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15 UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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18 OAKLAND BULK & OVERSIZED TERMINAL, LLC, 19 Plaintiff, 20 v. 21 CITY OF OAKLAND, 22 Defendant, 23 and 24 SIERRA CLUB and SAN FRANCISCO BAYKEEPER, 25 Defendant-Intervenors.	Case No. 16-cv-7014-VC **DEFENDANT-INTERVENORS' NOTICE OF MOTION, RULE 52(C) MOTION FOR JUDGMENT, AND MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT** Hearing: March 28, 2018 Time: 10:00 a.m. Judge: Hon. Vince Chhabria Place: Courtroom 4, 17th Floor Action Filed: Dec. 7, 2016

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NOTICE

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE, pursuant to Civil Local Rule 7, that on March 28, 2018, at 10:00 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Vince Chhabria, at the United States Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant-Intervenors will, and hereby do, move, pursuant to Federal Rule of Civil Procedure 52(c), for an order granting judgment for Defendant the City of Oakland ("the City") and Defendant-Intervenors on Plaintiff Oakland Bulk & Oversized Terminal, LLC's ("OBOT") breach of contract claim.

Defendant-Intervenors make this motion on the grounds that:

- Oakland Ordinance No. 13385 (the "Ordinance") did not conflict with any rules, regulations, or official policies that the development agreement locked into place. Because the Ordinance did not conflict with the underlying regulatory framework in force at the time the development agreement was entered, consistent with California Government Code Section 65866, the City could freely apply the Ordinance against OBOT regardless of the terms of the development agreement.

This motion is based on Government Code Section 65866, the accompanying Memorandum, and such oral argument as the Court may allow.

WHEREFORE, Defendant-Intervenors request that the Court grant judgment for Defendant and Defendant-Intervenors on OBOT's breach of contract claim.

DATED: February 9, 2018

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MEMORANDUM IN SUPPORT

I. STATEMENT OF FACTS

In 2013, Defendant the City of Oakland and Plaintiff OBOT's predecessor in interest entered into an agreement allowing development of a "ship-to-rail terminal designed for the export of non-containerized bulk goods." Trial Ex. 584 (DA) at 107. On July 19, 2016, the City adopted the Ordinance, which amended the City's Health and Safety Code to ban the storage or handling of coal and coke within the City. *See* Oakland Municipal Code §§80.60.010 *et seq*. Thereafter, OBOT filed this lawsuit against the City, alleging, among other claims, that the City's decision to enforce the Ordinance against OBOT breached the parties' development agreement. Dkt. No. 74 (First Amend. Complaint) at ¶¶ 161-167.

II. STANDARD OF REVIEW

Defendant-Intervenors move, pursuant to Federal Rule of Civil Procedure 52(c), for judgment on OBOT's breach of contract claim. A motion for judgment under Rule 52(c) is the equivalent, in a bench trial like this case, of a Rule 50 motion for judgment as a matter of law in a jury trial. *See Ritchie v. United States*, 451 F.3d 1019, 1022-23 (9th Cir. 2006). Unlike with a Rule 50 motion, however, "the district court is not required to draw any inferences in favor of the non-moving party; rather, the district court may make findings in accordance with its own view of the evidence." *Id.* at 1023. Accordingly, this Court should enter judgment for defendants on OBOT's breach of contract claim if, after independently reviewing the law and evidence, it "finds against [OBOT] on [an] issue" that, under controlling law, precludes OBOT from prevailing on its breach of contract claim. Fed. R. Civ. P. 52(c).

III. ARGUMENT

A. Government Code Section 65866 entitles the City to judgment on OBOT's breach of contract claim.

California Government Code Section 65866 allows developers and government entities to enter into development agreements that lock in the land use regulations applicable to a development project. *See 216 Sutter Bay Assocs. v. Cnty. of Sutter*, 58 Cal.App.4th 860, 865 (1997) (Section 65866 "authorizes local governments to enter into development agreements, which, unless otherwise

provided in the agreement, make applicable those *land-use regulations* that are in force when the agreement was executed." (emphasis added)). But the statute also limits the scope of such agreements.

