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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO BAYKEEPER,

Defendant-Intervenors.

Case No. 3:16-cv-07014-VC

DEFENDANT CITY OF OAKLAND'S STATEMENT OF POSITION RE: DEFENDANT-INTERVENORS' RULE 52(C) MOTION FOR JUDGMENT

Trial Date: January 16, 2018
Ctrm.: No. 2, 17th Floor
Judge: Honorable Vince Chhabria

Defendant City of Oakland ("City") presents the following position with respect to Defendant-Intervenors' Motion for Judgment under Federal Rule of Civil Procedure 52(c) ("Motion") and joins therein to the extent that Intervenors and the City concur that the City is entitled to judgment on OBOT's breach of contract claim because the City was and is entitled to apply the Ordinance to OBOT without reliance on section 3.4.2 of the Development Agreement.

I. INTRODUCTION

Government Code section 65866 provides that "[a] development agreement shall not prevent a city … 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." [Emphasis added.] Ordinance No. 13385 does not conflict with any vested right obtained by Plaintiff Oakland Bulk & Oversized Terminal, LLC ("OBOT"), either pursuant to the 2013 Development Agreement ("DA") or pre-existing City regulations. Thus, this Court should rule that DA section 3.4.2 does not apply. Therefore, the City Council's first of two alternative grounds for applying the Ordinance to OBOT—that OBOT never had acquired a right to develop a bulk goods terminal *for the purpose of storing and handling coal*—prevails, and the City is entitled to judgment on OBOT's breach of contract claim (and DA section 3.4.2 need not be applied).

However, if this Court determines that the Ordinance conflicts with OBOT's right under pre-DA City regulations to develop a bulk goods terminal, then the City's second of two alternative grounds for applying the Ordinance to OBOT—the City Council's DA section 3.4.2 determination, based on substantial evidence, "that a failure to do so would place existing or future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health or safety"—applies. Since the City Council's section 3.4.2 determination was based on substantial evidence, the City prevails.

Under either scenario, the City has not contracted away its police power. In the City Council's action to apply the Ordinance to OBOT (by adopting Resolution No. 86234), and in this litigation, the City has maintained that OBOT never had a right—by the DA or the then-existing City regulations and approvals upon which it had a right to rely pursuant to the DA—to

store and handle bulk goods. Moreover, the Court is obligated to narrowly read DA section 3.4.2 in a manner that preserves the City's police power (and to avoid ruling that the City contracted away its police power). Thus, the Court should reconcile California Government Code section 65866 and DA section 3.4.2 in the manner advanced herein.

Accordingly, the City joins Intervenors' Motion to the extent Intervenors assert that (1) there is no conflict between the Ordinance and pre-DA regulations, (2) DA section 3.4.2 can be reconciled with California Government Code section 65866 and upheld as a valid exercise of the City's police powers with respect to post-DA regulations that conflict with pre-DA regulations, and (3) the City is entitled to judgment on OBOT's breach of contract claim.

II. FACTS

In 2013, the City and OBOT's predecessor-in-interest entered into a Development Agreement allowing OBOT to pursue development and use of a "ship-to-rail terminal designed for the export of non-containerized bulk goods." Trial Ex. 584 [DA] at 107. The DA gave OBOT the right to pursue the development and use of private improvements described in the DA (defined therein as the "Project") pursuant to City regulations and approvals governing the development and use of the Terminal that were in effect as of the date of the DA, July 16, 2013. *See* Trial Ex. 584 [DA] at 20-23 (§§ 3.2, 3.4, and 3.4.1).

However, DA section 3.4.2 provides for an "exception to Developer's vested rights under this Agreement" that authorizes the City to "apply City Regulations adopted" after approval of the DA if the "City determines based on substantial evidence and after a public hearing that a failure to do so would place existing or future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health or safety…." Trial Ex. 584 [DA] at 0023.

