Nos. 18-16105, 18-16141

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OAKLAND BULK & OVERSIZED TERMINAL, LLC,

Plaintiff-Appellee,

v.

CITY OF OAKLAND,

Defendant-Appellant, and

SIERRA CLUB; SAN FRANCISCO BAYKEEPER,

Intervenor-Defendants-Appellants.

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

REPLY BRIEF OF INTERVENOR-DEFENDANTS-APPELLANTS

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INTRODUCTION

After lying about its plans to build a dirty, dusty, and dangerous coal terminal in environmentally overburdened West Oakland, OBOT now seeks to gut a key contractual commitment in its Development Agreement ("DA") with the City of Oakland. Section 3.4.2 of the DA affords OBOT some regulatory certainty but also obligates it to follow new municipal health and safety requirements when the City determines, "based on substantial evidence," that failing to do so poses a "substantial danger" to community members.

Just as OBOT's efforts to conceal its coal project ultimately were exposed, OBOT cannot avoid the tens of thousands of pages of evidence compiled by the City or the black letter law defining "substantial evidence." The City adopted the Ordinance and Resolution after months of public comment and hearings—an open process OBOT largely ignored. The City considered reports and testimony from experts and other professionals documenting the substantial dangers that the coal terminal would inflict upon nearby residents already subjected to poor air quality. The "substantial evidence" test required the district court to review and credit this evidence. Instead, the court erred by eschewing that record, holding an extensive trial to receive post hoc, extra-record evidence, and ultimately substituting its own judgment for the City's. Accordingly, its decision should be reversed.

OBOT insists that the well-established meaning of the term "substantial evidence" in government and administrative law should not define the identical term in the DA because this case involves a contract. But California contract law compels the opposite conclusion: that meaning must be followed precisely because "substantial evidence" possesses a "special meaning" from long, broadly accepted usage. The DA is a contract between OBOT and a government entity, and section 3.4.2 describes a prototypical government function—adoption and application of a new health and safety ordinance following a public hearing. Given this public law context, section 3.4.2 must be construed based on precedent that addresses this type of government decision making.

Separately, the Court should reverse the denial of Intervenors' motion for intervention as of right. Intervenors meet all of the requirements for intervention as of right, including a lack of adequate representation by the City. The City possesses broader economic interests—including contractual ties to OBOT and other developers—that differ markedly from Intervenors' specific, narrow environmental interests.

The Court also should reverse the district court's denial of Intervenors' motion for judgment as a matter of law pursuant to California Government Code section 65866. That provision governs development agreements and forecloses OBOT's interpretation of DA section 3.4.2.

ARGUMENT

I. The City Adduced Substantial Evidence for its Findings.

A. The Interpretation of Section 3.4.2 and the Determination Whether Substantial Evidence Supports the City's Findings Pose Issues of Law Subject to De Novo Review.

The DA specifies that it shall be "governed by and interpreted" under California law. ER2000 (DA § 14.11). "When interpreting state law," this Court is "bound to follow the decisions of the state's highest court." *Paulson v. City of San Diego*, 294 F.3d 1124, 1128 (9th Cir. 2002) (en banc). California's highest court has established substantive rules governing judicial review in this case.

First, when a contract's meaning can be discerned from the text, as here, "interpretation is a question of law" reviewed "independently" on appeal. *People v. Doolin*, 45 Cal. 4th 390, 413 n.17 (2009) (citation omitted); *accord United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992) ("Under California law, the interpretation of a contract is a question of law subject to de novo review.").

Second, section 3.4.2 of the DA requires the City to make determinations based on "substantial evidence," and "substantiality of the evidence … is a question of law" in California. *W. States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 570 (1995) ("*WSPA*"); *accord Dredge Corp. v. Penny*, 338 F.2d 456, 462 (9th Cir. 1964) ("A judicial determination of whether a finding of fact is supported by substantial evidence presents only an issue of law."). In determining

whether substantial evidence support the City's findings, trial and appellate courts "essentially perform identical roles." *Envtl. Prot. Info. Ctr. v. Cal. Dep't of Forestry & Fire Prot.*, 44 Cal. 4th 459, 479 (2008) (citations omitted). "[T]he appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review … is de novo." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 427 (2007).[1]

B. Section 3.4.2's Reference to "Substantial Evidence" Requires the Court to Review the City's Findings for Reasonableness, Based Solely on the Record the City Compiled.

Under California law, the words of a contract must be given the "special meaning … given to them by usage." *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995) (citing Cal. Civ. Code § 1644); OBOT Br. at 33 (same). Here, the California Supreme Court has declared that the words "substantial evidence" are presumed "to have their established legal meaning." *WSPA*, 9 Cal. 4th at 570.

