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,

Intervenors-Defendants-Appellants.

On Appeal From The United States District Court
For The Northern District Of California

BRIEF FOR APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiff-Appellee Oakland Bulk & Oversized Terminal, LLC ("OBOT") states that it is a limited liability company whose sole member is California Capital & Investment Group, Inc.; OBOT has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutory Authorities

Rules and Regulations

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises from Defendant-Appellant City of Oakland's ("City") breach of its development agreement ("DA") with Plaintiff-Appellee Oakland Bulk & Oversized Terminal, LLC ("OBOT"), concerning OBOT's development of a multi-commodity, ship-to-rail terminal ("Terminal") at the portion of the former Oakland Army Base known as the West Gateway. California's development agreement statute, Cal. Gov. Code §§ 65864 *et seq.*, authorizes a local government to enter into a long-term contract with a developer, under which the developer agrees to invest substantial resources in a project—providing many public benefits—in exchange for a "vested right" to develop and operate the project pursuant to the then-existing regulatory scheme. The California legislature determined that a regulatory "freeze" would provide developers with the certainty necessary to undertake large, important projects, thus avoiding wasted resources and increased costs to the public.

The DA here froze the regulatory scheme that existed when the DA was executed, thus giving OBOT a "vested right" to develop the Terminal in accordance with those pre-existing regulations, subject to a narrow exception for public health and safety. In particular, DA Section 3.4.2 allows the City to apply new regulations to the Terminal only if the "City determines based on substantial evidence and after a public hearing that a failure to [apply the new regulation]

would place existing … occupants [or] adjacent neighbors … in a condition substantially dangerous to their health or safety." ER1970.

After the DA was executed, in response to political pressure by, among others, Intervenor-Defendant-Appellant Sierra Club (collectively with San Francisco Baykeeper, "Intervenors"), the City began an effort to ban coal in Oakland. The City's effort culminated in the Oakland City Council's ("City Council") passage of an ordinance (the "Ordinance") banning the storage and handling of coal and petcoke at "Bulk Material Facilities" and a resolution (the "Resolution") applying the Ordinance to the Terminal—notwithstanding the DA's regulatory freeze.

OBOT responded with this lawsuit, which, among other claims, alleged that the Resolution breached the DA because the City lacked "substantial evidence" that coal operations at the Terminal would result in a substantial danger to public health and safety. Following a bench trial, the U.S. District Court for the Northern District of California (Chhabria, J.) found that the City breached the DA because the City Council record was "riddled with inaccuracies, major evidentiary gaps, erroneous assumptions, and faulty analyses," such that it contained no substantial evidence of a substantial danger. ER4-5. The district court thus ruled that the Resolution was invalid, but it left the Ordinance in place. The City and Intervenors identify no error in the district court's judgment.

First, contrary to the City's and Intervenors' assertions, DA Section 3.4.2 does not transform this breach-of-contract case into a judicial review of agency action subject to administrative-law standards of review and evidentiary restrictions. Section 3.4.2 provides that the City must have "substantial evidence"—which the district court properly concluded meant evidence that is "reasonable, credible, and of solid value"—of a substantial danger in order to apply a new regulation to the Terminal. The text of the DA does *not* provide that a court determining whether the City breached Section 3.4.2 must apply substantial evidence "review." OBOT did not "appeal" the Resolution through administrative channels, and the district court was not tasked with "reviewing" any administrative decision. Instead, OBOT sued the City for breach of contract, and the district court considered *in the first instance* whether the Resolution breached the DA. Accordingly, neither this Court nor the district court sits as a "reviewing court" vis-à-vis the Council's actions, as the City and Intervenors repeatedly assert.

Second, the City and Intervenors show no error—let alone clear error—in the district court's factual finding, following bench trial, that the City breached the DA. The evidence established that the primary basis for the City Council's substantial danger determination—a report prepared by Environmental Science Associates ("ESA")—contained emissions estimates that were completely unreliable. Those estimates did not account for such variables as train and wind

speed, selected the wrong inputs for use with an Environmental Protection Agency ("EPA") guidance document, and wrongly assumed that OBOT would not employ mitigation measures it had committed to implement. The City Council record was independently unreliable because it contained no evidence concerning air-quality modeling, which is necessary to estimate the concentration of pollution at particular distances from an emissions source. Without modeling, the City had *no* evidence whether emissions from the Terminal would impact *anyone* in Oakland. And, as the district court also concluded, the City had no evidence of a substantial fire danger—the City Council record on this issue was entirely speculative.

Nor, *third*, are Intervenors able to demonstrate any error in the judgment. The district court properly granted permissive intervention, rather than intervention of right, because the City adequately represented Intervenors' interest in this case. And Intervenors' argument that Cal. Gov. Code § 65866 entitles the City to judgment on the contract claim disregards the DA's text and misinterprets the statute. Section 3.4.2 *preserves* the City's police power, not abrogates it.

The judgment should be affirmed in its entirety.

COUNTER-QUESTIONS PRESENTED

1. Whether the term "substantial evidence" in the development agreement refers to the quantum and quality of evidence that must be in the City Council record, not the judicial standard of review for administrative decisions.

2. Whether the City breached the development agreement because the City Council record did not contain substantial evidence of a substantial danger to public health or safety.

3. Whether the City adequately represented Intervenors' interest in enforcement of the Ordinance and Resolution, such that intervention of right was properly denied.

4. Whether the district court correctly determined that Cal. Gov. Code § 65866 did not require judgment in the City's favor on the contract claim.

COUNTERSTATEMENT OF THE CASE

A. The Development Agreement Between OBOT And The City

With limited exceptions, California's development agreement statute seeks to ensure that developers' "vested rights" are protected by allowing a local government to enter into an enforceable contract with a developer that freezes regulations in place at the time of contracting. *See* Cal. Gov. Code § 65866(a); *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 191 Cal. App. 4th 435, 443 (2010). Before the California Legislature enacted this statute in 1979, the California Supreme Court had held that a developer had no vested right to complete work under the existing regulatory scheme—even if it had already "performed substantial work and incurred substantial liabilities on [a development] project"—and could be required to comply with a new permitting scheme

mandated by an intervening law. *Mammoth Lakes*, 191 Cal. App. 4th at 443 (citing *Avco Comm. Developers, Inc. v. S. Coast Regional Com.*, 17 Cal. 3d 785, 791 (1976)). The Legislature determined that the resulting "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." Cal. Gov. Code § 65864(a). Accordingly, it enacted the development agreement statute to provide "[a]ssurance 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." *Id.* § 65864(b).

Here, in 2009, the City selected OBOT to redevelop the "West Gateway" portion of the former Oakland Army Base. *See* SER458-73. OBOT and the City entered into a Lease Disposition and Development Agreement in December 2012 (the "LDDA") (SER216-303), and began negotiating a related development agreement that was intended to provide OBOT "long-term certainty … concerning the project so that the project is successfully implemented and the benefits in the LDDA intended for [OBOT] and the City are realized" (SER305).

In July 2013, after notice and a public hearing, the City and OBOT executed the DA. ER1953; ER1957-58. Under the LDDA and DA, OBOT was granted the right to develop, use and operate a "Bulk Oversized Terminal" at the West

Gateway, defined as a "ship-to-rail terminal designed for the export of non-containerized bulk goods and import of oversized or overweight cargo." ER2054; *see* ER1955; ER1965-66. During negotiations over the DA, the City never proposed limiting the types of bulk goods that could be shipped through the Terminal (SER3 (Cashman, City's project manager for Oakland Army Base)), and the parties did not discuss what commodities might be shipped from the Terminal (SER13 (Ranelletti, lead City staff for processing DA)). Prior to the execution of the DA, however, OBOT provided the City with materials indicating that coal was among the commodities under consideration. SER9 (Cashman); SER9, SER28-29 (Tagami, CEO of OBOT's sole member).

The DA states in Section 3.2 that "[t]his Agreement vests in [OBOT] the right to develop the Project in accordance with the terms and conditions of this Agreement, the City Approvals and the Existing City Regulations." ER1967. The DA also limits future regulations that may be applied to the Terminal, providing in Section 3.4.1 that, with respect to "Future City Regulations":

> Except as otherwise specifically provided in this Agreement, including, without limitation, the provisions relating to … regulations for health and safety reasons under Section 3.4.2 below …, 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 [of the DA] … that would: (i) be inconsistent or in conflict with the intent, purposes, terms, standards or conditions of this Agreement; [or] (ii) materially change, modify or reduce the permitted uses of the Project Site ….

ER1969-70.

Section 3.4.2 contains a health-and-safety exception to Section 3.4.1's prohibition on the application of new City Regulations to the Terminal. That provision permits the City to apply a new regulation to the Terminal only if the

> City determines *based on substantial evidence* and after a public hearing that a failure to [apply the new regulation] would place existing or future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health or safety.

ER1970 (emphasis added). Section 3.4.2 expressly states that it is an "exception to Developer's vested rights under this Agreement." ER1970. The City considered Section 3.4.2 a "narrow" and "limited" exception to OBOT's vested rights. *E.g.*, ER1170 (City Council Agenda Report).

In April 2014, OBOT and Terminal Logistic Solutions ("TLS") entered into an exclusive negotiation agreement, granting TLS the exclusive right to sublease the proposed Terminal. ER474-82; *see* SER565-66 (Wolff, CFO of Bowie Resource Partners). TLS was a wholly-owned subsidiary of Bowie Resource Partners, which would supply western bituminous coal for shipment overseas through the Terminal. SER569-73 (Bridges, President of TLS).

In July 2015, OBOT prepared a Basis of Design ("BoD") for the Terminal, in consultation with TLS and third-party consultants. ER1839-55. The BoD explained that "[i]n general, a Basis of Design … is the first step in a project's

design process" (ER1843), which, in this case reflected about 8-10% of the Terminal's anticipated final design. SER17, SER20, SER32 (Tagami); SER82, ER87 (McClure, Vice President of OBOT's sole member); *see* ER1847; ER1853-55. The BoD did not identify any specific commodities that would be shipped through the Terminal, instead describing preliminary plans to, for example, safely convey and store unspecified "Commodity A" and "Commodity B" over the 66-year term of the lease. ER1850-51.

B. The City Council Proceedings

1. The City's Decision To Ban Coal

Despite the City's awareness—even before entering the DA—that the Terminal might handle coal (*see supra*, at 7), the possibility of coal at the Terminal became politically unacceptable to the City. Thus, "[i]n response to broader concerns about climate change and the environment" (ER7), and political pressure (*see*, *e.g.*, SER582-84), in June 2014, the City Council adopted a Resolution announcing its general opposition to the transportation of fossil fuel materials, including coal, "using existing rail lines" through Oakland. SER542.

