Nos. 18-16105, 18-16141

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OAKLAND BULK & OVERSIZED TERMINAL, LLC,

Plaintiff-Appellee,

v.

CITY OF OAKLAND,

Defendant-Appellant, and

SIERRA CLUB; SAN FRANCISCO BAYKEEPER,

Intervenor-Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. 3:16-cv-07014
Hon. Vince Chhabria

OPENING BRIEF OF INTERVENOR-DEFENDANTS-APPELLANTS

Colin C. O'Brien
Adrienne Bloch
Heather M. Lewis
Marie E. Logan
EARTHJUSTICE
50 California Street, Suite 500
San Francisco, CA 94111
Tel: (415) 217-2000

Attorneys for Intervenor-Defendants-Appellants

Jessica Yarnall Loarie
Joanne Spalding
SIERRA CLUB
2101 Webster Street, Suite 1300
Oakland, CA 94612
Tel. (415) 977-5636

Attorneys for Intervenor-Defendant-Appellant Sierra Club

Daniel P. Selmi
919 Albany Street
Los Angeles, CA 92662
Tel. (213) 736-1098

Attorney for Intervenor-Defendant-Appellant Sierra Club

RULE 26.1 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor-Defendants-Appellants Sierra Club and San Francisco Baykeeper hereby state that they are non-profit organizations that have no parent corporation and that no publicly-held corporation owns any stock in either entity.

Dated: December 10, 2018

Respectfully submitted,

s/ Colin C. O'Brien

Colin C. O'Brien
EARTHJUSTICE
50 California Street, Suite 500
San Francisco, CA 94111
Tel: (415) 217-2000
Fax: (415) 217-2040
cobrien@earthjustice.org

Attorney for Intervenor-Defendants-Appellants Sierra Club and San Francisco Baykeeper

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

State Cases

Federal Cases

Statutes

Other Authorities

INTRODUCTION AND SUMMARY OF THE ARGUMENT

West Oakland is a resilient community but residents there face challenges including lower incomes, insufficient health-supporting infrastructure, higher rates of chronic disease, and a heightened burden of harmful air pollution. These factors contribute to an average life span that is 15 years shorter than other parts of the City of Oakland (the "City"). Against this backdrop, West Oakland community members were cautiously optimistic as the City pursued plans to revitalize an adjacent, City-owned property at the former Oakland Army Base. The City's contractual partner, Oakland Bulk and Oversized Terminal, LLC ("OBOT"), assured neighbors it would transform the dilapidated property into a clean, modern trade and logistics center to handle agricultural goods and other products like iron ore and building materials. OBOT also unequivocally promised: "One bulk material OBOT does not plan to export or import is coal."

OBOT's promise was a lie. Unknown to City officials and the community, OBOT negotiated an agreement with a wholly-owned subsidiary of a coal company to operate the terminal, while the parent company worked with officials from coal-producing counties in Utah to secure a state-funded loan to finance the terminal for coal. Only after word of the Utah state funding reached Oakland did City officials and West Oakland community members learn that OBOT intended to

use the terminal to handle and store dusty, air-polluting, spontaneously combustible coal.

Shocked by OBOT's plans, residents and public interest groups like Sierra Club and San Francisco Baykeeper demanded that the City protect the over-burdened West Oakland community. Over the next year, the City solicited public comments, held multiple hearings, and received information from numerous environmental scientists and public health professionals as well as hundreds of members of the public. The information indicated that developing a coal terminal in West Oakland would exacerbate poor air quality there, introduce toxic contaminants, and risk catastrophic explosion and fire.

Based on this evidence, the City Council adopted an ordinance that bans the storage and handling of coal at bulk material facilities, and a resolution applying it to OBOT. The City's actions adhered to the development agreement it had signed with OBOT. That agreement grants OBOT certain rights but reserves the City's police power to apply new regulations if the "City determines based on substantial evidence and after a public hearing that a failure to do so would" cause a "condition substantially dangerous" to the health and safety of neighbors.

Despite its interest in the subject of the City's actions, OBOT disengaged from the City's process. Instead, OBOT thereafter filed suit alleging the City lacked substantial evidence for its actions and thus breached the development

agreement. OBOT based its claim on post-hoc, extra-record evidence that it never submitted to the City Council—including voluminous expert testimony offered during a three-day bench trial.

The district court's decision in favor of OBOT must be reversed. First, the court erred because the well-established "substantial evidence" standard incorporated into the development agreement bars the consideration of extra-record evidence, which formed the core of OBOT's case. The court should not have admitted this evidence. Likewise, under the substantial evidence standard, a court may not re-weigh evidence or substitute its own judgment for the City's, as the district court did here.

The district court also erroneously denied intervention as of right to Sierra Club and San Francisco Baykeeper (collectively, "Intervenors"). The two groups meet all requirements for intervention as of right but, without explanation, the court granted limited, permissive intervention only.

Finally, the district court erred when it denied Intervenors' motion for judgment as a matter of law pursuant to California Government Code section 65866, which governs development agreements like the one at issue here. Not only did the court fail to harmonize the contract with this statute, the court erroneously refused to consider Intervenors' full argument on the meaning of section 65866, citing Intervenors' limited intervention status.

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1367 (supplemental jurisdiction). It entered final judgment on May 23, 2018. ER0053. Sierra Club and San Francisco Baykeeper timely filed a notice of appeal on June 19, 2018. ER0043. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. Whether the district court erred by misapplying the settled "substantial evidence" standard of review when it:

   a. Held a bench trial to explore issues that were fully addressed within the City's administrative record;

   b. Accepted the testimony of experts retained by OBOT in this litigation long after the City's administrative record closed, over the City's repeated objections;

   c. Failed to consider and give appropriate deference to the thousands of pages of evidence the City amassed before enacting an ordinance and resolution that prohibited the handling and storage of coal for public health and safety reasons; and

   d. Disregarded the City's findings, concluding the City did not rely upon substantial evidence when it enacted the ordinance and resolution.

II. Whether the district court erred when it:

a. Denied Sierra Club and San Francisco Baykeeper intervention as of right; and

b. Declined to reach a dispositive argument presented exclusively by Intervenors in post-trial briefing.

III. Whether the district court erred by failing to interpret the City's development agreement with OBOT in harmony with California Government Code section 65866 or, alternatively, to deem it unenforceable as an unlawful surrender of the City's police powers.

STATEMENT REGARDING ADDENDUM

An addendum setting out relevant constitutional and statutory provisions is bound with this brief.

STATEMENT OF THE CASE

I. Factual Background

A. The City Planned for Beneficial Development of the West Gateway.

After Congress voted in 1995 to close the Oakland Army Base, the City initiated redevelopment planning to address the physical and economic blight in West Oakland that the City expected the base closure would cause or exacerbate. ER1861. The City's initial redevelopment plan, issued in 2002, envisioned "light industrial, research and development (R&D), and flex-office space uses," with

"some warehousing and distribution facilities and ancillary maritime support facilities." ER1903. The City's 2002 environmental analysis did not examine the possibility of a coal or coke terminal. ER1803–05, ER1837.[1]

In 2012, the City revised its redevelopment plan for the area, shifting the predominant uses from office space and R&D to warehouse/distribution and maritime-related logistics. ER1904. Among the projects considered was a bulk goods terminal to handle the exchange of goods between rail and ships. The terminal would occupy approximately 34 acres of former Army base property owned by the City and called the "West Gateway." ER1934. Like its 2002 review, the City's 2012 analysis never assessed the possibility of coal at the terminal. ER1803–05, ER1837.

During that same year, and consistent with the 2012 redevelopment plan, the City and OBOT's legal predecessor entered into a "Lease, Development and Disposition Agreement" ("LDDA"). ER0343. One year later, in July 2013, the City and that predecessor signed a "Development Agreement" ("DA") formalizing the predecessor's right to develop the West Gateway into "a marine terminal for

[1] "Coke," short for "petroleum coke" or "petcoke," is a black-colored petroleum distillate composed primarily of carbon with properties similar to coal. ER0918. This brief refers to coal and coke collectively as "coal."

bulk and oversized cargo and other uses and improvements." ER1955 (DA). Neither the LDDA nor the DA mention coal or any specific commodity.[2]

The DA fixed in place for OBOT certain "Existing City Regulations" that would apply to the terminal, but also preserved the City's authority to apply new regulations under specific circumstances. ER1968–69 (DA § 3.4). Section 3.4.2 of the DA is the key provision defining these respective rights:

> Regulation for Health and Safety. 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. …

ER1970.

B. OBOT's Secret Plan to Develop a Coal Terminal Became Public.

During the redevelopment planning process and negotiation of the LDDA and DA, OBOT did not disclose any intention to handle coal at the terminal. Phil Tagami, an OBOT principal, assured community members that coal was *not* part of his plans. He categorically stated in a December 2013 newsletter: "It has come to my attention that there are community concerns about a purported plan to develop

[2] OBOT assumed the rights and obligations under the LDDA and DA, and therefore effectively is the contracting party. ER0343.

a coal plant or coal distribution facility …. This is simply untrue." ER1777. He reiterated this promise at a community meeting of the Asian Pacific Environmental Network (APEN). ER1238–39 (testimony of former Oakland Mayor Quan); *see also* ER1240–41 (testimony of APEN representative that Tagami "promise[d] … that he would never allow coal to come through these ports").

Just months later, in April 2014, OBOT broke this commitment by signing an exclusive negotiation agreement with Terminal and Logistics Solutions, LLC (TLS)—a wholly owned subsidiary of a coal company, Bowie Resources Partners, LLC (Bowie). ER1856. The agreement grants TLS an option to lease, build, and operate the West Gateway terminal. *Id*.

In April 2015, OBOT's false promise that the terminal would not handle coal was exposed. A Utah newspaper broke news that several coal-producing counties there, working with Bowie, had received $53 million in loan funding from the state to construct and secure dedicated coal capacity at the West Gateway. ER0642, ER0645–50.

In a July 2015 letter to the City, OBOT and TLS finally acknowledged their intent to transport coal. ER1857 ("yes, coal"). In September 2015, OBOT and TLS submitted to the City a "Basis of Design" describing the basic framework for the terminal. ER1856. OBOT also submitted a report by HDR Engineering that

claimed coal dust pollution from coal-filled rail cars and terminal operations would be "negligible." ER1571–72.

C. The City Commenced a Public Process to Assess Health and Safety Impacts.

Responding to news of OBOT's plans, ER1566–70, in September 2015, the City announced a public hearing, ER1168, the first step in a nearly yearlong public process to assess the consequences of handling and storing coal at the terminal.

Before and at the September 21, 2015 hearing, concerned citizens and groups including Intervenors submitted extensive written comments. They objected to the proposed terminal for public health, safety, and environmental reasons. *See, e.g.*, ER1718–39, ER1753–54, ER1617–99 (Sierra Club et al. comments, Sept. 2, 2015; Sept. 14, 2015; Sept. 21, 2015); ER1700–04 (Baykeeper comments, Sept. 21, 2015); ER1516–61 (No Coal in Oakland comments, Sept. 18, 2015).

