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

OAKLAND BULK & OVERSIZED TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant,

and

SIERRA CLUB and SAN FRANCISCO BAYKEEPER,

Defendant-Intervenors.

Case No. 16-cv-7014-VC

REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT-INTERVENORS' RULE 52(C) MOTION FOR JUDGMENT

Hearing: March 28, 2018
Time: 10:00 a.m.
Judge: Hon. Vince Chhabria
Place: Courtroom 4, 17th Floor

Trial Date: Jan. 16, 2018

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I. INTRODUCTION

Government Code Section 65866 provides that 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." OBOT offers no persuasive reason why this language does not apply to the Ordinance and thus entitle Defendants to judgment on OBOT's breach of contract claim, since the Ordinance does not conflict with the land use rules applicable to the property. Initially, OBOT's medley of procedural objections does not prevent this Court from reaching the issue. On the merits, OBOT's contentions also fail. OBOT interprets the terms "governing permitted uses of the land" and "conflict" so broadly as to render them essentially meaningless. And OBOT's contention that the development agreement conferred a right to develop its property free from *all* future regulations ignores the important limits on development agreements that Section 65866 imposes. Accordingly, this Court cannot interpret the development agreement as OBOT urges, and should instead grant Rule 52(c) judgment for Defendants.

II. ARGUMENT

A. This Court may grant Rule 52(c) judgment for defendants.

OBOT first offers meritless procedural objections to Defendant-Intervenors' arguments.

1. Defendant-Intervenors' arguments are not waived.

OBOT argues that Defendant-Intervenors have waived any argument based on Section 65866 by not raising it in their first responsive pleading. Opp. at 2-3. However, Defendant-Intervenors' argument that section 3.4.2 of the development agreement does not apply to the Ordinance (Mot. at 10-11) is not an affirmative defense that must be pled in an initial pleading. Fed. R. Civ. P. 8(c). Rather, it is OBOT's burden to establish the City's breach of contract by identifying a provision of the contract and proving the City's failure to adhere to its terms. The argument that section 3.4.2 cannot be interpreted to apply to the Ordinance (Mot. at 10-11) merely "demonstrates that plaintiff has not met its burden of proof." *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). As such, it is "not an affirmative defense required to be pled in [an] answer." *Id.*[1]

[1] OBOT cites *Morrison v. Mahoney*, 399 F.3d 1042 (9th Cir. 2005), Opp. at 2, but that case addressed the need to plead procedural default, which "is an affirmative defense." 399 F.3d at 1046.

Defendant-Intervenors also have not waived, and could not waive, the argument that if section 3.4.2 is construed as OBOT proposes, that provision would be illegal and thereby invalid. A party cannot waive the affirmative defense that a contract is unenforceable as a matter of public policy. *See Cal. Pac. Bank v. Small Bus. Admin.*, 557 F.2d 218, 223 (9th Cir. 1977) ("Properly speaking, of course, one cannot estop a party from asserting the illegality of a contract. The court has a duty sua sponte to raise the issue in the interest of the administration of justice."); *see also Yoo v. Robi*, 126 Cal.App.4th 1089, 1103 (2005) (it is "well-settled" that "a defense of illegality based on public policy is not waived by the defendant's failure to include it as an affirmative defense in the answer to the complaint"). Were it otherwise, a court would be required to "lend its assistance to the consummation or encouragement of what public policy forbids." *Yoo*, 126 Cal.App.4th at 1103. Here, Defendant-Intervenors' argument that this Court must invalidate section 3.4.2 if it applies to the Ordinance (Mot. at 12 n.4) "assert[s] the illegality" of that provision as applied. *See Cal. Pac. Bank*, 557 F.2d at 223. As such, it is a defense that cannot be waived.

