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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

OAKLAND BULK & OVERSIZED TERMINAL, LLC

Plaintiff,

vs.

CITY OF OAKLAND,

Defendant.

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

PLAINTIFF OAKLAND BULK & OVERSIZED TERMINAL, LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT CITY OF OAKLAND'S RULE 12(b)(6) MOTION TO DISMISS

Date: April 20, 2017
Time: 10 a.m.
Ctrm.: No. 4, 17th Floor

Honorable Vince Chabria

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Plaintiff Oakland Bulk & Oversized Terminal, LLC ("OBOT") hereby submits this Opposition to Defendant City of Oakland's ("City's") Rule 12(b)(6) Motion to Dismiss the third cause of action of Plaintiff's Complaint (respectively, the "Opposition" and "Motion"). In support of this Opposition, OBOT has filed concurrently herewith a Request for Judicial Notice with attached exhibits ("RJN").

I. INTRODUCTION

OBOT's third cause of action is based on the City's conduct in breach of a Development Agreement between OBOT and the City (the "DA"). Specifically, the City breached the DA by applying Ordinance No. 13385 to OBOT's bulk goods terminal via City Council Resolution No. 86234. The City further breached the DA by taking multiple actions that were specifically intended to, and did, injure OBOT's rights to receive the benefits of the DA. (*E.g.*, Compl. ¶¶ 36-37, 41-44, 46, 78, 99-102; DA § 14.10.)[1]

Far from demonstrating that the language of the DA unambiguously supports the City's position, the City's Motion confirms the opposite: the DA unambiguously supports OBOT's breach of contract claim. In fact, the City's Motion should be denied because the DA unambiguously grants OBOT a vested right to handle any non-containerized bulk goods at its terminal, including coal and pet coke—subject to a "health and safety" exception in the DA not at issue on this Motion. Even at this early stage of the proceedings, this conclusion emerges clearly from the following undisputed facts:

First, the key rights granted to OBOT in the DA were "vested rights." The fact that OBOT's rights were vested is undisputed and is apparent on the face of the DA. (*See e.g.*, DA Recital C; DA §§ 2.4, 3.4.1, 3.4.2, 11.2, 3.2 ("vest[ing]" the "permitted uses" of the property).)

Second, OBOT received a "vested right" specifically to develop, use and operate a "ship-to-rail terminal for the export of non-containerized bulk goods and import of oversized or overweight cargo." (*See* DA Recital H; DA §§ 3.2, 1.1.)

[1] All citations to the DA refer to Dkt. No. 20-1 (Ex. A to City's Request for Judicial Notice).

Third, pursuant to the Development Agreement Statute and DA, the fact that OBOT's rights are "vested" has a very specific meaning: OBOT is entitled to certainty that it may develop and use its "ship-to-rail terminal" for the "export of non-containerized bulk goods" subject only to rules and regulations in force as of the DA's adoption date, as well as the terms of the DA itself. (*E.g.*, DA §§ 3.4.1, 3.4.2, 7.2.)

Fourth, and critically, the City does not and cannot cite to any regulation existing at the adoption date of the DA, or to any provision of the DA, that limits OBOT's right to handle any particular non-containerized bulk good, including coal and pet coke. Indeed, it is indisputable that no such limitation existed before the passage of Ordinance No. 13385 and Resolution No. 86234 in 2016—that is why the City had to pass them to achieve its goal of banning coal and coke at the OBOT's terminal.

Based on the foregoing, it is respectfully submitted that the Court should deny the City's Motion by ruling that the DA unambiguously granted OBOT a vested right to store and handle any and all lawful bulk goods at the Terminal, including coal and pet coke, subject to the exception set forth in Section 3.4.2. of the DA. (*See* Mot. at 9:19-23.)

II. BACKGROUND

The Development Agreement Statute, California Government Code sections 65864, *et seq.* (the "DA Statute"), was enacted in 1979. In pertinent part, the DA Statute provides developers with certainty that the rights they are granted at the beginning of a project will not change. Cal. Gov't Code § 65864; *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 191 Cal. App. 4th 435, 443 (2010). Put simply, a development agreement protects a developer like OBOT as it invests millions of dollars over many years by ensuring that the City will not pull the rug out from under it with new regulations that impair its ability to develop and use the subject property as promised (and thus receive its benefit of the development agreement bargain). In return, the City and its residents receive, among other things: "public improvements and infrastructure," a "strengthen[ing] [of] the City's economic base with a variety of long term jobs" and "substantial revenues for City." (DA Recital D.)

