SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

HAYWARD HALL OF JUSTICE

Oakland Bulk & Oversized Terminal, LLC, et al., Plaintiff, v. City of Oakland, Defendant.	Nos.: RG18930929, RG20062473 **STATEMENT OF DECISION**
City of Oakland, Counter-Plaintiff, v. Oakland Bulk & Oversized Terminal, LLC, et al., Counter-Defendant.	

The Court issued its proposed Statement of Decision on October 27, 2023, regarding the Parties' respective claims of liability for breach of contract.[1] (Cal. R. Ct. 3.1590(c)(1).) On November 13, 2023, in accordance with Rule of Court 3.1590(g), the Parties each filed written objections and comments to the proposed Statement of Decision, which the Court considered. This is the Court's final Statement of Decision as to liability. The Court will issue a proposed Statement of Decision as to damages once that phase of the trial is concluded.

I. INTRODUCTION

This case involves a contract dispute concerning the redevelopment of an old army base located South of the Bay Bridge toll plaza, along the San Francisco Bay, in the City of Oakland (City). After considering numerous potential projects, the City decided to use the land for a bulk commodity marine terminal (Project). The City entered into a series of agreements (including the December 4, 2012 Army Base Gateway Redevelopment Project Lease Disposition and Development Agreement (LDDA), the July 16, 2013 Development Agreement, and the February 16, 2016, Army Base Gateway Redevelopment Project Ground Lease for West Gateway (Ground Lease or Lease))[2] with Oakland Bulk and Oversized Terminal, LLC (OBOT)[3] to develop the Project.

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[1] "A statement of decision need not address all the legal and factual issues raised by the parties. Instead, it need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision." (*Muzquiz v. City of Emeryville* (2000) 79 Cal. App. 4th 1106, 1124–25.) Accordingly, the trial court need not respond "point by point" to the issues posed by the Parties requesting the statement of decision." (*Pannu v. Land Rover N. Am., Inc.* (2011) 191 Cal. App. 4th 1298, 1314 n.12.)

[2] The Court periodically refers to these documents collectively as the contracts or the agreements.

[3] OBOT is a wholly owned subsidiary of California Capital Investment Group (CCIG). Oakland Global Rail Enterprise LLC (OGRE) is owned by CCIG and is OBOT's subtenant. CCIG and Prologis formed a joint venture (Prologis CCIG Oakland Global) and the City selected that entity as the master developer for the Project. Because OBOT is the successor in interest to Prologis CCIG Oakland Global for the purposes of the Project, the Court refers to these entities collectively in this action as OBOT. OBOT and the City are collectively referred to as the Parties.

The City terminated the Ground Lease on November 22, 2018. OBOT then filed this action. OBOT primarily asserted that the City breached the Development Agreement and the Lease when it hindered or delayed the Project due to political and community concerns surrounding coal as a potential commodity to be shipped through the new terminal, and then failed to recognize OBOT's force majeure claim. OBOT also alleged the City breached the implied covenant of good faith and fair dealing. The City filed its own action claiming OBOT breached the Ground Lease when it did not complete the minimum project by the Initial Milestone Date. OBOT and the City each contend they incurred damages based on the breach of the other. (OBOT & OGRE's Am. Compl. ¶¶ 98–119, 125–33; City's Compl. ¶¶ 56–60.) The Court bifurcated the issue of liability and held a bench trial that began on July 10, 2023, and concluded on October 11, 2023.

During the trial there were surprisingly few factual discrepancies. Most of the relevant facts were memorialized in documents, and the Parties do not dispute the authenticity of those exhibits. While the Parties interpret the documents differently, in most instances the Court finds the documents speak for themselves. Except for those instances noted in this Statement of Decision, the Court found each of the witnesses, for OBOT and the City, earnest and credible.

The backdrop of this case involves serious concerns about coal and its impact on climate change, the environment, and human health. However, those legitimate concerns were not the *legal* issues this Court was called to decide. The narrow legal question in the first phase of this trial was which party, OBOT or the City, breached the agreements. For the reasons set forth in this Statement of Decision, the Court finds the City breached the Parties' contracts.

II. PROCEDURAL HISTORY

For nearly seven years, the Parties have been engaged in litigation regarding this Project. On December 7, 2016, OBOT filed an action in the U.S. District Court for the Northern District of California, *Oakland Bulk and Oversized Terminal, LLC v. City of Oakland*, No. 16-CV-07014-VC. As amended on June 14, 2017, OBOT's complaint in the federal case alleged the Oakland City Council's resolution—that coal operations at the West Gateway terminal would pose a substantial danger to the health and safety of people in Oakland—was a breach of the Development Agreement. (*See Oakland Bulk & Oversized Terminal, LLC v. City of Oakland* (2018) 321 F. Supp. 3d 986, 988.) On May 15, 2018, the federal court ruled for OBOT, concluding "the resolution adopted by the City Council applying the coal ordinance to this shipping facility constitutes a breach of the development agreement, it is invalid and the City may not rely on it to restrict operations there." (*Id.* at 989; *see also infra* Section III.A (restating entirety of opinion).) On June 13, 2018, the City filed a notice of appeal to the U.S. Court of Appeals for the Ninth Circuit.

Following the City's termination of the Ground Lease, OBOT filed this action in the Superior Court for the County of Alameda on December 4, 2018. In response, the City demurred, moved to strike, and filed a special motion to strike (anti-SLAPP motion) OBOT's complaint. Concerning the demurrer and motion to strike the complaint, the Court (Judge Jo-Lynne Q. Lee presiding) partly sustained the demurrer with leave to amend and partly granted the motion. (Order re Demurrer, May 16, 2019; Order re Motion to Strike, May 16, 2019.) As a result, the Court did not have an operative complaint before it to assess the merits of OBOT's causes of action, and the Court denied the anti-SLAPP motion without prejudice as premature. (Order, Apr. 28, 2019.) On May 20, 2019, the City appealed the order denying its anti-SLAPP motion. On May 26, 2020, while the City's appeal of this Court's order denying its anti-SLAPP motion was pending, the Ninth Circuit affirmed the Northern District's order. (*Oakland Bulk & Oversized Terminal, LLC v. City of Oakland* (9th Cir. 2020**)** 960 F.3d 603.) Several months later, the Court of Appeal for the First Appellate District affirmed this Court's orders and remanded

with instruction to deny the City's anti-SLAPP motion. (*Oakland Bulk & Oversized Terminal, LLC v. City of Oakland* (2020) 54 Cal. App. 5th 738.)

On May 28, 2020, the City filed a complaint against OBOT in this Court. The City asserted a cause of action for breach of contract and requested damages, declaratory relief, and specific performance. OBOT answered on June 26, 2020, generally denying the City's allegations and asserting several affirmative defenses.

On December 11, 2020, OBOT amended its complaint, dropping several causes of action. In its current form, the complaint asserts two causes of action for breach of contract, anticipatory breach of contract, and breach of the implied covenant of good faith and fair dealing. In addition to its request for damages, OBOT requested declaratory relief and specific performance. The City filed an answer, generally denying OBOT's allegations and asserting several affirmative defenses. Later that year, the City filed a motion for summary judgment.

On March 19, 2021, this Court (Judge Delbert C. Gee presiding) consolidated this action with the City's action against OBOT. On January 6, 2022, the Court denied the City's motion for summary judgment finding there were triable issues of material fact that precluded granting summary judgment.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. District Court's Decision in *Oakland Bulk & Oversized Terminal,* No. 16-CV-07014-VC

On May 15, 2018, following a three-day bench trial that began January 16, 2018, the United States District Court (Judge Vince Chhabria presiding) issued its findings of fact and conclusions of law (Federal Decision). The federal court determined the City breached the Development Agreement and entered judgment in favor of OBOT. Because nearly all the factual findings and legal conclusions contained in the Federal Decision are directly relevant to the current matter, this Court (with limited exceptions noted by

ellipses) quotes the entirety of the Federal Decision below, and expressly adopts those findings of fact and conclusions of law in this matter:[4]

FINDINGS OF FACT AND CONCLUSIONS OF LAW[5]

An old army base sits along the water in Oakland, next to the Bay Bridge toll plaza. In an effort to convert the old base into something useful to the community, the City of Oakland entered into an agreement with a developer to build and operate a bulk cargo shipping terminal. The idea was to allow commodities to be delivered to the terminal by train and then shipped out by boat for export to other countries.

The development agreement froze in place the local regulations that existed at the time the agreement was signed. This means, generally speaking, that any regulations adopted by Oakland thereafter would not apply to the shipping terminal. But the agreement contains an important exception: a regulation that postdates the development agreement can be applied to the shipping terminal if the City determines that the failure to apply the new regulation would pose a "substantial danger" to the health or safety of people in Oakland. The agreement specifies that any such determination by the City must be supported by "substantial evidence."

After the development agreement was signed, word spread that the developer was making plans to transport coal through the terminal. Many people in Oakland expressed concern about this. The Oakland City Council responded by adopting two measures: (i) an ordinance that bans coal operations at "bulk material facilities" in Oakland; and (ii) a resolution that applies the ordinance to this terminal, through a finding by the City Council that coal operations at the terminal would pose a substantial danger to the health and safety of people in Oakland.

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[4] (*See Doe v. Finke* (2022) 86 Cal. App. 5th 913, 921 ("The court considered the merits of the equal protection argument, stating that it 'conducted its own analysis' and then 'adopt[ed] the analysis and conclusion' of the ruling of July 15, 2020, in the Los Angeles County lawsuit.").)

[5] The Federal Decision is quoted with the original references, including trial transcript designations and exhibit numbers. Although the Parties used many of the same documents as exhibits in both the federal trial and the trial before this Court, and some of the same witnesses testified in both trials, the trial transcript designations and the exhibit numbers are different in each case.

In this Statement of Decision, other than what is quoted in the Federal Decision, all cited transcripts and exhibit numbers are from this trial. For each exhibit, the Court uses the exhibit and page number as marked by the Parties (generally at the bottom center of each page in bold) and not the page numbers printed in the original documents.

The developer responded by filing this lawsuit. Among other things, the suit alleges that the City lacked substantial evidence to conclude that the proposed coal operations at the terminal would pose a substantial health or safety danger to people in Oakland. This means, according to the developer, that the City breached the development agreement by applying the coal ban to the terminal.

The parties have a number of disputes about how to interpret and apply the provision in the development agreement that allows the City to protect its people from substantial health or safety dangers. With respect to many of these disputes, Oakland makes strong arguments. For example, Oakland is correct that the "substantial evidence" standard is deferential and gives policymakers significant latitude to determine whether a danger to health or safety is significant enough to justify applying a new regulation to the facility. Oakland is also right to say that it has a special obligation to protect vulnerable members of the community—people who, partly because of their income status and where they live, are more likely to experience adverse health effects from pollution. Furthermore, Oakland is probably right that local policymakers are not required to take it on faith that existing federal or state pollution standards will adequately protect people.

But on the primary question presented by this lawsuit, Oakland is wrong. The question, as both sides agree, is not whether any evidence that might possibly exist could support the City Council's decision to ban coal operations at the facility. Rather, the question is whether the record before the City Council when it made this decision contained substantial evidence that the proposed coal operations would pose a substantial health or safety danger. Even under the deferential standard of review in the development agreement, the record before the City Council does not contain enough evidence to support the City Council's conclusion that the proposed coal operations would pose a substantial danger to people in Oakland. In fact, the record is riddled with inaccuracies, major evidentiary gaps, erroneous assumptions, and faulty analyses, to the point that no reliable conclusion about health or safety dangers could be drawn from it. Perhaps a more thorough investigation could result in a lawful determination that coal operations may be restricted at the facility, but in this case, the record was inadequate. Because the resolution adopted by the City Council applying the coal ordinance to this shipping facility constitutes a breach of the development agreement, it is invalid and the City may not rely on it to restrict operations there.

I.

After the Oakland Army Base was closed in 1999, some of its land became the property of the City of Oakland. The City then embarked upon years of planning to redevelop it, which culminated in contractual agreements with a group of developers who were interested in building a bulk goods shipping terminal. A bulk goods shipping terminal is a

facility that can receive, store, handle, and ship goods that are typically transported in large quantities, such as cement, iron ore, coal, and petroleum coke (also known as petcoke or coke). In 2012, Oakland officially entered into a "Lease Disposition and Development Agreement" with the Oakland Bulk & Oversized Terminal ("OBOT") to develop this terminal. Lease Disposition and Development Agreement (Trial Exhibit ("Ex.") 65). In July 2013, the City and OBOT entered into a "Development Agreement," which further established and elaborated OBOT's rights to build a bulk goods terminal on this property. Development Agreement (Ex. 584). (Technically, both agreements were signed by a legal predecessor of OBOT, but OBOT has assumed all of the relevant rights and obligations under the agreements, so for all relevant purposes, it is effectively the contracting party.) Since then, OBOT has contracted with a company named Terminal Logistics Solutions to design and manage the terminal, although OBOT remains the landlord. Collectively, OBOT, Terminal Logistics Solutions, and their partners are considered the project developers. "OBOT" is used to refer to both the company and the bulk goods terminal being planned.

At this stage, the most detailed description of OBOT's operations is contained in its "basis of design." The basis of design is a set of documents that the project developers gave the City in September 2015. These documents describe, in general terms, how the terminal will operate, the permits the developers will seek, and the rules and regulations the developers believe they will have to follow. The basis of design is no more than a basic framework for the project, with the details yet to be filled in. It reflects the design process at 8 to 10 percent completion, meaning that approximately 90 percent of the pre-construction process remains, including further design and permitting. Basis of Design, Volume 1, July 2015 Presentation (Ex. 1238.0005); May 16, 2016 OBOT Response to City Questions at 2 (Ex. 166.0002); Trial Transcript ("Tr.") 59:10-60:4, 61:15-24 (Tagami).

The basis of design lists goods that could be shipped through the terminal but does not specify which of these goods the developers will actually ship. Two of the listed commodities are coal and coke, and it is widely understood that they are intended to be the primary goods to be shipped. Although OBOT continues to say it is considering other commodities, news articles have reported that Terminal Logistics Solutions has been negotiating the transport of coal from Utah. ESA Report at 2-3 to 2-4 (Ex. 14.0024-0025); May 16, 2016 OBOT Response to City Questions at 1-2 (Ex. 166.0001-0002); Oct. 6, 2015 OBOT Response to City Questions (Ex. 149.0001). Moreover, Terminal Logistics Solutions, which was formed to operate bulk terminals like OBOT, is a wholly owned subsidiary of a natural resources company named Bowie Resource Partners that primarily owns coal mines in Utah.

According to the basis of design, the developers are planning for roughly 5 million metric tons of coal and/or coke to pass through the terminal each year. Both commodities would be brought to Oakland from other parts of the country. Basis of Design, Volume 1, July 2015 Presentation (Ex. 1238.0011); June 23, 2016 Agenda Report at 8-9 (Ex. 135.0008-0009). While the Port of Oakland, which is adjacent to the former army base, ships many different kinds of goods, it does not currently ship coal or have a bulk coal facility. Therefore, OBOT would be the first coal shipping facility of its kind in Oakland. June 23, 2016 Agenda Report at 4 (Ex. 135.0004). For the purposes of this dispute, the parties have not meaningfully distinguished between coal and coke, focusing almost exclusively on coal. Accordingly, for ease of reference, this ruling describes OBOT's proposed operations as "coal operations" and uses the word "coal" as shorthand to refer to both commodities.

The proposed coal operations can be broken down into three phases. The first is the "transport" phase. The coal will be mined in western states, such as Wyoming and Utah, and then travel via interstate rail lines to the terminal. These rail lines will likely be operated by Union Pacific and Burlington Northern Santa Fe, which are known as mainline or long-haul rail carriers. ESA Report at 2-4 to 2-5, 5-1 (Ex. 14.0025-0026, 0070).

The second phase is "staging." Once the trains reach the rail yard at the Port of Oakland, they will be segmented. For instance, a 104-car train may be divided into four 26-car trains. At that point, the rail car segments will be taken across a dedicated portion of rail track, called a rail spur, to "dumper pits" on the property of the OBOT terminal. ESA Report at 2-4, 5-1, 5-10, 5-11 (Ex. 14.0025, 0070, 0079, 0080); Tr. 189:22-190:7 (Evans).

The third phase is "terminal operations." In this phase, the cars will be pulled over the dumper pits and their bottoms will open up, unloading the coal onto an underground conveyance system. The conveyance system will move the coal into storage in enclosed buildings, and later, onto ships that will carry the coal overseas. ESA Report at 2-9, 5-1 (Ex. 14.0030, 0070); Tr. 275:22-276:14 (McClure).

In response to broader concerns about climate change and the environment, the City Council adopted a resolution expressing Oakland's opposition to transporting fossil fuels through the city in mid-2014. Resolution No. 85054 (Myre Decl. ISO OBOT's Mot. for Summ. J. Ex. 62, Dkt. No. 141-62). Soon thereafter, word began to spread about the developers' plans to ship coal through the bulk goods terminal, which generated significant public concern in Oakland. In September 2015 and May 2016, the City Council held public hearings to receive testimony about the health and safety effects of storing, handling, and transporting coal through Oakland. Community members, organizations, and stakeholders from across the Bay Area testified and submitted written comments.

The City Council asked its staff to evaluate the submissions to determine what actions the City Council should take, if any. As a part of this undertaking, the City Council authorized the City Administrator to hire Environmental Science Associates ("ESA"), an outside consultant, to analyze the health and safety effects of transporting coal through OBOT.

The City's focus on health and safety was prompted at least in part by the language of the development agreement. In the agreement, the City committed to limiting its ability to impose new regulations on OBOT. With a few exceptions, the agreement freezes in place the regulations that existed when the agreement was signed and precludes the application of regulations adopted after the signing. However, one exception in the agreement allows the City to apply new regulations to the project if the City makes certain findings about the project's impact on health or safety.

ESA produced its report on June 23, 2016. The report summarized the existing public record before the City Council and purported to estimate the environmental impact of the proposed coal operations. A handful of other reports in the record also summarized the public comments and offered opinions on the health and safety question. For instance, one was prepared by Dr. Zoe Chafe for City Councilmember Dan Kalb, and another was prepared and sent to the City Council by a group of public health professionals called the "Public Health Advisory Panel." Environmental organizations, such as the Sierra Club, also submitted comments.

Based in large part on the ESA report, as well as the public testimony and comments, the City Administrator recommended that the City Council enact an ordinance prohibiting the storage and handling of coal at bulk goods facilities in Oakland. It is undisputed that no such facility currently exists in Oakland, and only one such facility has been contemplated—OBOT. But the City appeared to operate under the assumption that this new ordinance could not automatically apply to the OBOT facility because of the restrictions in the development agreement. So the City Administrator also recommended that the City adopt a resolution that would apply the ordinance to OBOT on the grounds that it would be "necessary to prevent conditions substantially dangerous to the health and/or safety of existing and/or future occupants or users of the Project and Adjacent Neighbors." These recommendations were contained in an Agenda Report, which attached drafts of the proposed ordinance and resolution, the ESA report, and other comments, and was transmitted to the City Council on Friday, June 24, 2016. June 23, 2016 Agenda Report at 8 (Ex. 135.0008). On Monday, June 27, 2016, the City Council held a public hearing, at which it approved the proposed resolution and ordinance. (Under state law, city councils generally must read and vote on new ordinances, but not resolutions, twice. So while the ordinance in this case was initially approved by the City Council on June 27, it officially became law after the City Council's second, pro forma vote

adopting it on July 19.) Ordinance No. 13385 (Ex. 4); Resolution No. 86234 (Myre Decl. ISO OBOT's Mot. for Summ. J. Ex. 50, Dkt. No. 141-50).

In response, OBOT filed this lawsuit. OBOT asserts that the City breached the development agreement by applying this new coal ordinance to OBOT, because the City Council failed to garner "substantial evidence" that transporting coal through the terminal would present a "substantial danger" to people in Oakland. OBOT also argues that the ordinance violates the Commerce Clause of the U.S. Constitution and is preempted by a variety of federal statutes: the Interstate Commerce Commission Termination Act, the Hazardous Materials Transportation Act, and the Shipping Act of 1984.

Shortly after the lawsuit was filed, the Sierra Club and San Francisco Baykeeper, two environmental advocacy groups, requested permission to intervene to help the City defend the ordinance. The organizations argued that they would bring their specialized expertise—in environmental law and the health and safety impacts of coal—to the case. The Court allowed the Sierra Club and San Francisco Baykeeper to intervene in the lawsuit, but limited the scope of their participation. Specifically, the Court ruled that these organizations could assist the City in defending its law, but that they could not bring counterclaims or cross-claims, or prevent the case from being dismissed pursuant to a settlement agreement between OBOT and the City. Mot. to Intervene (Dkt. No. 28); Order Granting Mot. to Intervene & Denying Mots. to Dismiss (Dkt. No. 71).

Both sides filed motions for summary judgment on all of the claims brought by OBOT. With respect to OBOT's breach of contract claim based on the development agreement, the Court denied both sides' motions, concluding that a bench trial was necessary to properly assess the evidence in the record before the City Council. The Court deferred ruling on OBOT's constitutional and federal preemption claims, since it would be unnecessary to adjudicate those potentially more weighty questions if the case could be resolved on the breach of contract claim. The Court then held a bench trial, at which both sides presented the testimony of the key people involved in the project and in the creation of the record before the City Council, as well as expert testimony and documentary evidence.

II.

For all the reasons discussed in this section, the record before the City Council does not contain substantial evidence that OBOT's proposed operations would pose a substantial danger to the health or safety of people in Oakland.

A.

As a general matter, development agreements are contracts between local governments and developers that freeze existing zoning and land use regulations into place. These agreements are intended to provide developers with a measure of certainty that new and unexpected government regulations will not stymie their projects, particularly when the projects require years of investment, government approvals, and construction. Consistent with this general approach, the agreement between the City and OBOT includes a provision that prevents the City from imposing new regulations on the terminal project after the date on which the City signed and adopted the agreement. Development Agreement § 3.4.1 (Ex. 584.0022-0023); *see Save Tara v. City of W. Hollywood*, 45 Cal. 4th 116, 138, 84 Cal.Rptr.3d 614, 194 P.3d 344 (2008); *Santa Margarita Area Residents Together v. San Luis Obispo Cty.*, 84 Cal. App. 4th 221, 226-27, 100 Cal.Rptr.2d 740 (2000).

But there are a few exceptions, one of which is section 3.4.2 of the agreement. Section 3.4.2 allows the City to apply a new regulation to the project if the City has "substantial evidence" that failure to apply the regulation would create a "substantial danger" to the health or safety of current or future users, occupants, or neighbors of the project. Specifically, section 3.4.2 of the development agreement states, in relevant part:

> Notwithstanding any other provision of this Agreement to the contrary, City shall have the right to apply City Regulations adopted by City after the Adoption Date, if such application
>
> (a) is otherwise permissible pursuant to Laws (other than the Development Agreement Legislation), and
>
> (b) 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.

Development Agreement § 3.4.2 (Ex. 584.0023).

There is a common understanding in the law of the meaning of the words "substantial evidence," and there is no indication that Oakland and OBOT intended a different meaning. "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," so long as it is "reasonable in nature, credible, and of solid value." *City of South San Francisco v. Workers' Comp. Appeals Board*, 20 Cal. App. 5th 881, 896, 229 Cal.Rptr.3d 518 (2018) (quoting *Braewood Convalescent*

Hospital v. Workers' Comp. Appeals Board, 34 Cal. 3d 159, 164, 193 Cal.RpTr. 157, 666 P.2d 14 (1983)). The "substantial evidence" standard is less rigorous than the evidentiary standard that governs civil trials, namely, the "preponderance of the evidence" standard, which requires juries to inquire whether the evidence makes it more likely than not that something happened. In other words, as applied to this case, the development agreement allows the City to apply a new law to the terminal even if the evidence suggests there is less than a 50 percent chance that the law is necessary to prevent a substantial danger to people in Oakland. This standard is deferential to the City. Even if the Court believed the proposed coal operations would not pose a health or safety danger, the Court would be required to uphold the decision to apply the new regulation to the facility as long as the record before the City Council contained reasonable and credible evidence to support the City Council's conclusion . . . .