2. OBOT has been "fully heard" on the relevant issues.

OBOT next argues that this Court cannot grant judgment under Rule 52(c) because OBOT has not been "fully heard" on the issues raised in the motion for judgment. Opp. at 3-4. But Rule 52(c) requires only that that a party have "an adequate *opportunity* to be heard." *Granite State Ins. Co. v. Smart Modular Techs., Inc.*, 76 F.3d 1023, 1031 (9th Cir. 1996) (emphasis added). On the first day of trial, Defendant-Intervenors informed the Court and OBOT that it intended to move for judgment based on Section 65866. Dkt. No. 228 (Tr. of Jan. 16, 2017) at 217. OBOT was thus on notice, long before the close of its case-in-chief, that it would need to oppose the motion. It had the full opportunity to introduce evidence in support of its position, and cannot complain now that it should have introduced that evidence at trial.[2] This is all Rule 52(c) requires. *See EBC, Inc. v. Clark*

[2] In any event, reaching Defendant-Intervenors' arguments would not prejudice OBOT. OBOT complains that it was not on notice of the need to submit certain evidence at trial or develop it through discovery. But the evidence OBOT cites is irrelevant. OBOT cites a letter that Defendant-Intervenors sent to the City. Opp. at 4, citing Dkt. No. 28-5 at 73. But even if OBOT had submitted that evidence at trial rather than after the close of evidence, it still would not undermine Defendant-Intervenors' arguments. Contrary to OBOT's contention, the letter did not admit that section 3.4.2 applies to the Ordinance. It stated only that section 3.4.2 "limits" OBOT's "vested right," which, as

Bldg. Sys., Inc., 618 F.3d 253, 274 & n.23 (3d Cir. 2010) (rejecting similar argument, where plaintiff was on notice of issue but made "tactical decision" not "to adduce additional testimony").

Moreover, Defendant-Intervenors' arguments do not turn on any evidentiary showing. Defendant-Intervenors argue, as a *legal* matter, that public policy requires this Court to construe section 3.4.2 not to apply to the Ordinance or, alternatively, invalidate it as applied to the Ordinance. OBOT has been "fully heard" on this issue via its opposition to the motion for judgment.

3. Law of the case does not apply to Defendant-Intervenors' arguments.

OBOT also argues that Defendant-Intervenors' arguments are barred by the "law of the case" doctrine because this Court already decided them at the motion to dismiss stage. Opp. at 4-6. But the ruling on the motions to dismiss did not address the issue, as this Court recognized at the time. Dkt. No. 72 (Tr. of Hrg. re Mot. to Dismiss) at 31 (Section 65866 issue "is an issue that *I'm not going to decide on this motion to dismiss*." (emphasis added)); *see also* Dkt. No. 230 (Tr. of Jan. 19, 2018) at 676 ("I don't think I've already decided" it.). In its order on the motions to dismiss, this Court noted OBOT's "*contractual* right to *pursue* development of a coal terminal." Dkt. No. 71 (Ord. re Mot. to Dismiss) at 1 (first emphasis added). But it did not decide whether that contractual right governs notwithstanding *all* future regulations or, instead, only against those that conflict with the land use regulations in force at the time of the development agreement. Defendant-Intervenors argue that, because the contractual right cannot apply to a non-conflicting regulation like the Ordinance, this Court must either construe the right not to apply to the Ordinance or, alternatively, invalidate it. The Court did not address these arguments in its order on the motions to dismiss.

Even if this Court had decided the issue in OBOT's favor, moreover, law of the case would still not apply and would not prevent granting Defendant-Intervenors' motion. *See City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001) ("*All rulings of a trial court are subject to revision at any time before the entry of judgment.*") (quoting, with added

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explained below, does *not* confer immunity against non-conflicting regulations like the Ordinance. *See* Section II.C, *infra*. OBOT also complains that it did not conduct discovery regarding other development agreements with similar provisions or "expert testimony supporting the validity of the DA," Opp. at 3 n.1, but neither type of evidence is relevant to the *legal question* of the development agreement's validity. *See United States v. Tamman*, 782 F.3d 543, 552 (9th Cir. 2015) ("[A]n expert cannot testify to a matter of law amounting to a legal conclusion.").

emphasis, *United States v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986)).

