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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED TERMINAL, LLC

Plaintiff,

vs.

CITY OF OAKLAND,

Defendant.

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

PLAINTIFF OAKLAND BULK & OVERSIZED TERMINAL, LLC'S OPPOSITION TO INTERVENORS' RULE 52(c) MOTION FOR JUDGMENT

Hearing Date: March 28, 2018
Time: 10:00 a.m.
Honorable Vince Chhabria

Trial Date: January 16, 2018

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INTRODUCTION

Defendant-Intervenors Sierra Club and San Francisco Baykeepers and Defendant City of Oakland offer inconsistent theories why California Government Code Section 65866 is purportedly a defense to OBOT's breach of contract claim. Despite not being a party to the DA, Intervenors argue that Section 65866 allows the City to apply the Ordinance to OBOT (as the City did here via the Resolution)—irrespective of Section 3.4.2 of the DA—because the Ordinance purportedly does not govern "permitted uses of the land" at the Terminal and does not conflict with the pre-existing regulatory scheme. D.E. 234 ("Mot."). Intervenors' contention is based on the mistaken premise that requiring the City to comply with Section 3.4.2 would impair the City's police power. Contradicting Intervenors' argument, the City unambiguously maintains that the DA preserved its police power, but nonetheless attempts to resurrect its argument—flatly rejected by the Court when it denied the City's motion to dismiss—that the DA did not give OBOT a vested right to handle any specific bulk good at the Terminal, and thus the Ordinance does not conflict "with OBOT's right under pre-DA City regulations." D.E. 235 ("City Statement") at 2.

Neither Intervenors nor the City raised their new defenses in any responsive pleading, at summary judgment, or at anytime until *after* the trial began, a choice made despite the Court's raising the prospect of this argument nearly a year ago at the hearing on the City's motion to dismiss. Accordingly, these defenses are waived. And although Intervenors have moved under Federal Rule 52(c), by its terms, that Rule does not apply, and thus Intervenors' motion is improper. In denying the City's motion to dismiss, moreover, the Court expressly determined that OBOT "has a contractual right to *pursue* development of a coal terminal to the extent allowed *under the municipal code as it existed when the Development Agreement was signed*," subject to the exception in Section 3.4.2 of the DA. D.E. 71 at 1 (emphasis added). The Court's determination regarding the extent of OBOT's vested right is the law of the case and Intervenors' and the City's defenses—which contradict the Court's ruling—are now barred.

If the Court elects to consider Intervenors' argument, Intervenors' motion should still be denied because the Ordinance and Resolution *are* regulations that affects "permitted uses of the land," and conflict with the regulatory scheme in place when the DA was adopted. By prohibiting

the development of a multi-commodity bulk goods terminal that handles coal and petcoke (sometimes referred to as a "coal and petcoke terminal") at the West Gateway property, the Ordinance and Resolution clearly affect "permitted uses of th[at] land." And because the pre-existing regulatory scheme *allowed* a bulk goods terminal to be developed and operated with no restrictions as to commodities, Intervenors and the City are simply wrong that there is no conflict between the Ordinance and Resolution and the regulations that existed at the time of the DA. Intervenors are also wrong in claiming—contrary to the City's position—that Section 3.4.2 improperly impaired the City's police power by expanding OBOT's vested rights. Mot. at 9-10. As both parties to the DA recognize—Section 3.4.2 is an *exception* to OBOT's vested rights that *preserves*, not limits, the City's police power. Intervenors' motion should be denied.

ARGUMENT

I. THE COURT SHOULD NOT CONSIDER THE INTERVENORS' AND CITY'S NEW SECTION 65866 ARGUMENTS

This Court should not consider Intervenors' or the City's new theories—each of which conflicts with the framework under which this case was tried—that Section 65866 entitles the City to judgment on OBOT's breach of contract claim. Intervenors' and the City's failure to raise their new Section 65866 defenses until after the trial commenced constitutes waiver, and their belated defenses are inconsistent with the law of the case, and thus barred.

A. The Intervenors' and City's Contract Defenses Are Waived

The Court was correct to express skepticism about the viability of any Section 65866 arguments at the final pretrial conference. D.E. 221 (1/10/18 Hr'g Tr.) 9:13-16 (acknowledging that the City "didn't make the argument that [the Court was] testing, so I'm not sure what else I can do with it."). In fact, this defense may not be heard: as Intervenors concede, their "argument based on Section 65866" is raised as "a defense to OBOT's breach of contract claim" (Mot. at 13), and the law is clear that "[a defendant] is required to raise every defense in its first responsive pleading, and defenses not so raised are deemed waived." *Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005). Here, even though the Court inquired about this issue at the hearing on the City's motion to dismiss nearly a year ago (*see* D.E. 72 (4/20/17 Hr'g Tr.) 21:3-23), neither the