Consistent with this purpose, OBOT and the City entered into the 2013 DA "to provide *certainty* to encourage the required substantial private investment" needed to develop the land at the West Gateway, a former army base that had sat dormant for years. (DA Recital D; Compl. ¶ 3.) (emphasis added). As the parties acknowledged in the DA: "*Certainty* that the Project can be developed and *used* in accordance with the General Plan, the Oakland Army Base Redevelopment Plan . . . , the Oakland Army Base Reuse Plan . . . , and other Existing City Regulations, will benefit City and Developer and will provide the Parties *certainty* . . . ." (DA Recital C.) (emphasis added).

The DA vested in OBOT the right to develop, use and operate for sixty-six years a "Bulk Oversized Terminal," defined as a "ship-to-rail terminal designed for the export of non-containerized bulk goods and import of oversized or overweight cargo." (*See, e.g.*, DA §§ 2.1-2.2; *id.*, Recital H, Ex. D-2-2; DA § 1.1 (incorporating Recital H in definition of "Project"); Compl. ¶¶ 3, 35, 122; RJN, Ex. A [Ground Lease] § 1.2.) The DA provided a specific health and safety exception to that vested right in Section 3.4.2, which permits the City to apply a new regulation to OBOT if, and only if, the "City determines based on substantial evidence and after a public hearing that a failure to [apply the new regulation] 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." (DA § 3.4.2; Compl. ¶ 31.)

The City Council held duly noticed public hearings on the DA before its adoption. (*See* DA recital K; *see also* Compl. ¶ 27.) After those hearings, the City Council adopted an ordinance enacting the DA. (DA Recital L.)

At the time the DA was enacted, no City regulation banned the storage, transport, shipment or other handling of coal or pet coke—or any other bulk good. (*See, e.g.,* Compl. ¶ 36; Mot. at 3.)[2] After the adoption date of the DA, July 16, 2013 (the "Adoption Date"), the City Council received political pressure to prohibit the transportation of coal through OBOT's terminal. (*E.g.*,

[2] *See also* Dkt. No. 20-3 [Resolution No. 86234] at 5 ("[T]he City has determined that pre-existing local, state and/or federal laws are inapplicable and/or insufficient to protect and promote the health and safety of the Citizens . . . and for such reasons (among others) has introduced the Coal-Coke Ordinance to the Project Facilities and Tenants . . . .")

Compl. ¶ 36.) In an effort to meet the health and safety exception to OBOT's vested right set forth in DA Section 3.4.2, the City conducted several purported "public hearings" and spent considerable public funds to procure consultant reports concerning the purported health and safety effects of transporting coal and pet coke. (*See* Compl. ¶¶ 41, 98.)

At a June 27, 2016 hearing the City Council introduced Ordinance No. 13385 (the "Ordinance"), banning the handling and storage of two non-containerized bulk goods, *i.e.*, coal and pet coke. (Compl. ¶ 47.) The City Council voted unanimously to adopt the Ordinance on the purported basis of findings in the consultant reports. (*See id.*; *see also* Dkt. No. 20-2 [Ordinance] at 14.)

At the same June 27 hearing, the City Council also passed Resolution No. 86234 (the "Resolution") in which the City Council recited a revisionist interpretation of the DA, and incorporated by reference the same findings used to support adoption of the Ordinance to conclude that those findings also satisfied the "substantial evidence" of "substantial[] danger[]" requirement of DA Section 3.4.2. (Dkt. No. 20-3 [Resolution] at 4, 7.) The City Council then resolved to apply the Ordinance to OBOT's terminal.[3]

III. LEGAL STANDARD

Typically, a motion to dismiss a contract claim is a tall order for a defendant. To win, the defendant must overcome the law that requires the complaint to be construed favorably to the plaintiff,[4] a standard that is rendered even more demanding in light of the rules that require any ambiguity in a contract to be decided in favor of the plaintiff at the motion to dismiss stage.[5] In

[3] This is not the first time the City has used generalized health and safety concerns to target and override specific vested rights after it experiences buyer's remorse. *Stewart Enterprises, Inc. v. City of Oakland*, 248 Cal. App. 4th 410, 423-24 (2016) (affirming trial court's decision that City had wrongly denied a vested right and, further, that City had improperly asserted unsubstantiated health and safety concerns to overcome that right.).

[4] *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 787 (9th Cir. 2012).

