Case Nos. 18-16105; 18-16141

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OAKLAND BULK & OVERSIZED TERMINAL, LLC,
Plaintiff-Appellee,

v.

CITY OF OAKLAND,
Defendant-Appellant,

and

SIERRA CLUB; SAN FRANCISCO BAYKEEPER,
Intervenor-Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
CASE NO. 16-cv-07014-VC
Hon. Vince Chhabria

AMICUS CURIAE BRIEF OF THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT IN FAVOR OF OAKLAND BULK & OVERSIZED TERMINAL, LLC

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The California Building Industry Association ("CBIA") is a California not-for-profit 501(c)(6) trade association which has members but no shareholders.

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I. INTEREST OF THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION[1]

The CBIA is a statewide, non-profit trade association representing approximately 3,000 businesses involved in all aspects of residential and commercial development. Collectively, its members are responsible for producing approximately 80% of all new homes being built annually in California.

The residential development process in California can take years between the time that an application for development is filed and the construction of the last home in a project. Millions of dollars can be spent as part of the development process before the first building permit issues. Developers have, on more than one occasion, found that the planning and zoning which would allow the development of a residential project has changed in a manner which no longer allows the project to go forward. California's common law late vesting rule allows cities and counties, either directly through their elected bodies or through the electorate by means of the initiative process, to make it impossible to complete the project – to build the homes – notwithstanding that the developer has invested significant amounts of money in the project.

The California Legislature has allowed for the use of development agreements, a statutory alternative to the common law late vesting rule. Those

[1] The California Building Industry Association has received consent to the filing of this amicus curiae brief from all parties.

agreements provide a developer with the assurance that the regulatory system in existence when the agreements are entered into won't be changed over the term of the agreements.

California suffers from a lack of housing. Without that assurance, developers are less likely to invest the money needed to provide the housing that California so sorely needs. The corollary is that developers must be assured that the courts will hold the cities and counties to the promises made in a development agreement, namely that the regulatory situation in effect when a development agreement is entered into will not be changed during the term of the agreement.

The CBIA submits this amicus curiae brief in favor of affirmance to demonstrate the importance of the development agreement and the need for judicial review that will reflect that importance.

II. RULE 29(a)(4)(E) NON-CONTRIBUTION DISCLOSURE

No part of this amicus curiae brief was prepared by any party's counsel nor has any party or any party's counsel contributed money that was intended to fund preparing or submitting this brief.

III. ARGUMENT

A. California's Common Law Late Vesting Rule

The California Supreme Court adopted a common law late vesting rule in *AVCO Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 791 (1976), *cert denied*, 429 U.S. 1083 (1977), a rule that holds:

> "… if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit."

AVCO had received zoning which would allow the development of a planned community which would contain almost 19,000 residential units on over 7,900 acres. (*Id.* at 789.) AVCO subdivided and graded the land; it had spent over $2,800,000, incurred liabilities of over $740,000 and was losing over $7,000 a day when the California Coastal Zone Conservation Act, with its requirement that AVCO obtain a coastal development permit, was enacted in 1972. (*Id.* at 790.)

However, because it had not obtained any building permits, it had no vested right to build and, more importantly, it had no vested right to be free of the permit requirement in the Coastal Act.

AVCO is by no means the only example of how California's late vesting rule can interfere with the ability to develop after substantial sums of money have been invested. That loss can occur by the action of a city council. See, *e.g., Spindler Realty Corp. v. Monning,* 243 Cal.App.2d 255 (1966). There the developer had its property rezoned to allow the construction of either a hotel or an apartment building. (*Id.* at 259.) It had obtained a grading permit and had substantially completed the grading before the site was rezoned for single family units only. (*Id.* at 261.) Prior to the rezoning, the developer had spent over $500,000 on its project. (*Id.* at 262.) The trial court, affirmed by the court of appeal, held that the

developer had a vested right to complete the grading but, because it had never received a building permit, it had no right to build either a hotel or an apartment building. (*Id.* at 265.)

It can also occur through the use of the initiative process and the voters' ability to rezone land. See, *e.g.*, *Arnel Development Co. v. City of Costa Mesa*, 28 Cal.3d 511 (1980). In *Arnel*, the developer had proposed to construct 127 single family residences and 539 apartment units on a 50 acre parcel. (*Id.* at 513-514.) A neighborhood association that objected to the project circulated an initiative petition to downzone the property to single family residential use; the voters approved the initiative. (*Id.* at 514.)