Following this Resolution, the City Council made a "political decision" to undertake a health-and-safety analysis pursuant to DA Section 3.4.2, which would result in a ban on coal being shipped through the Terminal. SER6 (Cashman); *see* SER4-6 (Cashman) (acknowledging the City lacked the "political will" to permit

mitigation). This decision was made despite the City's standard conditions for redevelopment at the former Oakland Army Base that impose approximately 660 environmental and mitigation conditions on construction and operation of the Terminal (SER310-82), and irrespective of the seventy-six permits OBOT would need before the Terminal could operate (SER18 (Tagami)).

2. The Initial Public Hearing

In September 2015, the City Council received public comments at a hearing it held regarding coal shipments through the Terminal. ER1168-87. OBOT submitted the draft BoD and expert reports, including a report from an engineering firm that concluded that "negligible coal dust emissions will result from transport … and handling of coal at the [T]erminal" and that public health would "not be harmed." ER1585. At the hearing, a representative of the Bay Area Air Quality Management District ("BAAQMD") stated that BAAQMD "did not take a support or oppose position" on a coal ban, and had instead adopted a "neutral position." SER539. The City also received comments from the public, government agencies, and environmental groups, including reports submitted on behalf of Intervenor Sierra Club concluding that the Terminal would adversely impact public health. *E.g.*, ER1617-99.

Following the hearing, OBOT repeatedly explained to the City that the draft BoD reflected only a preliminary (and partial) design for the Terminal. For

example, in response to a series of questions that the City posed shortly after the hearing, OBOT stated the BoD "marks the beginning of a process" and that "much lies ahead in terms of commodity selection, terminal design, and commodity-specific utility." SER391; *see* SER434-36 (City's questions). And in March 2016 OBOT met with representatives of the Oakland Fire Department, who informed OBOT that its fire safety plan should be submitted only after design and construction documents for the Terminal were complete. *See* SER20 (Tagami); SER86-87 (McClure).

During this period, OBOT and TLS also informed the City that they would contractually commit to several mitigation measures. They agreed to accept only covered rail cars carrying coal at the Terminal, and to comply with the requirements in South Coast Air Quality Management District ("SCAQMD") Rule 1158 (SER521), concerning application of surfactants during the transport and handling of coal. ER1745; SER24-25 (Tagami). OBOT and TLS further stated they would agree to be contractually bound to handle only western bituminous coal (ER1745)—and thus not the "much dustier" Powder River Basin coal from Wyoming (SER57-58, SER75-76 (Evans, ESA's project manager for ESA Report); ER175 (OBOT's expert Chinkin)).

3. The City's Retention Of ESA And Rejection Of Air-Quality Modeling

Following the September 2015 hearing, City staff told the City Council that it did not have the expertise to evaluate the information it had received concerning the health-and-safety impacts of shipping coal through the Terminal. SER91-92 (Cappio, Assistant City Administrator); ER832. Accordingly, the City retained ESA. ER832-34; *see* SER94-95 (Cappio); SER431; SER437-46.

ESA originally proposed "two phases of work" for its health-and-safety assessment of the Terminal. SER124; *see* SER39-40 (Evans). In the first phase, ESA would review the public comments submitted for the September 2015 hearing, and, in the second phase, ESA would independently evaluate any health-and-safety issues presented by Terminal operations. SER124-25; SER39-40 (Evans). This independent evaluation would have included air-quality modeling. SER133; SER135.

Air-quality modeling is based on (and different from) emissions estimates. "[E]missions estimates capture[] the quantity of a pollutant released into the air, typically in terms of pounds per day or tons per year," at the *source* of the pollutant. ER26; *see* ER122 (Chinkin).[1] Air-quality modeling, by contrast, "is

[1] As the district court explained, the EPA tracks two kinds of particulate matter emissions: particulate matter 2.5 (PM2.5), which is comprised of "particles in the air that are 2.5 micrometers or less in diameter," and particulate matter 10 (PM10),

measured in terms of concentration [and] captures the amount of pollutant in a given quantity of air." ER26; *see* ER122 (Chinkin). These concentrations "are calculated using dispersion models that … combin[e] emissions estimates with [weather] data [from] a given geographic area," in order to "assess how the emissions from a particular source affect a region's air quality." ER27; *see* ER123-24 (Chinkin). Thus, for example, while emissions estimates would estimate the anticipated quantity of a pollutant *at* a smokestack, air-quality modeling would be required to determine the expected concentration of the pollutant at different distances from the smokestack. *See* ER27; ER122 (Chinkin).

Even though air-quality modeling is necessary to determine the impact of emissions on air quality at any distance from the emissions source (ER122-24 (Chinkin); *see* ER27), the City rejected the second phase of ESA's proposal (SER40 (Evans)). Thus, rather than a two-phased approach that would have incorporated modeling, ESA provided only a "preliminary review based on limited information." SER40 (Evans). The scope of work attached to the City and ESA's May 2016 contract shows the limited nature of the engagement:

> This is not a CEQA [California Environmental Quality Act] review, and is not limited to CEQA topics or the use of regulatory standards as significance criteria, but rather will consider the public comments as they may apply to health and/or safety effects, regardless of

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which "is comprised of particles in the air that are between 2.5 and 10 micrometers in diameter." ER13.

> whether the mechanisms for these effects are fully understood or documented in peer-reviewed scientific sources.

SER203. The employees in charge of preparing the ESA Report acknowledged that the City wanted an analysis that would support a coal ban. SER35-36 (Brown, ESA employee)); SER41-42 (Evans); SER168 (ESA email).

Simultaneous with approval of ESA's contract, the City Council scheduled a "special" meeting for Monday, June 27, 2016. SER96-97 (Cappio). This schedule called for the public release of the ESA Report only one business day before the meeting, on Friday, June 24, 2016. SER97-98 (Cappio).

4. The ESA Report

ESA's report (ER864-1026) was delivered to the City Council on Friday, June 24, 2016 (SER98-99 (Cappio)), attached to an Agenda Report by City staff dated June 23, 2016 (ER837-61). The Agenda Report recommended a coal ban (ER838), and was accompanied by drafts of the Ordinance and Resolution (SER98-99 (Cappio)).

The ESA Report concludes that "[b]ased upon … public commenters' estimates and ESA's emissions calculations for rail transport [and staging], the *uncontrolled emissions* of fugitive coal dust … from uncovered coal unit trains would exacerbate already poor air quality," and "would likely add to the existing number of exceedances of the California and federal PM2.5 ambient air quality standards" in adjacent areas. ER948 (emphasis added). The ESA Report similarly

concludes that, *based on its emissions estimates in Table 5-7*, coal operations at OBOT "would further degrade existing air quality," and "likely … cause additional exceedances of ambient air quality standards," thus "impact[ing] the health of the adjacent neighbors." ER950. Table 5-7 purports to estimate emissions during three phases of proposed coal operations involving the Terminal: (1) rail transport (emissions from rail cars attached to a train moving from the source of the commodity);[2] (2) staging (emissions from rail cars being transported from the Port of Oakland railyard on a spur track to the Terminal); and (3) terminal operations (including unloading, storage, and transloading of coal onto ships). *See* ER950. Table 5-7 provides estimates for both PM2.5 and PM10. ER950.

The district court found that the ESA Report was the primary basis for the Agenda Report's recommendation that the City Council enact a coal ban. *See* ER8. The Agenda Report relied in particular on—and reprinted—ESA's emissions estimates in Table 5-7. ER848. Specifically, the Agenda Report stated that the emissions estimates in Table 5-7 demonstrated that "overall emissions from the OBOT project are expected to exceed" CEQA "thresholds of significance." ER848. "Thresholds of significance" are state emissions standards that "reflect the

[2] The emissions estimates in Table 5-7 for the transport phase include rail transport *to* Oakland (ER950), even though under DA Section 3.4.2, only a substantial danger to "adjacent neighbors" of the Terminal could justify applying a new regulation (ER1970).

emissions levels that California has determined would result in a significant and adverse impact on air quality from a particular project." ER14.

5. The Ordinance And Resolution

The City Council held a public hearing on Monday, June 27, 2016—one business day after it had received the ESA Report. At the hearing, OBOT was allotted *only four minutes* to speak. ER1198-1200. OBOT's representative stated that OBOT was "disappointed" that the ESA Report was not made public until the prior Friday, and that the June 23, 2016 Agenda Report recommending a coal ban was drafted and dated "the same day" as ESA's report. ER1199. OBOT's representative also questioned "how you received the report and studied the report and made recommendations on a report if you got it all at the same time." ER1199.

At the conclusion of the hearing, the City Council passed the Ordinance (*see* ER809-22), which "establish[ed] a citywide ban on the storage, loading, unloading, stockpiling, transloading and handling of Coal and Coke … throughout the City of Oakland" (ER812).[3] The City Council also passed the Resolution applying the Ordinance to the Terminal pursuant to DA Section 3.4.2. ER823-31.

[3] The Ordinance, however, exempts "on-site manufacturing facilities" that are "operated pursuant to … permits granted by [BAAQMD]." ER818. This exemption was intended to cover an Oakland iron foundry. *See* ER26.

C. The District Court Proceedings

1. The Pre-Trial Proceedings

OBOT filed a complaint against the City in the district court in December 2016. ER734-75. The complaint alleged that the City breached the DA by enacting the Resolution applying the Ordinance to the Terminal. ER773-74. OBOT also alleged that the Ordinance violates the Commerce Clause (ER765-67) and is preempted by several federal statutes (ER768-72).

The district court thereafter granted Intervenors permissive intervention, defining "[t]he scope of their intervention" as "defending against [OBOT's] claims and not includ[ing] 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." ER42. The district court denied intervention of right, crediting OBOT's argument that the City adequately represented Intervenors' interest in the action. *See* ER42; Dist. Ct. Dkt. 41 at 4-10.

After discovery concluded, the parties filed cross-motions for summary judgment. *See* Dist. Ct. Dkt. 122. The district court denied the cross-motions for summary judgment on the contract claim, and reserved ruling on the other claims pending trial on the contract claim. Dist. Ct. Dkt. 219.

2. The Bench Trial

The district court held a three-day bench trial concerning whether the City had "substantial evidence" of a substantial health-and-safety danger as required by

DA Section 3.4.2. "[B]oth sides presented the testimony of the key people involved in the project and in the creation of the record before the City Council, as well as expert testimony and documentary evidence." ER10.