Intervenors nor the City included their newly minted-Section 65866 defenses in any responsive pleading (D.E. 28-6 (Intervenors' Answer); D.E. 77 (City's Answer)), and, in fact, did not raise the argument until *after* months of extensive discovery and *after* trial had commenced on an entirely different question—whether the City had met the requirements of Section 3.4.2. Because the Court and the parties have already tried this case on the (correct) premise that the Ordinance and Resolution may only be applied to OBOT if Section 3.4.2 is satisfied, moreover, OBOT would suffer severe prejudice if the Court were to find either the Intervenors' or the City's new defense dispositive.[1] Accordingly, the Intervenors' and City's new arguments that the Ordinance and Resolution are not subject to Section 3.4.2 are waived. *See, e.g.*, *Borges v. Cnty. of Humboldt*, No. 15-cv-00846, 2017 WL 4552006, at *2-3 (N.D. Cal. Oct. 12, 2017) (defense not raised in answer or supplemental pleadings but instead raised on "eve of trial" waived).

B. Intervenors' Motion Is Procedurally Improper

Intervenors purport to move for judgment under Rule 52(c), but that rule does not apply here. Rule 52(c) states that "[*i*]*f a party has been fully heard on an issue during a nonjury trial* and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue." Fed. R. Civ. P. 52(c) (emphasis added). There was no trial in which OBOT was "fully heard" on the issues raised in Intervenors' and the City's briefs regarding Section 65866. To the contrary, trial in this case was conducted under a different framework under which the parties (correctly) assumed that the City had to meet the requirements of Section 3.4.2 of the DA (to invoke the health and safety exception to OBOT's vested right).[2] Had such a

[1] Not only has OBOT expended considerable resources litigating this case, but had Defendants raised their defenses earlier, OBOT could have "pursued a different litigation strategy" —pursuing discovery aimed at submitting additional evidence, such as other development agreements throughout the state with provisions similar (or identical) to Section 3.4.2, or even expert testimony supporting the validity of the DA—which "constitute[s] [a] prejudicial consequence[] due defendants' failure to plead the defense." *Borges*, 2017 WL 4552006, at *2.

[2] This was certainly the issue to which the Court directed the parties. D.E. 221 (1/10/18 Hr'g Tr.) 83:18-25 ("I don't think I have . . . a comprehensive enough understanding . . . to conclude that the record does not contain substantial evidence of a substantial danger, but I think we're going to have a trial on that question"), 130:17-22 ("[W]as the City Council given the ability to

trial been held, OBOT would have had an opportunity to present evidence concerning, for example, Intervenors' prior admission that Section 3.4.2 applies. *See* D.E. 28-5 at 73 (Letter to Oakland City Council on behalf of Intervenors arguing that "[i]n agreeing to the Development Agreement, OBOT agreed to future regulations based upon health and safety of the occupants or users of the Project, adjacent neighbors, or any portion thereof [under Section 3.4.2]"). Because OBOT was not heard on the primary issue raised in Intervenors' motion—*i.e.*, whether Section 65866 precludes application of Section 3.4.2 of the DA—Rule 52(c) is by its terms inapplicable, and Intervenors' motion is procedurally improper.

C. <u>The Intervenors' and City's Arguments Are Barred By The Law of the Case</u>

Defendants' Section 65866 theories are separately barred by the law of the case. "Under the doctrine of 'law of the case,' a court is generally precluded from reconsidering an issue that has already been decided by the same court." *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 146 F.3d 1088, 1093 (9th Cir. 1998). In denying the City's motion to dismiss, this Court previously ruled that OBOT "has a contractual right to *pursue* development of a coal terminal to the extent allowed *under the municipal code as it existed when the Development Agreement was signed*," subject to certain exceptions such as the health and safety exception memorialized in Section 3.4.2 of the DA. D.E. 71 at 1 (emphasis added), 2 ("There are, of course, limits to the City's ability to bind itself to an earlier regulatory regime . . . . Most notably, section 3.4.2 of the Development Agreement provides that the City may impose a new ordinance if failing to do so would place neighbors of the development 'in a condition substantially dangerous to their health or safety.'"). The Ordinance and Resolution undisputedly changed the municipal code. TX0004.0004 ("Ordinance") § 3 (adding Chapter 8.60 "to the Oakland Municipal Code"); TX0598.0007 ("Resolution") (adopting § 3 of Ordinance). Accordingly, the Court ordered that the issue for trial was whether the City met the requirements of Section 3.4.2 such that the City could invoke the health and safety exception to OBOT's vested right. D.E. 221 (1/10/18 Hr'g) 83:18-25, 130:17-22; *see also* D.E. 71 at 2 ("But whether this 'health and safety' exception applies here is a question

judge whether the amount of emissions from the facility would pose . . . a substantial danger. And that's what the trial is going to be about.").

that can't be answered on a motion to dismiss (and perhaps not even on summary judgment).").