4. Defendant-Intervenors may offer the arguments within the scope of intervention.

OBOT's contention that Defendant-Intervenors' arguments fall outside the scope of intervention also fails. The *only* limit placed on intervention was that Defendant-Intervenors could not "bring counterclaims . . . cross-claims . . . or prevent the case from being dismissed on a stipulation between the developer and the City." Dkt. No. 71 (Ord. re Mot. to Intervene) at 3. OBOT does not argue that the motion for judgment falls into any of these categories. Instead, it argues that Defendant-Intervenors have no "expertise" on the contract claim and are not parties to the contract. Opp. at 6. Initially, OBOT cites no authority for either proposition, and for good reason. Permissive intervention does not require some level of "expertise" to offer arguments on an issue. *See* Fed. R. Civ. P. 24(b). Nor does it require "a direct personal or pecuniary interest in the subject of the litigation." *Employee Staffing Servs., Inc. v. Aubry*, 20 F.3d 1038, 1042 (9th Cir. 1994) (quoting *S.E.C. v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940)). And, in any case, this Court's intervention order clearly allowed Defendant-Intervenors to defend against OBOT's breach of contract claim.[3] Dkt. No. 71 (Ord. re Mot. to Intervene) at 3 ("The scope of their intervention will be limited to defending against the developer's *claims*." (emphasis added)).

B. The Ordinance neither governs "permitted uses of the land" nor conflicts with the land use regulations in force at the time of the agreement.

Under Section 65866, 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." Because the Ordinance neither governs "permitted uses of the land" nor conflicts with the regulations in force at the time the development agreement was entered, the City could freely impose it against OBOT notwithstanding the development agreement.[4] *See* Mot. at 2-7. OBOT's arguments to the contrary are meritless.

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[3] OBOT's reliance on the Court's statements during the hearing on intervention is misplaced. Those statements were not incorporated in the order on intervention, which limits intervention only as discussed above.

[4] If this Court determines that both sentences of Section 65866 apply only to land use regulations, *see* Mot. at 6 n.2, then in order to grant judgment for Defendants it would only need to

1. The Ordinance does not govern "permitted uses of the land."

OBOT argues that the Ordinance governs "permitted uses of the land" merely because it "prevents OBOT from developing and using" its property "as a coal and petcoke terminal." Opp. at 7. But the fact that the Ordinance *applies* to OBOT and thereby restricts some activity that OBOT could conceivably engage in on its property does not mean that it governs "permitted uses of the land." Were this the test, minimum wage laws, child labor laws, and controlled substances laws would all govern "permitted uses of the land," because they regulate activity on private property.

OBOT also argues that the Ordinance "applies *only*" to OBOT. Opp. at 7. But that is not accurate. Rather, the Ordinance applies to "*any* owner or operator of a coal or coke bulk material facility." Oakland Municipal Code § 8.60.040 (emphasis added). OBOT is merely the only entity seeking to engage in activity that the Ordinance prohibits. And, in any case, a regulation does not govern "permitted uses of the land" simply because of the fortuity that only a single entity seeks to undertake activity covered by it.[5] Were this the test, a regulation requiring surgeons to sterilize equipment would govern "permitted uses of the land" in a city with a single operating room.

Finally, Defendant-Intervenors' argument does not turn on the location of the Ordinance in the City's Health and Safety Code. Opp. at 8-9. Instead, the Ordinance does not govern "permitted uses of the land" because it does not accomplish its regulatory objectives by altering permitted use rights, in contrast to the regulations at issue in the cases that OBOT cites. The regulations at issue in those cases all expressly amended rules governing permitted use and zoning rights. *Stewart Enters. v. City of Oakland*, 248 Cal.App.4th 410, 415 (2016) ("Under section 3 of the emergency ordinance, '[c]rematoriums or existing crematoria *uses* expanded shall only be *permitted* upon the granting of a major conditional use *permit* pursuant to *the conditional use permit* procedure . . . .'" (emphasis added)); *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*, 56 Cal.4th

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find *either* that the Ordinance i) does not govern "permitted uses of the land"; or ii) does not conflict with the existing land use framework, *see id.* at 7 n.3.