Among other witnesses, OBOT offered the expert testimony of Dr. Lyle Chinkin, who testified concerning "a number of flaws in [ESA's] approach" to estimating emissions (ER152), including that ESA selected the "wrong inputs" from an EPA guidance document in calculating its estimates (ER152-53). Dr. Chinkin further explained that air-quality modeling is necessary "to understand where emissions go" (ER123), and thus to determine "who is affected" by a particular emissions source (ER122). OBOT also called Victoria Evans, the ESA employee who led ESA's review; she testified that ESA did not have information relating to train and wind speed—factors that would affect potential emissions. SER64. She also confirmed that air-quality modeling would have been "useful and important," but that the City had rejected ESA's proposal to perform modeling. SER40.

The City offered, among other testimony, the expert testimony of Dr. Ranajit Sahu, who "review[ed] the ESA calculations about PM2.5." SER102-03. Dr. Sahu prepared his own estimates, but relied on the same assumptions as ESA, and thus reached the same estimate as ESA for PM2.5 emissions during staging. SER106-08.

After trial, Intervenors filed a motion pursuant to Fed. R. Civ. P. 52(c), arguing for the first time that the City is entitled to judgment on the contract claim because, under Cal. Gov. Code § 65866, DA Section 3.4.2 does not apply to the Resolution. Dist. Ct. Dkt. 235.

3. The Post-Trial Findings Of Fact And Conclusions Of Law

In its post-trial Findings of Fact and Conclusions of Law, the district court relied on California case law to interpret the term "substantial evidence" in DA Section 3.4.2 to mean "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' so long as it is 'reasonable in nature, credible, and of solid value.'" ER11 (quoting *City of S. S.F. v. Workers' Comp. Appeals Bd.*, 20 Cal. App. 5th 881, 896 (2018)). The court explained that, because "substantial evidence" is "less rigorous" than a "preponderance of the evidence," Section 3.4.2 was "deferential to the City." ER11. Accordingly, the district court stated that even if it "believed the proposed coal operations would not pose a health or safety danger, the Court would be required to uphold the decision to apply the [Ordinance] to the [Terminal] as long as the record before the City Council contained reasonable and credible evidence to support the City Council's conclusions." ER11-12.

Applying that standard, the district court found that the City breached the DA because "the record before the City Council does not contain substantial

evidence that OBOT's proposed operations would pose a substantial danger to the health or safety of people in Oakland." ER10. The court concluded that the City Council record "is riddled with inaccuracies, major evidentiary gaps, erroneous assumptions, and faulty analyses, to the point that no reliable conclusions about health or safety dangers could be drawn from it." ER4-5. In so finding, the court recognized that "both sides presented evidence that was not in the record before the City Council," and that "[t]his type of evidence is relevant … because it sheds light on the adequacy of the evidence that was actually before the City Council." ER12.

Specifically, the district court found that "ESA's [emissions] estimates … were almost completely unreliable." ER13. The court observed that the "emissions estimates in Table 5-7 [of the ESA Report] were the focal point of … trial" because they were "the grounds for ESA's conclusions about OBOT's danger" and "were also an important part of the City Administrator's recommendation that the City Council enact the coal ban." ER15. The district court found that those estimates were unreliable for several independent reasons:

- *First*, the court found that ESA failed to "meaningfully explore" the impact of OBOT's mitigation measures, including rail car covers and surfactants, on emissions estimates for the transport and staging phases. ER15-19. Because "the City Council was not even equipped to meaningfully guess how well these controls would mitigate emissions," there was "a sizable gap in the record." ER19.

- *Second*, the court found that ESA's emissions estimates for transport and staging "resulted from a misapplication of federal

guidance and mistaken assumptions about the type of coal to be transported to the [T]erminal." ER20. In particular, ESA "did not select the appropriate inputs" regarding "threshold friction velocity" from an EPA document, AP-42. ER20-21.

- *Third*, the court found that the emissions estimates for transport and staging wrongly "assume[d] the same amount of fugitive coal dust will be produced at each mile of the rail journey from the coal mines to the [T]erminal" and did not account for train or wind speed. ER22.

- *Fourth*, the court found that ESA's emissions estimates for the terminal operations stage did not account for OBOT's use of "best available control technology" and did not account for BAAQMD's role in mitigating any health or safety danger. ER22-26.

The district court separately found that "[e]ven if the emissions estimates could somehow be considered reliable despite the flaws … the record contains no meaningful assessment of how these emissions would actually affect air quality in Oakland," because the City Council had rejected air-quality modeling. ER26-27. The district court noted that while "some reports in the record … imported [modeling]" from "a study by Daniel Jaffe of the University of Washington," that study was "a poor substitute for actual air quality modeling for OBOT." ER27-28. Without air-quality modeling, the district court concluded that the City Council could not credibly "assess whether the proposed coal operations would *actually* present a substantial health danger" in Oakland. ER32.

The district court also found that the City Council record concerning potential danger relating to the risk of fire, worker safety, or global warming was

wholly speculative. ER33-36. The district court determined that the City Council record actually "contradicted the City's speculation that coal operations would pose a more significant danger of fire or combustion than other bulk commodity operations" (ER33), and that the evidence concerning a danger to worker safety was "even thinner" (ER35). The district court described the City's argument that global warming allows it to invoke Section 3.4.2 as "facially ridiculous." ER35.

The district court also denied Intervenors' motion for judgment in the City's favor on the contract claim based on Cal. Gov. Code § 65866. ER36-39. The court explained that Intervenors' proposed interpretation of Section 3.4.2 was "inconsistent with the language of the development agreement itself" because "[n]either section 3.4.1, which freezes new regulations by the City, nor section 3.4.2 … say that the substantial evidence standard is only meant for new land use regulations." ER38. The district court rejected, as outside the scope of intervention, Intervenors' argument that their construction of Section 3.4.2 was necessary to avoid an unconstitutional abrogation of the City's police power. ER38-39. The court explained that Intervenors "were permitted to intervene to help defend Oakland, not to seek to invalidate a provision of an agreement that Oakland entered into." ER38.

The district court thus ruled that the Resolution was "invalid" because it constituted a breach of the DA, but expressly left the Ordinance in place. ER39.

STANDARD OF REVIEW

This Court "review[s] the district court's conclusions of law following a bench trial *de novo* and its findings of fact for clear error." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1067 (9th Cir. 2008) (en banc). "Whether a breach occurred is, of course, a question of fact." *Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 973 (9th Cir. 2017. Under the clear error standard, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessmer City*, 470 U.S. 564, 573-74 (1985).

This Court reviews the denial of intervention of right *de novo*. *See, e.g.*, *Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053, 1060 (9th Cir. 2018).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY INTERPRETED THE DEVELOPMENT AGREEMENT

A. The Term "Substantial Evidence" Refers To The Quantum And Quality Of Evidence Required For The City To Apply New Regulations To The Terminal

The district court properly rejected the City's and Intervenors' attempts to impose the standard of judicial review applicable to California administrative decisions on this breach-of-contract case. The DA makes clear the parties did *not* intend to bind the district court or this Court to a particular standard of review or

seek to limit the evidence to be admitted at trial. Indeed, any such provision would have been unenforceable under this Court's precedent.

1. Section 3.4.2 Does Not Incorporate The Substantial Evidence Standard Of Review From Administrative Law

The district court correctly ruled that the term "substantial evidence" in DA Section 3.4.2 specifies the quantum and quality of proof of a substantial danger that the City needed in order to apply new regulations to the Terminal. ER11-12. That provision states that the City

> shall have the right to apply City Regulations adopted by [the] City after the Adoption Date [of the DA], *if … [the] 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 (emphasis added). The DA thus requires that, in order to justify an exception to OBOT's vested rights, the City determine that failure to apply a new regulation to the Terminal would result in a substantial danger to health or safety based on "substantial evidence"—full stop. Here, the City and Intervenors both concede—consistent with the district court's ruling (ER11)—that the term "substantial evidence" is evidence of "ponderable legal significance" that is "reasonable, credible, and of solid value." City Br. 31 (citing *S. Coast Framing, Inc. v. Workers' Comp. Appeals Bd.*, 61 Cal. 4th 291, 303 (2015)); Intervenors' Br. 20 (citing *Kuhn v. Dep't of Gen. Servs.*, 22 Cal. App. 4th 1627, 1633 (1994)).

Contrary to the City's (Br. 33) and Intervenors' (Br. 20-21) suggestions, Section 3.4.2 does ***not*** require a court to apply "substantial evidence review" in which all conflicting evidence and inferences must be resolved in the City's favor. *See, e.g.*, *W. States Pet. Ass'n v. Superior Ct.*, 9 Cal. 4th 559, 571 (1995) ("*WSPA*") ("The definition of substantial evidence *review* in the appellate courts is very well settled.") (emphasis added). This argument wrongly conflates "substantial evidence"—a quantum and type of proof—with "substantial evidence review," which is a judicial standard of review applied in reviewing administrative decisions. *Cf. Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension*, 508 U.S. 602, 650-51 (1993) (Thomas, J., concurring) ("Standards of proof and standards of review are entirely unrelated concepts …."); *Dantran, Inc. v. U.S. Dep't of Labor*, 171 F.3d 58, 70 (1st Cir. 1999) ("In its normal iteration, the preponderance of the evidence standard, like 'clear and convincing' and 'beyond a reasonable doubt,' establishes a quantum of proof to be measured by the factfinder, not a standard for error-detection."). Section 3.4.2 does not use the term "substantial evidence review" or "substantial evidence test," and nothing in the text of Section 3.4.2 suggests that the parties intended a different or broader meaning of "substantial evidence" than the district court used.

Moreover, where the parties to the DA intended to incorporate administrative-law concepts, they did so expressly. The City and Intervenors fail

to acknowledge DA Section 14.14, which states that "[a]ny challenge made by [OBOT] to [the] City's termination, modification, or amendment of this Agreement pursuant to a right to do so granted by this Agreement, *shall be subject to review in the Superior Court of the County of Alameda and solely pursuant to California Code of Civil Procedure Section 1094.5(c).*" ER2001 (emphasis added).[4] The cited statute governs administrative mandamus proceedings, and is the source of the very standard of review that the City and Intervenors seek to import into Section 3.4.2. *See* Cal. Code Civ. Proc. § 1094.5(c) (providing that in reviewing administrative decisions, "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record"). The express incorporation of Section 1094.5(c) review in Section 14.14—but not Section 3.4.2—confirms that the parties did not intend that standard of review to apply to actions alleging breach of Section 3.4.2. *See, e.g.*, Cal. Civ. Code § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."); *Poseidon Development, Inc. v. Woodland Lane Estates, LLC*, 152 Cal. App. 4th 1106, 1114 (2007) ("Specific provisions of a contract should not be considered in isolation.").