Under the guise of its new Section 65866 theory, the City attempts (*e.g.*, City Statement at 2, 4-5) to resurrect its argument that Section 3.4.2 of the DA does not apply because OBOT never acquired a right to develop a bulk goods terminal for the purpose of storing and handling coal.[3] This argument was squarely rejected by this Court when it denied the City's motion to dismiss. D.E. 71 at 1 ("The City sets up a strawman in arguing that [OBOT] never acquired a vested right to develop a coal-handling terminal."), 2 ("If the City wanted to restrict the developer to an approved list of commodities—or to foreclose the handling of a particular commodity such as coal—it should have included language to that effect in the Development Agreement."). Accordingly, OBOT's right "to pursue development of a coal terminal to the extent allowed under the municipal code as it existed when the Development Agreement was signed" (*id.* at 1), subject to certain exceptions including Section 3.4.2 is the law of the case, and the Court should not consider the City's previously rejected contrary theory. *See, e.g.*, *Plantronics, Inc. v. Am. Home Assurance Co.*, No. 07-cv-06038, 2014 WL 2452577, at *2-3 (N.D. Cal. May 30, 2014) (applying law of case doctrine to issue decided previously on motion to dismiss).

Intervenors' theory likewise conflicts with this Court's order denying the City's motion to dismiss. Despite the Court's express determination that "[t]here are … limits to the City's ability to bind itself to an earlier regulatory regime … [m]ost notably section 3.4.2 of the Development Agreement," (D.E. 71 at 2), Intervenors maintain that—under its proposed interpretation of Section 65866—"the City may apply [the Ordinance] against OBOT regardless of whether the City complied with the 'substantially dangerous' standard of [S]ection 3.4.2." (Mot. at 2).[4]

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[3] The City goes so far as to suggest (City Statement at 2-3) that "OBOT never had a right … to store and handle bulk goods." While this position is required by the illogic of the City's position, it is plainly incorrect, as the DA granted OBOT a vested right to develop and operate "[a] ship-to-rail terminal designed for the export of *non-containerized bulk goods* . . . ." TX0584.0001 (DA) § 3.2; TX0096.0001 ("Ground Lease") § 3.1.1, Ex. 3.1; *see infra* III.A.

[4] To be clear, OBOT does *not* argue, as Intervenors claim (Mot. at 2), that the City is "required to comply with section 3.4.2 of the development agreement to enforce *any* new regulation against OBOT." The City needs to comply with Section 3.4.2 *in this case* because Section 3.4.2 is the only exception to OBOT's vested right that the City attempted to meet. As discussed *infra* III.A, other sections of the DA vest in OBOT a right not to have "Future City Regulations" that would be "be inconsistent or in conflict with the intent, purposes, terms,

1 Intervenors' argument that Section 65866 renders DA Section 3.4.2 inapplicable is thus
2 incompatible with the law of the case that Section 3.4.2 applies and, accordingly, should not be
3 considered. *Plantronics*, 2014 WL 2452577, at *2-3.

4 **D. <u>The Intervenors' Motion Is Outside the Scope of Intervention</u>**

5 The Court also observed that Intervenors' "Government Code" motion might be "outside
6 the scope of the intervention" and/or "more appropriately made in some other lawsuit." Trial Tr.
7 675:15-25, 677:12-15. The Court's observation was correct. The Court held that "there's no
8 intervention as a right here"; the intervention granted was permissive. D.E. 72 (4/20/17 Hr'g Tr.)
9 45:25-46:1; D.E. 71 at 3. In support of their application to intervene, Intervenors acknowledged
10 that the Court could "set limits on [the] intervention," and represented that Intervenors—who had
11 filed a (partial) motion to dismiss on OBOT's Dormant Commerce Clause claim—brought
12 "expertise" to the table on the Dormant Commerce Clause. D.E. 72 (4/20/17 Hr'g Tr.) 68:14-
13 69:7. By contrast, Intervenors have no "expertise" with respect to the contract claim; indeed, they
14 were not a party to the contract—and make arguments about it that conflict with the City's.
15 Intervenors' attempt to invalidate key terms of the DA on the basis that the City exceeded its
16 authority under the Government Code—a claim that the City adamantly denies—is outside the
17 scope of the granted intervention. D.E. 71 at 2-3.