[1] OBOT quotes *Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963 (9th Cir. 2017) and argues breach of contract always presents "a question of fact" subject to clear error appellate review. Br. at 23. OBOT is wrong. *Campidoglio* cited and applied *Washington state* law. 870 F.3d at 966. And the decision further stated that contract interpretation also raises "questions of law," and a "mixed question of law and fact … collapses into a question of law" when "the historical facts are admitted or established" and the case turns on their "legal significance." *Id*. at 973-74 (citations omitted). Here, OBOT does not dispute the court's ruling on the scope of the record (ER0001) and, as noted above, whether a record contains substantial evidence is a question of law in California. *WSPA*, 9 Cal. 4th at 570.

When a city originally finds facts, "substantial evidence" is evidence "of ponderable legal significance ... reasonable in nature, credible, and of solid value." *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 328 (2004) (citation omitted). But when a court reviews findings, "the words 'substantial evidence' … describe a decidedly different type of judicial review." *WSPA*, 9 Cal. 4th at 571. Under such review, "all legitimate and reasonable inferences" must be "indulged in to uphold" found facts, and "the reviewing court is without power to substitute its deductions" for the factfinder's. *Id*. Further, and importantly here, a court may *not* "freely consider extra-record evidence" when reviewing for "substantial evidence." *Id.* at 572.

OBOT does not dispute these principles. Br. at 24-25. Instead, it tries to avoid them with an argument founded on a single premise: because this dispute arises from a contract, the district court may conduct its own, original fact finding instead of reviewing the City's record for substantial evidence with appropriate deference. Br. at 3, 27. OBOT is wrong.

First, the fact that a contract is at issue does not change the legal meaning of the term "substantial evidence"—which defines *both* the City's fact-finding role *and* the duties of the reviewing court. OBOT fixates on the former and would have the court ignore the latter, but California law requires that contract terms be given their full "special meaning" reflected "by usage." *Waller*, 11 Cal. 4th at 18. Here

section 3.4.2's invocation of "substantial evidence" necessarily incorporates "the cluster of ideas" attached to this "borrowed" phrase. *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 815 (2015).

Thus, even in contract disputes, judicial review for substantial evidence is deferential and must be limited to record evidence. *See, e.g.*, *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-15 (1963) (discussing the standard of review for government fact finding under "dispute" clauses in government contracts); *accord Crown Coat Front Co. v. United States*, 386 U.S. 503, 512-13 (1967) (noting a contractor invoking government disputes clause "is free to file his suit in court" but "is not entitled to demand a de novo determination").

Second, OBOT's defense of extra-record fact finding by the district court contravenes three foundational principles identified by the California Supreme Court as undergirding the limitations of "substantial evidence" review:

1. "[A] court's authority to second-guess the legislative determinations of a legislative body is extremely limited. It is a 'well-settled principle that the legislative branch is entitled to deference from the courts because of the constitutional separation of powers.'" *Conn. Indem. Co. v. Superior Court*, 23 Cal. 4th 807, 814 (2000) (quoting *WSPA*, 9 Cal. 4th at 572); *accord Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553, 564 (1990) ("We may not … substitute our judgment for that of the people and their local representatives.").

2. "A court's task is not to weigh conflicting evidence and determine who has the better argument" in environmental disputes because courts "have neither the resources nor scientific expertise to engage in such analysis." *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 393 (1988).

3. Duplicative fact finding by courts would waste the resources of the courts, government decision makers, and the public. Without any citation, OBOT claims it is "absurd" to disallow the courts from entertaining new, extra-record evidence. Br. at 31. But California adheres to the doctrine of administrative exhaustion both to conserve resources and to prevent precisely the kind of post-decision re-litigation of factual issues that OBOT has sought here. *Williams & Fickett v. County of Fresno*, 2 Cal. 5th 1258, 1264 (2017) ("As a general rule, a party must exhaust available administrative remedies as a prerequisite to seeking relief in the courts."); *WSPA*, 9 Cal. 4th at 578 (admitting extra-record evidence would undermine finality and trigger repetitive re-openings of proceedings).[2]

[2] Federal law accords. *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 623 (1993) ("[A] reviewing body characteristically examines prior findings in such a way as to give the original factfinder's conclusions of fact some degree of deference … because in many circumstances the costs of providing for duplicative proceedings are thought to outweigh the benefits … and because, in the usual case, the factfinder is in a better position to make judgments about the reliability of some forms of evidence than a reviewing body.").