Here, Section 65866 prevents this Court from finding that the City breached its development agreement with OBOT. OBOT argues that enforcing the Ordinance against OBOT violated the development agreement because the City did not adopt the Ordinance in compliance with section 3.4.2 of the development agreement.[1] However, the Ordinance does not conflict with any City rules, regulations, or official policies that the development agreement locked in place. Because no conflict exists, the City could freely apply the Ordinance against OBOT's project notwithstanding the development agreement.

OBOT argues that the City was required to comply with section 3.4.2 of the development agreement to enforce *any* new regulation against OBOT. But that interpretation of section 3.4.2 would render it unenforceable under Section 65866 as applied to the Ordinance at issue here. To avoid invalidating that contract provision, this Court should instead interpret it to apply only to regulations that "conflict" with the underlying land use and development framework that the development agreement locked into place. Because the Ordinance does not conflict with that framework, the City may apply it against OBOT regardless of whether the City complied with the "substantially dangerous" standard of section 3.4.2. Its power to do so entitles the City to judgment on OBOT's breach of contract claim.

1. The Development Agreement Statute provides a limited exception for land use regulations to the general rule that government entities may not contract away their police power.

The default rule in California is that "a government entity may not contract away its right to exercise the police power in the future." *Cotta v. City and Cnty. of San Francisco*, 157 Cal.App.4th 1550, 1557 (2007). For this reason, a "contract that purports to do so is invalid as against public policy." *Id*. at 1558. On that basis, "California courts have consistently invalidated agreements that

[1] Section 3.4.2 allows the City to apply new regulations, as exceptions to OBOT's "vested rights," if the City finds that the failure to apply the regulation would create "a condition substantially dangerous to [the] health or safety" of the public. Trial Ex. 584 (DA) at §3.4.2.

had the effect of surrendering or impairing the police power." *Id.* For instance, a city impermissibly impairs its right to exercise the police power by entering into a contractual agreement with taxicab owners that would preclude the city from terminating a natural gas taxicab incentive program. *Id.* at 1563-64. Any agreement to guarantee the program's existence notwithstanding a change in the regulatory landscape is an "untenable" "chilling of the police power." *Id.* at 1564.

The Development Agreement Statute (Cal. Gov. Code §§65864 *et seq.*) provides a limited, precisely tailored means of entering agreements that lock in some aspects of existing law in a manner that is not invalid on police power grounds. *See Trancas Prop. Owners Ass'n v. City of Malibu*, 138 Cal.App.4th 172, 182 (2006) (because of the "procedural and substantive limitations" in the Development Agreement Statute, a valid agreement that complies with its requirements does not amount to an "unconditional surrender of the police power"). However, the Development Agreement Statute does not grant government entities unlimited authority to contract away their right to exercise the police power in the future. Instead, it allows developers and government entities to agree to apply the "*land-use regulations* that are in force when the agreement was executed." *216 Sutter Bay Assocs.*, 58 Cal.App.4th at 865 (emphasis added); *see also Cotta*, 157 Cal.App.4th at 1559 n.5 (the Development Agreement Statute allows for agreements that "freeze *zoning* early in the development process." (emphasis added)). The provision that grants this authority provides in full:

> Unless otherwise provided by the development agreement, rules, regulations, and official policies governing permitted uses of the land, governing density, and governing design, improvement, and construction standards and specifications, applicable to development of the property subject to a development agreement, shall be those rules, regulations, and official policies in force at the time of execution of the agreement. A development agreement shall not prevent a city, county, or city and county, in subsequent actions applicable to the property, from applying new rules, regulations, and policies which do not conflict with those rules, regulations, and policies applicable to the property as set forth herein, nor shall a development agreement prevent a city, county, or city and county from denying or conditionally approving any subsequent development project application on the basis of such existing or new rules, regulations, and policies.

Cal. Gov. Code §65866.

Section 65866's two sentences apply to different categories of "rules, regulations, and policies" applicable to a development agreement. Section 65866's first sentence freezes in place certain existing laws unless otherwise provided in a development agreement. But, by Section

65866's own terms, that freezing is limited to "rules, regulations, and official policies *governing permitted uses of the land, governing density, and governing design, improvement, and construction standards and specifications*." Cal. Gov. Code §65866 (emphasis added). These italicized categories all regulate land use and development. *See* "Land-Use Regulation," *Black's Law Dictionary* 958 (9th ed. 2009) ("An ordinance or other legislative enactment governing the development or use of real estate.").