18 **II. EVEN UNDER INTERVENORS' INTERPRETATION OF SECTION 65866, THE CITY IS NOT ENTITLED TO JUDGMENT**

19 Even if the Court were to consider Intervenors' improper motion, the City is not entitled to
20 judgment even under Intervenors' argument that Section 65866 limits parties to a DA to freeze
21 "land use" regulations that conflict with the regulatory regime in place at the time of the DA's
22 adoption. *First*, Intervenors are incorrect (Mot. at 7) that the Ordinance and Resolution do not
23 govern "permitted uses of the land." By prohibiting storage and handling of coal and petcoke at
24 the West Gateway property, the Ordinance and Resolution plainly regulate "permitted uses of the
25 land" at the Project Site, and are thus squarely within the categories of frozen regulations under
26 Section 65866. *Second*, Intervenors are incorrect (*id.* at 8-9) that the Ordinance and Resolution do
27
28

standards or conditions of [the DA]" or "materially change, modify, or reduce the permitted use of the Project Site" applied to it. DA § 3.4.1. Section 3.4.2 is then an exception to that vested right.

1 not conflict with the regulatory scheme as of the DA's adoption. Before the City enacted the
2 Ordinance and Resolution, storage and handling of coal and petcoke—and thus development of a
3 coal and petcoke terminal—was a permitted use of the land under existing laws. The Ordinance
4 and Resolution, however, now ban storage and handling of coal and petcoke at the Terminal site,
5 and thus conflict with the regulatory regime as it existed when the DA was adopted.

6 **A. The Ordinance Governs Permitted Uses Of The West Gateway Property**

7 Contrary to Intervenors' conclusory assertion (Mot. at 7), there is no question that the
8 Ordinance governs "permitted uses" of the development site at the West Gateway, and thus—even
9 under Intervenors' interpretation of Section 65866—could not be applied to OBOT unless the City
10 complied with an exception such as DA Section 3.4.2. The first sentence of Section 65866
11 expressly provides that the "rules, regulations, and official policies governing *permitted uses of the*
12 *land* … applicable to development of the property subject to a development agreement, shall be
13 those rules, regulations, and official policies in force at the time of execution of the agreement."
14 Cal. Gov. Code § 65866 (emphasis added). The fact that the Ordinance prevents OBOT from
15 developing and using the West Gateway as a coal and petcoke terminal could not be more evident:
16 as Intervenors concede (Mot. at 7), the Ordinance prohibits storage and handling of coal and
17 petcoke at a "Coal or Coke Bulk Material Facility," defined to mean "an existing or proposed
18 source, site, or facility, including all contiguous *land*, . . . and improvements thereon, where Coal
19 or Coke is or may be Stored or Handled." Ordinance § 8.60.030(4) (emphasis added).

20 The Ordinance, moreover, applies *only* to the Terminal development project that is the
21 subject of the development agreement, (*see* D.E. 135 at 12 (citing D.E. 141-25 at 57:15-20)),
22 further demonstrating that the Ordinance regulates "permitted uses of the land … applicable to
23 development of the property" under Section 65866. Cal. Gov. Code § 65866. Consistent with the
24 Court's observation at the hearing on the City's motion to dismiss, "since there is … one facility
25 in Oakland to which this Ordinance applies, and there's only one facility in Oakland to which this
26 Ordinance was targeted," the Ordinance is properly considered "a regulation governing permitted
27 uses of the land" that is the subject of the DA. D.E. 72 (4/20/17 Hr'g Tr.) 25:8-13. Because the
28 Ordinance (as applied to OBOT via the Resolution) prevents OBOT from developing the "Project

1 Site" (DA § 1.1) as a coal and petcoke terminal—*i.e.*, a terminal handling coal or petcoke—the
2 Ordinance governs "permitted uses of the land" at the West Gateway and falls within the
3 categories of frozen regulations even under Intervenors' interpretation of Section 65866.
4 Intervenors maintain (Mot. at 7) that the Ordinance was not adopted "as a form of land use
5 classification" because "the City imposed the restrictions [on coal and petcoke] by amending the
6 City's Health and Safety Code." That overly formalistic position would permit cities to evade
7 their obligations—and destroy developers' vested rights—under development agreements simply
8 by codifying new regulations in certain titles as opposed to others. That cannot be right.
9 Accordingly, the California Supreme Court has stated that "development agreements … between a
10 developer and a local government limit the power of that government to apply *newly enacted*
11 *ordinances* to ongoing developments," without any limitation on the type of ordinance. *City of*
12 *West Hollywood v. Beverly Towers, Inc.*, 52 Cal. 3d 1184, 1193 n.6 (1991) (emphasis added). The
13 California Court of Appeal recognized in *Mammoth Lakes*, moreover, that "the scope of
14 development agreements *need not be limited to freezing land use rules, regulations, and policies*
15 but can include other promises between the municipality and the developer." *Mammoth Lakes*
16 *Land Acquisition, LLC v. Town of Mammoth Lakes*, 191 Cal. App. 4th 435, 444 (2010) (emphasis
17 added). This authority is consistent with the legislature's findings and purpose, as codified in the
18 Development Agreement statute: development agreements are intended to provide "[a]ssurance to
19 the applicant for a development project that upon approval of the project, the applicant may
20 proceed with the project in accordance with existing policies, rules and regulations"—without
21 regard to how those policies, rules and regulations are styled. Cal. Gov. Code § 65864(b).
22 Laws (ostensibly) directed to health and safety often govern permitted uses of land. *See,*
23 *e.g.*, *Stewart Enters., Inc. v. City of Oakland*, 248 Cal. App. 4th 410, 415, 423 (2016) (ordinance
24 proclaiming it was "necessary to . . . avoid a direct threat to the health, safety, and welfare of the
25 community" regulated "land use" by crematorium owner); *Kirby v. Cnty. of Fresno*, 242 Cal. App.
26 4th 940, 948, 950 (2015) (county ordinance with the "stated purpose and intent . . . to immediately
27 prohibit the large-scale cultivation of medical marijuana in order to preserve the public peace,
28 health, safety and general welfare of the citizens of Fresno County" adopted under county's