Finally, OBOT misstates the law in asserting that section 3.4.2 of the DA may not be interpreted to prescribe "how the federal courts conduct the business of resolving disputes," quoting *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003). Br. at 28. *Kyocera* is inapposite; it addressed a federal law—the Federal Arbitration Act—while this case turns on state law. In *Cable Connection, Inc. v. DIRECTV, Inc.*, the California Supreme Court acknowledged *Kyocera* but concluded that under state law "contractual limitations may alter the usual scope of review." 44 Cal. 4th 1334, 1340, 1347-49 (2008). Although OBOT's brief elided this key difference between federal and California law, this Court has recognized the distinction. *See Biller v. Toyota Motor Corp.*, 668 F.3d 655, 664 (9th Cir. 2012) (noting the California Supreme Court does not follow *Kyocera*).

C. The District Court's Finding that the City Lacked Substantial Evidence of a Substantial Danger is Erroneous.

The district court violated the well-established tenets of substantial evidence review. The court not only failed to acknowledge or give due weight to credible evidence in the City's extensive record, it improperly admitted and relied upon extra-record evidence and wrongly substituted its judgment for the City's. It even went so far as to demand that the City produce or create certain specific evidence.

1. The District Court Failed to Credit Substantial Evidence in the Record.

The City's and Intervenors' opening briefs detailed the depth and breadth of expert reports, other written submissions, and testimony *in the record* supporting the City's finding that OBOT's proposed terminal would pose a "substantial danger" to the health and safety of nearby community members. City Br. at 11-21, 42-61; Intervenor Br. at 9-14, 21-24, 30-38. The City and Intervenors emphasized the same record evidence in briefing before the district court.

However, the district court ignored significant portions of the City's record and substituted its own judgment on the basis of post hoc, extra-record evidence. The Court refused to credit large swaths of reasonable, credible evidence from the record that were presented to it but are nowhere mentioned in the court's decision. For example, the decision never acknowledged that exposure to fine particulate matter ($PM_{2.5}$)—the principal pollutant generated by coal operations—is known to cause severe health outcomes including premature death, increases in lung cancer, hospitalization for heart and lung disease, emergency room visits, asthma attacks, adverse birth outcomes, and work and school absenteeism. *See, e.g.*, ER1316, ER1334, ER1338-41 (PHAP); ER0942-43 (ESA). Moreover, the U.S. EPA, California EPA, World Health Organization, and the National Academy of Sciences all have concluded that every increment of increased $PM_{2.5}$ pollution is

associated with an increase in negative health outcomes. *See, e.g.*, ER1045-46 (Chafe); ER1338-39 (PHAP).

Additional examples of reasonable, credible evidence presented to the district court but ignored by it include: (1) the expert report prepared by Dr. Phyllis Fox concluding the terminal would cause adverse health and environmental impacts (ER1664-65, ER1669, ER1673); (2) the expert report prepared by Dr. Deb Niemeier and her team at Sustainable Systems Research, LLC, estimating that coal-filled rail cars waiting to be unloaded would emit hundreds of tons of coal dust annually (ER1677); (3) oral and written testimony of Dr. Bart Ostro, author of over 100 peer-reviewed studies on the health effects of air pollution, predicting "significant increases in coal dust" that will "affect the public health of the people of Oakland" (ER1218-24, ER1556-57); and (4) oral and written testimony of Dr. Muntu Davis, Public Health Director of Alameda County, warning that a coal terminal in West Oakland "would be more devastating than in any other place given … poor health outcomes" there and existing "issues with air quality" (ER1214-17, ER1825-1828).

This evidence should have compelled the district court to affirm the City's determination because it is "reasonable in nature, credible, and of solid value." *Sav-On Drug Stores*, 34 Cal. 4th at 328. Even if the court might have weighed this evidence differently, it was required to indulge "all legitimate and reasonable

inferences" to uphold the City's finding, and to affirm "if there is any substantial evidence, contradicted or uncontradicted, which will support" the City's decision. *WSPA*, 9 Cal. 4th at 571; *Berkeley Hillside Pres. v. City of Berkeley*, 60 Cal. 4th 1086, 1114 (2015).

Like the district court, OBOT's brief ignores virtually all this evidence. Though it does discuss the Sustainable Systems Research report in a footnote (Br. at 40 n.8), it omits the expert report commissioned by City Council Member Dan Kalb and compiled by Dr. Zoë Chafe (ER1027-1162). This failure to address record evidence favorable to the City greatly hinders this Court's review for substantial evidence. Indeed, under California law, OBOT's entirely one-sided discussion of the evidence creates an independent ground for ruling against it. *See Defend the Bay v. City of Irvine*, 119 Cal. App. 4th 1261, 1266 (2004) ("As with all substantial evidence challenges," the party alleging "insufficient evidence must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal.").