For these types of rules (i.e. regulations of land use and development), the first sentence preserves the set of rules that is "in force at the time of execution of the [development] agreement," "[u]nless otherwise provided by the development agreement." In other words, the effect of this sentence is to "freeze" the "*land-use regulations*" applicable to a development agreement, unless a development agreement says otherwise. *216 Sutter Bay Assocs.*, 58 Cal.App.4th at 865 (emphasis added).

By contrast, Section 65866's second sentence applies to a broader category of "rules, regulations, and policies." That sentence omits the first sentence's descriptor phrase "governing permitted uses of the land, governing density, and governing design, improvement, and construction standards and specifications." Because it omits this descriptor phrase, the second sentence applies to additional, general non-land use rules, regulations, and policies. *See Cornette v. Dep't of Transp.*, 26 Cal.4th 63, 73 (2001) ("When one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning.").

The second sentence of Section 65866 thus addresses a government entity's authority, after it has entered into a development agreement, to adopt rules that fall within the broader category of non-land use regulations – for instance, health and safety or employment rules. The second sentence of section 65866 provides that, for these non-land use rules, a development agreement "shall not prevent a city . . . from applying new rules, regulations, and policies which do not conflict with those rules, regulations, and policies applicable to the property as set forth herein" (i.e. the regulations "frozen" in the first sentence of Section 65866). Accordingly, the second sentence of Section 65866 establishes a different legal regime for general, non-land use regulations. Development agreements

not only do not "freeze" such regulations, but they also may not prevent cities from applying to a project any general regulations that do not conflict with the regulations governed by the first sentence of Section 65866.

Other provisions of the Development Agreement Statute further support this interpretation of Section 65866. *See Weatherford v. City of San Rafael*, 2 Cal.5th 1241, 1247 (2017) (a statute's "surrounding provisions can reveal the semantic relationships that give more precise meaning to the specific text being interpreted" (quoting *Poole v. Orange Cnty. Fire Auth.*, 61 Cal.4th 1378, 1391 (2015) (Cuéllar, J., concurring)). For example, Section 65865.4 provides that development agreements are "enforceable by any party thereto notwithstanding any change in any applicable general or specific plan, zoning, subdivision, or building regulation adopted by the city, county, or city and county entering the agreement, which alters or amends the rules, regulations, or policies specified in Section 65866." Cal. Gov. Code §65865.4. The statute's specific enumeration of changes to zoning, subdivision, and building regulations further underscores that the purpose of the Development Agreement Statute is to provide developers with certainty for a specific set of rules: those that govern the *land use* regulatory process.

Finally, the statute's legislative history confirms its critical distinction between land use and non-land use regulations. The California Legislature adopted the Development Agreement Statute in 1979 to address the "harsh result" of the California Supreme Court's decision in *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785 (1976). *See Davidson v. Cnty. of San Diego*, 49 Cal.App.4th 639, 646-47 (1996). In *Avco*, the Supreme Court held that, without having made substantial expenditures in reliance on a building permit, a developer lacked a vested right to complete its project without complying with the new requirement that it obtain a permit from the California Coastal Zone Commission. 17 Cal.3d at 788, 793. The issue in *Avco* was therefore whether a developer's improvements had vested in the developer a right to complete its project exempt from "a new land use requirement." *Santa Margarita Area Residents Together (SMART) v. San Luis Obispo Cnty.*, 84 Cal.App.4th 221, 229 (2000).

The Development Agreement Statute, of which Section 65866 is a part, directly addressed the precise problems created by "new land use requirement[s]," the issue in *Avco*. *SMART*, 84

Cal.App.4th at 229. The law sought to provide developers with "certainty to the land use regulatory process" through the adoption of development agreements. Report of Sen. Committee on Local Gov't (Aug. 20, 1979) re: Assembly Bill 853 at 1. There is no indication that the Legislature intended to take on a problem any different from, or bigger than, that created by *Avco*.