1 "power to regulate land use"). In fact, cities often regulate "appropriate uses of land" pursuant to
2 their police power to protect "health, safety and welfare." *City of Riverside v. Inland Empire*
3 *Patients Health*, 56 Cal. 4th 729, 738 (2013) (a City's "inherent local police power includes broad
4 authority to determine, *for purposes of the public health, safety, and welfare*, the *appropriate uses*
5 *of land* within a local jurisdiction's borders" (emphasis added)).

6 Accordingly, the fact that the City adopted the Ordinance and applied it to the Terminal as
7 a public health and safety regulation does not mean that the Ordinance does not regulate
8 "permitted uses of the land."

9 **B. <u>The Ordinance Conflicts With The Pre-Existing Regulatory Scheme</u>**

10 Intervenors also fail, as they must, to establish that the Ordinance was consistent with the
11 regulatory scheme in effect when the DA was adopted. As the City conceded at the hearing on its
12 motion to dismiss, "there [was] nothing in the existing City of Oakland regulations that would
13 have … precluded" storage or handling of coal and petcoke. D.E. 72 (4/20/17 Hr'g Tr.) 15:18-20.
14 Because storage and handling of coal and petcoke was not prohibited under the regulatory scheme
15 the DA froze, the Ordinance's prohibition of storage and handling of coal and petcoke plainly
16 conflicts with the pre-existing rules and regulations applicable to the Terminal, and thus may not
17 be applied to the Terminal via the Resolution absent the City's compliance with an exception such
18 as the health and safety exception of Section 3.4.2. The only authority Intervenors cite (Mot. at 8)
19 is a "dictionary published the year that California Legislature enacted the Development Agreement
20 Statute," which defines "conflict" as "to show antagonism or irreconcilability." A regulatory
21 scheme that allows development of a terminal that handles coal and petcoke is irreconcilable with
22 a regulatory scheme that prohibits development of a terminal that handles coal and petcoke.

23 Contrary to Intervenors' argument, the law governing permitted uses of the West Gateway
24 prior to the Ordinance *did* permit storage and handling of coal and petcoke. The DA was adopted
25 as law by the City on July 16, 2013. Oakland Ordinance 13183 (2013).[5] Consistent with
26 California Government Code Section 65865.2, which requires a development agreement to specify
27
28 [5] *Available at* https://oakland.legistar.com/LegislationDetail.aspx?ID=1427119&GUID=9122B74A-273F-4343-B954-F848BC668685&Options=&Search=.

the "permitted uses of the property," the DA provides that the "permitted uses" of the Project Site—*i.e.*, the land at the West Gateway—include the right to "develop[,] use and operate the Premises"[6] as a "ship-to rail terminal designed for the export of non-containerized bulk goods" with no limitation on the type of bulk goods. Specifically, Section 3.2 of the DA states that the "permitted uses" are those in "the City Approvals, the Subsequent Approvals, the [Lease Disposition and Development Agreement ("LDDA")], and the applicable Ground Lease for each phase." DA § 3.2. The "applicable Ground Lease" provides that OBOT's "Permitted Uses" include the right to "develop[,] use and operate the Premises solely for the purposes of development and operation of (a) the Bulk and Oversized Terminal." Ground Lease § 3.1.1. This terminal is, in turn, defined as "[a] ship-to-rail terminal designed for the export of *non-containerized bulk goods*," with no limitation as to specific bulk goods. *Id.* § 3.1.1, Ex. 3.1.[7]

The regulatory regime governing development and use of the West Gateway property plainly *permitted* use of that land to store and handle coal and petcoke; the Ordinance *prevented* use of the West Gateway to store and handle coal and petcoke. The Ordinance is thus in "conflict with those rules, regulations and policies applicable to the property," and the rules, regulations and policies "governing permitted uses of the land" in particular. Cal. Gov. Code § 65866.