To support their comments, Intervenors attached expert reports prepared by Dr. Phyllis Fox and Sustainable Systems Research, LLC. ER1652–73 (Fox); ER1675–99 (SSR). The Fox report identified flaws in the HDR report proffered by OBOT, and concluded the terminal would cause adverse health and environmental impacts. ER1664–65, ER1669, ER1673. The Sustainable Systems Research report estimated potential air emissions from coal-filled rail cars waiting

to be unloaded, finding they would emit hundreds of tons of coal dust annually. ER1677.

Nearly 600 people requested to speak at the hearing. ER1209–11. Many, including prominent health and air pollution experts, testified that a coal terminal would endanger nearby residents in West Oakland. For example, Dr. Muntu Davis, Public Health Director of Alameda County, warned that a coal terminal in West Oakland "would be more devastating than in any other place given … poor health outcomes" there and existing "issues with air quality." ER1214–17. Likewise, Dr. Bart Ostro, former chief of the air pollution epidemiology section for the California EPA and author of over 100 peer-reviewed studies on the health effects of air pollution, foresaw "significant increases in coal dust." Those increases will "affect the public health of the people of Oakland" because even "the first couple micrograms [of exposure] will cause health effects." ER1218–24. A local dockworker—formerly a nurse—explained that she stopped accepting coal trans-loading jobs at the Port of Stockton because of the negative impacts of coal dust on her health. ER1225–27.

At the hearing's conclusion, the City Council voted unanimously to solicit additional public comments, requested more evidence from stakeholders, and instructed City staff to review and summarize the evidence submitted. ER1248–71. City staff subsequently sent follow-up questions to interested parties and, in

October 2015, received responses from, *inter alia*: OBOT and TLS (ER1740–52); labor organizations (ER1790–1801); environmental groups including Intervenors (ER1755–73); the Alameda County Public Health Department (ER1824–34); the Bay Area Air Quality Management District (ER1818–23); the U.S. EPA (ER1835–38); and the East Bay Regional Park District (ER1782–89).

Also in October 2015, Intervenors and others filed a state court lawsuit against the City seeking to compel evaluation of the impacts of a coal terminal under the California Environmental Quality Act ("CEQA"). ER0642, ER0670–0705. OBOT was named in the lawsuit and aligned with the City as a "real party in interest." ER0674–75. On December 1, 2015, Intervenors and the other plaintiffs voluntarily dismissed the action. ER0726–33. They did so after the City represented in court papers that it was evaluating "discretionary decisions it may take in the future with respect to" the terminal and "the scope of additional environmental review, if any," for future decisions. ER0720, ER728. Despite these acknowledgments, the City reserved its position on whether it must conduct additional CEQA review before construction of a coal terminal. ER0720.

D. The City Commissioned Two Expert Reports and Collected Additional Evidence.

In early 2016, the City negotiated a contract with the consulting firm Environmental Science Associates ("ESA") to analyze the health and safety impacts of storing and handling coal in West Oakland. ER1163–65. The City

Council approved the ESA contract on May 3, 2016. ER0832–34. ESA issued its report on June 23, 2016. ER0864–1026 (ESA).

Contemporaneous with the City Council's retaining ESA, Councilmember Dan Kalb commissioned Dr. Zoë Chafe, Ph.D., MPH, to analyze and summarize findings on the potential health impacts and safety risks posed by OBOT's proposed terminal. ER0862–63. Dr. Chafe issued her report on June 22, 2016. ER1027–1162 (Chafe).

The City accepted additional comments in June 2016, including a detailed report by the Public Health Advisory Panel, a coalition of prominent Bay Area physicians and public health experts. ER1310–1456 (PHAP). Fifteen other physicians, scientists, and public health professionals endorsed the Panel report. ER1314. The Director of the Alameda County Public Health Department also concurred with the Panel's conclusions. ER1457.

E. The City Determined that Substantial Evidence Supported Adoption of the Ordinance and Resolution.

On June 24, 2016, City staff published a detailed agenda report that analyzed the public comments received during months of public review. ER0837–61. The report recommended that the City Council adopt an ordinance to prohibit storage and handling of coal at bulk material facilities in Oakland, and a resolution applying the ordinance to the West Gateway. *Id.* The agenda report described and attached the ESA report. It also discussed the Chafe report, the Public Health

Advisory Panel report, and other evidence submitted to the City—including OBOT's Basis of Design. *Id*.

All three major reports agreed that terminal activities (i.e., rail transport of coal to West Oakland, staging of coal-filled rail cars before unloading, and storage and ship-loading operations within the terminal) would generate fugitive coal dust. The dust would include significant amounts of the harmful and sometimes deadly air pollutant $PM_{2.5}$. ER0875, ER0934–51 (ESA); ER1030, ER1032 (Chafe); ER1316, ER1334 (PHAP). Further, the Chafe and Public Health Advisory Panel reports found that coal dust emissions would contain toxic components like mercury and arsenic. ER1052–53 (Chafe); ER1348–51 (PHAP). All three reports discussed the enhanced risks of fire or explosion at OBOT's proposed terminal, given coal's potential to spontaneously combust. ER0876, ER0956–58 (ESA); ER1030–31 (Chafe); ER1363–66 (PHAP). Finally, the three reports warned these health and safety risks were even more consequential because of the terminal's proximity to West Oakland—where residents are already disproportionately burdened with high levels of pollution, elevated cancer risks, poor birth outcomes, frequent emergency room visits for asthmatic children, and shorter lifespans. ER0874–75, ER0926–33 (ESA); ER1065–82 (Chafe); ER1322–33 (PHAP).

On June 27, 2016, after a final public hearing (ER0835–36), the City Council unanimously enacted Ordinance No. 13385 ("Ordinance"), which states

that owners and operators of a "Coal or Coke Bulk Material Facility shall not … Store or Handle any Coal or Coke." ER1201–02 (vote); ER0818 (Ordinance § 8.60.040(B)). The Council also unanimously approved Resolution No. 86234 ("Resolution"), which applied the Ordinance to OBOT. ER1202–06 (vote); ER0823–31 (Resolution). The City Council found, "based on substantial evidence in the record," that failing to apply the Ordinance to OBOT would result "in a condition substantially dangerous" to the "health and/or safety" of nearby community members. ER0829 (Resolution).[3]

II. Litigation History

OBOT filed a lawsuit against the City in the United States District Court for the Northern District of California on December 7, 2016. Dist. Ct. Dkt. 1. It contended the Ordinance and Resolution breached the DA, violated the Commerce Clause of the U.S. Constitution, and were preempted by three federal statutes. *Id*.

On January 30, 2017, the City filed a motion to dismiss the breach of contract claim. Dist. Ct. Dkt. 19.

On February 16, 2017, Sierra Club and San Francisco Baykeeper moved for intervention as of right to defend the Ordinance and Resolution. ER0614. Intervenors, apart from the City, also moved to dismiss OBOT's Commerce Clause

[3] On July 19, 2016, the City Council completed the second reading of the Ordinance required for final passage. ER1193.

claim. Dist. Ct. Dkt. 30. OBOT opposed intervention (ER0595) and the motions to dismiss (Dist. Ct. Dkts. 48, 56).

On June 6, 2017, the district court granted permissive intervention to Intervenors—without explaining why it denied intervention as of right. ER0040. The order specified intervention was "limited to defending against [OBOT]'s claims and will not include the right to bring counterclaims, the right to bring cross-claims, or the right to prevent the case from being dismissed on a stipulation between [OBOT] and the City." ER0042. Additionally, the district court denied both motions to dismiss. ER0040–42.

The case subsequently proceeded on an accelerated discovery schedule. Dist. Ct. Dkt. 62. The City did not object to discovery for OBOT's federal claims but twice informed the court that only the public record was relevant to OBOT's contract claim. ER0613, ER0594.

The parties thereafter filed cross-motions for summary judgment on all claims. Dist. Ct. Dkts. 135, 145, 156. On January 10, 2018, the district court heard argument, took OBOT's federal claims under submission, and scheduled a bench trial on the breach of contract claim to assess whether the City adduced substantial evidence to enact the Ordinance and Resolution. Dist. Ct. Dkt. 217.

Before, during, and after the trial, the City objected to OBOT's post-hoc, extra-record evidence. The City argued this evidence would enable OBOT to

improperly contradict the City's administrative record with information that the Council had no opportunity to review. The City raised this issue in its pre-trial brief, ER0337–40; filed a pre-trial objection, ER0253–58; lodged a continuing objection at the outset of trial, ER0250–51 (Tr., Jan. 16, 2018); and renewed the objection after trial, ER0054–70. Nonetheless, the Court admitted extra-record evidence. ER0001–02 (order).

The three-day trial began on January 16, 2018, six days after the summary judgment hearing. ER0249 (Tr., Jan. 16, 2018). The district court permitted OBOT to present testimony from an assortment of witnesses, including lengthy extra-record testimony from OBOT's experts who supplied post-hoc critiques of the City's evidence, methods, and conclusions. *See*, *e.g.*, ER0087–106 (Mr. Buccolo); ER0118–82 (Mr. Chinkin); ER0186–201 (Dr. Maier); ER0211–30 (Dr. Rangwala). The court also allowed OBOT's experts to address the relevance and significance of new, extra-record exhibits. *See*, *e.g.*, ER0102–03 (Buccolo discussing Ex. 515); ER0160–62 (Chinkin discussing Ex. 1085); ER (Chinkin discussing Ex. 982); ER0181–82 (Chinkin discussing Ex. 478).

At the close of trial, the district court directed the parties to file post-trial briefs, proposed findings of fact, and evidentiary objections. Dist. Ct. Dkt. 232. The court also set a briefing schedule for a motion for judgment by Intervenors. *Id.* Intervenors' motion, premised on California Government Code section 65866,

contended that section 3.4.2 of the DA must be harmonized with that statutory provision or invalidated. Dist. Ct. Dkt. 234. Intervenors filed their motion after the court twice raised Government Code section 65866 *sua sponte*—but the City declined to present the argument. *See* ER0586–90 (Tr., Apr. 20, 2017); ER0320–22 (Tr., Jan. 10, 2018).

On May 15, 2018, the district court issued Findings of Fact and Conclusions of Law. ER0003. The court invalidated the Resolution as a breach of the DA, concluding "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." ER0003–04, ER0039. The court acknowledged that the City's decision "may only be justified on the basis of evidence that was before the City Council at the time the decision was made." ER0012. Nonetheless, the opinion relies heavily on post-hoc, extra-record testimony. *See, e.g.*, ER0007, ER0015, ER0017, ER0020–28, ER0032, ER0034. The court's opinion focused on OBOT's critiques of the ESA report and largely did not address other evidence amassed and reviewed by the City.

As for Intervenors' motion for judgment, the district court ruled that the DA cannot be harmonized with Government Code section 65866. ER0036–38. The court then declined to consider Intervenors' related argument, that section 3.4.2 of

the DA is invalid if it cannot be harmonized with section 65866, finding it "beyond the scope of the intervention that was allowed in this case." ER0038.

The district court entered judgment for OBOT on May 23, 2018. ER0053.

