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15 UNITED STATES DISTRICT COURT  
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
17 SAN FRANCISCO DIVISION

18 OAKLAND BULK & OVERSIZED TERMINAL,  
LLC,

19 Plaintiff,

20 v.

21 CITY OF OAKLAND,

22 Defendant,

23 and

24 SIERRA CLUB and SAN FRANCISCO  
BAYKEEPER,

25 Defendant-Intervenors.  
26

Case No. 16-cv-7014-VC

**DEFENDANT-INTERVENORS’  
NOTICE OF MOTION, RULE 52(C)  
MOTION FOR JUDGMENT, AND  
MEMORANDUM IN SUPPORT OF  
MOTION FOR JUDGMENT**

Hearing: March 28, 2018  
Time: 10:00 a.m.  
Judge: Hon. Vince Chhabria  
Place: Courtroom 4, 17th Floor

Action Filed: Dec. 7, 2016  
27

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**NOTICE**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE, pursuant to Civil Local Rule 7, that on March 28, 2018, at 10:00 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Vince Chhabria, at the United States Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant-Intervenors will, and hereby do, move, pursuant to Federal Rule of Civil Procedure 52(c), for an order granting judgment for Defendant the City of Oakland (“the City”) and Defendant-Intervenors on Plaintiff Oakland Bulk & Oversized Terminal, LLC’s (“OBOT”) breach of contract claim.

Defendant-Intervenors make this motion on the grounds that:

- Oakland Ordinance No. 13385 (the “Ordinance”) did not conflict with any rules, regulations, or official policies that the development agreement locked into place. Because the Ordinance did not conflict with the underlying regulatory framework in force at the time the development agreement was entered, consistent with California Government Code Section 65866, the City could freely apply the Ordinance against OBOT regardless of the terms of the development agreement.

This motion is based on Government Code Section 65866, the accompanying Memorandum, and such oral argument as the Court may allow.

WHEREFORE, Defendant-Intervenors request that the Court grant judgment for Defendant and Defendant-Intervenors on OBOT’s breach of contract claim.

DATED: February 9, 2018

*/s/ James M. Finberg*  
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1 **MEMORANDUM IN SUPPORT**

2 **I. STATEMENT OF FACTS**

3 In 2013, Defendant the City of Oakland and Plaintiff OBOT's predecessor in interest entered  
4 into an agreement allowing development of a "ship-to-rail terminal designed for the export of non-  
5 containerized bulk goods." Trial Ex. 584 (DA) at 107. On July 19, 2016, the City adopted the  
6 Ordinance, which amended the City's Health and Safety Code to ban the storage or handling of coal  
7 and coke within the City. See Oakland Municipal Code §§80.60.010 *et seq.* Thereafter, OBOT filed  
8 this lawsuit against the City, alleging, among other claims, that the City's decision to enforce the  
9 Ordinance against OBOT breached the parties' development agreement. Dkt. No. 74 (First Amend.  
10 Complaint) at ¶¶ 161-167.

11 **II. STANDARD OF REVIEW**

12 Defendant-Intervenors move, pursuant to Federal Rule of Civil Procedure 52(c), for  
13 judgment on OBOT's breach of contract claim. A motion for judgment under Rule 52(c) is the  
14 equivalent, in a bench trial like this case, of a Rule 50 motion for judgment as a matter of law in a  
15 jury trial. See *Ritchie v. United States*, 451 F.3d 1019, 1022-23 (9th Cir. 2006). Unlike with a Rule  
16 50 motion, however, "the district court is not required to draw any inferences in favor of the non-  
17 moving party; rather, the district court may make findings in accordance with its own view of the  
18 evidence." *Id.* at 1023. Accordingly, this Court should enter judgment for defendants on OBOT's  
19 breach of contract claim if, after independently reviewing the law and evidence, it "finds against  
20 [OBOT] on [an] issue" that, under controlling law, precludes OBOT from prevailing on its breach of  
21 contract claim. Fed. R. Civ. P. 52(c).