[6] Intervenors concede that the DA "grant[ed] OBOT a right to develop the property as a 'ship-to-rail terminal designed for the export of non-containerized bulk goods," (Mot. at 8), but ignore that it also granted the right to *operate* such a terminal. *See, e.g.*, Ground Lease § 3.1.1.

[7] The DA's definition of "Project" reflects the same "Permitted Uses": "Project" is defined as "[t]he development, use and occupancy of the Private Improvements on the Project Site . . . as identified in Recital H and described in Exhibit D." DA § 1.1. Recital H refers to a "a marine terminal for bulk and oversized cargo . . . as further described in Exhibits D-1 and D-2," and Exhibit D-2 describes a "ship-to rail terminal designed for the export of non-containerized bulk goods," all subject to "the provisions of the applicable Ground Lease." *Id.* Recital H, Ex. D-2-2. Not one of these contractual provisions concerning "permitted uses" imposed any limitation on the type of bulk goods that may be handled. Further, the City intended that creation of the Gateway Industrial District would "facilitate the approved Army Base project," and "would permit the types of land use activities envisioned in the master plan for the project." TX0127.0002 (May 28, 2013 Agenda Report). In particular, the "activities permitted in the new [Gateway Industrial District] are consistent with the activities envisioned in the approved master plan for the project, including warehousing … maritime support …, and rail-related activities." TX0127.0003-0004; *see also* Oakland Planning Code § 17.101F.010 *et. seq.* & tbl 17.101F.01 ("General Warehousing, Storage and Distribution," "General Outdoor Storage," and "Regional Freight Transportation," including "Seaport" and "Rail Yard" allowed at the Gateway Industrial District).

Intervenors maintain (Mot. at 8) that "none of the City's land-use regulations … granted OBOT … express authority to handle or transport coal," but OBOT did not need "express authority" to store or handle coal or petcoke.[8] It had "express authority" to develop and operate a bulk goods terminal, which, by definition, includes a terminal that handles coal and petcoke—two bulk goods that make up about half of the bulk goods market. Trial Tr. 71:4-13. If development agreements were required to list every specific lawful activity and sub-activity, cities could circumvent the very vested rights these agreements were meant to confer unless the agreements were prohibitively long. Indeed, under Defendants' theory, the DA would have had to list thousands of bulk goods, *id.* 58:6-11, 282:22-23, and myriad specific activities that are required to run a terminal (or any facility). As the Court observed in its order on the City's motion to dismiss: "If the City wanted to restrict the developer to an approved list of commodities – or to foreclose the handling of a particular commodity such as coal – it should have included language to that effect in the Development Agreement." D.E. 71 at 2. It did not.

III. THE PARTIES' AGREEMENT TO FREEZE THE MUNICIPAL CODE AS IT APPLIED TO OBOT SUBJECT TO A HEALTH AND SAFETY EXCEPTION UNDER SECTION 3.4.2 IS ENTIRELY CONSISTENT WITH CALIFORNIA LAW AND THE DEVELOPMENT AGREEMENT STATUTE

Intervenors' argument rests on two faulty premises. *First*, contrary to Intervenors' contention, OBOT's vested right to develop and operate a bulk commodities terminal under the municipal code as it existed when the DA was adopted is entirely consistent with California law, including the development agreement statute. *Second*, Intervenors incorrectly maintain (Mot. at 2-3, 9-10)—in conflict with the City's position—that under Section 65866 "the City could freely apply the Ordinance against OBOT's project notwithstanding [Section 3.4.2 of] the development agreement," because construing Section 3.4.2 to apply would purportedly impair the City's police power. Intervenors have it backwards: Section 3.4.2 of the DA *preserved* the City's police power, and nothing in Section 65866 renders it inapplicable.

[8] Intervenors' argument incorrectly assumes that anything not "expressly authorized" by law is proscribed. Innumerable lawful activities are not expressly authorized by law or regulation.

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A. The DA Permissibly Gave OBOT A Vested Right To Develop A Bulk Commodities Terminal Under The Then-Existing Regulatory Scheme

As explained in OBOT's post-trial brief (D.E. 239 at 1-4), and as this Court previously ruled, the DA granted OBOT the right to develop and operate a bulk commodities terminal, "to the extent allowed under the municipal code as it existed when the Development Agreement was signed." D.E. 71 at 1; DA § 3.4.1 (the "City shall not impose or apply any City Regulations on the development of the Project Site that are adopted or modified by the City after the Adoption Date … that would … (i) be inconsistent or in conflict with the intent, purposes, terms standards or conditions of this Agreement; (ii) materially change, modify or reduce the permitted uses of the Project Site….").[9] The DA expressly states that "the Existing City Regulations shall govern the development of the Project," and "Existing City Regulations" is defined to include "[t]he City Regulations and City Policies *in effect as of the Adoption Date*." *Id.* §§ 1.1 (emphasis added), 3.4.