It bears emphasis that notwithstanding the deferential standard of judicial review, under the agreement, the City Council's decision to ban coal at the facility may only be justified on the basis of evidence that was before the City Council at the time the decision was made. The City Council's record includes the oral and written testimony received at the public hearings, the comments submitted to the City Council by community members, the reports commissioned by public officials, and any other documents the City Council considered in connection with the ordinance before its passage. The basis of design for the terminal is also part of the record. When the City Council was considering the new law, the basis of design was the single most comprehensive description of OBOT's plans available, although OBOT supplemented it with various materials during the legislative process.

During the trial, both sides presented evidence that was not in the record before the City Council. For instance, email exchanges between people working on the ESA report were not part of the record before the City Council but were admitted at trial. This type of evidence is relevant to the Court's ruling, to a limited extent, because it sheds light on the adequacy of the evidence that was actually before the City Council. In other words, the non-record evidence admitted at trial can inform the Court's understanding of whether the record before the City contained substantial evidence that the proposed coal operations would pose a substantial danger to health or safety. In the discussion that follows, the term "record" is used to describe only the evidence before the City Council when it enacted the ordinance.

B.

Air pollution was one of the key concerns behind the ordinance. The most significant parts of the record before the City Council focus on whether OBOT's operations would diminish air quality in Oakland and thereby endanger human health. ESA used the

evidence from the record to estimate emissions for the project, which were then reprinted in the City Administrator's June 23, 2016 report recommending that the City Council pass the ordinance and apply it to OBOT. June 23, 2016 Agenda Report at 12 (Ex. 135.0012). ESA's estimates, however, were almost completely unreliable.

Background on Emissions

The emissions at issue are particulate matter emissions. Particulate matter is an air pollutant consisting of a mixture of fine particles. It can include liquid droplets, chemicals, dust, metals, and other elements emitted from cars, factories, fires, and other activities, that become suspended in the air. The U.S. Environmental Protection Agency tracks two kinds of particulate matter—particulate matter 2.5 and particulate matter 10. Particulate matter 2.5, also known as PM 2.5, is made up of particles in the air that are 2.5 micrometers or less in diameter. That is the equivalent of 0.0001 inch or less in diameter, which is less than the thickness of a human hair. Particulate matter 10, also known as PM 10, is comprised of particles in the air that are between 2.5 and 10 micrometers in diameter. Typically, the smaller the particles, the deeper they can go into the human lungs and the easier it is for them to enter the bloodstream. ESA Report at 4-5 (Ex. 14.0062).

The most significant particulate matter emissions are expected from fugitive coal dust. Fugitive coal dust is created when pieces of coal jostle against each other, eroding the coal into fine particles. When air flows past these particles, they can become suspended in the air as fine particulate matter. These particles can be emitted during any activity that involves the movement of coal, including when coal is carried by rail car, unloaded from a train, moved around a bulk facility, or conveyed onto a ship. These kinds of emissions can also result from wind blowing over coal piles and producing coal dust that becomes suspended in the air. ESA Report at 5-1 (Ex. 14.0070).

ESA estimated emissions in Oakland from each of the three stages of OBOT's operations and concluded that overall PM 2.5 emissions from the operations would be 21 tons per year, or 115 pounds per day. ESA believed that the bulk of these emissions would result from the staging phase—when the rail cars would be disassembled at the Port of Oakland's railyard and taken across the terminal's special rail spur to the terminal itself. Specifically, ESA estimated PM 2.5 emissions of 6 tons per year from the initial rail transport, 11.7 tons per year from the staging, and 2.7 tons per year from the operations at the terminal. These emissions estimates are summarized in Table 5-7 of the ESA report, which was reprinted in the June 23, 2016 Agenda Report provided to the City Council. (As the City explained at trial, the subtotal for staging of 11.7 tons per year was incorrectly printed as 18 tons in the ESA report, although the overall totals were added up correctly.) ESA also estimated the PM 10 emissions that would result from each phase of the

operations. In large part, however, the discussion about emissions in the record and at trial focused on PM 2.5, likely because of the heightened health concerns associated with finer particulate matter. Accordingly, the discussion below focuses on PM 2.5—although the methodological mistakes described apply to the calculations for both kinds of emissions. ESA Report at 5-17 (Ex. 14.0086); June 23, 2016 Agenda Report at 12 (Ex. 135.0012).

State emissions standards put ESA's numbers in context. These standards, which are often referred to as the "thresholds of significance," are used to monitor compliance with the California Environmental Quality Act. For PM 2.5, the annual threshold is 10 tons of emissions per year for a given project, and the daily threshold is 54 pounds of emissions per day. These thresholds reflect the emissions levels that California has determined would result in a significant and adverse impact on air quality from a particular project. BAAQMD May 2017 CEQA Guidelines at 2-1 to 2-2 (Long Decl. ISO City's Mot. for Summ. J. Ex. 68, Dkt. No. 166-11 at 20-21). Regional agencies in charge of air quality monitoring use these thresholds in their oversight of emissions from development projects and commercial operations in their areas. For instance, the Bay Area Air Quality Management District (the "Air District") regulates air pollution in the Bay Area to ensure compliance with these standards. Typically, the Air District examines whether a project's estimated emissions will exceed the thresholds of significance to decide whether to require the developer to take measures to mitigate the emissions. BAAQMD May 2017 CEQA Guidelines at 1-6 (Long Decl. ISO City's Mot. for Summ. J. Ex. 68, Dkt. No. 166-11 at 17); Tr. 322:6-18, 333:24-334:22 (Chinkin). When recommending that the City Council enact the ordinance, the City Administrator pointed to the fact that ESA estimated that OBOT's emissions would exceed these state standards as evidence that the terminal would pose a substantial health danger.

Incidentally, ESA did not provide separate emissions estimates for coke, simply saying that it expected emissions to be similar for both commodities. This implied that ESA's estimates would remain largely the same as long as the total throughput of coal and coke remained 5 million metric tons. ESA Report at 5-18 to 5-19 (Ex. 14.0087-0088); Tr. 177:25-178:22 (Evans).

Transport and Staging: Covers and Surfactants

The first major problem with the emissions estimates for the transport and staging phases is that ESA assumed OBOT would take no mitigation measures during those parts of the operations. As explained in further detail below, while ESA offered rough estimates of what "controlled" emissions could look like, its analysis and final emissions estimates in Table 5-7 disregarded at least two critical mitigation measures that the developers committed to using—rail car covers and surfactants. This mistake tainted the record

before the City Council. Not only were the estimates in Table 5-7 the grounds for ESA's conclusions about OBOT's dangers, but they were also an important part of the City Administrator's recommendation that the City Council enact the coal ban. June 23, 2016 Agenda Report at 12 (Ex. 135.0012). For this reason, the emissions estimates in Table 5-7 were the focal point of the debate at trial.

To begin, the City did not meaningfully explore whether rail car covers could be used to mitigate fugitive coal dust emissions, and if so, what their impact would be. The terminal operator, Terminal Logistics Solutions, has committed to requiring any rail cars transporting coal to the terminal to use covers, made by certain identified manufacturers, such as EcoFab, or any other manufacturer willing to provide them. Oct. 6, 2015 OBOT Response to City Questions (Ex. 149.0008). Despite the developers' commitment, ESA's inquiry into the issue extended only as far as learning that these kinds of covers have not yet been used for coal cars in the United States. Unable to find additional information about how well these covers would work for coal cars, ESA simply assumed they would not be used. ESA Report at 2-11 to 2-13 (Ex. 14.0032-0034). This was a big mistake. The lack of existing data about the effectiveness of a new technology like rail car covers is not enough of a reason to assume them away, particularly when the developers have committed to using them.

ESA emphasized that there are no existing rules or regulations that would require the coal operations to use covers. Other commenters, and later, the City, echoed this point. But this simply begs the question. ESA Report at 2-13 (Ex. 14.0034). The project developers submit that they are willing to obligate themselves to accept only coal that is carried to the terminal on covered rail cars. That is, OBOT could, and seemingly would, contractually require the terminal operator, coal supplier, or rail carrier to use covers as a condition of doing business. This would address any concerns about limits on local governmental authority to impose constraints on the coal or rail operations. Oct. 6, 2015 OBOT Response to City Questions (Ex. 149.0008-0009, 0045-0046). And it appears that after the ordinance was passed, OBOT did just that, requiring the terminal operator to use covered rail cars as part of its lease agreement. Tr. 65:24-66:11 (Tagami).

Alternatively, the Air District in the Bay Area could require OBOT to mitigate emissions by using coal covers. As OBOT points out, the South Coast Air Quality Management District recently adopted a rule requiring covers. The rule requires facilities that store, handle, and transport coal and coke to cover vehicles carrying these goods before they leave the facilities. The rule also specifies the kinds of covers that are acceptable, allowing alternatives only if they are capable of preventing fugitive particulate matter emissions. South Coast Air Quality Management District Rule 1158(d) (Ex. 448.0004-0008). Not only

could the Air District in the Bay Area require the use of covers as a condition of issuing a permit to operate, but it could pass similar regulations that would apply more generally.

The City also asserts that its lawmakers could reasonably have concluded covers would be dangerous, given the public comments expressing concern that covered coal could be prone to spontaneous combustion. Tr. 188:22-189:10 (Evans); ESA Report at 5-5 (Ex. 14.0074); Chafe Report at 70 (Ex. 961.0072); Public Health Advisory Panel Report at 25 (Ex. 960.0035). But this was nothing more than generalized speculation, since the record before the City Council did not contain any actual, specific evidence about the danger of covers. In fact, Steve Radis, ESA's subcontractor for safety issues, told ESA that there was no data to support the idea that using covers on rail cars would increase the risk of coal fires or spontaneous combustion. June 21, 2016 Radis Email to Barringhaus (Ex. 58); Tr. 126:14-127:19 (Evans). And the Air District's Director of Planning testified before the City Council in September 2015 that the City should require covers on OBOT's coal cars (as well as its conveyors, storage, and other operations), suggesting their viability. Sept. 21, 2015 City Council Public Hearing Transcript at 160 (Myre Decl. ISO OBOT's Mot. for Summ. J. Ex. 29, Dkt. No. 141-29 at 5).

The City also failed to meaningfully consider how chemicals could be used to suppress coal dust emissions. Certain chemicals, called surfactants or dust suppressants, can be sprayed on a coal pile to create a crust on top of the coal. The crust can help keep the coal intact while it travels in an uncovered rail car or while it is stored as an uncovered pile. This decreases the amount of fugitive coal dust that a coal pile would otherwise create. Because surfactants are another potential mitigation measure that OBOT could be required to use—and one that OBOT itself proposes using—they should have factored into the City's analysis of the project's health dangers. South Coast Air Quality Management District Rule 1158 (d)(2)-(4) (Ex. 453.0005); Oct. 6, 2015 OBOT Response to City Questions (Ex. 149.0008, 0045-0046, 0049-0050); Tr. 277:21-278:2 (McClure); ESA Report at 2-10, 2-14 to 2-18 (14.0031, 0036-0039).

ESA excluded surfactants from its main emissions estimates because it claimed it did not have objective scientific data about how well surfactants would reduce coal dust emissions from rail cars. But instead of attempting to estimate their effectiveness, ESA simply decided that surfactants would not be effective and did not account for them in its final emissions estimates. ESA Report at 2-17 to 2-18, 5-17 (Ex. 14.0038-0039, 0086). This again was a big mistake. Because the project developers had told the City they would require surfactants to be used on the coal arriving at the terminal, ESA should have made a meaningful effort to incorporate them in its final estimates rather than deeming them irrelevant.

ESA sought to justify its decision to disregard surfactants by asserting that surfactants would dissipate during the rail journey. Because surfactants can wear off, ESA concluded that fugitive coal dust emissions would resume unabated well before the trains reached the terminal. ESA Report at 5-5 (Ex. 14.0074). But this fails to acknowledge the ability of the coal supplier, rail carrier, or terminal operator to require surfactants to be reapplied during the journey. Surfactants could also be reapplied to the coal during the staging phase, just before the rail cars are broken up and taken to the terminal for unloading. Thus, the fact that surfactants can wear off does not justify omitting them from the analysis.

The City reprises its argument that surfactants were excluded because no laws require the coal supplier, terminal developer, or terminal operator to use them. June 23, 2016 Agenda Report at 10-11 (Ex. 135.0010-0011); *see also* ESA Report at 2-14 (Ex. 14.0035). But again, the Air District or another agency could impose regulations or permitting conditions requiring OBOT to use surfactants. If this is not enough, OBOT has expressed a willingness to commit itself contractually to using surfactants—which presumably includes requiring the rail lines carrying coal to the terminal to use surfactants as a condition of doing business.

ESA attempted to reason around its decision to exclude controls by arguing that its emissions estimates were already conservative because they did not account for other kinds of air pollution that OBOT's operations could cause. For example, ESA's estimates did not account for re-suspended dust—that is, coal dust that would accumulate on rail tracks and other surfaces, and later, as a result of wind or other movement, become suspended in the air as particulate matter pollution. ESA Report at 2-17, 5-4 to 5-5, 5-12, 5-16 to 5-17 (Ex. 14.0038, 0073-0074, 0081, 0085-0086). ESA suggested, albeit indirectly, that these emissions would make the proposed coal operations substantially dangerous even if the developers used controls. This line of reasoning was reiterated by other comments in the public record and by the City's experts at trial. But the City cannot justify the failure to analyze OBOT's intended design, which includes controls, by pointing to other gaps in the record—particularly where the record provides no way of comparing the mitigating effects of covers and surfactants to the effects of these aggravators that ESA points to. Combating error with error is not the way to create a credible record.

ESA's final estimates thus wrongly assumed that emissions during transport and staging would be uncontrolled. ESA provided rough estimates of "controlled" emissions earlier in its report, where it assumed (without any meaningful analysis) an 85 percent reduction in emissions during the transport and staging phases (Tables 5-2 and 5-5). But these numbers were excluded from the final table (Table 5-7). Although these earlier tables suggested the dramatic reduction in emissions that controls might make possible, ESA,

and later, the City, gave them little, if any, weight. As explained earlier, the City Administrator reprinted Table 5-7 in the June 23, 2016 Agenda Report and concluded from it that the emissions from OBOT would pose a substantial danger to health and safety and that the City Council should pass the ordinance. As the City Administrator put it, "Per the table . . . the overall emissions from the OBOT project are expected to exceed both the daily and annual PM 10 and PM 2.5 City of Oakland CEQA Thresholds of Significance, which would be considered a significant unavoidable impact under CEQA and thus presumptively a substantially dangerous condition to health." June 23, 2016 Agenda Report at 12 (Ex. 135.0012); ESA Report at 5-6, 5-12, 5-17 (Ex. 14.0075, 0081, 0086); *see also* ESA Report at 5-15 to 5-19 (Ex. 14.0084-0088).

Therefore, given the record before it, the City Council was not even equipped to meaningfully guess how well these controls would mitigate emissions. This created a sizable gap in the record, and a major flaw in the City Council's ultimate conclusion that OBOT's emissions would pose a substantial health or safety danger.

Transport and Staging: Coal Type

The emissions estimates were further flawed because they resulted from a misapplication of federal guidance and mistaken assumptions about the type of coal to be transported to the terminal.

The guidance document ESA used to produce its emissions estimates was from the U.S. Environmental Protection Agency. Titled "AP-42," this document explains how to calculate emissions from different industrial activities and sources of pollution. ESA Report at 5-1 to 5-2 (Ex. 14.0070-0071); Tr. 172:6-25 (Evans); Tr. 351:12-352:6 (Chinkin); Tr. 536:10-537:2 (Sahu). There was a debate at trial about whether it was appropriate for ESA to use the AP-42 guidance, but in the end it doesn't matter, because even if using the AP-42 guidance was the best available approach, ESA did not select the appropriate inputs for it.

Of particular concern is ESA's choice of threshold friction velocity. Threshold friction velocity describes the minimum wind speed necessary for a collection of particles to begin moving. The lower the threshold friction velocity, the less wind is required to get the particles moving. Tr. 355:17-356:13 (Chinkin). The AP-42 guidance lists threshold friction velocities for six types of coal. ESA used the threshold friction velocity associated with "fine coal dust on concrete pad," which was 0.54 meters per second. However, OBOT's expert credibly and convincingly explained that this threshold friction velocity was too low a value to use for the coal that would travel by rail car from Utah to Oakland, because it reflected the wind speed necessary to begin moving an ultrafine pile of coal dust—the equivalent of coal dust that had been bulldozed and crushed under heavy equipment.

Tr. 358:10-361:11 (Chinkin); Muleski Study (Ex. 1085). This is not what would be carried on rail cars from mines in Wyoming and Utah to Oakland. The threshold friction velocity for an "uncrusted coal pile," which reflects emissions from a coal pile that is actively moving with pieces being added, removed, and replaced, would almost certainly have been a better fit. Tr. 361:12-362:16 (Chinkin); Axetell & Cowherd Study (Ex. 982). This type of coal is listed as having a threshold friction velocity of 1.12 meters per second. AP-42 Guidance Section 13.2.5—Industrial Wind Erosion at 13.2.5-5 (Ex. 435.0005).

Victoria Evans, the ESA project manager who oversaw the preparation of the report for the City, explained that ESA used the "fine coal dust on concrete pad" threshold friction velocity because it felt that would better capture jostling cars in motion, while the "uncrusted coal pile" threshold friction velocity better characterized stationary coal. Evans Decl. ISO City's Mot. for Summ. J. ¶ 7 (Dkt. No. 155 at 3-4). But OBOT's expert provided credible testimony, citing to the scientific studies underlying the AP-42 guidance, that the "uncrusted coal pile" coal type describes active, moving coal and more closely resembles the kind of coal that OBOT would handle.

This testimony was not meaningfully rebutted by the City's expert at trial. The City's expert responded by arguing, in large part, that the lower threshold friction velocity for "fine coal dust on a concrete pad" was justifiable because it compensated for other shortcomings in the AP-42 guidance. According to the City's expert, the threshold friction velocities listed for different coal types in the AP-42 guidance were not suited for estimating fine particulate matter emissions because they came from studies of larger particulate matter. Therefore, he said, even the threshold friction velocity for "fine coal dust on a concrete pad," which was the lowest one in the AP-42 guidance, was conservative. Tr. 538:1-539:25 (Sahu). But if the City's expert was correct about the AP-42 guidance being a poor fit for this case, perhaps the ESA report should not have estimated emissions using this guidance; at the very least, ESA should have described its shortcomings to the City Council. It would be difficult to conclude that ESA was justified in selecting an inapplicable coal type from inapplicable guidance simply because that coal type was the "least inapplicable" coal type from the inapplicable guidance, at least without an explanation in the record about why that would be appropriate.

OBOT's expert went on to estimate that the projected PM 2.5 emissions from staging would fall from 11.7 tons per year to 0.68 tons per year if the threshold friction velocity for "uncrusted coal pile" type coal were used. Tr. 365:12-366:2 (Chinkin); *see also* Chinkin Decl. ISO OBOT's Mot. for Summ. J. ¶ 28 (Dkt. No. 140 at 10). But even setting the expert's revised estimates aside (since they were not before the City Council when the ordinance was passed), ESA's decision to use "fine coal dust on concrete pad" for its emissions estimates was a significant flaw in the record.

Transport and Staging: Rate of Emission

Another major issue with the emissions estimates for transport and staging is that they assume the same amount of fugitive coal dust will be produced at each mile of the rail journey from the coal mines to the terminal. ESA estimated that 6 tons of PM 2.5 would be emitted each year during the Oakland segment of the rail trip by calculating total emissions over the approximately 700-mile rail journey and multiplying that by the fraction of rail track in Oakland. In calculating total emissions, ESA assumed that PM 2.5 emissions from the rail cars would be one pound per mile per car for the entire 700-plus mile journey (assuming no covers or surfactants). Tr. 177:18-24, 198:9-204:4 (Evans). But common sense suggests that even if no controls were used—indeed, especially if no controls were used—the train speed and ambient wind speed would affect how much coal dust would be emitted and become suspended in the air. Tr. 345:14-346:17 (Chinkin); Tr. 567:8-22 (Sahu). As a point of comparison, OBOT's expert estimated fugitive coal dust emissions would be no more than 2.5 tons per year in the Bay Area and 0.1 tons per year in West Oakland if train and wind speeds were taken into account, assuming no controls. Tr. 348:13-350:9 (Chinkin). Although the Court takes no view on the accuracy of the expert's estimates, they suggest that a more precise estimate of coal dust emissions is possible—and that the City could estimate these values in a meaningful way if it chose to.

Terminal Operations

ESA's emissions estimates for terminal operations also have serious problems. OBOT has said it will use (and more importantly, will likely be required to use) "best available control technology" for the operations at the terminal that follow the staging phase—namely, unloading, storing, and transferring the coal to ships. Best available control technology is the Air District's term for the most effective emissions controls that are both technologically feasible and cost effective, which the Air District can require a developer to use as a condition of receiving the permits it needs to begin construction and operation. BAAQMD Regulation 2, Rule 2 at 2-2-4 to 2-2-5, 2-2-11 (Long Decl. ISO City's Mot. for Summ. J. Ex. 60, Dkt. No. 166-3 at 5-6, 12). OBOT is already laying the groundwork for using this kind of technology. For instance, OBOT has proposed using bottom-release rail cars to unload the coal into underground dust collection systems, and then moving the coal across the facility using enclosed conveyance systems with dust control technology. According to ESA, all of these control measures would qualify as best available control technology. ESA Report at 5-12 to 5-14 (Ex. 14.0081-0083); Tr. 194:22-195:7 (Evans).

But the City appears to have ignored these controls. ESA's estimates for emissions from terminal operations are listed in Table 5-6 of its report. Despite Table 5-6's title, which says that it contains controlled emissions estimates, the underlying spreadsheet strongly

suggests that the table mistakenly contains uncontrolled emissions estimates. In the spreadsheet, the emissions estimates that are labeled "controlled" equal 1 percent of the emissions estimates labeled "uncontrolled," seemingly reflecting ESA's assumption that OBOT would use control technology that would be 99 percent effective in mitigating emissions. But, as OBOT's expert pointed out, the estimates labeled as "controlled" in the spreadsheet never made it into the final report. Instead, Table 5-6 presents the estimates labeled "uncontrolled" in the spreadsheet. And ESA used the numbers from Table 5-6 in its final table of emissions estimates from all three phases—that is, Table 5-7. ESA Report at 5-13, 5-17 (Ex. 14.0082, 0086); June 6, 2016 ESA Emissions Spreadsheet (Ex. 432.005); Tr. 135:11-136:12 (Evans); Tr. 367:12-372:16 (Chinkin).

Evans testified that the underlying spreadsheet, not the final report, is incorrect. According to Evans, ESA adjusted the inputs that were used to calculate emissions to account for controls. For instance, Evans says that ESA used reduced wind speeds to reflect OBOT's use of closed coal conveyance systems. (These inputs are not visible in the spreadsheet.) As a consequence, although the spreadsheet labels the numbers that were used in the final report as "uncontrolled," Evans says they are actually controlled numbers, and Table 5-6 was correctly titled. Tr. 194:10-196:14 (Evans); *see also* Evans Decl. ISO Opp. to Summ. J. ¶¶ 9-10 (Dkt. No. 155 at 4).

It's not obvious which side's story is correct. The spreadsheet with the underlying numbers does not list the inputs that were used, such as wind speed; nor does it explain how these numbers may have been modified to capture the effects of using best available control technology. The City, for its part, did not elicit an explanation from Evans (or others) to clarify this confusion.

Given the state of the record, OBOT's read of the data is more credible. Evans's explanation requires reading the "uncontrolled" section of the spreadsheet to reflect controlled emissions estimates, and the "controlled" section to reflect a further 99 percent reduction in emissions. Would this mean the 99 percent reduction in the "controlled" section was duplicative, doubly accounting for controls? Does this mean that other "uncontrolled" values in ESA spreadsheets also implicitly incorporated control technology? Although the record is not clear, OBOT's explanation of what happened is far more plausible.