22 **III. ARGUMENT**

23 **A. Government Code Section 65866 entitles the City to judgment on OBOT's breach of**  
24 **contract claim.**

25 California Government Code Section 65866 allows developers and government entities to  
26 enter into development agreements that lock in the land use regulations applicable to a development  
27 project. See *216 Sutter Bay Assocs. v. Cnty. of Sutter*, 58 Cal.App.4th 860, 865 (1997) (Section  
28 65866 "authorizes local governments to enter into development agreements, which, unless otherwise



1 provided in the agreement, make applicable those *land-use regulations* that are in force when the  
2 agreement was executed.” (emphasis added)). But the statute also limits the scope of such  
3 agreements.

4 Here, Section 65866 prevents this Court from finding that the City breached its development  
5 agreement with OBOT. OBOT argues that enforcing the Ordinance against OBOT violated the  
6 development agreement because the City did not adopt the Ordinance in compliance with section  
7 3.4.2 of the development agreement.<sup>1</sup> However, the Ordinance does not conflict with any City rules,  
8 regulations, or official policies that the development agreement locked in place. Because no conflict  
9 exists, the City could freely apply the Ordinance against OBOT’s project notwithstanding the  
10 development agreement.

11 OBOT argues that the City was required to comply with section 3.4.2 of the development  
12 agreement to enforce *any* new regulation against OBOT. But that interpretation of section 3.4.2  
13 would render it unenforceable under Section 65866 as applied to the Ordinance at issue here. To  
14 avoid invalidating that contract provision, this Court should instead interpret it to apply only to  
15 regulations that “conflict” with the underlying land use and development framework that the  
16 development agreement locked into place. Because the Ordinance does not conflict with that  
17 framework, the City may apply it against OBOT regardless of whether the City complied with the  
18 “substantially dangerous” standard of section 3.4.2. Its power to do so entitles the City to judgment  
19 on OBOT’s breach of contract claim.

- 20 1. The Development Agreement Statute provides a limited exception for land use  
21 regulations to the general rule that government entities may not contract away their  
22 police power.

23 The default rule in California is that “a government entity may not contract away its right to  
24 exercise the police power in the future.” *Cotta v. City and Cnty. of San Francisco*, 157 Cal.App.4th  
25 1550, 1557 (2007). For this reason, a “contract that purports to do so is invalid as against public  
26 policy.” *Id.* at 1558. On that basis, “California courts have consistently invalidated agreements that

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27 <sup>1</sup> Section 3.4.2 allows the City to apply new regulations, as exceptions to OBOT’s “vested  
28 rights,” if the City finds that the failure to apply the regulation would create “a condition  
substantially dangerous to [the] health or safety” of the public. Trial Ex. 584 (DA) at §3.4.2.

1 had the effect of surrendering or impairing the police power.” *Id.* For instance, a city impermissibly  
2 impairs its right to exercise the police power by entering into a contractual agreement with taxicab  
3 owners that would preclude the city from terminating a natural gas taxicab incentive program. *Id.* at  
4 1563-64. Any agreement to guarantee the program’s existence notwithstanding a change in the  
5 regulatory landscape is an “untenable” “chilling of the police power.” *Id.* at 1564.

6 The Development Agreement Statute (Cal. Gov. Code §§65864 *et seq.*) provides a limited,  
7 precisely tailored means of entering agreements that lock in some aspects of existing law in a  
8 manner that is not invalid on police power grounds. *See Trancas Prop. Owners Ass’n v. City of*  
9 *Malibu*, 138 Cal.App.4th 172, 182 (2006) (because of the “procedural and substantive limitations” in  
10 the Development Agreement Statute, a valid agreement that complies with its requirements does not  
11 amount to an “unconditional surrender of the police power”). However, the Development  
12 Agreement Statute does not grant government entities unlimited authority to contract away their  
13 right to exercise the police power in the future. Instead, it allows developers and government entities  
14 to agree to apply the “*land-use regulations* that are in force when the agreement was executed.” 216  
15 *Sutter Bay Assocs.*, 58 Cal.App.4th at 865 (emphasis added); *see also Cotta*, 157 Cal.App.4th at  
16 1559 n.5 (the Development Agreement Statute allows for agreements that “freeze *zoning* early in the  
17 development process.” (emphasis added)). The provision that grants this authority provides in full:

18 Unless otherwise provided by the development agreement, rules, regulations, and official  
19 policies governing permitted uses of the land, governing density, and governing design,  
20 improvement, and construction standards and specifications, applicable to development of  
21 the property subject to a development agreement, shall be those rules, regulations, and  
22 official policies in force at the time of execution of the agreement. A development  
23 agreement shall not prevent a city, county, or city and county, in subsequent actions  
24 applicable to the property, from applying new rules, regulations, and policies which do not  
25 conflict with those rules, regulations, and policies applicable to the property as set forth  
26 herein, nor shall a development agreement prevent a city, county, or city and county from  
27 denying or conditionally approving any subsequent development project application on the  
28 basis of such existing or new rules, regulations, and policies.

25 Cal. Gov. Code §65866.

26 Section 65866’s two sentences apply to different categories of “rules, regulations, and  
27 policies” applicable to a development agreement. Section 65866’s first sentence freezes in place  
28 certain existing laws unless otherwise provided in a development agreement. But, by Section

1 65866’s own terms, that freezing is limited to “rules, regulations, and official policies *governing*  
2 *permitted uses of the land, governing density, and governing design, improvement, and construction*  
3 *standards and specifications.*” Cal. Gov. Code §65866 (emphasis added). These italicized  
4 categories all regulate land use and development. See “Land-Use Regulation,” *Black’s Law*  
5 *Dictionary* 958 (9th ed. 2009) (“An ordinance or other legislative enactment governing the  
6 development or use of real estate.”).

7 For these types of rules (i.e. regulations of land use and development), the first sentence  
8 preserves the set of rules that is “in force at the time of execution of the [development] agreement,”  
9 “[u]nless otherwise provided by the development agreement.” In other words, the effect of this  
10 sentence is to “freeze” the “*land-use regulations*” applicable to a development agreement, unless a  
11 development agreement says otherwise. *216 Sutter Bay Assocs.*, 58 Cal.App.4th at 865 (emphasis  
12 added).

13 By contrast, Section 65866’s second sentence applies to a broader category of “rules,  
14 regulations, and policies.” That sentence omits the first sentence’s descriptor phrase “governing  
15 permitted uses of the land, governing density, and governing design, improvement, and construction  
16 standards and specifications.” Because it omits this descriptor phrase, the second sentence applies to  
17 additional, general non-land use rules, regulations, and policies. See *Cornette v. Dep’t of Transp.*, 26  
18 Cal.4th 63, 73 (2001) (“When one part of a statute contains a term or provision, the omission of that  
19 term or provision from another part of the statute indicates the Legislature intended to convey a  
20 different meaning.”).

21 The second sentence of Section 65866 thus addresses a government entity’s authority, after it  
22 has entered into a development agreement, to adopt rules that fall within the broader category of  
23 non-land use regulations – for instance, health and safety or employment rules. The second sentence  
24 of section 65866 provides that, for these non-land use rules, a development agreement “shall not  
25 prevent a city . . . from applying new rules, regulations, and policies which do not conflict with those  
26 rules, regulations, and policies applicable to the property as set forth herein” (i.e. the regulations  
27 “frozen” in the first sentence of Section 65866). Accordingly, the second sentence of Section 65866  
28 establishes a different legal regime for general, non-land use regulations. Development agreements

1 not only do not “freeze” such regulations, but they also may not prevent cities from applying to a  
2 project any general regulations that do not conflict with the regulations governed by the first  
3 sentence of Section 65866.

4 Other provisions of the Development Agreement Statute further support this interpretation of  
5 Section 65866. See *Weatherford v. City of San Rafael*, 2 Cal.5th 1241, 1247 (2017) (a statute’s  
6 “surrounding provisions can reveal the semantic relationships that give more precise meaning to the  
7 specific text being interpreted” (quoting *Poole v. Orange Cnty. Fire Auth.*, 61 Cal.4th 1378, 1391  
8 (2015) (Cuéllar, J., concurring)). For example, Section 65865.4 provides that development  
9 agreements are “enforceable by any party thereto notwithstanding any change in any applicable  
10 general or specific plan, zoning, subdivision, or building regulation adopted by the city, county, or  
11 city and county entering the agreement, which alters or amends the rules, regulations, or policies  
12 specified in Section 65866.” Cal. Gov. Code §65865.4. The statute’s specific enumeration of  
13 changes to zoning, subdivision, and building regulations further underscores that the purpose of the  
14 Development Agreement Statute is to provide developers with certainty for a specific set of rules:  
15 those that govern the *land use* regulatory process.