[5] *See e.g.*, *Yakima Co. v. Lincoln Gen. Ins. Co.*, 583 F. App'x 744, 746 (9th Cir. 2014) (holding that the district court erred by dismissing breach of contract action where the contractual term at issue was ambiguous); *ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1010 (9th Cir. 2014) (same); *Roling v. E*Trade Sec., LLC,* 756 F.Supp.2d 1179, 1188–89 (N.D. Cal. 2010) (denying defendant's motion to dismiss a breach of contract claim where the contract was ambiguous).

this case, these rules dictate that the motion be denied because the language of the contract is, at a very minimum, "reasonably susceptible" to OBOT's construction.[6]

Here, however, the motion should also be denied because the contract language is *not* reasonably susceptible to the *City's* construction: the DA clearly and unambiguously vested OBOT with the right to build and operate a bulk-goods terminal with no limitation on the type of bulk goods. Thus, not only should the City's motion be denied, but the Court may find that OBOT has a vested right to build and operate a bulk-goods terminal with no limitation on the type of bulk goods. The breach of contract claim should efficiently proceed to trial on the targeted question of whether Section 3.4.2 of the DA saves the Resolution from being a breach of the DA. *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18-19 (1995), *as modified on denial of reh'g* (Oct. 26, 1995) ("Courts will not strain to create an ambiguity where none exists.").

IV. THE DEVELOPMENT AGREEMENT CREATED A "VESTED RIGHT" TO HANDLE ANY NON-CONTAINERIZED BULK GOODS NOT BANNED AS OF THE DEVELOPMENT AGREEMENT'S ADOPTION DATE

A. OBOT's "Vested Right" Is The Right to Use the Terminal Free From New Regulations

1. The DA Statute Gives Cities the Power to Bind Themselves to Development Agreements Like the One at Issue

The City improperly characterizes the DA Statute as a "*limited* exception" to common law rules regarding vested rights. (Mot. at 7.)[7] (emphasis added). In fact, the DA Statute "provide[s] a way for the municipality and developer to depart from the common law rule of vested rights" and enter into broad development agreements, as long as those agreements conform to the

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[6] The language of a contract is ambiguous if it is reasonably susceptible to more than one interpretation. *Yakima*, 583 F. App'x at 746 (citing *Horath v. Hess,* 225 Cal.App.4th 456, 464 (2014)). Whether contract language is ambiguous is a question of law. *United States v. Sacramento Mun. Util. Dist.*, 652 F.2d 1341, 1343 (9th Cir. 1981). The court may consider facts extrinsic to the contract that are properly before it on a 12(b)(6) motion to determine whether the contract is reasonably susceptible to multiple constructions. *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1017 (9th Cir. 2012); *Atlanta Cancer Care, P.C. v. Amgen, Inc.*, 359 F. App'x 714, 716 (9th Cir. 2009) (quoting *Wolf v. Superior Court,* 114 Cal.App.4th 1343 (2004)). If the court is required to look to evidence outside the pleadings (or noticed items properly before the court on a motion to dismiss), however, "resolution of the disputed meaning of the contract on a motion to dismiss is inappropriate." *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1051 (9th Cir. 2011).

[7] The only case cited for that proposition does not support it. (*See* Mot. at 7 (citing *Santa Margarita Area Residents Together v. San Luis Obispo Cty.,* 84 Cal.App.4th 221, 229-30 (2000).)

requirements of the DA Statute and are "approved by ordinance" and made "subject to referendum." *Mammoth Lakes*, 191 Cal. App. 4th at 443; Cal. Gov't Code § 65865.4. The California Legislature found that such broad rights were in the public interest:

> Assurance to the applicant for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development.

Cal. Gov't Code § 65864(b).

Accordingly, the DA Statute provides that "[u]nless otherwise provided by the development agreement" any such agreement is governed by the "rules, regulations, and official policies governing permitted uses of the land . . . in force at the time of execution of the agreement." *Id.* § 65866. A development agreement must, among other things, "specify the duration of the agreement" as well as the "permitted uses of the property." *Id.* § 65865.2. The development agreement may also include "conditions, terms, restrictions, and requirements for subsequent discretionary actions" provided, however, that these "shall not prevent development of the land for the uses and to the density or intensity of development set forth in the agreement." *Id.*

Once a city enters a development agreement it becomes a fully enforceable contract:

> a development agreement shall be enforceable by any party thereto notwithstanding any change in any applicable general or specific plan, zoning, subdivision, or building regulation adopted by the city . . . which alters or amends the rules, regulations, or policies specified in Section 65866.

Id. § 65865.4; *see also Mammoth Lakes*, 191 Cal. App. 4th at 443 ("[A] legislatively-approved development agreement gives both parties vested contractual rights.").