Notably, ESA's estimates appear to be the only ones in the record before the City Council about emissions from terminal operations. Tr. 196:15-21 (Evans). Even if the numbers in the report are accurate, the ambiguity about how they were calculated suggests that the City Council probably couldn't have understood what they represented even if it had tried. If the numbers in Tables 5-6 and 5-7 are actually mislabeled, as appears to be the

case, the record is even more mangled. A 90 to 99 percent reduction in coal dust emissions would mean that ESA's estimated emissions from terminal operations would have been between 0.027 and 0.27 tons per year, not 2.7 tons per year. This is a dramatic difference, and the City Council did not have the chance to consider it.

The Air District's Authority

As the preceding discussion makes clear, an overarching problem with the record before the City Council is that it reflects no meaningful analysis of the Air District's role in mitigating the health and safety risks associated with the project. The ordinance, resolution, and underlying reports hardly mention the agency—even though it was clear that the Air District would require OBOT to obtain permits to operate and that the Air District could impose conditions to limit emissions from the project. Evans admitted that the ESA report did not even contemplate whether the project would pose a danger after the developers had secured the necessary permits from the Air District. Tr. 112:19-21, 235:22-236:24 (Evans). Nearly all the evidence before the City Council presumed OBOT would operate in a regulatory vacuum.

Although the Air District permitting process is complex and involves multiple approvals, two primary permits are relevant here. The first is the "authority to construct," a permit the Air District requires the developer to obtain before building or installing anything. The second is the "permit to operate," which the Air District requires the developer to obtain before starting to use the facility or equipment that was installed pursuant to the authority to construct. The Air District can, and typically will, impose conditions on both the authority to construct and the permit to operate. And the Air District will not issue the permit to operate if the developer does not comply with the conditions associated with the authority to construct. The Air District has a fair amount of latitude: it can impose almost any condition that it deems necessary to ensure compliance with its emissions limits and other regulations. BAAQMD Regulation 2, Rule 2 at 2-2-16, 2-2-18 (Long Decl. ISO City's Mot. for Summ. J. Ex. 60, Dkt. No. 166-3 at 17, 19).

Most significantly, the Air District could impose permitting conditions that would limit the amount of coal that could be processed at the terminal. ESA assumed the terminal would be shipping 5 million tons of coal per year. Other commenters assumed 10 million tons. But if that amount of coal would pollute the air as much as the City speculates, there is strong reason to believe the Air District would step in, and the City provides no reason to think otherwise. Limiting the magnitude of the coal operations would have a significant impact on emissions, even if the Air District did not directly regulate coal dust from the rail transport or staging phase. As explained earlier, the Air District could also require OBOT to limit emissions by using rail car covers, surfactants, and other controls. Tr. 344:4-23 (Chinkin). All of this is consistent with the evidence presented at trial that the Air

District had informed ESA that it could work with OBOT to reduce its emissions by 95 percent compared to an entirely uncontrolled operation. Tr. 112:23-114:21 (Evans); May 20, 2016 Evans Email (Ex. 53.0003).

But the record before the City Council makes only fleeting reference to the Air District's authority. For example, a footnote in the City Administrator's June 23, 2016 report gestured to proposed Air District regulations, but concluded in a cursory manner (and incorrectly) that the ESA report already accounted for any impact these new regulations might have. June 23, 2016 Agenda Report at 5 n.1 (Ex. 135.0005). More generally, there is no serious evaluation in the record of the broad scope of the Air District's regulatory power or the effect it would likely have on the proposed coal operations.

Paradoxically, the ordinance itself recognizes that the Air District's permitting process is meaningful, even though the City disregarded it in evaluating OBOT's proposed coal operations. As written, the ordinance exempts manufacturing facilities in Oakland that consume coal and coke on site as part of their production processes, so long as their consumption is consistent with their permits from the Air District. This narrow exemption seems to be aimed at protecting an iron foundry in Oakland that burns coke to make pipes and fittings. Ordinance No. 13385 § 8.60.040(C) (Ex. 4.0010); June 23, 2016 Agenda Report at 4 (Ex. 135.0004); ESA Report at 2-23 (Ex. 14.0044); *see also* City's Mot. for Summ. J. at 8 & n. 16 (Dkt. No. 145 at 20). The City does not explain how the Air District's permit power could have been a reason to exempt the iron foundry from the ordinance yet unworthy of consideration when it came to OBOT.

C.

Even if the emissions estimates could somehow be considered reliable despite the flaws discussed above, the record contains no meaningful assessment of how these emissions would actually affect air quality in Oakland.

Emissions are a measure of air pollution in terms of volume. In other words, an emissions estimate captures the quantity of a pollutant released into the air, typically in terms of pounds per day or tons per year. Air quality, on the other hand, is measured in terms of concentration. It captures the amount of pollutant in a given quantity of air. For particulate matter, air quality is measured in terms of micrograms per cubic meter. The two metrics are distinct, albeit related. Air pollutant concentrations are calculated using dispersion models that use emissions estimates as inputs. By combining emissions estimates with data about a given geographic area and pollution source, these models assess how the emissions from a particular source affect a region's air quality. Tr. 321:5-323:15 (Chinkin).

Take, for example, a smokestack at a coal power plant that emits a constant amount of particulate matter each day. As you might expect, a person living next to the smokestack breathes in a different amount of particulate matter each day than a person living one mile from the smokestack. The air quality one mile away depends on many different factors, including wind speed, weather patterns, and baseline pollution levels. The same quantity of emissions can yield very different measures of air quality in different places and at different times. Because air quality describes how much particulate matter is in the air in a particular place, it more accurately reflects how much pollution a person actually breathes in.

ESA originally proposed a two-part study of the air pollution from OBOT: the first phase would involve reviewing the comments the City had received, and the second phase would involve independently analyzing OBOT's anticipated emissions and their effects on air quality. ESA even proposed conducting dispersion modeling to estimate the concentration of air pollution. Evans, who led the ESA project, testified that ESA thought it would be useful and important to do this kind of modeling. But the City rejected this plan, asking ESA to skip the air quality modeling. Tr. 108:10-110:2 (Evans); Oakland-ESA Service Agreement (Ex. 62); Jan. 8, 2016 ESA Draft Scope of Work at 10 (Ex. 25.0011).

Lacking air quality models of their own, some reports in the record instead imported the findings of a study by Daniel Jaffe of the University of Washington. Jaffe's study described particulate matter emissions along a rail route in the Columbia River Gorge in the summer of 2014. Jaffe's team measured PM 2.5 concentrations in the air before and after freight and coal trains passed by. On average, the researchers found that PM 2.5 concentrations increased by 8.8 micrograms per cubic meter when a freight train passed and by 16.7 micrograms per cubic meter when a coal train passed. But these numbers were a poor substitute for actual air quality modeling for OBOT. Jaffe's findings reflected the wind speeds, weather patterns, and geographic features of the Columbia River Gorge, not Oakland. Moreover, the trains in the Gorge carried coal from the Powder River Basin of Wyoming and Montana. Powder River Basin coal is far dustier and likelier to emit particulate matter than western bituminous coal from Utah, making Jaffe's numbers largely inapposite to OBOT's operations. Nor did Jaffe's study model how controls, such as covers or surfactants, could affect emissions. Daniel A. Jaffe et al., *Diesel Particulate Matter and Coal Dust from Trains in the Columbia River Gorge, Washington State, USA*, 6 Atmospheric Pollution Research 946 (2015), https://doi.org/10.1016/j.apr.2015.04.004; Tr. 176:17-19, 179:12-180:5 (Evans).

Therefore, the numbers from the Jaffe study cannot be used as meaningful evidence of how OBOT's operations would impact the concentration of air pollutants in Oakland. Even though the differences between Jaffe's study and OBOT's operations were clear, the

ESA report, the public health professionals' report, the Chafe report, and other public comments all made the mistake of uncritically applying Jaffe's findings to evaluate the terminal. ESA Report at 2-14 to 2-15, 5-7 to 5-8 (Ex. 14.0035-0036, 0076-0077); Public Health Advisory Panel Report at 18-19 (Ex. 960.0028-0029); Chafe Report at 14 n.17, 32 n.102, 70-71 (Ex. 961.0016, 0034, 0072-0073); *see also* Tr. 229:10-232:11 (Evans). Jaffe's earlier 2014 study, which was cited by some commenters, was inapplicable for similar reasons. Daniel A. Jaffe et al., *Diesel Particulate Matter Emission Factors and Air Quality Implications from In-Service Rail in Washington State, USA*, 5 Atmospheric Pollution Research 344 (2014), https://doi.org/10.5094/APR.2014.040.

Nor does the City's invocation of national air quality standards compensate for its failure to do air quality modeling. Those standards, officially titled the National Ambient Air Quality Standards, are established by the U.S. Environmental Protection Agency and used to measure air quality on a regional basis across the country. If a region does not meet any one of these standards, it is considered "out of attainment." For instance, when this litigation began, the Bay Area was considered out of attainment in terms of the concentration of PM 2.5 in the air, although it was re-designated as "in attainment" in 2017. Tr. 329:2-330:16 (Chinkin). The standards are set at levels intended to protect public health. Tr. 396:17-397:17 (Maier); Tr. 603:5-25 (Moore). Although these standards could have provided a useful benchmark for the City to evaluate the danger from OBOT's emissions, the record provides no way for the City to make a meaningful comparison to them since it lacks any rigorous analysis of how OBOT would actually impact air quality in Oakland.

Despite the absence of any adequate air quality analysis, the City argues that OBOT would cause impermissible exceedances of the national standards. The record does not contain meaningful evidence to support this assertion. The concentration of a pollutant in the air is measured by dividing the amount of pollutant that passes through an air quality monitor by the total amount of air that goes through the monitor during a given time period. For PM 2.5, the annual standard is 12 micrograms per cubic meter, averaged over three years. This means the annual PM 2.5 concentration, averaged over the last three years, should not exceed 12 micrograms per cubic meter. The daily standard is 35 micrograms per cubic meter, averaged over three years. This means the daily PM 2.5 concentration, averaged over the last three years, should not exceed 35 micrograms per cubic meter, with seven days of exceedances allowed each year. The allowance for seven exceedances means that brief extreme weather events, like wildfires, do not put a region out of attainment. NAAQS Table (Chinkin Decl. ISO OBOT's Mot. for Summ. J. Ex. B, Dkt. No. 140 at 26-28); ESA Report at 4-2 to 4-3 (Ex. 14.0059-0060); Tr. 324:11-328:12 (Chinkin).

Not only did the City fail to meaningfully estimate how many exceedances OBOT would cause, the City did not appear to recognize that seven exceedances of the national standard for daily PM 2.5 concentration are allowed. ESA and other public commenters merely stated, in a generalized way, that OBOT would cause additional exceedances. ESA Report at 4-12, 5-9, 5-15 to 5-17 (Ex. 14.0069, 0078, 0084-0086); *see also* Public Health Advisory Panel Report at 18 (Ex. 960.0028). In light of the allowance for seven exceedances, a handful of additional exceedances caused by OBOT would not automatically lead to a violation of the national standards. Moreover, the record does not appear to acknowledge the Air District's rules specifying that the agency will not grant a permit to construct for a project that will significantly increase emissions from a federally monitored pollutant without first finding that the project will not contribute to an exceedance of the national standard for that pollutant. BAAQMD Regulation 2, Rule 2 at 2-2-12 to 2-2-13 (Long Decl. ISO City's Mot. for Summ. J. Ex. 60, Dkt. No. 166-3 at 13-14).

D.

The City argues that none of this matters because no amount of exposure to particulate matter is safe, especially for the vulnerable residents of West Oakland. But the City's contract with OBOT sets the bar higher. Recall that section 3.4.2 of the development agreement says that before applying a new regulation to OBOT, the City must determine, based on substantial evidence, that existing or future occupants or users of the project or adjacent neighbors would face a condition *substantially* dangerous to their health or safety without the regulation. When the City asserts that any increase in exposure to particulate matter is enough to meet this standard, it reads the word "substantial" out of the contract.

Deciding what is "substantial" requires context. To understand whether something poses a "substantial" danger, you need a baseline against which to compare the danger. Defining "substantial" as "[o]f considerable importance, size, or worth," the Oxford English Dictionary gives the following example of its usage: "a substantial amount of cash." *Substantial*, Oxford English Dictionary, https://en.oxforddictionaries.com/definition/substantial [https://perma.cc/XAS2-BC7C]. But what is a substantial amount of cash? Without context, it's impossible to tell . . . .

Of course, the City was not limited to using federal and state standards as context. Oakland's assertions that these existing standards are inadequate to protect the health of its residents may be legitimate (notwithstanding the record's failure to provide meaningful evidence of that). And presumably the City is correct that adverse health effects can sometimes result from pollution levels lower than the national and state standards. Tr. 586:24-587:5, 589:4-590:12 (Moore); Chafe Report at 19 (Ex. 961.0021).

But if these are not the right standards for assessing what makes for "substantial" danger, what are? If the City wanted to argue that the national and state standards are insufficient, it should have provided a different way of showing that the danger from OBOT to public health would be substantial, rather than simply repeating that no amount of PM 2.5 exposure can be considered safe.

For instance, perhaps the City could have compared emissions from the OBOT project to emissions from other sources nearby—the Port of Oakland, the Bay Bridge toll plaza, the iron foundry exempted by the ordinance, or even the construction of a new stadium for the A's that is being contemplated at the port near Jack London Square. Perhaps the City could have argued that any project with more particulate matter emissions than one or more of these sources would pose a substantial danger. Although it's not clear that this would have been sufficient, at the very least, it would have provided a benchmark for the policymakers to use when evaluating the magnitude of OBOT's potential effects on public health.

Counterintuitively, the City says that any emissions pose a substantial danger even though it continues to allow the East Bay Municipal Utility District and iron foundry to consume coal and coke—and emit particulate matter. Ordinance No. 13385 § 8.60.040(C) (Ex. 4.0010); June 23, 2016 Agenda Report at 4 (Ex. 135.0004); ESA Report at 2-23 (Ex. 14.0044); *see also* City's Mot. for Summ. J. at 8 & n. 16 (Dkt. No. 145 at 20). Granted, these facilities receive and use less coal and coke than the shipping terminal would. But if any emissions are a substantial danger, how does the City justify allowing emissions from these sources? The utility district and iron foundry are not alone. All kinds of activities emit particulate matter, from truck traffic to office park development. Tr. 33:24-35:22 (Cashman). Without comparing these activities' impact on air quality to OBOT's, it's difficult to grasp how the City decides which activities pose a substantial danger to health and which do not.

At trial, the ESA project manager made clear that context would have been useful. However, the City had restricted the scope of ESA's study so that it was limited to identifying existing agency-developed thresholds and the public comments in the record before the City. Oakland-ESA Service Agreement (Ex. 62.0032, 0033, 0037); *see also* Jan. 8, 2016 ESA Draft Scope of Work at 7 (Ex. 25.0008). As a result, ESA did not compare the OBOT emissions estimates to emissions from other sources of pollution in Oakland, or even to emissions from other bulk facilities in California. There wasn't even a comparison to the overall level of emissions in Oakland, even though ESA "could easily have done that." Tr. 206:4-210:9 (Evans). Much of this information was available from regional Air Districts or the U.S. Environmental Protection Agency. An Air District official even testified before the City Council that the Air District could provide data on air quality in Richmond,

where there is another shipping terminal and port. Sept. 21, 2015 City Council Public Hearing Transcript at 163 (Myre Decl. ISO OBOT's Mot. for Summ. J. Ex. 29, Dkt. No. 141-29 at 8). At the very least, a clearer presentation in the record about the impact on air quality of shipping terminals in Richmond, Long Beach, or elsewhere could have shed some light on the reliability and magnitude of ESA's estimates for OBOT.

Relatedly, the City emphasizes that the old army base is located near residential neighborhoods in low-income parts of West Oakland, as well as near a child care center and schools. The City correctly points out that children and low-income people are more vulnerable to environmental contamination. And it rightly expresses concern that existing air quality standards may be especially inadequate to protect these particular Oaklanders from public health dangers. These are factors that the City can, and absolutely should, consider when assessing whether the proposed operations will present a substantial danger to public health. But it is not enough to simply intone that the facility will operate near a child care center and low-income neighborhoods. If the City wanted to point to these residents to justify the ordinance, it should have compiled a record with credible evidence that would allow the City to assess whether the proposed coal operations would *actually* present a substantial health danger to these people.

E.

The City raises a host of other concerns about the terminal, including fire hazards, worker safety, and greenhouse gases. But on these points, too, the City's record lacks substantial evidence that the coal operations will pose a substantial health or safety danger.

Fire Safety

Any bulk commodity shipping operation will involve some fire risk, which the City knowingly took on when it signed the development agreement. But the record before City Council contains mere speculation about the possibility of combustion, with no attempt to quantify the risk or meaningfully compare it to the fire risk from operations involving commodities other than coal. Taken to its extreme, the City's argument suggests that the City could put the brakes on any development given any chance of fire.

The record before the City Council and the evidence at trial contradicted the City's speculation that coal operations would pose a more significant danger of fire or combustion than other bulk commodity operations. As the City Council was informed in advance of its September 2015 hearing, bituminous coal is classified as a low fire risk by the National Fire Protection Association, a nonprofit organization that creates model fire safety codes used nationwide. Specifically, bituminous coal has a flammability rating of 1 on a scale of 1 to 4—the same rating that ground corn has. Sept. 10, 2015 City Agenda Report at 5 (Ex. 213.0005); Basis of Design—Potential Commodities, NFPA 704 (Ex. 1261).

The Fire Department did not keep this a secret: in a fall 2015 meeting with Claudia Cappio, who was then the Assistant City Administrator and responsible for managing the army base development project, the Oakland Fire Marshal informed Cappio not only that coal was a low risk commodity on the National Fire Protection Association's rankings, but also that the Fire Department uses these rankings in its emergency response system. Tr. 468:20-469:22 (Cappio). The National Fire Protection Association also classifies commodities into "dust hazard classes" based on their relative risk of explosion (using a slightly different ranking than for fire risk). Bituminous coal dust and petroleum coke dust are both classified in the lowest dust hazard class. By comparison, cellulose, which is the main component of paper (and which the City presumably would have no objection to shipping through the terminal, at least so long as it's recycled), belongs to a higher dust hazard class. NFPA 68 Standard on Explosion Protection by Deflagration Venting at 68-57, 68-67 (Ex. 900.0060, 0070); Tr. 415:17-416:11 (Rangwala).

Radis, ESA's safety subcontractor, actually told staffers at ESA that major fires at coal terminals are infrequent and more commonly associated with Powder River Basin coal. June 15, 2016 Radis Email to Barringhaus (Ex. 48); Tr. 127:20-128:20 (Evans); *see supra* p. 26. Radis's statements, like the Fire Marshal's comments, do not appear to have made it into the ESA report, and do not appear to have been meaningfully explored elsewhere in the record. This further detracted from the City's ability to make an informed decision about the project's dangers.

The record is also bereft of any serious discussion of the Fire Department's oversight and ability to mitigate the project's risks. As the City acknowledges, the OBOT developers will be required to submit a fire safety plan once the project is completely designed, before the building permit is issued. At that point, the Fire Department will be able to require changes to the plan or reject the plan if it does not adequately address fire hazards. 2012 Oakland Army Base Project Standard Conditions of Approval/Mitigation Monitoring and Reporting Program at 48 (Ex. 138.0049). This process was set up as part of the regulatory scheme for the redevelopment of the army base, which the City Council approved in July 2013 and which involved more than 70 pages of environmental conditions and mitigation measures that OBOT is required to comply with. But nothing in the record examines the effectiveness of these requirements. 2012 Oakland Army Base Project Standard Conditions of Approval/Mitigation Monitoring and Reporting Program (Ex. 138); Tr. 278:16-280:2 (McClure); Tr. 470:3-471:12 (Cappio). ESA had offered to evaluate mitigation measures for fire risk, but the City Council excluded that from ESA's scope of work as well. Jan. 8, 2016 ESA Draft Scope of Work at 11-12 (Ex. 25.0011-0012); Oakland-ESA Service Agreement (Ex. 62). Perhaps the City Council thought the Fire Department's regulatory authority would not be enough to address the fire risk. But the record does not adequately explain why this would be the case.

Worker Health and Safety

The evidence in the record about danger to worker health and safety, relative to the health and safety risks posed by other bulk commodity operations, is even thinner. Again, there is little discussion of whether mandatory workplace safety laws would be inadequately protective and if so, why. The Chafe report refers to the health risks for coal miners as evidence of the kinds of dangers workers at the terminal would face, but does not discuss how dangers would differ at a bulk materials facility that uses best available control technology and is subject to federal, state, and local workplace safety laws. The Chafe report also asserts that existing workplace coal dust standards are insufficient to prevent the illnesses that result from coal dust, but withholds any explanation of those standards or why they are inadequate. The same report criticizes OBOT for not adequately evaluating the health risks of coal dust to workers, without acknowledging the preliminary nature of OBOT's operating plans. Chafe Report at 33-39 & nn. 125-26 (Ex. 961.0035-0041). The ESA report makes similarly sweeping statements, like when it points to comments in the record about the health risks of coal dust buildup. ESA Report at 5-20 to 5-21 (Ex. 14.0089-0090). Certainly these are real concerns, but the record provides no way of understanding just how significant a danger they pose, particularly once all reasonable mitigation measures are taken.

Global Warming

The hostility toward coal operations in Oakland appears to stem largely from concern about global warming. To be sure, shipping coal for use in other countries will make some contribution to the accumulation of greenhouse gases in the earth's atmosphere, and climate change is detrimental to public health and safety. But the City's argument that global warming allows it to invoke section 3.4.2 of the development agreement barely merits a response . . . .

Other Risks

The City gestures to other risks, such as the release of metals like mercury, arsenic, and lead from coal and coke into the environment, but there is virtually nothing in the record to support a conclusion that these elements will escape in sufficient quantities to pose a substantial danger to public health. The ordinance proclaims that "exposure to these toxic heavy metals is linked to cancer and birth defects" without explaining the extent to which this project will lead to meaningful exposure to these metals, where that exposure will be in Oakland, or the likelihood of adverse health effects from it. Ordinance No. 13385 § 8.60.020(B)(1)(a) (Ex. 4.0005). The evidence in the record is equally devoid of such analysis. ESA Report at 3-8 to 3-9 (Ex. 14.0053-0054); Chafe Report at 15-17, 26-28 (Ex. 961.0017-0019, 0028-0030); Public Health Advisory Panel Report at 29-32

(Ex. 960.0039-0042). Again, simply identifying a potential risk is not the same as evaluating whether that risk poses a substantial danger.

* * *

The City was not required to compile a perfect evidentiary record; far from it. But the gaps and errors in this record are so numerous and serious that they render it virtually useless. Perhaps a record that more carefully and thoroughly laid out the evidence, accompanied by more rigorous analysis, could have satisfied the standard the City imposed on itself in the development agreement. But this record does not come close to doing so, which means OBOT prevails on its breach of contract claim.

III.

The intervenors defending the ordinance, the Sierra Club and San Francisco Baykeeper, raise a new argument in post-trial briefing: that California Government Code section 65866, which is a part of the development agreement statute, allows the City to apply the ordinance to OBOT even without substantial evidence in the City Council record that the coal operations present a substantial danger to people in Oakland, and notwithstanding the language of section 3.4.2 of the development agreement. The development agreement statute provides the groundwork for cities and counties to give developers a measure of certainty about the legal regimes that will govern their projects by locking in the rules and regulations that are in place at the time the agreements are signed. *See Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 191 Cal. App. 4th 435, 443-44, 120 Cal.Rptr.3d 797 (2010). Although normally California public policy prohibits local governments from contracting away their right to exercise their "police power" in the future—that is, the power to regulate private conduct in furtherance of the public good—the development agreement statute creates a limited exception to this rule. *See Santa Margarita Area Residents Together*, 84 Cal. App. 4th at 232-34, 100 Cal.Rptr.2d 740. Specifically, section 65866 of the statute says the following:

> 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.