[4] The City rightly has never suggested that the Resolution somehow constituted a "termination, modification, or amendment" of the DA, or that this case was required to proceed in Alameda County Superior Court.

Nor is the City correct (Br. 31-32) that the word "determines" in Section 3.4.2 shows that the parties intended to import the substantial evidence standard of review. This term establishes nothing about the nature of the district court's task; no matter what standard the district court applied, the City would have "determine[d]" whether there was a substantial danger. The fact that the City made such a determination did not somehow preclude the district court from making its own assessment of whether that determination was based on evidence of "ponderable legal significance" that is "reasonable, credible, and of solid value."

In advocating substantial evidence review, neither the City nor Intervenors identifies a single case in which a *contract* was held to impose on a court the substantial evidence—or any other—standard of review. Instead, they wrongly rely on unremarkable California cases applying substantial evidence review where—unlike here—a *statute* governing review of administrative decisions required it.[5] Indeed, as the California Court of Appeal has recognized,

[5] *See, e.g.*, *Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal. 4th 1086, 1109 (2015) (applying Pub. Res. Code § 21168.5 to petition for writ of mandate challenging administrative approval of use permits under CEQA); *WSPA*, 9 Cal. 4th 559 (applying Pub. Resources Code § 21168.5 in administrative mandamus action challenging air-quality regulations); *M.N. v. Morgan Hill Unified School Dist.*, 20 Cal. App. 5th 607, 613-15 (2018) (applying Code Civ. Proc. § 1094.5(b), (c)in administrative mandamus action challenging expulsion of student); *Kutzke v. City of San Diego*, 11 Cal. App. 5th 1034, 1036, 1040 (2017) (applying Code Civ. Proc. § 1094.5(b) in administrative mandamus action challenging denial of subdivision permits); *Doe v. Regents of Univ. of Cal.*, 5 Cal. App. 5th 1055, 1070 (2016) (applying Code Civ. Proc. § 1094.5(c) administrative mandamus action

"[administrative] mandamus is not an appropriate remedy for enforcing a contractual obligation against a public entity." *300 De Haro St. Inv. v. Dep't of Housing*, 161 Cal. App. 4th 1240, 1254-57 (2008).

Finally, even if the DA could be reasonably interpreted to incorporate the substantial evidence standard of review (it cannot), that requirement would be unenforceable because, as this Court has recognized, "private parties lack the power to dictate *how* the federal courts conduct the business of resolving disputes." *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc). Instead, "[t]hat power is reserved to Congress—and when Congress is silent on the issue, *the courts govern themselves*." *Id.* at 1003 (emphasis added). Accordingly, in no circumstance could the DA dictate how the district court or this Court receive and review evidence in this contract dispute.

2. Section 3.4.2 Does Not Incorporate Evidentiary Restrictions From Administrative Law

The City's (Br. 34-36) and Intervenors' (Br. 24-27) contentions that the district court erred in considering evidence outside the City Council record

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challenging suspension from university); *Larson v. State Personnel Bd.*, 28 Cal. App. 4th 265, 269-70 (1994) (applying Code Civ. Proc. § 1094.5(c) administrative mandamus action challenging discharge of teacher).

Intervenors also cite (Br. 21) *Gutierrez v. Comm'r of Social Sec.*, 740 F.3d 519 (9th Cir. 2014), where 42 U.S.C. § 405(g) prescribed substantial evidence review of an ALJ's denial of a claim for supplemental security income. *See id.* at 522.

likewise rest on the faulty premise that the DA imposed substantial evidence review. Contradicting its present assertion that the district court was limited to the administrative record, the City recognized that a jury-trial right attaches to a contract claim, and initially sought a jury trial on "on all issues triable by a jury." ER540 (Answer); *see* SER591-97 (Case Management Statement). After the parties waived their right to a jury, the district court held a bench trial and properly applied the Federal Rules of Evidence (*see* ER12)—*not* state law standards governing review of administrative proceedings. As shown (*supra*, at 25-28), the DA did not require the district court to follow any different procedure here, nor could it have, *see Kyocera*, 341 F.3d at 1000, 1003. The City's and Intervenors' arguments to the contrary are incorrect.

First, the City (Br. 34-35) and Intervenors (Br. 24-30) continue to misplace reliance on cases that analyze the term "substantial evidence" in a statute, not a contract. In *WSPA*, for example, the California Supreme Court held that the term "substantial evidence" as used in Cal. Public Resources Code § 21168.5—a provision of CEQA concerning judicial review of agency action—prescribed the substantial evidence standard of review, thus precluding extra-record evidence in a review proceeding under that statute. *See* 9 Cal. 4th at 568-69. And in *Larson*, 28 Cal. App. 4th at 273, the court applied Cal. Code Civ. Proc. § 1094.5(c), the general provision for administrative mandamus proceedings. Neither decision

suggests that use of the term "substantial evidence" in a contract limits the evidence that a court may consider in deciding whether that contract was breached.

The City, moreover, is wrong (Br. 34-35) that OBOT withheld evidence from the City Council. OBOT did not even have a meaningful opportunity to *present* evidence to the City Council. *See supra*, at 16. And OBOT repeatedly informed the City that the proceedings were premature given the preliminary nature of the planning for the Terminal. *See supra*, at 10-11. The authority the City cites on this point, *Toyota of Visalia Inc. v. New Motor Vehicle Bd.*, 188 Cal. App. 3d 872 (1987), is another inapposite administrative mandamus case in which the substantial evidence standard of review was prescribed by Cal. Code Civ. Proc. § 1094.5(c). *See* 188 Cal. App. 3d at 876.

Second, contrary to the City's assertion (Br. 35), Section 3.4.2's requirement that the City hold a "public hearing" does not impose any further "implicit" requirement that "all relevant evidence be submitted during the hearing process." The City cites no authority supporting its contention that this language could limit the evidence admissible in a civil trial for breach of contract. And while the City argues (Br. 35) that admission of evidence outside the City Council record would render the public hearing "an empty formality," it disregards that the public-hearing requirement seeks to ensure that the City Council uses a public, not secret, process when it considers impairing OBOT's vested rights. If the City's public

hearing was an "empty formality" it was because the evidence the City received at the hearing was not credible—not because the district court considered evidence relevant to the City's breach.

Finally, confining the district court to the administrative record would lead to absurd results. If the district court could not consider evidence outside the City Council record in assessing whether that record was "reasonable, credible, and of solid value," then *any* evidence superficially or apparently supporting the City's ultimate conclusion would suffice—even if that evidence has no factual or scientific basis—thus reading the "substantial evidence" requirement out of the DA.

3. The District Court Properly Considered Evidence Outside Of The City Council Record To Assess The Evidence In That Record

The City likewise mischaracterizes *how* the district court used the so-called "extra-record" evidence. Contrary to the City's assertion (*e.g.*, Br. 29), the district court did not credit any such evidence *in place of* the City Council record; instead, it properly considered evidence to explain and evaluate *the record before* the City Council. As the City concedes (Br. 36-37), the district court correctly recognized that, under Section 3.4.2, the "decision to ban coal at the [Terminal] may only be justified on the basis of evidence that was before the City Council at the time the decision was made." ER12. And the district court rightly considered "evidence

that was not in the record before the City Council" only insofar as it "inform[ed] 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." ER12 (emphasis added).

The City again mischaracterizes (Br. 29, 37-39) the district court's decision in arguing that the court "conclu[ded] that OBOT's expert's emissions estimates were more reliable than those submitted to the Council during the public hearing process." The court did not substitute the emissions estimates of OBOT's experts for those submitted to the City Council, or conclude that OBOT's expert provided correct estimates that the City should have used. Instead, the court properly considered the parties' trial experts to the extent they supported—or as the court found demonstrated shortcomings in—the City Council record.

For example, while the City argues (Br. 37) that the district court erroneously relied on testimony from OBOT's expert, Dr. Chinkin, to conclude that ESA "used the wrong 'threshold friction velocity,'" the district court relied on Dr. Chinkin's testimony only to the extent it "shed[] light on the adequacy of the evidence that was actually before the City Council." ER12; *see* ER21-22. That testimony (and other testimony from Dr. Chinkin) was thus probative of whether the ESA Report—the principal evidence on which the City Council relied—was "reasonable, credible, and of solid value." *See supra*, at 24. In any event, the City

ignores that the district court also relied on the *City's own witness* in concluding that ESA chose the wrong threshold friction velocity. *See* ER21.

The City is also wrong (Br. 38) that "the District Court relied on Dr. Chinkin's emissions calculations to conclude that ESA's estimates were unreliable because they failed to account for train and wind speed in Oakland." To the contrary, the district court expressly took "*no view on the accuracy of the expert's estimates*," and concluded that "the City could [have] estimate[d] these values in a meaningful way if it chose to." ER22 (emphasis added); *see* ER21-22 ("[E]ven setting the expert's revised estimates aside …."). In this manner, the district court properly considered evidence outside the City Council record in determining that that record did not contain substantial evidence.

B. The Term "Substantially Dangerous" Requires A Baseline Comparison

The City (Br. 28-29 n.13) and Intervenors (Br. 39-42) similarly fail to show any error in the district court's interpretation of the phrase "substantially dangerous" in Section 3.4.2. Under California law, "[t]he 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." Cal. Civ. Code § 1644. Here, the district court properly relied on a dictionary definition of the term "substantial"—consistent with its understanding in

an "ordinary and popular sense"—in concluding that "[d]eciding what is 'substantial' requires context," in that "[t]o understand whether something poses a 'substantial' danger, you need a baseline against which to compare the danger." ER30.

The City (Br. 28 n.13) and Intervenors (Br. 39) wrongly argue that "substantial danger" means "a danger which is real and not insignificant," but this proposed definition comes from a jury instruction given by a California trial court trying a failure-to-warn claim. *See Cavers v. Cushman*, 95 Cal. App. 3d 338, 349 (1979). Nothing suggests that the parties intended this 40-year-old jury instruction to supply the meaning of "substantially dangerous" in the DA.