On June 27 and July 19, 2016, the City introduced and adopted, respectively, Ordinance No. 13385, amending the City's Health and Safety Code to ban the storage or handling of coal and coke (*e.g.,* petroleum coke) at bulk material facilities, as defined in the Ordinance. Trial Ex. 4. The City also adopted Resolution No. 86234, determining that the Ordinance applied to OBOT for two separate and independent reasons—the first of which does not rely on section

3.4.2, and the second of which does:

> **Section 3.** The Coal-Coke Ordinance applies to the Project Facilities and Tenants and each of them, and/or any Owner or Operator of a Coal or Coke Bulk Material Facility (as defined in the Coal-Coke Ordinance), because Developer Entities have no right, under the DA or otherwise, not to be subject to the Coal-Coke Ordinance. *The application of the Coal-Coke Ordinance does not impair any vested right regarding development or use of the subject property and thus falls outside the limitations on subsequent regulations*, including as set forth in Exhibit D-2-2 and Sections 3.2 and 3.4.1 of the DA.
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> **Section 4.** *Separately and independently*, the Coal-Coke Ordinance applies to the Project Facilities and Tenants, and each of them, and/or any Owner or Operator of a Coal or Coke Bulk Material Facility (as defined in the Coal-Coke Ordinance), *because the City Council hereby finds and determines*, based on substantial evidence in the record, after conducting public hearings, *that failure to apply the Coal-Coke Ordinance* to the Project Facilities and Tenants, and each of them, and/or to any Owner or Operator of a Coal or Coke Bulk Material Facility (as defined in the Coal-Coke Ordinance), *would place existing and/or future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health and/or safety* (as stated in the DA) if the Project Site is developed with a Coal or Coke Bulk Material Facility.

Trial Ex. 598 [Resolution] at 0007 (italics added).

III. ANALYSIS

OBOT does not have a vested right to develop a coal-handling terminal. Rather, the DA provided OBOT a vested right to rely on pre-DA City regulations and approvals in pursuit of its development and use of a bulk goods terminal. Dkt. 71 at 1 [Order Granting Motion to Intervene and Denying Motions to Dismiss] (OBOT "never acquired a vested right to develop a coal-handling terminal," rather the DA "purported to enshrine the regulatory regime to which the developer's plans would be subject").

The Court has questioned whether the City unlawfully contracted away its police powers, in violation of California Government Code section 65866, to the extent that it agreed in DA section 3.4.2 that it could only apply post-DA regulations to create an exception to OBOT's vested rights if the City complied with the process and standards set forth in section 3.4.2

As explained below, the City did not contract away its police powers, and it properly determined that (1) it was authorized to apply the Ordinance to OBOT without relying on DA

section 3.4.2, but, if section 3.4.2 applied, (2) the City lawfully created an exception to OBOT's vested right to rely on pre-DA regulations pursuant to section 3.4.2.

Government Code section 65866 provides as follows:

> **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't Code § 65866 (emphasis added).

Here, OBOT had a right to pursue the development and use of a bulk goods terminal pursuant to the DA and pre-existing City regulations and project approvals. *See* Trial Ex. 584 at 20-23 (§§ 3.2, 3.4, 3.4.1). As stated in Section 3 of the Resolution (Trial Ex. 598 at 0007), OBOT never acquired a right to store or handle coal or coke, either in the DA or otherwise, *e.g.*, pursuant to any pre-DA regulations or approvals.

The Ordinance prohibits OBOT from storing and handling coal and coke, but since this post-DA regulation does not conflict with any pre-DA regulation, under Government Code section 65866, the "development agreement shall not prevent" the City from applying the Ordinance to OBOT. *See* Cal. Gov't Code § 65866 ("A development agreement shall not prevent a city …, 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").

Yet the Court inquires whether, in approving DA section 3.4.2, the City unlawfully attempted to contract away its authority to apply a new law that does not conflict with pre-DA regulations. The answer is no.