The intervenors appear to make two alternative arguments based on this provision. The first appears to be that section 65866 allows a local government, in a development agreement, to restrict its ability to apply future *land use* regulations to the property, but not *other* types of new regulations (at least so long as those other types of regulations do not conflict with the land use regulations that have been locked into place). Applying this reading of section 65866 to this case, the intervenors appear to argue that: (i) the coal ordinance is not a land use regulation; (ii) the coal ordinance does not conflict with any land use regulations that were frozen in place when the development agreement was signed; and therefore (iii) Oakland is permitted to apply the ordinance to OBOT. In other words, according to the intervenors, section 65866 does not meaningfully disturb the default rule, at least with respect to non-land use regulations, that a local government may not contract away its police power. In the intervenors' view, this means that the Court should construe section 3.4.2 of the development agreement and its "substantial evidence" requirement to apply only to (i) land use regulations or (ii) non-land use regulations that directly conflict with locked-in land use regulations. The consequence of this would be that section 3.4.2 would not be applied to this ordinance at all, to avoid a conclusion that section 3.4.2 gives away more of Oakland's police power than Government Code section 65866 permits.

Whatever else might be said about this argument, the problem with it in this case is that it's too inconsistent with the language of the development agreement itself. Neither section 3.4.1, which freezes new regulations by the City, nor section 3.4.2, which sets out the health and safety exception, say that the substantial evidence standard is only meant for new land use regulations. The language of the development agreement does not even distinguish between land use regulations and non-land use regulations. And the City clearly knew how to draw distinctions between categories of regulations. The development agreement demonstrates this by carving out not only the health and safety exception in section 3.4.2 but also an exception for new regulations relating to construction under section 3.4.4. Nor do sections 1.1 or 3.4.3, which define "Existing City Regulations" and require the City to provide the developer with a compiled volume of these regulations, limit the laws that are frozen in place to land use regulations. As if to further prove this point, the City itself has, from the very early days, proceeded on the theory that section 3.4.2's substantial evidence standard applies to the ordinance. This is why the contract with ESA, the City Administrator's Agenda Reports to the City Council,

and the ordinance and resolution, among many other documents, all reference section 3.4.2 of the development agreement as the governing standard.

In the alternative, the intervenors [appear] to argue that if section 3.4.2 applies to all new laws, it is invalid and unenforceable because it restricts Oakland's police power more than the Government Code allows, and contrary to public policy. Perhaps there is merit to this argument, but the Court declines to consider it, because it is beyond the scope of the intervention that was allowed in this case. The Sierra Club and San Francisco Baykeeper were permitted to intervene to help defend Oakland, not to seek to invalidate a provision of an agreement that Oakland entered into. If the intervenors wish to assert this argument by suing Oakland and OBOT in state court to invalidate section 3.4.2, presumably they may do so. Indeed, the issue is likely better addressed in state court, because it is complicated, novel, and presents important questions of state law. Although OBOT is right to note that it would also be unfair to force it to defend against this argument so late in the litigation, that is beside the point, because the intervenors could not have raised it earlier in any event.

IV.

The resolution applying the coal ordinance to the OBOT facility is invalid, because it is a breach of the development agreement. The City is therefore enjoined from relying on the resolution either to apply the ordinance to OBOT or to restrict future coal operations at the facility. As a practical matter, this renders the coal ordinance a nullity, because the only reason the City adopted it was to restrict OBOT's operations, and OBOT is the only facility in Oakland to which it could conceivably apply. But as a strictly technical matter, there's no reason to strike down the ordinance once it has been determined that Oakland may not presently apply it to OBOT. The City remains free, of course, to pursue future regulation of the project so long as it complies with its legal obligations, including any legitimate contractual obligations to the project developers. Because OBOT prevails on its breach of contract claim, the Court enters judgment for OBOT without reaching the constitutional and statutory claims raised at summary judgment.

IT IS SO ORDERED.

(*Oakland Bulk & Oversized Terminal*, 321 F. Supp. 3d.)

B. Factual Findings and Conclusions of Law Not Addressed in the Federal Decision

The Federal Decision was limited to the factual findings and conclusions of law pertinent to the issues before the district court. That case involved some but not all the facts and law relevant to the claims in this case.

Here, the Parties agreed they entered into contracts (the Ground Lease and the related agreements, including the LDDA and the Development Agreement). Each alleged the other breached the contracts. The Parties agreed OBOT did not complete the Minimum Project by the August 14, 2018 Initial Milestone Date.[6] OBOT asserted its performance was excused as set forth in its claims of force majeure, which the City improperly rejected. The City contended the opposite—OBOT's non-performance was not excused, and the City therefore correctly denied OBOT's claims of force majeure and properly terminated the Lease on November 22, 2018. This trial was limited to the liability phase of those allegations. As a result, this Court makes the following additional findings of fact (regarding events that occurred before, during and after and Federal Decision) and conclusions of law that are specific to this case.

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[6] Although OBOT never alleged, prior to trial, that it had commenced the Minimum Project by the Initial Milestone Date (August 14, 2018), during trial there was conflicting testimony that perhaps could support the argument that OBOT did so. For example, Mr. McClure testified about work performed in the Outer Claw, including improvements to Leads 1 and 2, and West of the Wake crossing. (Tr. 3582:15–25, 3590:2–18, 3591:10–3592:7, 3608:24–3609:6, 3609:14–3610:3; *see also* Exs. 833 (photograph of West Gateway Lead Track Nos. 1 & 2), 837 (photograph of railroad crossing at Engineer's Road).) While OBOT's construction activities show it was working in good faith to complete the Minimum Project by the Initial Milestone Date, the evidence at trial did not clearly demonstrate that OBOT had made any of the rail improvements listed in section 6.1(b) of the ground lease—the evidence was, at best, equivocal. (Ex. 68 at 32.) Further, OBOT presented no evidence it had also commenced any construction of Bulk and Oversized Terminal before August 14, 2018, which it would have needed to do to meet the Initial Milestone Date. (*See* Ex. 68 at 33 (at § 6.1.1.1).) To the extent OBOT now argues that it commenced the Minimum Project by the Initial Milestone Date, the Court finds that assertion unsupported by the record and does not address it further in this Statement of Decision.

1. History and relationship of the Parties

The principals of OBOT and OGRE, Mark McClure and Phil Tagami, have a long history of goodwill and public service with the City. Mr. Tagami served on Oakland's Planning Commission's Landmarks Preservation Advisory Board, served as both a commissioner and the president of the Port of Oakland (Port)[7] (where he oversaw the development of Terminal 2 at the Oakland International Airport), and led some of the economic revitalization efforts of former Mayor Elihu Harris. (Tr. 131:14–132:1 (Tagami).) Mr. McClure served as a Port commissioner from 2006 to 2009. (Tr. 1519:21–1520:3 (McClure).) Prior to working on this Project, Messrs. McClure and Tagami, through various business entities, successfully worked on complicated and historic development projects in Oakland, such as renovations to both the Rotunda Building in Frank Ogawa Plaza and the Fox Theater on Telegraph Avenue. (*See* Tr. 136:19–137:17 (Tagami); 1789:6–10 (Schaaf).)

Over the years, Messrs. McClure and Tagami cultivated relationships with many people who are or were City employees and leaders, such as Claudia Cappio who worked as a consultant for CCIG before working for the City,[8] and Megan Morodomi who worked at CCIG as a project manager on this Project before joining the Port as a Construction Administrator. (Tr. 2069:21–2070:13 (Cappio), 1885:2–1888:1 (Morodomi).) In some instances, these interpersonal roots extend for decades; former Mayor Libby Schaaf has known Messrs. McClure and Tagami since high school. (Tr. 1789:3–5 (Schaaf).)

This history of public service and successful collaboration informed the City's decision to select Messrs. Tagami and McClure (through CCIG, OBOT, and OGRE) as the

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[7] The Port is an independent department of the City of Oakland. (Tr. 1757:7–11 (Schaff).) The Port's commissioners are appointed by the mayor of Oakland and confirmed by the City Council. (Tr. 1757:12–14 (Schaff).)

[8] CCIG hired Ms. Cappio as a consultant for the environment impact review of the Oakland Army Base Project, the document that was eventually incorporated into the 2012 EIR Addendum. (Tr. 2069:21–2070:13 (Cappio).)

developer for the Project *and* as the City's representative to manage the Oakland Army Base project's *public* infrastructure improvements, as memorialized in the 2012 Property Management Agreement between the Parties. (*See* Ex. 127; Tr. 1168:23–1169:5 (Tagami), 1856:11–13 (McClure).) Former Mayor Schaaf testified she had confidence in the City's selection of OBOT to lead the Project because she had seen Mr. Tagami "take on very difficult and complicated development projects and succeed." (Tr. 1788:21–1789:10 (Schaaf).)

2. Factual Findings and Conclusions of Law through the Execution of the West Gateway Ground Lease

The Parties entered into the Ground Lease on February 16, 2016. (Ex. 68 at 1.) With attachments, the Lease is nearly 600 pages long. (*See generally* Ex. 68.) This Court references the relevant background leading up to the execution of the Ground Lease, as well as key provisions within the Lease, that support and otherwise provide context for this Statement of Decision.

After the Parties entered into the Ground Lease, they continued to be bound by the terms of the Development Agreement and the LDDA (as periodically amended). For example, the Development Agreement required OBOT to "apply for an annual review of this Agreement" by submitting an application and a written report to the Director of City Planning (with a copy to the City Attorney); in the annual report, OBOT was required to describe its "good faith substantial compliance with the terms of [the Development Agreement] during the preceding year." (Ex. 7 at 32 (§ 6.2).) The Court periodically references other relevant provisions of the Development Agreement as applicable to this Statement of Decision.

a. Basis of Design

As noted in the Federal Decision, OBOT submitted the Project's Basis of Design (or BOD) to the City in September 2015. (Exs. 37 (draft BOD), 38 (BOD).) It took a

significant amount of time and money for OBOT to create the Basis of Design, which comprised three volumes and about 1,500 pages of information. (Tr. 583:9–12 (Tagami), 2222:19–2223:2, 2279:17–20 (Cappio).)

There are approximately 15,000 bulk commodities. (Tr. 207:19–208:4, 414:22–25 (Tagami), 2634:14–19 (McClure).) When OBOT prepared the Basis of Design, it was unclear which of those commodities would actually be shipped through the terminal; and, as discussed in the Federal Decision and later in this Statement of Decision, there was already conflict between the Parties regarding coal. As a result, the Basis of Design states, "OBOT's objectives for this phase of the project are to create a terminal for the receipt by rail, storage and shipment of Commodity A and Commodity B."[9] (Ex. 38 at 9 (§ 2.3).) Although the mechanical and logistical aspects of transporting and temporarily storing commodities is vastly different depending on the commodity to be shipped (for instance, wheat, an oversized crane, or crude oil), the Basis of Design provided an initial design framework for how the Project (including the rail, land, and marine and wharf areas) would address these two general categories of commodities (e.g., conveyors, infrastructure, dredging, dust control, electrical, fire protection, infrastructure, office facilities, marine operations, safety, storage, structural loads, vehicle access, wastewater, etc.). (*See* Ex. 38.)

The City understood OBOT's Basis of Design was a preliminary document. An iterative, collaborative process was necessary to advance the Project design: The City would provide feedback and direction, and OBOT would respond with changes and further detail. (Tr. 2294:14–19, 2552:13–19 (Cappio); *see also* Tr. 396:10–17, 438:19–439:3, 583:9–12, 704:5–10 (Tagami).) The Court finds that once OBOT submitted the Basis of Design to

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[9] OBOT removed the reference to coal from the draft Basis of Design and instead referenced Commodities A and B. Commodity A represented an example commodity with certain properties, including a bulk density of 55 lb/ft^3 (mass), not corrosive, and extremely abrasive. (*Id.* at 10 (Table 5-1).) Commodity B represented an example commodity with other properties, including a bulk density of 78 lb/ft^3 (mass), not corrosive, and abrasive. (Ex. 38 at 10 (§ 5).)

the City—and certainly once the Ground Lease was executed—one of the things that was necessary for the Project to proceed was for the City to thoroughly review the Basis of Design and provide OBOT with clear, specific, and timely feedback.

b. Conflict Regarding Coal

In 2002, the City prepared an Environmental Impact Report (EIR) under the California Environmental Quality Act, California Public Resources Code, section 21000 *et seq*. (CEQA). (*See* Ex. 1 at 15 (§ 1.1).) The EIR, which was certified by the City and adopted by the Port, "described and disclosed the potential consequences associated with adoption . . . of the Redevelopment Plan . . . identified all potentially significant environmental impacts . . . , and provided mitigation measures that reduced the majority of impacts to a less-than-significant level." (*Id.* at 17 (§ 1.2.2.a).) In 2012, the City prepared an addendum to the 2002 EIR (2012 Addendum), that concluded no subsequent or supplemental EIR was required. (*Id.* at 15 (§ 1.1).) In the LDDA, the Parties agreed the 2002 EIR and the 2012 Addendum "fully analyzed all potentially significant environmental effects in compliance with . . . CEQA and the CEQA Guidelines." (Ex. 378 at 10 (¶ AA).)

When the Parties entered into the Development Agreement in 2013, with certain exceptions discussed in the Federal Decision, it locked in place the regulations that existed at the time and precluded regulations adopted after the Development Agreement was signed from being applied to the Project. There is nothing in the EIR, the 2012 Addendum, the LDDA, or the Development Agreement that precluded the transportation of any bulk commodity (that could lawfully be transported in the U.S. at the time), to, from, or through the Project.

Between the time the Development Agreement was signed in 2013 and the Ground Lease was finalized in 2016, members of the public and City officials expressed concerns about health and environmental issues associated with coal. Libby Schaaf, who had served on the City Council from 2011 to 2015, began serving as the City's mayor in 2015.

(Tr. 1749:21–1750:1 (Schaaf).) Indicative of her clear view on the matter, on May 11, 2015, she sent an email to Mr. Tagami with the subject line: "stop all mention of coal now." (Ex. 29.) In the body of email, she wrote:

> Dear Phil,
>
> I was extremely disappointed to once again hear Jerry Bridges mention the possibility of shipping coal into Oakland at the Oakland Dialogue breakfast. Stop it immediately. You have been awarded the privilege and opportunity of a lifetime to develop this unique piece of land. You must respect the owner and public's decree that we will not have coal shipped through our city. I cannot believe this restriction will ruin the viability of your project. Please declare definitively that you will respect the policy of the City of Oakland and you will not allow coal to come through Oakland. If you don't do that soon, we will all have to expend time and energy in a public battle that no one needs and will distract us all from the important work at hand of moving Oakland towards a brighter future.
>
> Best,
>
> Libby

(Ex. 29 at 3).

Mayor Schaaf was consistently and adamantly opposed to the Project including coal as a potential commodity, although she wanted the important community benefits associated with redevelopment of the army base. (Tr. 1789:21–1792:5, 1792:19–1793:1 (Schaaf).) On October 22, 2015, she called Mr. McClure who was in his car at the time. (Tr. 1540:4–16 (McClure), 1819:19–1820:2 (Schaaf).) Mr. McClure memorialized their conversation in a note he created approximately two hours after the call. (Tr. 1540:4–16 (McClure), 1819:19–1820:2 (Schaaf); *see also* Ex. 59A (Email from McClure to McClure re Mayor Schaaf Call (Oct. 22, 2015).) During the discussion, Mayor Schaaf stated she was going to meet and enlist the help of New York City Mayor Michael Bloomberg to fight the Project and ensure there would never be any coal shipped through Oakland. (Ex. 59A at 1.) Mr. McClure said he was aware of Mr. Bloomberg's support of the Sierra Club's efforts to oppose coal-related power generation. (*Id.*) Mayor Schaaf stated she was convinced

there was a business solution to this disagreement; she wanted Mr. McClure to present a resolution (including the proposed terms of a deal for the Project) in which OBOT would agree to never ship coal. (*Id.*) She said the issue was so important to her she would do everything in her power to make sure no coal would come through Oakland—even if it meant killing the entire Project. (*Id.* at 2, 3.) Mayor Schaaf reminded Mr. McClure that he grew up in Oakland and should know shipping coal through the City would not be tolerated. (*Id.* at 3.)

Mayor Schaaf was unequivocal—in her communications both at the time and during her testimony at trial—she did not want coal moving through Oakland irrespective of the fact the coal was destined for other countries. (*See* Ex. 69 (Press Release from Mayor Schaaf re Transport and Handling of Coal in Oakland (Feb. 16, 2016).)

The health concerns, air quality risks, and CO2 emissions caused by burning fossil fuels are well documented. The protective atmosphere shared by everyone on the planet is not bound by national or political borders. The concerns expressed by community members in Oakland and the City's leaders are not frivolous.[10]

Yet, the City (through the community's elected officials) signed contracts with OBOT for the development of the Project, and that Project did not exclude coal. With that paradigm in place, the Parties elected to move forward with the Ground Lease. They reached an agreement that, among other things, acknowledged: nothing in the Lease prevented the City from exercising its lawful regulatory authority; nothing in the Lease prevented OBOT from challenging any future legislation adopted by the City; OBOT's "obligation . . . to comply with all present or future Laws is a material part of the

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[10] (*See Juliana v. United States* (9th Cir. 2020) 947 F.3d 1159, 1166 ("The record leaves little basis for denying that climate change is occurring at an increasingly rapid pace. . . . The hottest years on record all fall within this decade, and each year since 1997 has been hotter than the previous average."); *Cole v. Collier* (S.D. Tex. 2017) 2017 WL 3049540 at *31, n.27 (taking judicial notice that "climate scientists forecast with a high degree of confidence that average temperatures in the U.S. will rise throughout this century and that heat waves will become more frequent, more severe, and more prolonged").)

bargained-for consideration under this Lease" (Ex. 68 at 28 (§ 5.1.1)); "no present or future Law, whether foreseen or unforeseen, and however extraordinary, shall relieve [OBOT] of its obligations hereunder, nor give [OBOT] any right to terminate this Lease in whole or in part or to otherwise seek redress against [the City]" (*id.* at 29 (§ 5.1.1.2)); and OBOT "waives any rights now or hereafter conferred upon it by any existing or future Law to terminate this Lease (*id.* at 29 (§ 5.1.1.3)).

Essentially, OBOT accepted the risk, and arguably the certainty, that the City would attempt to enact legislation prohibiting coal as a commodity at the Project. And if the legislation was lawful, OBOT would need to comply with the new laws and could not terminate the Lease or seek other relief.[11] Unless and until such lawful legislation was enacted and applied to the Project, the Parties had to move forward with their contractual and legal obligations in the Ground Lease and the related agreements.[12] (Ex. 68).

c. Local Regulations that Apply to the Project

As noted in the Federal Decision, the Development Agreement "froze in place" the local regulations that would apply to the Project. Presumably to eliminate uncertainty

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[11] On February 11, 2016, five days before the Parties signed the ground lease, Ms. Landreth, the City Administrator, sent OBOT a letter stating, "Although we have reached agreement on the major provisions that were at issue, I believe it is important to provide a clear position of where the City and CCIG find themselves with regard to the potential transport and handling of coal at the proposed bulk commodities terminal . . . ." (Ex. 66 at 1.) Ms. Landreth was unambiguous—the City intended to conduct an evaluation, including gathering evidence and taking testimony from subject matter experts, regarding the "transport, transloading and export of coal at the [Project]." (*Id.*) Ms. Landreth stated that once that work was completed the City will, "develop[,] and evaluate potential actions that the City could employ to address the health and/or safety Impacts of the transloading, transportation, handling, and export of coal, *fuel oil and gasoline* as part of the Project." (*Id.* (emphasis added).) Although Ms. Landreth did not describe this process as a *"commodity by commodity" review*, this is the first instance the Court has identified in which the City indicated in writing it may have had concerns with commodities other than coal.

[12] As the City described it, "the parties broke their stalemate over the City's regulation of coal by agreeing to set that dispute to one side and let it play out elsewhere, while the parties moved forward with the multi-commodity bulk terminal project by these deadlines." (City's Proposed Stmt. of Decision 3:16–3:18.)

about what regulations were in place as of July 16, 2013, section 3.4.3 of the Development Agreement states:

> Existing City Regulations. The City shall, at the Developer's sole cost and expense, compile two binders which include copies of all Existing City Regulations within ninety (90) calendar days after the Adoption Date, sign both copies, and deliver one copy to Developer. The City shall make every reasonable effort to include all Existing City Regulations.

(Ex. 7 at 23.)

d. Scope of Development

The Ground Lease describes the "Scope of Development for West Gateway" with this initial language:

> Bulk and Oversized Terminal: A ship-to-rail terminal designed for the export of non-containerized bulk goods and import of oversized or overweight cargo consistent with the Master Plan, which includes . . . the City Funded Wharf Improvements and the wharf repairs and improvements included in the OBOT Wharf and Rail Improvements . . . .
>
> Railroad Improvements: The railroad improvements and related equipment, consistent with the Master Plan including . . . the rail Improvements included in the OBOT Wharf and Rail Improvements located within the Premises . . . . The Railroad Improvements do not include any of the rail improvements that are included within the scope of the Public Improvements.

(Ex. 68 at 239.)

Rail was fundamental to the Project. (Tr. 148:2–21, 209:12–210:1 (Tagami).) To support the development, the Port and the City were awarded more than $200 million in public funds from the State of California's Trade Corridors Improvement Fund (TCIF) under the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 to construct public infrastructure improvements at the Oakland Army Base. (Ex. 378 at 8.) These funds were reserved for projects that improved trade corridor

mobility and reduced diesel particulate and other pollutant emissions. (Tr. 251:15–23 (Tagami).) The Project was eligible for (and ultimately received) TCIF grant funds because the rail components of the Project would reduce the volume of commodities transported by truck and the number of associated truck trips; the Project would therefore improve transportation efficiency and reduce pollution in the area. (Tr. 203:12–204:2, 251:15–252:8 (Tagami), 3840:15–3846:5 (Wan), 1755:10–25 (Schaaf); *see also* Ex. 453.) The Project's state funding, through the TCIF grant, was directly linked to rail. (Tr. 203:21–204:2, 251:15–252:8, (Tagami), 1755:10–25 (Schaaf).)

The Project would connect to the Port of Oakland's rail terminal via a rail corridor (Railroad R/O/W). (Ex. 68 at 11 (§ 1.1).) The ownership and easement rights within the entire rail corridor connecting the Port's rail terminal with the West Gateway property involved multiple entities: the City, the Port, Union Pacific, Burlington Northern Santa Fe (BNSF), and the East Bay Municipal Utilities District. (Ex. 68 at 32 (§ 6.1(b)).) Access to rail, owned or held by these parties, was essential to the Project. (Tr. 2090:21–23, 2093:23–2094:3, 2095:12–16 (Cappio).)

The Ground Lease stated,

> [T]he City shall use commercially reasonable efforts to enter into a 'Rail Access Agreement' . . . with the Port which shall provide a definitive written agreement regarding (i) the rights of use with respect to the Port Rail Terminal to be reserved in favor of the West Gateway . . . , (ii) the services to be provided by the Port Rail Terminal Operator, and (iii) the parameters for the rates to be charged for such services.

(Ex. 68 at 31 (§ 5.2.3(a)).) The City's Rail Access Agreement (or RAA) with the Port would allow OBOT's use of the Port's rail. (Tr. 214:13–215:11 (Tagami), 3801:23–3802:24 (Wan).)