[5] Contrary to OBOT's suggestion, this Court did not determine that the Ordinance is a land use regulation because OBOT is the only entity within city limits that is currently seeking to handle coal. Opp. at 7, citing Dkt. No. 72 (Hrg. re Mot. to Dismss) at 25:8-13. Instead, the court merely *asked* whether the Ordinance was a land use regulation.

729, 739 (2013) (city acted "by *zoning* ordinances" (emphasis added)); *Kirby v. County of Fresno*, 242 Cal.App.4th 940, 950 (2015) (ordinance prohibited dispensaries "in all *zone* districts" (emphasis added) (quoting Fresno Municipal Code § 10.60.060).

By contrast, the Ordinance does not alter any rules governing permitted use or zoning rights. Because the City did not adopt the restrictions in the Ordinance as a form of land use classification, OBOT still possesses the full panoply of land use rights guaranteed to it by its authorization to operate a bulk goods terminal. Instead, the City adopted the Ordinance to protect its residents from the inherently dangerous properties of coal and without amending permitted use or zoning rights. The Ordinance therefore does not govern "permitted uses of the land."

2. The Ordinance does not "conflict" with the regulations that the development agreement locked into place.

OBOT argues that the Ordinance conflicts with the regulatory scheme in force at the time of the agreement because that scheme "allow[ed] development of a terminal that handles coal and petcoke." Opp. at 9. This is misleading. In support of its argument that the regulatory scheme allowed coal handling, OBOT cites development agreement provisions that incorporate existing City regulations, Opp. at 9-10 & n. 7, but *none* of the regulations that those provisions incorporate mentions coal or petcoke.[6] The regulatory regime therefore did not authorize coal handling but rather was silent on the subject, as this Court recognized. Dkt. No. 221 (Hrg. re MSJ) at 5 ("The regulatory regime that existed at the time was silent on the issue of coal.").

By contending that the Ordinance conflicts with a regulatory regime that was silent on the subject of coal, OBOT is essentially arguing that *all* new regulations conflict with the regulatory framework in force at the time of a development agreement. In OBOT's view, a new regulation conflicts with the existing framework by addressing *either* i) a subject that existing regulations cover

[6] OBOT argues that its ground lease conferred the right to handle all bulk goods. Opp. at 10. In fact, the ground lease—which the parties signed after the coal dispute arose—does not confer rights beyond those extended in the development agreement. Trial Ex. 131(Ground Lease) § 5.2.1 ("[N]othing herein shall be deemed to limit or amend the rights and obligations of Developer or City under the . . . Development Agreement as they pertain to the Permitted Uses [and] the Scope of Development.").

or ii) a subject on which the existing framework is silent. Under that logic, *all* new regulations conflict with the existing framework.

This unjustifiably broad interpretation of the word "conflict" renders part of Section 65866 meaningless. The second sentence of Section 65866 creates a specific exception to the general rule that development agreements freeze the land use regulations applicable to a given project. The Legislature must have intended for it to have some meaning. Under OBOT's interpretation of "conflict," however, the second sentence of Section 65866 serves no purpose. Had the Legislature intended to freeze the existing framework entirely (i.e. to provide that all future regulations "conflict" with the existing framework), it would simply have enacted the second sentence of Section 65866 and omitted the first. Because it did not, this Court cannot interpret "conflict" as OBOT urges. *See Shoemaker v. Myers*, 52 Cal.3d 1, 22 (1990) (courts "do not presume that the Legislature performs idle acts" or "construe statutory provisions so as to render them superfluous.").