In sum, Section 65866 automatically freezes a specific category of regulations: the land use regulations applicable to a given project (unless the development agreement specifies otherwise).

The regime for non-land use regulations, however, is different. Consistent with its purpose of providing certainly in the *land use* regulatory process, Section 65866 did *not* freeze applicable non-land use regulations. Even if a development agreement is entered, Section 65866 allows government entities to impose subsequent non-land use regulations so long as those new regulations do not conflict with the regulations in force at the time of the agreement. If the then-existing regulations were silent regarding the new regulations' subject, government entities may impose new non-land use regulations on a party to a development agreement. [2]

Interpreting the statute in this manner gives effect to the plain language of Section 65866. It also avoids the serious constitutional questions that would attend an interpretation of the Development Agreement Statute that allowed cities to enter into contracts that impermissibly impaired their ability to exercise their police power to adopt new, generally applicable regulations in the future. *See SMART*, 84 Cal.App.4th at 232 (construing Development Agreement Statute "in a manner that does not permit the County to surrender its police power in the name of planning

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[2] Alternatively, this Court could construe both sentences of Section 65866 to apply only to land use regulations. Under this interpretation, the second sentence of Section 65866 would limit the scope of development agreements by providing that such agreements "shall not prevent a city, county, or city and county . . . from applying new [land use] rules, regulations, and policies which do not conflict with those rules, regulations, and policies applicable to the property as set forth herein." Section 65866 would permit development agreements to protect only against future conflicting land use regulations, meaning that a city could freely impose all non-land use regulations, and any non-conflicting land use regulations, against an existing project notwithstanding a development agreement. Under this interpretation of Section 65866, a development agreement could not preclude a government entity from applying to a project a future land use regulation that does not conflict with the land use regulations in force at the time of the agreement. So long as the new land use regulation addressed a subject on which the land use regulations applicable to a development agreement were silent, a government entity could enforce that land use regulation against a property regardless of the terms of a development agreement.

efficiency"); *Cotta*, 157 Cal.App.4th at 1564 (citing *Avco*, outside land use context, to hold that San Francisco could not contract away its ability to terminate a taxicab incentive program).

2. Section 65866 allows the City to enforce the Ordinance because it neither governs "permitted uses of land" nor conflicts with the land use framework that the agreement locked into place.

Because the Ordinance a) is not a land use regulation; and b) does not conflict with the regulations in force at the time of the development agreement, the City may apply it against OBOT notwithstanding the development agreement.

a. The Ordinance is not a land use regulation.

The Ordinance prohibits the "storage or handling" of "coal" or "coke" at any facility in Oakland where such materials are or may be stored or handled. Oakland Municipal Code §§8.60.030 (definitions); 8.60.040 (applicability, prohibitions). The Ordinance plainly does not govern "density" or "design, improvement, and construction standards." Nor does it govern "permitted uses of land." The City did not adopt the restrictions in the Ordinance as a form of land use classification. *See id*. §§17.10 *et seq.* (describing land use classifications). Instead, the City imposed the restrictions by amending the City's Health and Safety Code, and in doing so made express findings that the transport, storing, or handling of coal in the City would "have many public health and/or safety impacts." *Id*. §8.60.020(B)(1). Moreover, in making these findings, the City considered more than just the adverse health and safety impacts of activity taking place on the property of a bulk material facility. The City also considered the "substantial public health and safety impacts" that would result from rail transport of coal and coke through the City. *Id*. §8.60.020(B)(1)(c). To be sure, the Ordinance, by its express terms, does not regulate coal transport. *Id*. §8.60.010. But the City's consideration of the health and safety impacts of rail transport nonetheless confirms that the City, in enacting the Ordinance, focused on the inherently dangerous properties of coal rather than on risks specifically attributable to operating a bulk material facility.

The Ordinance therefore does not govern "permitted uses of land," and the first sentence of Section 65866 does not render it inapplicable to OBOT.[3]

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[3] If this Court interprets Section 65866 as set forth in footnote 2, *supra*, such that a development

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b. The Ordinance does not "conflict" with the regulations that the development agreement froze.