First, the DA only vested in OBOT the right to rely on pre-DA regulations and approvals governing the development and use of the Project, as opposed to granting OBOT vested rights to rely on other regulations and approvals, *e.g.,* employment or tax legislation. *See* Trial Ex. 584 at 20-23 (§§ 3.2, 3.4, and 3.4.1). Thus, DA section 3.4.2 is limited to post-DA regulations that govern the development and use of the Project.[1]

Second, 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 County 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 construe section 3.4.2 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 Government Code section 65866 and reconciles it with DA section 3.4.2. *See Cotta v. City and Cnty. of San Francisco*, 157 Cal.App.4th 1550, 1559 (2007) (in interpreting contracts that bind government entities, courts should avoid construing the contracts to impermissibly impair the right to exercise the police power); *accord City of Burbank v. Burbank-Glendale-Pasadena Airport Auth.*, 72 Cal.App.4th 366, 376-77 (1999). Since the Ordinance does not conflict with any pre-DA regulations, the City was authorized to apply the Ordinance to OBOT without relying on section 3.4.2.[2]

Indeed, Resolution No. 86234 is consistent with the foregoing. The City Council determined that the Ordinance did not conflict with any vested right OBOT had acquired, and

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[1] The forgoing is consistent with the Development Agreement Statute (Cal. Gov't Code §§ 65864 – 65869.5), which "allows a city or county to freeze zoning and other land use regulation applicable to specified property." *Santa Margarita Area Residents Together v. San Luis Obispo Cty.*, 84 Cal.App.4th 221, 226-27 (2000). With respect to such regulations, development agreements are limited, statutory exceptions to the California Supreme Court rule that a developer secures a vested right to preclude imposition of new land use regulations only after (1) the governmental entity issues a building permit, and (2) the developer substantially relies on the permit by expending construction costs. *See id.* at 229-230, and *Avco Community Developers, Inc. v. South Coast Regional Com.,* 17 Cal.3d 785, 796 (1976).

[2] By contrast, had the City adopted a new ordinance that would, if applied to OBOT, impose conflicting regulations governing development and use of the site—*e.g.*, regarding the density of the site, set back requirements, height limits—then the City's only option for applying the ordinance to OBOT would be pursuant to section 3.4.2.

thus that application of the Ordinance did not impair any right. As such, the first, independent, and sufficient ground for the Resolution was that the Ordinance applied to OBOT, and that section 3.4.2 need not be invoked.

However, if the Court finds that the Ordinance does conflict with pre-DA regulations or that OBOT otherwise had a vested right not to be subject to the Ordinance, then the Court should affirm the City's exercise of its rights under section 3.4.2 to apply the Ordinance to OBOT, because City Council properly determined, as a second, separate and independent ground for applying the Ordinance, based on substantial evidence in the record:

> that failure to apply the Coal-Coke Ordinance to the Project Facilities and Tenants, and each of them, and/or to any Owner or Operator of a Coal or Coke Bulk Material Facility (as defined in the Coal-Coke Ordinance), would place existing and/or future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health and/or safety (as stated in the DA) if the Project Site is developed with a Coal or Coke Bulk Material Facility.

Trial Ex. 598 [Resolution] at 0007 (italics added).

In sum, the Court should (1) interpret DA section 3.4.2 in a manner that reconciles it with California Government Code section 65866 and (2) uphold the City Council's determination that application of the Ordinance neither conflicts with any pre-DA regulations nor impairs any vested right. Accordingly, the City joins Intervenors' Motion to the extent it is consistent with the City's position.

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IV. CONCLUSION

For the foregoing reasons, this Court should grant judgment to the City pursuant to Rule 52(c). Alternatively, this Court should deny OBOT's breach of contract claim because the City Council's second ground for applying the Ordinance, based on section 3.4.2, satisfied the standards thereunder.

Dated: February 9, 2018

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