16 Finally, the statute’s legislative history confirms its critical distinction between land use and  
17 non-land use regulations. The California Legislature adopted the Development Agreement Statute in  
18 1979 to address the “harsh result” of the California Supreme Court’s decision in *Avco Community*  
19 *Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785 (1976). See *Davidson v. Cnty.*  
20 *of San Diego*, 49 Cal.App.4th 639, 646-47 (1996). In *Avco*, the Supreme Court held that, without  
21 having made substantial expenditures in reliance on a building permit, a developer lacked a vested  
22 right to complete its project without complying with the new requirement that it obtain a permit from  
23 the California Coastal Zone Commission. 17 Cal.3d at 788, 793. The issue in *Avco* was therefore  
24 whether a developer’s improvements had vested in the developer a right to complete its project  
25 exempt from “a new land use requirement.” *Santa Margarita Area Residents Together (SMART) v.*  
26 *San Luis Obispo Cnty.*, 84 Cal.App.4th 221, 229 (2000).

27 The Development Agreement Statute, of which Section 65866 is a part, directly addressed  
28 the precise problems created by “new land use requirement[s],” the issue in *Avco*. *SMART*, 84

1 Cal.App.4th at 229. The law sought to provide developers with “certainty to the land use regulatory  
 2 process” through the adoption of development agreements. Report of Sen. Committee on Local  
 3 Gov’t (Aug. 20, 1979) re: Assembly Bill 853 at 1. There is no indication that the Legislature  
 4 intended to take on a problem any different from, or bigger than, that created by *Avco*.

5 In sum, Section 65866 automatically freezes a specific category of regulations: the land use  
 6 regulations applicable to a given project (unless the development agreement specifies otherwise).

7 The regime for non-land use regulations, however, is different. Consistent with its purpose  
 8 of providing certainty in the *land use* regulatory process, Section 65866 did *not* freeze applicable  
 9 non-land use regulations. Even if a development agreement is entered, Section 65866 allows  
 10 government entities to impose subsequent non-land use regulations so long as those new regulations  
 11 do not conflict with the regulations in force at the time of the agreement. If the then-existing  
 12 regulations were silent regarding the new regulations’ subject, government entities may impose new  
 13 non-land use regulations on a party to a development agreement.<sup>2</sup>

14 Interpreting the statute in this manner gives effect to the plain language of Section 65866. It  
 15 also avoids the serious constitutional questions that would attend an interpretation of the  
 16 Development Agreement Statute that allowed cities to enter into contracts that impermissibly  
 17 impaired their ability to exercise their police power to adopt new, generally applicable regulations in  
 18 the future. *See SMART*, 84 Cal.App.4th at 232 (construing Development Agreement Statute “in a  
 19 manner that does not permit the County to surrender its police power in the name of planning  
 20

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21  
 22 <sup>2</sup> Alternatively, this Court could construe both sentences of Section 65866 to apply only to land  
 23 use regulations. Under this interpretation, the second sentence of Section 65866 would limit the  
 24 scope of development agreements by providing that such agreements “shall not prevent a city,  
 25 county, or city and county . . . from applying new [land use] rules, regulations, and policies which do  
 26 not conflict with those rules, regulations, and policies applicable to the property as set forth herein.”  
 27 Section 65866 would permit development agreements to protect only against future conflicting land  
 28 use regulations, meaning that a city could freely impose all non-land use regulations, and any non-  
 conflicting land use regulations, against an existing project notwithstanding a development  
 agreement. Under this interpretation of Section 65866, a development agreement could not preclude  
 a government entity from applying to a project a future land use regulation that does not conflict  
 with the land use regulations in force at the time of the agreement. So long as the new land use  
 regulation addressed a subject on which the land use regulations applicable to a development  
 agreement were silent, a government entity could enforce that land use regulation against a property  
 regardless of the terms of a development agreement.