2. The DA Undisputedly Granted OBOT Vested Rights

The City concedes that the DA, consistent with the DA Statute, granted OBOT a "vested right" to be regulated only by "pre-existing land use regulations." (*E.g.*, Mot. at 1:16-18, 9.) Indeed, the City must concede this as there are no less than six places in the DA where the "vested" nature of OBOT's rights are recognized. (*See* DA Recital C; DA §§ 2.4, 3.2, 3.4.1, 3.4.2, 11.2.) For example, Section 3.2 of the DA expressly states that "[t]his Agreement vests in

Developer the right to develop the Project[8] in accordance with the terms and conditions of this Agreement, the City Approvals and the Existing City Regulations." (DA§ 3.2.) Indeed, as the Oakland City Administrator informed the City Council, prior to adopting the DA, the "key provisions" of the DA would "[v]est (i.e., lock-in)" OBOT's then-existing rights. (RJN, Ex. B [May 6, 2013 Agenda Report Re: the DA] at 4; *see also* Compl. ¶ 30.)

By the express terms of the DA, the City could not:

> impose or apply any City Regulations on the development of the Project Site that are adopted or modified by the City after the Adoption Date [July 16, 2013] (whether by action of the Planning Commission or the City Council, or by local initiative, local referendum, ordinance, resolution, rule, regulation, standard, directive, condition, moratorium) that would [among other things]: (i) be inconsistent or in conflict with the intent, purposes, terms, standards or conditions of this Agreement; (ii) materially change, modify or reduce the ***permitted uses*** of the Project Site . . ."

(DA § 3.4.1.)[9] (emphasis added).

3. The DA Undisputedly Granted OBOT a Vested Right in a "Non-Containerized Bulk Goods" Terminal

Despite conceding that OBOT's rights are vested, the City's main argument is that the term "non-containerized bulk goods" in the DA does not "expressly" include "any and all" bulk goods. (Mot. at 9.) The City has it backwards. OBOT has an express and unqualified vested right to use and operate a terminal which is limited only by the requirement that it be for "non-containerized bulk goods." The term "bulk goods" is the generic term for all goods "that are not packaged in any type of container and are stored, transported and sold in large quantities," and includes "coal, grains, oil or chemicals." (RJN, Ex. C [Cambridge Business English Dictionary Definition]; Compl. ¶ 3, n. 1.) The City cites neither authority, a canon of contract interpretation nor any principle of plain English that would exclude from the generic class of "bulk goods" a particular

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[8] As described in greater detail below, the "Project" is defined as "[t]he development, *use* and occupancy of the Private Improvements on the Project Site pursuant to the City Approvals, the Subsequent Approvals and this Agreement . . . ." (DA § 1.1.) (emphasis added).

[9] DA Section 7.2.1, regarding "Effect of Conflicting Law," echoes the same agreement:

> Except as prohibited by Government Code Section 65869.5 or other applicable state or federal law, to the extent any future rules, ordinances, regulations or policies applicable to development of the Project Site are inconsistent with the land use designations or permitted or conditionally permitted uses on the Project Site . . . the terms of the City Approvals and this Agreement shall prevail.

(DA § 7.2.1).

bulk good, or as the City's logic suggests—*any* bulk good it chooses at any time. Indeed, were the City's interpretation correct, it would lead to the absurd result that OBOT would be allowed only to build a terminal which the City could later render, literally, useless (by prohibiting any and all bulk goods at OBOT's terminal).[10]

The City is correct that the permitted uses vested by the DA must be expressly stated, which is precisely why an unexpressed limitation on the term "bulk goods" may not be read into DA. Rather than being "silent" regarding coal and pet coke as the City claims (Mot. at 10), the record is clear that the DA granted to OBOT an unqualified vested right to operate a terminal handling "non-containerized bulk goods" which includes—by definition—coal, pet coke and any other non-containerized bulk good.

Indeed, one of the few provisions of the DA that the City actually quotes in its Motion, Section 3.2, makes clear that "[n]otwithstanding any provision to the contrary, the ***permitted uses*** of each Phase of the Project . . . shall consist only of those described in and expressly permitted by, and subject to all terms, conditions and requirements of, the City Approvals, the Subsequent Approvals, the [Lease Disposition and Development Agreement ("LDDA")], and the applicable Ground Lease for each phase."[11] (DA § 3.2.) (emphasis added). The "applicable Ground Lease" expressly describes OBOT's "Permitted Uses" as including the right to "develop use [sic] and

[10] Moreover, absent the long-term certainty conveyed by OBOT's vested rights, there would also have been no reason for DA Section 3.4.2, which provides the only relevant exception to OBOT's vested rights—to apply new regulations to OBOT's use of the terminal for health and safety reasons.