ARGUMENT

I. The City Adduced Substantial Evidence to Support the Ordinance and Resolution.

Section 3.4.2 of the DA establishes when the City may apply new, post-agreement regulations to OBOT, and sets the standard for judicial review of them. The City may apply new regulations whenever it "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 [or] adjacent neighbors … in a condition substantially dangerous to their health or safety." ER1970.

Section 3.4.2's explicit reference to "substantial evidence"—a legal term of art—also determines the standard of review for this case. California law limits such review to record evidence and is deferential to the City; it prohibits a court from substituting its judgment for the City's. Here, the district court erred by neglecting to credit the full breadth of evidence in the City's record and by failing to respect the limits imposed by the "substantial evidence" standard.[4]

[4] The DA states it "shall be governed by and interpreted" by California law. ER2000 (DA § 14.11). This brief presents California law but incorporates federal authority where analogous or illustrative.

A. The Standard of Appellate Review is De Novo.

This Court reviews de novo the district court's determination that the record before the City Council did not contain substantial evidence demonstrating that a coal terminal poses a substantial danger to the health and safety of neighbors. *Bixby v. Pierno*, 4 Cal. 3d. 130, 149 (1971) (scope of appellate review "identical to that of the trial court" in substantial evidence appeal); *accord Stone v. Heckler*, 761 F.2d 530, 532 (9th Cir. 1985) ("Our review is essentially the same as that undertaken by the district court."). This Court conducts its own review of the City's record and is "not bound by the trial court's conclusions." *Envtl. Prot. Info. Ctr. v. Cal. Dep't of Forestry & Fire Prot.*, 44 Cal. 4th 459, 479 (2008); *accord San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 981 (9th Cir. 2014) (conducting "independent record review" of agency decision on appeal from district court).

B. The Substantial Evidence Test Asks if a Reasonable City Could Reach the Same Conclusion as Oakland.

The district court properly recognized that the DA's use of the term "substantial evidence" in section 3.4.2 explicitly references a legal term of art with specific contours. ER0011. This "very well settled" standard asks "whether there is any substantial evidence, contradicted or uncontradicted, which will support the [finding]." *W. States Petroleum Ass'n v. Superior Ct.*, 9 Cal. 4th 559, 571 (1995) ("*WSPA*").

Substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Cal. Youth Auth. v. State Pers. Bd.*, 104 Cal. App. 4th 575, 584 (2002); *accord Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014) (same, and noting "'[s]ubstantial evidence' means more than a mere scintilla, but less than a preponderance"). "Substantial" evidence is evidence of "ponderable legal significance … reasonable …, credible, and of solid value." *Kuhn v. Dep't of Gen. Servs.*, 22 Cal. App. 4th 1627, 1633 (1994) (citation omitted).

Under the substantial evidence standard, courts must resolve all evidentiary conflicts in a city's favor and accept "legitimate and reasonable inferences." *WSPA*, 9 Cal. 4th at 571 (citation omitted); *accord Phelps Dodge Corp. v. Occupational Safety & Health Review Comm'n*, 725 F.2d 1237, 1239 (9th Cir. 1984) (accepting "reasonable factual inferences"). "[I]f there is *any* substantial evidence" in the record that supports a city's finding, the reviewing court "must affirm." *Berkeley Hillside Pres. v. City of Berkeley*, 60 Cal. 4th 1086, 1114 (2015) (emphasis added) (citation omitted).

A court's role in reviewing the record for substantial evidence differs from a city's role reviewing the same evidence. *WSPA*, 9 Cal. 4th at 576. While a city must "weigh the evidence and determine which way the scales tip," *Berkeley Hillside*, 60 Cal. 4th at 1114, "[a] court's task is not to weigh conflicting evidence

and determine who has the better argument ….” *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 393 (1988). A court may not overturn a city’s decision because “an opposite conclusion would have been equally or more reasonable.” *Id.*; *accord Gutierrez v. Comm’r of Soc. Sec.*, 740 F.3d 519, 523 (9th Cir. 2014) (if record “can reasonably support either affirming or reversing, the reviewing court may not substitute its judgment” for the city’s).

Consequently, a court may reverse a city’s decision “only if, based on the evidence before [the city], a reasonable person could not have reached the conclusion reached by it.” *Kutzke v. City of San Diego*, 11 Cal. App. 5th 1034, 1040 (2017). Stated differently, a court must defer to a city’s determination unless the record evidence “would *compel* a reasonable finder of fact to reach a contrary result.” *Ursack Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949 (9th Cir. 2011).

C. Substantial Evidence in the Record Supports the City’s Actions.

The City undertook an open and extended public process, and compiled substantial evidence that the storage and handling of coal at OBOT’s proposed terminal poses a substantial danger to public health and safety. Submissions from multiple qualified and independent sources supported the City’s determination.

The terminal, associated rail transport, and staging activities will generate fugitive coal dust that includes $PM_{2.5}$. ER1030, ER1032, ER1037, ER1039–40

(Chafe); ER1316, ER1334, ER1355 (PHAP); ER1668 (Fox). $PM_{2.5}$ is a dangerous air pollutant that causes significant health effects including premature death, hospitalization for cardiovascular and respiratory disease, emergency room visits, asthma, and adverse birth outcomes. ER0942–43 (ESA); ER1334, ER1338–41, ER1428–31 (PHAP). Lower education and income levels are correlated with a higher risk of death from $PM_{2.5}$ (ER0926 (ESA); ER1339 (PHAP)), and the California EPA has designated adjacent West Oakland as a "disadvantaged community" because it is already disproportionately burdened by, and especially vulnerable to, air pollution. ER0841 (agenda report); ER0874 (ESA).

The City received three independent reports from qualified professionals who calculated expected emissions from the terminal and associated activities: the ESA report, the Public Health Advisory Panel Report, and the Sustainable Systems Research report. These reports estimated the terminal and associated activities would generate 276 to 646 tons of coal dust annually, including at least 21 tons of $PM_{2.5}$ each year. ER0950 (ESA); ER1336 (PHAP); ER1677 (SSR). Credible reports from experts cautioned that such an increase in $PM_{2.5}$ levels would cause adverse health effects. *See, e.g.*, ER1045–46 (Chafe); ER1338–39 (PHAP).

To understand the magnitude of the danger posed by these $PM_{2.5}$ emissions, the City applied "thresholds of significance" used to evaluate projects under CEQA. The terminal's forecasted emissions of 21 tons of $PM_{2.5}$ per year more

than double the City's 10-ton benchmark used to identify a "significant" air pollution impact. ER0848 (agenda report).

Two reports also assessed the danger posed by this increase in $PM_{2.5}$ emissions in relation to the national ambient air quality standards (NAAQS) for $PM_{2.5}$. $PM_{2.5}$ levels in West Oakland barely meet the annual standard now, ER1334–35 (PHAP), and levels sometimes exceed the 24-hour standard, ER0932 (ESA). Both ESA and the Public Health Advisory Panel predicted OBOT's activities would likely or very likely cause additional exceedances of the 24-hour or annual NAAQS, and would adversely impact health in West Oakland. *See, e.g.*, ER0875, 0948–50 (ESA); ER1334–38 (PHAP).

Dr. Chafe and the Public Health Advisory Panel also advised the City that, in addition to the inherent dangers of $PM_{2.5}$, coal dust contains numerous toxic constituents—metals, metalloids, and polycyclic aromatic hydrocarbons. These are harmful to human health and unsafe at all exposure levels. ER1052–54 (Chafe); ER1348–51, ER1355 (PHAP).

Additionally, the City determined that OBOT's coal proposal posed a substantial danger from fires or explosions. Coal self-heats, ignites easily, and sometimes spontaneously combusts. Fires at coal terminals and storage facilities are fairly common, and the difficulty and complexity of extinguishing such fires compounds that danger. ER0956–59 (ESA); ER1085–90, ER1093 (Chafe);

ER1362–63 (PHAP); ER1529–30 (comments). Here, a fire or explosion poses a heightened threat because of OBOT's proximity to densely populated West Oakland.

D. The District Court Improperly Admitted and Credited Extra-Record Evidence to Contradict the City.

The district court declared that the City's decision "may only be justified on the basis of evidence that was before the City Council at the time the decision was made." ER0012. This statement correctly reflects a fundamental tenet of the substantial evidence standard that limits judicial review to the record compiled by the government entity. But the court then misconstrued and grossly misapplied that standard. Instead of limiting its review to the record, the court—over repeated objections—conducted a bench trial to accept extra-record evidence. This approach constituted legal error. Additionally, it unfairly penalized the City and community members who participated in the City's public process while OBOT deliberately withheld its evidence, preventing evaluation of it.

1. Long-Established California Law Limits Substantial Evidence Review to the Record.

Section 3.4.2 of the DA declares that the City may apply new regulations to OBOT if it "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 [or] adjacent neighbors … in a condition substantially dangerous to their health or safety." ER1970 (emphasis added).

In its foundational *WSPA* decision, the California Supreme Court explained that the phrase "substantial evidence" has an "established legal meaning" and does not allow a court "to readily admit extra-record evidence." 9 Cal. 4th at 570–71. Under *WSPA*, extra-record evidence is inadmissible under the substantial evidence test because "the substantiality of the evidence" is "a question of law." *Id*. at 573. Consequently, the Court concluded:

> [J]ust as appellate courts generally may not consider evidence not contained in the trial record when reviewing such findings, courts generally may not consider evidence not contained in the administrative record when reviewing the substantiality of the evidence supporting a quasi-legislative administrative decision ….

Id. at 565.

The district court, however, refused to limit its review to the City's record. It explained that it "need not get bogged down in state law standards that apply in cases involving judicial review of actions taken by administrative agencies" because "this is a contractual dispute." ER0012. But the court had it backwards. Using the term "substantial evidence" in a contract does not change the term's legal meaning. To the contrary, contract terms are afforded a "strict legal meaning" if such terms possess "a special meaning … given to them by usage." Cal. Civ. Code § 1644; *accord Waller v. Truck Ins. Exch., Inc*., 11 Cal. 4th 1, 18

(1995). Here, the California Supreme Court has held that the term "substantial evidence" possesses a special meaning; it sets an evidentiary standard that prohibits admission of extra-record evidence. *WSPA*, 9 Cal. 4th at 570-71. The district court erred in refusing to follow this definitive interpretation of state law. *See Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1046–47 (9th Cir. 2014).

The reason for confining substantial evidence review to the record stems from the standard's nature and notions of judicial restraint. According to the California Supreme Court, allowing courts to "freely consider extra-record evidence … would in effect transform the highly deferential substantial evidence standard of review" into an inquiry whether the government's decision "was the wisest decision given all the available scientific data." *WSPA*, 9 Cal. 4th at 572.

This Court likewise found that "[w]hen a reviewing court considers evidence that was not before the agency, it inevitably leads the reviewing court to substitute its judgment for that of the agency." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) ("*Jewell*") (citing *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980)). Thus, this Court has reversed two district court decisions that, while purportedly reviewing for substantial evidence, improperly relied on trial testimony and other extra-record evidence. *Jewell*, 747 F.3d at 603–04 (court "overstepped its bounds" with a trial that became "a forum

for debating the merits" of agency decision); *Asarco*, 616 F.2d at 1160–61 (disapproving extra-record testimony "elicited for the purpose of determining the scientific merit of the EPA's decision" which "led the district court to substitute its judgment for that of the agency").