OBOT attempts to justify the district court's and its own focus on a narrow slice of the approximately 40,000-page record—i.e., just the ESA report—by labeling this report as "the primary basis" for the City's decision. *See, e.g.*, Br. at 15, 20, 38. But that unproven characterization is irrelevant under the substantial evidence standard, which required the court to "consider the entire record." *Sav-*

On Drug Stores, 34 Cal. 4th at 328. No legal authority supports OBOT's invention of a separate, "primary basis" review. Moreover, OBOT wrongly suggests the City must show that the Council actually relied on particular evidence. California law directs courts to presume that City officials performed their duties regularly, Cal. Evid. Code § 664, and "it is not within the province of the court to inquire into what evidence was or was not examined or relied on by a council member in reaching his or her decision." *S. Cal. Underground Contractors, Inc. v. City of San Diego*, 108 Cal. App. 4th 533, 548 (2003) (citing *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 777 (1975)).

2. The District Court Improperly Admitted and Considered Extra-Record Evidence.

The district court also erred by admitting and relying upon post hoc, extra-record testimony to question the wisdom of the City's findings. City Br. at 34-39; Intervenor Br. at 24-30.

OBOT asserts "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." Br. at 31. This argument misrepresents the district court's decision. Moreover, the substantial evidence test does not allow use of extra-record evidence to "explain and evaluate" the record.

The court's decision on its face disproves OBOT's "explain and evaluate" theory. To begin with, the court never acknowledged much of the evidence in the

City's record, let alone explained or evaluated it. Meanwhile, the opinion cites extra-record testimony forty-four times, frequently pitting the court testimony of one side against the other's—not the record. *See, e.g.*, ER0020-21, ER0023-24. This demonstrates the district court relied on trial evidence to decide the case, not to evaluate the record.

But even if the court had used trial testimony to "explain and evaluate" the City's record, this approach is still improper. The California Supreme Court held that such use of extra-record evidence is improper, calling it "nothing more than a thinly veiled attempt to introduce conflicting expert testimony to question the wisdom and scientific accuracy" of a government decision. *WSPA*, 9 Cal. 4th at 578. Tellingly, neither the district court nor OBOT cite *any* authority to justify the court's approach. ER0012; OBOT Br. at 31-32.[3]

3. The District Court Erroneously Faulted the City for Lacking Scientific Proof that Does Not Exist or Was Not Required.

Rather than crediting the evidence before the City, the district court chastised the City for not finding or creating specific evidence. For example, the court complained "the City did not meaningfully explore whether rail car covers could be used to mitigate fugitive coal dust emissions …." ER0015. But the

[3] Intervenors (Br. at 27-30, 38) addressed the limited exceptions to the bar against extra-record evidence—none of which apply here. OBOT ignored this authority.

record fully explored this issue. It contained a literature review and reports from contacts with all known manufacturers documenting that such covers have never been commercially produced, let alone studied or field-tested for effectiveness or safety. ER0896-99 (ESA); ER1342-44 (PHAP); ER1663-64 (Fox); ER1677, ER1681, ER1683 (SSR); ER1433-36 (Foo letter). Here, the district court asked for more information that did not exist.

Similarly, the court faulted the estimate of "staging" emissions in the ESA report. It questioned ESA's use of one U.S. EPA guidance document (i.e., the AP-42 manual) and then found that, even if use of AP-42 was proper, ESA selected the wrong section and values from the manual. ER0020-21. But the court erred in rejecting ESA's approach, and endorsing the extra-record testimony on the issue offered by OBOT's expert, Mr. Lyle Chinkin.[4] There is no single, definitive approach for calculating "coal train losses." ER1512. Moreover, ESA's choice of methodology was reasonably supported in the City's record: (1) an expert report by Sustainable Systems Resources used the same section and input values from AP-42 (ER0944, ER1688); and (2) a Canadian government "Study of Fugitive Coal Dust Emissions" likewise endorsed the manual and section used by ESA as "applicable"

[4] While OBOT's brief repeatedly refers to "Dr. Chinkin" (*see, e.g.*, Br. at 18), Mr. Chinkin has not received a doctorate degree. ER0119 ("I have a BS and an MS in Atmospheric Science ….").

for estimating rail emissions. ER1464, ER1512. The court exceeded its authority in demanding a different methodology.[5]

A third example is the district court's criticism of the City's consideration of a study by Dr. Daniel Jaffe from the University of Washington who measured the influence of passing coal trains on local air pollution levels. The court perceived differences between conditions in the study and conditions in Oakland. ER0027-28. But the Jaffe study is the only existing peer-reviewed scientific study on how passing coal trains impact $PM_{2.5}$ levels, and OBOT submitted no comparable, contrary evidence to the record. So it is unclear what other science or evidence the district court wanted from the City.