The second sentence of section 65866 also does not render the Ordinance inapplicable to OBOT, because the Ordinance does not "conflict" with any land use regulations in force at the time the development agreement was entered. A dictionary published the year that the California Legislature enacted the Development Agreement Statute defines "conflict," in the verb form in which it appears in Section 65866, as "to show antagonism or irreconcilability." "Conflict," *Webster's New Collegiate Dictionary* 235 (1979 ed.). The Ordinance is neither antagonistic nor irreconcilable with the regulations that existed at the time of the development agreement. As OBOT concedes, none of the City's land use regulations – or indeed, *any* of the City's "rules, regulations, and official policies" – granted OBOT or any other entity express authority to handle or transport coal. Nor does the development agreement do so. It merely grants OBOT a right to develop the property as a "ship-to-rail terminal designed for the export of non-containerized bulk goods" and never once mentions coal. Trial Ex. 584 (DA) at 107.

Rules governing non-containerized bulk goods terminals and rules governing coal handling simply regulate different subjects. The two types of regulations may, as here, apply to the same property in a manner that restricts *some* activity that OBOT could conceivably engage in on its property under its general land use rights. But such overlap does not establish a conflict between them. Arguing that a health and safety regulation like the Ordinance conflicts with OBOT's general *land use* authorization is akin to arguing that a prohibition on the sale of non-pasteurized dairy products conflicts with the rights of a grocery store or restaurant developer with a development agreement that predates the prohibition. *See* Oakland Municipal Code §§17.10.270-280 (describing

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agreement would only protect an existing project against conflicting *land use* regulations, the inquiry ends with a determination that the Ordinance is not a land use regulation because section 65866 would not preclude its application. Moreover, under that interpretation, even if the court determined that the Ordinance is a land use regulation, its applicability to OBOT would depend on whether it conflicts with the land use regulations that existed at the time of the development agreement. As explained below in Section III.B.2.b, the Ordinance does not conflict with any land use regulations that existed when OBOT entered the development agreement. Accordingly, if this Court construes Section 65866, as set forth in footnote 2, to apply only to land use regulations, it should grant judgment for defendants if it finds either that the Ordinance is not a land use regulation or that it does not conflict with the existing land use framework.

various use designations for food service commercial establishments); *id.* §§17.10.290, 345 (use designations for food retail commercial establishments).

3. OBOT's interpretation of section 3.4.2 renders the provision unenforceable as a matter of public policy when applied to a non-conflicting, generally applicable rule like the Ordinance.

OBOT's breach of contract claim rests on the premise that the City cannot impose the Ordinance against it without complying with section 3.4.2 of the development agreement. *See, e.g.*, Dkt. No. 48 (OBOT Resp. to Mot. to Dismiss) at 10-11. Essentially, OBOT argues that the development agreement locked in place the City's *entire* regulatory framework applicable to its project, and that the City must therefore comply with section 3.4.2's "substantially dangerous" requirement to impose any new requirement on OBOT's project. *Id.* at 6-7 ("Section 3.2 of the DA expressly states that "[t]his Agreement vests in Developer the right to develop the Project in accordance with the terms and conditions of this Agreement, the City Approvals and the Existing City Regulations.").

OBOT's reading of the agreement, however, would render section 3.4.2 unenforceable under Section 65866 because it would limit the City's ability to impose new regulations that do not conflict with the regulations in force when the development agreement was entered. Government Code Section 65866 is clear: "A development agreement *shall not* prevent a city . . . from applying new rules, regulations, and policies which do not conflict with those rules, regulations, and policies applicable to the property as set forth herein" (emphasis added). If section 3.4.2 is read to apply to *any* regulatory change – including those that do not conflict with the "rules, regulations, and policies applicable to the property" – the development agreement would circumscribe the City's police power authority in precisely the manner that Section 65866 prohibits.