Finally, allowing extra-record evidence would invite gamesmanship by parties. If allowed, "[a]ny individual dissatisfied with a regulation could hire an expert who is likewise dissatisfied to prepare a report … and, if he can persuade the court that the report raises a question regarding the wisdom of the regulation, obtain an order reopening the rulemaking proceedings." *WSPA*, 9 Cal. 4th at 578. This would incentivize parties "to withhold evidence at the administrative level," thereby producing "needless duplication of evidentiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 717 (1963).

2. The District Court Did Not Abide the Narrow Exceptions that Allow Admission of Extra-Record Evidence in a Substantial Evidence Case.

The district court addressed its decision to admit and credit OBOT's extra-record evidence in just two sentences. It found extra-record evidence "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." ER0012. It continued: "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." *Id*.; *accord* ER0001–02 (evidentiary order).

This purported justification for admission of extra-record evidence, offered by the court without citation to authority, violates settled California law. In its seminal *WSPA* decision, the California Supreme Court firmly rejected a similar rationale offered by an industry association that sought to introduce extra-record evidence in a challenge to an air quality regulation. 9 Cal. 4th at 570. Alleging that the regulation was not supported by substantial evidence, the association insisted that "the only way to demonstrate this inaccuracy is to admit the extra-record expert evidence that supposedly reveals it." *Id*. at 577–78. The Court rejected this reason, dismissing it as "nothing more than a thinly veiled attempt to introduce conflicting expert testimony to question the wisdom and scientific accuracy of the [agency]'s decision." *Id*. at 578.

The *WSPA* Court also rejected the related argument that admission of extra-record evidence might help the court determine whether the agency considered "all relevant factors." The Court acknowledged that federal courts maintain such an exception, *id*. at 577, but refused to accept it under California law. The Court found that the "exception would swallow the rule" and ultimately lead courts to

impermissibly evaluate whether government decisions are "wise or scientifically sound in light of the extra-record evidence." *Id*.

The *WSPA* decision does allow the admission of extra-record evidence in "rare instances" that meet two requirements: "(1) the evidence in question existed *before* the agency made its decision, and (2) it was not possible in the exercise of reasonable diligence to present this evidence to the agency *before* the decision was made so that it could be considered and included in the administrative record." *Id*. at 578. Importantly, this standard does not allow admission of *new* evidence. Moreover, such extra-record evidence "can *never* be admitted merely to contradict the evidence the administrative agency relied on … or to raise a question regarding the wisdom of that decision." *Id*. at 579 (emphasis added).[5]

The district court's opinion ignores the bar against extra-record evidence in a substantial evidence review. The opinion is premised on extra-record testimony, citing the trial transcript forty-four times. On key issues, the court accepted and weighed extra-record testimony from rival experts and witnesses. ER0020–21, ER0023–24. Moreover, the court explicitly premised its decision on extra-record

[5] Likewise, under well-established federal law, "post-decision information 'may not be advanced as a new rationalization either for sustaining or attacking an agency's decision.'" *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130–31 (9th Cir. 2012) (quoting *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006)).

credibility determinations. *See, e.g.*, ER0021 ("OBOT's expert provided credible testimony" that "was not meaningfully rebutted by the City's expert at trial"). This approach to extra-record evidence was erroneous because the substantial evidence standard simply does not allow a court to "freely consider extra-record evidence" or question whether the City's decision "was the wisest decision given all the available scientific data." *WSPA*, 9 Cal. 4th at 572.

E. The District Court Substituted Its Own Judgment for the City's.

Beyond admitting and using extra-record evidence, the district court departed from the substantial evidence test in other significant ways. The five examples below illustrate how the court rejected the City's legitimate factual inferences, failed to resolve evidentiary and expert conflicts in the City's favor, and ultimately substituted its factual judgments for the City's.

1. Rail Car Covers

Uncovered coal-filled rail cars emit fugitive dust while they are moving or staged for unloading, and the City determined OBOT could not mitigate this danger by using car covers. *See, e.g.*, ER0846–47 (agenda report). Answering a City questionnaire, OBOT pledged on one page that it would "agree to use covered rail cars" but backtracked on the next, stating its response "shall not be binding on OBOT." ER1745–46.

Despite OBOT's ambivalence, ESA and other professionals thoroughly vetted the use of covers on coal rail cars. A literature review and extensive contacts with potential manufacturers documented that such covers are not and have never been in commercial production for coal cars. They also found that covers have never been field-tested for their safety or effectiveness at reducing fugitive coal dust on extended train trips. ER0896–99 (ESA); ER1342–44 (PHAP); ER1663–64 (Fox); ER1677, ER1681, ER1683 (SSR); ER1433–36 (Foo letter). Record evidence also highlighted that cost, logistical constraints, and self-combustion risks likely preclude the use of covers on coal cars. ER1664 (Fox); ER1343–44 (PHAP). And still further record evidence established that OBOT could not credibly promise to use covers on cars controlled by coal companies and railroads. ER1669 (Fox); ER1343 (PHAP).

Despite the record, the district court deemed it a "big mistake" for the City to conclude that covers would not be used effectively. The court credited OBOT's pledge as a guarantee of successful implementation. ER0016. But that conclusion was legal error because substantial evidence review requires that a court accept all "legitimate and reasonable inferences" by the City. *WSPA*, 9 Cal. 4th at 571; *accord Phelps Dodge Corp.*, 725 F.2d at 1239.

Here, it was eminently reasonable for the City to conclude rail cars would not be used. OBOT qualified its promise to use them, and their use would be

unprecedented in the industry. Additionally, OBOT would have to impose such use on coal companies and rail carriers. The court should not have credited OBOT's pledge because such "conjecture and surmise" cannot overcome the City's substantial evidence. *In re Teed's Estate*, 112 Cal. App. 2d 638, 646 (1952); *accord Woods v. United States*, 724 F.2d 1444, 1451–52 (9th Cir. 1984) ("Substantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or a possibility.").[6]

2. Air District Mitigation

The district court improperly faulted the City for not *assuming* the local Air District would curtail OBOT's emissions from activities outside of the terminal's fence line—i.e., fugitive emissions from rail transport and staging. ER0016–18, ER0025–26. But the City's conclusion that it could not rely on the Air District was reasonable and supported by the record. For example, the Air District has not adopted any specific regulation for coal handling and storage, even though it is already home to one existing coal terminal. ER1369 (PHAP). Commenters also flagged that the Air District's jurisdiction is limited to stationary sources on

[6] The court also criticized the City for not assuming OBOT would employ chemical dust suppressants—"another potential mitigation measure." ER0017. But record evidence showed the coal industry does not regularly use chemical suppressants. Moreover, OBOT lacks authority to compel their use, and, in any event, they are ineffective. ER0899–0903 (ESA); ER1344–45 (PHAP); ER1681–83 (SSR).

OBOT's property, and does not extend to rail transport or off-site staging. ER1663 (Fox); ER1343 (PHAP). OBOT itself repeatedly argued that federal law preempts local regulation of rail activities. *See, e.g.*, ER1716; ER1228–37; ER1280–81. Finally, the Air District representative who appeared before the City Council emphasized the need for *the City* to act. ER1242–43 (testifying "we really want to encourage you to implement all feasible mitigations … we strongly urge you to look at whatever mechanisms you have to make those happen").

The district court ignored this record evidence, instead accepting conjecture and surmise. The court's decision notes the Air District "has a fair amount of latitude," "could impose regulations," and "can, and typically will, impose" permitting conditions. ER0018, ER0025. After setting forth this conditional language, the court conceded the City "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." ER0004. The court's inferences based on "faith" cannot overcome the City's substantial evidence. Based on that evidence, the City reasonably refused to rely on the Air District to address the dangers posed by OBOT's pollution.

3. Terminal Emissions

Before acting, the City Council considered estimates of expected $PM_{2.5}$ emissions from OBOT's operations, including emissions at the terminal proper

(i.e., the storage and handling facility). These were calculated by ESA. ER0950. ESA's report explained that its estimates for the terminal account for the installation of the "best available control technology," including covered storage domes and conveyor belts. ER0945–47. At trial, however, OBOT alleged that ESA did not account for expected control measures in its emissions estimate.

The district court entertained post-hoc, extra-record testimony on this issue. After hearing from an ESA representative and experts from the City and OBOT, the court found that "[i]t's not obvious which side's story is correct." ER0024. Nonetheless, the court proceeded to side with OBOT, crediting OBOT's account as "far more plausible." *Id*.

Once again, this was error. The court's role was not to determine the "correct" story. Instead, the substantial evidence standard obligated it to uphold the City's finding. *See, e.g.*, *Berkeley Hillside*, 60 Cal. 4th at 1114–15 (courts must "resolv[e] all evidentiary conflicts in the agency's favor" because the "court's task is not to weigh conflicting evidence and determine who has the better argument") (citation and internal quotation omitted); *accord Gutierrez*, 740 F.3d at 523 ("[i]f the evidence can reasonably support either affirming or reversing," the reviewing court "may not substitute its judgment" for the City's).

4. Threshold Friction Velocity

ESA also estimated emissions from the movement of coal cars during rail staging. ER0943–45. As the starting point for its estimates, ESA referred to the earlier expert report prepared by Sustainable Systems Research. ER0944. OBOT did not contest either of these calculations before the City acted. Instead, OBOT waited until trial to attack ESA's methodology (i.e., use of section 13.2.5 of EPA's AP-42 Manual). OBOT also challenged ESA's choice of a particular value for one specific variable in its calculations—the "threshold friction velocity." ER0020–22.

Record evidence amply supported ESA's choices of both methodology and threshold friction velocity. As to the overall methodology, a Canadian government study in the record noted that EPA has not specified an approach for calculating fugitive emissions from coal trains. It then observed that section 13.2 of EPA's AP-42 Manual—which includes the section 13.2.5 equation used by ESA—"would be as applicable as anything" for estimating rail emissions. ER1512. Likewise, the expert report prepared by Sustainable Systems Research utilized section 13.2.5, thus endorsing its appropriateness. ER1688. Similarly, in choosing a specific input for threshold friction velocity, ESA tracked the Sustainable Systems Research report, which characterized the selected value as "relatively conservative" and noted it "may underestimate the actual amount of fugitive emissions occurring." ER1681, ER1688.

Despite this record evidence, the district court evaluated significant extra-record testimony and rejected the City's approach. In doing so, it violated bedrock principles of substantial evidence review. First, the court erred by admitting extra-record expert testimony used to attack the wisdom of the City's calculations and conclusions. *See WSPA*, 9 Cal. 4th at 579; *Tri-Valley CAREs*, 671 F.3d at 1130–31. Second, the district court was required to credit the expert view accepted by the City, particularly on an issue of scientific methodology. *See O.W.L. Found. v. City of Rohnert Park*, 168 Cal. App. 4th 568, 593 (2008).