This Court should instead interpret "conflict" in a manner consistent with its dictionary definition and that effectuates the purpose of Section 65866. *See Webster's New Collegiate Dictionary* 235 (1979 ed.) (defining "conflict" to mean "to show antagonism or irreconcilability"); *Los Angeles Cnty. Bd. of Supervisors v. Superior Court*, 2 Cal.5th 282, 293 (2016) (courts must construe statutes in the manner that "best advances the Legislature's underlying purpose"). The second sentence of Section 65866 has a *prohibitory* purpose. It limits, as required by the constitutional imperative to preserve a city's police power, the scope of development agreements. If there is any doubt as to the meaning of "conflict," this Court must resolve that doubt in favor of achieving the statute's prohibitory purpose and not, as OBOT urges, in a manner contrary to that purpose. Accordingly, the Ordinance (which addresses coal) is not irreconcilable with the existing framework (which is silent on coal). It therefore does not "conflict" with that framework.

C. Because it is a generally applicable, non-conflicting regulation, the Ordinance cannot be subject to the restrictions of section 3.4.2 of the development agreement

Because the Ordinance is a generally applicable regulation that does not "conflict with the rules, regulations, and policies applicable to the property," Section 65866 allows the City to enforce it against OBOT regardless of the development agreement. Mot. at 9-12. OBOT offers several

arguments in response to attempt to establish that section 3.4.2 of the development agreement applies to the Ordinance. None is persuasive.

First, OBOT cities the language of the development agreement. Opp. at 12. But—even if the inquiry considered only the contractual language—the development agreement does not once mention coal or, as this Court recognized, confer a vested right to handle coal. Dkt. No. 71 (Ord. re Mot. to Dismiss) at 1 (OBOT "never acquired a vested right to develop a coal-handling terminal"). OBOT states that coal is a commodity essential to the viability of its project, Opp. at 11, but it did not discuss coal when negotiating with the City or incorporate it into the development agreement.

Because the development agreement does not mention coal, OBOT tethers its argument to contractual provisions that, OBOT argues, vested the right to develop OBOT's project subject only to regulations that existed at the time of the development agreement, unless the City complies with section 3.4.2. Opp. at 12-13 (citing § 3.4.1 of the development agreement). But the mere assertion of a "vested right" does not confer immunity against all future regulation. Instead, it is the *nature* of the developer's rights that governs which future regulations a government entity may apply to an existing project. In *Communities for a Better Environment v. South Coast Air Quality Management District*, 48 Cal.4th 310, 323-24 (2010), the California Supreme Court rejected the argument that the vested right to operate a piece of machinery conferred the right to operate that machinery however one wishes, immune from future regulation. *Id*. at 324 ("[T]he boiler permits give ConocoPhillips no vested right to *pollute the air* at any particular level" or "use the boilers *for the Diesel Project*.").[7]

In the context of a development agreement, the nature of a developer's rights is limited by the terms of the development agreement *and* the constraints of the Development Agreement Statute. The statute's constraints are especially important, as they ensure the enforceability of development agreements. *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 statute, a valid agreement that

[7] OBOT maintains that Defendant-Intervenors misconstrue its position by pointing out that, under OBOT's reading of the development agreement, section 3.4.2 applies to any new regulation. Opp. at 5 n.4. But this implication of OBOT's interpretation follows necessarily from OBOT's contentions that the agreement vested a "right to develop and operate the Terminal under the regulatory scheme as it existed when the DA was signed," Opp. at 12, and that "Section 3.4.2 is an exception to" that vested right, Opp. at 14 (emphasis omitted).

complies with its requirements is not an "unconstitutional surrender of the police power"). The provision that limits the rights conferred by a development agreement—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). A development agreement therefore cannot be construed to contract away a government entity's power to impose *all* new regulations, including those that "do not conflict with those rules, regulations, and policies applicable to the property." Gov't Code § 65866. Accordingly, the contractual language that OBOT cites does not establish that it is immune from new non-conflicting regulations like the Ordinance.