1 efficiency”); *Cotta*, 157 Cal.App.4th at 1564 (citing *Avco*, outside land use context, to hold that San  
2 Francisco could not contract away its ability to terminate a taxicab incentive program).

- 3 2. Section 65866 allows the City to enforce the Ordinance because it neither governs  
4 “permitted uses of land” nor conflicts with the land use framework that the agreement  
5 locked into place.

6 Because the Ordinance a) is not a land use regulation; and b) does not conflict with the  
7 regulations in force at the time of the development agreement, the City may apply it against OBOT  
8 notwithstanding the development agreement.

9 *a. The Ordinance is not a land use regulation.*

10 The Ordinance prohibits the “storage or handling” of “coal” or “coke” at any facility in  
11 Oakland where such materials are or may be stored or handled. Oakland Municipal Code  
12 §§8.60.030 (definitions); 8.60.040 (applicability, prohibitions). The Ordinance plainly does not  
13 govern “density” or “design, improvement, and construction standards.” Nor does it govern  
14 “permitted uses of land.” The City did not adopt the restrictions in the Ordinance as a form of land  
15 use classification. *See id.* §§17.10 *et seq.* (describing land use classifications). Instead, the City  
16 imposed the restrictions by amending the City’s Health and Safety Code, and in doing so made  
17 express findings that the transport, storing, or handling of coal in the City would “have many public  
18 health and/or safety impacts.” *Id.* §8.60.020(B)(1). Moreover, in making these findings, the City  
19 considered more than just the adverse health and safety impacts of activity taking place on the  
20 property of a bulk material facility. The City also considered the “substantial public health and  
21 safety impacts” that would result from rail transport of coal and coke through the City. *Id.*  
22 §8.60.020(B)(1)(c). To be sure, the Ordinance, by its express terms, does not regulate coal transport.  
23 *Id.* §8.60.010. But the City’s consideration of the health and safety impacts of rail transport  
24 nonetheless confirms that the City, in enacting the Ordinance, focused on the inherently dangerous  
25 properties of coal rather than on risks specifically attributable to operating a bulk material facility.

26 The Ordinance therefore does not govern “permitted uses of land,” and the first sentence of  
27 Section 65866 does not render it inapplicable to OBOT.<sup>3</sup>

28 <sup>3</sup> If this Court interprets Section 65866 as set forth in footnote 2, *supra*, such that a development



1                   b. *The Ordinance does not “conflict” with the regulations that the development*  
2                   *agreement froze.*

3                   The second sentence of section 65866 also does not render the Ordinance inapplicable to  
4                   OBOT, because the Ordinance does not “conflict” with any land use regulations in force at the time  
5                   the development agreement was entered. A dictionary published the year that the California  
6                   Legislature enacted the Development Agreement Statute defines “conflict,” in the verb form in  
7                   which it appears in Section 65866, as “to show antagonism or irreconcilability.” “Conflict,”  
8                   *Webster’s New Collegiate Dictionary* 235 (1979 ed.). The Ordinance is neither antagonistic nor  
9                   irreconcilable with the regulations that existed at the time of the development agreement. As OBOT  
10                  concedes, none of the City’s land use regulations – or indeed, *any* of the City’s “rules, regulations,  
11                  and official policies” – granted OBOT or any other entity express authority to handle or transport  
12                  coal. Nor does the development agreement do so. It merely grants OBOT a right to develop the  
13                  property as a “ship-to-rail terminal designed for the export of non-containerized bulk goods” and  
14                  never once mentions coal. Trial Ex. 584 (DA) at 107.

15                  Rules governing non-containerized bulk goods terminals and rules governing coal handling  
16                  simply regulate different subjects. The two types of regulations may, as here, apply to the same  
17                  property in a manner that restricts *some* activity that OBOT could conceivably engage in on its  
18                  property under its general land use rights. But such overlap does not establish a conflict between  
19                  them. Arguing that a health and safety regulation like the Ordinance conflicts with OBOT’s general  
20                  *land use* authorization is akin to arguing that a prohibition on the sale of non-pasteurized dairy  
21                  products conflicts with the rights of a grocery store or restaurant developer with a development  
22                  agreement that predates the prohibition. *See* Oakland Municipal Code §§17.10.270-280 (describing