[11] City Approvals are defined as "Permits or approvals required under Applicable City Regulations to develop, use and operate the Project and granted on or before the Adoption Date of this Agreement as identified in Recital I of this Agreement and described in Exhibit B." (DA § 1.1.) The City Approvals are expressly incorporated by reference into the DA. (DA § 14.5). The full list of City Approvals, as described in DA, Ex. B, is as follows: (1) The 2002 Oakland Army Base Redevelopment Plan Environmental Impact Report and the 2012 OARB Initial Study/Addendum ("EIR"); (2) The Oakland Army Base Redevelopment Plan (as amended prior to the Adoption Date); (3) The Oakland Army Base Reuse Plan (as amended prior to the Adoption Date); (4) The LDDA; (5) The Gateway Industrial zoning district (Ordinance No. 13182 C.M.S.); and (5) The Gateway Industrial Design Standards (Resolution No. 84498 C.M.S. "Subsequent Approvals" are approvals concerning the Project made *after* the Adoption Date, and must therefore be based solely on prior City Approvals and Existing City Regulations, unless reliance on a post-Adoption-Date City Regulation would not "change, modify or reduce" the "permitted uses of the Project Site." (DA §§ 1.1 (defining "Subsequent Approvals"), 3.4, 3.4.1.)

operate the Premises solely for purposes of development and operation [sic] of (a) the Bulk and Oversized Terminal . . . ."[12] (RJN, Ex. A [Ground Lease] § 3.1.1.) This terminal is defined as "[a] ship-to-rail terminal designed for the export of non-containerized bulk goods and import of oversized or overweight cargo." (*Id.* § 3.1.1, Ex. 3.1.) The DA's definition of "Project" reflects the same "Permitted Uses": "Project" is defined as "[t]he development, use and occupancy of the Private Improvements on the Project Site . . . as identified in Recital H and described in Exhibit D." (DA § 1.1.)[13] Recital H in turn refers to a "a marine terminal for bulk and oversized cargo . . . as further described in Exhibits D-1 and D-2," and Exhibit D-2 in turn describes a "ship-to rail terminal designed for the export of non-containerized bulk goods and import of oversized or overweight cargo" all subject to "the provisions of the applicable Ground Lease." (*Id.* Recital H, Ex. D-2-2.) In not a single one of these carefully crafted contractual provisions was any limitation imposed on the type of bulk goods that may be handled at OBOT's terminal.

In sum, it is undisputed that the DA granted OBOT a vested right in a "non-containerized bulk goods terminal"—and thus, from the 2013 Adoption Date of the DA until the 2082 expiration of the sixty-six year Ground Lease, the DA, the City Approvals and the Existing City Regulations form the complete, comprehensive universe of rights and limitations applicable to OBOT's ability

[12] The Ground Lease and the City Approvals for the permitted uses of the West Gateway should have been included in the City's Request for Judicial Notice, which asks the Court to take judicial notice of the DA because it "form[s] the basis of [OBOT]'s claim." (*See* Dkt. No. 20 at 4:3-4.) Accordingly, as set forth more fully in OBOT's RJN filed concurrently herewith, these documents are submitted pursuant to Fed. R. Evid. 201 and 106 ("If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — ***or any other writing or recorded statement*** — that in fairness ought to be considered at the same time.") (emphasis added). It is also clear that the Court may not construe the DA without the benefit of these documents, as they expressly define and limit the permitted uses of the West Gateway and are expressly incorporated into the DA. *See Atlanta Cancer Care, P.C. v. Amgen, Inc.*, 359 F. App'x 714 (9th Cir. 2009) (reversing grant of motion to dismiss breach of contract claim where contract before the court was incomplete without other documents incorporated by reference into the contract).

[13] The City's contention that the DA does not govern "post-development operations" (Mot. at 12) is thus expressly contradicted by the DA—and makes no sense. The "Project" that is the subject of the DA expressly includes the "development," "*use*" and "*occupancy*" of the improvements on the land—*i.e.* the terminal. (DA § 1.1.) Moreover, the DA refers in multiple places to the "uses" vested by the DA. (*E.g.*, DA §§ 3.2 (vesting the "permitted uses"), 3.4.1 (prohibiting the application of future regulations affecting "permitted uses"), 7.2.1 (providing that the DA and City Approvals trump future regulations inconsistent with "permitted uses"); *id.* Recital C (acknowledging that "use[]" of the Project is governed by Existing City Regulations).)

to "develop," "use" and "operate" a "non-containerized bulk goods" terminal at the West Gateway.