Further, the district court exceeded its authority by ultimately concluding the City used the wrong formula and incorrect threshold friction velocity. The substantial evidence standard does not allow a court to "pit[] the experts against each other and resolve[] their contrary positions as a matter of scientific fact." *Jewell*, 747 F.3d at 604; *accord Town of Atherton v. Cal. High-Speed Rail Auth.*, 228 Cal. App. 4th 314, 350 (2014) (noting the California "Supreme Court has cautioned reviewing courts against performing our own scientific critiques of environmental studies, a task for which we have neither resources nor scientific expertise").

5. Air Quality Impacts

The record before the City included expert evidence that emissions from OBOT's proposed terminal and associated activities would impair air quality and

threaten public health. For example, ESA calculated that the terminal and related activities would generate at least 21 tons of harmful $PM_{2.5}$ annually, and concluded that this amount likely would cause exceedances of federal air quality standards. ER0875, ER0948–50. The Public Health Advisory Panel likewise predicted such exceedances based on calculations adapted from a recent published study of coal trains in the Columbia River Gorge known as the "Jaffe study". ER1334–38.

The district court rejected all of this evidence after hearing improper, extra-record testimony from an OBOT expert. The court faulted the City "for its failure to do air quality modeling" to more precisely quantify the negative impact of increased $PM_{2.5}$ emissions. ER0028. Further, the court dismissed the Jaffe study because its "numbers were a poor substitute for actual air quality modeling for OBOT." *Id*.

The court's conclusion that air modeling was *per se* required unquestionably violates substantial evidence review. The court may not substitute its judgment for the City's, and the court's preference for more analysis does not invalidate the City's determination because "[t]he fact that additional studies might be helpful does not mean that they are required." *Ass'n of Irritated Residents v. Cnty. of Madera*, 107 Cal. App. 4th 1383, 1396 (2003); *Jewell*, 747 F.3d at 608 (finding agency's decision was "supported by substantial evidence" even though agency "could have done more"). Moreover, the court's wholesale dismissal of the Jaffe

study was particularly improper because no other studies on the impacts of coal trains on air quality exist. While some differences may exist between the conditions of the Jaffe study and conditions in Oakland, they "do[] not render the [City]'s conclusions unreasonable or unsupported." *Jewell*, 747 F.3d at 633. Here, the City "has drawn rational conclusions from the best available science," and the district court's role is not "to task the [City] with filling the gaps in the scientific evidence." *Id*.

As the foregoing examples demonstrate, the district court violated basic principles of substantial evidence review. Most fundamentally, the court freely admitted post-hoc, extra-record evidence and then relied upon it to overturn the City's determination. The court also failed to accept the City's legitimate factual inferences or resolve evidentiary conflicts in the City's favor, and ultimately substituted its judgment for the City's. The court's admission and use of extra-record evidence constitutes the kind of *improper* review described in *Jewell*:

> The appearance of an open record was the reality. The district court relied extensively on … the parties' experts-as-advocates as the basis for rejecting the [decision]. In places, the district court pits the experts against each other and resolves their contrary positions as a matter of scientific fact. In effect, the district court opened the [decision] to a post-hoc notice-and-comment proceeding involving the parties' experts, and then judged the [decision] against the comments received.

747 F.3d 581, 604. This Court reversed the district court's ruling in *Jewell* and, for the same reasons, should do likewise here.

F. The District Court Erred in Its Interpretation of the Development Agreement's Reference to "Substantially Dangerous" Conditions.

As discussed above, section 3.4.2 of the DA authorizes the City to impose new laws upon OBOT if the "City determines based on substantial evidence" that the terminal will create "a condition substantially dangerous" to the "health or safety" of workers or nearby community members. ER1970. The district court's construction of the phrase "substantially dangerous" departed from the meaning of that phrase under California law. Further, the same failure to follow the well-established principles of substantial evidence review plague the court's treatment of the phrase "substantial danger."

California law defines the word "substantial" to mean "not seeming or imaginary, not illusive, real, true …" as well as "considerable in amount, value or the like; firmly established, solidly based." *In re Teed's Estate*, 112 Cal. App. 2d at 644. California law further addresses when danger is substantial. In *Cavers v. Cushman Motor Sales, Inc.*, 95 Cal. App. 3d 338, 349 (1979), the California Court of Appeals approved jury instructions that defined "substantially dangerous" to mean a "danger which is real and not insignificant," something more than a "trivial danger" but not "synonymous with great or extreme danger." The *Cavers* opinion recognized several criteria that bear on "[w]hether a danger is substantial or insubstantial," including "the likelihood that injury might result, the quality and extent of danger …, and whether a danger is latent or patent …." *Id*.

In assessing what constitutes "substantial danger," the district court cited a dictionary definition of the word "substantial" (i.e., "of considerable importance, size, or worth"). ER0030. The court added its own gloss, however, insisting that "[d]eciding what is 'substantial' requires context" and "a baseline against which to compare the danger." *Id*. The court cited no definition or authority for its view that context or comparison is necessary. *Id*. Further, the opinion indicates that the court would only accept one kind of evidence to establish substantial danger: a comparison of OBOT's emissions to other sources of $PM_{2.5}$ in Oakland. ER0031–32 (mentioning comparison with other sources three times).

This interpretation of "substantial danger" was error for several reasons. First, the court's comparative approach cannot reliably determine whether a danger is "substantial," i.e. "real and not insignificant." *Cavers*, 95 Cal. App. 3d at 349. Comparing OBOT's emissions to emissions from other sources might indicate the *relative* danger posed by OBOT. But even if other sources emit more, that fact alone does not mean OBOT's emissions are not themselves dangerous. *See, e.g.*, *N. Am.'s Bldg. Trades Unions v. Occupational Safety & Health Admin.*, 878 F.3d 271, 290 (D.C. Cir. 2017) (concluding regulation was supported by substantial evidence because "[t]he mere fact that the brick industry faces a lower risk than other industries does not mean the brick industry's risks are not significant").

Second, even assuming *arguendo* that the district court's approach was one appropriate method for evaluating whether OBOT posed a substantial danger, the substantial evidence standard does not allow the court to insist upon its approach, demand new studies, or substitute its judgment for the City's. *See, e.g.*, *Ass'n of Irritated Residents*, 107 Cal. App. 4th at 1396; *Jewell*, 747 F.3d at 608.

Third, in contrast to the purely relational approach preferred by the court, the City used well-established, scientific benchmarks to gauge whether OBOT poses a substantial danger. As explained above, the City determined OBOT's emissions would exceed the "significance threshold" used to measure project impacts under CEQA, and found violations of the 24-hour and annual $PM_{2.5}$ NAAQS were likely. *See supra* at 22–23.

Fourth, additional indicia of danger support the City's determination. For example, every increment of increased $PM_{2.5}$ pollution is associated with an increase in negative health outcomes, ER1045 (Chafe); ER1338–39 (PHAP), and disadvantaged communities like West Oakland are particularly susceptible to $PM_{2.5}$ ER1214–17 (Dr. Davis); ER1065–82 (Chafe); ER1322–33 (PHAP). Accordingly, the City established a high "likelihood that injury might result." *Cavers*, 95 Cal. App. 3d at 349. Moreover, the record demonstrated that "the quality and extent of danger" (*id.*) is substantial, given that $PM_{2.5}$ is known to cause severe health consequences including death. ER0942 (ESA); ER1334.

Finally, the district court erred when it suggested the City must justify its decision to regulate OBOT but not certain other sources of $PM_{2.5}$. ER0031. No law requires the City do so. Governments possess discretion to address problems incrementally, and here the City took a sensible, efficient step toward improving air quality by preventing a new, substantial pollution source. *See Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) (agencies may "whittle away" at "massive problems" gradually); *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489 (1955) (government may address problems "one step at a time"); *Coal. for Reasonable Regulation of Naturally Occurring Substances v. Cal. Air Res. Bd.*, 122 Cal. App. 4th 1249, 1263–64 (2004) (deferring to agency's decision regarding scope of new asbestos regulation).

The district court's opinion reveals that the court held its own ideas about how to determine whether OBOT's terminal poses a substantial danger, and judged the City's determination on that basis. This was error because the court may not ignore the meaning of "substantially dangerous" under California law, nor may it substitute its views on how to evaluate and regulate danger for the City's.

II. The District Court Erred in Denying Intervenors Intervention As Of Right.

Apart from the merits, the district court also erred by rejecting Intervenors' motion to intervene as of right and granting only limited, permissive intervention. In its order, the court did not address the statutory factors in Federal Rule of Civil

Procedure 24(a)(2), nor did it explain its ruling. ER0042. Denial of intervention as of right proved prejudicial here because the court later refused to address a merits argument proffered solely by Intervenors on the ground that it exceeded the scope of permissive intervention. ER0038–39.

This Court reviews de novo a district court's denial of intervention as of right. *Akina v. Hawaii*, 835 F.3d 1003, 1011 (9th Cir. 2016). Here, it should reverse the decision below because Intervenors plainly meet the statutory requirements.

A. Federal Rule of Civil Procedure 24(a)(2) Establishes the Standard for Intervention As Of Right.

Federal Rule of Civil Procedure 24(a)(2) addresses intervention as of right. When analyzing a motion to intervene of right, the Court applies a four-part test:

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1177 (9th Cir. 2011) (citation omitted). A court must permit an applicant meeting these standards to intervene. *Yniguez v. Ariz.*, 939 F.2d 727, 731 (9th Cir. 1991). Rule 24(a)(2) is construed "broadly in favor of proposed intervenors." *Wilderness Soc'y*, 630 F.3d at 1179.

B. Intervernors Are Entitled to Intervention As Of Right.

1. Intervenors Filed a Timely Motion.

Intervenors filed their intervention motion two months after OBOT filed its complaint and before the court heard any substantive motions. OBOT did not dispute Intervenors' timeliness. *See* ER0595–611.

Courts evaluating timeliness under Rule 24(a)(2) consider the stage of the proceedings, prejudice to other parties, and reasons for and length of delay, if any. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995). When a motion is made "at an early stage of the proceedings," intervention will neither prejudice other parties nor delay the proceeding. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). Here, Intervenors filed their motion at a very early stage, and it neither prejudiced other parties nor caused delay. *Idaho Farm Bureau Fed'n*, 58 F.3d at 1397 (motion timely when filed four months after complaint but "before any hearings or rulings on substantive matters").

2. Intervenors Have Protectable Interests in the Ordinance and Resolution.

Because Intervenors' members are intended beneficiaries of the Ordinance and Resolution, and Intervenors supported enactment, they have a protectable interest in this case. OBOT did not dispute that Intervenors possess a protectable interest. ER0595–611.

An intervenor has a "significant protectable interest" if it asserts an interest protected by some law, and a relationship between that interest and the claims at issue. *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006). The applicant need not have a specific legal or equitable interest. *Citizens for Balanced Use*, 647 F.3d at 897. "[A] party has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation." *Lockyer*, 450 F.3d at 441.