23 \_\_\_\_\_  
24 agreement would only protect an existing project against conflicting *land use* regulations, the inquiry  
25 ends with a determination that the Ordinance is not a land use regulation because section 65866  
26 would not preclude its application. Moreover, under that interpretation, even if the court determined  
27 that the Ordinance is a land use regulation, its applicability to OBOT would depend on whether it  
28 conflicts with the land use regulations that existed at the time of the development agreement. As  
explained below in Section III.B.2.b, the Ordinance does not conflict with any land use regulations  
that existed when OBOT entered the development agreement. Accordingly, if this Court construes  
Section 65866, as set forth in footnote 2, to apply only to land use regulations, it should grant  
judgment for defendants if it finds either that the Ordinance is not a land use regulation or that it  
does not conflict with the existing land use framework.

1 various use designations for food service commercial establishments); *id.* §§17.10.290, 345 (use  
2 designations for food retail commercial establishments).

3 3. OBOT’s interpretation of section 3.4.2 renders the provision unenforceable as a matter  
4 of public policy when applied to a non-conflicting, generally applicable rule like the  
5 Ordinance.

6 OBOT’s breach of contract claim rests on the premise that the City cannot impose the  
7 Ordinance against it without complying with section 3.4.2 of the development agreement. *See, e.g.*,  
8 Dkt. No. 48 (OBOT Resp. to Mot. to Dismiss) at 10-11. Essentially, OBOT argues that the  
9 development agreement locked in place the City’s *entire* regulatory framework applicable to its  
10 project, and that the City must therefore comply with section 3.4.2’s “substantially dangerous”  
11 requirement to impose any new requirement on OBOT’s project. *Id.* at 6-7 (“Section 3.2 of the DA  
12 expressly states that “[t]his Agreement vests in Developer the right to develop the Project in  
13 accordance with the terms and conditions of this Agreement, the City Approvals and the Existing  
14 City Regulations.”).

15 OBOT’s reading of the agreement, however, would render section 3.4.2 unenforceable under  
16 Section 65866 because it would limit the City’s ability to impose new regulations that do not conflict  
17 with the regulations in force when the development agreement was entered. Government Code  
18 Section 65866 is clear: “A development agreement *shall not* prevent a city . . . from applying new  
19 rules, regulations, and policies which do not conflict with those rules, regulations, and policies  
20 applicable to the property as set forth herein” (emphasis added). If section 3.4.2 is read to apply to  
21 *any* regulatory change – including those that do not conflict with the “rules, regulations, and policies  
22 applicable to the property” – the development agreement would circumscribe the City’s police  
23 power authority in precisely the manner that Section 65866 prohibits.

24 The Ordinance does not conflict with *any* rules, regulations, and policies applicable to  
25 OBOT. *See* Section III.A.2.b, *supra*. Accordingly, absent section 3.4.2, the City could impose the  
26 Ordinance against OBOT so long as its enactment met the long-established abuse of discretion  
27 standard for exercises of legislative authority – i.e. that enacting the Ordinance was not “so palpably  
28 unreasonable and arbitrary as to reveal an abuse of discretion as a matter of law.” *County of Del*  
*Norte v. City of Crescent City*, 71 Cal.App.4th 965, 972 (1999). But OBOT reads section 3.4.2 to



1 impose a higher standard: the City must demonstrate that failing to adopt the Ordinance would be  
 2 “substantially dangerous” to the health and safety of the public. Trial Ex. 584 (DA) §3.4.2. Were it  
 3 read to impose this higher standard instead of the baseline abuse of discretion standard applicable to  
 4 the exercise of legislative authority, section 3.4.2, as applied to the Ordinance, would violate Section  
 5 65866. Under OBOT’s reading, section 3.4.2 would narrow the city’s authority to adopt new non-  
 6 conflicting regulations, even though Section 65866 prohibits development agreements from limiting  
 7 a City’s ability to impose new regulations that do not conflict with the existing regulatory  
 8 framework.

9 Accordingly, this Court cannot construe section 3.4.2 to sweep so broadly as to apply to  
 10 generally applicable non-conflicting rules like the Ordinance.