B. There Were Undisputedly No Limitations on Coal and Pet Coke in the DA, Existing Regulations or City Approvals

As set forth above, any and all limitations on OBOT's permitted uses of its terminal must be contained in, or derived from, one of three sources: (1) the DA, (2) the Existing City Regulations,[14] and (3) the City Approvals. As should be inferred from the City's failure to cite any limitations contained in any of these sources, there is no prohibition or limitation on coal or pet coke in any of them. (*See, e.g.*, Compl. ¶¶ 30-31.) As for the DA itself, nothing in the definition of "Project," "Bulk Oversized Terminal" or any other provision in the DA limits or qualifies the type of non-containerized bulk good that can be handled at OBOT's terminal. (*See e.g.*, DA §§ 1.1, 3.2, 3.4; DA Recitals A-L; DA, Ex. D.) As for the Existing City Regulations, they too contain no such limitation: no such claim is made by the City (*see* Mot.), and, indeed, the City's conduct in enacting the Ordinance three years after the DA's Adoption Date demonstrates that no such City Regulation existed as of the Adoption Date. (*See e.g.*, Dkt. No. 20-3 [Resolution] at 5.) Finally, and quite tellingly, the City Approvals (which include, among other things, extensive review of the potential environmental impact of OBOT's terminal) provide specific limitations on OBOT's terminal, *e.g.*, "any activity that constitutes waste or nuisance," such as "adult entertainment on a commercial basis," "medical marijuana" or emissions of "objectionable odors"—but no limitation on coal or pet coke. (RJN, Ex. A [Ground Lease] § 3.3.1; *see also*, RJN, Ex. D [Standard Conditions of Approval/Mitigation Monitoring and Reporting Program] § 3.3, Ex. E [2012 EIR Addendum], Ex. F [Gateway Indus. District Zone Regulations], Ex. G [LDDA].) Moreover, the "Limitations on Uses" expressly "do not include activities that are necessary and integral to the operation of the Project." (*Id.*, Ex. A [Ground Lease] § 3.3.1.3.) Because there is no limitation on the type of bulk goods permitted, the DA

[14] "Existing City Regulations" are defined in the DA as "City Regulations and City Policies in effect as of the Adoption Date and to the extent such are consistent therewith, the City Approvals as such are adopted from time to time." (DA § 1.1.)

granted OBOT a "vested" right to use its terminal for any bulk good, including coal and pet coke—only subject to the "Health and Safety" exception of Section 3.4.2.[15]

The City's conduct following the adoption of the DA makes this conclusion clear. For example, in a February 3, 2016 City Agenda Report entitled "Status Report on Coal," the City stated: "[The DA] vested rights to the developer (CCIG [the sole member of OBOT]) to ***operate*** the facility under the current set of laws at the time of adoption, with limited exceptions. No specific restriction or prohibition on coal was made part of that agreement. There is a ***narrow*** exception related to health and/or safety (Section 3.4.2 of the DA)." (Compl. ¶ 30; *see also* RJN, Ex. H [Feb. 3, 2016 City Status Report] at 2).) (emphasis added). Pursuant to this interpretation of the DA, the City held purported public hearings and procured an expensive yet flawed consultant's report in an attempt to meet the "narrow" Health and Safety exception to OBOT's vested rights. (*E.g.*, Compl. ¶¶ 37, 41; *see also* RJN, Ex. H [Feb. 3, 2016 City Status Report] at 4.)

These post Adoption Date statements and acts further confirm that the only reasonable reading of the DA includes a vested right to handle all non-containerized bulk goods including coal and pet coke. *Kennecott Corp. v. Union Oil Co.*, 196 Cal. App. 3d 1179, 1189 (Cal. Ct. App. 1987) (reasoning that post-execution conduct is "most reliable evidence of the parties' intentions"). For these reasons alone, the Court should deny the City's Motion.

V. THE CITY'S REMAINING ARGUMENTS ARE NON-AVAILING

A. The City's Argument that Current Regulations Apply Based on Section 3.2's Use of "Applicable City Regulations" Is Directly at Odds With the Plain Meaning of the Contract

The City's argument that current regulations apply to OBOT's terminal based on DA Section 3.2's use of "Applicable City Regulations" (Mot. at 10-11) is beyond the pale. Not only is the argument entirely at odds with the vesting purpose of Section 3.2, but it is based on a gross misreading of Section 3.2. The City argues that the last two sentences of Section 3.2 provide that

[15] Under the maxim *expressio unius est exclusio alterius* when a contract "expresses certain exceptions to the general rule, other exceptions are necessarily excluded." *White v. W. Title Ins. Co.*, 40 Cal. 3d 870, 895, n. 4 (1985) (applying this canon to the construction of a contract).