Intervenors are also wrong (Br. 39-40) that the district court failed to explain "its view that context or comparison is necessary." The district court clearly explained, in rejecting the City's argument that *any* exposure to PM2.5 was dangerous, that context or comparison was necessary to give meaning to the term "substantially." ER30 ("When the City asserts that any increase in exposure to particulate matter is enough to meet this standard, it reads the word 'substantial' out of the contract").[6]

[6] Indeed, as the district court noted, the City "[c]ounterintuitively [argued] that any emissions pose a substantial danger even though it continues to allow the East Bay Municipal Utility District and [an] iron foundry to consume coal and coke—and emit particulate matter." ER31. Accordingly, the district court rightly concluded that "[w]ithout comparing these activities' impact on air quality to

Intervenors' remaining arguments fare no better. Because the substantial evidence standard of review does not apply (*see supra*, Part I.A), Intervenors' assertion (Br. 41) that substantial evidence review would "not allow the court to insist upon its approach, demand new studies, or substitute its judgment for the City's" is immaterial. Intervenors' separate assertion (Br. 41) that "the City determined OBOT's emissions would exceed the 'significance threshold' used to measure project impacts under CEQA," ignores the district court's findings that the City's determination lacked a credible basis (*see* ER19-26). Intervenors then repeat (Br. 41) the City's argument that *any* exposure to PM2.5 is dangerous, which is what prompted the district court to conclude that "[d]eciding what is 'substantial' requires context" in the first place. ER30. And Intervenors' contention (Br. 42) that "[n]o law requires the City" to "justify its decision to regulate OBOT" ignores that *the DA itself* imposes the requirement. *See* ER1970.

II. THE DISTRICT COURT CORRECTLY FOUND THAT THE CITY BREACHED THE DEVELOPMENT AGREEMENT

The district court correctly found, after bench trial, that the City breached the DA by applying the Ordinance via the Resolution to OBOT without "substantial evidence" that coal transportation at the Terminal would present a

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OBOT's, it's difficult to grasp how the City decides which activities pose a substantial danger to health and which do not." ER31.

substantial danger to health and safety. ER13-36; ER39. The City and Intervenors fail to identify any error—much less clear error—in the court's factual findings.

A. The City Lacked "Substantial Evidence" Of A Substantial Danger From Emissions

1. ESA's Emissions Estimates Were Unreliable

In adopting the Ordinance and Resolution, the City Council principally relied on emissions estimates in Table 5-7 of the ESA Report. *See* ER848 & n.9; ER950; *supra*, at 15-16. As the district court found, however, none of ESA's estimates—for transport, staging, or terminal operations—was reliable, and thus none constitutes "substantial evidence" of a substantial danger. *See supra*, at 24.

(a) The Emissions Estimates For Transport And Staging Were Unreliable

(i) ESA Did Not Account For Train And Wind Speed

The district court correctly concluded that ESA's emissions estimates in Table 5-7 for transport and staging erroneously assumed a constant rate of emissions—*i.e.*, that "the same amount of fugitive coal dust will be produced at each mile of the rail journey from the coal mines to the terminal." ER22. In so concluding, the district court rightly observed that "common sense suggests that even if no controls were used—indeed, especially if no controls were used—the train speed and ambient wind speed would affect how much coal dust would be emitted and become suspended in the air." ER22.

The City argues (Br. 51) that "whether coal dust is emitted at a constant rate" is a "question that implicates matters of technical and scientific expertise on which experts can differ." But that is precisely the expertise that the district court found *was not before the City Council*. ER22. While the City's trial expert, Dr. Sahu, conceded that the rate of emissions varies depending on several factors, including wind and train speed (SER113), ESA's own Evans testified without contradiction that ESA did not have information regarding certain factors affecting potential emissions in Oakland, including train speed (SER64).

The City, moreover, is simply wrong (Br. 51-52) that "the Council record *did* contain evidence that answers the District Court's criticism." The City cites a report submitted by a Public Health Advisory Panel ("PHAP"), which the district court acknowledged (*see* ER8), but the emissions estimates in that report were even less credible than those in the ESA Report. In addition to suffering from many of the same deficiencies as the ESA Report (*see infra*, at 50-51), the PHAP's emissions estimates came from an unrelated Burlington Northern & Santa Fe Railroad ("BNSF") study of "sub-bituminous coal from Wyoming or Montana" (ER935; *see* ER1336)—*i.e.*, Powder River Basin coal—which, as ESA's Evans conceded at trial, is "much dustier" than the bituminous coal that would be shipped from Utah to the Terminal (SER57-58, SER75-76 (Evans)). For this reason, ESA recognized that BNSF's estimates did not accurately reflect OBOT's potential

operations, and accordingly—only because it "is *possible* that sub-bituminous coal from Wyoming or Montana *could* also be exported through [the Terminal]"—treated BNSF's estimates as a "worst case estimate for fugitive coal dust." ER935-36 (emphasis added). ESA made no effort to incorporate the estimates that PHAP used with its own. Indeed, while the City's Agenda Report for the June 27, 2016 hearing acknowledged the PHAP report (ER844), it relied instead on the ESA Report in recommending that the City Council adopt the Ordinance (ER845-52). The PHAP report thus provides no basis to avoid the district court's breach finding.

(ii) ESA Used An Erroneous Threshold Friction Velocity

The City and Intervenors also identify no error—let alone clear error—in the district court's finding that ESA's estimates of emissions during transport and staging "were … flawed because they resulted from a misapplication of federal guidance and mistaken assumptions about the type of coal to be transported to the [T]erminal." ER20.

In calculating the emissions estimate in Table 5-7 for staging—the estimate that contributed the most to the purported exceedance of "thresholds of significance" that the Agenda Report used—ESA relied on an EPA document, "AP-42." ER934-35; *see* ER20. This document explains how to calculate emissions from different industrial activities and sources of pollution. ER152-53

(Chinkin); *see* ER20. The key input into AP-42 is "threshold friction velocity," which represents "the minimum wind speed necessary for a collection of particles to begin moving." ER20; *see* ER152-53 (Chinkin). While the City (Br. 50) and Intervenors (Br. 35-36) concede only that "none of the available threshold friction velocity figures precisely describe conditions at the proposed terminal," the district court found that ESA's "decision to use [the threshold friction velocity for] 'fine coal dust on concrete pad' for its emissions estimates was a *significant flaw* in the record." ER22 (emphasis added).

That finding is well supported. OBOT's expert Dr. Chinkin "credibl[y]" demonstrated at trial that ESA's chosen threshold friction velocity "was too low a value to use for the coal that would travel by rail car from Utah to Oakland, because it reflected the wind speed necessary to begin moving an ultrafine pile of coal dust—the equivalent of coal dust that had been bulldozed and crushed under heavy equipment." ER20-21; *see* ER159-62 (Chinkin). By contrast, the threshold friction velocity for "uncrusted coal pile" describes "emissions from a coal pile that is actively moving with pieces being added, removed, and replaced" (ER20; *see* ER158-59 (Chinkin)), and Dr. Chinkin testified that this threshold friction velocity would have resulted in more accurate emissions estimates (*see* ER162-63 (Chinkin)).

Contrary to the City's contention (Br. 50-51), the district court did not "err[] by crediting [OBOT's expert] testimony over [the City's] experts' opinions." Dr. Chinkin's testimony regarding threshold friction velocity was probative of whether the City Council record contained credible evidence because it demonstrated that ESA's use of AP-42 was based on a deeply flawed assumption. And, as the district court observed, that testimony was "not meaningfully rebutted by the City's expert," Dr. Sahu. ER21. Dr. Sahu simply opined that AP-42 guidance should not have been used at all, somehow justifying the wrong threshold friction velocity (ER74-75).[7] And ESA's Evans could not explain at trial why ESA used the threshold friction velocity for "fine coal dust on concrete pad." *See* SER77.3-77.4. And while Dr. Chinkin offered a much lower calculation of PM2.5 emissions based on the threshold friction velocity for "uncrusted coal pile," the district court *did not rely on that alternate calculation*. *See* ER21-22; *supra*, at 31-33.[8]

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[7] As the district court noted (ER20-21), *both parties'* trial experts conceded that AP-42 should *not* have been used in estimating emissions associated with the Terminal. *See* SER110 (Sahu); ER152-53 (Chinkin).

[8] Intervenors maintain (Br. 35) that "a Canadian government study in the record … observed that [AP-42] … 'would be as applicable as anything' for estimating rail emissions," but that observation is hardly an endorsement of using AP-42 to estimate emissions from moving piles of coal or of ESA's chosen threshold friction velocity. That study, moreover, underscores that "[a]lthough AP-42 covers various emissions sources associated with coal mining, *the shipment of coal by trains is not addressed as a source of dust emission*." ER1510 (emphasis added). And Intervenors' reliance (Br. 35) on another expert report that utilized AP-42 merely

(iii) ESA Did Not Consider Mitigation Measures

The City and Intervenors also fail to identify any error (clear or otherwise) in the district court's finding that ESA's emissions estimates for transport and staging were unreliable for the independent reason that they did not incorporate mitigation measures that OBOT agreed to use. ER15-19. Contrary to the City's assertion (Br. 45), the district court did not "impermissibly shift[] the burden of proof on the issue" or require the City to prove that mitigation measures would be ineffective. Rather, the court properly determined that "the City *did not meaningfully explore* whether rail car covers [or surfactants] could be used to mitigate fugitive coal dust emissions, and if so, what their impact would be." ER15 (emphasis added). And because ESA did not meaningfully consider the impact of rail car covers or surfactants—measures OBOT had committed to using—on its emissions estimates, the court rightly concluded that this "created a sizable gap in the record" and constituted "a major flaw in the City Council's ultimate conclusion that OBOT's emissions would pose a substantial health or safety danger." ER19.

The district court's findings that OBOT was "willing to obligate [itself] to accept only coal that is carried … on covered rail cars" (ER16) and "would require surfactants to be used on the coal arriving at the [T]erminal" (ER18) are well supported by the record. In response to questions from the City after the

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demonstrates that that expert relied on inappropriate guidance—it does not transform the ESA Report into substantial evidence of a substantial danger.

September 2015 hearing, OBOT committed in writing that it would contractually agree to accept only covered rail cars, and to be bound by the standards of SCAQMD Rule 1158 concerning application of surfactants during the transport and handling of coal. ER1745; SER84-85 (McClure); *see* SER525 (Rule). And as the district court observed (ER16), the lease agreement between OBOT and TLS already requires use of covered rail cars (SER24-25 (Tagami)).

The City wrongly maintains (Br. 49) that OBOT's willingness to employ mitigation measures was "conditional" because OBOT might demand "concessions" in negotiating a contract requiring such measures. *See also* Intervenors Br. 31-32. The City ignores that *OBOT* proposed incorporating use of protective measures into a specific, existing contract (*see* ER1746), and it never explains why OBOT might try to exact concessions in exchange for the City agreeing to OBOT's *own proposal*.