The Ordinance does not conflict with *any* rules, regulations, and policies applicable to OBOT. *See* Section III.A.2.b, *supra*. Accordingly, absent section 3.4.2, the City could impose the Ordinance against OBOT so long as its enactment met the long-established abuse of discretion standard for exercises of legislative authority – i.e. that enacting the Ordinance was not "so palpably unreasonable and arbitrary as to reveal an abuse of discretion as a matter of law." *County of Del Norte v. City of Crescent City*, 71 Cal.App.4th 965, 972 (1999). But OBOT reads section 3.4.2 to

impose a higher standard: the City must demonstrate that failing to adopt the Ordinance would be "substantially dangerous" to the health and safety of the public. Trial Ex. 584 (DA) §3.4.2. Were it read to impose this higher standard instead of the baseline abuse of discretion standard applicable to the exercise of legislative authority, section 3.4.2, as applied to the Ordinance, would violate Section 65866. Under OBOT's reading, section 3.4.2 would narrow the city's authority to adopt new non-conflicting regulations, even though Section 65866 prohibits development agreements from limiting a City's ability to impose new regulations that do not conflict with the existing regulatory framework.

Accordingly, this Court cannot construe section 3.4.2 to sweep so broadly as to apply to generally applicable non-conflicting rules like the Ordinance.

4. This Court should construe section 3.4.2 of the development agreement to implement Government Code Section 65866 by providing a means for the City to enforce later-adopted regulations that the Development Agreement Statute would otherwise render inapplicable to OBOT's project.

To the extent possible, courts construing a contract must adopt an interpretation that "renders a contract valid and effectual." *Titan Group, Inc. v. Sonoma Valley Cnty. Sanitation Dist.*, 164 Cal.App.3d 1122, 1127 (1985) (quoting *Serv. Emps. Int'l Union, Local 18 v. Am. Bldg. Maint. Co.*, 29 Cal.App.3d 356, 359 (1972)). This Court should thus reject OBOT's interpretation of section 3.4.2 of the agreement and instead construe it to apply only to regulations that "conflict" with the regulations in effect at the time the agreement was entered. Such an interpretation is consistent with Section 65866 and avoids invalidating the provision on grounds of unenforceability. *See Cotta*, 157 Cal.App.4th at 1559 (in interpreting contracts that bind government entities, courts should avoid construing the contracts to impermissibly impair the right to exercise the police power).

As previously explained, Government Code Section 65866 allows development agreements to include provisions authorizing government entities to alter even those regulations that Section 65866 locks into place. *See* Cal. Gov. Code §65866 ("*Unless otherwise provided by the development agreement*, rules, regulations, and official policies governing permitted uses of the land . . . shall be those rules, regulations, and official policies in force at the time of execution of the agreement." (emphasis added)). Section 3.4.2 is one such provision. It applies "[n]otwithstanding

any other provision of [the] Agreement to the contrary" and allows the City, upon a finding of substantial dangerousness, to impose *any* new regulation – including a land use regulation – against OBOT. Trial Ex. 584 (DA) §§3.4.2 ("City shall have the right to apply City Regulations adopted by City after the Adoption Date"); 1.1 (defining "City Regulations" as, *inter alia*, "all other ordinances, resolutions, codes, rules, regulations, and policies in effect as of the time in question"). The effect of this provision is solely to authorize the City to apply new regulations that the development agreement would otherwise render inapplicable to the property, upon certain findings supported by substantial evidence. *Id.* §3.4.2 (this section provides an "exception to Developer's vested rights").

Section 3.4.2 of the development agreement therefore applies to two categories of City regulations. First, it applies to *any* to new *land use* regulation, because the Development Agreement Statute would otherwise "freeze" the existing land use framework and make those changes inapplicable to the property. As an exception to that "freeze," Section 3.4.2 allows the City, upon determining that OBOT's vested land use rights threaten its residents' health and safety, to alter the land use framework that applies to OBOT.

Second, it applies to certain non-land use changes, but only those changes that Section 65866 allows development agreements to limit: those that create a "conflict" with the regulations in effect at the time of the development agreement. Section 3.4.2 should be read to apply only to this category of non-land use changes because OBOT's development agreement can only guarantee that generally-applicable rules that conflict with OBOT's vested rights will ordinarily be unenforceable against the project. Section 65866 only allows development agreements to provide this specific type of guarantee. Because the evident purpose of section 3.4.2 is to create an exception to the vested land use rights that OBOT's development agreement guarantees, the provision should apply only to new regulations that Section 65866 identifies as impairing vested rights: any new land use rule, and generally-applicable rules that "conflict" with the regulations applicable to the property.

