650(c) should be subject to the "arbitrary and capricious" standard of review for quasi-legislative acts. (City's Opening Brief, at p. 17:27-18:1.) But the City cites no authority for this proposition, and it flies in the face of the special treatment afforded to "electric, gas, or water public utility property."

A resolution of necessity *in every other eminent domain case* may be attacked for "gross abuse of discretion" under Code Civ. Proc. §1245.255(b). The challenge may be mounted as a writ petition under Code Civ. Proc. §1085 before the eminent domain case is filed, or as an objection to the right to take after the suit is filed. (Code Civ. Proc. §1245.255(a).) As the Court explained in *Anaheim Redevelopment Agency v. Dusek*, 193 Cal. App. 3d 249 (1987), the "gross abuse of discretion" standard applicable to a challenge to a resolution of necessity is evaluated under the writ of mandate standard:

> "The 1978 Legislative Committee Comment to section 1245.255 . . . states, 'Judicial review of the resolution of necessity by ordinary mandamus on the ground of abuse of discretion is limited to an examination of the proceedings to determine whether adoption of the resolution of the governing body of the public entity has been arbitrary, capricious, or entirely lacking in evidentiary support . . . .' (*Dusek*, 193 Cal. App. 3d at 257.)

But *Dusek* did not involve "electric, gas, or water public utility property." If the "gross abuse of discretion" standard applicable to every *other* resolution of necessity were to applied in an action involving "electric, gas, or water public utility property" — like this one — the Legislature's creation of that separate class of property would be rendered an illusion. Challenges to resolutions of necessity involving "electric, gas, or water public utility property" would be no different than challenges to resolutions of necessity in every other eminent domain case. The Legislature's adoption of SB 1757 would be negated, as nothing would have changed.

Of course, the statutes cannot be read in that manner. By making the otherwise conclusive presumptions only "presumptions affecting the burden of proof," the Legislature was saying that the rules applicable to challenges to resolutions of necessity in cases of "electric, gas, or water public utility property" are *not* the same as such challenges in all other eminent cases. Thus, challenges to resolutions of necessity in cases involving "electric, gas, or water public utility property" are not limited to ordinary mandamus or review of an administrative record. A full evidentiary trial is required.

By creating a special standard of review in cases involving "electric, gas, or water public utility property" challenges, the Legislature changed the "arbitrary and capricious" standard that applies in other eminent domain cases like *Dusek*. In its place, the "presumption affecting the burden of proof" standard applies, as

explained in Evid. Code §606. The Law Revision Commission Comments to Evid. Code §606 make clear that the "arbitrary and capricious standard" does not apply to such presumptions:

> "Section 606 describes the manner in which a presumption affecting the burden of proof operates. In the ordinary case, the party against whom it is invoked will have the burden of proving the nonexistence of the presumed fact ***by a preponderance of the evidence.*** Certain presumptions affecting the burden of proof may be overcome only by clear and convincing proof." (Emphasis added.)

The "presumptions affecting the burden of proof" created by Code Civ. Proc. §1245.250(b) and Code Civ. Proc. §1240.650(c) say nothing about "clear and convincing proof." Hence, Golden State must prove the nonexistence of the presumed facts ***by a preponderance of the evidence,*** not by the "arbitrary and capricious standard."

The presumptions thus operate like any other presumption affecting the burden of proof. The Court of Appeal in *In re Marriage of Cooper*, No. C073014, 2016 WL 3138012 (Cal. App. May 6, 2016), very recently explained how it works. In that case, the Court was dealing with the presumption applicable to property acquired during marriage:

> "[P]roperty acquired during marriage is subject to the rebuttable presumption that it is community property. This is a rebuttable presumption affecting the burden of proof; hence . . . *virtually any credible evidence may be used to overcome it*. . . . The party seeking to rebut the community property presumption must do so *by a preponderance of the evidence*." (2016 WL 3138012 * 5 [emphasis added].)

The same type of rebuttable presumption applies here, with the same requisites. While Golden State has the burden of proof, the presumption may be overcome by "virtually any credible evidence," and it need only be rebutted by a *preponderance* of the evidence.