Nor does the City identify any clear error in the district court's findings that BAAQMD "could require OBOT to mitigate emissions by using coal covers" (ER16) and "could impose regulations or permitting conditions requiring OBOT to use surfactants" (ER18). The City hypothesizes (Br. 48-49) that "the [City] Council could reasonably have been concerned" that federal law would preempt such regulations. But the City Council could not have "reasonably … been concerned" that a regulation requiring mitigation measures might be preempted,

but nonetheless impose a total ban on an article of interstate commerce without such concern. In any event, as OBOT acknowledged to the City in 2015, even if a BAAQMD regulation requiring mitigation measures could be preempted, OBOT's proposed contractual agreement to employ mitigation measures would not be. ER1751; *see Joint Pet. For Declaratory Order—Boston & Maine Corp. & Town of Ayer*, 2001 WL 458685, *5 (STB May 1, 2001) ("voluntary agreements must be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce" and thus would not be preempted).

The City (Br. 44-45, 47) and Intervenors (Br. 31) fare no better in arguing that ESA justifiably ignored mitigation measures. As the district court found, "[t]he lack of existing data about the effectiveness of a new technology … is not enough of a reason to assume them away, particularly when the developers have committed to using them." ER16; *see* ER17-18 ("[I]nstead of attempting to estimate [surfactants'] effectiveness, ESA simply decided that surfactants would not be effective and did not account for them in its final emissions estimates.") Neither the City nor Intervenors offer any response supporting ESA's extreme position.

Unable to dispute that ESA did not consider mitigation measures, the City wrongly argues (Br. 45-46) that OBOT "had the burden to prove that [the City]

breached Section 3.4.2 by relying on emissions data that did not properly account for coal car covers, both because it was the plaintiff and under the substantial evidence standard." But, as shown (*supra*, Part I.A), the substantial evidence standard of review does not apply. And OBOT's burden as plaintiff was to prove by a preponderance of the evidence that the City Council did not have "substantial evidence" of a substantial danger (*see supra*, at 24). As the district court rightly concluded, OBOT did so by demonstrating that the ESA Report failed to consider mitigation measures OBOT had committed to employ.

The City is also incorrect (Br. 36) that the district court "forc[ed] Oakland to come forward with affirmative evidence that coal car covers are ineffective" and required "the City to conduct experiments on the issue." The district court did not rule on the effectiveness of mitigations measures, but instead found that the City did not "*meaningfully explore*" (ER15) or "*meaningfully consider*" (ER17) mitigation measures that OBOT had committed to employ. The court did not require proof, from either party, regarding the effectiveness of such measures.[9]

And this failure to account for mitigation measures was not for want of evidence. The City and ESA had evidence that, at a minimum, rail car covers were

[9] The City's argument (Br. 48) that the district court "essentially required Oakland to prove that less restrictive alternatives to the Resolution would have been insufficient" similarly mischaracterizes the court's ruling—it was ESA's failure to *consider* the effect of mitigation measures (not failure to prove their ineffectiveness) that rendered its report unreasonable.

effective for "dusty toxic materials." ER1745. Ecofab, the manufacturer of the rail-car covers that OBOT and TLS were considering (*see* ER1745), informed ESA that, while its "covers have not been specifically tested for coal transport, … the same cover has been used to protect the environment from dusty toxic materials for over 40 years [and] *effectively contains all dust*." SER175 (emphasis added).[10] But rather than meaningfully consider this evidence, the City instructed its expert consultant ESA to accept Ecofab's statement simply as evidence that rail covers had not been used for coal cars. SER49 (Evans). And despite the City's contention (Br. 47) that "[t]he single reported scientific study on [the effectiveness of surfactants] documented significant *spikes* in PM2.5 immediately after the passage of coal trains … treated with surfactants," ESA's Evans testified that ESA had no basis to disagree with a BNSF study—cited in the ESA Report—that found a 75%-93% suppression rate from surfactants at the time of application. SER46 (Evans); *see* ER900.[11]

[10] Ecofab also informed ESA that it "has provided covers for many commodities … [m]any [of which] are significantly toxic or radioactive[,] [y]et in the billions of miles traveled, there *has never been an incident of dusting reported or radioactive material exposed to the environment or the public*." SER447; *see* SER59 (Evans).

[11] The ESA Report also recognized that repeat applications of surfactants over the course of coal transport have been utilized. ER902; ER938; ER944. And the City's expert conceded at trial that surfactants can mitigate coal dust emissions. SER120-21 (Sullivan, City's rail expert).

(b) The Emissions Estimates For Terminal Operations Were Unreliable

The City and Intervenors locate no clear error in the district court's conclusion that "ESA's emissions estimates for terminal operations also have serious problems" because they do not account for BAAQMD's role in mitigating any health-and-safety risks or OBOT's commitment to using "best available control technology" ("BACT"). ER22-26. These findings have broad support in the record.

(i) ESA Did Not Consider BAAQMD's Role

The district court correctly concluded that the City Council and ESA failed to consider BAAQMD's role in mitigating any health-and-safety risk at the Terminal—indeed, "[n]early all the evidence before the City Council presumed OBOT would operate in a regulatory vacuum" (ER25), even though the City Council knew that there were coal/petcoke-consuming facilities in Oakland operating pursuant to BAAQMD permits (*see* ER818; ER24). As ESA's Evans conceded at trial, "the ESA report did not even contemplate whether the project would pose a danger after [OBOT] had secured the necessary permits from [BAAQMD]." ER25 (citing SER43, SER71-72 (Evans)).

Unable to dispute that the City Council record contains *no* evidence regarding any health-and-safety danger the Terminal might pose after OBOT secured the necessary permits, the City instead maintains (Br. 53) that the district

court "relied on erroneous assumptions about BAAQMD's powers." But in arguing (*id.*) that BAAQMD "has *never* promulgated specific regulations governing" coal or petcoke terminals in Benicia or Richmond, the City ignores that those terminals are operating subject to BAAQMD's *existing general* regulations, including emissions limits. *See generally* BAAQMD Regulation 6, Rule 1. The City is likewise incorrect (Br. 53) that the district court "assumed without any basis that BAAQMD would 'step in' to prevent substantial danger[]." Rather, the district court accurately explained BAAQMD's role, noting that OBOT must obtain "two primary permits" before even "building or installing anything" (ER25), and that, in issuing these permits, BAAQMD "has a fair amount of latitude [and] can impose *almost any condition that it deems necessary* to ensure compliance with its emissions limits and other regulations" (ER23). *See* BAAQMD Regulation 2, Rule 2 at 2-2-140.[12]

Moreover, even if the City were correct (Br. 53-55) that BAAQMD has jurisdiction only over the Terminal (*but see* SER83-84 (McClure); ER125 (Chinkin)), the City ignores that, as the district court explained, BAAQMD "could impose permitting conditions that would limit the amount of coal that could be processed at the terminal" and additionally could require "OBOT to limit

[12] And, as discussed, the Terminal is subject to approximately 660 environmental and mitigation conditions on construction and operation. SER310-82.

emissions by using rail car covers, surfactants, and other controls" (ER25). These mitigation measures—which OBOT has also agreed to implement by contract (*see* ER1745)—would reduce emissions from the transport and staging phases as well.

(ii) ESA Did Not Account For OBOT's Use Of Best Available Control Technology

The district court also correctly found that ESA's estimates for emissions during the terminal operations phase were unreliable because they did not reflect that OBOT would implement BACT at the Terminal. ER22-24. For example, although OBOT "proposed using bottom-release rail cars to unload the coal into underground dust collection systems, and then moving the coal across the facility using enclosed conveyance systems with dust control technology" (ER23; *see* SER391; SER31-32 (Tagami)), the ESA Report estimated *uncontrolled* emissions—*i.e.*, before application of BACT (ER944; ER172-77 (Chinkin)).

The City and Intervenors, moreover, fail altogether to address the district court's finding that Table 5-6 of the ESA Report, which lists ESA's emissions estimates for terminal operations (ER946), was unreliable because it conflicts with ESA's underlying data. ER23-24. Table 5-6 (ER946) purports to include "controlled estimates" for terminal operations—"the only ones in the record before the City Council about emissions from terminal operations" (ER24; *see* SER61 (Evans)—but those estimates are labeled "uncontrolled" in the spreadsheet ESA

used to generate Table 5-6 (SER520), and the estimates labeled "controlled" in that spreadsheet (SER520) were not included in the ESA Report. *See* ER23.

With no credible explanation for the emissions estimates in Table 5-6, the City seeks (Br. 52-53) to minimize the significance of the terminal operations phase, again asserting that BAAQMD "could require BACT only for terminal operations … and not the rail transport or staging phases." But that is the point: the City relied on "emissions estimates for terminal operations" that have "serious problems." ER22. As explained (*supra*, at 36-45), ESA's estimates for transport and staging were unreliable for different reasons.

2. The Absence Of Air-Quality Modeling Independently Rendered ESA's Report Unreliable

The district court also correctly ruled that "the record contains no meaningful assessment of how these emissions would actually affect air quality in Oakland," because the City refused to allow ESA to perform the air-quality modeling it had proposed. ER26-27; *see* SER39-41 (Evans). The City and Intervenors fail to demonstrate clear error in this finding—which stands as an independent basis to affirm the district court's conclusion that the City lacked substantial evidence of substantial danger from emissions.

The evidence at trial established that air-quality modeling is required to determine the potential "dose" of exposure to PM2.5 air concentration levels in areas surrounding the Terminal. ER123-24 (Chinkin); SER67-68 (Evans). As the

district court found, "[b]y combining emissions estimates with data about a given geographic area and pollution source, … model[ing] [shows] how the emissions from a particular source affect a region's air quality." ER27; *see* ER122-24 (Chinkin). Thus, without modeling, emissions estimates measure particulates only at the *source—i.e.*, at the Terminal—and do not address the air quality in surrounding areas.

The City (Br. 58 & n.27), Intervenors (Br. 41), and amici (West Oakland Env't Indicators Br. 5-7) all argue that emissions from the Terminal would disproportionately affect areas near the Terminal. But without air-quality modeling data, there is no evidence—let alone substantial evidence—whether or to what extent those areas would be affected. As the district court observed, "[i]f the City wanted to point to these residents to justify the ordinance, it should have compiled a record with credible evidence that would allow the City to assess whether the proposed coal operations would *actually* present a substantial health danger to these people." ER32.