* * *

In sum, the Ordinance does not conflict with the regulations in force at the time of the agreement. The City may therefore enforce it against OBOT notwithstanding the development agreement. It may do so without complying with section 3.4.2 of the agreement because interpreting

the contractual provision to apply to a non-conflicting regulation like the Ordinance would violate Section 65866 and thus render the provision unenforceable as a matter of public policy. Either section 3.4.2 does not apply as a matter of contract to the Ordinance, or it is unenforceable as applied to the Ordinance.[4] In either case, however, the City cannot have breached the development agreement. As a result, it is entitled to judgment on OBOT's breach of contract claim.

B. These Government Code Section 65866 arguments are properly before this Court.

During the final day of trial in this case, this Court asked whether Defendant-Intervenors have standing to make these Section 65866 arguments and the right to offer them within the scope of Defendant-Intervenors' permissive intervention. Dkt. No. 230 (Tr. of Jan. 19, 2018) at 677. Both questions should be answered in the affirmative.

1. Standing

Article III standing is evaluated on a claim-by-claim basis. *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009) ("A plaintiff must demonstrate standing 'for each claim he seeks to press' and for 'each form of relief sought.'" (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006))). Where the named parties establish standing for a certain claim and relief sought, however, there is no need to evaluate whether an intervenor independently has standing, because Article III jurisdiction already exists. *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 573 (9th Cir. 2014).[5] Regarding OBOT's contract claim, the Defendant-Intervenors and City both seek identical relief in the form of a judgment that the City did not breach the development agreement. This Court therefore need not separately evaluate Defendant-Intervenors' standing to argue that Section 65866 precludes a finding that the City breached the contract.

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[4] Because section 3.4.2 of the development agreement is unenforceable as applied to the Ordinance, if this Court determines that section 3.4.2 does apply as a matter of contract, it must hold that application of section 3.4.2 to be unlawful and grant judgment to the City on that basis. *See Cotta*, 157 Cal.App.4th at 1558 ("California courts have consistently invalidated agreements that had the effect of surrendering or impairing the police power.").

[5] This is true even if the intervenor-defendants and the party-defendant "seek the same ultimate relief" but advance different arguments. *Ruiz v. Estelle*, 161 F.3d 814, 833 (5th Cir. 1998); *see also Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (holding that an intervenor must have standing "to pursue relief that is *different* from that which is sought by a party with standing" (emphasis added)).

2. Scope of Intervention

Per this Court's order, Defendant-Intervenors may defend against OBOT's claims but may not "bring counterclaims," "bring cross-claims" or "prevent the case from being dismissed on a stipulation between developer and the City." Dkt. No. 71 (Ord. re Mot. to Intervene) at 3. Defendant-Intervenors' argument based on Section 65866 is not a counterclaim or cross-claim but instead is a defense to OBOT's breach of contract claim. Defendant-Intervenors argue that section 3.4.2 should be construed to apply to new, non-land use rules only if those rules conflict with the regulations in effect at the time of the agreement. The upshot of Defendant-Intervenors' argument is that the City did not contravene an enforceable term of the development agreement. *See P.&J. Artukovich, Inc. v. Simpson*, 128 Cal.App.2d 440, 447 (1954) (no breach where "no provision in the written contract" is violated); *Cotta*, 157 Cal.App.4th at 1564 & n.7 (holding that contract that is unenforceable as against public policy will not support claim for breach of contract). In either case, the argument is a defense, not a counterclaim or cross-claim, and Defendant-Intervenors may properly offer it within the scope of their intervention.

IV. CONCLUSION

This Court should grant judgment under Rule 52(c) for Defendant and Defendant-Intervenors on OBOT's breach of contract claim. If, however, the Court determines that judgment should not be entered for defendants pursuant to Government Code Section 65866, this Court should still enter judgment for defendants on OBOT's breach of contract claim for all the reasons set forth in defendants' proposed findings of fact and post-trial brief.

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Respectfully submitted,

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