- 11 4. This Court should construe section 3.4.2 of the development agreement to implement  
 12 Government Code Section 65866 by providing a means for the City to enforce later-  
 13 adopted regulations that the Development Agreement Statute would otherwise render  
 14 inapplicable to OBOT’s project.

15 To the extent possible, courts construing a contract must adopt an interpretation that “renders  
 16 a contract valid and effectual.” *Titan Group, Inc. v. Sonoma Valley Cnty. Sanitation Dist.*, 164  
 17 Cal.App.3d 1122, 1127 (1985) (quoting *Serv. Emps. Int’l Union, Local 18 v. Am. Bldg. Maint. Co.*,  
 18 29 Cal.App.3d 356, 359 (1972)). This Court should thus reject OBOT’s interpretation of section  
 19 3.4.2 of the agreement and instead construe it to apply only to regulations that “conflict” with the  
 20 regulations in effect at the time the agreement was entered. Such an interpretation is consistent with  
 21 Section 65866 and avoids invalidating the provision on grounds of unenforceability. *See Cotta*, 157  
 22 Cal.App.4th at 1559 (in interpreting contracts that bind government entities, courts should avoid  
 23 construing the contracts to impermissibly impair the right to exercise the police power).

24 As previously explained, Government Code Section 65866 allows development agreements  
 25 to include provisions authorizing government entities to alter even those regulations that Section  
 26 65866 locks into place. *See* Cal. Gov. Code §65866 (“*Unless otherwise provided by the*  
 27 *development agreement*, rules, regulations, and official policies governing permitted uses of the land  
 28 . . . shall be those rules, regulations, and official policies in force at the time of execution of the  
 agreement.” (emphasis added)). Section 3.4.2 is one such provision. It applies “[n]otwithstanding

1 any other provision of [the] Agreement to the contrary” and allows the City, upon a finding of  
 2 substantial dangerousness, to impose *any* new regulation – including a land use regulation – against  
 3 OBOT. Trial Ex. 584 (DA) §§3.4.2 (“City shall have the right to apply City Regulations adopted by  
 4 City after the Adoption Date”); 1.1 (defining “City Regulations” as, *inter alia*, “all other ordinances,  
 5 resolutions, codes, rules, regulations, and policies in effect as of the time in question”). The effect of  
 6 this provision is solely to authorize the City to apply new regulations that the development  
 7 agreement would otherwise render inapplicable to the property, upon certain findings supported by  
 8 substantial evidence. *Id.* §3.4.2 (this section provides an “exception to Developer’s vested rights”).

9 Section 3.4.2 of the development agreement therefore applies to two categories of City  
 10 regulations. First, it applies to *any* to new *land use* regulation, because the Development Agreement  
 11 Statute would otherwise “freeze” the existing land use framework and make those changes  
 12 inapplicable to the property. As an exception to that “freeze,” Section 3.4.2 allows the City, upon  
 13 determining that OBOT’s vested land use rights threaten its residents’ health and safety, to alter the  
 14 land use framework that applies to OBOT.

15 Second, it applies to certain non-land use changes, but only those changes that Section 65866  
 16 allows development agreements to limit: those that create a “conflict” with the regulations in effect  
 17 at the time of the development agreement. Section 3.4.2 should be read to apply only to this  
 18 category of non-land use changes because OBOT’s development agreement can only guarantee that  
 19 generally-applicable rules that conflict with OBOT’s vested rights will ordinarily be unenforceable  
 20 against the project. Section 65866 only allows development agreements to provide this specific type  
 21 of guarantee. Because the evident purpose of section 3.4.2 is to create an exception to the vested  
 22 land use rights that OBOT’s development agreement guarantees, the provision should apply only to  
 23 new regulations that Section 65866 identifies as impairing vested rights: any new land use rule, and  
 24 generally-applicable rules that “conflict” with the regulations applicable to the property.