OBOT also argues that the development agreement vested the right to develop the property subject only to then-current regulations because, according to OBOT, the City interpreted the agreement to do so. Opp. at 12-13 & n.10. But OBOT ignores the fact that the City enforced the Ordinance against OBOT on *two independent bases*: first, on the ground that OBOT had no "right, under the DA or otherwise, not to be subject to the" Ordinance; and, second, on the ground that the City satisfied section 3.4.2 in applying the Ordinance to OBOT. Trial Ex. 598 (Resolution) at 7. The circumstances of the adoption and enforcement of the Ordinance therefore say nothing about the City's interpretation of the development agreement.

More important, the City's interpretation of the development agreement—whatever it may be—does not answer the separate question whether this Court may permissibly interpret section 3.4.2 to apply to a non-conflicting regulation like the Ordinance. Even if the City believed section 3.4.2 applies to the Ordinance, this Court would still have an independent duty to ascertain whether public policy requires the Court to disregard that interpretation and construe the provision otherwise (or invalidate it if it cannot be construed otherwise). *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); *Neighbors in Support of Appropriate Land Use v. Cnty. of Tuolumne*, 157 Cal.App.4th 997, 1015 (2007) (invalidating development agreement even though government entity argued that it was valid). Because the Ordinance does not conflict with the land use framework applicable to OBOT,

this Court cannot interpret section 3.4.2 to apply to the Ordinance. Mot. at 11-12.

Finally, OBOT quotes *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 191 Cal.App.4th 435, 444 (2010), for the principle that "the scope of development agreements need not be limited to freezing land use rules, regulations, and policies but can include other promises between the municipality and the developer." Opp. at 8. But *Mammoth Lakes* does not aid OBOT. In the sentence directly before that quoted in OBOT's opposition, *Mammoth Lakes* quotes a provision of the Development Agreement Statute that authorizes development agreements to include promises "concerning financing and construction of necessary infrastructure"—that is, contractual promises in a city's *proprietary* capacity that do not limit its regulatory authority. 191 Cal.App.4th at 444 (citing Gov't Code § 65864, subd. (c)). Read in context, then, the quotation from *Mammoth Lakes* refers to the ability for a development agreement to include *non-regulatory* promises such as those for infrastructure financing. It does not establish that development agreements may restrict a city's *regulatory* power beyond the limits set by the plain language of Section 65866.[8]

In sum, this Court cannot interpret the development agreement, as OBOT argues, to vest the right to develop OBOT's property free from *any* new regulation—including those that do not conflict with the existing regulations—unless the City satisfies section 3.4.2. To be sure, section 3.4.2 is an "exception to [OBOT's] vested rights." Trial Ex. 584 (DA) § 3.4.2. But, as such, it applies only to the rights that Section 65866 allows a development agreement to vest: vested rights not to have new conflicting regulations applied to a project. Because the Ordinance does not conflict with any rules applicable to OBOT, this Court must either construe the development agreement not to apply section 3.4.2 to the Ordinance or, alternatively, invalidate section 3.4.2 as applied to it.

DATED: March 2, 2018

Respectfully submitted,

/s/ James M. Finberg

[8] OBOT also cites *Davidson v. County of San Diego*, 49 Cal.App.4th 639 (1996), and *Stewart Enterprises, Inc. v. City of Oakland*, 248 Cal.App.4th 410 (2016). Opp. at 14-15. But these cases discuss vested rights conferred by means other than a development agreement. *Davidson*, 49 Cal.App.4th at 648; *Stewart*, 248 Cal.App.4th at 414. Thus, whatever those decisions say about vested rights in those contexts, they do not establish that a development agreement may flout Section 65866 and confer immunity from new, non-conflicting regulations.

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