UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND BULK & OVERSIZED TERMINAL, LLC, Plaintiff, v. CITY OF OAKLAND, et al. Defendants.	Case No. 16-cv-07014-VC **ORDER GRANTING MOTION TO INTERVENE AND DENYING MOTIONS TO DISMISS** Re: Dkt. Nos. 19, 28, 30

For the reasons discussed below, the proposed intervenors' motion to intervene is granted, and the motions to dismiss are both denied in their entirety.

I

The City sets up a strawman in arguing that the developer (Oakland Bulk & Oversized Terminal, LLC) never acquired a vested right to develop a coal-handling terminal. Of course it didn't. The parties' Development Agreement didn't purport to enshrine affirmative development rights linked to an approved list of commodities. It purported to enshrine the regulatory regime to which the developer's plans would be subject. D.A. (Dkt. No. 20-1) § 3.2 ("This Agreement vests in Developer the right to develop the Project in accordance with the terms and conditions of this Agreement, the City Approvals and the Existing City Regulations . . . ."). Accordingly, although the developer may have no vested right to develop a coal terminal, it still has a contractual right to *pursue* development of a coal terminal to the extent allowed under the municipal code as it existed when the Development Agreement was signed. *See* Cal. Gov't Code § 65865.2; *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 191 Cal. App. 4th 435, 442 (2010). This is the right the developer is suing on. *See* D.A. § 3.4.1 ("City shall not impose or apply any City

Regulations on the development of the Project Site that are adopted or modified by City after the Adoption Date . . . that would . . . be inconsistent or in conflict with the intent, purposes, terms, standards or conditions of this Agreement . . . ."). If the City wanted to restrict the developer to an approved list of commodities – or to foreclose the handling of a particular commodity such as coal – it should have included language to that effect in the Development Agreement.[1]

There are, of course, limits to the City's ability to bind itself to an earlier regulatory regime. *See, e.g.*, Cal. Gov't Code § 65865.3(b); D.A. §§ 3.4.2, 3.4.5, 3.4.6. Most notably, section 3.4.2 of the Development Agreement provides that the City may impose a new ordinance if failing to do so would place neighbors of the development "in a condition substantially dangerous to their health or safety." D.A. § 3.4.2. But whether this "health and safety" exception applies here is a question that can't be answered on a motion to dismiss (and perhaps not even on summary judgment). Even if the City is owed a degree of legislative deference on this question, both the "substantially dangerous" standard and the City's satisfaction of its procedural obligations are matters that call for factual development. *See id.* (requiring that the City act "based on substantial evidence and after a public hearing"). The same problem applies to the City's argument under the public-trust doctrine. *See* MTD (Dkt. No. 19) at 11-12; Reply (Dkt. No. 57) at 7-8.

The City's statute of limitations argument is similarly premature. There is perhaps some intuitive appeal to the proposition that the City's ordinance is either a health and safety regulation, in which case section 3.4.2 applies, or a zoning regulation, in which case the developer's action is untimely. *See id.* at 14-15. But the statute of limitations is an affirmative

[1] The City's effort to read such language into the contract after the fact is unsuccessful. To the extent the City argues that the project's "permitted uses" had to be "expressly listed" in the Development Agreement, the City's position conflicts with the plain language of the Agreement, which contemplates permitted uses being identified in "Subsequent Approvals" granted after the Agreement's signing. *See* D.A. § 3.2. To the extent the City argues that the "Applicable City Regulations" governing its Subsequent Approvals incorporate later-adopted ordinances, the City ignores the clause making later-enacted ordinances applicable to the project only insofar as they fit within a recognized exception to the Agreement's fixed regulatory regime – the health and safety exception at section 3.4.2, for example. *Compare* MTD (Dkt. No. 19) at 10 *with* D.A. § 1.1. And to the extent the City argues that ambiguities in the Agreement's terms authorize it to supply a reasonable construction of its own choosing, the City incorrectly presumes both the existence of an ambiguity and the reasonableness of its proposed interpretation. *See* MTD (Dkt. No. 19) at 10-11.

defense. Fed. R. Civ. P. 8(c); *see also* Schwing, Cal. Affirmative Defenses §§ 1.5, 25.1, 25.32 (2d ed. 2017). At this stage, its applicability must be evident on the face of the complaint. *See Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995). Here, even the City agrees that it's unclear how the ordinance should be classified. *See* Hr'g (Dkt. No. 62) at 10:33:20-33:50; Cal. Gov't Code § 65009(c)(1)(B) (imposing a 90-day limitation on actions challenging a "zoning ordinance"). The City will have to revisit its statute of limitations argument on summary judgment.

II

Sierra Club and San Francisco Baykeeper are recognized as permissive intervenors. *See* Fed. R. Civ. P. 24(b). The scope of their intervention will be limited to defending against the developer'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 the developer and the City. The intervenors' proposed answer, Dkt. No. 28-6, is accepted as their answer to the complaint.

The intervenors' motion to dismiss is denied. The developer's "undue burden" theory is sufficiently pled to proceed to summary judgment. *See generally Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The developer's interstate discrimination theory is substantially weaker, both conceptually and in terms of the facts alleged to support it. But at least in this case, where discovery into different versions of the dormant Commerce Clause claim seems likely to overlap, there is no practical value in insisting on a new round of pleading. *See* Reply (Dkt. No. 59) at 2. If the intervenors or any other party has concerns about effectively managing discovery burdens, those concerns can be addressed through the discovery letter process laid out in this Court's Civil Standing Order.

IT IS SO ORDERED.

Dated: June 6, 2017

VINCE CHHABRIA
United States District Judge