Indeed, both parties to the DA acknowledge they intended to vest OBOT's right to develop and operate the Terminal under the regulatory scheme as it existed when the DA was signed, subject only to certain express exceptions. TX0128.0004 (June 24, 2013 Agenda Report) ("The intent of the parties is to vest the current regulatory scheme, subject to the express exceptions included in the Development Agreement."). Even after the coal controversy arose, the City acknowledged that Section 3.4.2 provides a "narrow" and "limited" health and safety exception to OBOT's vested right. D.E. 238 at 3-4 (PFF 22-24 (citing Sept. 10, 2015 Agenda Report (Section 3.4.2 is a "narrow exception for certain later-enacted health and/or safety regulations," and a "limited" exception to the "vested rights")))[10]; D.E. 238 at 4 (PFF 25 (citing TX0031.0001 (Feb. 3, 2016 Agenda Report) (Section 3.4.2 is "narrow exception related to health and/or safety")));

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[9] *See also* TX0213.0003 (September 10, 2015 Agenda Report) (noting that "[t]he DA between the City and CCIG provides vested rights to CCIG to operate the … Terminal subject to the 'laws on the books' at the time the DA was approved, with limited exceptions"); TX0031.0002 (February 3, 2016 Agenda Report) (noting that the DA "vested rights to the Developer (CCIG) to operate the facility under the current set of laws at the time of adoption, with limited exceptions").

[10] The statement in the September 10 Agenda Report is particularly probative because it was made by Mark Wald, a primary drafter of the DA. D.E. 238 at 3-4 (PFF 22, 24 (citing Trial Tr. 43:8-16, TX0213.0003)). Moreover, the parties' post-agreement conduct is evidence of what the parties intended, *see, e.g.*, *City of Hope Nat. Med. Ctr. v. Genentech, Inc.* 43 Cal.4th 375, 394 (2008), and the City not only attempted to comply with Section 3.4.2 by hiring ESA to prepare a report, but also concluded that Section 3.4.2 applied in passing the Resolution. Resolution at 4.

1 DA § 3.4.2 ("The Parties agree that the foregoing exception to Developer's vested rights . . . .").
2 The City even acknowledged it was relying on an exception to OBOT's vested right in applying
3 the Ordinance to OBOT via the Resolution. Resolution at 4 ("[P]ursuant to DA Section 3.4.2, the
4 Coal-Coke Ordinance may be applied … as an exception to any vested right ….").

5 The parties' contractual agreement—that OBOT could develop and operate the Terminal
6 under the pre-existing regulatory scheme subject to express exceptions such as the "narrow" health
7 and safety exception in Section 3.4.2—is entirely consistent with Section 65866, as even the City
8 has conceded. *See e.g.*, TX0128.0004 (June 24, 2013 Agenda Report) ("the California
9 Government Code permits cities to enter into Development Agreements which vest the
10 Developer's rights to develop the subject project under the then current City regulatory scheme");
11 *id.* ("[a]s such, a Development Agreement may legally prohibit the imposition of a future
12 regulation adopted by a local initiative or local referendum").

13 **B. <u>Section 3.4.2 Does *Not* Limit the City's Ability to Impose New Regulations</u>**

14 Intervenors incorrectly argue (Mot. at 9) that "OBOT's reading of the agreement . . . would
15 render section 3.4.2 unenforceable under Section 65866 because it would limit the City's ability to
16 impose new regulations that do not conflict with the regulations in force when the development
17 agreement was entered" and thus impermissibly "circumscribe the City's police power authority."
18 That is wrong. Indeed, Intervenors appear to confuse the functions of Section 65866 of the
19 Government Code and Section 3.4.2 of the DA.

20 Section 65866 of the Government Code provides that vested rights under development
21 agreements prohibit the application of new regulations that "conflict with those rules, regulations
22 and policies applicable to the property" in force at the time the development agreement was
23 entered into. Cal. Gov. Code § 65866. As OBOT previously explained (D.E. 239 at 2-3),
24 development agreements grant these vested rights to provide certainty to the developer so it can
25 embark upon multi-year multi-million dollar, development of a property without risk that the city
26 will change the rules for the development in a manner that undermines it—such as by preventing a
27 bulk goods terminal under development from shipping key bulk goods and thereby jeopardizing
28 the entire development project. *See, e.g.*, Trial Tr. 284:20-285:10; *id.* 58:6-11.