25 \* \* \*

26 In sum, the Ordinance does not conflict with the regulations in force at the time of the  
 27 agreement. The City may therefore enforce it against OBOT notwithstanding the development  
 28 agreement. It may do so without complying with section 3.4.2 of the agreement because interpreting

1 the contractual provision to apply to a non-conflicting regulation like the Ordinance would violate  
 2 Section 65866 and thus render the provision unenforceable as a matter of public policy. Either  
 3 section 3.4.2 does not apply as a matter of contract to the Ordinance, or it is unenforceable as applied  
 4 to the Ordinance.<sup>4</sup> In either case, however, the City cannot have breached the development  
 5 agreement. As a result, it is entitled to judgment on OBOT's breach of contract claim.

6 **B. These Government Code Section 65866 arguments are properly before this Court.**

7 During the final day of trial in this case, this Court asked whether Defendant-Intervenors  
 8 have standing to make these Section 65866 arguments and the right to offer them within the scope of  
 9 Defendant-Intervenors' permissive intervention. Dkt. No. 230 (Tr. of Jan. 19, 2018) at 677. Both  
 10 questions should be answered in the affirmative.

11 1. Standing

12 Article III standing is evaluated on a claim-by-claim basis. *Oregon v. Legal Servs. Corp.*,  
 13 552 F.3d 965, 969 (9th Cir. 2009) ("A plaintiff must demonstrate standing 'for each claim he seeks  
 14 to press' and for 'each form of relief sought.'" (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S.  
 15 332, 352 (2006))). Where the named parties establish standing for a certain claim and relief sought,  
 16 however, there is no need to evaluate whether an intervenor independently has standing, because  
 17 Article III jurisdiction already exists. *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 573 (9th Cir.  
 18 2014).<sup>5</sup> Regarding OBOT's contract claim, the Defendant-Intervenors and City both seek identical  
 19 relief in the form of a judgment that the City did not breach the development agreement. This Court  
 20 therefore need not separately evaluate Defendant-Intervenors' standing to argue that Section 65866  
 21 precludes a finding that the City breached the contract.

22  
 23 <sup>4</sup> Because section 3.4.2 of the development agreement is unenforceable as applied to the  
 24 Ordinance, if this Court determines that section 3.4.2 does apply as a matter of contract, it must hold  
 25 that application of section 3.4.2 to be unlawful and grant judgment to the City on that basis. *See*  
 26 *Cotta*, 157 Cal.App.4th at 1558 ("California courts have consistently invalidated agreements that had  
 27 the effect of surrendering or impairing the police power.").

28 <sup>5</sup> This is true even if the intervenor-defendants and the party-defendant "seek the same ultimate  
 relief" but advance different arguments. *Ruiz v. Estelle*, 161 F.3d 814, 833 (5th Cir. 1998); *see also*  
*Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (holding that an intervenor  
 must have standing "to pursue relief that is *different* from that which is sought by a party with  
 standing" (emphasis added)).

2. Scope of Intervention

Per this Court’s order, Defendant-Intervenors may defend against OBOT’s claims but may not “bring counterclaims,” “bring cross-claims” or “prevent the case from being dismissed on a stipulation between developer and the City.” Dkt. No. 71 (Ord. re Mot. to Intervene) at 3. Defendant-Intervenors’ argument based on Section 65866 is not a counterclaim or cross-claim but instead is a defense to OBOT’s breach of contract claim. Defendant-Intervenors argue that section 3.4.2 should be construed to apply to new, non-land use rules only if those rules conflict with the regulations in effect at the time of the agreement. The upshot of Defendant-Intervenors’ argument is that the City did not contravene an enforceable term of the development agreement. *See P. & J. Artukovich, Inc. v. Simpson*, 128 Cal.App.2d 440, 447 (1954) (no breach where “no provision in the written contract” is violated); *Cotta*, 157 Cal.App.4th at 1564 & n.7 (holding that contract that is unenforceable as against public policy will not support claim for breach of contract). In either case, the argument is a defense, not a counterclaim or cross-claim, and Defendant-Intervenors may properly offer it within the scope of their intervention.

**IV. CONCLUSION**

This Court should grant judgment under Rule 52(c) for Defendant and Defendant-Intervenors on OBOT’s breach of contract claim. If, however, the Court determines that judgment should not be entered for defendants pursuant to Government Code Section 65866, this Court should still enter judgment for defendants on OBOT’s breach of contract claim for all the reasons set forth in defendants’ proposed findings of fact and post-trial brief.

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Respectfully submitted,

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