Early in the redevelopment process, the Parties understood the Rail Access Agreement was key to development of the Project. On June 19, 2012, prior to the LDDA, the City and the Port executed an Amended Cost Sharing Agreement (CSA) to enter the Rail Access Agreement and a Rail Operating Agreement. (Ex. 3 at 17 (§ 11).) City

representatives, including John Monetta (City Project Manager) and Douglas Cole (the City's Project Manager responsible for compliance with the State's TCIF grant), agreed the Rail Access Agreement and Rail Operating Agreement were close to completion when the City and the Port executed the Cost Sharing Agreement. (Tr. 1664:13–20, 1647:10–25 (McClure); Ex. 854 at 14–15 (Cole Dep.).) Mr. Cole referred to the Rail Access Agreement as "probably the most critical agreement to delivering all of the obligations for the project." (Ex. 854 at 14.) He explained that without an RAA, trains would only be able to bring commodities to the edge of the Port property and could not continue into the area of the Project, and ultimately the shipping terminal, because only authorized short line rail operators could use the existing rail lines in the Port. (*Id.* at 14–15.) "So, without the Rail Access Agreement, you basically—you can't do anything." (*Id.* (cleaned up))

More than two years later, on November 25, 2014, the Oakland City Council passed a resolution addressing the Rail Access Agreement. In Resolution Number 85325, the City Council expressed its understanding that, "the City's developments in the Central, East, North and West Gateway areas . . . will rely on rail access across the Port's Phase One rail yard to the main rail line at the *Port; without this rail access, portions of the contemplated development of the City-owned portions of the Base by private developers may become infeasible* . . . ." (Ex. 18 at 2 (emphasis added).) Understanding this, the City Council authorized the City Administrator "to negotiate and execute, without returning to City Council, a Rail Access Agreement and any related agreement with the Port of Oakland for a term up to 66-years to enable rail access to the City-owned Central, East, North and West Gateways Areas at the Base." (*Id.*)

By April 2015, City and Port staff reached a consensus upon a Rail Access Agreement term sheet. (Tr. 1674:20–1675:15 (McClure).) Later in 2015, an RAA was drafted and was pending execution by the Port and the City. (Ex. 854 at 39–40.) On August 10, 2015, Mr. Monetta, on behalf of the City, sent a letter to Mr. McClure stating, "The City and Port executed an amended Cost Sharing Agreement on June 19, 2012, which provides for the City and Port to execute a Rail Access Agreement and the Port to

execute a Rail Operator Agreement. Both of these agreements are close to completion by the parties and will memorialize both the City and OGRE's rights to access and use the Port Rail Terminal." (Ex. 47 at 3.)

Despite its importance, by February 2016, when the Parties were poised to sign the Ground Lease, the Rail Access Agreement had not been executed. The Parties included language in the Ground Lease acknowledging the Rail Access Agreement was so important that OBOT could elect to terminate the lease if the City was unable to execute an RAA with the Port, despite the City's commercially reasonable efforts to do so. (Ex. 68 at 31 (§ 5.2.3(a)).) The Court finds that one of the things that was necessary to advance the Project was for the City to timely and diligently work to finalize the Rail Access Agreement.

e. Public Improvements and Survey Requirement

The Project included public and private improvements. The City was obligated to complete the "Public Improvements" as defined in section 37.9.2(a) of the Lease. (Ex. 68 at 116.) The Parties acknowledged they were entering into the Lease "prior to City's completion of the Public Improvements" and that "the completion of those Public Improvements may involve the construction of improvements or grant of property rights to third parties *that materially limits the utility of portions of the Premises for Project operations*." (Ex. 68 at 11 (emphasis added).) The Parties therefore agreed:

> [W]ithin sixty (60) calendar days after City's Completion of the Public Improvements that are located on or adjacent to the Premises, the Parties shall jointly retain a civil engineer to re-survey the square footage of the Premises, with the direction to omit any portion of the Premises that has been materially affected by the Completion of the Public Improvements. The civil engineer shall certify such survey to each of the Parties. Each Party shall pay fifty percent (50%) of the cost of the survey.

(Ex. 68 at 11 (§ 1.1.1).) Once the Parties reached an agreement[13] as to "the adjustments to the Premises," those adjustments would be memorialized in "an amendment to this Lease" that:

> (i) identifies the portions of the Premises removed pursuant to this provision[], (ii) memorializes the final boundaries, acreage and square footage of the final Premises[,] and (iii) states that except for those obligations which are expressly stated in this Lease to survive termination of this Lease, all of the Parties' obligations under this Lease with respect to the removed areas shall terminate . . . .

(Ex. 68 at 11.)

When OBOT signed the Ground Lease, the Parties understood, among other things, that the City was required to complete certain Public Improvements (such as, grading and drainage work) before OBOT could begin the private development of the rail corridors (e.g., installing ballast rock, ties, and rail). (Ex. 68 at 11 (§ 1.1.1); *see also* Tr. 3314:25–3315:11 (McClure).) But although the City was obligated to commence construction "and diligently prosecute the [Public Improvements] to Completion," the Lease did not include a deadline for that work. (Ex. 68 at 117 (§ 37.9.2(b)).) Given that OBOT had an obligation to construct private improvements that hinged on the City's completion of Public Improvements that had no deadline, the Ground Lease provided OBOT with some protection: If the City failed "to achieve Completion of the Public Improvements," OBOT could "elect, upon not less than ninety (90) days prior written notice to [the City]," to terminate the Lease. (Ex. 68 at 117 (§ 37.9.2(b)).) The Court finds that to move the Project forward it was necessary for the City to timely complete the Public Improvements

[13] If either Party disagreed with the civil engineer's certified survey, the Parties agreed to a dispute resolution procedure.

and the associated survey so OBOT could begin construction of the private improvements in those areas.[14]

f. Initial Milestone Date

In the Ground Lease the Parties "acknowledge[d] and agree[d]" that the City had an interest in ensuring:

> [T]hat the portion of the Initial Improvements with respect to the Premises comprised of all of the following Improvements (consistent with the Scope of Development and the Permitted Uses) (the "Minimum Project") are constructed within a specified period of time:
>
> (a) the Bulk and Oversized Terminal which is (i) consistent with the Master Plan and (ii) capable of servicing one or more lines of export products; and
>
> (b) the following railroad improvements shown on Exhibit 6.1-B (excluding the grading, drainage and sub-base improvements included in the Public Improvements), some of which are located outside the boundaries of the Premises (the "Minimum Project Rail Improvements"):
>
> (i.) The portion of the WGW Lead Track No. 1. to be constructed within the BNSF Rail Easement and transferred to BNSF pursuant to the BNSF Rail Easement (the "BNSF Rail Improvements");

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[14] The City correctly stated that the Parties "expressly waived all conditions precedent to the execution of the Ground Lease." (City's Proposed Stmt. of Decision 21:17–21:19.) The City also accurately noted the Lease did not include a deadline for the completion of the Public Improvements; instead, the Parties agreed that OBOT could elect to terminate the Lease if the City failed to complete the Public Improvements. (*Id.* at 21:20–21:27.) The City argued that because the Lease provided the "remedy" of termination, "the force majeure clause cannot implicitly override this knowing and express assumption of this risk." (*Id.* at 96:8–96:9.)

The Court rejects the City's argument for two reasons. First, the fact the Parties agreed to the extreme remedy of termination does not support the conclusion they implicitly rejected the significantly less dire and collaborative option of force majeure, which would have simply allowed OBOT to have more time to meet its obligations once the City completed its work. Second, the City did not point to any language in the Ground Lease or provide other authority to support its legal position.

The City made a nearly identical argument regarding the Rail Access Agreement—namely, that the Ground Lease did not provide a deadline for finalizing the Rail Access Agreement but allowed OBOT to terminate the Lease if the City did not complete the RAA. The City then contended that only Lease termination, and not the lesser option of force majeure, was available to OBOT if the City did not enter into a Rail Access Agreement. (*Id.* at 96:17–96:20.) The Court rejects this argument for the same reason it rejects the City's parallel analysis regarding the City's completion of the Public Improvements.

(ii.) The portion of the WGW Lead Track No. 2 that is located within the Port Rail Easement (the "East of Wake Rail Improvements");

(iii.) The portion of WGW Lead Track No. 2 to be constructed on the Port property located east of the Railroad R/0/W Property and north of the Port Rail Terminal and commonly referred to as the "Outer Claw" property;

(iv.) If the Port and/or the City enters into an Industrial Track Agreement with BNSF which permits the nonexclusive use of the BNSF Rail Improvements to provide rail service into the Port Rail Terminal and to the West Gateway, MH-1 Lease Area and the New Central Gateway Lease Area which is reasonably satisfactory to the City and [OBOT], the portion of WGW Lead Track No. 1 to be constructed on the Port property located east of the Railroad R/O/W Property and north of the Port Rail Terminal and commonly referred to as the "Outer Claw" property; and

(v.) The rail Improvements designated as Industry Drill Track No. 1.

(Ex. 68 at 31–32 (§ 6.1).)

The Lease then set deadlines by which OBOT had to begin, hit milestones, and complete construction of the "Minimum Project." (Ex. 68 at 32–33.) Section 6.1.1 of the Lease provides: "*Initial Milestone Date.* Commenced Construction[15] of the Bulk and Oversized Terminal *and* at least *one* of the components of the Minimum Project Rail Improvements listed in section 6.1(b) above prior to the date that is 180 days after the Commencement Date (the "Initial Milestone Date")[.]" (Ex. 68 at 33 (emphasis added).)

The Ground Lease set a "Commencement Date" of February 16, 2016, but the date "shall be tolled" if "promptly following execution of this Lease, [OBOT] commences, and thereafter diligently pursues to Completion, the design and construction of the OBOT Wharf and Rail Improvements." (Ex. 68 at 17 (§ 1.7.2).) The Parties stipulated that the

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[15] The Lease defined "Commenced Construction" as, "with respect to any and all Improvements on all or any portion of the Premises, that a Building Permit has been obtained for such Improvements, where applicable a foundation (slab or other type) has been installed and such Improvements are subject to active and on-going construction." (Ex. 68 at 129.)

Commencement Date was tolled until February 15, 2018; accordingly, OBOT had to commence construction of the Bulk and Oversized Terminal *and* at least one of the components of the Minimum Project Rail Improvements by August 14, 2018.

g. Leased Premises Including Railroad R/O/W

The City leased OBOT 26.02 acres, the "West Gateway Property"[16] and an additional 7.82 acres, the "Railroad R/O/W Property"[17] (which included "both fee interests owned by [the City] and easement interests in favor of [the City]"). (Ex. 68 at 11 (§ 1.1.1); *see also* Ex. 68 at 149–56 (description of West Gateway Property); Ex. 68 at 157–90 (description of Rail R/O/W/ Property).) The Railroad R/O/W Property included areas in which OBOT was to complete the Minimum Project Rail Improvements. (Ex. 68 at 31.)

h. Force Majeure Provision

The Parties included the following force majeure language in section 16.1 of the Ground Lease:

> For all purposes of this Lease, a Party whose performance of its obligations hereunder is hindered or affected by events of Force Majeure shall not be considered in breach of or in default in its obligations hereunder to the extent of any delay resulting from Force Majeure, provided, however, that the provisions of this Section 16.1 shall not apply to Tenant's obligation to pay Rent, inc1uding Additional Rent. A Party seeking an extension of time pursuant to the provisions of this Section 16.1 shall give notice to the other Party describing with reasonable particularity (to the extent known) the facts and circumstances constituting Force Majeure within (a) a reasonable time (but not more than thirty (30) days unless the other Party's rights are not prejudiced by such delinquent notice) after the date that the claiming party

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[16] The "West Gateway Property" is within but does not comprise all of the property in the West Gateway area. (Ex. 68 at 11.)

[17] The "Railroad R/O/W Property" included property that is in the North Gateway "and certain other real property in the vicinity of the West Gateway Property." (Ex. 68 at 11.)

> has actual knowledge of the scope and magnitude of the applicable Force Majeure event or (b) promptly after the other Party's demand for performance.

(Ex. 68 at 84–85.)

The Parties defined "Force Majeure" in article 40 as follows:

> [E]vents which result in delays in a Party's performance of its obligations hereunder due to causes beyond such Party's control, including, but not restricted to, acts of God or of the public enemy, acts of the government, acts of the other Party, fires, floods, earthquakes, tidal waves, terrorist acts, strikes, freight embargoes, delays of subcontractors and unusually severe weather and, in the case of Tenant, any delay resulting from a defect in Landlord's title to the Premises other than a Permitted Exception. Force Majeure does not include failure to obtain financing or have adequate funds. The delay caused by Force Majeure includes not only the period of time during which performance of an act is hindered, but also such additional time thereafter as may reasonably be required to complete performance of the hindered act.

(Ex. 68 at 132.)

i. Non-Disturbance Agreements and Estoppel Certificates

qThe Ground Lease anticipated OBOT could sublease its interest to others. Recognizing that subtenants would likely want or need assurances regarding the stability of their tenancies, the Parties agreed that the City:

> shall enter into [Non-Disturbance Agreement] with Subtenants providing generally, with regard to a given Sublease, that in the event of any termination of this Lease, [the City] will not terminate or otherwise disturb the rights of the Subtenant under such Sublease, but will instead honor such Sublease as if such agreement had been entered into directly between [the City] and such Subtenant.

(Ex. 68 at 74 (§ 12.5.1 (Conditions for Non-Disturbance Agreements)).)

Similarly, to protect and inform the Parties, future purchasers, and subtenants, sections 25.1 and 26.1 of the Ground Lease address OBOT's and the City's respective

obligations to execute estoppel certificates. (Ex. 68 at 93–94.) For its part, in section 26.1, the City agreed, among other things, it would:

> execute, acknowledge and deliver to [OBOT] (or at [OBOT]'s request, to any Subtenant, prospective Subtenant, prospective Mortgagee, or other prospective transferee of [OBOT]'s interest under this Lease), within fifteen (15) Business Days after a request, a certificate stating to the best of [the City]'s knowledge . . . that this Lease is unmodified and in full force and effect, . . . [and whether] to the knowledge of [the City], there are then existing any defaults under this Lease (and if so, specifying the same) . . . . Any such certificate may be relied upon by [OBOT], any successor, and any prospective subtenant, mortgagee or transferee of [OBOT]'s interest in this Lease.

(Ex. 68 at 94.)

j. The "Cappio Memo"

Approximately three months before the Ground Lease was executed, when the coal conflict was causing significant friction between the Parties, the City's Assistant City Administrator, Claudia Cappio, issued an interoffice memo, dated November 6, 2015, concerning the issuance of permits for the Project. (Ex. 61 at 2 (Cappio Memo).) The City Administrator, Sabrinia Landreth, instructed Ms. Cappio to prepare and circulate the Cappio Memo among the Planning and Building Department staff, City Council, and the Mayor. (Trail Tr. 2251:14–2252:4 (Cappio).) Ms. Cappio testified she understood the City Council had requested updates on the status of OBOT's implementation of the Project. (Tr. 2256:18–22 (Cappio).)

In the memo, Ms. Cappio informed the City's Planning and Building Department that redevelopment was occurring at the former army base and over the next six months the City was expecting applications for building and construction-related permits for vertical improvements, including the proposed bulk and oversized terminal. (Ex. 61 at 2.) The Cappio Memo continues:

> Due to the high-profile nature of the project it is important for the City Administrator's Office to provide updates to the City Council on the status of OBOT implementation. As such, I plan to notify the City Council of the following:
>
> - When an application for a building or construction-related permit is submitted and the estimated timeline for processing the application;
> - When a determination has been made that the application is complete; and
> - At least 15 working days prior to the issuance of any building or construction-related permits.
>
> Accordingly, upon receipt of any building or construction-related permit application for OBOT (including, without limitation, building permit, p-job, grading permit, creek protection permit, etc.), please take the following actions:
>
> 1. Notify the following staff:
>
> a. Claudia Cappio, Assistant City Administrator;
>
> b. Rachel Flynn, Director of Planning and Building; and
>
> c. Darin Ranelletti, Deputy Director, Planning and Building;
>
> and
>
> 2. Do not deem the application complete or issue the permit until after consultation with the above staff.
>
> Please ensure that appropriate notes are added to City permitting/parcel records, such as the Accela permit tracking system, so that staff is aware of these procedures.

(Ex. 61 at 2–3.)

Ms. Cappio confirmed the requirements of her memo only applied to OBOT's private development of the Project and not the public improvement work OBOT was performing on behalf of the City as the City's contractor. (Tr. 2252:5–21 (Cappio).) Ms. Cappio testified the memo was "unique." (Tr. 2260:12 (Cappio).) She could not identify another project in which the Planning and Building Department was asked to notify others about

the status of a project. (Tr. 2260:18–2261:8.) Former Mayor Schaaf also could not recall a similar memorandum being issued for any other project during the time she worked for the City of Oakland. (Tr. 1818:25–1819:7.)

During trial, City witnesses stated the purpose of the Cappio Memo was not to delay or prevent OBOT from getting permits for the Project. For example, Elizabeth Lake (who originally served as the City's outside counsel for the Project and was later hired to serve as the Deputy City Administrator) testified the Cappio Memo was not intended to stop or slow the Project; instead, "[t]he Cappio Memo was an effort to ensure cooperation and coordination between the various departments of the city. We are quite large and we do often have a right hand, left hand problem. So when you have complex projects, then you do want your planning department, who is on the regulatory side, to coordinate with the city administrator's office on the negotiator-landlord side." (Tr. 3731:23–3732:3, 3732:4–11 (Lake).) Ms. Lake testified the Cappio Memo would allow the City Administrator to "keep things moving." (Tr. 3733:4–16 (Lake).)

The Court finds the explanations of the City witnesses regarding the purpose of the Cappio Memo—to ensure that OBOT's Project permits were efficiently processed with good communication and coordination throughout the various City offices—strained credulity given the Parties' disagreement about coal when the Memo was written and because no witness from the City was able to identify any similar memo or protocol that had ever been implemented by the City on any other development project, regardless of size or complexity.

Nevertheless, the Cappio Memo's relevance is limited because not only did OBOT not know about the memo until about April 2016 (Tr. 2962:11–21), but it is also undisputed OBOT did not attempt to apply for any permits to advance the private development portion of the Project between the time the Cappio Memo was issued in 2015, and July 19, 2018, when Ms. Morodomi went to the City Building Department seeking a permit for the West Burma Road fence. (Ex. 458.) Therefore, the Cappio Memo did not hinder or affect any of OBOT's permits for the Project prior to July 19, 2018, and the

memo cannot lay a foundation for OBOT's claim of force majeure before that date.[18] (Tr. 1997:4–19, 1999:13–19 (Morodomi), 3561:18–22, 3564:9–15 (McClure).)

The Court finds the City's failure to rescind the Cappio memo by the summer of 2018, as well as the pretext for its issuance, demonstrate a lack of good faith by the City vis-à-vis its relationship with OBOT for the development of the Project's private improvements.

3. Factual Findings and Conclusions of Law Between Execution of the Ground Lease and June 14, 2017

a. Kick-off Meeting

On March 9, 2016, OBOT representatives and people from various departments in the City met for what the Parties referred to as the "kickoff" meeting. (Tr. 1590:19–24 (McClure), 3151:25–3152:14 (Ranelletti).) Consistent with the meeting agenda, the representatives from OBOT expected that during the meeting the Parties would review the basis of design, discuss permitting and the permitting process, and would plan the

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[18] The City approved the design of the West Burma Road fence, an improvement initially included within the Public Improvements. At some point, presumably with the agreement of the Parties, the installation of the fence was reclassified as a private improvement. (*See* Ex. 180 at 1 (Email from Tagami to Lake et al. about W. Burma Road Safety and Security (Aug. 16, 2018)).)

The grade between the road and the adjacent property was not level. (Ex. 180 at 1.) Due to the grade differential, as well as illegal dumping, theft, and vandalism that was already occurring at the Project, OBOT expressed concerns about Burma Road being opened to the public without a fence first being installed between the public's right-of-way and the rail corridor. (*See* Tr. 1907:7–1908:15 (Tagami); Ex. 180.)

After Ms. Morodomi went to the City's Planning and Building Department to get a permit for the Burma Road Fence, it took numerous emails from Ms. Morodomi and Mr. Tagami to move the permit application along. During that time OBOT was informed it needed to seek additional approvals from the City as the property owner as well as the San Francisco Bay Conservation and Development Commission. (*See* Ex. 178 at 2 (Email from Morodomi to Peterson Vollman about Burma Road Permanent Fence (July 26, 2018)), Ex. 658 at 1 (Email from Morodomi to Lake, et al. about Burma Road Permanent Fence (July 31, 2018)), Ex. 460 (Letter from McGowan to Morodomi about Submittal Requirements for Burma Road Fence (Aug. 8, 2018)), Ex. 464 (Email from Morodomi to Coates-Maldoon re BCDC Application—Permanent Fence at Burma Road Oakland, CA (Aug. 14, 2018)), Ex. 462 (Email from McGowan to Morodomi about Burma Road Permanent Fence (Aug. 14, 2018)), Ex. 180.)

next steps—generally, how the parties would work together to move the project forward.[19] (Tr. 1961:3–9 (Morodomi), 2901:9–23 (Sanders), 3150:1–3151:15 (Ranelletti); *see also* Ex. 567 (agenda for kickoff meeting).)

The testimony was murky and inconsistent as to exactly what occurred during the short meeting. The Court finds, weighing the evidence, that the City informed OBOT building permits would go through a discretionary (instead of administrative) review, and the City would conduct a commodity-by-commodity review of any commodity that would be transported through the Project. (Tr. 1590:25–1591:8, 1593:5–1594:17 (Tagami), 2901:25–2906:6, 2903:1–12 (Sanders), 3152:20–3153:25 (Ranelletti), 3615:3–22 (McClure).) Further, the City indicated it might re-open a CEQA analysis for the Project. (Tr. 1590:25–1591:8, 1593:5–1594:17 (Tagami), 2901:25–2906:6 (Sanders), 3152:20–3153:25 (Ranelletti), 3615:3–22 (McClure).) Upon hearing this, Tagami left the meeting early because, the meeting "was not to kick off the project. It was to restart the land use process." (Tr. 1594:12–17.)

b. OBOT's First Force Majeure Claim and the City's Response

Two days later, on March 11, 2016, legal counsel for OBOT sent its first force majeure letter to the City. (Ex. 76.) The letter stated, among other things, that during the March 9th meeting:

> [T]he City had not yet determined whether the City's current Construction Codes and Standards are adequate to address all of the matters involved with the design and operation of the Project Improvements and . . . the City intended

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[19] The City argued it would have reviewed the Basis of Design with OBOT at the kickoff meeting if Mr. Tagami and other OBOT representatives had not walked out. (*See* City's Proposed Stmt. of Decision 35:8–35:10.) Given the totality of the testimony and the circumstances between the Parties in March 2016, the Court does not find that assertion credible. Further, if the City was prepared to provide feedback on the Basis of Design at the kickoff meeting, it should have been able to provide that feedback over the ensuing two and a half years before it terminated the Ground Lease on November 22, 2018. The Court received no evidence that the City provided any substantive feedback on the Basis of Design to OBOT during that time.

> to review the Construction Codes and Standards applied by other jurisdictions (including the City of Long Beach) to determine whether the City needed to supplement its current Construction Codes and Standards in order to review the Project Improvements.

(Ex. 76 at 1–2.) The letter continued:

> Notwithstanding the City's obligation under Section 3.4.3 of the Development Agreement to provide OBOT with a binder confirming the existing City Regulations that would be applicable to the Project and OBOT's prior written requests for the same, the City was not in a position to provide OBOT with the required binder. As such, OBOT understands that the City is not able to inform OBOT of the Construction Codes and Standards and applicable City Regulations that will apply to the Premises and the Project Improvements.

(Ex. 76 at 2). The letter then quoted numerous provisions of the Ground Lease, including sections relating to tolling of time periods, scheduling, the initial milestone date, construction standards, and force majeure. (Ex. 76 at 2, 3.) The penultimate paragraph of the letter stated:

> OBOT hereby requests that the City confirm that (1) OBOT's obligation to promptly commence, and thereafter diligently pursue to Completion, the design and construction of the OBOT Wharf and Rail Improvements and (2) the time periods set forth in Section 1.7.2 of the WOW Lease shall each be extended for the time period commencing February 16, 2016 through the date that the City is able to provide OBOT with written confirmation of the Construction Codes and Standards and applicable City Regulations that will apply to the design of the Project Improvements. Please note that the City's failure to timely provide such confirmation shall not affect the application of the Force Majeure provisions of the WOW Lease.

(Ex. 76 at 3.)