In all these instances, the City relied on available, credible information that constitutes substantial evidence. The court's preference for more analysis—including "idealized" but nonexistent evidence—provides no basis for invalidating the City's fact findings. *See Ass'n of Irritated Residents v. County of Madera*, 107 Cal. App. 4th 1383, 1396 (2003) ("The fact that additional studies might be helpful

[5] OBOT wrongly states "both parties' trial experts conceded that AP-42 should *not* have been used." Br. at 40 n.7. Though the court expressed some confusion on this point (ER0020), OBOT's expert testified that: (1) AP-42 is "a compendium, many volumes in length on how to calculate emissions for basically every source type in America," but (2) he would have utilized a different "section" and "inputs" than ESA. ER0152-53. The City's expert testified that "you still have to apply judgment when you use AP-42. That's all." SER110.

does not mean that they are required."); *accord Indus. Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 474 n.18 (D.C. Cir. 1974) (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 811 (1968)) ("Where existing methodology or research … is deficient, the agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information.").

***

In sum, section 3.4.2 of the DA adopted the familiar, well-established "substantial evidence" standard both for the City's initial fact finding and subsequent judicial review. While the City met that standard by basing its findings on reasonable, credible evidence, the court did not adhere to it. Rather than undertaking the required deferential review of the City's extensive record, the court liberally admitted and relied upon extra-record evidence to second-guess the City's judgments. The court's decision therefore must be reversed.

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

The district court erred when it denied intervention as of right. OBOT concedes Intervenors satisfy three of the four factors required for intervention by right. Br. at 54. The fourth factor—whether an intervenor's interest is adequately represented by existing parties—requires Intervenors to show only that the City's representation "may be" inadequate. Moreover, "the burden of making that

showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972).

Intervenors have more than met that "minimal" burden. While Intervenors' interests are narrowly focused on environmental issues, the City holds far broader interests, including distinct interests in its development agreements with OBOT and other developers. Unsurprisingly, then, the City declined to make Intervenors' arguments about the DA. The district court's denial of intervention and refusal to hear Intervenors' dispositive argument about the DA's interpretation impaired Intervenors' substantial rights and must be reversed.[6]

A. Intervenors' Interests Are Not Adequately Represented by the City.

"The most important factor in assessing the adequacy of representation is how the [intervenors'] interest compares with the interests of existing parties." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (citation and internal quotation omitted). Here the Intervenors' and City's interests differ in significant and consequential ways.

Indisputably, Intervenors' interests in this litigation are narrowly focused. Intervenors seek to protect the health and safety of their members living and

[6] OBOT asserts "[t]he district court rightly accepted OBOT's sole argument in opposition to intervention." Br. at 54. But what persuaded the court is unknown. Its order did not address any factors for intervention as of right or otherwise explain its reasoning. ER0042.

working near the proposed terminal; to protect air quality and water quality; and to defend the Ordinance for which they advocated. ER0627-30.

By contrast, the City's broader economic interests center on its ongoing business relationship with OBOT. In addition to the DA, the City and OBOT have entered into a companion agreement and a ground lease—the latter signed even after OBOT's coal plans were exposed. ER0343. Relatedly, the City has financial interests in $242 million of state grant funding it has received to redevelop the former Oakland Army Base (ER1169-70), and tax revenues from redevelopment (ER1290-1309). The City also is concerned about this litigation's implications for other development agreements with comparable provisions—both existing and potential. *See* SER12-13. Unsurprisingly, given these different interests, the City declined to make an argument attacking the DA that the district court had raised, leaving that argument solely to Intervenors. *See infra* at 23-30.[7]

OBOT does not deny the City's broader economic interests. Instead, it asserts these "*additional* interests have no bearing on whether the City adequately

[7] The divergent interests of the City and Intervenors are also evident in the 2015 state court lawsuit in which Intervenors alleged that the City conducted an inadequate environmental review for OBOT's proposed terminal. *See* Intervenor Br. at 11. OBOT suggests any differences cannot be substantial because "it did not prevent the free shifting of counsel between Intervenors and the City." Br. at 57, n.13. But OBOT's argument wrongly conflates the parties' different interests and litigation goals with conflicts of interests of counsel, which the parties can and did waive.

represented *Intervenors'* concededly common interest in enforcing the Ordinance and Resolution." Br. at 55 (emphasis in original). However, established Ninth Circuit precedent "permit[s] intervention on the government's side in recognition that the intervenors' interests are *narrower* than that of the government and therefore may not be adequately represented." *Arakaki v. Cayetano*, 324 F.3d 1078, 1087 (9th Cir. 2003) (emphasis added); *accord Allied Concrete and Supply Co. v. Baker*, 904 F.3d 1053, 1067 (9th Cir. 2018) (intervenors' interests "were potentially more narrow and parochial than the interests of the public at large"); *Californians for Safe Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) (same); *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992) (environmental groups "represent the interests of their members and answer only to their members," while the state is "obliged to represent the interests of all its citizens").