B. The California Legislature Has Provided A Statutory Means To Obtain A Vested Right

After discussing the *AVCO* decision and its late vesting rule, the court of appeal in *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 191 Cal.App.4th 435, 443-444 (2010), set forth the history and purpose of development agreements:

> "In 1979, the Legislature's enactment of the development agreement statutes provided a way for the municipality and developer to depart from the common law rule of vested rights. The Legislature declared that '[t]he lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.' (Gov. Code, § 65864, subd. (a).)

> "The Legislature recognized that the newly authorized development agreements would provide benefits for both municipality and developer. The agreements allowed the developer to proceed with a project with the assurance that the project would be approved based on rules, regulations, and policies existing at the time the development agreement was approved, even if those rules, regulations, and policies changed over the course of the development project. (Gov. Code, § 65864, subd. (b).) In 1984, the Legislature added a declaration that development agreements would also allow municipalities to extract promises from the developers concerning financing and construction of necessary infrastructure. (Gov. Code, § 65864, subd. (c); Stats. 1984, ch. 143, § 1, p. 431.) This declaration makes it clear that 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. Thus, a legislatively approved development agreement gives both parties vested contractual rights."

The *Arnel* case, discussed above, is particularly instructive as to the need for development agreements. The court of appeal had originally found the rezoning invalid because the rezoning was essentially adjudicative. *Arnel Development Co. v. City of Costa Mesa*, 126 Cal.App.3d 330, 333 (1981). On remand after the California Supreme Court reversed on this ground, the court of appeal found that the initiative's rezoning was invalid because it was arbitrary and discriminatory. (*Id.* at 334.) Thus, because of the absence of any vested rights, the project was put on hold for over four years, from July, 1977, when the City approved the project, until December, 1981, when the court of appeal held the rezoning invalid. (*Id.* at 334.) In doing so, the court of appeal specifically recognized the shortage in affordable housing. (*Id.* at 338.)

California has produced fewer than 80,000 residential units annually over the last ten years at a time when 180,000 units are needed every year. California Department of Housing and Community Development, *California's Housing Future: Challenges and Opportunities,* 2 (Feb. 2018), found at http://www.hcd.ca.gov/policy-research/plans-reports/docs/sha_final_combined.pdf. Today, more than ever, residential developers need the assurance that a development agreement provides in order to ensure that the housing that California so badly needs will be built.

C. Judicial Review Of The Breach Of A Development Agreement Is Broader Than That Generally Applicable To The Review Of Governmental Action

The courts of California pay special attention when a vested right is in issue. Thus, the general rule is that judicial review of an administrative action -- there is none in the case at bar -- will be upheld if there is any substantial evidence in the record to support it. *Goat Hill Tavern v. City of Costa Mesa,* 6 Cal.App.4th 1519, 1525-1526 (1992). That is not true where a vested right is involved.

> "However, if an administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgement on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32 [112 Cal.Rptr. 805, 520 P.2d 29]." 6 Cal.App.4th at 1526 (tavern owner had a vested fundamental right to a renewal of an existing conditional use permit).

The deference to the contractual nature of a development agreement is more marked when the issue, as in the case at bar, is not an administrative action but rather the breach of a development agreement. In *Mammoth Lakes Land Acquisition, supra,* the court of appeal upheld a $30,000,000 judgement against the Town as a result of the Town's breach of a development agreement. In particular, the court of appeal held that

> "… the judicial remedy is a breach of contract action based on the Town's executive decision not to move forward as required by contract, not an administrative mandamus action to review a quasi-judicial decision of the Town concerning a land use application." 191 Cal.App.4th at 802-803.

The district court recognized that it was dealing with a breach of contract action in the case at bar because it stated:

> "This case is not an administrative law case. Rather, this is a contractual dispute, and the contract – namely, the development agreement – sets the standard the Court must apply." ER at 12.

IV. CONCLUSION

The case before the Court demonstrates why a development agreement is important to the developer of a terminal. However, the case is much broader in its implications because it will make it clear to cities and counties throughout California that both federal and state courts will hold cities and counties accountable if they violate the obligations voluntarily assumed when they enter into development agreements. The result will be to strengthen the rights that development agreements provide and to assure residential, commercial and

industrial developers that their investments will not be in vain, thereby increasing the chances that developers in California will continue to provide the housing and jobs needed for all of its residents.

The CBIA therefore supports the appellee's position and contends that this Court should affirm the district court's judgment.

Respectfully submitted,

DATED: February 13, 2019

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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CERTIFICATE OF SERVICE

I certify that on February 13, 2019, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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