The Ordinance's stated purpose is "to protect and promote the health, safety and/or general welfare of its citizens, residents, workers, employers and/or visitors" by prohibiting storage and handling of coal. ER0812 (§ 8.60.010). Intervenors' members fall within this sphere of protection. They include Oakland residents and people who regularly visit and work near the proposed terminal. ER0638-44, ER0651-64 (declarations). Public interest groups have a protectable interest when, as here, an action challenges a legislative measure intended to protect their members. *Fresno Cnty. v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980).

Intervenors' strong advocacy for passage of the Ordinance and Resolution also confers a protectable interest because they are "entitled as a matter of right to intervene in an action challenging the legality of a measure [they] … supported." *Idaho Farm Bureau Fed'n*, 58 F.3d at 1397; *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983) (same). Intervenors urged adoption of the Ordinance

and Resolution and participated in every stage of the administrative proceedings—during the City's initial investigatory phase and through the ultimate hearing on the legislation. ER1617–26, ER1700–04, ER1718–39, ER1753–54, ER1755–73 (comments); ER0638–44, ER0656–60 (declarations). Consequently, Intervenors have the required protectable interest.

Finally, Intervenors possess longstanding, articulated interests in protecting public health and preserving the environment, *see, e.g.*, ER0658–60, ER0663–64 (declarations). These further constitute a protectable interest. *See Citizens for Balanced Use*, 647 F.3d at 897–98 (environmental group had significant interest in protecting forest from development); *United States v. Carpenter*, 526 F.3d 1237, 1240 (9th Cir. 2008) (environmental group "had the requisite interest in seeing that the wilderness area be preserved").

3. The Action May Impair Intervenors' Ability to Protect Their Interests.

If the determination in an action would substantially affect an applicant in a practical sense, that applicant "should, as a general rule, be entitled to intervene." Fed. R. Civ. P. 24 advisory committee's note. The impairment inquiry sets a low bar, asking only if the disposition of the case may practically affect the applicant's interest. *See Lockyer*, 450 F.3d at 441–42. Here, if OBOT prevails, handling and storage of coal in Oakland will impair Intervenors' interests in their members' health, safety, general welfare, and quality of environment. It also will undermine

Intervenors' multi-year advocacy efforts supporting the City's Ordinance and Resolution. OBOT did not dispute that this action may impede Intervenors' ability to protect these interests. ER0595–611.

4. The City Does Not Adequately Represent Intervenors' Interests.

OBOT opposed intervention as of right on the sole ground that the City would adequately represent Intervenors. ER0595–611. However, from the beginning of the OBOT coal controversy, it was evident the City would not do so.

A proposed intervenor must show only that representation "may be" inadequate, "and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Some courts apply a rebuttable presumption of adequate representation when parties have the same ultimate objective, or when the government is acting on behalf of its constituency, but a "compelling showing" to the contrary rebuts the presumption. *Citizens for Balanced Use*, 647 F.3d at 898. And even when there is a presumption of adequacy, this Court has repeatedly "emphasize[d] that the burden of showing inadequacy of representation is generally minimal." *Prete v. Bradbury*, 438 F.3d 949, 959 (9th Cir. 2006). It also has "stress[ed] that intervention as of right does not require an absolute certainty that … existing parties will not adequately represent" a proposed intervenor's interests. *Citizens for Balanced Use*, 647 F.3d at 898. Ultimately, "[t]he most important factor in assessing the adequacy of

representation is how the interest compares with the interests of existing parties." *Id.* (internal quotation marks omitted).

Here, Intervenors and the City have distinct interests. A range of economic and business interests animate the City's actions, including redevelopment of the Port, strengthening Oakland's economic base, job creation, competition with other West Coast ports, and increasing Port productivity and efficiency. ER1887–88 (CEQA report). Related financial interests include $242 million in state grant funding for redevelopment of the former Oakland Army Base, ER1169–70 (agenda report), along with tax revenues from redevelopment, ER1290–1309 (tax memo).

The City's interests also differ from Intervenors' because *the City and OBOT are contractual partners*. In addition to the DA and LDDA, the City and OBOT also agreed to a ground lease in February 2016 (ER0343)—signed well after OBOT's coal plans were exposed and Intervenors raised objections (*see supra* at 8–11). The City's contractual ties to OBOT mean that ongoing litigation poses particular risks for the City, including potential liability to OBOT for money damages.[7] This litigation also could affect the City's agreements with other developers.

[7] OBOT threatened to sue the City for damages, *see* ER0514 (case management statement), and reportedly did so on December 4, 2018 in Alameda County Superior Court (case no. RG18930929).

Intervenors, in contrast, have no business entanglements with OBOT or financial stake in the terminal, and are singularly concerned with health, safety, and environmental protections. ER0640, ER068 (declarations). Intervenors' narrower interests completely rebut any presumption of adequate representation. *See Lockyer*, 450 F.3d at 445 (showing of "more narrow, parochial interests" overcame presumption of adequate representation by government).

A presumption of adequate representation also may be rebutted by showing an existing party is neither positioned nor willing to "undoubtedly make all the intervenor's arguments." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001). Here, it was clear from the outset that the City would not "undoubtedly" make all of Intervenors' arguments. Before the motion to intervene was heard, the City had already chosen not to make Intervenors' arguments for dismissal of OBOT's Commerce Clause claims. *Compare* Dist. Ct. Dkt. 19 (City Mot. to Dismiss) with Dist. Ct. Dkt. 30 (Intervenor Mot. to Dismiss). The pattern continued with Intervenors' post-trial Motion for Judgment. Dist. Ct. Dkt. 234. This motion argued that the DA should be interpreted to avoid a conclusion that the City had unlawfully contracted away its police powers, and if it could not be so interpreted, the DA should be held invalid. *Id*. The City did not join the motion or Intervenors' specific arguments. Dist. Ct. Dkt. 235 (City Statement). Ironically,

the district court declined to rule on one of Intervenors' independent arguments, citing their limited intervention status. ER0038–39.

The City's and Intervenors' prior litigation further rebuts the presumption of adequate representation by the City. In October 2015, Intervenors sued the City under CEQA to compel review of the environmental and health impacts of a coal terminal. *See supra* at 11. Notwithstanding the stipulated dismissal of that case, a conflict of interest persists because the City rejects Intervenors' position that CEQA necessarily requires further environmental review before coal is stored or handled at the terminal. *See, e.g.*, ER0720 n.8.

This Court has repeatedly held that in cases where environmental groups engaged in advocacy directed at the government, the groups were entitled to intervene as a matter of right because they could not rely on the government to represent them adequately. *See Idaho Farm Bureau Fed'n*, 58 F.3d at 1398; *Fresno Cnty.*, 622 F.2d at 439. Accordingly, Intervenors have met the minimal burden to show the City's representation of their interests may be inadequate.

Finally, Intervenors' extensive expertise on environmental issues, ER0644, ER0658–59 (declarations), also "offer[s] important elements to the proceedings that the existing parties would likely neglect." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823. Intervenors' expertise, too, demonstrates inadequate representation.

***

In sum, Intervenors meet all four requirements set forth in Rule 24(a)(2)—which are construed "broadly in favor of proposed intervenors," *Wilderness Soc'y*, 630 F.3d at 1179 (citation omitted)—and therefore should be permitted to intervene as of right. *See Yniguez*, 939 F.2d at 731.

III. The California Constitution and Government Code Section 65866 Allow the City to Apply the Ordinance to OBOT, Whether or Not a Showing of Substantial Evidence Is Made.

As set forth above, the Ordinance and Resolution are well supported by substantial evidence that fulfills the requirements of DA section 3.4.2. However, even if the City did not strictly meet the requirements of section 3.4.2, that provision cannot be interpreted to limit the City's ability to apply the Ordinance to OBOT. The California Constitution grants the City authority to legislate for public health and safety. A contract cannot cede that constitutional authority, which the California Development Agreement Statute preserves. The DA can and should be read to conform to California Government Code section 65866 and the California Constitution. If, however, the contract cannot be harmonized with state law, then section 3.4.2 is invalid. Either way, OBOT's breach of contract claim fails.[8]

[8] The interpretation of a contract is a question of law to be reviewed de novo. *Markely v. Beagle*, 66 Cal. 2d 951, 962 (1967); *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1021 (9th Cir. 2016).

The district court rejected Intervenors' argument that the DA should be harmonized with section 65866; it also refused to consider Intervenors' argument that section 3.4.2 is otherwise invalid on the grounds that the motion exceeded the scope of permissive intervention. ER0036–38. The court refused to consider this latter argument even though the court twice raised the issue *sua sponte*. ER0586–90, ER0320–23 (Trs.). In any event, the court erred in both rulings.

A. Government Code Section 65866 Limits a City's Authority to Contract Away Police Power.

The California Constitution gives local governments broad authority to enact legislation protecting public health and safety. Cal. Const. art. 11, § 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."). A city's police power encompasses the authority to legislate "for the general welfare of society" and is "an inherent attribute of political sovereignty." *Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.*, 91 Cal. App. 4th 678, 689 (2001).

A city's police power is so fundamental that it "cannot be bargained or contracted away, and all rights and property are held subject to it." *Laurel Hill Cemetery v. City & Cnty. of San Francisco*, 152 Cal. 464, 475 (1907), *aff'd*, 216 U.S. 358 (1910). "[A] government entity may not contract away its right to exercise the police power in the future," and "[a] contract that purports to do so is

invalid as against public policy." *Cotta v. City & Cnty. of San Francisco*, 157 Cal. App. 4th 1550, 1557–58 (2007).

Development agreements are statutorily-authorized contracts between a municipal government and a developer that are intended to provide some measure of regulatory certainty for developers by allowing the parties to freeze certain local regulations in place. Cal. Gov't Code § 65864; *accord Ctr. for Cmty. Action & Envtl. Justice v. City of Moreno Valley*, 26 Cal. App. 5th 689, 696–97 (2018). Under the Development Agreement Statute, cities can freeze certain regulations because the statute's "procedural and substantive limitations" ensure that lawful development agreements do not amount to "an unconstitutional surrender of the police power." *Trancas Prop. Owners Ass'n v. City of Malibu*, 138 Cal. App. 4th 172, 182 (2006); *accord Santa Margarita Area Residents Together v. San Luis Obispo Cnty.*, 84 Cal. App. 4th 221, 232 (2000) ("*SMART*") ("[T]he development agreement statute must be construed in a manner that does not permit the County to surrender its police power in the name of planning efficiency.").

One of these key "substantive limitations" is Government Code section 65866, which provides in full:

> Unless otherwise provided by the development agreement, rules, regulations, and official policies governing permitted uses of the land, governing density, and governing design, improvement, and construction standards and specifications, applicable to development of the property subject to a development agreement, shall be those rules, regulations, and official policies in force at the time of execution of the

> agreement. A development agreement shall not prevent a city, county, or city and county, in subsequent actions applicable to the property, from applying new rules, regulations, and policies which do not conflict with those rules, regulations, and policies applicable to the property as set forth herein, nor shall a development agreement prevent a city, county, or city and county from denying or conditionally approving any subsequent development project application on the basis of such existing or new rules, regulations, and policies.

Cal. Gov't Code § 65866.