On March 22, 2016, the City responded to OBOT's March 11, 2016 force majeure letter. (Ex. 81.) Although the City acknowledged it had not provided OBOT with the binders of existing regulations that would apply to the Project, the City said it was committed to doing so "as soon as practicable;" moreover, if they failed to include an

existing regulation in the binders, "it d[id] not in any way waive the applicability of such to the Project." (*Id.* at 2).

Without explanation, the City also acknowledged it was having "preliminary discussions" with OBOT regarding "certain improvements" for the Project. Irrespective of those acknowledgements, the City maintained it "has not taken any acts, in any capacity, resulting in any delay that could be characterized as an event of Force Majeure"—ostensibly because the City concluded that none of the issues raised by OBOT prevented OBOT from meeting the deadlines for the Minimum Project in Article 6 of the Lease. (*Id.* at 1–2.)

Finally, the City stated it had "not provided any notification to Tenant that Tenant is in breach of or default [of] its obligations" under the Ground Lease. (*Id.* at 2.) The letter itself does not explain the relevance of this assertion. Later communications between the Parties in 2018 suggest the City was attempting to convey that because section 16.1 requires a Party to give notice to the other Party "(b) promptly after the other Party's demand for performance," and because the City had not informed OBOT that it was in default or otherwise demanded OBOT's performance—that in addition to disagreeing with OBOT's substantive claim of force majeure, procedurally the City viewed the claims as premature.

c. Applicable Regulations, Status of the Basis of Design, and Permissible Commodities

As noted above, although section 3.4.3 of the Development Agreement required the City (before November 2013) to compile and deliver to OBOT the binders of local regulations that applied to the Project, the City had not completed that task by the time the Ground Lease became operative on February 16, 2016. From November 2013 until the March 9, 2016 kickoff meeting, the City's failure to provide OBOT with the local regulations that applied to the Project—particularly the regulations related to commodities—did not appear to be a significant issue between the Parties.

Sometime before March 31, 2016, OBOT took the lead and prepared a list of existing regulations it believed could apply to the Project and forwarded that list to the City. (Tr. 686:9–18 (Tagami); *see also* Ex. 79 (Letter from Cappio to Tagami about "Ordinance and Regulations Pertaining to Development Agreement Section 3.4.3 (Mar. 31, 2016)).) On June 15, 2016, the City sent OBOT a letter stating it had made "every reasonable effort" to compile the existing City regulations (as required in the Development Agreement). (Ex. 84 at 1.) The regulations were attached to the letter on a set of discs; the City stated it understood Mr. Tagami agreed to receive the regulations in either electronic or paper format. (*Id.*)

OBOT argued during the trial and in its briefs that the City never provided OBOT with the existing regulations that applied to the Project (in part because the regulations were not in binders and did not have an approving signature from the City). OBOT's argument on this point is unpersuasive and the Court views it as a red herring. Albeit belatedly, the City substantially complied with this obligation. As discussed further below, the primary issue between the Parties was not the historic regulations that were applicable to the Project. The issue was the moving target and general lack of clarity about what commodities, if any, the City would or would not permit to be shipped through the terminal, and what legal or regulatory basis the City would use to make those determinations.

* * *

As the City correctly argued during the trial, nothing in the Ground Lease or the other agreements between the Parties obligated the City to provide OBOT with a list of "approved" commodities. Such a list would have been unnecessary because, until the City suggested otherwise, the Project could presumably handle any legal bulk commodity, so long as it was within the logistical parameters of the shipping channels in the San Francisco Bay and the Project itself (e.g., the respective heights of the Golden Gate and Bay Bridges, the depth of the Project wharfs, etc.). The Court finds that when the City made it clear to OBOT that it would evaluate otherwise legal commodities on a

"commodity-by-commodity" basis (beginning with coal) to determine whether each product could be transported through the Project—the standards by which the City would conduct this analysis became critically important.[20]

* * *

On May 11, 2016, as Environmental Science Associates (ESA), on behalf of the City, was analyzing the health and safety effects of transporting coal through the Project in anticipation of the June 27, 2016 public hearing, Ms. Cappio sent an email to OBOT requesting additional information. (Ex. 594.) Specifically, on behalf of ESA, Ms. Cappio asked whether OBOT had "any update or additional information for the offloading, handling, storage and on loading activities at the proposed OBOT Terminal to add to BOD, dated July 2015." (*Id.*) Ms. Cappio also sought to verify the correct "throughput volume of commodities by type A and B." (*Id.*)

On May 16, 2016, Mr. Tagami, on behalf of OBOT, sent a lengthy response to Ms. Cappio's request. (Ex. 598.) OBOT asserted ESA's proposed scope of analysis was premature because there was no "ultimate design" for the Project in significant part because OBOT did not know what commodities the Project would handle. (*Id.* at 1). The letter reminded the City the Basis of Design, "used generic commodity designations (i.e., 'Commodity A' and 'Commodity B') because there was no and remains no commitment to handle any particular commodity. The generic designation was purely for illustrative purposes." (*Id.* at 2.) OBOT wrote that "site configuration and logistics variables" depend upon the identified commodity. "Dry or liquid? Powdery[,] versus granular[,] versus chunky[,] versus break bulk. Each variable is potentially different based upon the commodity." (*Id.* at 2–3.) OBOT summarily stated, "The ultimate design will be a multi-

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[20] The City's failure to provide this information to OBOT after the Federal Decision was a further breach of the Development Agreement, and was also a breach the implied covenant of good faith and fair dealing in both the Ground Lease and the Development Agreement as discussed further in Section 7 of this Statement of Decision.

disciplinary effort by many experts so, among other things, it will be very expensive. It would be folly to make that effort and expend those funds in advance of knowing the type, number, and quantity of commodities to be handled. We simply are not there yet." (*Id.* at 1.)

Even after the City issued the no-coal ordinance and applied it to the Project, OBOT continued to seek clarification from the City about what commodities were potentially acceptable. For example, Mr. Tagami requested a letter from the City confirming that soda ash (also known as sodium carbonate, a cleaning agent that is a component of dry soap powder, including laundry detergent) would be an acceptable commodity to transport through the project. (Tr. 415:24–416:2 (Tagami), 416:18–418:5, 2084:4–11 (Cappio).) Ms. Cappio testified the City "looked into soda ash as a possible commodity," and analyzed concerns about its transport. (Tr. 2085:5–19 (Cappio).) Sometime before September 7, 2016, Ms. Cappio prepared (but did not sign) a draft letter to OBOT that, with many qualifications, stated:

> From our preliminary review of the BOD and other documents and analysis, soda ash will not trigger further review under the California Environmental Quality Act (CEQA) and you may proceed with the ministerial permitting process identified above. This finding is based on the fact that soda ash does not present, based on the preliminary information that has been submitted and is known at this time, the unique characteristics, hazards and/or risks that have been of concern to the City Council.

(Ex. 91 at 2.) Ms. Cappio shared the draft letter with OBOT. (Tr. 2086:5–2089:12 (Cappio), 418:7–9 (Tagami).) However, for reasons not illuminated during the trial, the City did not authorize Ms. Cappio to finalize the letter. (Tr. 2086:19–2089:21 (Cappio), 418:7–16 (Tagami).) Soda ash, therefore—like every other potential commodity that could be transported through the Project—lacked the City's clear imprimatur.

Separately, Mr. Tagami asked Mayor Schaaf whether grain would be an acceptable commodity to transport through the terminal. (Tr. 277:21–25 (Tagami).) According to Mr. Tagami, Mayor Schaaf said grain could be acceptable to the City, but the City needed to

consider its position on the transport of grain that was genetically modified (also known as GMOs).[21] (Tr. 277:21–25 (Tagami).)

The Court finds that one of the critical items that was necessary to move the Project forward was the need for the City to inform OBOT, clearly and unequivocally, what commodities the City viewed as impermissible, and the legal basis for City's position.

d. Status of Rail Access Agreement

Even though the Rail Access Agreement was reportedly poised to be executed in 2015, it was not completed by the fall of 2016. On October 13, 2016, approximately three months after the City issued the no coal ordinance, Ms. Cappio sent Messrs. McClure and Tagami a letter regarding the status and sequence for the various rail agreements that the Port, the City, and OBOT needed to complete. (Ex. 95 at 1.) Ms. Cappio noted that, "The Port-City Cost Sharing Agreement provided that both parties negotiate terms and conditions of access for Port and City tenants to the Port Railyard, including execution of long-term access easements for the respective properties." (*Id.* at 3.) Ms. Cappio reiterated that the Port and the City had prepared a "[d]iscussion draft" of the Rail Access Agreement and the agreement "will be discussed by the City and Port by early November, 2017." (Ex. 95 at 3.) There was no evidence or testimony that the City's reference to November 2017—a date that was thirteen months after this letter was written—was a typographical error. Completion of the Rail Access Agreement was a significant step in advancing the Project. As stated in section 5.2.3(a) of the Lease, "the City shall use commercially reasonable efforts to enter into a 'Rail Access Agreement.'" (Ex. 68 at 31.) The Court finds that due to the lack of any articulated, legitimate explanation for the delay, thirteen months for the City and the Port to review a "discussion draft" of a

[21] During her testimony, Mayor Schaaf testified she had no recollection of the conversation. (Tr. 1819:8–17 (Schaaf).)

document that had reportedly been near completion for years does not constitute "commercially reasonable efforts."

e. OBOT's Annual Compliance Report and OBOT's Federal Action

On July 15, 2016, pursuant to the requirements of the Development Agreement, OBOT submitted its annual compliance report to the City. (Ex. 93 at 4–13.) In the report, OBOT described its Project activities over the preceding year (July 16, 2015, through July 16, 2016). During that year, OBOT reported it had not "received any written notice of noncompliance from the City" and was not "aware of any other action on its behalf that would demonstrate bad faith compliance or noncompliance with the [Development Agreement]." (*Id.* at 6.) OBOT asserted it had acted with substantial, good faith compliance with the Development Agreement and as required, asked the City to issue a certificate of OBOT's compliance within 45 days. (*Id.* at 7.) When the City did not respond, OBOT sent a follow up letter on September 13, 2016, reminding the City, pursuant to section 17.138.090 of the Development Agreement and section 65865.1 of the Government Code, that the City was required to respond within 45 days. (*See* Ex. 93.) On September 19, 2016, the City issued its response and stated it "has determined that [OBOT] is in substantial compliance with the [Development Agreement] for the July 16, 2015, to July 16, 2016, period." (Ex. 94 at 1.)

As noted in Section II of this Statement of Decision, OBOT filed its complaint in the federal action on December 7, 2016, and its first amended complaint on June 14, 2017. (Exs. 120, 120A.)

4. Factual Findings and Conclusions of Law Between June 15, 2017, and May 15, 2018

a. Fourth Amendment to LDDA and City's Answer in the Federal Action

On June 22, 2017, the Parties entered into the fourth amendment to the LDDA. (Ex. 819 at 2.) Among other things, the amendment provided an update regarding the budget for Public Improvements (then authorized at $235,341,000). (*Id.*)

On June 27, 2017, the City filed its answer in the federal action.

b. OBOT's Annual Compliance Report

On July 5, 2017, pursuant to the requirements of the Development Agreement, OBOT submitted its annual compliance report to the City for the preceding year. (Ex. 633.) OBOT reported it had not "received any written notice of noncompliance from the City" and it was not, "aware of any other action on its behalf that would demonstrate bad faith compliance or noncompliance with the [Development Agreement]." (*Id.* at 4.) OBOT maintained it had acted with substantial, good faith compliance with the Development Agreement. (*Id.* at 1–4.) As required, OBOT asked the City to issue a certificate of OBOT's compliance within 45 days. (*Id.* at 1.) On August 21, 2017, the City responded stating it "has determined that [OBOT] is in substantial compliance with the [Development Agreement] for the July 16, 2016, to July 5, 2017, period." (Ex. 122 at 1.)

c. OBOT's Construction Drawings and Materials for Rail Improvements

OBOT completed the construction drawings for the railroad plans (for the public improvements), including specifications for the track, crossings, and other rail improvements, by August 28, 2017. (Tr. 1659:6–11, 1720:2–7, 2731:16–2734:14 (McClure).) OBOT also ordered the materials needed to construct the rail improvements

in the Ground Lease. (Tr. 1659:6–12, 1676:24–1677:21 (McClure); *see also* Ex. 854 at 16, 60 (deposition of Cole).)

d. The City Stopped Using OBOT as the City's Agent to Manage Public Improvements

On October 17, 2017, the City notified OBOT that as of October 23, 2017, OBOT would no longer serve as the City's agent to manage the Public Improvements for the Project. (Ex. 127 at 1.) The City stated it "intends to provide to [sic] day-to-day management of the Project beginning on October 24, 2017. *CCIG is directed to stop work*, as the City will not pay for any work performed after that date." (*Id.* at 1).) The City directed OBOT, by "[n]o later than October 20, 2017"—three days form the date of the letter—to provide notice to more than a dozen consultants terminating their agreements and eliminating work those consultants had not yet completed. (*Id.* at 2–3.) Among other things, the City also directed OBOT as follows:

> Regarding [OBOT's] contracts with Alarcon Bohm dated October 22, 2013 for wharf improvements, November 11, 2013 for fencing, and dated February 12, 2014 for demolition, [OBOT] is directed to issue a stop work notice to Alarcon Bohm immediately stating that work must stop by October 23, 2017. The notice should also specify that Alarcon Bohm is to cease operations and that it shall not place further orders or enter into contracts for materials, labor, services, or facilities except to the extent necessary to protect or preserve the work performed to date. City staff will follow up with more specific direction regarding the process for terminating these agreements.

(*Id.* at 3.) The Court did not receive evidence or testimony that explained why the City made its decision or how, if at all, the City concluded such an action would assist the Parties in fulfilling their obligations under the Development Agreement, the current version of the LDDA, or the Ground Lease.

On October 23, 2017, OBOT responded to the City's letter and provided a detailed account of the steps OBOT had taken to comply. (Ex. 128 at 1–3.)

e. OBOT's Sublease with IES and Request for Non-disturbance Agreement

On January 12, 2018, OBOT sent a letter informing the City that OBOT had executed a sublease with Insight Energy Solutions, LLC (IES).[22] (Ex. 137 at 1–2.) OBOT requested the City's approval and execution of a non-disturbance agreement, which were attached to the letter. (*Id.* at 1.) The City responded on February 1, 2018, noting what it viewed as numerous deficiencies in the IES sublease and requesting six categories of additional information. (Ex. 145 at 2.) On February 5, 2018, OBOT replied to the City's letter, said it would provide more detailed information shortly, and asked for clarification of various deficiencies noted by the City.[23] (Ex. 643 at 1–2.) It does not appear the City responded to OBOT's February 5, 2018 letter until July 17, 2018. But a later City correspondence suggests OBOT did not provide the more detailed information it promised to the City in its February 5, 2018 letter. (Ex. 654 at 1–2.) As a result, the Court finds that at least through the spring of 2018, OBOT abandoned its January 12, 2018, request seeking a Non-disturbance Agreement for the IES sublease.

f. OBOT's Second Force Majeure Claim

On April 10, 2018, OBOT (through counsel) sent a letter to the City reasserting its claim of force majeure under the Ground Lease. (Ex. 148 at 2.) OBOT stated the City had recently "raised the issue of the expiration of tolling" period set forth in section 1.7.2 of the

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[22] At this time the Parties were participating in the federal trial.

[23] For example, OBOT asked the City:

> Can you expressly state how the use requirement in the IES Sublease is deficient and fails to comply with Section 12.4.1.2 of the Ground Lease? The language in Section 3.1.1 of the IES Sublease mirrors Section 3.1.1 of the Ground Lease, and Exhibit 3.1 of the IES Sublease does not grant to IES greater uses than what was afforded to OBOT under Exhibit 3.1 of the Ground Lease.

(Ex. 643 at 1.)

Lease. (*Id.* at 2.) OBOT noted that during its meeting with the City, OBOT reminded "City representatives of OBOT's claim of a Force Majeure extension of certain of the time periods that were tolled pursuant to [section 1.7.2.]. The City representatives requested that OBOT provide them with an additional copy of the Force Majeure claim." (*Id.* at 2.) Pursuant to the City's request, OBOT attached its first force majeure letter to the City, dated March 11, 2016, stating, "please see the enclosed letter stating OBOT's claim for a tolling of the time periods related to OBOT's obligation to proceed with the design and construction of the OBOT Wharf and Rail Improvements." (*Id.* at 2–7.) OBOT further stated that although it was "under no obligation to do so" it was:

> reiterat[ing] "its claim for an extension (due to Force Majeure delay related to the City's failure to provide necessary information related to Construction Codes and Standards) of the time periods applicable to the design and construction of the Project Improvements, including without limitation, (a) the condition to the implementation to the provisions of Section 1.7.2 and (b) Section 6.1 of the [Ground] Lease.

(*Id.* at 2.)

g. No Commodity Information, No Feedback on the Basis of Design, No Rail Access Agreement

During the nearly one-year period between June 15, 2017 (when OBOT filed its first amended complaint in the federal action) and May 15, 2018 (when the federal court issued the Federal Decision), the City did not provide OBOT with any additional information about what commodities, if any, were acceptable or unacceptable to be transported and shipped through the Project. (*See* Tr. 2082:19–22, 2272:10–14, 2556:3–12 (Cappio)).) In addition, during that time the City did not provide OBOT with any feedback on the Basis of Design. (*See* Ex. 191 at 3 ("OBOT still awaits substantive comments from the City on the BOD.").) Finally, the City and the Port did not execute the Rail Access Agreement.

(*See id.*) The City's failure to act on these items during the time the federal litigation was pending continued to cause the Project to stagnate.

5. Factual Findings and Conclusions of Law Between May 16, 2018, and the City's Termination of the Ground Lease

a. Response to Federal Decision

When the Federal Decision was issued, OBOT believed the Project would immediately proceed with the full cooperation of the City. (Tr. 1080:21–1081:3 (Tagami).) That is not what occurred. (Tr. 1081:4–5 (Tagami).)

Almost immediately following the Federal Decision, the City took steps toward terminating the Lease. For example, on May 22, 2018—one week after the Federal Decision was issued—Ms. Lake wrote an email to Messrs. Cole, Monetta, and Kennedy (a City consultant) asking whether OBOT had constructed the Minimum Project Rail Improvements pursuant to the Ground Lease. (Ex. 847 at 2.). Ms. Lake understood the potential legal import of this inquiry: If OBOT had failed to construct the Minimum Project Rail Improvements, that could be a path for the City to terminate the Ground Lease. In response, staff informed Ms. Lake that OBOT had constructed "rail improvements within its leased premises," but the City had not yet completed *its* work that was necessary for OBOT to complete all the rail segments identified in the Minimum Project Rail Improvements. (*Id.* at 1–2.)

As noted in Section II of this Statement of Decision, on June 13, 2018, the City filed a notice of appeal (regarding the Federal Decision) to the U.S. Court of Appeals for the Ninth Circuit.

The City had the right to appeal the Federal Decision. It was also appropriate and responsible for the City to explore every *legal* option available to effectuate its legitimate interest in protecting the health and safety of its constituents, and the greater environmental concerns about coal and climate change that were expressed by City residents and many local, national, and international scientists and leaders.

In addition to appealing the Federal Decision, the City had the option to engage in settlement discussions with OBOT to attempt to reach an agreement to change the terms of the Development Agreement, the LDDA and/or the Ground Lease.[24] Separately, or in addition to those options, the City could have diligently, and in good faith, taken every reasonable step to move the Project forward (consistent with the Parties' agreements and legal obligations), and simultaneously tried again to issue a regulation, supported by a record of substantial evidence, banning coal (or any other commodity) that the City established would pose a substantial health or safety danger to people in Oakland.

What the City could not do was undermine or improperly terminate the contracts it had with OBOT—that was not a legal option. That, however, was the path the City selected.

b. Status of Rail Access Agreement as of July 2018

On July 20, 2018, OBOT sent the City a letter requesting the City do one or both of the following:

> (i) as required by . . . the [Ground Lease], use commercially reasonable efforts to pursue a written agreement with the [Port] for rail access to the Port Rail Terminal . . . or (ii) acknowledge in writing that OBOT . . . [has] the right to access the Port Rail Terminal through rights granted under the [Cost Sharing Agreement (CSA)] and the Ground Lease.[25]

(Ex. 166 at 1.) OBOT reiterated the importance of rail to the Project, noting the City received rail related grants from TCIF and the Federal Railroad Administration to

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[24] The Court understands the Parties have repeatedly—but unsuccessfully—engaged in settlement negotiations to resolve this matter.

[25] OBOT was also taking other steps to ensure that it could construct track. For example, on May 23, 2018, OBOT filed a petition with the Surface Transportation Board seeking a declaratory order confirming that construction approval is not required for OBOT "to rehabilitate track in an existing rail right of way" at the Project. (Ex. 155.)

support the Project. (*Id.*) OBOT also reported it had received a "+$1.7 Million grant through the Bay Area Air Quality Management District ("BAAQMD") to purchase a Tier 4 locomotive based on BAAQMD's assumptions of rail traffic at the Project as outlined in the City's Master Plan." (*Id.* at 1.) OBOT then reasonably queried:

> Given the requirement in the CSA for the parties to use good faith efforts, the requirement in the Ground Lease for the City to use commercially reasonable efforts, as well as the detailed terms set forth in the CSA to be memorialized in the Rail Access Agreement, OBOT is left wondering, after six (6) years, what efforts (if any) are being used by the City and the Port to enter into the Rail Access Agreement. Do the City and the Port still intend to enter into a Rail Access Agreement? Is there some other reason why the City and the Port have not executed the document?

(*Id.* at 2.) OBOT outlined myriad problems and delays the lack of a Rail Access Agreement (and the lack of a Rail Operating Agreement) had caused the Project. (*Id.* at 1–2.) The City did not provide a written response to OBOT's letter.

The Court finds that after the Federal Decision, the City continued to not "use commercially reasonable efforts to enter into a 'Rail Access Agreement'" as required by section 5.2.3(a) of the Ground Lease (Ex. 68 at 31). The City's failure to do so, as well as its lack of transparent communication with OBOT regarding the RAA, demonstrates a lack of good faith by the City to move the Project forward.

c. The City Demands Rent, OBOT Pays Rent and Asserts Force Majeure

On July 24, 2018, the City sent OBOT a "Notice of Past Due Base Rent" stating the Ground Lease required OBOT to pay rent beginning on February 15, 2018. (Ex. 169 at 1.) The City asserted OBOT owed $248,149.15 in "Past Due Base Rent" (including interest). (*Id.*) The City also reminded OBOT it would owe another rental payment of $166,661.30 "due no later than July 31, 2018." (*Id.* at 2.)

On July 30, 2018, six days after the City's demand for rent, OBOT paid the City "under protest" the full $248,149.15 "Past Due Base Rent," including interest. (Ex. 174 at 1.) OBOT attached the check to a letter in which it again raised its force majeure claim against the City. (Ex. 174.) OBOT asserted that the City's actions in passing the no coal ordinance in violation of the Development Agreement constituted an act of force majeure. (*Id.*) In addition, OBOT incorporated by reference its March 11, 2016 force majeure letter in which it requested additional time to complete its "Minimum Project' obligations" under the Ground Lease. (*Id.* at 1–2.)

d. OBOT Pays 2018 Q3 Rent, Asserts Force Majeure and Non-cooperation

On August 3, 2018, OBOT, "under protest," sent the City $166,661.30 (Base Rent Pay Payment) for "Q3 2018." (Ex. 176 at 1.) OBOT reiterated the force majeure claims it made in its July 30, 2018 letter—namely, that the City's actions in passing the no coal ordinance in violation of the Development Agreement constituted an act of force majeure and OBOT was entitled to additional time to complete its Minimum Project obligations under the Ground Lease, as OBOT originally asserted in its March 11, 2016 force majeure letter. (*Id.* at 1.) OBOT also documented non-cooperation by the City for the "Laydown Area" as follows:

> Furthermore, after months of trying to work with the City and the City's contractor—Tuner/Goodfellow Top Grade/Flatiron (the "JV")—the license agreement between OBOT and the JV for an approximately 74,736 sf portion of the West Gateway ("Laydown Area") expired on July 31, 2018 ("Expiration Date"); OBOT scheduled three walkthroughs of the Laydown Area with the City and the JV, but a representative of the City failed to appear at all three meetings. Despite its contractual obligation to vacate the Laydown Area as of the Expiration Date and leave the Laydown Area in a broom swept condition, the JV is still occupying the Laydown Area with material and equipment strewn about.