Indeed, Intervenors' narrower interests are sufficient to make a "compelling showing" of inadequate representation and to defeat any presumption of adequate representation. In analogous circumstances, this Court has found a presumption of adequate representation overcome because a federal government agency "is required to represent a broader view than the more narrow, parochial interests" of the intervenor state and county. *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated on other grounds by Wilderness*

Soc'y v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011); *accord Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823-24 (9th Cir. 2001) (narrower interests of intervening developers defeated presumption of adequate representation by government defendants).

Intervenors established inadequate representation on additional, independent grounds by showing that the City will *not* "undoubtedly make all of" Intervenors' arguments. *Arakaki*, 324 F.3d at 1086. "[I]ntervention of right does not require an absolute certainty that … existing parties will not adequately represent [intervenors'] interests." *Citizens for Balanced Use*, 647 F.3d at 900. Here, even before the district court decided the intervention motion in this case, the divergence in the City's and Intervenors' arguments was obvious. The City had moved to dismiss only the breach of contract claim, while Intervenors moved to dismiss OBOT's Commerce Clause claims. *See* Dist. Ct. Dkt. 19 (City Mot. to Dismiss); Dist. Ct. Dkt. 30 (Intervenor Mot. to Dismiss). Later, Intervenors pursued a Government Code section 65866 argument in a post-trial motion for judgment, which the City did not join. Dist. Ct. Dkt. 234 (Mot. for J.); Dist. Ct. Dkt. 235 (City Statement on Mot. for J.); *see also infra* at 23-30.

For these reasons, the City did not adequately represent Intervenors' interests and the district court erred in denying intervention as of right.

B. The District Court's Error Impaired Intervenors' Substantial Rights.

If an applicant satisfies all four requirements for intervention as of right—as Intervenors did here—denial of intervention as of right is erroneous and must be reversed. *Citizens for Balanced Use*, 647 F.3d at 901. Since Intervenors were entitled to intervene *as of right*, the district court's denial necessarily impaired Intervenors' rights.

Here, the denial also had a practical impact of substantial consequence. The district court refused to consider one of Intervenors' arguments—that section 3.4.2 of the DA as interpreted by OBOT is invalid as an unconstitutional surrender of the City's police power—on the grounds that it exceeded the scope of permissive intervention. ER0037-38 ("*Perhaps there is merit to this argument*, but the Court declines to consider it, because it is beyond the scope of the intervention that was allowed in this case.") (emphasis added).[8] An intervenor, however, is entitled to intervention as of right unless the existing parties would *undoubtedly* make all of their arguments. *Citizens for Balanced Use*, 947 F.3d at 901 (reversing denial of intervention as of right because "we cannot conclude that the Forest Service will undoubtedly make all of [intervenors'] arguments"). Accordingly, the district

[8] In fact, this argument is within the scope of intervention permitted by the district court because it is a defense to OBOT's breach of contract claim, not a cross-claim or counterclaim. *See infra* at 29-30; Intervenor Br. at 61-62.

court's exclusion here of a dispositive argument necessarily impaired Intervenors' substantial rights.

Intervenors searched extensively and are aware of no cases in which this Court declined to reverse an improper denial of intervention as of right. OBOT only cites one case, *Prete v. Bradbury*, for the proposition that this Court should not reverse (Br. at 57), but *Prete* is inapposite. There, the Court found that a district court improperly *granted* intervention as of right but declined to reverse because the intervenor had submitted only one piece of evidence considered by the district court, and that evidence was "not crucial." 438 F.3d 949, 960 (9th Cir. 2006).

OBOT does not dispute that the district court refused to consider one of Intervenors' arguments but attempts to minimize the consequences by denigrating it as "part of" an "after-thought argument" that "entirely lacks merit." Br. at 58. Intervenors' argument, though, was originally suggested by the district court *sua sponte*.[9] And it would have defeated OBOT's breach of contract claim if decided in Intervenors' favor. *See infra* at 23-30. In any event, the test for intervention as of right does not evaluate the merits of an argument but only whether the argument

[9] The district court specifically commended the Government Code section 65866 argument to the City at the outset of the case, and again shortly before the trial. *See* ER0585-88 (Tr. April 20, 2017), ER0320-25 (Tr. Jan. 10, 2018).

will be made by an existing party. *See, e.g.*, *Arakaki*, 324 F.3d at 1087 ("The only question we must resolve … is whether existing defendants are capable and willing to make this argument should it be necessary."). Here, that question was answered decisively when the City declined to make the argument.