Section 3.4.2 of the DA does not define the vested right or in any way attempt to memorialize Section 65866 of the Government Code. Rather, Section 3.4.2 is an *exception* to the vested right—*i.e.*, an exception to the prohibition against applying new regulations that would change the rules on the developer mid-stream. Section 3.4.2 of the DA thus does not "limit the City's ability to impose new regulations that do not conflict with regulations in force when the development agreement was entered" as Intervenors argue (Mot. at 9)—to the contrary, it expands the universe of new regulations that might (under certain circumstances) be applied to the development project even if they *do* conflict with the pre-DA regulatory regime.

In sum, the DA created a vested right freezing the regulatory regime applicable to the Terminal Project in a manner entirely consistent with Section 65866. The DA then separately memorialized a health and safety exception to that vested right consistent with the DA Statute—and California law more broadly—through Section 3.4.2.

C. Section 3.4.2 *Preserved* The City's Police Power

Indeed, Intervenors are wrong (Mot. at 9-10) that requiring the City to meet the requirements of DA Section 3.4.2 would contract away the City's police power. To the contrary, Section 3.4.2 confirms that the City has *retained* its police power, notwithstanding OBOT's vested rights under the DA. The City concedes this. *See* City Statement at 4-5 ("[T]he City did not contract away its police powers, and it properly determined that … section 3.4.2 … lawfully created an exception to OBOT's vested right to rely on pre-DA regulations.").

"[A] legislatively-approved development agreement gives both parties vested contractual rights," *Mammoth Lakes*, 191 Cal. App. 4th at 444, and it has long been established that "[t]he retrospective application of a statute [or local law] may be unconstitutional … if it deprives a person of a vested right." *Rosefield Packing Co. v. Super. Ct.*, 4 Cal. 2d 120, 123 (1935). At the same time, however, in order to reconcile the constitutional prohibition on impairment of vested rights by retroactive application of a local law with the rule that a City may not abdicate its police power, "[t]he vested rights doctrine in the land use context 'is subject to the qualification that … a vested right, while immune from divestment through ordinary police power regulations, may be impaired or revoked if the use authorized or conducted thereunder constitutes a menace to the

1 public health and safety or a public nuisance." *Davidson v. Cnty. of San Diego*, 49 Cal. App. 4th
2 639, 649 (1996); *see also Santa Margarita Area Residents v. San Luis Obispo Cnty.*, 84 Cal. App.
3 4th 221, 232 (2001).

4 "As *Davidson* explains, there are various bases for finding a vested right. First, under the
5 judicial vested-rights doctrine, a party acquires a vested right in a building permit if the party has
6 performed substantial work and incurred substantial liabilities in good faith reliance upon a permit
7 issued by the government. Second, certain state statutes confer vested rights based on
8 development agreements and vesting tentative maps. Finally, local ordinances may confer vested
9 rights earlier than available under the judicial doctrine." *Stewart*, 248 Cal. App. 4th at 418
10 (citations, internal quotations and interlineations omitted). Even though the vested right prevents
11 the application of new, inconsistent regulations, the City still retains its police power to apply
12 them if "substantial evidence" demonstrates that application of the new regulation is "sufficiently
13 necessary" to prevent "a menace to the public health and safety." *Id.* at 420-21, 423; *see also*
14 *Bouley v. Long Beach Mem'l Med. Ctr.*, 127 Cal. App. 4th 601, 611 (2005) ("vested rights are not
15 immutable; the state exercising its police power, may impair such rights when considered
16 reasonably necessary to protect the health, safety, morals and general welfare of the people");
17 *Plotkin v. Sajahtera, Inc.*, 106 Cal. App. 4th 953, 963 (2003) (same).

18 Section 3.4.2 expressly recognized the City's power to apply new, inconsistent regulations
19 even in the face of OBOT's vested right *if* the "City determines based on substantial evidence and
20 after a public hearing that a failure to do would place existing or future occupants or users of the
21 Project [or] adjacent neighbors . . . in a condition substantially dangerous to their health or safety."
22 DA § 3.4.2. Indeed, the City—the other party to the DA—confirmed that Section 3.4.2 preserved
23 its police power in its summary judgment motion, stating expressly that "[t]he DA preserved the
24 City's police power authority to apply subsequently-adopted regulations that prevent substantially
25 dangerous health and safety conditions." D.E. 145 at 3 (citing DA § 3.4.2).[11] Intervenors'
26 argument that the City abdicated its police power by agreeing to Section 3.4.2 is without merit.
27

28 [11] Intervenors, without limitation, "adopt[ed] the statement of facts …. Contained in the City of Oakland's … Memorandum in Support of its Motion for Summary Judgment." D.E. 156 at 1.

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Respectfully submitted,

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