(*Id.* at 2.)

e. August 16, 2018 Internal City Emails Regarding Grants, Rail Access Agreement and Delay

On August 16, 2018, a series of internal Project-related emails were exchanged among City employees, including Pat Cashman (City Project Director), Doug Cole, Elizabeth Lake, and Bijal Patel (Special Counsel). (Ex. 181.) The emails address a variety of topics, beginning with reference to an audit of the 2013 TCIF Grant Agreement for $176,341,000. (Ex. 181 at 4.) The emails reflect a sense of urgency, including information that was being requested in preparation for a meeting scheduled for the following day. (Ex. 181.) The final email in the thread was from Mr. Cole, who was responsible for managing the grant funding for the Project including communicating with the State. In his email, Mr. Cole stated:

> This [Third Amendment to the LDDA] and PMA and Lawsuit are part of the story that has been conveyed to the State in relation to this shift and delay in advancing Segment 5 (Wharf, Marine Terminal)
>
> On that note . . . at some point real soon the City and Port are probably going to have to answer to why the RAA has not advanced and how this has impacted the fundamental basis for the grants to both the City and Port, . . . I think you get this but not sure?

(*Id.* at 1.) Mr. Cole's email confirms the City had informed the State that part of the reason the Project had not progressed was due to the litigation, which began on December 7, 2016, and was ongoing, regarding the City's no coal ordinance. The email also suggests, but does not answer, the question: How much delay did the years long lack of a Rail Access Agreement have on various aspects of the Project?

f. City Letter to OBOT re Laydown Area, OBOT's Failure to Satisfy the Initial Milestone Date, and the City's "Deferral" of OBOT's Force Majeure Claims

On August 20, 2018, the City hand-delivered OBOT a letter responding to OBOT's July 30, 2018, and August 3, 2018 letters.[26] (Ex. 185.) The City acknowledged OBOT's concerns that the City's contractors (the JV) were still occupying the Laydown Area.[27] However, the City essentially stated the issue with the JV was OBOT's problem, noting the license to occupy the Laydown area was between the JV and OBOT, and we "remind you that the City is not a signatory to this licensee agreement. As such, we anticipate OBOT will directly address these concerns with the JV. *Of course, in the spirit of cooperation, the City is available to participate in such discussions as needed*." (*Id.* at 1–2 (emphasis added).) The Court finds the City's response to OBOT (written three weeks after OBOT raised the issue) ignored its responsibility for its contractor, caused delay, was not made in the "spirit of cooperation," and demonstrates a lack of good faith effort to move the Project forward.

As to OBOT's claims of force majeure, the City wrote the following:

> *Minimum Project Obligations*
>
> As you are aware, under Section 6.1 of the Ground Lease, the latest date by which OBOT must have commenced construction of the Bulk and Oversized Terminal and at least one of the components of the Minimum Project Rail Improvements was August 14, 2018 (the "Initial Milestone Date"). The City notes OBOT's failure to satisfy these obligations by the Initial Milestone Date.
>
> The City acknowledges receipt of OBOT's claims for Force Majeure and its request, through the letter dated March 11, 2016 from Mr. Marc Stice [OBOT's

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[26] The letter was signed by Ms. Landreth and copied Barbara Parker (the City Attorney), Ms. Lake, and Ms. Patel.

[27] The City also acknowledged OBOT's "Past Due" rent payment, as well as its "timely . . . 2018 Q3 Base Rent under the Ground Lease." (Ex. 185 at 1.)

> counsel], to toll the Initial Milestone Date. With a reservation of all rights and remedies, the City elects to continue a deferral of its substantive response to, including denial and/or legal challenge of, such claims and request.

(*Id.* at 2 (emphasis added).)[28]

This correspondence reflects the City's efforts to develop a narrative and a written record that would support its ensuing termination of the Ground Lease. The City had now informed OBOT that—in the City's view—OBOT had failed to commence construction of the Minimum Project by the Initial Milestone Date in the Ground Lease, which would be a fatal lapse if OBOT did not timely cure the problem, or if the City did not agree to toll the Initial Milestone Date. Thus, the amount of time OBOT had to complete the Minimum Project was critically important. Yet, the very thing that would have clarified or extended the amount of time available to OBOT under the Lease was a substantive response from the City regarding OBOT's claims of force majeure. The Court finds the City's unexplained failure to substantively respond to OBOT's three claims of force majeure in 2018 (April 10, 2018, July 30, 2018, and August 3, 2018) demonstrates a lack of good faith and fair dealing by the City.

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[28] The City hand-delivered OBOT another letter the same day (August 20, 2018); this one came from the City Attorney, signed by Ms. Patel, and copied Ms. Landreth and Ms. Lake, and primarily addressed sublease issues. (Ex. 492.) The final paragraph of the letter includes similar language as the letter from Ms. Landreth:

> We acknowledge that OBOT has made certain claims against the City for Force Majeure (as defined in the Ground Lease). As noted in the letter from Ms. Sabrina Landreth dated concurrently herewith, the City, with a reservation of all rights and remedies, *elects to continue a deferral of its substantive response* to, including denial and/or legal challenge of, such claims.

(*Id.* at 2 (*emphasis added*).)

g. August 24, 2018 City Email Regarding Project Issues and Delays

On August 24, 2018, Mr. Cole wrote a lengthy email to Ms. Lake expressing many concerns about the Project, including the status of compliance with the grant funding and the State Department of Finance audit.[29] (Ex. 187.) In relevant part Mr. Cole wrote:

> [A]s you know, completion of the Project now has an outside date of August-September 2018 . . . . In order for the Public Improvements to become operable, the *Public Improvements have to be accepted by the City* Council and was . . . . scheduled for . . . no later than the first meeting in October (Ideally in September when Council reconvenes) and then to Council in the latter half of October or early November to be followed by a 30-day noticing period with the County prior to final retentions being released to the JV in December, January [2019] at the absolute latest
>
> . . .
>
> You should also know that the State has yet to determine whether or not the City's request to shift the $25.9M Private Spend out of Segment 3 and into Segment 5 as previously requested via the Quarterly Report and Project Change Request back in April 2018 [*sic*]. You are aware of this request because we have discussed it . . . the purpose of which was to one, bring into alignment the provisions approved by the City in the 3rd Amendment to the LDDA and to also enable compliance with the completion of the funded segment prior to April 16, 2018 *given the lawsuit by and between the City and OBOT, defunding of ACTC wharf improvements, and lack of progress on closing the Rail Access Agreement by both the City and Port, etc.* You need to seek direction from the Caltrans Program Staff if this will [*sic*] request will require California Transportation Commission (CTC) approval and require a public hearing?
>
> . . .

[29] Mr. Cole's letter expressed frustration with the City, and Ms. Lake in particular, about both the Project's progress, and Mr. Cole's interpersonal dealings with Ms. Lake. The Court observed the same frustration during Mr. Cole's trial testimony (played via video). While Mr. Cole did not agree with all the City's Project-choices (for example he did not agree that OBOT should have been both the Developer for the Project's Private Improvements and the City's agent to manage the Public Improvements) (Ex. 854 at 80), Mr. Cole was committed to performing his obligations to advance the Project on behalf of the City, including properly administering the grant funding. The Court found Mr. Cole credible.

> Again, as we have also discussed the City and Port Funded Segments were justified as rail served projects and it is for that reason that *the state awarded tax payer dollars to both the City and Port totaling $242M with the expectations that it would be a rail served . . . .* [*sic*] *but fundamentally, to date, neither the City nor the Port have an executed the* [*sic*] *Rail Access Agreement (RAA) based on the term sheet that was approved by Council and the Commission back in October-November 2014*? [*sic*] Without having a RAA in place, nothing rail or rail served can become operational and [that] also impacts [the] developers[']ability to secure rail served tenants. If we have to go back to the CTC to request the shift, because everything is linked, the City or Port may find some difficulty here in terms of the shift request and or inability to meet the programmatic requirements, the primary basis for which the grant was made? [*sic*]

(*Id.* at 2–4.) This email corroborates that the City's failure to accept the Public Improvements, the federal litigation between the Parties regarding the no coal ordinance, and the failure of the City and Port to complete the Rail Access Agreement, had caused—and was continuing to cause—Project delays.

h. The City's Uncertain Timing Re Completion of Public Improvements

At about this time, OBOT was in communication with City about the schedule for the City's completion of the Public Improvements. (Ex. 189 at 3–4.) On August 21, 2018, Mr. Tagami emailed numerous individuals from the City and the JV stating he (Mr. Tagami) understood that within the next 30 days the JV will be "turning over to the City certain project areas;" Mr. Tagami specifically inquired about each of the track areas that comprised the Minimum Project Rail Improvements (as set forth in exhibit 6.1-B of the Ground Lease). Mr. Tagami asked the City for "written notice" as to when OBOT "can expect to have these areas turned over to [OBOT] for private improvements[.]" (*Id.* at 4.)

On August 27, 2018, the City replied to Mr. Tagami's email stating: "It is an action item for the City and [the] JV to complete as part of the Public Improvements acceptance process . . . . We do not have dates or estimated timing to share with you at this time." (*Id.* at 2.)

Mr. Tagami followed up with the City later that day stating that OBOT understood the City would turn these areas over to OBOT within approximately 60 days (which would be the end of October 2018). (*Id.* at 1.) Mr. Tagami asked the City to discuss a rent credit because OBOT was paying rent for the complete Lease area even though it did not "have access to the subject areas and therefore [did] not [have] the beneficial use" of the areas where the City had not accepted the Public Improvements from the JV, and in turn had not turned those areas over to OBOT. (*Id.*)

These communications reinforce the conclusion that the City had caused and was continuing to cause Project delays by failing to complete the Public Improvements. The correspondence also demonstrates the City's general apathy to substantively responding to OBOT's reasonable requests. The City's conduct hamstrung OBOT, making it difficult, exceedingly impracticable or functionally impossible for OBOT to fulfill its own obligations under the Lease.

As discussed further below, the City then used OBOT's inability to proceed as a pretext for terminating the Lease. In this instance, and each of the incidents the Court describes that occurred after May 15, 2018, the record discloses no good faith justification for the City's conduct. And, at trial, the City did not provide one. Considering the totality of the circumstances (specifically the City's actions and omissions, the public statements made by City officials at the time, and the testimony and evidence at trial), the only reasonable inference is that the City wanted the benefit of the ordinance that was rejected (as a breach of the Development Agreement) in the Federal Decision—the City wanted OBOT to build a coal-free Project or the City would stop the Project altogether.

i. OBOT's Annual Compliance Report and the City's Response Requesting Further Information Demonstrating OBOT's Good Faith

OBOT submitted its annual Compliance Report to the City on July 12, 2018, and summarized its efforts to substantially comply with the Development Agreement over the

previous year.[30] The City responded by letter more than a month later, on August 27, 2018. (Ex. 188.) In its letter, the City stated it "determined [OBOT] has substantially and in good faith complied with the terms of the DA for the period from July 6, 2017 to July 12, 2018 for the MH-1 lease area." (*Id.* at 1.) The City continued by reiterating its position contained in its letter from August 20, 2018: OBOT had not met its obligation by the Initial Milestone Date to "develop the Private Improvements for each Phase of the Project in accordance with the 'Minimum Project' . . . [as] set forth in the Ground Lease[.]" (*Id.*)

The City then asserted, "As of July 12, 2018, OBOT had not submitted schematic drawings or a building permit application to the City for review; therefore, *it would not have been possible* [for OBOT] to meet the Initial Milestone Date." (*Id.* at 2.)

The Court notes that as of July 12, 2018, the City had provided no feedback to the Basis of Design that OBOT submitted to the City almost exactly three years prior. With the exception of the no-coal ordinance—which the federal court invalidated and held was a breach of the Development Agreement—by July 12, 2018, the City also had not provided OBOT with any specific guidance regarding what commodities could or could not be transported through the Project.

The Court finds that without that information, it was unreasonable—and from a practical standpoint, impossible—for OBOT to submit accurate or relevant Project schematic drawings, let alone a Project building permit, for the City's review. The Court therefore disagrees with the City's premise but agrees with its conclusion: based on the City's actions and inactions, it was not possible for OBOT to meet the Initial Milestone Date. The City inaccurately suggested OBOT's failure to meet the Initial Milestone Date was OBOT's fault; the implication also demonstrates a lack of good faith by the City to move the Project forward.

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[30] OBOT's Compliance Report was not admitted into evidence during the trial, but the City's response that references OBOT's Report was admitted as Exhibit 188.

The City concluded its letter by stating it was unable to determine whether OBOT "made good faith efforts to substantially comply with the material terms of the [Development Agreement]" from July 6, 2017, to July 12, 2018. (*Id.*) The City asked OBOT to describe its efforts and provide that information to the City within 30 days. (*Id.*)

j. OBOT's Response, OBOT's Letter re Status of Force Majeure Claims, the City's Notice to Cure, and OBOT's Rejection of the City Notice

On August 28, 2018—the day after the City sent its letter requesting OBOT to describe its substantial and good faith efforts to comply with the Development Agreement—OBOT sent an extensive eight-page, single-spaced response to the City explaining how it had done so. (Ex. 191.) OBOT raised many reasonable and relevant points, including the following:

- It took a substantial amount of time and money (more than $8 million) to prepare the Basis of Design for the Project Terminal. The City failed to provide any substantive response or comment to the Basis of Design (*id.* at 2 and 3);
- OBOT hired a contractor to perform the rail work and spent approximately $1.6 million on labor and materials. The materials were still on site, but the City had not completed the Rail Access Agreement and had not turned over the rail right-of-way to OBOT (*id.*); and
- OBOT had repeatedly raised claims of force majeure, and the City had not responded to those claims (*id.* at 1).

In its letter, OBOT also stated that, since the City had filed its notice of appeal, "the Mayor and City Council members [had said] they will do whatever is in their power to stop

the Terminal from moving forward."[31] (*Id.* at 5.) OBOT explained the City's conduct documented in OBOT's letter was not exhaustive but "clearly demonstrate[d] that the contention in the [City's letter] that OBOT is somehow culpable for a perceived lack of progress towards the Initial Milestone Date is inaccurate. OBOT has worked diligently and in good faith at every juncture to advance all aspects of this Project, including the Terminal and Rail." (*Id.* at 7.) OBOT then asked the City for "meaningful engagement" to resolve the outstanding issues between the Parties. (*Id.*)

After three weeks, OBOT did not receive a written response from the City. (*See* Ex. 216.) Marc Stice sent another letter to the City on September 19, 2018. (*Id.*) In his letter written to Ms. Landreth and Ms. Patel, Mr. Stice stated he had two conversations with Ms. Patel in an effort to understand whether the City intended its August 20, 2018 letter to serve as a notice of default to OBOT. (*Id.* at 1.) Mr. Stice reported that Ms. Patel said the City was still "discussing the matter internally." (*Id.*) Mr. Stice wrote, "OBOT concludes that the City did not intend to assert a formal notice of default regarding the commencement of the Minimum Project" and the City "will defer further discussion of this matter and OBOT's related force majeure claim in recognition of OBOT's good faith negotiations regarding other disputes related to the [Ground] Lease." (*Id.* at 1–2.)

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[31] In footnote 4 of OBOT's letter, it provided the following information as support for this proposition:

> Mayor Schaaf is quoted as saying: "We will continue to fight this battle on all fronts; not just today, but every day." Darwin Bond Graham, *Judge Rules in Favor of Oakland Coal Project*, East Bay Express (May 15, 2018). Council Member Dan Kalb is quoted as saying: "I will do everything in my power to stand against attacks on the health and safety of our East Bay communities. The City should do whatever it takes within the law to make sure this coal terminal never gets built." Dan Kalb, Council member Kalb's Spring Newsletter (May 18, 2018). Council Member Kalb is further quoted as saying: "We need to do whatever it takes within the law to hold firm in our opposition to this ridiculous proposal. The residents in that area, the workers of Oakland and the entire world need us to stop this export terminal." Kimberly Veklerov, *Federal Judge Strikes Down Oakland's Ban of Coal Facility Operations*, SFGate (May 15, 2018)

(Ex. 191 at 5–6, n.4 (internal citations omitted).)

On September 21, 2018, the City—on a Friday night—hand-delivered a letter to OBOT, titled "Notice to Cure with respect to an Unmatured Event of Default by [OBOT]." (Ex. 217.) In it, the City did not substantively respond to any of the issues raised in OBOT's August 27, 2018 letter. (*See id.*) Instead, the City reported that OBOT had "failed to satisfy its obligation to Commence Construction of the Minimum Project by the Initial Milestone Date under section 6.1.1.1 of the Ground Lease. Such failure has resulted in an Unmatured Event of Default, notwithstanding OBOT's claims of Force Majeure." (*Id.* at 1.) The City continued, "We write to inform you that **the City rejects such claims and provides you an official notice to cure this Unmatured Event of Default pursuant to Section 18.1. 7 of the Ground Lease**." (*Id.* (emphasis in original).)

The Court finds the City's decision to "defer" its response to OBOT's claims of force majeure until September 21, 2018, and then reject those claims without providing a written, substantive basis for doing so demonstrates a lack of good faith by the City.

OBOT provided a written response to the City on September 24, 2018. (Ex. 222.) Mr. Stice stated the City's letter unilaterally imposed unreasonable deadlines on OBOT and demanded OBOT waive substantial rights. (*Id.* at 1.) Specifically, the City had rejected OBOT's claims of force majeure and informed OBOT that the City would only provide OBOT with additional time to cure if OBOT, by September 26, 2018, entered into an agreement with the City, and accepted the City's terms. (*Id.*) OBOT contended the City was acting in "bad faith" to secure an outcome it wanted, but did not achieve, in the Federal Decision. (*Id.*) OBOT summarized that it:

> disagree[d] with the City's allegation of an Unmatured Event of Default, disagree[d] with the City's position that OBOT is not entitled to a Force Majeure extension of the Minimum Project dates, and reject[ed] the terms offered by the City related to the proposed Extended Cure Period.
>
> Notwithstanding the foregoing, OBOT w[ould] continue to prosecute the Minimum Project to Completion with diligence and dispatch to the extent the same is feasible given the City's continued attempts to frustrate such efforts.

(*Id.* at 2.)

k. September 22, 2018, Through the City's November 22, 2018 Lease Termination

Despite the City's resolute trajectory toward terminating the Lease, OBOT continued to try to advance the Project. Three days after the City issued its notice to cure, OBOT entered into a sublease for the Project with Insight Terminal Solutions (ITS) as the Subtenant that would construct the Project. (Ex. 801.) Several days later, on September 26, 2018, Mr. McClure sent an email to Ms. Lake stating, "In today's OAC meeting it was confirmed that there will be a survey completed of the rail corridor to confirm that the boundaries and grade levels conform with the design specifications." (Ex. 227 at 5.) Mr. McClure said he understood the survey would take approximately 30 days to complete and once it was done "the City team could facilitate the formal hand over of the rail corridor to OBOT. Given the recent correspondence from the City Attorney related to the minimum project completion dates could you please confirm the date of the formal turn-over of the rail corridor." (*Id.*)

Within minutes, Ms. Lake forwarded Mr. McClure's email to Mr. Kennedy and others at the City and asked, "[W]hy are we not turning over the rail corridor at the same time we are accepting the public improvements?" (*Id.* at 4.) Over the next day, there were a series of internal City emails questioning whether or at what risk the City could accept the Public Improvements and allow OBOT to take possession of those areas without the City first completing the survey required by the Ground Lease.[32] (*Id.* at 1–4.)

[32] On the same day, September 27, 2018, the City refused to issue OBOT an NDA for a sublease stating that section 12.5.1(v) of the Lease permits the City to withhold an NDA if OBOT had an Unmatured Event of Default. (Ex. 226.) "On September 21, 2018, the City sent OBOT an official Notice to Cure an Unmatured Event of Default for failure to meet the Initial Milestone Date. Accordingly, the City withholds its approval of [the] NDA[.]" (*Id.* at 1.) OBOT made additional requests for NDAs and estoppel certificates during this time, which the City either did not grant or conditioned on additional information. (*See* Exs. 235, 236, 485, 675, 676.)

On September 28, 2018, OBOT sent a letter to the City stating it was submitting (on behalf of ITS) the schematic drawings for the Project pursuant to section 6.2.1 of the Lease. (Ex. 239 at 1.) OBOT said the "Schematic Drawings are entitled 'Basis of Design'" and that it had provided both print and electronic copies for the City's review. (*Id.*)

* * *

During the trial, the City made two arguments regarding OBOT's submission. First, the City argued the real reason the Project had been delayed was not because of the City's actions or omissions but instead was because OBOT wanted a subtenant to be financially responsible for advancing the Project. The evidence for this argument, the City contended, was the fact OBOT had not submitted schematic drawings for nearly three years but then did so within a week of executing its sublease with ITS. Second, the City argued that what OBOT claimed were "schematic drawings" were nothing more than the original Basis of Design—all OBOT had done was replace the July 15, 2015 date on the cover with September 28, 2018. (*See* Ex. 240.)

As to the latter argument, the City is correct—there were no substantive changes between OBOT's 2015 Basis of Design and the submission it made on September 28, 2018. However, there were at least two related reasons why OBOT resubmitted the Basis of Design to the City when it did. First, although the City had not provided OBOT with any clarity as to what commodities could be shipped through the terminal, the May 15, 2018 Federal Decision determined that at a minimum, coal was a legally permissible commodity. Second, while the City had not given OBOT any feedback on the Basis of Design, the City had also just asserted (on August 27, 2018) that OBOT could not have met the Initial Milestone Date in the Lease because it had failed to submit schematic drawings. The City, therefore, placed OBOT in a lose-lose situation. To provide the City with detailed schematic drawings, OBOT needed the City's feedback on the Basis of Design and the City's clear direction regarding what commodities the City deemed acceptable for transport through the Project. The City had provided neither. At the same

time, the City warned that the failure to submit the schematic drawings placed OBOT at significant risk of being unable to meet the Initial Milestone deadline.

The City argued OBOT had a different option: it could have, and should have, moved forward with Project schematic drawings without any feedback from the City. OBOT could have designed a smaller Project, a Project that could have handled a wide range of commodities, or even called the City's bluff so to speak and moved forward with schematic drawings for the same Project originally anticipated in the Basis of Design.[33] Essentially, the City argued OBOT was legally obligated to spend countless additional millions of dollars and time to advance the development of the Project that would transport unknown commodities—all to circumvent the City's lack of feedback, its failure to cooperate and meet its own legal obligations, and its absence of good faith. This is neither what the Lease nor the law required of OBOT.

* * *

On October 4, 2018, "under protest," OBOT paid the City $166,661.31 in Base Rent for Q4 2018. (Ex. 243.) OBOT reiterated its seven previous force majeure claims against the City; all but one of those claims (March 11, 2016), occurred after the Federal Decision, including one letter (dated October 3, 2018) from OBOT's litigation counsel not entered as an exhibit during trial. (*Id.* at 1.)

On October 9, 2018, Mr. McClure emailed Ms. Lake and asked if "there is any update on the timing of the turn-over of the rail corridor." (Ex. 477 at 1.) Mr. McClure said he understood the survey had been ordered and wanted to "make sure that [it] is moving ahead." (*Id.*) Ms. Lake immediately responded, "Yes[,] waiting on the survey,

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[33] In its objections to the Court's proposed statement of decision, the City went further and argued OBOT should have moved forward with building the shipping terminal even without the construction of rail linking the terminal to anything else. (*See* City's Objection 8:23–24 ("The [Court] also omits any discussion rejecting OBOT's meritless arguments that construction of the rail was somehow necessary for construction of the terminal,").) Not only is this approach not required by the Parties' contracts, but it could yield a perverse result: instead of a proverbial bridge to nowhere, the terminal would risk being an "island" with no bridge.

which I understand is moving ahead[.]" (*Id*.) The City's position that OBOT had failed to complete the Minimum Project, and OBOT was not entitled to additional time to complete those Private Improvements, when the City *still* had not completed the Public Improvements and turned over the rail corridor to OBOT (which would have allowed OBOT to complete that work) evidences the City's lack of good faith.