The first sentence of section 65866 addresses *land use* regulations. It authorizes development agreements to freeze those regulations "governing permitted uses of the land, governing density, and governing design, improvement, and construction standards and specifications, applicable to development of the property" at issue in the development agreement. *Id*. These land use regulations are frozen "[u]nless otherwise provided by the development agreement." *Id.*

In contrast, the second sentence of section 65866 describes a very narrow category of *non-land use* regulations that a development agreement may restrict. Under this sentence, a city retains authority to adopt new regulations in the future *on any topic*, so long as those rules "do not conflict with those rules, regulations, and policies applicable to the property as set forth herein." *Id*. Accordingly, a city's authority to enact non-land use regulations remains intact so long as those non-land use regulations do not conflict with the land use regulations frozen by the development agreement.

Section 65866's distinction between land use and non-land use regulations, and the greater latitude it affords the City to constrain the former, reflects the Development Agreement Statute's codification within the state's zoning laws. A mere zoning freeze—a land use regulation—does not rise to the level of an unconstitutional surrender of police power. *See SMART*, 84 Cal. App. 4th at 233.

In short, then, Government Code section 65866 provides two ways the City may circumscribe its authority in a development agreement. First, the City may contractually limit its authority to enact future land use regulations. Second, for all other kinds of regulations, the City may only contractually limit new regulations that conflict with the specific land use regulations it has frozen into place. Otherwise, a development agreement "shall not prevent a city … from applying new rules, regulations, and policies." Cal. Gov't Code § 65866.

B. The Development Agreement Must Be Interpreted in Light of Government Code Section 65866.

In this case, the question is whether section 3.4.2 conforms to the limits established by section 65866. Under California law, courts construing a contract must, to the extent possible, adopt an interpretation that "renders a contract valid and effectual." *Titan Grp., Inc. v. Sonoma Valley Cnty. Sanitation Dist.*, 164 Cal. App. 3d 1122, 1127 (1985); *accord* Cal. Civ. Code § 1643 ("A contract must receive such an interpretation as will make it lawful."). Here, such a "reasonably permissible" interpretation of section 3.4.2 exists that would make the DA lawful

under section 65866, and this Court should adopt that interpretation. If this Court does so, it also must find that the substantial evidence requirements of section 3.4.2 do not apply to the Ordinance. *See Titan Group*, 164 Cal. App. 3d at 1127. Alternatively, if section 3.4.2 limits the City's police power beyond the constraints allowed by section 65866, then that provision of the DA is invalid. *See Cotta*, 157 Cal. App. 4th at 1557–58 (contract purporting to contract away city's right to exercise police power in the future "is invalid as against public policy").

1. When Section 3.4.2 Is Harmonized With Government Code Section 65866, Section 3.4.2's Substantial Evidence Requirement Does Not Apply to the Ordinance.

As set forth above, Government Code section 65866 allows the City to limit its authority through a development agreement in two ways: by freezing existing land use regulations, and by forgoing other new regulations that conflict with the frozen land use regulations. Read in harmony with these constraints, section 3.4.2 and its substantial evidence requirement apply only to (1) land use regulations locked in by the DA, and (2) general regulations that conflict with those locked-in land use regulations. To imbue section 3.4.2 with a broader reach would render the provision inconsistent with section 65866, and thus unlawful. Here, the challenged Ordinance is not a land use regulation, and it does not conflict with those land use regulations frozen by the DA. Accordingly, the constraints of section 3.4.2 do not apply to it.

First, the Ordinance is not a land use regulation. The Ordinance prohibits storage or handling of coal at any bulk material facility in the City. ER0812, ER0818 (§§ 8.60.010, 8.60.040.) It constitutes a generally applicable regulation, enacted pursuant to the City's police power, that regulates certain activities that may impair the health of Oakland's citizens. It does not govern "permitted uses of land" as contemplated by section 65866 because it is not a regulation "governing density, … design, improvement, [or] construction standards and specifications…." Cal. Gov't Code § 65866.

An ordinance regulating certain classes of health-impairing activities does not become a land use ordinance merely because it affects actions landowners may take on their property. *See CEEED v. Cal. Coastal Zone Conservation Comm'n*, 43 Cal. App. 3d 306, 319 (1974) (distinguishing between land use ordinances and "legislation declaring certain classes of activities public nuisances"). Before the district court, OBOT insisted the Ordinance governs land use because it prevents OBOT from developing a terminal for coal. But if this were enough, then any ordinance regulating activity on private property would transmute into a "land use" regulation. Minimum wage laws, controlled substances regulation, and food safety laws would all be swept into the land use category by their regulatory impact. Here, the Ordinance regulates a health-impairing activity, not a land use.

Second, the Ordinance does not fall within the second category established by section 65866 because it does not conflict with the regulations frozen by the DA. When the DA was executed, none of the City's existing laws governed the storage or handling of coal. *See* ER0323 (Tr., Jan. 10, 2018) ("The regulatory regime that existed at the time was silent on the issue of coal."). Because the regulations frozen by the DA did not address the subject of the Ordinance, the Ordinance is neither antagonistic to, nor irreconcilable with, those pre-existing regulations. *See Webster's New Collegiate Dictionary* 235 (1979 ed.) (defining "conflict" as "to show antagonism or irreconcilability").[9]

Below, OBOT argued that the Ordinance conflicts with the pre-existing regulatory regime because the old regime allowed development of a coal terminal, while the new regulatory scheme does not. However, under this overbroad interpretation of "conflict," any new regulation that affected the terminal would "conflict" with the previous regulatory scheme. A new regulation could avoid a conflict only if the prior scheme expressly permitted it. This interpretation of "conflict" would render section 65866's express reservation of police powers meaningless. *See* Cal. Gov't Code § 65866 ("A development agreement shall not

[9] This 1979 edition of the dictionary was published contemporaneously with enactment of the Development Agreement Statute. *City of Moreno Valley*, 26 Cal. App. 5th at 696.

prevent a city … from applying new rules, regulations, and policies which do not conflict ….”); *see also Shoemaker v. Myers*, 52 Cal. 3d 1, 22 (1990) (courts should not “construe statutory provisions so as to render them superfluous”).

Ultimately, the Ordinance neither regulates land use within the meaning of section 65866 nor conflicts with pre-existing land use regulations. The Ordinance therefore does not fall within the narrow circumstances under which the City may freeze its police power authority via contract. Consequently, when section 3.4.2 of the DA is read in harmony with Government Code section 65866, the requirements of section 3.4.2 simply do not apply to the Ordinance, and OBOT therefore failed to state a claim for breach of contract.

2. If Section 3.4.2 Cannot Be Harmonized with Government Code Section 65866, It Impermissibly Restricts the City’s Police Power and Is Invalid.

If section 3.4.2 of the DA cannot be harmonized with Government Code section 65866, but instead applies to all new laws (including the Ordinance), then it exceeds the restrictions on the City’s police powers allowed by section 65866. The City “may not contract away its right to exercise the police power in the future,” and any contract that purports to do so “is invalid as against public policy.” *Cotta*, 157 Cal. App. 4th at 1557–58; *accord Selten v. Hyon*, 152 Cal. App. 4th 463, 468 (2007) (contract provisions that do not comply with state law are invalid). If this Court construes section 3.4.2 as applying to all future regulations, the DA would

impermissibly restrict the City's future exercise of its police powers. Thus, section 3.4.2 would be invalid.

C. The District Court Erred When It Declined to Harmonize the Development Agreement With State Law and Refused to Consider Intervenors' Argument that Section 3.4.2 is Otherwise Unenforceable.

Intervenors presented these arguments on section 65866 in a motion for judgment (Dist. Ct. Dkt. 234) which the district court denied. The court erred for two reasons.

First, the district court failed to harmonize the language of the DA with Government Code section 65866. *See* ER0037–38. The court apparently rejected the interpretation suggested by Intervenors—that section 3.4.2 only applies to land use regulations and non-land use regulations that conflict—as not the most natural reading of the DA. For example, the court noted that the DA's language did not distinguish between land use and non-land use regulations on its face, and that the section of the DA describing existing City regulations did not specifically state that only land use regulations would be frozen. ER0038. But the court should not have stopped its inquiry there.

When a court must interpret a contract to avoid an unconstitutional meaning, the question is not whether the suggested reading is the most natural one, but rather whether the contract could reasonably be read in such manner. *See Quantification Settlement Agreement Cases*, 201 Cal. App. 4th 758, 798 (2011). On this principle,

courts will interpret a contract in a manner not apparent on its face to avoid an unlawful interpretation. *See S. Tahoe Gas Co. v. Hofmann Land Improvement Co.*, 25 Cal. App. 3d 750, 755 (1972) (where contract specified an unlawful charge, court interpreted the contract to mean a lawful charge instead); *Zadvydas v. Davis*, 533 U.S. 678, 689, 701 (2001) (indefinite detention statute interpreted to include "implicit limitation" restricting detention to avoid unconstitutionality). Here, section 3.4.2 readily may be interpreted as applying only to land use regulations. This is a "reasonably permissible" interpretation of section 3.4.2 of the DA, which would render the provision lawful and avoid conflict with the California Constitution. *See Titan Grp.*, 164 Cal. App. 3d at 1127–28.

Second, the district court erred by refusing to even consider Intervenors' argument that section 3.4.2 is invalid as contrary to California law. The court found this argument "beyond the scope of the intervention that was allowed in this case," which prohibited Intervenors from bringing "counterclaims or cross-claims." ER0038. This was error because Intervenors were entitled to intervention as of right without limitation. *See supra* at 42–51. In any event, Intervenors' argument fell within the scope of permissive intervention because it is not a cross-claim or counterclaim, but merely a defense that argues OBOT has not carried its prima facie burden as plaintiff. OBOT cannot establish a breach of section 3.4.2 if that section cannot lawfully be interpreted as applying to the Ordinance. *See P.&J.*

Artukovich, Inc. v. Simpson, 128 Cal. App. 2d 440, 447 (1954) (no breach where "no provision in the written contract" is violated); *Cotta*, 157 Cal. App. 4th at 1564 & n.7 (contract that is unenforceable as against public policy will not support claim for breach); *see also Fed. Deposit Ins. Corp. v. F.S.S.S.*, 829 F. Supp. 317, 322 n.11 (D. Alaska 1993) (distinguishing "defenses" that "challenge the underlying liability" and "[c]ounterclaims" which "are separate claims independent of the plaintiff's underlying claim"), *cited with approval in Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 839 (9th Cir. 2010).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment on OBOT's breach of contract claim, and remand for entry of judgment in the City's favor. This Court also should reverse the district court's denial of Sierra Club and San Francisco Baykeeper's motion for intervention as of right.

DATED: December 10, 2018

Respectfully submitted,

s/ Colin C. O'Brien
Colin C. O'Brien
Adrienne Bloch
Heather M. Lewis
Marie E. Logan
EARTHJUSTICE

Attorneys for Intervenor-Defendants-Appellants Sierra Club and San Francisco Baykeeper

Jessica Yarnall Loarie
Joanne Spalding
SIERRA CLUB

Daniel P. Selmi

Attorneys for Intervenor-Defendants-Appellants Sierra Club

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Intervenor-Defendants-Appellants hereby state that this case is related to another appeal before this Court that arises out of the same district court proceedings. This case and the related case, *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland* (No. 18-16105) were consolidated by the Court on August 1, 2018. Dkt. 28. Intervenor-Defendants-Appellants are unaware of any other related cases currently pending in this court.