The City's failure to recognize the special status afforded "electric, gas, or water public utility property" also distinguishes the case of *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60 (1982). The City cites the Supreme Court's musing

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in that case that if the City fathers of Oakland wanted to condemn the Raiders "are we to say to them nay?" (City Opening Brief, at p. 18:17-20.) But the *Raiders* case did not involve "electric, gas, or water public utility property." In cases like this one, courts must review all of the evidence and decide whether the presumptions affecting the burden of proof have been overcome by a preponderance of the evidence. The Legislature specifically empowered courts to "say to them nay" in cases involving "electric, gas, or water public utility property." That was the whole point of SB 1757. To pretend that such cases are to be treated like non-public utility cases would annul the statute.

"SEPARATION OF POWERS" DOES NOT RENDER THIS COURT POWERLESS

The City also tries to invoke the "separation of powers" doctrine to undercut this Court's role. (City's Opening Brief, at p. 18:1-6.) But the doctrine actually requires courts to pass muster on legislative acts like the City's resolutions of necessity here:

> "The separation of powers doctrine articulates a basic philosophy of our constitutional system of government; it establishes a system of checks and balances to protect any one branch against the overreaching of any other branch. Of such protections, probably the most fundamental lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority." (*Bixby v. Pierno*, 4 Cal. 3d 130, 141 [1971] [emphasis added, citations omitted].)

If the "separation of powers" doctrine could be invoked to prevent the Court from deciding the questions of necessity and more necessary public use here, the Legislature's special statutory scheme applicable to "electric, gas, or water public utility property" would once again be destroyed. As the Supreme Court has repeatedly recognized, "judicial deference is not judicial abdication." (*Associated Home Builders v. City of Livermore*, 18 Cal. 3d 582, 609 [1976]; *California Building Industry Assn. v. City of San Jose*, 61 Cal. 4th 435, 456 [2015].)

The Legislature granted to this Court the power to review and invalidate resolutions of necessity involving "electric, gas, or water public utility property." That power should be exercised when the evidence sufficiently rebuts the presumption — as will be the case here.

CASITAS IS NOT RELEVANT

The City has raised the decision in *Golden State Water Co. v. Casitas Municipal Water Dist.*, 235 Cal. App. 4th 1246 (2015) in nearly every hearing in this case. It has handed copies of the decision to the Court numerous times, and now attaches another copy to its Opening Brief.

Repetition does not create relevancy. *Casitas* was not an eminent domain case. It was a reverse validation proceeding in which Golden State challenged the District's effort to use the Mello-Roos Act as a vehicle to *finance* a proposed takeover of a water system. Here, the City of Claremont has resolved to use revenue bonds if it is allowed to proceed with the acquisition. *Casitas* has no relevance to this case, no matter how many times the City tries to raise it.

CONCLUSION

The evidence will show that the City's takeover of Golden State's private property is neither "necessary" nor "more necessary" than Golden State's existing use. Golden State's private property is "electric, gas, or water public utility property" which is not for sale.

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When all the evidence has been admitted, Golden State will respectfully request the Court to find that the City does not have the right to take Golden State's property.

Dated: June 8, 2016

MANATT, PHELPS & PHILLIPS, LLP

By: _____
Edward G. Burg
Attorneys for Defendant
GOLDEN STATE WATER COMPANY

06/09/2016

PROOF OF SERVICE

I, Soran Kim, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is MANATT, PHELPS & PHILLIPS, LLP, 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On June 8, 2016, I served the within:

GOLDEN STATE'S RESPONSIVE TRIAL BRIEF

on the interested parties in this action addressed as follows:

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☒ **(BY OVERNIGHT MAIL)** By placing such document(s) in a sealed envelope, for collection and overnight mailing at Manatt, Phelps & Phillips, LLP, Los Angeles, California following ordinary business practice. I am readily familiar with the practice at Manatt, Phelps & Phillips, LLP for collection and processing of overnight service mailing, said practice being that in the ordinary course of business, correspondence is deposited with the overnight messenger service, Federal Express, for delivery as addressed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June 8, 2016, at Los Angeles, California.

Soran Kim

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