In sum, reflecting its different interests, the City did not make all of Intervenors' arguments, and the court refused to hear one key argument the City did not make. The district court's error was not harmless and should be reversed.

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

When section 3.4.2 of the DA is read in light of California Government Code section 65866 and the California Constitution, the substantial evidence requirement of section 3.4.2 does not apply to the Ordinance and Resolution. Any alternative reading would mean that a development agreement could broadly restrict a city's lawmaking authority, preventing cities from enacting future health and safety laws that even remotely touch a project.

A. Section 65866 Permits Development Agreements to Freeze Land Use Regulations But Prohibits Further Surrender of Police Power.

Government Code section 65866 permits a city to contractually limit future exercise of its police power by freezing existing land use regulations in place. It then prohibits one category of new, non-land use regulations: those that conflict

with the frozen land use regulations. This rule recognizes the need for regulatory certainty in development agreements, while honoring the common law rule that a city's police power is so fundamental that it "cannot be bargained or contracted away, and all rights and property are held subject to it." *Laurel Hill Cemetery v. City & County of San Francisco*, 152 Cal. 464, 475 (1907), *aff'd*, 216 U.S. 358 (1910).

OBOT argues that this interpretation of section 65866 would conflict with the language of the DA. Br. at 59. But it is state law that controls a contract's interpretation, not the other way around. *See supra* at 4-5; *see also* Cal. Civ. Code § 1643 ("A contract must receive such an interpretation as will make it lawful.").

OBOT also quotes *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 191 Cal. App. 4th 435 (2010) out of context to argue that section 65866 allows an agreement to freeze more than just land use regulations. It quotes the *Mammoth Lakes* statement 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." Br. at 60 (quoting 191 Cal. App. 4th at 444). That quoted statement, however, refers to additional promises a *developer* could make to a municipality, *not* to additional, non-land use regulations a municipality could promise to freeze. 191 Cal. App. 4th at 443-44 (explaining that "development agreements would also allow municipalities to extract promises

from the developers concerning financing and construction of necessary infrastructure").

Mammoth Lakes does not directly discuss which kinds of municipal regulations might be frozen but, if anything, it confirms Intervenors' interpretation that section 65866 only allows freezing of land use regulations. *See id.* at 442 (stating development agreements allow developers to plan "without risking future changes in the municipality's *land use* rules") (emphasis added); *id.* at 443 ("After approval … the development agreement is enforceable despite subsequent changes in the municipality's *land use laws*.") (emphasis added).

B. When Read in Light of Section 65866, Section 3.4.2 of the Development Agreement Cannot Apply to the Ordinance.

Read in light of section 65866, the substantial evidence requirement of DA section 3.4.2 applies only to new land use regulations, or to new non-land use regulations that conflict with the land use regulations frozen in the DA. Because the Ordinance is not a land use regulation and does not conflict with the land use regime frozen in place by the DA, the substantial evidence requirement of section 3.4.2 does not apply to the Ordinance.[10]

[10] Amici do not respond to this argument, but instead summarize immaterial state vested rights law, make extraneous policy arguments, and miscomprehend the constitutional avoidance doctrine. CBIA Br. at 2-6; Nat'l Mining Ass'n Br. at 10, 19-22.

1. The Ordinance is Not a Land Use Regulation.

The Ordinance does not become a land use regulation merely by affecting what activities OBOT may undertake on its leased property. If this were the case, any local regulation would transform into a land use regulation by affecting what individuals can do on private property. For example, local ordinances prohibiting the sale of cigarettes to individuals under the age of twenty-one or banning single-use plastic bags are not land use ordinances, even though they control activities undertaken on private property. Here, a restriction on the handling and storage of coal—a single commodity among thousands—does not alter the permitted use of the West Gateway site as a bulk materials terminal.

While the City's police power is its source of authority for both health and safety ordinances and land use regulations, that single source does not eliminate the distinction between the two types of regulations, as OBOT implies. Br. at 61-62. Though land use regulations sometimes protect health and safety, it does not logically follow that all health and safety regulations are necessarily land use regulations. OBOT's citation to select examples of land use regulations addressing health and safety concerns (Br. at 62) does not cure this logical fallacy.

Further, OBOT's contention that section 65866 creates three categories of regulations that may be frozen (Br. at 60-61) does not change the outcome. OBOT suggests the first sentence of section 65866 creates three different categories that

may be frozen: regulations that govern (1) permitted uses of land, (2) density, and (3) design, improvement, and construction standards and specifications. But the Ordinance still permits OBOT to use the terminal for bulk materials handling and storage, and the Ordinance plainly does not fall into the last two categories, either.