(1) "Applicable City Regulations" apply when the DA is otherwise silent, and (2) inconsistencies between "Applicable City Regulations" and the DA are resolved by the City Council. (Mot. at 10-11.) At the threshold, the DA is *not* silent: it expressly granted OBOT a vested right in a "non-containerized bulk goods" terminal. (Section IV.A.3., *supra*.) Moreover, although the City correctly states that "Applicable City Regulations" include "Existing City Regulations" and "other City Regulations" (Mot. at 10:16-17), the City fails to mention that these "other City Regulations" must be "***otherwise applicable to development of the Project pursuant to the provisions of DA Section 3.4***." (*See* DA § 1.1 (defining "Applicable City Regulations").) (emphasis added). In other words, City Regulations enacted after the Adoption Date are not "Applicable City Regulations" unless they do not "materially change, modify or reduce the permitted uses of the Project Site" (among other things) under Section 3.4. (*See* DA § 3.4.1.) The 2016 Ordinance and Resolution thus cannot be "Applicable City Regulations" because they *do* materially modify, change and reduce the permitted uses of OBOT's terminal. Accordingly, Section 3.2 provides no basis for the City to apply a new 2016 ban on coal and pet coke to OBOT in violation of OBOT's vested rights.

B. The Public Trust Doctrine Supports OBOT's Rights

The City's argument that the public trust doctrine insulates the City's unlawful breach of the DA from review by this Court is similarly tortured. The City was well aware of its position as trustee of public-trust property when it granted OBOT the vested right to develop, use and operate a bulk-goods terminal on that property (the West Gateway).[16] The City's status as trustee does not diminish OBOT's ability to assert its contractual, vested rights to uses consistent with that trust. (RJN, Ex. I § 1(a) (providing that the City may lease trust property for "purposes consistent with" trust uses); *see also Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 440 (1983) (acknowledging that a private grantee of trust property "may assert a vested right" to trust uses).

[16] In 1911 the State of California granted to Oakland the "tide lands and submerged lands" that include portions of what is now the West Gateway, subject to the restriction that the land may ***only*** be used "for the establishment, improvement and conduct of a harbor, and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce . . . ." (RJN, Ex. I [Chapter 657 of 1911 California Statutes] § 1(a).)

And a bulk-goods terminal is undisputedly one such use: the City itself expressly determined that use of the West Gateway as a bulk-goods terminal is "consistent with the public trust" and consistent with the "terms and conditions of the 1911 grant." (RJN, Ex. A [Ground Lease] Recital E; *see also Citizens for E. Shore Parks v. California State Lands Com.*, 202 Cal. App. 4th 549, 571, 576 (2011), *as modified on denial of reh'g* (Jan. 27, 2012) (recognizing that public trust lands can be leased "for such uses consistent with the trust" and finding that a that a marine terminal used for shipping crude oil was a permissible trust use).) The City's argument based on its status as trustee also conflicts with Section 14.7 of the DA which provides that the DA "shall not be construed for or against either Party . . . by reason of the status of either Party." (DA § 14.7.) The City is not permitted to hide behind its status to shield its unlawful conduct from scrutiny.

C. The DA Freezes Regulations Governing "Permitted Uses" of the Land

Despite the City's concession that the DA Statute allows "rules, regulations, and official policies governing permitted uses of the land" to be frozen by a development agreement (Mot. at 8), the City argues that the 2016 Ordinance is not a regulation "subject to a freeze" because the Ordinance "amends the City's Health and Safety Code" and concerns "certain commodities." (Mot. at 13.) The City cannot seriously contend that the Ordinance and Resolution, which prevent OBOT from using the land at the West Gateway for a coal and pet coke terminal, does not govern the "permitted uses" of the land simply because the Ordinance and Resolution are purportedly based on health and safety concerns. *See, e.g.*, *People v. Optimal Glob. Healing, Inc.*, 241 Cal. App. 4th Supp. 1, 7-8 (Cal. App. Dep't Super. Ct. 2015) (rejecting City's contention that a ban on medical marijuana dispensaries was a nuisance ordinance rather than a zoning ordinance because actual effect of the ordinance was to "[r]egulat[e] the use of buildings, structures, and land.") (interlineations in original); *Kirby v. Cty. of Fresno*, 242 Cal. App. 4th 940, 948 (2015), *review denied* (Feb. 17, 2016) (county ordinance banning storage of marijuana adopted under county's "power to regulate land use"). The City's decision to characterize the regulation at issue as a "Health and Safety" regulation does not change the fact that it is intended to, and does, govern the permitted uses of the land at the West Gateway that is the subject of the DA.