Unable to meaningfully dispute that air-quality modeling was necessary for any credible health-and-safety review, the City (Br. 56-58) and Intervenors (Br. 37) point to the PHAP report, but as explained (*supra*, at 37-38), the emissions estimates underlying that report were even less credible than ESA's. Moreover, as the district court correctly determined, the PHAP report relied on modeling from

the Jaffe study that "reflected the wind speeds, weather patterns, and geographic features of the Columbia River Gorge, not Oakland." ER28. The Jaffe study also analyzed trains carrying Powder River Basin coal from Wyoming and Montana, which, as noted (*supra*, at 37-38), is "far dustier and likely to emit particulate matter than western bituminous coal from Utah" that would be shipped through the Terminal. ER28; *see* SER57-58, SER75-76 (Evans); ER175 (Chinkin). Nor did the Jaffe study account for mitigation measures. ER28. Accordingly, even assuming, as the City maintains (Br. 57), that the PHAP report accurately "corrected for local conditions," it does not constitute substantial evidence of exposure to PM2.5 from operations at the Terminal in Oakland.

3. The City Did Not Conduct An Analysis Under The California Environmental Quality Act

Amicus State of California wrongly argues (Br. 8-12) that, in conducting its health-and-safety analysis of the Terminal, "the City chose a rigorous approach that tracked the California Environmental Quality Act." To the contrary, the ESA Report itself expressly states that "this is not a California Environmental Quality Act (CEQA) review" (ER872), and the Assistant City Administrator so conceded (SER96 (Cappio)). Moreover, the State's suggestion (Br. 9) that the City "used … CEQA Concepts" in comparing "OBOT's projected emissions" to CEQA thresholds is meaningless because the underlying projected emissions were not credible (*see supra*, Part II.A.1-2).

B. The City Lacked "Substantial Evidence" Of A Substantial Fire Danger

The district court also correctly found that the City lacked substantial evidence that coal operations at the Terminal would result in a substantial fire danger. ER32-36. Intervenors do not challenge this finding and instead recite (Br. 23-24) the same record evidence about purported fire risk that the district court rejected. The City likewise fails (Br. 59-61) to demonstrate any clear error.

Although the City invokes (Br. 59-60) the supposedly "cumulative" evidence of a fire risk, the district court observed that "the record before the City Council contains mere speculation about the possibility of combustion, with no attempt to quantify the risk or meaningfully compare it to the fire risk from operations involving commodities other than coal." ER33. Indeed, as the district court correctly found (ER33), the City Council record actually *contradicted* the City's conclusion that coal operations pose a substantial fire danger.

For example, Steve Radis, the safety expert ESA retained because his knowledge was superior to its own, informed ESA "that major fires at coal terminals are infrequent and more commonly associated with Powder River Basin coal" (SER170; *see* SER53-54 (Evans)), a statement ESA inexplicably omitted in its Report (*see* ER34). The City Council had previously been informed, however, that "bituminous coal is classified as a low fire risk by the National Fire Protection Association" (SER415)—ranking "1" on a scale of 1 to 4—and that the Oakland

Fire Department uses these rankings in its emergency response system (SER90-91; *see* ER33). The City maintains (Br. 60) that "the NFPA system addresses only the *likelihood* of combustion, not the *magnitude* or harm posed by a combustion event," but a highly unlikely danger of a large fire would not satisfy Section 3.4.2. That provision requires the City to determine that failure to apply a new regulation to the Terminal "*would* place existing or future occupants … [or] adjacent neighbors … in a condition substantially dangerous to their health or safety" (ER1970 (emphasis added)); the City's speculative evidence of fire danger—irrespective of potential magnitude—is thus insufficient.

The City also identifies no error in the district court's finding that the City Council record was "bereft of any serious discussion of the Fire Department's oversight and ability to mitigate the project's risks." ER34. The City does not dispute that OBOT is "required to submit a fire safety plan once the project is completely designed, before the building permit is issued," and that the Fire Department can either require changes or reject the plan if it does not adequately address fire hazards. *Id.* Instead, the City argues (Br. 61) that the City Council "could reasonably determine that the proposed terminal posed a substantial safety risk notwithstanding Fire Department oversight" because the Terminal would "use untested methods" "to enclose coal-handling operations." This argument is wholly

speculative and does not identify any evidence of a substantial danger, let alone substantial evidence.

III. THE DISTRICT COURT CORRECTLY GRANTED ONLY PERMISSIVE INTERVENTION

A. Intervenors Did Not Rebut The Presumption That The City Adequately Represented Their Interest

The district court rightly accepted OBOT's sole argument in opposition to intervention of right that the City would adequately represent Intervenors' interest in enforcing the Ordinance and Resolution. *See* ER42. Under this Court's precedent, the City is *presumed* to adequately represent Intervenors' interest in this case both because "the government is acting on behalf of a constituency it represents," *Gonzalez v. Arizona*, 485 F.3d 1041, 1052 (9th Cir. 2007); *see Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003), and because Intervenors and the City "have the same *ultimate objective*"—enforcing the Resolution, *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305-07 (9th Cir. 1997).

Intervenors fail to overcome this presumption. Contrary to Intervenors' contention (Br. 47, 50), they were required to make a "very compelling showing" that the City would not represent their interest. *Arakaki*, 324 F.3d at 1086; *see* 7C Wright, Miller & Kane, FED. PRAC. & PROC. § 1909 (3d ed. 2018). Intervenors wrongly suggest (Br. 47) that this Court held otherwise in *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006), but that decision adhered to the rule that "[i]n the absence

of a very compelling showing to the contrary, it will be presumed that a [government] adequately represents its citizens," *id.* at 956 (quoting *Arakaki*, 324 F.3d at 1086), and then applied it in holding that "[i]ntervenor-defendants fail to present that compelling showing of inadequate representation," *id.* at 957.

Intervenors fare no better in asserting (Br. 48-49) that they and the City have "distinct interests." The only interest they identify as their own (Br. 44-46) is in enforcement of the Ordinance and Resolution to protect public health and preserve the environment—an interest shared with the City. *See* ER812 (Ordinance's purpose is "to protect and promote the health, safety and/or general welfare of [the City's] citizens, residents, workers, employers and/or visitors"); ER810 (Ordinance will prevent "Storing or Handling coal and petcoke [from] negatively impact[ing] the environment"). And even if Intervenors were correct (Br. 48-49) that the City has additional, purportedly broader, interests, these *additional* interests have no bearing on whether the City adequately represented *Intervenors'* concededly common interest in enforcing the Ordinance and Resolution.

None of the cases upon which Intervenors rely (Br. 49) even remotely supports intervention of right here. For example, in *California ex rel. Lockyer v. United States*, 450 F.3d 436 (9th Cir. 2006), this Court determined that the proposed intervenor satisfied the "very compelling showing" requirement because it presented "direct evidence that the [government] will take a position that

actually compromises (and potentially eviscerates) the protections" of the statute that both the government and the proposed intervenors had an interest in upholding. *Id.* at 444-45. Here, Intervenors do not even suggest that the City took a position that "actually compromise[d]" or "potentially eviscerate[d]" the Ordinance or Resolution.

Intervenors likewise misplace reliance on *Southwest Center For Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001), in arguing (Br. 49) that the presumption is rebutted because the City's and Intervenors' arguments do not completely overlap. In *Berg*, this Court determined the proposed intervenors "and Defendants do not have sufficiently congruent interests" where the city-defendant had expressly stated that it "will not represent proposed intervenors' interests in this action." *Id.* at 823. Here, by contrast, Intervenors and the City are completely aligned with respect to their interest in enforcing the Ordinance and Resolution.

Finally, Intervenors' argument (Br. 50) that their expertise on environmental issues rebuts the presumption of adequate representation is inconsistent with their position (Br. 24-27) that the district court should have been limited to the City Council record, and also ignores that Intervenors were allowed to join the City in offering expert testimony in the district court. The cases Intervenors cite (Br. 50) where environmental groups were allowed to intervene as of right all involved regulatory challenges, not breach of contract like here. *See Idaho Farm Bureau v.*

Babbitt, 58 F.3d 1392 (9th Cir. 1995) (challenge to EPA rule); *Fresno Cnty. v. Andrus*, 622 F.2d 436 (9th Cir. 1980) (suit to enjoin Interior regulations governing excess land sales).[13]

B. Any Error Was Harmless

Even if Intervenors were entitled to intervene as of right (they were not), the judgment should nonetheless be affirmed because Intervenors have not shown they were prejudiced by the district court's grant of permissive intervention rather than intervention of right. This Court "may not reverse the district court's judgment unless [an] error affected the 'substantial rights of the parties.'" *Prete*, 438 F.3d at 959-60; *see* FED. R. CIV. P. 61. Intervenors' status as permissive intervenors did not affect their substantial rights.

Intervenors were full participants in every phase of this case, from the pleadings stage through trial and this appeal. Intervenors filed and argued their own motion to dismiss (Dist. Ct. Dkt. 30, 65); fully participated in discovery (*see, e.g.*, Dist. Ct. Dkt. 81 (submitting proposed protective order)); submitted their own summary judgment briefs (Dist. Ct. Dkt. 156, 194); and fully participated at trial—objecting to evidence (SER79) and examining witnesses (SER116-17). Intervenors then filed their own notice of appeal and full-length appellate brief.

[13] Intervenors also suggest (Br. 50) that "a conflict of interest persists" based on litigation between Intervenors and the City, but whatever supposed conflict exists, it did not prevent the free shifting of counsel between Intervenors and the City. *See* CA9 Dkt. 25 at 2-3.

ER43; CA9 Dkt. 35. Intervenors have not shown that their role would have been any different had they intervened as of right.

Intervenors wrongly assert (Br. 43) that they were prejudiced because the district court declined (ER38-39) to address *part* of their argument under Cal. Gov. Code § 65866 because it was outside the scope of the permitted intervention. Throughout this case, Intervenors' chose to focus on OBOT's constitutional claims (*see* Dist. Ct. Dkt. 30, 156, 194), not the contract claim—indeed, Intervenors are *not* a party to the DA. It was not until *after trial* that Intervenors first raised their Section 65866 argument regarding the contract claim. The district court's decision not to consider one aspect of Intervenors' after-thought argument concerning a contract to which they are not a party did not affect their substantial rights. In any event, as shown below (*see infra*, Part IV), Intervenors' Section 65866 argument entirely lacks merit, and thus the judgment would be the same even if the district court had considered it in full.