Dated: December 10, 2018

s/ Colin C. O'Brien
Colin C. O'Brien

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) Nos. 18-16105, 18-16141

I am the attorney or self-represented party.

This brief contains 13,996 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (•) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ( ) it is a joint brief submitted by separately represented parties;
  - ( ) a party or parties are filing a single brief in response to multiple briefs; or
  - ( ) a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated _____.
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Colin C. O'Brien **Date** Dec 10, 2018

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

ADDENDUM

Table of Contents

Rule 24. Intervention

(a) INTERVENTION OF RIGHT. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) PERMISSIVE INTERVENTION.

(1) *In General*. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) *By a Government Officer or Agency*. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) *Delay or Prejudice*. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) NOTICE AND PLEADING REQUIRED. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

The right to intervene given by the following and similar statutes is preserved, but the procedure for its assertion is governed by this rule:

U.S.C., Title 28:

§45a [now 2323] (Special attorneys; participation by Interstate Commerce Commission; intervention) (in certain cases under interstate commerce laws)

§48 [now 2322] (Suits to be against United States; intervention by United States)

§401 [now 2403] (Intervention by United States; constitutionality of Federal statute)

U.S.C., Title 40:

§276a–2(b) [now 3144] (Bonds of contractors for public buildings or works; rights of persons furnishing labor and materials).

Compare with the last sentence of [former] Equity Rule 37 (Parties Generally—Intervention). This rule amplifies and restates the present federal practice at law and in equity. For the practice in admiralty see Admiralty Rules 34 (How Third Party May Intervene) and 42 (Claims Against Proceeds in Registry). See generally Moore and Levi, *Federal Intervention: I The Right to Intervene and Reorganization* (1936), 45 Yale L.J. 565. Under the codes two types of intervention are provided, one for the recovery of specific real or personal property (2 Ohio Gen.Code Ann. (Page, 1926) §11263; Wyo.Rev.Stat.Ann. (Courtright, 1931) §89–522), and the other allowing intervention generally when the applicant has an interest in the matter in litigation (1 Colo.Stat.Ann. (1935) Code Civ.Proc. §22; La.Code Pract. (Dart, 1932) Arts. 389–394; Utah Rev.Stat.Ann. (1933) §104–3–24). The English intervention practice is based upon various rules and decisions and falls into the two categories of absolute right and discretionary right. For the absolute right see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 12, r. 24 (admiralty), r. 25 (land), r. 23 (probate); O. 57, r. 12 (execution); J. A. (1925) §§181, 182, 183(2) (divorce); *In re Metropolitan Amalgamated Estates, Ltd.*, (1912) 2 Ch. 497 (receivership); *Wilson v. Church*, 9 Ch.D. 552 (1878) (representative action). For the discretionary right see O. 16, r. 11 (nonjoinder) and *Re Fowler*, 142 L. T. Jo. 94 (Ch. 1916), *Vavasseur v. Krupp*, 9 Ch.D. 351 (1878) (persons out of the jurisdiction).

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENTS

Note. Subdivision (a). The addition to subdivision (a)(3) covers the situation where property may be in the actual custody of some other officer or agency—such as the Secretary of the Treasury—but the control and disposition of the property is lodged in the court wherein the action is pending.

Subdivision (b). The addition in subdivision (b) permits the intervention of governmental officers or agencies in proper cases and thus avoids exclusionary constructions of the rule. For an example of the latter, see *Matter of Bender Body Co*. (Ref.Ohio 1941) 47 F.Supp. 224, aff'd as moot (N.D.Ohio 1942) 47 F.Supp. 224, 234, holding that the Administrator of the Office of Price Administration, then acting under the authority of an Executive Order of the President, could not intervene in a bankruptcy proceeding to protest the sale of assets above ceiling prices. Compare, however, *Securities and Exchange Commission v. United States Realty & Improvement Co*. (1940) 310 U.S. 434, where permissive intervention of the Commission to protect the public interest in an arrangement proceeding under Chapter XI of the Bankruptcy Act was upheld. See also dissenting opinion in *Securities and Exchange Commission v. Long Island Lighting Co*. (C.C.A.2d, 1945) 148 F.(2d) 252, judgment vacated as moot and case remanded with direction to dismiss complaint (1945) 325 U.S. 833. For discussion see Commentary, *Nature of Permissive Intervention Under Rule 24b* (1940) 3 Fed.Rules Serv. 704; Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts* (1940) 50 Yale L.J. 65.

Regarding the construction of subdivision (b)(2), see *Allen Calculators, Inc. v. National Cash Register Co*. (1944) 322 U.S. 137.

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The amendment substitutes the present statutory reference.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This amendment conforms to the amendment of Rule 5(a). See the Advisory Committee's Note to that amendment.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

In attempting to overcome certain difficulties which have arisen in the application of present Rule 24(a)(2) and (3), this amendment draws upon the revision of the related Rules 19 (joinder of persons needed for just adjudication) and 23 (class actions), and the reasoning underlying that revision.

Rule 24(a)(3) as amended in 1948 provided for intervention of right where the applicant established that he would be adversely affected by the distribution or disposition of property involved in an action to which he had not been made a party. Significantly, some decided cases virtually disregarded the language of this provision. Thus Professor Moore states: ''The concept of a fund has been applied so loosely that it is possible for a court to find a fund in almost any in personam action.'' 4 *Moore's Federal Practice*, par. 24.09[3], at 55 (2d ed. 1962), and see, e.g., *Formulabs, Inc. v. Hartley Pen Co.*, 275 F.2d 52 (9th Cir. 1960). This development was quite natural, for Rule 24(a)(3) was unduly restricted. If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of. Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion. See Louisell & Hazard, *Pleading and Procedure: State and Federal* 749–50 (1962).

The general purpose of original Rule 24(a)(2) was to entitle an absentee, purportedly represented by a party, to intervene in the action if he could establish with fair probability that the representation was inadequate. Thus, where an action is being prosecuted or defended by a trustee, a beneficiary of the trust should have a right to intervene if he can show that the trustee's representation of his interest probably is inadequate; similarly a member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court.

Original Rule 24(a)(2), however, made it a condition of intervention that ''the applicant is or may be bound by a judgment in the action,'' and this created difficulties with intervention in class actions. If the ''bound'' language was read literally in the sense of res judicata, it could defeat intervention in some meritorious cases. A member of a class to whom a judgment in a class action extended by its terms (see Rule 23(c)(3), as amended) might be entitled to show in a later action, when the judgment in the class action was claimed to operate as res judicata against him, that the ''representative'' in the class action had not in fact adequately represented him. If he could make this showing, the class-action judgment might be held not to bind him. See *Hansberry v. Lee*, 311 U.S. 32 (1940). If a class member sought to intervene in the class action proper, while it was still pending, on grounds of inadequacy of representation, he could be met with the argument: if the representation was in fact inadequate, he would not be ''bound'' by the judgment when it was subsequently asserted against him as res judicata, hence he was not entitled to intervene; if the representation was in fact adequate, there was no occasion or ground for intervention. See *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961); cf. *Sutphen Estates, Inc. v. United States*, 342 U.S. 19 (1951). This reasoning might be linguistically justified by original Rule 24(a)(2); but it could lead to poor results. Compare the discussion in *International M. & I. Corp. v. Von Clemm*, 301 F.2d 857 (2d Cir. 1962); *Atlantic Refining Co. v. Standard Oil Co.*, 304 F.2d 387 (D.C.Cir. 1962). A class member who claims that his ''representative'' does not adequately represent him, and is able to establish that proposition with sufficient probability, should not be put to the risk of having a judgment entered in the action which by its terms extends to him, and be obliged to test the validity of the judgment as applied to his interest by a later collateral attack. Rather he should, as a general rule, be entitled to intervene in the action.

The amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i), as amended, unless his interest is already adequately represented in the action by existing parties. The Rule 19(a)(2)(i) criterion imports practical considerations, and the deletion of the ''bound'' language similarly frees the rule from undue preoccupation with strict considerations of res judicata.

The representation whose adequacy comes into question under the amended rule is not confined to formal representation like that provided by a trustee for his beneficiary or a representative party in a class action for a member of the class. A party to an action may provide practical representation to the absentee seeking intervention although no such formal relationship exists between them, and the adequacy of this practical representation will then have to be weighed. See *International M. & I. Corp. v. Von Clemm*, and *Atlantic Refining Co. v. Standard Oil Co.*, both supra; *Wolpe v. Poretsky*, 144 F.2d 505 (D.C.Cir. 1944), cert. denied, 323 U.S. 777 (1944); cf. *Ford Motor Co. v. Bisanz Bros.*, 249 F.2d 22 (8th Cir. 1957); and generally, Annot., 84 A.L.R.2d 1412 (1961).

An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

Language is added to bring Rule 24(c) into conformity with the statute cited, resolving some confusion reflected in district court rules. As the text provides, counsel challenging the constitutionality of legislation in an action in which the appropriate government is not a party should call the attention of the court to its duty to notify the appropriate governmental officers. The statute imposes the burden of notification on the court, not the party making the constitutional challenge, partly in order to protect against any possible waiver of constitutional rights by parties inattentive to the need for notice. For this reason, the failure of a party to call the court's attention to the matter cannot be treated as a waiver.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

New Rule 5.1 replaces the final three sentences of Rule 24(c), implementing the provisions of 28 U.S.C. §2403. Section 2403 requires notification to the Attorney General of the United States when the constitutionality of an Act of Congress is called in question, and to the state attorney general when the constitutionality of a state statute is drawn into question.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 24 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The former rule stated that the same procedure is followed when a United States statute gives a right to intervene. The statement is deleted because it added nothing.

Rule 25. Substitution of Parties

(a) DEATH.

(1) *Substitution if the Claim Is Not Extinguished.* If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the mo-

CONSTITUTION OF THE STATE OF CALIFORNIA

ARTICLE XI LOCAL GOVERNMENT

Section 7

SEC. 7. A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.

(Sec. 7 added June 2, 1970, by Prop. 2. Res.Ch. 331, 1969.)

State of California

CIVIL CODE

Section 1643

1643. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.

(Enacted 1872.)

State of California

CIVIL CODE

Section 1644

1644. The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

(Enacted 1872.)

State of California

GOVERNMENT CODE

Section 65864

65864. The Legislature finds and declares that:

(a) The lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.

(b) 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.

(c) The lack of public facilities, including, but not limited to, streets, sewerage, transportation, drinking water, school, and utility facilities, is a serious impediment to the development of new housing. Whenever possible, applicants and local governments may include provisions in agreements whereby applicants are reimbursed over time for financing public facilities.

(Amended by Stats. 1984, Ch. 143, Sec. 1.)

State of California

GOVERNMENT CODE

Section 65866

65866. 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.

(Added by Stats. 1979, Ch. 934.)