D. OBOT's Breach-of-Contract Claim is Timely

A four-year statute of limitations applies to OBOT's breach-of-contract claim. Cal. Civ. Proc. Code § 337. The City nonetheless argues that if "the Ordinance and Resolution are new zoning or land use regulations," then OBOT's breach of contract claim would be subject to the 90-day limitations period of California Government Code section 65009(c)(1). (Mot. at 14.) The City is wrong for two reasons. First, as the City itself concedes, "[t]o determine the statute of limitations which applies to a cause of action," courts examine the "gravamen" of the claim, which depends on "the right sued upon." *Hensler v. City of Glendale*, 8 Cal.4th 1, 22-23 (1994). The DA created an enforceable, contractual right to sue the City for breach of its contract with OBOT. *See, e.g.*, Cal. Gov't Code § 65865.4 ("[A] development agreement shall be enforceable by any party thereto . . . ."); DA §§ 3.4.1 ("Developer reserves the right to challenge in court any City Regulation that would conflict with [the DA] or reduce the development rights provided by [the DA], provided that such City Regulation directly affects the project"), 8.7 (providing that breach of the DA gives other party the right "bring any action at law or in equity"). OBOT's third cause of action is based on those contractual rights. Where, as here, a plaintiff's asserted right is based in contract, California courts have rejected attempts to subject those claims to statutory limitations similar to those the City seeks to impose. *See, e.g.*, *Legacy Grp. v. City of Wasco*, 106 Cal. App. 4th 1305, 1312 (2003) (rejecting assertion that 120-day limitations period under Subdivision Map Act applied to claims arising "from [a] City's failure to perform its contractual obligations" under a development agreement, instead finding those claims subject to four-year limitations period); *cf. Mammoth Lakes*, 191 Cal. App. at 455 (rejecting assertion that claims premised on breach of development agreement were subject to administrative exhaustion "and other restrictions on judicial relief," as claims were grounded in contractual rights).[17]

[17] The presence of OBOT's contract right renders the cases cited by the City wholly inapposite. (*See* Mot at 14-15 (citing *Hensler*, 8.Cal.4th at 22-23; *Buena Park Motel Ass'n v. City of Buena Park,* 109 Cal.App.4th 302 (2003)).) No contract was at issue in either case, but rather the courts found plaintiffs' claims for inverse condemnation were "necessarily challenges the validity [] of the ordinance or regulation" at issue, since "only if the ordinance or regulation would be invalid on its face or as applied unless compensation is paid to an affected landowner is a claim in inverse condemnation meritorious." *Hensler*, 8.Cal.4th at 24-25; *Buena Park,* 109 Cal.App.4th at 307-08.

Second, the City's conduct in breach of the DA is not covered by the types of conduct that Code Section 65009(c)(1) subjects to a 90-day limitation period in detailed subdivisions. Indeed, the City fails to state which subdivision of Code Section 65009(c)(1) would apply (*see* Mot. at 14-15), and, in fact, none does. For example, subdivision (B) applies to actions to "attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance." (Cal. Gov't Code § 65009(c)(1)(B)). But this only applies to "facial challenges" to ordinances that "consider[] only the text of the challenged law." *Avenida San Juan P'ship v. City of San Clemente*, 201 Cal. App. 4th 1256, 1275-77 (2011). OBOT's third cause of action is not a "facial challenge" to the Ordinance; rather, it alleges that the City breached the DA by applying the Ordinance to OBOT's terminal through the Resolution.[18] The City's reliance on section 65009(c)(1) is thus unavailing.[19]

VI. CONCLUSION

For the foregoing reasons, OBOT respectfully requests that the City's Motion be denied in its entirety.

Dated: March 15, 2017

Respectfully submitted,

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[18] Even if it were accurate to say that OBOT is challenging the "validity" of the Resolution in its breach of contract claim, that would not be a challenge to a "zoning ordinance" under section 65009. *See generally City of Sausalito v. Cty. of Marin*, 12 Cal. App. 3d 550, 565 (Cal. Ct. App. 1970) (recognizing the "very real difference between a 'resolution' and an 'ordinance'" and noting that the California Legislature does not use the terms interchangeably).

[19] That DA Section 3.4.2 uses the terms "public hearing" and "substantial evidence" does not change the nature of the City's contract-based actions. Those terms, though familiar in the public-law context, took on a new legal identity when incorporated into the DA. *Cf. 300 DeHaro St. Inv'rs v. Dep't of Hous. & Cmty. Dev.*, 161 Cal. App. 4th 1240, 1256 (2008) ("When statutory language is included in a contract, it assumes a new legal identity: that of contractual language.") Accordingly, when the City held "public hearings" and reviewed "evidence" to satisfy DA Section 3.4.2's required showing of a "substantial[] danger[]," it was acting in its capacity as a party to the DA. *See, e.g.*, *Guntert v. City of Stockton*, 43 Cal. App. 3d 203, 217 (Cal. Ct. App. 1974) ("Once it has entered into a valid contract, a municipal corporation's contractual obligations are subject to the same rules of interpretation and the same liabilities as those of a private person.").