On October 18, 2018, the City informed OBOT it determined the schematic drawings OBOT submitted on September 28, 2018, to be incomplete. (Ex. 247.) The City's brief letter noted six deficiencies, (e.g., the schematic drawings did not include a description of how the proposed Project would meet the Minimum Project requirements in the Lease), and concluded with, "The City's response to [OBOT's] submittal shall in no way be construed as a substantive response or acceptance of a cure or commencement of cure of the Unmatured Event of Default described in the letter from the City Attorney dated September 21, 2018." (*Id*. at 1–2.) The City did not include any detailed comments regarding OBOT's submission; the City provided no red line, no proposed edits, no questions or feedback that could be construed as participating in an iterative process. The City was correct: Its letter could not be construed as a substantive response.

The following day, OBOT's litigation counsel sent the City Attorney a 51-page, single-spaced letter that was a preview of this case. (Ex. 248.) The letter summarized the history of the Project, the events that led to the Federal Decision, the subsequent disputes between the parties (including OBOT's claims of force majeure that were rejected by the City), and gave notice of OBOT's claims against the City. (*Id*.) OBOT denied that the City properly "asserted a claim against OBOT for an Unmatured Event of Default," and even if the City had done so, OBOT "has commenced the required cure within thirty (30) days of the City's September 21, 2018" notice of claim. (*Id*. at 46.)

Also on October 19, 2019, Millcreek Engineering (ITS's engineering and construction management company) sent Ms. Lake a letter and 75 pages of additional materials (including the "Basic Application for Development Review," "Project Zoning Clearance," and "Property Owner authorization to complete Section 3 of the DRX

application") as a follow-up to ITS's September 28, 2018 Basis of Design submission, "which contained schematic level drawings and other preliminary development details" for the Project. (Ex. 249 at 1.) Millcreek stated that when ITS submitted the package to the City, it sought to provide enough information about the proposed Project "to initiate a discussion about the required City interdepartmental approvals and process to achieve a building permit. Although the Monday pre-application meeting to discuss these matters was postponed at the City's request, the ITS project team looks forward to a rescheduled meeting at your earliest convenience." (*Id.*)

The City did not respond to the letter it received from OBOT's counsel on October 19, 2018. The City also did not respond to the October 19, 2019 letter from Millcreek Engineering regarding the Basis of Design. Instead, on October 23, 2018, the City hand-delivered OBOT a "Notice of Event of Default." (Ex. 250.) In its Notice, the City asserted OBOT had failed to Commence Construction of the Minimum Project by the Initial Milestone Date, and OBOT had failed to "cure, or alternatively, to commence and diligently dispatch a cure of OBOT's failure to Commence Construction of the Minimum Project" within the 30-day Cure Period. (*Id.* at 1.) The City then stated OBOT was in default pursuant to section 18.1.7 of the Lease, demanded OBOT pay Liquidated Damages to the City within 30 days as set forth in section 6.1.2.1 of the Lease, and contended that without any further notice, the Ground Lease would automatically terminate on November 22, 2018. (*Id.* at 1–2.) Ms. Landreth testified she did not recall reviewing OBOT's force majeure claims before she made the decision to terminate the Ground Lease. (Tr. 3261:6–3262:3, 3281:15–20 (Landreth).) The Court finds the City's decisions to issue a Notice of Event of Default and terminate the Lease instead of substantively responding to any of the correspondence, materials or issues raised by OBOT, ITS or Millcreek Engineering since September 22, 2018, including OBOT's force majeure claims, demonstrate the City's lack of good faith to honor the Lease and the other agreements between the Parties.

After the City issued its Notice of Default, OBOT and ITS sent several additional correspondences to the City in October 2018 that provided further responses to the City's rejection of the schematic drawings, reminded the City of OBOT's force majeure claims, rejected the City's determination that an Event of Default had occurred, inquired about the status of the still incomplete survey of the rail corridor, and requested the City work collaboratively with OBOT to move the Project forward. (Exs. 252, 253, 254, 480.) As a further example of a lack of good faith, the City did not respond to any of those communications.

The City terminated the Ground Lease on November 22, 2018, and this litigation ensued. The City stipulated that if OBOT had not breached the Lease prior to November 22, 2018, then the City breached when it terminated the Lease.

6. Factual Findings and Conclusions of Law: OBOT's First and Second Causes of Action for Breach of Contract Against the City for Terminating the Lease on November 22, 2018 (Force Majeure)

The Parties negotiated a Force Majeure provision in the Lease. Although the provision was specific to the Project and their respective interests, there was nothing strikingly unique about the Ground Lease's force majeure language, which is included in Section B of this Statement of Decision.

When a court interprets a contract's force majeure provision, it must seek to "ascertain the mutual intent of the parties solely from the written contract so long as possible." (*W. Pueblo Partners, LLC v. Stone Brewing Co., LLC* (2023) 90 Cal. App. 5th 1179, 1185; *see also id.* at 1187 ("We begin our analysis with the language of the force majeure provision itself."); *Gilkyson v. Disney Enter., Inc.* (2021) 66 Cal. App. 5th 900, 916 ("The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time they entered into the contract.").) "When the contract is clear and explicit, the parties' intent is determined solely by reference to the language of the agreement." (*Gilkyson*, at 916; *see also* Civ. Code § 1638 ("The language of

a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."); *Brown v. Goldstein,* 34 Cal. App. 5th at 432 ("Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract's terms.") (quoting *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal. App. 4th 1107, 1125–26); *Fitness Int'l, LLC v. KB Salt Lake III, LLC* (2023) 95 Cal. App. 5th 1032, ____; 313 Cal. Rptr. 3d 820, 835–36 (quoting *Gilkyson*).)

The Force Majeure provision in section 16.1 of the Ground Lease must be read in concert with the definition of Force Majeure in article 40, as one informs the other. Force Majeure events are defined as "events which result in *delays* in a Party's performance" of Lease obligations. (Ex. 68 at 132 (emphasis added).) Section 16.1 states "a Party whose performance of its [Lease] obligations is *hindered* or *affected* by events of Force Majeure" shall not be considered in breach of or in default" of its Lease obligations. (*Id.* at 84–85 (emphasis added).)

Like many force majeure provisions, the Lease provided examples of the serious types of occurrences that would qualify, including "acts of God or of the public enemy . . . fires, floods, earthquakes . . . freight embargoes [or] delays of subcontractors." (*Id.* at 132.) Within this list the Parties included "acts of the other Party." (*Id.*) Finally, the only force majeure remedy the Parties agreed upon was additional time "as may reasonably be required to complete performance of the hindered act." (*Id.*)

The City does not dispute its acts could constitute an event of force majeure according to the Lease. However, the Parties disagree about the magnitude of impact the City's acts must have had on OBOT for the Force Majeure provision to apply, such that OBOT could not be considered in breach or default of its Lease obligations and would be entitled to additional time to perform. (*Id.* at 84.)

A party's performance is not excused pursuant to a force majeure provision "unless there exists 'extreme and unreasonable difficulty, expense, injury, or loss involved.'" (*Butler v. Nepple* (1960) 54 Cal. 2d 589, 599 (quoting *Oosten v. Hay Haulers Dairy Emp. & Helpers Union* (1955) 45 Cal. 2d 784, 788).) "This standard derives from the doctrines of

impossibility and impracticability, which are common law defenses to contract performance." (*W. Pueblo Partners*, 90 Cal. App. 5th at 1188.)

The Court interprets the words "delays," "hindered," or "affected" in the Lease, as those words are generally understood. The Court also interprets those terms in the context of both the Force Majeure provision and the totality of the Ground Lease. The Lease's Force Majeure language does not refer to events that are minor or ministerial; the events must have been sufficiently severe to have caused OBOT's non-performance of its contractual obligations.[34] Conversely, the words "delays" "hindered" or "affected" do not literally mean "impossible" or "at any cost." As the court held in *West Pueblo Partners*, "This reasoning would obviate the doctrine of impracticality, as any performance obligation short of an impossible one could be satisfied at sufficient expense. This is not the standard . . . ." (*W. Pueblo Partners*, 90 Cal. App. 5th at 1191.) Rather, this Court must consider whether the City's acts were sufficiently acute that it was impracticable or unreasonably difficult for OBOT to perform its Lease obligations. (*See id.* at 1188 ("Stone's ability to pay rent must have been 'delayed, interrupted, or prevented' by COVID-19 because timely performance would have either been impossible *or was made impracticable due to extreme and unreasonable difficulty*.") (emphasis added).)

Interpreting the Lease's Force Majeure provision to require actual impossibility would also negate the only remedy the Parties' negotiated—more time. If OBOT's contractual performance had to in fact be impossible, then no amount of time or money

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[34] "[A]cts that merely make performance unprofitable or more difficult or expensive do not suffice to excuse a contractual obligation." (*SVAP III Poway Crossings, LLC v. Fitness Int'l, LLC* (2023) 87 Cal. App. 5th 882, 895; *see also Butler*, 54 Cal. 2d at 599 ("Even in the case of a force majeure provision in a contract, mere increase in expense does not excuse the performance unless there exists 'extreme and unreasonable difficulty, expense, injury, or loss involved.'") (quoting *Oosten*, 45 Cal. 2d at 788).)

would have allowed OBOT to perform its obligations under the Lease. The Court will not read the Lease's Force Majeure provision to render its only remedy, meaningless.[35]

The Court finds that, consistent with section 16.1 of the Ground Lease, OBOT's performance of its Lease obligations were hindered, affected, or delayed the by each of the following acts by the City, each of which the Court finds is a separate event of force majeure:[36]

- the City's breach of the Development Agreement when it enacted a no-coal ordinance that was unsupported by substantial evidence (as determined in the Federal Decision) and applied that ordinance to the Project;[37]

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[35] The City argues that under California law, an event of force majeure must be unanticipated or unforeseeable at the time the parties entered the contract. (*See* City's Proposed Stmt. of Decision 74:9–75:3.) In support, the City cites to two U.S. district court opinions: *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.* ((C.D. Cal. 2001) 178 F. Supp. 2d 1099) and *Free Range Content, Inc. v. Google Inc.* ((N.D. Cal., May 13, 2016, No. 14-CV-02329-BLF) 2016 WL 2902332). (*See* City's Proposed Stmt. of Decision 74:9–17.) In addition, the City asserts that California law requires that the party invoking force majeure to have acted with "skill, diligence and good faith" to meet its performance requirements, even in the face of the force majeure event. (*See id.* at 75:4–11.) Here, the City relies upon *Oosten* (45 Cal. 2d at 789) for support. (City's Proposed Stmt. of Decision 75:4–11.)

OBOT disagreed stating that this language is not included in, and should not be read into, the Lease. (*See* OBOT's Proposed Stmt. of Decision 39:24–40:17.) OBOT also argued, in support of the first point, the City only provided persuasive authorities. (*Id.* at 40:18–41:3.)

The Court need not, and does not, resolve these disputes because the Court finds that since the Parties entered into the contracts, OBOT has acted with skill, diligence, and good faith. Further, the Court finds that each of the City's acts that caused OBOT's non-performance (as discussed further in the body of this section) were unforeseen and unanticipated.

[36] The City vigorously argued that none of the force majeure issues alleged by OBOT were the real cause of the Project delays. Instead, it was OBOT's tenacious focus (driven by potential profits) on only building a terminal that could accommodate coal that prevented OBOT from completing the Minimum Project by the Initial Milestone Date. The City points to many financial transactions and failed option agreements with potential subtenants to support its claims. The logistics of OBOT finding Project partners and subtenants were no doubt difficult, and were further complicated by the failure to have clear direction from the City regarding the Basis of Design, the commodities that could be transported, and the timing of rail access. The Court finds that the evidence (described in this Statement of Decision) reveals that it was the acts of the City failing to carry out its obligations, that ultimately prevented OBOT from completing the Minimum Project by the Initial Milestone Date.

[37] To be clear, it was not the City's decision to enact a no-coal ordinance that constituted an act of force majeure; on the contrary, that act was a near certainty when the Parties entered into the Ground Lease. It was the City's enactment of an ordinance that was *not supported by substantial evidence* (as determined in the Federal Decision), and the City's application of that ordinance to the Project *in breach of*

- the City's breach of the Development Agreement by failing to clearly and unequivocally inform OBOT what commodities the City viewed as impermissible, and the legal basis for the City's position;
- the City's breach of the implied covenant of good faith and fair dealing (previously described in this Statement of Decision) when it did not diligently advance the Project, and instead took repeated measures to terminate the Lease, after the Federal Decision;
- the City's failure to provide substantive, written feedback to OBOT regarding the Basis of Design;
- the City's failure to use commercially reasonable efforts to enter into the Rail Access Agreement with the Port; and
- the City's failure to complete the Public Improvements and the related survey of the rail corridor, and its failure to turn over the property to OBOT to complete the private rail improvements.

Except for the City's breaches of the Development Agreement, each of these acts occurred after May 15, 2018.[38]

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the Development Agreement, all of which caused delays and hindered OBOT's ability to comply with the Lease (including after May 18, 2018)—*that* was an act of force majeure.

[38] The City separately raised and briefed issues of res judicata, arguing OBOT was barred from asserting breach of contract issues in this case that OBOT was obligated to raise in the federal litigation.

Although elsewhere in this Statement of Decision, the Court has referred to the Development and the Ground Lease as the "contracts" or "agreements," on this point, the two must be distinguished. The federal litigation, as noted above, concerned the Development Agreement, not the Ground Lease.

Insofar as the City breached the *Ground Lease* by failing to honor OBOT's force majeure claims, the Court does not need to reach the res judicata issues briefed by the City. This is because while OBOT's operative complaint in the federal action was filed on June 14, 2017, and the trial occurred in January of 2018, this Court's factual findings and conclusions of law regarding OBOT's breach of contract claims based on force majeure and breach of the implied covenant of good faith and fair dealing all rely on events that occurred after May 15, 2018—the date of the Federal Decision. The only exceptions relate to the City's breaches of the Development Agreement. As to those breaches of the *Development Agreement* that occurred prior to May 15, 2018, those were the subject of the federal action. The federal court determined the City breached the Development Agreement; any damages or related costs that OBOT incurred up until that time were matters for the federal court to decide. This Court also finds that the City breached the Development

As addressed above, in 2018, OBOT timely and repeatedly raised each of these issues and numerous others in its force majeure claims to the City. OBOT explained to the City why and how it could not meet its obligations without the City's cooperation. The City did not take steps to ameliorate the impediments or show, at trial, that it did not in fact impede OBOT's progress. Rather, OBOT's performance of its obligations under the Lease was severely hindered, affected, and delayed by each of these events of force majeure. OBOT was not "in breach of or in default in its obligations" and was entitled to additional time to perform under the Ground Lease consistent with section 16.1 and article 40 of the Lease; this includes the reasonable additional time OBOT needed to commence construction of the minimum project by the Initial Milestone Date.[39] (Ex. 68 at 84–85, 132.) Therefore, OBOT had not breached the Development Agreement or the Ground Lease as of November 22, 2018, and the City's termination of the Ground Lease on that day constituted a breach of contract.[40]

Agreement after the Federal Decision when the City failed to inform OBOT what commodities the City concluded were impermissible, and the legal basis for the City's determination. To the extent the City asserts this breach is barred by res judicata, the City's argument fails for two reasons. First, although this breach was continuous, this Court relies on the events that occurred after May 15, 2018, and thus could not have been resolved in the federal action. Second (and assuming the City's argument is correct), the Court only considered this breach as evidence that the City breached the Ground Lease (by failing to honor OBOT's force majeure claims), and not as an independent breach of the Development Agreement.

[39] In this phase of the trial, the Court only considered the issue of liability. The Court has not made findings of fact or conclusions of law regarding how much additional time OBOT should have received, based on its properly alleged force majeure claims, to meet its obligations under the Ground Lease and the Parties' other agreements. If this issue becomes relevant in the next phase of the trial, the Court will address it at that time.

[40] In Section 5.e of this Statement of Decision, the Court rejected the City's argument that irrespective of the City's acts, OBOT could have and should have moved forward, at an unknown cost, with Project schematic drawings, without any feedback from the City on the existing Basis of Design, and without clarity regarding potential commodities. Although this is not what the Lease required, even if OBOT had taken those steps, the Court finds it would have been extremely difficult if not impossible for OBOT to have commenced construction of the Minimum Project by the Initial Milestone Date because the City had not completed the Rail Access Agreement, had not completed the Public Improvements and survey, and had not turned over the property to OBOT.

7. Factual Findings and Conclusions of Law: OBOT's Fourth Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (*Carma Devs. (Cal.), Inc. v. Marathon Dev. Cal., Inc.* (1992) 2 Cal. 4th 342, 371; *Bevis v. Terrace View Partners*, LP (2019) 33 Cal. App. 5th 230, 252.) "The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another." (*Carma*, 2 Cal. 4th at 372.) "Such power must be exercised in good faith." (*Id.*)

"The covenant operates 'as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.'" (*Cobb v. Ironwood Country Club*, (2015) 233 Cal. App. 4th 960, 966 (quoting *Racine & Laramie, Ltd. v. Dep't of Parks & Rec.* (1992) 11 Cal. App. 4th 1026, 1031–32) (unnecessary quotation marks omitted); *see also Thrifty Payless, Inc. v. Americana at Brand*, LLC (2013) 218 Cal. App. 4th 1230, 1244; *Ojjeh v. Brown* (2019) 43 Cal. App. 5th 1027, 1037 ("To prove breach of the implied covenant of good faith and fair dealing, plaintiff must show that defendants engaged in conduct which frustrated plaintiff's rights to the benefits of the parties' agreement that defendants would film and produce the documentary.").) "This covenant [of good faith and fair dealing] not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose." (*Pasadena Live v. City of Pasadena*, (2004) 114 Cal. App. 4th 1089, 1093 (quoting *Harm v. Frasher* (1960) 181 Cal. App. 2d 405, 417); *see also* J. Council of Cal. Civ. Jury Instrs., (CACI) No. 325 (2023 ed.) ("In every contract or agreement there is an implied promise of good faith and fair dealing. This implied promise means that each party will not do

anything to unfairly interfere with the right of any other party to receive the benefits of the contract.").)

"Although breach of the implied covenant [of good faith and fair dealing] often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract." (*Digerati Holdings, LLC v. Young Money Ent.*, LLC (2011) 194 Cal. App. 4th 873, 885 (alteration in original).) "[B]reach of a specific provision of the contract is not a necessary prerequisite" to establish a breach of the implied covenant. (*Carma*, 2 Cal. 4th at 373.) "Were it otherwise, the covenant would have no practical meaning, for any breach thereof would necessarily involve breach of some other term of the contract." (*Id.*)

"The essence of the good faith covenant is objectively reasonable conduct." (*Lazar v. Hertz Corp.*, (1983) 143 Cal. App. 3d 128, 141*; see also Digerati*, 194 Cal. App. 4th at 885 ("Nor is it necessary that the party's conduct be dishonest. Dishonesty presupposes subjective immorality; the covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive.").)

To prove its claim that the City violated the covenant of good faith and fair dealing, OBOT must prove all the following:

1. The parties entered into contracts for the Project;
2. OBOT did all, or substantially all of the significant things that the contracts required it to do, or OBOT was excused from having to do those things;
3. All conditions required for the City's performance had occurred or were excused;
4. The City prevented OBOT from receiving the benefits under the contracts;
5. By doing so, the City did not act fairly and in good faith; and
6. OBOT was harmed by the City's conduct.

(CACI No. 325.)

The Parties agree they entered into contracts for the Project. In this Statement of Decision, the Court determined OBOT proved it was excused from completing the Minimum Project by the Initial Milestone Date due to the City's acts of force majeure. The Court finds that all the conditions necessary for the City's performance under the

contracts had occurred. OBOT proved the City's lack of good faith efforts to address various obstacles (some of which were created by the City) in OBOT's path, and its unjustified termination of the Lease, prevented OBOT from receiving the benefits of the contracts. As the Court repeatedly found in Section B.5 of this Statement of Decision, the City provided no justification for its actions and apathy; the only reasonable inference is that (particularly after May 15, 2018) the City was attempting to create leverage to require the Project be coal-free, despite (as the Federal Decision determined) the City's failure to provide the necessary evidentiary foundation for such a condition.[41] Thus, the City sought concessions from OBOT that OBOT was not obligated to make. This cannot be described as conduct that is "fair and in good faith." OBOT proved it was harmed by the City's conduct because the City terminated the Ground Lease, which stopped the Project. The monetary value of OBOT's harm will be addressed by the Court in the remedy phase of this trial. The Court finds the City breached the covenants of good faith and fair dealing implied in the Ground Lease and the Development Agreement.

8. Factual Findings and Conclusions of Law: OBOT's Fifth Cause of Action for Declaratory Relief

In its first amended complaint, OBOT's fifth cause of action sought declaratory relief. Specifically, OBOT asked this Court to find that OBOT is "not in default under the DA or the Lease." (Am. Compl. ¶ 136(a).) Based on the findings in this Statement of Decision, the Court has determined OBOT is not in default under the DA or the Lease.

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[41] As noted above, while the Court understands that the Parties unsuccessfully engaged in settlement negotiations, the Court is unaware of the substance of those negotiations. The Court's inference as to this point is based solely on the actions and omissions of the City, the public statements that were made by City officials at the time, and the testimony and evidence the Court received during the trial. The City's position was clear and consistent before, during, and after the federal action—the Project would not move forward if coal was a commodity.

9. OBOT's Other Causes of Action

The Court does not reach OBOT's third cause of action for the City's alleged anticipatory breach of Ground Lease—the Court has already determined that the City's termination of the Ground Lease on November 22, 2018, constituted a breach of contract.

The Court also does not reach OBOT's sixth cause of action for specific performance. Specific performance is an equitable remedy and not a cause of action. (*Timothy W. v. Julie W.* (2022) 85 Cal. App. 5th 648, 663*; Green Valley Landowners Ass'n v. City of Vallejo* (2015) 241 Cal. App. 4th 425, 433 n.8.) If OBOT elects to pursue specific performance, OBOT must present evidence and legal argument at the remedy phase of the trial.

10. The City's Claims Against OBOT

The City asserted two causes of action against OBOT: breach of contract and declaratory relief. The City's claims rely on the same facts the Court has already considered in this Statement of Decision. As a result, the Court finds the City failed to prove its claims against OBOT.

IT IS SO ORDERED.

* * *

The remedy phase of this trial will begin on Tuesday, November 28, 2023, at 9:00 a.m. in Department 514. The remedy phase may include damages, specific performance, and/or other remedies as applicable. OBOT may be required to make an election of remedies depending on the Court's subsequent legal rulings.

Dated: November 22, 2023

Noël Wise
Judge of the Superior Court

Noël Wise / Judge

SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA	Reserved for Clerk's File Stamp **FILED** Superior Court of California County of Alameda 11/22/2023 Chad Finke, Executive Officer / Clerk of the Court By: Melissa Callender Deputy M. Callender
COURTHOUSE ADDRESS: Hayward Hall of Justice 24405 Amador Street, Hayward, CA 94544	
PLAINTIFF/PETITIONER: Oakland Bulk And Oversized Terminal, LLC et al	
DEFENDANT/RESPONDENT: City of Oakland et al	
CERTIFICATE OF ELECTRONIC SERVICE CODE OF CIVIL PROCEDURE 1010.6	CASE NUMBER: RG18930929

I, the below named Executive Officer/Clerk of Court of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served one copy of the Statement of Decision entered herein upon each party or counsel of record in the above entitled action, by electronically serving the document(s) from my place of business, in accordance with standard court practices.

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Chad Finke, Executive Officer / Clerk of the Court

Dated: 11/22/2023

By:

Melissa Callender

M. Callender, Deputy Clerk

CERTIFICATE OF ELECTRONIC SERVICE
CODE OF CIVIL PROCEDURE 1010.6