2. The Ordinance Does Not Conflict with the Pre-Existing Regulatory Scheme.

Because the Ordinance is not a land use regulation, under section 65866, section 3.4.2 applies to the Ordinance only if it conflicts with the pre-existing regulatory regime. Here, it is uncontested that the pre-existing regime did not address coal storage or handling.

OBOT argues that since such storage and handling were permissible under the prior regulatory regime, the Ordinance necessarily conflicts with that regime. Br. at 62. However, under this theory, almost *any* type of new regulation would conflict with a pre-existing regulatory scheme. Regulatory silence on an issue therefore would mean a city could adopt no future regulations on that topic. OBOT's interpretation would thus render this portion of section 65866 surplusage. If the "conflict" language of section 65866 is to have meaning, a regulation addressing coal handling and storage cannot conflict with a regulatory regime that does not address those activities.

OBOT also argues that the Ordinance conflicts with the pre-existing regulatory regime because the DA was silent on which commodities the terminal

could handle. According to OBOT, if the City wanted to prevent the handling of a specific commodity such as coal, "it should have included language to that effect in the Development Agreement." Br. at 63 (quoting ER0041). Again, statutory interpretation does not hinge on parties' intent in a contract.

Further, this suggestion lays bare OBOT's strategy of concealing its plans from the City and the public in order to finalize a development agreement and obtain a regulatory freeze before giving the City any reason to believe that a coal ordinance might be necessary. *See, e.g.*, ER0407 (OBOT representative asserting that "[c]oal is not in the plans"); ER0682 ("[T]he script was to downplay coal and discuss bulk products and a bulk terminal …. Phil Tagami had been pleased at the low profile that was bumping along to date on the terminal and it looked for a few days like it would just roll into production with no serious discussion."). A decision rewarding OBOT's omissions and misrepresentations about its intentions would encourage similar gamesmanship from developers, thereby undermining the Development Agreement Statute's goal to "strengthen the public planning process." Cal. Gov't Code § 65864(b).

C. If It Cannot Be Harmonized with Section 65866, then Section 3.4.2 of the Development Agreement Unconstitutionally Surrenders the City's Police Power and is Invalid.

If section 3.4.2 of the DA cannot be harmonized with Government Code section 65866, and the substantial evidence requirement of section 3.4.2 restricts

the City's ability to enact new health and safety regulation, then section 3.4.2 invalidly restricts the City's police power.

OBOT ignores this argument. Instead, it characterizes section 3.4.2 as preserving rather than abdicating the City's police power. Br. at 64-65. Indeed, if section 3.4.2 is harmonized with section 65866, it *would* preserve the City's police power to enact new land use regulations that conflict with the frozen land use regulations, upon a finding of substantial evidence. If, however, section 3.4.2 is read to apply to non-land use regulations that do not conflict with the frozen land use regulations, then it surrenders the police power in violation of section 65866.

Finally, OBOT tries to avoid the entire issue by labeling this argument as beyond the scope of the limited intervention allowed by the district court. The court's intervention order prohibited Intervenors from bringing "counterclaims or cross-claims," but it did not otherwise restrict Intervenors from making arguments on the breach of contract claim. ER0038. OBOT argues, without citation, that Intervenors' section 65866 argument is a counterclaim against OBOT and a cross-claim against the City because it would invalidate a section of the DA. Br. at 64. But counterclaims and cross-claims differ substantially from defenses, which challenge underlying liability. *See Riverside Mem'l Mausoleum, Inc. v. UMET Tr.*, 581 F.2d 62, 68 (3d Cir. 1978) ("A counterclaim may entitle the defendant in the original action to some amount of affirmative relief; a defense merely precludes or

diminishes the plaintiff's recovery …. The two concepts are distinct and must be kept so."); Wright & Miller, Fed. Prac. & Proc. § 1431 ("[A] crossclaim that … merely alleges a complete defense against the opposing party's claim does not fall within Rule 13(g)," which governs the procedure for crossclaims).

CONCLUSION

This Court should (1) reverse the judgment in favor of OBOT's breach of contract claim, and remand for entry of judgment in the City's favor; and (2) reverse the denial of Intervenors' motion for intervention as of right.

DATED: April 30, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

Except for the following reprint of California Evidence Code section 664, all applicable statutes are contained in the addendum bound with the Opening Brief of Intervenor-Defendants-Appellants.

State of California

EVIDENCE CODE

Section 664

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664. It is presumed that official duty has been regularly performed. This presumption does not apply on an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant.

(Enacted by Stats. 1965, Ch. 299.)