IV. THE DISTRICT COURT CORRECTLY REJECTED INTERVENORS' EFFORTS TO NULLIFY THE DEVELOPMENT AGREEMENT'S "SUBSTANTIAL EVIDENCE" REQUIREMENT

The district court also rightly concluded that Cal. Gov. Code § 65866 does not require judgment in the City's favor on OBOT's contract claim. ER36-39. Intervenors' arguments (Br. 55-62) to the contrary conflict with the text of DA Section 3.4.2 and rest on a flawed interpretation of Section 65866.

A. Section 3.4.2's "Substantial Evidence" Requirement Applies Here

1. Cal. Gov. Code § 65866 Authorized The Development Agreement To Freeze More Than "Land Use" Regulations

Intervenors wrongly contend (Br. 54-56) that Section 3.4.2 should be interpreted to apply only to "land use" regulations because that is purportedly the reach of Section 65866. As the district court correctly observed, however, Intervenors' proposed interpretation is "inconsistent with the language of the development agreement itself." ER38. Even though the parties "clearly knew how to draw distinctions between categories of regulations" (ER38), neither Section 3.4.1, the DA provision that froze existing regulations applicable to the Terminal, nor Section 3.4.2 distinguishes between "land use" and other types of regulations. *See* ER1969-70; *see also* ER1959 (DA § 1.1) (defining "City Regulations" to include "all … ordinances, resolutions, codes, rules, regulations and policies in effect as of the time in question"). Further, both OBOT and the City—the parties to the contract and whose intent governs—have "from the early days, proceeded on the theory that section 3.4.2[] … applies to the [O]rdinance." ER38.

Moreover, contrary to Intervenors' position (Br. 60-61), even if the DA's text could support that interpretation, it is not compelled by Section 65866. The California Legislature intended that statute to provide "[a]ssurance 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"—without restricting such assurance to "land use" regulations. Cal. Gov. Code § 65864(b). Thus, as the California Court of Appeal has recognized, "the scope of development agreements *need not be limited to freezing land use rules, regulations, and policies* but can include other promises between the municipality and the developer." *Mammoth Lakes*, 191 Cal. App. 4th at 444 (emphasis added).

Intervenors also misinterpret the first sentence of Section 65866, which provides:

> 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.

Cal. Gov. Code § 65866(a) (emphasis added). By its plain terms, this sentence freezes three distinct categories of rules, regulations, and official policies: (1) those "governing permitted uses of the land;" (2) those "governing density;" and (3) those "governing design, improvement, and construction standards and specifications." Intervenors' interpretation (Br. 57) that a rule, regulation, or official policy can govern "permitted uses of the land" only if it "govern[s] density, … design, improvement, [or] construction standards and specifications," impermissibly reads the separate category "governing permitted uses of the land"

out of the statute. *See, e.g.*, *Planned Parenthood of Idaho v. Wasden*, 376 F.3d 908, 928 (9th Cir. 2004) (it "'is a cardinal principle of statutory construction that a statute ought … to be so construed that … no clause, sentence, or word shall be superfluous, void, or insignificant'").

2. The Ordinance And Resolution In Any Event Govern "Permitted Uses Of The Land" At The West Gateway

Even if Section 65866 could be construed to authorize freezing of only regulations "governing permitted uses of the land" (it cannot), the Ordinance and Resolution plainly govern "permitted uses of the land" because they limit how OBOT may use the West Gateway by prohibiting storage and handling of coal at the Terminal. *See* ER817.

Intervenors mischaracterize (Br. 57) the Ordinance as regulating "a health-impairing activity, not a land use." That characterization would permit local governments to evade their obligations—and destroy developers' vested rights—under development agreements simply by codifying new regulations in certain titles as opposed to others. Intervenors' proposed distinction, moreover, is illusory: The City's authority to regulate "appropriate uses of the land" comes from its police power, which allows a local government to regulate "for purposes of health and safety." *See City of Riverside v. Inland Empire*, 56 Cal. 4th 729, 738 (2013) (city's "inherent local police power includes broad authority to determine, for purposes of public health, safety, and welfare, the appropriate uses of land

within a local jurisdiction's borders"). Accordingly, laws directed to health and safety—including those regulating "controlled substances" (*see* Intervenors' Br. 57)—frequently govern permitted uses of the land, as the Ordinance does here. *See, e.g.*, *Stewart Enters., Inc. v. City of Oakland*, 248 Cal. App. 4th 410, 415, 423 (2016) (health-and-safety ordinance governed "land use" by crematorium owner); *Kirby v. City of Fresno*, 242 Cal. App. 4th 940, 948, 950 (2015) (health-and-safety ordinance prohibiting marijuana cultivation adopted under county's "power to regulate land use").[14]

3. The Ordinance And Resolution Conflict With The Pre-Existing Regulatory Scheme

Nor are Intervenors correct that the substantial-evidence requirement is inapplicable because the Ordinance purportedly "does not conflict with the regulations frozen by the DA." Intervenors assert (Br. 58) that there is no conflict because "[w]hen the DA was executed, none of the City's existing laws governed the storage or handling of coal." The absence of prior laws governing storage or handling of coal, however, meant that those activities were *permissible*.

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[14] Intervenors misplace reliance (Br. 57) on *CEEED v. Cal. Coastal Zone Conservation Comm'n*, 43 Cal. App. 3d 306 (1974). The court there did not distinguish between public-health regulations and land-use regulations, and instead simply explained that while "the power to regulate nuisances and the power to enact conventional zoning ordinances are both derived from the police power, the impact of the two types of legislation on property rights differ substantially." *Id.* at 319.

Indeed, consistent with Cal. Gov. Code § 65865.2, which requires a development agreement to specify the "permitted uses of the property," the DA provides that the "permitted uses" of the property include the right to "develop[,] use and operate the Premises" as a "ship-to rail terminal designed for the export of non-containerized bulk goods" with *no limitation* as to the type of bulk goods. As the district court observed, "[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." ER41.

B. Section 3.4.2 Preserves The City's Police Power

Intervenors' fallback position (Br. 59-62) that the district court's interpretation of the DA impermissibly restricts the City's exercise of its police power is both procedurally and substantively flawed.

1. The Police-Power Argument Is Outside The Scope Of Intervention

The district court properly ruled that Intervenors' argument that Section 3.4.2 "restricts [the City's] police power more than the Government Code allows" was outside the scope of intervention because they "were permitted to intervene to help defend [the City], not to seek to invalidate a provision of an agreement that [the City] entered into." ER38; *see* ER42 (excluding from scope of intervention the "right to bring counterclaims [or] the right to bring cross-claims"). Intervenors

do not contest that "[t]he district court's discretion … under Rule 24(b), to grant or deny an application for permissive intervention includes discretion to limit intervention to particular issues," *Dep't of Fair Employment & Housing v. Lucent Techs., Inc.*, 642 F.3d 728, 741 (9th Cir. 2011) (quoting *Van Hoomissen v. Xerox Corp.*, 497 F.2d 180, 181 (9th Cir. 1974)), but contend (Br. 61) that their police-power argument was within the scope of permissive intervention because it is not a prohibited "cross-claim or counterclaim." Intervenors ignore, however, that their argument functioned as both a cross-claim against the City *and* a counterclaim against OBOT because, if accepted, it would have *invalidated DA Section 3.4.2*. The district court was well within its discretion to preclude Intervenors, as non-parties to the DA, from pursuing such an argument.

2. Section 3.4.2 Is A Police-Power Exception To OBOT's Vested Rights Under The Development Agreement

On the merits, Intervenors argue (Br. 59-62) that if Section 3.4.2 cannot be "harmonized" with Section 65866, then Section 3.4.2 is an unconstitutional surrender of the City's police power. Not so. Section 3.4.2 is an exception to OBOT's vested rights under the DA that ensures the City does *not* unconstitutionally surrender its police power. The City itself confirmed below that Section 3.4.2 *preserves* its police power. SER558 ("The DA preserved the City's police power authority to apply subsequently-adopted regulations that prevent substantially dangerous health and safety conditions.").

Intervenors emphasize (Br. 59) the rule that a City "may not contract away its right to exercise the police power in the future" (quoting *Cotta v. City & Cnty. of S.F.*, 157 Cal. App. 4th 1550, 1557-58 (2007)), but fail to acknowledge the equally-clear California law providing that "[t]he retrospective application of a statute [or local law] may be unconstitutional … if it deprives a person of a vested right," *Rosefield Packing Co. v. Superior Ct.*, 4 Cal. 2d 120, 122 (1935). They also fail to acknowledge that, in order to reconcile these two rules, California law provides that "[t]he vested rights doctrine in the land use context 'is subject to the qualification that … a vested right, while immune from divestment through ordinary police power regulations, may be impaired or revoked if the use authorized or conducted thereunder constitutes *a menace to the public health and safety* or a public nuisance." *Davidson v. Cnty. of San Diego*, 49 Cal. App. 4th 639, 649 (1996) (emphasis added).

The DA follows precisely this framework. *First*, the DA grants OBOT a vested right to develop and operate a bulk-commodities terminal under the municipal code as it existed when the DA was executed—as the City acknowledged. ER1967 (§ 3.2) ("This Agreement vests in [OBOT] the right to develop the Project in accordance with the terms and conditions of this Agreement, the City Approvals, and the Existing City Regulations…."); ER1969-70 (§ 3.4.1); SER307 (City Council Agenda Report) ("The intent of the parties is to vest the

current regulatory scheme, subject to the express exceptions included in the Development Agreement."). And, *second*, DA Section 3.4.2 creates a health-and-safety exception to OBOT's vested right that mirrors the common-law exception, *see Davidson*, 49 Cal. App. 4th at 649, thereby ensuring that the City maintains its police power. Section 3.4.2 in fact explicitly describes itself as an "exception to Developer's vested rights under this Agreement." ER1970. Section 3.4.2 thus preserves, not restricts, the City's police power.

Because Section 3.4.2 strikes the balance between OBOT's vested rights and the City's police power that California law requires, Amicus California State Association of Counties' argument (Br. 6-10) that the district court interpreted the DA to "override [the City's] safety judgments" is unfounded. And for the same reason, the State's argument (Br. 4) that the City's application of the Ordinance to OBOT "was a permissible exercise of … bedrock police power authority"—which ignores OBOT's vested rights—lacks merit.

CONCLUSION

The judgment should be affirmed.

Dated: February 8, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rules 32-1(a) and 32-2(b), this brief contains 15,397 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 complies with the longer length permitted by Cir. R. 32-2(b) because a party is filing a single brief in response to multiple briefs.

Dated: February 8, 2019

s/ Robert P. Feldman
Robert P. Feldman

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief for Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 8, 2019

s/ Robert P. Feldman
Robert P. Feldman